

# Put and Call Option Agreement (Brazil): Checklist

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*A checklist of the key considerations when drafting a put and call option agreement to make it compliant with Brazilian law. Key considerations include the option exercise period, exercise price, restrictions on transfer, anti-dilution mechanisms, and other typical features of a put option and call option agreement in respect of shares in non-listed public and private companies in Brazil.*

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This Checklist sets out the key issues to consider when tailoring a [put option](#) and [call option](#) agreement in respect of shares in non-listed companies to make it compliant with Brazilian law.

It provides background commentary in relation to issues of Brazilian law that may impact [Standard Document, Put and call option agreement: Cross-border](#). Where clauses in this Standard Document need to be amended to comply with Brazilian law, suggested drafting is provided.

## What Are Put or Call Options?

A right to purchase, or a call option, is generally understood to be a right (but not an obligation) for its owner to purchase assets for a fixed or indefinite period, usually at a predetermined price.

Conversely, a right of sale, or a put option, is considered a right (but not an obligation) for the owner to sell assets for a fixed or indefinite period, usually at a predetermined price.

An option is deemed a binding offer to purchase or sell. Usually, the purchase or sale is effected by a single statement from the owner. Subject to contractual requirements, the statement may have to be in writing. Apart from issuing this statement, there is nothing further the owner of an option must do to exercise their option rights. Depending on the contractual provisions, following the exercise of the option right, a separate purchase agreement may need to be concluded between the parties to effect the purchase or sale.

Typically, the option is freely transferable unless limitations on transferability apply (see [Transfers to Third Parties](#)).

## Option Exercise Period

There is no mandatory legal provision in Brazil requiring exercise of an option within a certain time. However, the buyer of the obligation can establish a deadline for the seller to fulfill the obligation by providing notice, either directly or through a judicial proceeding.

If the seller denies the buyer the right to exercise the option, the buyer may file a lawsuit before the civil courts for the performance of the option within ten years of the denial, under the statute of limitations (*Article 205, Civil Code (Código Civil) (Law No. 10406/2002)*).

The time frame for exercising an option should be defined in the option agreement. If the agreement does not specify a time frame, the option has no legal time limit. However, any party can terminate the option agreement within a reasonable time frame or under general provisions of contract law. For example, in Brazil, a party can terminate an agreement because of an excessive burden on one party.

No amendments are necessary to the definition of "Option Period" in [Standard document, Put and call option agreement: Cross-border: clause 1.1](#).

## Acceleration Events

It is common for put and call option agreements in Brazil to set out acceleration events, especially:

- The company's achievement of a certain level of performance or results.
- An initial public offering of the company's shares.

No amendments are necessary to the definition of "Third Party Offer" in [Standard document, Put and call option agreement: Cross-border: clause 1.1](#).

## Consideration for the Grant of a Call or Put Option

Brazilian law does not require any consideration for the grant of an option to be valid. However, court decisions tend to consider the transaction to be legally stronger when there is a reasonable consideration. Also, if the buyer does not pay consideration, state tax authorities may consider the granting of the option to be a donation to the buyer and subject to the applicable state tax for donations, calculated according to a percentage of the value of the assigned right. This percentage varies in Brazil by state.

Standard document, Put and call option agreement: Cross-border: [clause 7.3](#) should be amended as follows:

"7.3 [The parties shall procure that the Consideration shall be finally determined as quickly as possible and, in any event, no later than the date for Completion specified by the Buyer in the Exercise Notice [failing which, the matter shall be referred to an expert for determination in accordance with Clause 12].]"

No amendments are necessary to Standard document, Put and call option agreement: Cross-border: clauses [3.1](#) and [3.2](#).

## Determination of Exercise Price

There are no applicable statutory provisions in Brazil governing calculation methods for the exercise price. The parties are free to establish put or call option prices and the calculation methods of those prices.

The usual method of calculation is [fair market value](#), calculated according to discounted cash flow formulas, [EBITDA](#) (earnings before interest, taxes, depreciation, and amortization) multiples, and so on. Other pre-established formulas are also common.

Typically, parties who are assisted by counsel negotiate specific procedures to determine the consideration value of the option exercise, avoiding any potential uncertainty or disagreement over the calculation. The presence of uncertainty or disagreement could mean that the matter is ultimately decided by a third party, for example an appraiser appointed by a judge. If the option agreement identifies an expert appraiser to determine the exercise price of an option, the parties can agree on the identity of an appraiser to be appointed as the judicial expert if they have a dispute over the option price.

No amendments are necessary to [Standard document, Put and call option agreement: Cross-border: clause 7.2](#).

## Exercise Price Set at Fair Market Value

Because anticipating the exercise price may be difficult, the parties may agree to fix the exercise price at the fair market value of the shares on the date the option is exercised. The fair market value is the price at which a willing seller would sell and a willing buyer would buy in an arm's-length transaction, without time constraints, motivated by normal business considerations. Fair market value may be determined by reference to the financial results of the company based on its financial statements at a given date. The parties may agree to adjust the financial results by taking into consideration elements that affect the value of the shares, including assets and liabilities of the company, current litigation, and so on.

## Independent Determination

It is both recommended and usual for an expert, or a list of experts, to be identified in the option agreement for appointment if a dispute takes place (see [Determination of Exercise Price](#)). It is also common for the parties to avoid disputes by employing

an expert to calculate and present the consideration amount. Unless the option agreement specifies the calculation method, the expert will generally use a method related to fair market value.

The parties can also agree to resolve disputes by arbitration rather than litigation. The parties can choose arbitrators with experience in similar transactions.

No amendments are necessary to [Standard document, Put and call option agreement: Cross-border: clause 7.3](#).

