LATIN LAWYER INSIGHT

The Guide to Mergers and Acquisitions

Editors
Paola Lozano and Daniel Hernández

The Guide to Mergers and Acquisitions

First Edition

Editors
Paola Lozano and Daniel Hernández

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Publisher's note

Latin Lawyer is delighted to publish *The Guide to Mergers and Acquisitions.*

Edited by Paola Lozano and Daniel Hernández of Skadden, Arps, Slate, Meagher & Flom LLP and containing the knowledge and experience of more than 40 leading practitioners, it provides guidance that will benefit all practitioners acting in Latin American mergers and acquisitions.

M&A activity in Latin America has grown significantly in recent decades and deals are increasingly complex. This guide draws on the expertise of highly sophisticated practitioners to provide an overview of the main elements of deal-making in a region shaped by its cyclical economies and often volatile political landscape. Its aim is to be a valuable resource for business-people, investors and their advisers as they embark on an M&A transaction.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide Mergers and Acquisitions.* If you find it useful, you may also like the other books in the Latin Lawyer series, including our *Guide to Corporate Compliance and Regulators*, our online tool that provides an overview of the major regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Rosie Cresswell, *Deputy Publisher*

Introduction

Paola Lozano and Daniel Hernández[1]

M&A activity, comprising transactions involving mergers, acquisitions, dispositions and other corporate arrangements that entail the combination or consolidation of two or more businesses or the transfer of interests in a business, is a global industry worth trillions of dollars annually worldwide and billions of dollars annually in Latin America. In the region, deal volumes and values have followed a path of exponential increase in the past 30 years, despite the cyclical nature of M&A and the volatility of the political, social and macroeconomic environments in many Latin American countries. With increasing deal volumes and a broader range of market participants, the sophistication of legal counsel, business people, bankers and other advisers has also increased significantly. M&A in the region is constantly evolving and requires all participants to monitor current topics and new trends. Advisers are required to stay abreast of recent developments, in addition to providing deep substantive knowledge of technical legal matters, to add value to their clients. New challenges resulting from a dynamic, ever-changing landscape demand rigorous attention to the many variables that may impact an M&A transaction, which, in addition to the proposed terms of a particular deal, include market conditions, regulatory and legal changes, relevant case law and arbitral precedents, and newly implemented structures and technical contractual features developed by seasoned parties and advisers around the world, especially in deeper, more developed M&A markets.

This guide is designed to provide an overview of certain critical aspects of current M&A deal-making from the perspective of a highly qualified and diverse group of experts in their field throughout the larger markets in Latin America, as well as from the United States and Spain. This guide is not meant to be an academic description of applicable laws or contract terms and conditions typically included in M&A agreements. Instead, we selected current topics of interest in areas of recent and expected continued evolution, as well as certain

1 Paola Lozano is a partner and Daniel Hernández is an associate at Skadden, Arps, Slate, Meagher & Flom LLP.

factors that we believe may drive increased M&A activity in the years to come, with the aim of creating a valuable resource for executives, board members, investors and attorneys (both in private practice and in-house counsel) as they embark in an M&A transaction.

As we set out to create this guide, the worst and most widespread global healthcare crisis the modern world has known – covid-19 – erupted. This fact required all M&A counsel to reassess priorities, focus on substantive and immediate issues (many unprecedented), quickly adapt to a new reality, and get creative in the use or development of tools to address the negotiation, execution, consummation, and in some cases, termination and amendment of M&A transactions.

Against that backdrop, Part I of this guide is an edited transcript of a roundtable discussion on the impact of the covid-19 pandemic on M&A in Latin America, held in August 2020, where Paola Lozano of Skadden in New York, as part of our role as editors of the Guide, moderated a panel of leading M&A practitioners working in the region who are based in Argentina, Brazil, Chile, Colombia, Mexico, Peru and Spain. The discussion addressed deal certainty in uncertain times from the perspective of New York and Delaware case law, as well as from the perspective of the civil law systems represented in the roundtable. The panel discussed whether, in the midst of the pandemic, parties to previously signed and announced M&A deals were obliged to consummate such deals on their documented, agreed upon terms, or whether there were paths to amend or terminate those deals on the basis of the unforeseen intervening facts and their impact on the target. The panel also discussed the difficulty of agreeing on target valuation as a result of the impact on the underlying businesses of the health crisis and the measures imposed by national and regional governments to addresses it, which became one of the most significant negative pressure points detracting from M&A volume in the region in the first half of 2020. The panellists presented some tools practitioners have at their disposal to help bridge the gap on valuation between buyers and sellers, such as earn-outs, modified purchase price adjustments and performance-based closing conditions. Finally, the panel discussed the expectations for 2021 M&A activity and some of the challenges and drivers that could impact market appetite for local targets, including the significant role that will be played by national governments in the region, as they implement policies to address the crisis and its aftermath.

Part II examines Latin American M&A transactions from the perspective of various types of market participants and how their involvement deeply impacts the nature of the process and the terms of the transactions.

Claudia Barrero of Philippi, Prietocarrizosa Ferrero DU & Uría in Colombia discusses the particularities of M&A transactions involving multilatinas, and their impact in the region and beyond. This chapter underscores the relevance of multilatinas in the recent evolution of the Latin American M&A market as strong drivers of transaction volume. Their very practical approach to deal-making and ability to quickly adapt to particular market conditions have made them increasingly competitive, as compared to other global players interested in Latin American targets.

Maurizio Levi-Minzi, Peter A Furci, Andrew M Levine and Jonathan Adler of Deveboise & Plimpton LLP in New York address M&A transactions involving private equity funds and other institutional investors, including intrinsic challenges thereof and recommended protections in partial acquisitions.

Jared Roscoe and Stephen Pelliccia of SoftBank in Miami discuss certain transaction terms expected by a US-based venture capital fund in their investments in Latin America and the need to adjust certain forms developed in Silicon Valley to the factual circumstances and complexities of the region.

Sergio Michelsen, Darío Laguado and Ángela García of Brigard Urrutia in Colombia provide a practical overview of M&A deals involving family-owned businesses, and the many particularities and complexities involved in such transactions. The chapter describes deal dynamics, as well as substantive issues prevalent when representing a family-owned business or its counterparties in a transaction, including the need to ascertain early on the power structure and the alignment of interests and objectives within the family group.

We close Part II with the insight provided by senior Latin American M&A investment bankers, Vanessa Dager and Nicolas Camacho of Credit Suisse in New York, who give us an overview of the critical role of investment bankers in assessing, structuring, organising and conducting an M&A transaction, particularly in the context of international sell-side auctions of Latin American businesses.

Part III covers types of transactions and evolving trends that are fairly new to Latin America and that we expect will continue to increase in volume, size and importance, potentially becoming a helpful driver of the resurgence of M&A in post-covid-19 times.

Francisco Antunes Maciel Müssnich, Monique Mavignier and Ana Paula Reis of BMA Barbosa Müssnich Aragão in Brazil discuss public company M&A, hostile takeovers and shareholder activism from the perspective of the Brazilian market. The article underscores the larger size and depth of the Brazilian capital markets, as compared to other jurisdictions in Latin America, and highlights the relationship between the evolution of the trading markets and the development of additional types of M&A transactions that are common in developed markets but nascent in Latin America, such as hostile takeovers.

