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M&A in the Energy Sector: A Brazilian Complex Negotiation Case

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Abstract

Communication The article explores a merger and acquisition case in southern Brazil involving a buyer, a seller, and an investment fund. The negotiation process included vseveral issues such as guarantees, a "kicker" clause for profits from asset resale, minimum limits, flexibility, and potential concessions. The investment fund prioritized risk mitigation, while the buyer aimed to ensure the project's financial sustainability, highlighting seemingly irreconcilable interests. The resolution of this negotiation is examined in the case study

Keywords:

Business negotiation; Type IV negotiation; Merger & Acquisition; Energy sector.

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1. INTRODUCTION

This article introduces a descriptive case study in which the unit of analysis is the business Mergers & Acquisition (M&A) negotiation, for the acquisition of assets for the generation of power generation, involving three parties: a buyer, a seller, and an investment fund, engaging in a Type IV Negotiation (Dias, 2020), where multiple parties negotiate multiple items. For compliance and ethical reasons, the real names and identities were preserved. Hereafter, the seller is Energy Company Inc., the buyer is ABC Company, and the investment fund is

Investments Inc. ABC Company is headquartered in Curitiba, Paraná state, southern Brazil, and belongs to a group of businesses economically consolidated in the energy projects sector (generation and commercialization).

Mergers and acquisitions are increasingly popular among management directors to accelerate global expansion strategies (Weber, 2010). These external corporate development strategies can be strategic, allowing for potential benefits that would be too costly or risky to gain independently, opportunistic, or defensive, depending on the organization's current state (Dess & Lumpkin, 2003). They can also be defensive to protect a firm's market share in a consolidated industry (Weber, 2010).

Negotiation is a "process of communication by which two or more parties seek to advance their interests or those of the persons they represent through an agreement on the desired future action" (Salacuse, 2003, p. 11), attracting scholars' attention over the last 50 years to date years (Dias, 2023; Dias, 2023a; Dias, 2023b; Dias et al., 2023; Fisher, Ury & Patton, 1981; Kissinger, 1969; Lax & Sebenius, 1986; Navarro & Dias, 2024; Pruitt, 1981; Raiffa, Richardson & Metcalfe, 2002; Rubin & Brown, 1975;Salacuse, 2003, 2006; Santos & Dias, 2024; Schatzki & Coffey, 1981; Shell, 2006; Zartman, 1988), including broad categories of scientific inquiry in the field, such as (i) business negotiations (Dias, 2023; Dias, Lafraia, Schmitz et al., 2024; Dias, Leitão, Batista & Medeiros, 2022; Dias, Pereira, Teles & Lafraia, 2023; Dias, Pereira, Vieira, et al., 2023; Dias, Toledo, Silva, et al., 2022; Santos & Dias, 2024; Valente & Dias, 2023); (ii) non-government negotiations (Navarro & Dias, 2024); (iii) conflict negotiations and mediation (Zartman, 1988); (iv) business negotiations and scenarios involving communication process (Acuff, 1993; Salacuse, 2003, 2006; Shell, 2006), (v) negotiation as a social interaction process (Dias, 2016; Schatzki & Coffey, 1981); as part of the (vi) decision-making process (Bazerman & Moore, 1994); involving complex civil and military negotiations (Dias, Toledo, Silva, Santos et at., 2022; Dias, Pires et al., 2022; Dias, Almeida, Silva, Russo, et al., 2022); (vii) contract negotiations (Cunha & Dias, 2021; Dias, Nascimento et al., 2021). The Four Type Negotiation Matrix (Dias, 2020) was applied to this case to represent the negotiation category, as illustrated in Figure 1:

Figure 1 The Four-Type Negotiation Matrix
Source: Dias, 2020. Reprinted under permission.

2. METHODOLOGY

This work applied Saunders, Lewis, and Thornhill's (2009) inductive method with interpretive philosophy. Inspired by Yin (2004), we investigated one M&A negotiation between three parties to acquire a power plant in southern Brazil as the unit of research, reinforced with direct participation of two of the authors.