## Consideration in the Form of Shares in the Buyer

In an agreement where the consideration payable by the buyer on exercise of an option is shares to be issued by the buyer, the transaction generally would be subject to the approval of the buyer's shareholders. Shareholders representing a majority of the buyer's voting shares would need to approve the transaction at a meeting of shareholders, held under the buyer's bylaws. However, if the buyer has authorized but unissued share capital, then the board of directors by a majority vote may have authority to approve the corresponding issuance of shares. In either scenario, the shareholders will have a pre-emptive right to subscribe to the newly issued shares, which they may waive on a case-by-case basis (see [Statutory Restrictions on Transfer of Shares](#)).

Therefore, the seller should obtain from the buyer evidence of the approval of its shareholders or of the board of directors, and the waiver of the buyer's shareholders of their pre-emption rights.

[Standard document, Put and call option agreement: Cross-border: clause 7.1](#) should be amended as follows:

"The Consideration payable by the Buyer on exercise of the Option shall be satisfied in shares issued by the Buyer at Completion and shall be calculated in accordance with clause 7.2."

## Statutory Restrictions on Transfer of Shares

In general, there are no mandatory pre-emption rights in transactions between shareholders, or between shareholders and third parties, under Brazilian law.

However, shareholders have pre-emption rights on the issuance of new shares. When a Brazilian corporation (*Sociedade Anônima*) intends to give its managers an option to purchase shares held in treasury, or shares subject to stock options, it must either:

- Give the shareholders the opportunity to exercise their pre-emption rights.
- Get the shareholders' waiver of their pre-emption rights.

If the option relates to equity in a limited liability company (*Sociedade Limitada*), any transfer of quotas (the name for shares in a *limitada*) depends on approval by the remaining quota-holders holding at least 25% of the company's capital stock, unless the company's articles of association establish otherwise (*Article 1057, Civil Code*). For the option transaction to close, the remaining quota-holders must either approve the intended transfer or have waived their approval rights by amending the company's articles of association.

## Transfers to Third Parties

Because an option is deemed to be a binding offer that the owner can make effective at will, it is important to consider the transferability of the option. In the option agreement, the parties can either limit the transferability of the option or provide that it can be transferred freely.

## Employee Consultation

In a share purchase or asset purchase in Brazil, there is no obligation to inform or consult employees or their representatives in advance of the acquisition. Employee consent is required only if the relevant employment agreement needs to be amended, that is, if an employee is transferred to a different company after the acquisition.

For more information on the rights of employees in connection with an acquisition of a Brazilian company, see [Practice Note, Employees: Cross-Border Private Acquisitions \(Brazil\)](#).

## Dividends

A Brazilian company must pay dividends or interest on equity to its shareholders. Shareholder status is determined by share ownership at the time of the resolution authorizing the payment of the dividend or interest on equity. The parties to an option agreement are free to establish how the amount received by the shareholder will be apportioned later. The tax burden for the transaction may be different for the final recipient of the dividends or interest on equity.

[Standard document, Put and call option agreement: Cross-border: clause 3.3](#) should be amended as follows:

"3.3 The Option Shares shall be sold [with full title guarantee] free from all liens, charges and encumbrances and with all rights attached to them at the date of Completion, including dividends already declared by the Company but not paid yet."

## Warranties in an Option

The warranties a seller typically gives a buyer in put and call option agreements depend on whether the option is an independent transaction or is part of a larger transaction, for example as part of a stock purchase agreement.

If the option transaction is linked to a major transaction, the seller usually gives only basic warranties to the buyer in the option transaction because the primary transaction involves more extensive warranties. The basic warranties given in the option transaction include:

- The ownership (and its maintenance) of the shares subject to the option.

- Authority to enter into the agreement.
- No previous consent needed.

If the option is not linked to a transaction in which the seller has already given other warranties, the seller should give the buyer the full warranties applicable to a regular stock purchase deal.

No amendments are necessary to [Standard document, Put and call option agreement: Cross-border: clause 10](#).

## Anti-Dilution Mechanisms

To guarantee the equity participation that is at stake in an option agreement, the parties can specify that the option is for a defined percentage of the shares issued by the company when the option is exercised, rather than for a specific number of shares.

No amendments are necessary to [Standard document, Put and call option agreement: Cross-border: clause 9](#).

## Formalities to Transfer the Shares on Exercise

When a limited liability company transfers quotas, the company's articles of association must be amended to reflect the new holders of the quotas or the number of quotas held by each partner, and the company must file the amended articles with the Board of Trade of the company's state of incorporation.

Shares of a closely held corporation are transferred by the execution by the transferor and the transferee of a share transfer form in the company's share transfer book. The company also must register the transfer in the company's share registration book.

Shares of a public corporation are transferred either by:

- Instruction given to the custodial agent by the shareholder.
- Execution of a share transfer form by the shareholder, prepared by and delivered to the custodial agent.

[Standard document, Put and call option: Cross-border: clause 8.4](#) should be replaced by the following provision:

"8.4 [Following Completion, each of the parties shall use its reasonable endeavors [at the expense of the Seller [(other than in respect of registration fees OR income tax)] to ensure the registration of the Buyer (or as it directs) as the holder of the Option Shares. To this effect [the Company's articles of association shall be amended and filed with the board of trade OR the Seller and the Buyer shall execute the relevant share transfer form in the Company's share transfer book and procure that the Company registers the executed share transfer form in the Company's shares registration book OR the Seller and the Buyer shall execute the relevant share transfer form prepared by Company's shares custody agent and, then, deliver the executed share transfer form to the Company's share custody agent].]"