Fulvio Italiani and Giancarlo Carrazza of D'Empaire in Venezuela discuss distressed M&A from the perspective of the Venezuelan market. The authors provide an interesting overview of lessons learned from the Venezuelan experience that may become exponentially relevant as distressed M&A is rapidly increasing in the region as a result of both the covid-19 crisis and the more generalised occurrence of economic downturns driven by political instability and social unrest.

Finally, Carolina Posada, Jaime Cubillos and Estefanía Ponce of Posse Herrera Ruiz Abogados in Colombia discuss deal-related litigation in Latin America, which is worth observing as a potential trend, following in the tradition of the common law jurisdictions that handle larger deal volumes and sizes, and have developed a robust body of case law around frequently contested topics in M&A. The authors draw interesting conclusions and note potential trends to develop in the region on the basis of a survey involving some of the most reputable Latin American firms.

Part IV addresses selected topics critical to M&A deal-making, outside the main transaction agreement, as well as a discussion on provisions within a transaction agreement that may impact certainty of closing.

Denise Grant, Augusto Ruiloba, Lisseth Rincon and Rita Ghanem of Shearman & Sterling LLP in New York address acquisition finance and debt structuring for M&A deals in the region. Naturally, the availability of an increased pool of sources of financing for M&A transactions has a positive impact on deal-making appetite, especially as lenders with strong balance sheets continue to take an interest in the region and develop a tailored approach to the facts that differentiate it from the larger, less volatile markets.

Pablo Mijares and Patricio Trad of Mijares, Angoitia, Cortés y Fuentes in Mexico provide their views on the negotiation and execution of preliminary legal documents. This chapter addresses important issues such as the preliminary nature and non-binding effect of letters of intent, memorandums of understanding and term sheets with respect to a transaction, and the binding effect of certain provisions often included in such documents. The chapter also provides an insightful overview of the main issues revolving around confidentiality agreements, exclusivity agreements and cost-sharing agreements.

Diego Pérez-Ordóñez of Pérez Bustamante & Ponce in Ecuador provides an overview of the particularities of due diligence efforts and risk assessment with respect to Latin American targets. The author combines remarks on some of the nuts and bolts of the interaction between due diligence efforts and the deal documents, with a practical overview of common due diligence findings for Latin American targets. He also discusses statutes of limitations (with a focus on Ecuadorian law), and trending issues such as the use of legal tech in due diligence.

Martín Cerruti, Geraldine Ifrán and Santiago Fontana of Ferrere in Uruguay discuss interim operating covenants and closing conditions in Latin American M&A deals. The chapter addresses antitrust and other regulatory approvals, key interim operating covenants, conditions to closing and termination rights.

Last, Luis Burgueño, Alberto Córdoba, Marisol Márquez and Elías Jalife of Von Wobeser y Sierra offer insights on escrow agreements, holdback provisions and other guarantees that may be used in the context of M&A transactions in Latin America. The chapter contains comprehensive remarks on some of the most critical issues typically related to escrow agreements, such as the selection of the escrow agent, the amount and term thereof, the use and beneficiary of interest accrued in the escrow account, and process and conditions for release of the escrowed funds. The authors also cover alternative mechanisms that may be relevant in Latin American M&A, such as parent guarantees, promissory notes and letters of credit.

We enjoyed the topic selection process and took great pride in editing each chapter of this guide. We thank each contributor for their time and appreciate the enriching exchange with each of the authors and collaborators. We hope the diverse experience and authoritative views captured in the guide will be very interesting and useful to attorneys, businesspeople and advisers in planning and preparing for their M&A transactions in Latin America. We expect to elaborate on these issues and other relevant and current topics in future editions of the guide.

The opinions expressed in this guide are those of the authors and not necessarily of their respective firms. The views expressed in this guide do not constitute legal advice. Each transaction is unique and any analysis thereof is necessarily impacted by the specific facts, circumstances and deal terms, as well as applicable law, which, among many other variables, may result in issues and conclusions that may significantly depart from certain general statements contained in this guide.

Part I

Covid-19 and Deal-Making in Latin America

1

Roundtable: Impact of the Covid-19 Pandemic on Mergers and Acquisitions in Latin America

In August 2020, Latin Lawyer brought together a panel of leading M&A practitioners to discuss the immediate impact of the covid-19 pandemic on deal-making in Latin America, as well as how it could shape transactions in the longer term. This roundtable was moderated by Paola Lozano of Skadden, Arps, Slate, Meagher & Flom LLP and features contributions from Iván Delgado of Pérez-Llorca; Manuel Galicia of Galicia Abogados; Pablo Guerrero of Barros & Errázuriz; Luciana Tornovsky of Demarest Advogados; Estanislao Olmos of Bruchou, Fernández Madero & Lombardi; Alberto Rebaza of Rebaza, Alcázar & De Las Casas; and Jaime Robledo of Brigard Urrutia. The following is an edited transcript.

Paola Lozano: We have all been experiencing these unprecedented times from different countries and perspectives and yet there's a commonality in what M&A practitioners have been seeing and working on. This discussion addresses the main challenges and opportunities that the uncertainties brought by the pandemic have led us to focus on. I would like to start with a common question that we get from our clients. In light of these unprecedented events, when M&A agreements are already signed but pending closing, is there an opportunity for buyers and sellers to terminate or renegotiate the agreement?

New York and Delaware have a long tradition of agreements drafted to foresee the risk allocation in the case of intervening unforeseen events. However, case law shows that it is extremely hard to terminate agreements. There's one seminal case in Delaware, also used as precedent by New York courts, and that's the *Akorn, Inc v. Fresenius Kabi AG, Inc*[1] case, where a buyer successfully used the material adverse change (MAC) clause to terminate a merger agreement that had already been executed. The standard established by that case is extremely high.[2] Many of our clients have a tough time with the notion that in this unprecedented situation there may be no remedy to alter or terminate agreements entered at a time when these facts were not known.[3]

Luciana, what have we seen in Brazil in terms of folks trying to honour, terminate, or amend the terms of agreements during this pandemic?

Luciana Tornovsky: The pandemic has impacted the implementation of M&A transactions everywhere. Like many other countries, Brazil is discussing the effects of covid-19 in MAC clauses and reps and warranties. MAC clauses are commonly found in M&A agreements in Brazil. In the current scenario, parties involved in M&A transactions must analyse the scope and coverage of clauses that may exempt one party, or both, from complying with contractual obligations. Usually, MAC clauses allow for termination of the agreement and modification of conditions of the transaction. MAC clauses are often used as a condition for closing. They grant the buyer the right to terminate the agreement if certain events affect the rationale of the transaction. It is usually in the interest of buyers to use MAC clauses to terminate their contract before closing, in the event of exceptional events that compromise the rationale of the transaction. It's very important to carefully analyse and negotiate in detail the allocated risks, the situation in which they apply, the exceptions of their applications and the solution in case of disagreement about the relevance of the event.

