BAKER & MCKENZIE

LATIN AMERICA MERGERS & ACQUISITIONS HANDBOOK

Latin America M&A Handbook

2016

Baker & McKenzie Latin America

Introduction

In spite of economic volatility in recent years, Latin America saw a spike in deal activity in the first quarter of 2016, with inbound values rising 70 percent over the same period in 2015. This has been driven largely by a strong US dollar — with investors seizing opportunities to acquire assets at good prices — and the reorganization in the oil and gas sector that came about as a result of lower commodity prices.

Whether these drivers continue to fuel deal activity in the region remains to be seen. What's clear is that Latin American markets are continuing to evolve, and offer opportunities to investors taking the long-term view. Free market policies are in place in Chile, Colombia and Peru; Argentina is headed in a similar direction, while Mexico's regulatory reforms are encouraging deal activity. The higher spending power of a growing middle class has fueled investments in consumer-facing industries, while opportunities arise in the infrastructure sector as some countries modernize their infrastructure.

In a region as diverse as Latin America, there's no one-size-fits-all approach to doing deals. A tailored approach with a thorough understanding of your target, the jurisdiction you invest in, the counterparties you deal with, and the local rules, business and cultural nuances that come into play — these make all the difference.

We are pleased to present the first edition of our *Latin America M&A Handbook*. This reference provides an overview of some key legal considerations that dealmakers should keep in mind when executing deals in the jurisdictions featured here. We hope you find this a useful resource as you explore M&A opportunities in the region.

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Argentina

Argentina

1.1 Overview

The federal government of Argentina is divided into provinces. All powers not delegated to the federal government by the National Constitution remain in the provinces. The capital of Argentina (the Autonomous City of Buenos Aires) and each province has its own public registry of commerce. The registries are headed by administrative authorities that gather all information relating to entities incorporated locally and deal with foreign entity registrations and formalities.

1.2 General Legal Framework

The Commercial Companies Law No. 19,550, as amended (CCL), regulates relevant issues for foreign entities in Argentina. It also governs which corporate vehicle can be used for a company to register in the jurisdiction, as well as establishes requirements for the transfer of shares or quotas, among others. The local public registries of commerce in each local jurisdiction complement the process.

The legal framework differs significantly, depending on whether the acquisition transaction is structured as a merger, purchase of assets or purchase of shares/quotas.

1.3 Corporate Entities

Argentine law provides for several types of legal entity (i.e., general partnership, limited partnership, etc.) The most common forms used to set up a branch or a subsidiary are the stock corporation and the limited liability company, which are subject to different corporate requirements.

1.3.1 Stock corporations

A stock corporation can have one or more shareholders.

Shareholders may be either individuals and/or legal entities, whether Argentine or foreign. Should the shareholders be foreign companies, they would have to be previously registered with the PRC to be able to act as foreign shareholders of a local stock corporation. Shareholders are, in principle, not liable for corporate debts and obligations beyond the amount of their capital subscription, unless certain specific circumstances related to fraud arise.

The Public Registry of Commerce (PRC) requires corporations to have a minimum corporate capital of ARS100,000 in accordance with their corporate purpose. The criteria used to determine the amount of corporate capital depends on each case. Generally, the corporate capital will be divided into nominative and non-endorsable shares, all of which must have the same “face” value and (depending on the provisions of the bylaws) can grant their owners between one and five votes per share. Shares may be ordinary or preferred. All shares must be duly subscribed for upon incorporation or on any increase of corporate capital. Upon incorporation, shareholders must pay in all contributions in kind and at least 25 percent of their contributions in cash. The remaining cash contributions (i.e., 75 percent) must be paid within

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two years of the incorporation date, unless the bylaws provide for a shorter term.

Currently, the PRC requests corporations to define their corporate purpose as narrowly as possible. Consequently, a corporate purpose with broad scope may be challenged by the PRC.

It is mandatory for the board of directors to meet at least every three months to discuss the ordinary course of the business of the corporation. The quorum needed to validly adopt resolutions may not be lower than the absolute majority of the members of the board. The board of directors may be composed of one or more directors who may or may not be shareholders. Directors may be either Argentine or foreign nationals, but the absolute majority of the members of the board of directors must be actual Argentine residents[1] and all of them, whether or not domiciled in Argentina, must establish a special domicile in Argentina for the purpose of receiving legal notifications relating to the company.

Additionally, all regular directors must lodge an insurance bond with an Argentine insurance company in the amount of ARS10,000 as a guarantee to third parties in the event of unlawful performance.

1.3.2 Limited liability companies

A limited liability company must have at least two quotaholders and a maximum of 50. Quotaholders are not, in principle, liable for corporate debts and obligations beyond the amount of their capital subscription, unless certain circumstances related to fraud occur.

The managers of limited liability companies have the same rights and obligations as directors of stock corporations and may or may not be quotaholders.

Unlike stock corporations, it is not mandatory for a limited liability company to have a minimum corporate capital, but the level of capital must be deemed reasonable to conduct the company's business activities. Capital is represented by quotas, all of which must have the same face value and must grant their quotaholders one vote per quota. All quotas must be subscribed upon incorporation and the quotaholders must pay in all contributions in kind and at least 25 percent of their cash contributions. The remaining 75 percent of the cash contributions must be paid in within two years of the date of incorporation.

The main difference between quotas and shares is that quotas are not represented in certificates. All quotas must be subscribed for upon incorporation. Quotas are freely transferred by assignment unless the bylaws provide otherwise and such transfers must be registered with the PRC in order to be enforceable against third parties.

[1] The majority of the regular members of the board must mandatorily be Argentine residents (e.g., in a board of three members, two must be Argentine residents).