3. NEGOTIATION SCENARIO: CHALLENGES, GUARANTEES AND KICKERS

The buyer, ABC Company, saw the acquisition of these Energy Company Inc. (seller) assets as a strategic opportunity to expand its presence in the power generation market since the transaction involved acquiring a set of plants that would strengthen its position in both the free and regulated markets. However, the challenge is not only in acquiring the aforementioned assets but also in financial engineering, which must be overcome.In order to make this operation financially viable, ABC sought financing from the Investment Fund based in São Paulo, southeastern Brazil, specialized in alternative and innovative investments in various segments. The financing in question dealt with the issuance of non-debenture convertible funds, allowing the Fund to act as a debenture holder and indirectly participate in the project results.However, during the structuring of the deed of issuance of these debentures, two sensitive points required intense negotiation, namely:
a) ***Guarantees:***(a) the Investment Fund requested that 100% of assets acquired via M&A be linked as a guarantee of the operation to protect its sector capital, which is susceptible to political and economic fluctuations. (b) the buyer, ABC, needed at least 50% of the unencumbered assets for the continuity of other projects of the group, as a total blockade would compromise its financial flexibility and would reduce its leverage possibilities future, compromising its sustainability in the medium and long term.

b) Kicker[1]:(a) the Investment Fund requested a 15% kicker on the valuation of the resold assetsfor a value higher than the purchase, as a fair subsidy for capitalinvested, considering that its contribution makes the M&A operation feasible and, possibly, a substantial profit in the future. (b) ABC, this percentage directly impacts the financial health of the project, as there is a need for a cash flow margin, since if the assets aresold quickly (at high prices), the obligation to pay the kicker maycompromising the company's liquidity, making it difficult to reallocate capital to new opportunities. It is worth noting that other topics that permeate the operation continue in discussions, such as financial covenants, early maturity events, and additional obligations, such as going public, contracting insurance, and audited financial statements.

4. UNFOLDING THE NEGOTIATION PROCESS

In the course of structuring this M&A operation, the Investment Fund sent to ABCa MOU, and in that document, described its proposed conditions for the availability of the required financial resources. However, ABC found that if it accepted all the conditions presented therein, it would not be able to structure the project and to carry out the acquisition of energy

[1]A clause or element can be inserted into financial contracts to provide extra benefits to one of the parties.

generation assets, since, from the Investment Fund, it would be sufficient to meet about 50% of the assumed obligations.In this sense, negotiations have begun, aiming to adjust the conditions of the MOU so that it is possible to compensate for the Investment Fund's financial disbursement and enable ABC's arrangement of the M&A operation.

During the negotiations, ABC took a more incisive approach, imposing its conditions for accepting the term sheet and arguing that the Investment Fund would have an excellent market projection if it concluded the investment process in question. However, the Investment Fund was reluctant, arguing that he already had a relevant social projection and that the core of his business depended on the guarantee and other contractual charges.Then, the negotiated solution should involve a hybrid model ofcollateral, allowing for the progressive release of compliant assetscertain financial milestones are reached, and a progressive escalationof the kicker, whose 15% rate will be applied only if the resale occurs in the short term; otherwise, if the assets are held longer before the sale, the percentage gradually decreases.

Drawing a parallel with the article's content, it is possible to identify that the three important questions were developed: (i) "What do you want?"; (ii) "What does another want?"; and (iii) "How do we get there?" because the negotiation is on its way to reaching the win-win point. Within the dual concerns model, the win-win point. In addition, considering the type of negotiation x number of subjects (2 parts and multiple issues), this negotiation, which was initially distributive, was transformed into an integrative type IV. Distributive at first, because each side maximized its gains by creating value for its side, it has evolved into a more integrative model, in which both parties could win. This approach brought greater predictability to both parties and made room for mutual gains.During the negotiation process, it became evident that the negotiation should be based on a collaboration model, in which both parties can extract sustainable benefits, since the structuring of financing via non-convertible debentures have advantages and disadvantages for both the issuer and the investor. In sum, the Investment Fund demanded that it ensure secure legal and financial costs, minimizing potential losses. In turn, ABC sought to acquire the assets and ensure the project's financial sustainability.

Thus, because the notes of each of the parties has been resolved, because their interests are interdependent, it is seen that it is of a potentially collaborative negotiation of interests, in which the outcome of the possible is that of the "acceptable package", that is, the parties negotiate the satisfaction of their interests and the total "package" is accepted by both. Regarding the basic structure of a negotiation, we can identify and even infer the following questions in the case at hand: (i) what is the alternative to negotiation; (ii) what is the minimum limit and to what extent each one is willing to be flexible; and, (iii) what concessions the parties are willing to build a Zone of Possible Agreement (ZOPA).