1 *Akorn, Inc v. Fresenius Kabi AG, Inc*, No. 535, 2018 (Del. Dec. 7, 2018); *Akorn, Inc v. Fresenius Kabi AG Inc*, CA No. 2018-0300-JTL (Del. Ch. Oct. 1, 2018).

2 Among other things, the court stated that a MAC must 'substantially threaten the overall earnings potential of the target in a durationally significant manner'. In addition, in that case, the seller had made significant misrepresentations involving the regulatory status of the target.

3 During the course of 2020, a series of complaints have been filed in the US in connection with the impact of the covid-19 pandemic, including complaints seeking to terminate the agreement or delay closing, complaints seeking specific performance on the obligation to close the transaction and complaints relating to interim operating covenants and in connection with the closure of business locations due to the pandemic. Such complaints have resulted and may continue to result in settlements or judicial opinions issued after this panel discussion was held. For example, on 30 November 2020 (after the panel discussion) the Delaware Court of Chancery issued an opinion in *AB Stable VII LLC v. Maps Hotels and Resorts One LLC*, allowing the buyer to terminate the agreement and refuse closing, among others, because seller's actions in response to covid-19, without obtaining buyer's consent, amounted to a material breach of seller's covenant to operate the business in the ordinary course, consistent with past practice. The court examined the specific wording of the covenant at issue, such that it expressly included the words 'only' and 'consistent with past practice', and concluded that the parties had created a standard that 'looks exclusively to how the business has operated in the past' and which did not allow the court to look at how similarly situated companies responded to the pandemic. The court, however, did not agree with the buyer that that the impact of the covid-19 pandemic amounted to a 'material adverse effect'. The court found that the impact of the pandemic was excluded from the definition of 'material adverse effect' in the agreement, via carve-outs relating to 'calamities', 'general changes or developments' in the relevant industries, changes in 'general economic, regulatory, political or market conditions', and ('arguably') 'natural disasters', among others. (see *AB Stable VII LLC v. Maps Hotels and Resorts One LLC*, CA No. 2020-0310-JTL (Del. Ch. Nov. 30, 2020)).

A key question here is: does the covid-19 pandemic constitute a MAC under existing agreements? Unfortunately, I cannot give you a straightforward answer because it should be analysed on a case-by-case basis. Under Brazilian law, MAC provisions should be interpreted narrowly to find the real intent of the parties when they negotiated the wording of the definition of MAC events in the agreement. Extreme events such as the covid-19 pandemic impose a retraction on the world economy - nobody can deny that – and in turn affect the consumption rates of products and services, the reduction in the market values of assets, and a strong fluctuation in currency exchange rates. All of this can lead to a material reduction of cash flow, receivables and the value of company assets. Asset pricing and risk assessment mechanisms allocated to each party should play an increasingly significant role, yet the economic impact of covid-19 is very difficult to quantify. Of course, you can include exceptions in the clause, but you should analyse the clause you include in the agreement because Brazil is a civil law country, meaning, unlike New York and Delaware, we don't have court decisions that can guide us. We should negotiate carefully.

Lozano: Manuel, I want to hear about the situation in Mexico as it's also a civil law country and therefore different from New York and Delaware on which the traditional MAC clauses are based. Do you find that you're drafting the provisions very differently from the New York and Delaware precedents? In Mexico, do you have your form of MAC provisions? Do those include common law and civil law concepts?

Manuel Galicia: In most cross-border and even domestic work, we use provisions very similar to the ones used in the US, and their purpose is the same: to allocate the risks between sellers and buyers. They are narrowly drafted and when we have recently analysed whether all these provisions would apply in the present situation, most of the existing contracts didn't foresee the pandemic as a MAC event. As a result of the foregoing, we will be changing our way of drafting in the future. It's going to change the way we perform due diligence and that will impact the way we draft reps, warranties and indemnity clauses. We need to segregate agreements into those that were signed before the covid-19 event and post-covid-19. As to whether agreements have been terminated or not, we faced one situation of a Mexican company doing business in the US in a sector that has been severely affected and, because of the way the agreement was drafted and subject to US law, there was no way to walk away from the transaction and the result was that the buyer had to file for bankruptcy.

In Mexico, as a general rule, parties do not rely on MAC provisions to walk away from a transaction, because it's so narrowly drafted and there are not many legal precedents in our system. The tendency for parties is to negotiate. In one example relating to the sale of a retail business that has been affected, the seller had the opportunity to ask or request specific performance because there was no provision in the MAC for the buyer to walk out of the transaction. Nevertheless, parties agreed to renegotiate. As Luciana was saying, there needs to be a broad analysis and an understanding of the specific characteristics of the transaction, including when it is happening and whether it was through an already-concluded bidding process. It's very hard to resume a bidding process after trying to sue somebody that failed to honour a contract. Mostly, in our jurisdiction, parties have been forced to sit down and renegotiate, mainly on pricing, but in some cases, like the retail sector, on a change of business model, as the pandemic has changed consumer habits. That makes the negotiation or renegotiation quite complex. This is not only a legal matter; it's a business matter that must be analysed very comprehensively.

Lozano: The practical outcome under New York and Delaware law is the same: at the end of the day, we are always looking at the parties' leverage, beyond what the agreement says. Even though you may have some contractual right as a seller to seek specific performance, if your buyer is unable to consummate the transaction, or may go bankrupt if it consummates the transaction, that does not solve the problem and a litigated resolution may take too long anyway. M&A practitioners must remember that, in addition to being extremely knowledgeable and technical, we have to be practical to be useful to our clients.

Let me switch to the theories of civil law that may be similar or different from the MAC provision. I believe in Colombia, Peru and other civil law jurisdictions there is a strong following of the *teoría de la imprevisión*, which is a theory under which contracts may be modified if circumstances have changed substantially. Jaime, can you tell us about what you have seen in Colombia and whether the *teoría de la imprevisión* or *force majeure* doctrines have been applied to fill the gap that the MAC provisions leave?

Jaime Robledo: Although we have theories of *force majeure* and a theory that under US law has been called hardship or extreme duress, the truth is that M&A practice in Colombia has been Anglo-Saxonised in the sense that all of our agreements follow the basic model of New York law-governed agreements. MAC provisions are very common, although as a statutory matter *force majeure* or a hardship theory could be invoked to walk out of a deal. To the extent that M&A provisions are adequately drafted, it is very difficult to allege or argue a hardship theory or *force majeure* to walk out of a deal. In general, the MAC clause is followed, but we exclude carve-outs. For instance, we exclude things like acts of God or unforeseeable events, or a general crisis in economic and financial markets. You can accommodate the pandemic into any of these concepts, certainly as a *force majeure* or an act of God event, but also as a general economic crisis, as that was one of the effects of the pandemic. It would be very difficult for a buyer to walk out of a deal by invoking that a material adverse effect or a material adverse change has occurred and simply saying that this is a *force majeure* or an extreme hardship event, because under Colombian law at least, we've got a lot of precedents where parties are free to allocate risks between themselves in the case of *force majeure*. If one of the parties decides to assume the full risk of *force majeure*, that party will bear the burden. The only way that a party can try to rebut or repudiate the agreement is if it demonstrates an abusive negotiation between parties. This would be very difficult to show in the case of two sophisticated parties negotiating an M&A deal.

