

 **LATIN LAWYER**

THE GUIDE TO MERGERS AND ACQUISITIONS

THIRD EDITION

Editors

Paola Lozano and Daniel Hernández

The Guide to Mergers and Acquisitions

Third Edition

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Paola Lozano and Daniel Hernández

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This article was first published in November 2022
For further information please contact insight@latinlawyer.com

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Published in the United Kingdom by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
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www.latinlawyer.com

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ISBN 978-1-83862-903-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Barros & Errázuriz Abogados

BMA Barbosa Müssnich Aragão

Brigard Urrutia

Bruchou, Fernández Madero & Lombardi

Credit Suisse

Debevoise & Plimpton LLP

Demarest Advogados

D'Empaire

Galicia Abogados

Gómez-Pinzón

Mijares, Angoitia, Cortés y Fuentes

Morrison & Foerster

OpenStore

Pérez Bustamante & Ponce

Pérez-Llorca

Acknowledgements

Philippi Prietocarrizosa Ferrero DU & Uría

Posse Herrera & Ruiz Abogados

Rodrigo, Elías & Medrano Abogados

Shearman & Sterling LLP

Skadden, Arps, Slate, Meagher & Flom LLP

SoftBank Group International

Von Wobeser y Sierra

Publisher's Note

M&A activity continues to grow exponentially across Latin America – both in terms of volume of deals and their complexity. As Paola Lozano and Daniel Hernández of Skadden, Arps, Slate, Meagher & Flom LLP point out in their introduction to this third edition of *The Guide to Mergers and Acquisitions*, this is putting even more pressure on practitioners to stay abreast of current topics and emerging trends in this complex and fast-moving environment.

Latin Lawyer and LACCA are therefore delighted to publish this latest edition of *The Guide to Mergers and Acquisitions*. It aims to meet this need by bringing together the knowledge and experience of leading experts from a variety of disciplines to provide guidance that will benefit all practitioners working across the region. The guide also carries an insightful roundtable on the impact of political instability on dealmaking, bringing together voices from a variety of jurisdictions to offer advice and key takeaways on how to navigate this mercurial landscape.

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

It is our great pleasure to have worked with so many outstanding individuals to produce *The Guide to Mergers and Acquisitions*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Infrastructure and Energy Investment* and *The Guide to Corporate Crisis Management*, as well as our jurisdictional references and our new tool providing overviews of regulators in Latin America.

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Introduction

Paola Lozano and Daniel Hernández¹

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, new trends and a complex and changing environment. 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. Such variables include, in addition to the proposed terms of a particular deal, 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.

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

This guide is designed to provide an overview of certain critical aspects of current M&A dealmaking 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 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 on an M&A transaction.

The years to come will likely be marked by challenging economic, political and social conditions impacting the globe at large and Latin America in particular. M&A practitioners will be required to adapt as governments and markets respond to current inflationary trends, a looming global recession, depreciation of local currencies against the US dollar, the gas and energy crisis created by the Russia–Ukraine conflict, continued worldwide polarisation, the rise of populist movements to power and the continued economic and social effects of the covid-19 crisis, including its long-lasting impact on supply chains.

Part I of this guide is an edited transcript of a roundtable discussion moderated by Paola Lozano of Skadden, on the impact of social unrest and political instability in M&A dealmaking, held in September 2021, at a time when the worst and most widespread global healthcare crisis the modern world has known, covid-19, 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.

A panel of leading M&A practitioners based in Argentina, Brazil, Chile, Colombia, Mexico, Peru and Spain addressed the then current social and political climate in the region and its direct and indirect impact on M&A activity. The panel discussed regulatory changes that may impact dealmaking in the region, providing a useful detailed overview of the specific political and social landscape in some of the major Latin American markets, as well as specific contractual issues that have or may become relevant or need to be addressed in the current environment. Among others, the panel touched on issues such as deal certainty, ESG investing, increase in carve-out deals, regulatory changes and merger control regimes, as well as hot industries such as energy, infrastructure and fintech. The roundtable also touched on the perspective and perception of foreign investors,

leveraging the participation of Iván Delgado from Pérez-Llorca in Spain and Paola's and Skadden's experience from the US perspective, and on the drivers of current high levels of deal activity (record-breaking in some cases), which may be based on an asymmetry in risk perception and more optimistic expectations than what is perceived by local actors. Among such factors, the participants shared their views on the role played by entrepreneurs, venture capital and private equity funds in driving deal activity. Finally, the panel discussed the expectations for 2022 M&A activity and some of the challenges and drivers that could impact the market appetite for local targets, many of which materialised, until the cycle started changing and new world order issues emerged.

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.

Federico Grebe, Rafael Boisset, Claudia Barrero and Martín Cruzat of Philippi, Prietocarrizosa Ferrero DU & Uría in Chile, Colombia and Peru discuss 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 dealmaking 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 of SoftBank and Stephen Pelliccia of OpenStore 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.

