

## **ius laboris – Transfer of Undertakings**

### **Outline structure for country chapters**

#### **TRANSFERS**

##### **When, in broad terms, does the legislation apply?**

*[i.e. upon the sale of a business or part of a business? when outsourcing? in other situations?]*

A transfer is considered as a change, at any title whatsoever, of the ownership of the company, of the undertaking or of part of the undertaking that constitutes an economic unit. A transmission or reversion of the company's exploitation (or of the undertaking or the economic unit's exploitation), at any title, is also considered to be a "transfer".

Transfer of undertakings provisions are applicable to the following situations:

- on the transfer of a company (e.g. merger and acquisitions – change in control); and
- on the transfer of an economic entity which retains its identity (e.g. the sale of a business); and

##### **What specific factors trigger the transfer of an undertaking?**

*[i.e. what criteria define an 'undertaking'? what constitutes a 'transfer'?]*

An "undertaking" includes any trade or business regardless of its area of activity.

A definition of "economic unit" is given by the Labour Code, being it considered as "a group of organised means with the aim of exercising an economic activity, either as its main activity or only as an ancillary".

Our law does not provide a definition of "transfer". In this particular case, we agree with the comments provided by the UK.

##### **Are there any forms of transaction to which the legislation does not apply?**

Taking into consideration the extension of the definition of "transfer of undertakings" set forth in our law (please refer to above), we do not anticipate any case of transaction to which the legal provisions do not apply.

#### **TERMS OF EMPLOYMENT**

##### **Who is protected?**

The legal provisions related to transfer of undertakings are applicable to employees. Nevertheless, such provisions are not applicable to employees that have been already moved or that are to be moved until the transfer date to another undertaking or part of the undertaking that is considered as an economic unit. These employees will continue to be considered as employees of the transferor.

##### **What if employees object to the transfer?**

Both the transferor and the transferee are bound to inform employee representatives (or the employees themselves when there are no representatives) of the date of the Transfer Act and of its motives.

The information to be given must also state the juridical, economic and social consequences of the transfer vis-à-vis the affected employees, as well as of the measures that are intended to be applied (if any).

The employees cannot object to the transfer itself but can object to the consequences arising out of the transfer. This means that, for example, if a collective dismissal or the

transfer of the employees to other premises is proposed, then the employees can oppose.

**What happens to terms of employment contracts?**

The employer's position is transferred from the transferor to the transferee, with all the inherent rights and duties. The responsibility for the payment of fines due to violation of labour laws is also transferred to the transferee.

**What about other employee benefits?**

Taking into consideration that the employer's position is transferred, the transferee continues to be bound to pay all benefits stipulated with employees or set forth in collective bargaining or in the law.

**What happens to pension rights?**

Please refer to the preceding comment.

**What liabilities transfer?**

The responsibility for the payment of fines due to violation of labour laws is transferred to the transferee, as well as any obligations that have become due up to the date of the transfer. This liability includes employees that have already been dismissed or that have been released from their duties.

Some information and consultation duties have to be complied with and only after completion of such duties the transferee may inform the employees that they have the right to claim any outstanding credits within the delay of three months. If such claim is not made, outstanding credits may not be transferred. The information to the employees should be made by putting an announcement on all places of work.

**What if employees are covered by a collective agreement?**

The comments provided in the preceding paragraphs are valid for this situation.

**CHANGE MANAGEMENT**

**Can employers make changes to employment contracts?**

No.

However, the transferee has the right to reorganise its workforce as any employer does. This means that agreements with employees to make certain arrangements are considered valid, provided that imperative rules foreseen in the Labour Code (e.g. maximum length of working hours, safety rules, etc.) or in the applicable CBA (e.g. minimum wage to be paid for the performance of a certain type of work) are not breached.

**When can employers safely dismiss employees before or after a transfer?**

The act of transferring an undertaking or part of it is not a valid reason for a dismissal.