The hardship concept has been invoked in terms of executory contracts rather than share purchase agreements. In claims for extreme hardship, typically one party demonstrates that during the life of the contract the rate of return of the investment will be completely different than what was expected when entering the contract. In the case of a sale, it would be very difficult to demonstrate that because as a rule, you buy a business for the rest of the life of the business. It is difficult to foresee that the business will not recover within the next 18 months or 24 months to the extent that the risk allocation wouldn't have to be borne by the buyer. In a case that we are dealing with right now, where we are on the side of the seller, the asset was a concession company and the MAC clause expressly excluded acts of God and general changes in economic conditions from the MAC definition. The buyer argued that they should be able to renegotiate since the agreement had a finite time and was supposed to offer a minimum expected return on investment, but the pandemic meant the infrastructure authority had suspended the collection of tolls, resulting in a completely different rate of return. Fortunately, the Colombian government said that it would recognise the suspension in the collection of tolls, either by extending the life of the contract or by allowing for an increase in tolls. There was not a lot of additional discussions. Even if you were going to go down the route of arbitrating that dispute, it would have been very difficult for the buyer to walk out of the deal or even renegotiate if the government had not been a willing negotiator. Most of our agreements are based in Colombia and generally subject to the jurisdiction of an arbitration tribunal, but they are not consistent. In any event, I still believe that it would be difficult for a party to walk out of a deal if they have a traditional MAC clause.

Alberto Rebaza: Unfortunately, in Peru, we do not have relevant jurisprudence that might help us to analyse whether or not an event could be considered as a *force majeure* event. Nevertheless, we might bear in mind that some administrative authorities have considered this pandemic as a *force majeure* event for several industries and economic sectors. Therefore, it might be important for every jurisdiction to look back and see previous events that have impacted their respective countries in such a significant way as covid-19. For instance, in Peru, we can draw on our experience of El Niño, the warm ocean current that hits our Pacific Coast, creating heavy rains that destroy cities and towns, factories and infrastructure, among other things. Even though it occurs more or less every five years, some authorities continue to consider El Niño as a *force majeure* event, and we do have jurisprudence where parties have been allowed to walk away from transactions or their contractual obligation due to El Niño. This creates a great risk to deals where a buyer or a seller could argue that this pandemic is a *force majeure* event based on past authority judgments or resolutions. Even though arbitration decisions are not public, I believe that a party trying to defend their case will have extensive administrative literature under Peruvian law to demonstrate that the covid-19 pandemic is a *force majeure* event. The outcome is hard to foresee.

Lozano: We have heard about regulators and governments themselves sometimes looking for ways out of onerous commitments and that becomes an enormous source of arguments for folks trying to apply a different standard to the typical M&A standard among sophisticated parties in New York.

Pablo Guerrero: In Chile, our civil code has a very short definition that says a *force majeure* event is an unexpected event that is impossible to prevent. We have to go to what the agreement says because, as in Colombia, even though we have a definition of *force majeure* and the general rule is that you are released from complying with an obligation when a *force* *majeure* event occurs, the parties are free to negotiate around that and it's very common for parties to assume the consequences of *force majeure* in different ways.

The first question is: what does the agreement say? Normally, the agreements in an M&A transaction have definitions that are very similar to what the civil code says. They refer to facts affecting the target or the parties, but not general conditions like a pandemic. Buyers generally have not been able to use MAC clauses to exit M&A transactions in Chile. Although there is very old case law that considers pandemics as *force majeure* events, you must go to what the agreement says and whether that *force majeure* event makes it impossible for the parties to comply with their obligations. Normally, no *force majeure* event makes it impossible for a party to pay a purchase price. Having problems with your business is not a reason to invoke *force majeure* in the sense that you have the possibility of complying with your obligations. When it comes to hardship or the theory of unforeseen events in Chile, it's safe to say that it's not recognised in our law or case law (except for a couple of arbitration awards that state that the theory of unforeseen events (*teoría de la imprevisión*) does apply in Chile). That said, because of the pandemic, two bills in Congress currently seek to incorporate the theory of unforeseen events into our law. We have talked a lot about the application of *force majeure* in agreements that have been signed but not closed, but as Manuel mentioned, what's going to happen in terms of future agreements? How are we going to negotiate these clauses based on the experience of this pandemic? It will depend on whether we're in a seller's market or a buyer's market. The parties will want to limit this uncertainty and what I've seen in contracts being negotiated right now is that parties typically exclude pandemics as a material adverse change event because they are aware that this is something that can happen, has happened, is happening and they don't want to take that uncertainty into future agreements.

There is an additional problem in the acquisition of public companies. In Chile, we have a mandatory tender offer requirement for certain acquisitions that have been included in the prospectus of the offer. Once you launch the tender offer you cannot renegotiate the price and you cannot revoke the tender offer unless there are certain objective conditions. The definition of those objective conditions in the context of a pandemic or a material adverse effect has never been easy and that will become harder.

Lozano: There are philosophical and policy reasons for the interpretation of MAC provisions under New York and Delaware law. One of the reasons courts demand such a high standard to allow buyers to terminate an agreement is because there is an intentional goal of the courts in these jurisdictions to be the forum where people come when they want certainty. A historical theory behind the MAC provision and its exceptions is that, on the one hand, the generalised risk – country risk, macro-economic risk, worldwide or geographical conflict, *force majeure* and acts of God – tend to be allocated to the buyer and, on the other hand, risks that are specific to the target sit with the seller through closing.[4] It's not by chance, which is why, when we find ourselves in a pandemic, even as unforeseen as it may be, it's deemed

4 This article does not address other provisions in which risk may be shifted to buyers, including limitations of representations and warranties or indemnities.

a generic risk that most buyers assumed when they signed that New York law-type agreement, subject to any non-customary variations in the specific wording of each document.

Iván, Spain and Europe are ahead of Latin America and the United States in terms of the evolution of the pandemic. Are there more definitive cases that have been resolved or situations that have played out sufficiently to see how European jurisdictions have dealt with this?

Iván Delgado: We are ahead of the crisis, but I don't think we are ahead on the clarity on how to solve this situation. I will convey to you seven short messages concerning Spain and Europe (other than the UK). First, as you all said, it is very difficult to get out of agreements. As a rule, it is very difficult to terminate or try to renegotiate if the other party is not willing. Second, we must differentiate or distinguish between share purchase agreements, when you buy a business or assets, and lease agreements. An example of the latter is one of the largest restaurant chains in the world trying to renegotiate or terminate all its lease agreements all around the world. In civil law countries, it is easier to terminate or renegotiate agreements that involve real estate assets, because if the asset is not valuable anymore you have an argument in accordance with the civil court not to comply with an obligation. The third message is MAC clauses are not regulated in our system. It's very common to negotiate and include MAC clauses in agreements, but there is no regulation, so you must fight to enforce them either in court or in arbitration. The fourth message is that we also have *force majeure* and the so-called called hardship concept, that we call *rebus sic stantibus* and is regulated under our civil code. This mechanism allows the parties to balance the situation in cases where there is an imbalance, such as this pandemic. When there is a MAC clause, we've seen clients trying to negotiate and enforce it in the courts or arbitration. When there is not a MAC clause our clients have been trying to use *rebus sic stantibus* to terminate their agreements, but it is very restrictive. The fifth message is that at the beginning of the pandemic in Europe people were trying to renegotiate in good faith, but it was not very successful, and parties didn't reach an agreement. All of them were suffering from the crisis so we were not able to find the right agreement for both parties in many, many cases. The sixth message is that we have recently seen more terminations and once the agreement is terminated, the parties want to fight, either in court or in arbitration, to recover the money that they believe they have lost between signing and closing because of the covid-19 pandemic. The final message is that we are ahead, but the arbitration decisions will give us guidance on what to do in the future.