Lina Uribe García and Juan Pablo Caicedo De Castro of Gómez-Pinzón in Colombia discuss the challenges faced when undertaking M&A transactions involving governments or government-owned entities, including a comprehensive overview of the regulatory intricacies of privatisations in Colombia. As noted by the authors, the current political and economic landscape and the fiscal deficit facing governments across the region will likely be responsible for an increase in the number of privatisations in the years to come, despite the recent rise to power of left-leaning governments in various countries in the region.

We close Part II with the insight provided by senior Latin American M&A investment banker Nicolas Camacho of Credit Suisse in New York, who gives 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-pandemic 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 chapter 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 more relevant as distressed M&A may become more relevant with economic challenges driven by political instability and social unrest. The authors also offer an interesting overview of recent changes in the Venezuelan M&A space, as the market gradually transitions from a predominantly distressed environment to more normalised dynamics.

Randy Bullard, Giselle C Sardiñas, Diego Rodriguez and Karina Vlahos of Morrison & Foerster in Miami address the incorporation of global environmental, social, and governance (ESG) practices and standards into Latin American deal-making, consistent with increased global attention to sustainability, ESG and impact investing. The authors provide a valuable overview of this trend in various countries in the region and discuss in detail how such trend impacts an array

of aspects of M&A transactions, including due diligence efforts and drafting of contractual provisions such as covenants and representations and warranties. The authors also provide commentary on significance of ESG matters for successful post-closing business integration.

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 provide interesting insights on the driving factors in the choice of forum for dispute resolution in M&A agreements in the region, and provide commentary on the prevalence of arbitration in Latin American deals and relevant factors to select the seat of international arbitration proceedings. The chapter also draws interesting conclusions and notes potential trends to develop in the region on the basis of surveys involving some of the most reputable Latin American firms.

For the third edition, the editors and Ralph E Pérez, counsel at Skadden, discuss the increased availability and implementation of representations and warranties insurance (RWI) in Latin American M&A deals. The chapter addresses recent increased penetration of RWI as an important risk allocation tool in the region, often fostering deal activity in a turbulent environment, providing solutions and aligning parties' interests and risk appetite in a manner often not possible without an industry based on the assumption of transactional risk. The chapter provides an overview of the 'nuts and bolts' of RWI, including cost, risk allocation in deals with RWI, the underwriting process, the process for claims under a RWI policy, limitations on coverage and insurability of particularly complex and costly risks (including money-laundering, corruption and tax risk), factors driving the availability of RWI for a particular transaction, relative benefits of RWI for sellers and buyers, and the interaction between the RWI policy and the purchase agreement.

Part IV addresses selected topics critical to M&A dealmaking, 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 and Pedro de Elizalde 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 dealmaking 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 and Andres Brown-Pérez of Pérez Bustamante & Ponce in Ecuador provide an overview of the particularities of due diligence efforts and risk assessment with respect to Latin American targets. The authors combine 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. They also discuss statutes of limitations (with a focus on Ecuadorian law), and trending issues such as the use of legal tech in due diligence.

Last, Luis Burgueño, Alberto Córdoba 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

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.

APPENDIX 1

About the Authors

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Paola Lozano is a New York-based M&A partner at Skadden, Arps, Slate, Meagher & Flom LLP. She is the co-chair of Skadden's Latin America Group and the head of the firm's Spanish language corporate practice. She has also served as a member of Skadden's Policy Committee.

Paola has been repeatedly recognised by her clients and colleagues. Among others, she was Latin Lawyer's 2019 International Lawyer of the Year; a *New York Law Journal* 2019 Distinguished Leader and Crain's New York Business Notable Women in Law 2019. She has also been ranked by Chambers in Band 1 for Corporate M&A in Latin America (the first and only woman to achieve that ranking); and is also included as a top attorney in Lawdragon 500 Leading Lawyers in America (2014–2020); Latinvex Latin America's Top 100 Lawyers (2014–2020) and Latinvex Latin America Top 50 and Top 100 Female Lawyers (2013–2020).

Her M&A practice focuses on cross-border transactions throughout the Americas and globally, including mergers, acquisitions, dispositions, joint ventures, private equity and venture capital transactions, as well as other complex corporate matters. Her clients include Fortune 500 companies, multinationals, multilatinas, private equity and venture capital funds, family offices and other privately held companies.

She is admitted to practise in New York and Colombia.

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He has more than 10 years of experience in cross-border M&A transactions involving Latin American parties, targets and assets, while based in New York, Brazil and Colombia. Daniel has an LLM degree from Harvard Law School and graduated first of his class from his JD at Universidad del Rosario (Colombia).

He is admitted to practise in New York and Colombia.

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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 dealmaking in a region shaped by its cyclical economies and an often volatile political landscape. Its aim is to be a valuable resource for business people, investors and their advisers as they embark on M&A transactions.

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ISBN 978-1-83862-903-8