The negotiation continued to unfold, and although these points were once decided, there were even more issues beyond warranties and the kicker being dealt with to reach the outcome. For now, in the solution found in ZOPA, ABC preserves its leverage capacity, while the

Investment Fund maintains a certain level of its investment. There is also the progressive scaling of the kicker, in which the 15% fee is applied only if the resale occurs within a short period. Otherwise, the percentage gradually decreases, ensuring higher financial predictability for ABC.

8. CLOSING THE DEAL

The parties have managed to reach a compromise meeting each one's needs. However, many hours of negotiation continue to be employed, which consequently leads to a delay in the completion of the project, which is at risk of loss. For the Investment Fund:
Best Alternative to a Negotiated Agreement (BATNA). Suppose the agreement with the Investment Fund does not go ahead. In that case, we can seek other investors or explore other ways of fundraising (e.g., debt issuance in the capital market), but this would imply a new process and possibly higher financial costs. If the agreement with ABC does not advance, we can analyze other possibleinfrastructure projects in which it could allocate its capital. However, theu would miss an opportunity to join an asset Consolidated electricity sector.

Options: (a) the limit needed is at least 50% of the assets acquired free for new purchases, and a 15% kicker cannot be accepted in any scenario. (b) At least 50% of assets were tied in warranty to reduce risks, and the kicker was kept as compensation for the risk assumed in the operation.considering only 50% of the assets are guaranteed, it indicates that others ways to guarantee the operation (e.g., insurance, endorsement, comfort letter...); participation in a potential future sale of ABC, if it sells the assets in the future, the Investment Fund has a preference or a stake in future appreciation; Creation of possibilities with shared value (e.g., making part of the guarantees more flexible in change of a financial performance trigger, in which specific results ABC operatives trigger additional payments.; Exit mechanisms of the trade (e.g., how to liquidate your position without destabilizing the capital structure of ABC), for instance.

ZOPA: ZOPA 50% of the assets tied as collateral and a progressive scaling of thekicker, with a fee of 15% if the resale occurs in the short term. Trade partner and the possible blocking of the other sectors involved.

In this sense, when it is necessary to discuss fundamental issues for the Completion of a deal requires demonstrating to the other party that the intentions of it is being considered when proposing, and also dispensing with the greatest possible time evaluating scenarios, considering that the more alternative sexisting, fewer risks, and greater negotiating possibilities. In the context of this operation, some things could have been done in a way that different, as the parties consider options and alternatives, for ABC:
Options:(a) the smaller the difference between the purchase price and the price ofsale, the smaller the kicker, and as this difference increases, the kicker increases proportionally (e.g., starting with 4% and going up to 15%); (b) possibilityco-investors (objective to dilute risk); (c) a hybrid model of guarantees, in which assets are progressively released as financial

milestones are met; (d) hit: a grace period to relieve pressure on cash flowIn the first few years of operation, etc.

Best Alternative to a Negotiated Agreement (BATNA). look for other investment funds in the market; Noallocation of the 50% of the financial structuring in the Investment Fund, but spread this funding, Reducing the impact and risk for the execution of the project.

9. IMPLICATIONS AND DISCUSSION

The implications for this M&A negotiation are threefold: (a) financial implications, such as interest rates, debt structure and risk management; (b) strategic implications, such as diversification of businesses, market positioning, and a sound partnership dynamics; (c) operational implications, including regualtory compliance, asset integration, and performance monitoring.

There are also some implications in other broad study areas, including Type II negotiations (Dias, 2020; Dias, 2016; Dias, Waltz & Oliveira, 2021; Dias, 2020a; Dias, 2020b; Dias, 2020c; Dias, Duzert & Lopes, 2021), also including family business negotiations (Dias, 2021; Dias & Lopes, 2020; Dias & Lopes, 2021; Dias & Navarro, 2020; Dias, Lopes & Duzert, 2020; Dias, Lopes & Teles, 2020; Sartori et al., 2020). In addition, role-play simulations on negotiations (Dias, Lopes, Cavalcanti & Golfetto, 2020; Dias & Silva, 2021; Dias, Netto, Oliveira et al., 2021; Dias, Andrade, Sotoriva, et al., 2021; Dias & Lopes, 2021), for example.

10. CONCLUSION

The negotiation between ABC Company and the Investment Fund demonstrates that complex deals can be successfully structured through collaborative efforts, creative problem-solving, and a willingness to find mutually beneficial solutions. By adopting a hybrid model of guarantees and a progressive kicker, both parties were able to address their key concerns, ensuring the financial sustainability of the project while mitigating risks. This case highlights the importance of flexibility, effective communication, and a deep understanding of each party's interests in achieving a successful outcome in M&A transactions.

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