Lozano: There are other provisions in agreements that we can use creatively to try to terminate contracts if we need to. One that comes to mind is the covenant to operate the business of the target in the ordinary course. In the US, if you are a buyer, once you are aware that it's going to be extremely hard to terminate the agreement based on the MAC provision, you start looking at breaches that allow you to say that the conditions to closing haven't been satisfied and, therefore, you are not obliged to consummate the closing and pay the purchase price. We have had some success renegotiating the terms by being able to prove factually that there has been a breach of some of the representations, warranties or covenants, specifically the ordinary course for a business covenant. Running a business in the ordinary course, consistent with past practice, in the middle of this pandemic has been virtually impossible.

Robledo: The way we generally export those covenants into our agreements in Colombia is to use the same language as in the US. You must make commercially reasonable efforts to maintain the business in the ordinary course, or you must use reasonable best efforts. Have the courts in the US already considered that? Even if sellers have taken all commercially reasonable decisions to maintain the ordinary course of business, would they still be breaching that covenant? In Colombia, it wouldn't be considered an end obligation, but more of a means obligation.

Lozano: Because the pandemic is still going on and the period for judiciary decisions has not been long enough, we don't have many resolved cases in the New York or Delaware courts on this, only a couple of pre-pandemic ones. The courts have said this analysis is extremely fact-specific. The courts in New York and Delaware are very clear that they don't look outside the agreement, to the extent the agreement regulates specific issues, like the ordinary course of the business covenant. But if you allocated the risk and said to the seller 'in order for you to receive this purchase price and these terms and conditions you need to run the business how you have run it before' then the courts will generally honour that. There's another very important thing, one of the traps for the unwary: if you represent a buyer, you can't just talk about ordinary course; you want to say ordinary course of business 'consistent with past practice'. The ordinary course may change. For example, it may become ordinary course in the pandemic that every company in retail is trying to switch from physical to e-commerce. But if a covenant says ordinary course of business 'consistent with past practice' then the courts will honour the intention of the parties to say 'for me to buy your business on these terms I expected consistency. I expected the same actions and facts of management that allowed me to price the business'.

The other issue is that the pre-closing period may be very long and what you could have done or the impact of the actions taken or not taken (which is often the more interesting question), may require extensive factual analysis. Often the failure is not by the act, but by omission because management or sellers didn't take all the action reasonable to preserve the business and the business relationships. When we're talking about the situations where we've been able to renegotiate, leverage is everything. It also depends on how many other offers the seller may have. In a couple of situations, credible threat of litigation was enough to bring the seller to the table and renegotiate. The key in the strength of the argument was not only the concept of past practice but also the exceptions to the covenant. Just like the MAC provision has some typical exceptions, usually, the ordinary course of business covenant will have some exceptions. Some of them will say, for example, that sellers and targets can depart from the ordinary course of business consistent with past practice if mandated by law or regulation. So, in one situation, buyer's argument was not palatable because the exception was there and most of the things that had or hadn't happened from the target's and seller's perspective were a requirement of the law. Given that governments mandated certain changes to address the pandemic, the business and the sellers had to depart from past practice because they would have otherwise been in breach of law and the contract.

We are going to be living with a pandemic for some time, so I want to talk about what are the mechanisms we can use to ensure that we can continue to generate opportunities for our clients while managing risk. Estanislao, what are you seeing and doing to create more M&A certainty?

Estanislao Olmos: Argentina is like Colombia in the sense that major transactions are made through US-style SPAs. Although we have in our civil code a full set of *teoría de la imprevisión*, *force majeure* and *caso fortuito*, or act of God, usually you have sophisticated lawyers when it comes to mid-level to complex transactions. You will typically see transaction documents contemplating MAC events as one of the conditions that would allow one of the parties to excuse performance, but I tend to agree that, in most cases, parties use that as leverage to resort to good-faith negotiation and even termination in good faith. Throughout recent history in Argentina, given that we suffer continuously from crises now and then, we have also come up with more specific clauses that deal with some of the recurrent consequences that occur as a result. One of those is tied to currency controls. In most transactions, the price is set in US dollars or another foreign currency and the purchase price is set to be paid abroad. You would also find a so-called 'Bonex' clause (Bonex referring to a publicly traded bond now replaced by other publicly traded securities) so that the buyer (or debtor) cannot excuse itself from paying the purchase price abroad and in foreign currency if the government resorts to foreign currency restrictions, which we have now and then. We have also developed over time specific clauses that deal with other government-related actions, which in most cases are the true contributing factor of our crises. We cannot deny the pandemic is a major and unforeseen event that has caused companies to suffer a lot, but in most cases, government restrictions worsened the situation.

As an example, back in the early 2000s when Argentina endured the *corralito* period [the economic measures taken at the end of 2001 to stop a bank run], which followed a decade of convertibility that ended abruptly in January 2002, you started seeing a lot of M&A activity in the banking industry. One of the key issues when selling a bank is that you cannot afford to be paying back the deposits if a bank run is triggered, so it's too much risk to leave it as a *force majeure* event. In one transaction, we had to build a specific industry risk test, so the seller could show that bank deposits would not go down to a certain level for the transaction to continue. On the seller-side, the purchaser had to put in place a facility abroad to support its obligation to keep deposits given back to the public after the closing. That was a very specific event for a very specific industry in a very specific time for Argentina, but when something like this happens, the agreements reflect the reality the following month and are kept there for years. The key issue is what are we doing now. A lockdown could be reinstated in some jurisdictions at any time, so, for example, in a manufacturing agreement, we are asking the manufacturer to have a disruption business plan, so that they can resort to a different facility to continue to provide and supply our client. You can only sometimes do that if parties are operating in different jurisdictions. It's fact-oriented, and you must be creative. Nowadays, you cannot say that the pandemic or a lockdown are unforeseen events.

We have already experienced them, and we know that a lockdown may be restored any time if the numbers of infections or deaths continue to increase. We are seeing parties be more flexible, in the sense of not building an interim period in a transaction if it is not necessary. If you need to carve out an asset, maybe it's a better idea to do it post-closing, or even to take the risk of closing without taking obtaining regulatory approval and then deal with the rest.