In cases of transfer of undertakings (or other situations of change in control), companies try to reach agreements with the employees for termination of employment. If agreements cannot be settled, then collective dismissal and dismissal due to job termination (dismissal due to objective reasons) are the only via to obtain the intended

termination of employment, and, even in these cases, only if the legal requirements are met.<sup>1</sup>

Dismissal due to objective reasons includes termination of employment due to market<sup>2</sup>, structural<sup>3</sup> or technological<sup>4</sup> reasons. The reference made to “objective reasons” means that, in such cases, dismissal is not due to the employee’s behaviour; on the contrary, it is due to causes external to the company, but that have a decisive influence on the employer’s decision to dismiss.<sup>5</sup>

If such termination occurs, the employee is entitled to receive one month of basic salary accrued of *diuturnidades* (*seniority allowances*) for each full year of seniority, with a minimum three-month payment. In case of fraction of years of seniority, compensation is paid in a proportional way, but it must respect the minimum stated above.

## **FOLLOWING THE RIGHT PROCEDURE**

### **Who must employers consult?**

For the purposes of information and consultation on a transfer of undertaking’s procedure, employees’ representatives are the works council, trade unions, trade union committees and union delegates.

In case none of the above-mentioned representatives exist in the company or undertaking to be transferred, the employees represent themselves directly.

Article 321 of the Labour Code expressly sets forth that if the company, the undertaking or part of the undertaking transferred maintains its autonomy after the transfer, then the status and duties of the representatives of the affected employees is not modified.

If, on the contrary, the transferred unit (company, undertaking or part of an undertaking) is incorporated on the acquirer’s company, and this company does not have a works council, the works council (or workers sub-committee) of the former unit will continue to exist for a period of two months as of the date of the transfer, or until a new elected works council initiates its duties (or for an additional period of two months if elections are annulled).

### **What information must they provide?**

Both the transferor and the transferee are bound to inform employee representatives (or the employees themselves when there are no representatives) of the date of the Transfer Act and of its motives.

The information to be given must also state the juridical, economic and social consequences of the transfer vis-à-vis the affected employees, as well as of the measures that are intended to be applied (if any).

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<sup>1</sup> Although one cannot say that Change in Control, for itself, is a ground for dismissal due to objective causes.

<sup>2</sup> Market reasons are related to the company’s reduction of productivity due to a predictable reduction of the products/services demand or the impossibility to place the referred products/services in the market.

<sup>3</sup> Structural reasons concern a lack of economical/financial balance of the company, restructuring of the company or replacement of dominant products.

<sup>4</sup> Technological reasons are connected to a modification on the techniques or on the procedures related to production and other reasons linked to a change of technology.

<sup>5</sup> In our opinion, Change in Control is not a cause external to the company.

The information described above must be given in writing, before the Transfer Act, and respecting a reasonable delay, being its minimum ten days before the consultation procedure.

**What does consultation involve?**

No. 3 of Article 320 of the Labour Code stipulates that both the transferor and the transferee must consult employee representatives prior to the Transfer Act, to obtain an agreement on the measures to be taken regarding the employees that will be affected by said transfer.

Apart from the consultation procedure, there may be certain specific rules (either legal or conventional) that must be observed depending on the measures agreed to be taken.

**What happens if an employer fails properly to inform or consult?**

The failure to comply with the information and/or the consultation procedure does not jeopardise the transfer itself, but it may give rise to the application of fines by the Labour Inspection Entity (IGT), due to the violation of labour rules.

The IGT may intervene by its own initiative or if anyone (either an employee or a union) informs this entity that labour rules are not being complied with.

## **ISSUES PECULIAR TO THIS COUNTRY**

**Are there any special issues employers should be aware of when transferring an undertaking in this country?**

**What are the main areas of legal uncertainty relating to transfers of undertakings in this jurisdiction?**

**What other factors would I need to consider in the case of a cross-border transfer into or out of this country? *[Please list headline issues.]***

## **IMPLEMENTING LEGISLATION**

**What are the main national laws implementing the EU acquired rights legislation?**

## **CONTACT**

**Bruno Barbosa**

~~Pedro Pinto, Reis & Associados~~ Março 2007

Email: ~~bsb@ppradv.com~~