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M&A CONFERENCE CONCLUSIONS

M&A lawyers must be fully aware of LatAm government regulations, say panellists

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There may be a wide range of approaches to government intervention Latin America, but it remains a key consideration for inbound deals throughout the region, said panellists at Latin Lawyer's M&A conference in São Paulo last week.

According to Sullivan & Cromwell LLP partner Sergio Galvis, in recent organisational meetings with new clients either selling or buying in Latin America, the number one issue under discussion has been the role of the government in economic activity. "The consequence for us as practitioners is that we can't close our eyes to this reality," he said.

Indeed, when it comes to government intervention, Barbosa Müssnich & Aragão partner Paulo Aragão noted that there is a broad range of approaches in Latin America.

Zang, Bergel & Viñes partner Carolina Zang introduced the regulatory situation in Argentina by paraphrasing Warren Buffett: "If fear is an investor's best friend, then welcome to Argentina". The principle risk that investors interested in Argentina face today, she said, is unpredictability, although there are signs that this could be changing. The past couple of weeks have seen moves from President Cristina Fernández de Kirchner aimed at resolving the on-going dispute with Repsol over last year's expropriation of its stake in YPF. "The way she's going to structure it seems very professional," said Zang.

Additionally, the former secretary of commerce, Guillermo Moreno – perceived to be unfriendly towards foreign investors - has been removed from office, and utility subsidies to commercial users considered by critics to be unnecessary are set to be cut. "Fernández de Kirchner is now a bit surprised because she was used to not being supported by the business community, and now a whole different crowd is applauding her," Zang said.

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Although the current Argentine administration has been broadly characterised by political uncertainty, in principle Zang said she believed that the government regulations are not in fact substantially different from any other country in Latin America. “I think we have bad marketing skills, and it’s more about the way we sell ourselves,” she said.

With respect to considerations M&A practitioners need to make, Zang said she recommended beginning by looking at the exchange control regulations, particularly if a project is set to be backed by a long-term loan coming from abroad. Secondly, she said it was important for lawyers to keep in mind Argentina’s stringent labour laws, especially with respect to the statute of limitations. For environmental matters she noted that while enforceability has been poor, the regulations are still important to take into account when drafting documents. “These three things have to be really considered to avoid headaches in the future,” she said.

Zang said she viewed the most important in Argentina as those from the antitrust commission, unless the transaction falls below 35 million pesos. Antitrust approvals can take a long time in the country – up to three years for transactions with a cross-border component – although she said there is not a history of deals being rejected on antitrust grounds. The only key prohibition for foreigners, she noted, is on the purchase of land – although this is a common feature of the Latin American legislative landscape.

Although they may be neighbours, the regulatory situation in Argentina contrasts sharply with Chile. “We have a very hands-off approach, consistent with a free market economy,” said Carey’s Francisco Ugarte. He described the country as very friendly towards investors and the business community, with a simple tax regime and no foreign exchange restrictions, solid ownership rights and strong investment protection. For antitrust matters, the country offers a voluntary merger control process, although Ugarte thinks this should be changed. The country also guarantees non-discriminatory treatment for foreign and local investors.

There are, however, some industries which have restrictions. There are a number of regulatory approvals required for the acquisition of banks, media companies, insurers and utility companies. With respect to land, individuals or entities from neighbouring countries are prohibited from acquiring land on borders, although all other

foreigners are free to make land purchases.

Although Chile has a more open economy than many other Latin America countries, Ugarte said he believes there is still work to be done. “Chile’s laws seem great, but if you compare them to developed countries you see a lot is missing,” he said. “That level of sophistication is still lacking.” There are a number of bills currently under discussion aimed at updating the existing legislation, although Ugarte says they are unlikely to be passed in the short term owing to this month’s elections.

Over in Mexico, Mijares, Angoitia, Cortés y Fuentes SC partner Patricio Trad said he could relate to both the Argentine and Chilean examples. While the previous party, PAN, which was in power for 12 years, took a hands-off approach, he believes that the current administration, ruled by the PRI, is in a “cloud of nostalgia”, going back to old methods and seeking to influence how business is done in Mexico.

Foreign investors in Mexico, Trad said, risk running up against a number of restrictions, with some sectors considered off-limits, such as gasoline distribution and some customs-related activities. Others have restrictions, such as aviation, where there is a maximum of 25 per cent foreign investment. An important recent change to these limits is in the telecoms sector, where a recent constitutional reform has allowed for foreign investors to purchase 100 per cent stakes, as well as introduced a new technical telecoms regulator for antitrust matters.

While M&A practitioners throughout Latin America have to consider the role of the government in deal-making, Venezuela is the country that is most synonymous with government intervention. “The government controls most sectors of the economy,” said D'Empaire Reyna Abogados partner Fulvio Italiani. The result is that investors in Venezuela face a variety of challenges, including significant risk, nationalisations, price controls, limits on access to foreign currency and an interdiction on repatriating profits.

Nevertheless, Italiani noted that the Venezuelan government has taken a “very pragmatic” approach to the oil and gas sector. “The legal framework actually allows foreign investors to invest in the oil sector, and it structures concessions in a way that is attractive to them,” he said. “The government has acknowledged the need for foreign investors and taken steps to implement this.”

With respect to considerations M&A practitioners need to take, Italiani said that the country is “liberal”. Apart from in a number of regulated sectors, transactions do not require regulatory or antitrust approval. Most sectors are open to investors, including those from foreign countries.

For Latin Americans entering the US, Galvis said that while they might run up against government involvement in some sectors, for the most part it is relatively limited. He noted that in cases where an acquisition is in a potentially sensitive area, the transaction must be submitted to a review process. While he said it had been a hot topic for clients in Beijing, for the most part Latin American acquirers tended not to opt for government-oriented deals.

On a general level, the most tightly regulated industry in the US at the moment is the financial sector, following the introduction of the Dodd Frank act. However, for Latin American companies the most problematic trend related to US law enforcement is the “fairly robust view” of the extra-territorial application of US laws. “That’s the biggest US political risk for Latin American M&A acquirers,” he said.

Latin Lawyer has reported on panellists' views of the M&A landscapes in Brazil and Spanish-speaking Latin America, and will continue its conference reporting throughout the week, looking at governance trends, opportunities in private equity and the business and financial perspective on prospects for M&A.