There are other matters that a lawyer needs to consider when a party has deferred the closing of a stock or asset purchase. One of the four-horse riders of the apocalypses is the bring down of the representations and warranties. If the seller has the right to update the disclosures schedule it will be a very stressful scenario for a purchaser in such a changing, uncertain environment. The bring down needs to be carefully designed to avoid being trapped in a scenario where you either must waive on closing but take all the updated risks that you didn't bargain for or walk away from the transaction. Some of the transactions are strategic, so it's not that easy to let the target go. That would create momentum for a re-trade at the very last moment, so careful attention should be paid to updates on disclosure schedules and the draft of the interim covenant. Of course, it's difficult to rule out that a seller would not be entitled to uphold that running a company in the ordinary course of business includes taking some extraordinary decisions and measures considering an extraordinary event.

We are seeing clients more interested in reducing the time between signing and closing or even making it go away. We have even gone further than that. We had a transaction in which we were representing the sellers and the buyer accepted that the due diligence is done after it signed a definitive share purchase agreement and the only exit of that transaction for the buyer was if they could raise issues out of the due diligence amounting to a certain level of price adjustment or potential indemnity claim – and only then to the extent the seller was not willing to accept the adjusted purchase price or to put up an escrow covering the potential indemnity claim, in which case the transaction needed to close as originally drafted. I have never seen that before, but it worked, and it was quick. I think we are going to get more flexible in terms of finding solutions to avoid this uncertainty because although the pandemic seems to be under control in some parts of the world, we know that there may be a second wave.

Guerrero: We have seen that a lot in Chile. We've seen a trend towards more lockbox mechanisms. That is, a deal that doesn't allow price adjustments. It has a fixed price and even if there's a time lag between signing and closing and intervening events there's no possibility to adjust the purchase price. I think that's part of the same trend of trying to eliminate sources of uncertainty in terms of price although it creates the need for more heavily negotiated conduct of business clauses and non-material changes in financial statements.

Lozano: Let's talk about other creative structures like earn-outs.

Tornovsky: Everybody is very curious to see what's going to happen with earn-outs. Considering the economic uncertainty, potential sellers and buyers may struggle to define enterprise value and agree on a purchase price. To address the uncertain valuations and forecasting difficulties we expect to see an increase in the use of earn-outs and other forms of contingent purchase price considerations in M&A transactions. These are clauses that entitle a seller to receive a future additional purchase price if the target business achieves certain performance targets. The seller essentially bets on the future performance of the business, and if correct then it would be entitled to additional consideration. There is also a scenario of no additional consideration being paid by the buyer depending on the economic performance of the company and the targets agreed for the earn-out. A buyer may also want to defer a portion of the purchase price consideration to ensure that the seller still has an incentive for closing. Identifying the right timing and metrics to correctly predict the future valuation is very tricky and due to the impact of covid-19, likely, a target company will not reach its financial target in the short and medium-term. In certain cases, the seller may lose part of the purchase price that has been negotiated as an earn-out. The key question is what will happen with agreements that had an earn-out payment based on the financial results of 2020? Should the earn-out provision be reviewed in this case? We should have in mind that both parties accepted to bear risk when they agreed to an earn-out and the conditions legally agreed on by the parties have not been implemented for reasons beyond the control of the buyer.

In Brazil, our civil code has a provision that establishes that agreements are ruled by the principle of minimum intervention. A contractual review is only accepted in very limited cases. On the other hand, there could be a clear case of price disproportion. The financial results of the company during a period of crisis may not represent its total production and sales capacity. If you consider that the crisis will pass after a certain time, the seller may seek the review of the earn-out arrangements. I think they have good arguments to say the negative consequences of the pandemic are transitory and non-recurring. Although the pandemic affects the company's results in one year, they are likely to normalise in subsequent years, so the effect of the company's value should be analysed over a longer time than initially agreed. The seller accepted the normal risks of the company's activities, including indications of future results, but should not suffer the losses resulting from the unpredictable inevitable transitory risk that does not affect the company's value in the long term. These effects should be excluded from the calculation of the earn-out and, in Brazil, we have a provision in our civil code that allows for review. It ensures that the debtor or the creditors can request the real amount to be paid as far as possible.

When extraordinary, unpredictable events make a contract excessively costly, parties could ask for the review of the agreement under the hardship principle. Both parties, in my opinion, have arguments that should be weighed against the circumstances of the specific case because it's established in the agreement. One of the elements to consider is the wording of the earn-out clause, which may bring greater protection to the buyer or the seller depending on how the parties have agreed on the earn-out. For instance, a provision that's more favourable to the buyer would say that the earn-out amount is subject to several factors outside the buyer's control. There is no guarantee that the sellers will receive a value for the earn-out and the buyer has not promised any value. This is just an example of things we could include in the agreement to protect the buyer and the same arguments can be used in the reverse if the company's results were positively impacted by the covid-19 pandemic

- for example, an internet streaming company or a supermarket. It's non-recurring and you must see the real value of the company. Another aspect to consider is whether the earn-out occurred before or after our knowledge of the covid-19 outbreak. In addition to an eventful revision of the earn-out calculation, attention should be paid to revising the payment terms because, of course, the adverse effects caused by the pandemic will also affect the finances of the buyer, which needs to pay for the earn-out.

Olmos: If you are representing a buyer, of course, you would push for certain clauses that make clear that you are not assuming a fiduciary duty concerning the seller's goal of achieving the targets and then collecting the fair purchase price. Is there any general rule that we in Latin America should consider or expect for implied fiduciary duties in the context of an earn-out? If we are representing a seller, are we sure that the buyer will run the company in a manner that will meet the targets? What happens if the company misses the target because of decisions taken as directed by the purchaser? Do we have a potential claim? In my recent experience, this has led to heavy discussions between the sellers and the buyer over the concept of who runs the company post-closing during the earn-out period. On the other hand, the parties should consider using more objective metrics, based on revenue instead of EBITDA, if the purchaser is contemplating merging the target into its group, which facilitate tracking the sales of services or goods that correspond to the purchased business without a major impact from the indirect costs or other revenues of the business. Sometimes, parties reduce tension in negotiations if the payout of the earn-out is arranged on a sliding scale, instead of an 'all-or-nothing' system. There have been all sorts of solutions, but we should keep in mind what New York law provides for if there is no mention of achieving or making efforts to achieve the targets.

Delgado: We are starting a few deals and discussing alternative structures for earn-outs in Europe. It's going to evolve. The concerns that the buyer and the seller usually have with earn-outs relate to the conduct of business in the future and how the target is fixed. First, how are you going to motivate the key managers? Who are the people who are going to lead the business in the future because the seller is no longer going to be there controlling them? The second is the option of not selling 100 per cent of the target, as that motivates managers to sell for a better price in the future, and the third element is how the business is run, including how you are going to build the business plan. What are you going to do with the costs, because normally when a new buyer comes into place, the company tries to adjust the cost as much as possible, and the third what are you going to do with Capex? What investments are going to be made to fulfil the targets?

Lozano: Fiduciary duties in Delaware and New York are specifically prescribed in the law and very often litigated. Fiduciary duties tend to be premised on a position of control or reliance. For example, when a party has a predominant position or for any reason is required to act in the best interest of the other party.[5] So fiduciary duties don't typically arise between opposing M&A transaction parties (even if they may arise for the parties' appointed members of the board of directors). A significant concern is that for earn-outs to work, there has to be enormous clarity on the metrics and the standard of conduct. If you are representing a buyer, you must depart from any concept of ordinary course of business, because the notion that you are going to buy a business to run it exactly as the seller did is not typically accepted. Often, the whole idea is that you can do better than the seller. As a buyer, you may also want to clarify that you don't have to incur extraordinary costs to achieve the agreed metrics. A good way to accomplish a shared risk between buyer and seller into the future performance of the target is through a partial or staggered equity transaction, which is very attractive. I see it both as an alternative to the earn-out and as a juxtaposition to it. If you have percentage equity that remains from the sellers then you most likely want to agree upon a business plan for the first few years. That business plan is a phenomenal way to ensure clarity on the obligations of the buyer related to the metrics for performance. They cannot do less, but they don't have to do more in terms of CAPEX, hiring people, changes in the business, etc. Now, when you don't have a partial equity deal, I would not advise a buyer to agree to any sort of business plan, for the same reason. It is not desirable to buy something and be beholden to strict commitments to the former owner wanted to do. In most cases, you are going to see changes in the workforce and you are going to see people trying to realise synergies - that's part of the opportunities the buyer is willing to factor into the price. The simpler earn-outs are where you assign an objective metric package without imposing this obligation on the buyer but understanding that New York and Delaware have an implied covenant of good faith. Also, if you have language that says reasonable efforts or commercially reasonable efforts should be used to seek to reach the metrics and you go into litigation you ought to prove that you considered, analysed and took informed decisions to act. And if you didn't take action you have to explain that such inaction was based on an educated exercise. So, the efforts provision is meaningful. Now and again you find specific things that a seller will want. We did have an example in the manufacturing sector where for the seller to accept an earn-out, they wanted to know that a certain plant wasn't going to be combined with one of the buyer's plants because they thought that would make it harder to reach the numerical metric. The detractors of earn-outs will say that, because it's so fact-specific and complex, it often leads to litigation. I see it as a great way to breach the gap on valuation because what we have right now, hopefully at the table end of the worst part of the pandemic, is opportunities. There are willing buyers and sellers, but there remains the uncertainty of whether the value is going to materialise, and earn-outs allow the parties to move those tests into the future when we will have more certainty.

Galicia: The earn-out provision presents an opportunity to get to a middle point to resolve a negotiation. The complication in many transactions is the uncertainty as to the future and of course, covid-19 is feeding this, but I don't think it is limited to that. In Mexico, we

5 The most typical regulated examples are the fiduciary duties of the board members to the company as a whole and all its shareholders.

are not only facing a health crisis, but also an international economic crisis and a domestic political crisis. This is a challenge for us as M&A lawyers. The health crisis is not over, but when it is, we will still be facing an economic crisis. We will be exposed to very complicated scenarios that will force us as lawyers to be more creative. I think that this brings us back to the basics of us becoming experts on different industries because discussions on earn-outs are going to be very difficult if we do not involve people who understand the target's industry. Unfortunately, we also need to help clients understand the political environment. This will also change our way of practising law. We will probably need to learn to collaborate with experts in other fields to have intelligent and rational discussions to help our clients.

Earn-out provisions have always been there, and we know that they are very tricky and an invitation to litigation, which is also fine if that resolves part of the problem. But I think we need to offer something different to our clients. In that respect, I would go back to what was said about trying to close transactions faster. In Mexico, we are limited by our antitrust rules and other regulators overseeing potential targets. We don't have failing business provisions that allow you to close the deal without clearance of the antitrust commission in this type of crisis. It would be very helpful to have those as it's very complicated to be able to shorten the period between signing and closing without them.

Earn-out provisions work much better when somebody retains equity. When we started doing M&A transactions, we were doing joint ventures. Investors like hedge funds or venture capital and private equity investors are more used to completing those types of transactions, and in those cases maintaining earn-out provisions and management could facilitate the closing of transactions. This is not theoretical. Some more flexible buyers could use this situation to make partial acquisitions with earn-out provisions. The risk of litigation will still be there, but some investors are better fit to do and close transactions in this uncertain environment. This is part of what we will experience representing private equity, hedge funds or venture capital investors. I like to have this positive view that M&A transactions will continue, but we will have more fun because challenges will be there but there are ways to resolve all these problems.

More practically, at the beginning of the pandemic, we were not able to meet with our clients, but we were able to close transactions. So, we adapted, and our system provides and recognises electronic signatures in agreements. We have tested them and used them, and I think the use of an electronic signature to facilitate transactions will be another development in our way of doing business. We will need to think about all those issues and become more practical to help our clients.

Robledo: At the beginning of the pandemic, the first concept we all resorted to if there was a gap in valuation was earn-outs, but when you speak to business people, you find out that might not be the best solution – not only because of all the things we have discussed, but maybe a buyer will not want to share in the future performance of the business or bridge the gap in valuation. We had to think outside the box about joint ventures and combinations in which there is not a full-blown sale and we are not just deferring the purchase price. One positive from this crisis is that it has made us less automatic in the way we negotiate

M&A deals. It's a little more creative, even in some of the cases in which nobody wanted to assume the risk of the uncertainty in the closing conditions. One of the things that we ended up proposing was borrowed from the break-up fees implied in best effort covenants, or financing conditions in some deals. You put in a breakup fee so if you did not meet the financial metrics, not only because of the poor performance of the management but because of the impact of the pandemic, you were able to walk out of the deal with a breakup fee and nobody was fully assuming the risk. I think we're going to have to develop a longer and more detailed menu of potential solutions for our client in terms of dealing with uncertainty.

One of the main risks in the pandemic for some companies was the risk of collections from certain clients in the future. One way in which we bridged the valuation gap was to assign all the accounts that were going to be collected to the seller so that they would bear the risk of collection. They were paid a portion in cash and the other portion was paid for the endorsement of those invoices.

Guerrero: A lot has been said about earn-outs and there is a consensus that we will see more of those in the future, but I am not completely sure about that. I have always seen earn-outs as a way to bridge a gap in valuation, but also a way for sellers to signal confidence in the business and their ability to run the business because earn-outs are normally related to the seller remaining as a shareholder and having a role in the running of the business. It's a way to say 'I trust the business I am selling and that's why I am willing to take the risk of the future for certain years.' I don't know if that willingness to assume the future of the risk of the business is going to be greater in the context of more uncertainty. I would expect sellers to be more reluctant to use earn-out mechanics because of the complications of extraordinary events when calculating an earn-out.

Rebaza: I would like to highlight the importance of due diligence. At times of high risk, due diligence becomes particularly useful and indeed crucial for M&A deals. For instance, there is a direct connection between costs incurred due to the pandemic and an eventually agreed earn-out clause, since companies today are assuming protocols and an endless number of measures that cost a lot of money and affect their financial results. I do not doubt that parties negotiating an earn-out clause will have a very detailed discussion on whether those costs should impact a particular company's EBITDA. Eventually, when this crisis ends, some of those costs will not continue and a company's financial results (including the EBITDA) should go up. There are several very concrete and useful aspects of the due diligence that will be critical for these discussions since the effect of the pandemic will vary significantly case to case.

Another risk that I am concerned about is political risk. Not in terms of who will be the next president in any given country, but material changes to current regulation affecting some industries. Currently, we are seeing a lot of intents and efforts not only in the Peruvian Congress but also in several Peruvian agencies to impose more control, more requirements, more administrative burden to companies in different sectors and different ways, such as employment regulation, price controls, limits to interest rates and environmental regulation, etc. Something similar can be seen in many other countries in the region. Therefore, I strongly believe that we must conduct due diligence not only of the target but also the sector and the legislative, regulatory and administrative activity related to the target. We have to know what bills might be approved and might affect our clients' potential targets. That kind of intelligence will be very important and critical to discuss a MAC clause in the share purchase agreement. I believe that profound and well-executed due diligence will be more important than ever to identify risks and support more complicated and detailed negotiations in a turbulent period like this.

Lozano: Agreed. In places like Peru that have been very hard hit by the pandemic, government regulations have been one of the significant factors negatively impacting businesses and M&A transactions, maybe more than the health crisis itself. One of the major impediments for simultaneous signing and closing and one of the things that impacts due diligence is the antitrust review. Has the law on pre-merger control been delayed in Peru due to the pandemic?

Rebaza: Yes, until March next year. Unfortunately, this crisis has created substantial noise and raised hard criticism of the economic model Peru has followed for more than 20 years, that is a free-market-oriented economy. Surprisingly, those criticisms and attempts to reform are coming from different political parties. Thus, I am more concerned with new bills that try to limit the economic rights of individuals and companies, to impose price controls and to expropriate some industries. In any event, today we have more controls and regulations than we had in the past, and clearly, antitrust control is one of the most important ones. The problem is that when you think about the recovery of M&A activity, you think about big companies holding important market share looking to acquire competitors. It is precisely these kinds of transactions that will be subject next year to a brand new control carried out by an antitrust authority with no relevant experience, no precedents and no duly trained people. This is a real source of concern for buyers and sellers.

Lozano: Sometimes a crisis can push many of our governments into more restrictions, including on foreign direct investment and protectionism.

Delgado: Europe has suddenly approved similar regulation as in seen in the US because of the covid-19 crisis. Now, a foreign investor must get government approval to acquire 10 per cent or more or control of a company in key sectors within the European Union. The definition of key sectors is very broad, and the percentage rule can be interpreted broadly. Because of this crisis, we are seeing more protectionism in the European Union and I think that it's here to stay.

Lozano: We have seen what has happened in the US with CFIUS (the Committee on Foreign Investment in the United States). It has become an important tool for foreign policy. For now, the jurisdiction most affected is China. Jurisdictions in Latin America have not been so hard hit, but because of how interconnected the world is, I am sure that we will all be seeing more cases where we must be concerned with CFIUS reviews.

Galicia: We are experiencing the same in Mexico. The government is trying to control most key activities in the economy. Foreign investment is suffering, especially in the energy sector. This protectionism is making it more difficult to complete transactions, even if they ask for local participation. That takes me back to the joint venture structure, which can offer an alternative for foreign investors navigating an over-regulated and protectionist environment, by partnering with local investors. Also, there is a lack of understanding by some regulators as to how to authorise new digital business platforms. On the one side, you tend to control and limit foreign investment, and on the other side, there is a lack of knowledge and expertise as to how to measure digital platform acquisitions from an antitrust perspective. Our antitrust commission has been working and it's quite sophisticated, but this is part of how we see our M&A transactions evolving.

Robledo: The opportunities in Colombia for M&A are being created by the government. Some regulatory changes have a direct impact on M&A activity. We have a much more lenient antitrust authority right now if you can demonstrate that the combination of businesses brings synergies and cost savings. Right now, you could easily see the two largest airlines in Colombia merging without the antitrust authority necessarily objecting or the largest hotels in Colombia. The Superintendency of industry and commerce and antitrust authorities have a mandate to clear those transactions if they protect jobs or there is a cost-saving or you save the business. Another regulatory change has had an impact. Although we had a developed insolvency regime, one of the things we had not seen was a secondary market for Chapter 11 claims. You didn't see, for instance, banks or financial entities trading those claims in the context of insolvency proceedings in Colombia. We've got a new regime that's been developed in the past three months in which you can bid for the whole business at a certain point during the insolvency proceedings. Now, if banks receive risk bonds, which are the equity or quasi-equity instruments that derived from insolvency proceedings, they can include them in their balance sheet and go out and sell them. Colombia is trying to develop a secondary market for that, and we've seen some interest from local and international players asking whether they should set up a fund to invest in these distressed assets that there are going to be a lot of.

The second way in which I see the government fostering M&A activity is that the government itself is an obliged seller right now. They are going to have to go out and sell assets. It needs to raise around US$9 billion to US$10 billion during 2021. In terms of opportunities, at least for M&A lawyers, it appears that we are going to have some work into the future, at least next year or the year after that. I think that's optimistic and I should say that we should be thankful for being in such a countercyclical business.

Lozano: Private equity funds, venture capital funds, hedge funds - they have the cash. This is not a crisis that stripped out all the liquidity from the investing sector. If you look at how the capital markets have performed, it is almost surprising to see that, in such a huge crisis, the markets continue to skyrocket. There is an appetite for a variety of companies and a variety of jurisdictions. We are pleasantly surprised by the number of Brazilian companies, for example, coming out into the markets, and we have seen that in Colombia and Mexico too. A peculiarity of this crisis is that there is cash in the system. Some sophisticated investors are ready, willing and able to put the money into a transaction. They are looking at targets. There are going to be opportunities never seen as the valuations are depressed and they are going to be looking for sophisticated counsel because those transactions require more structuring. They require experience. They require creativity and so I think it's great value added if we can all focus on helping bring together the capital available from those funds and the companies that desperately need help.

Tornovsky: Investor interest in distressed assets has increased during the crisis. Private equity funds are the first movers and they are the most liquid players in the market. They are going to find good opportunities considering they tend to be quite active in times of crisis. Those that are well funded, meaning the ones that have recently closed a fundraising cycle, tend to benefit because valuations are depressed now. Brazil has good opportunities. We have some advantages: we are a large market, so we have strong potential for growth. We have a very important agribusiness sector, infrastructure investments promoted by the government, private investment in public equity and a favourable exchange rate.

Guerrero: In Chile, we are seeing a lot of private equity firms scouting for assets, some of which we have not seen in the past. There's a lot of activity in the energy and infrastructure sector but also others like agribusiness, food, infrastructure and e-commerce.

Galicia: In the case of Mexico, we have a strong private sector, we have a growing economy and a growing population. We are very close to the US. I see business opportunities in different sectors, a lot of which, like the digital sector, cannot be controlled that easily by the government. We need to be careful as lawyers not to over legalese our documents because of this pandemic. We need to learn how to live in this environment, so we shouldn't overcomplicate agreements in trying to protect clients, because we may limit our clients or their access to finance sources. We need to be practical; we need to be careful and we need to be better lawyers and better business advisers.

Lozano: That's one of the things that I like to repeat often. You need to be useful to your clients, which requires a combination of very high technical training and a lot of working hours with being practical and having a deep understanding of their business.

Tornovsky: We are deal-makers and not deal-breakers. We try to add value.