2. Acquisition Methods

The legal framework differs significantly, depending on whether the transaction is structured as a merger, a purchase of assets or a purchase of shares/quotas.

2.1 Acquisition of Shares

If a foreign company is willing to acquire shares or quotas in Argentine commercial companies, Argentine regulations state that the foreign legal entity must be registered with the PRC.

2.2 Acquisition of Assets

The purchase of all or a substantial part of the assets of a company should be regarded as a transfer of a going concern (*transferencia de fondo de comercio*) or "bulk transfer." Transfers of going concerns are specifically governed by Law No. 11,867. The application of the provisions of this law is not mandatory, but can be voluntarily opted into, when the buyer wants to be assured that the liabilities of the seller transferred to the buyer does not exceed those declared to the buyer by the seller. The main purpose of this legal procedure is to protect the buyer from the seller's hidden and contingent liabilities and to protect the seller's creditors in cases where the seller is transferring a substantial part of its assets. Nevertheless, labor and some tax liabilities and contingencies will pass to the buyer, which will be jointly and severally liable with the seller for these obligations. The purchase price may not be lower than those reported liabilities.

2.3 Mergers

Under Argentine law, two or more companies can merge, either by consolidation or absorption.

In both cases, the company surviving the merger acquires, as universal successor, all the assets and liabilities of the companies and the companies are dissolved without being wound up. As a result, the shareholders of the companies become shareholders of the surviving company in accordance with the share exchange mechanism agreed upon between the merging companies.

The main difference between the two merger procedures lies in the nature of the surviving company. Under the merger–consolidation, the merging companies are succeeded by a newly formed company, while in the merger–absorption, an existing company is absorbed by the surviving company.

3. Negotiation, Signing and Closing

3.1 Precontractual Obligations

In Argentina, the abusive exercise of rights is unlawful, being contrary to the purpose of the law and/or in excess of limits imposed by good faith, customs or morals. In principle, interrupting ongoing negotiations prior to the execution of the transaction agreements will not normally give rise to such precontractual liability under that principle, as long as the interruption is not arbitrary or abrupt. But the sudden or abrupt interruption of ongoing negotiations could fall foul of this rule, if it could be considered abusive and in

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violation of the good faith negotiations and confidence of the other party. In such a case, the party that ceased negotiations could be exposed to liability and may be asked to recompense the other party for lost time and for the costs of any preparatory work undertaken in preparation for the (abandoned) deal.

3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Argentinian purchase agreements. Baker & McKenzie's fully interactive comparison of these provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking this.

Purchase Price		
1	Is a purchase price adjustment common? What type is common (e.g., debt-free, cash-free)?	All purchase price adjustments are common, including working capital adjustment, cash-free debt-free and NAV adjustments.
2	Is there a collar on the adjustment?	Collars are uncommon.
3	Who prepares completion balance sheet?	This is usually prepared by the target company.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	Yes.
6	Is a deposit common?	No.
7	Is an escrow common?	Yes.
8	Is a break fee common?	No.
Conditions Precedent		
9	Is Express Material Adverse Event (MAE) completion condition common?	Yes.
10	Is the MAE general or specific?	Both.
11	Is the quantification of MAE common?	Yes.
Covenants, Access		
12	Is a noncompete common? Do you use waterfall/blue pencil provisions?	Yes. Waterfall/blue pencil provisions are uncommon.
13	Is the non-solicit (of employees) common?	Yes.
14	Is the non-solicit (of customers) common?	Yes.
15	Is broad access to books, records, management between sign and close common?	Yes.

No.	Question	Answer
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	No.
17	Is a separate tax covenant/indemnity or tax deed common?	No.
Representations and Warranties		
18	Materiality in representations – how is it quantified (e.g., by a dollar amount)?	Materiality is generally quantified by a specific amount.
19	How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?	Knowledge qualifiers are increasingly common and are often limited to the actual knowledge and due inquiry of a specified list of senior management personnel.
20	Is a warranty that there is no materially misleading/omitted information common?	Yes.
21	Is disclosure of the data room common?	No.
Repetition of Representations and Warranties		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring- down certificate at completion common?	Repetition at completion is common. Bring-down certificates are not.
23	What is the applicable standard? Is it true in all material respects? What is Material Adverse Effect standard?	True and correct.
24	Is double materiality common (e.g., where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation)?	No.
Limitations on Liability		
25	What is the common cap amount (as a percentage of purchase price)?	Commonly, less than 100%.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	It applies to the entire agreement.

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27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g., title, capitalization, authority), often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
28	Is a deductible or basket common?	Both are.
29	Is a *de minimis* common?	Yes.
30	How long does liability survive? Are there any common carve-outs (e.g., fraud, tax, key warranties)?	General survival of 18–36 months is common. Tax, labor and environmental liabilities are usually tied to the expiry of statute of limitations time periods.
31	Is warranty insurance common?	No.
Reliance		
32	Do financiers seek to rely on purchaser's due diligence reports?	No.
Set-offs against Claims		
33	Is a set off against claims for tax benefits common?	No.
34	Are insurance proceeds common?	No.
35	Are third-party recoveries common?	No.
Damages, Knowledge		
36	Is there an obligation to mitigate damages?	No.
37	Is there exclusion of consequential damages?	Yes.
38	Is it common to include provisions such as, "there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity"?	No.
Dispute Resolution		
39	Does local law allow for a choice of governing laws? What is the common governing law?	Yes. New York law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. ICC.

Stamp Duty		
41	If stamp duty is payable, is it normally shared?	Yes. Stamp tax is between 1% and 2% of the economic value of the transaction depending on the local jurisdiction.

3.3 Formalities for Execution of Documents

3.3.1 Transfers of shares

Shares can be freely transferred. While a company's bylaws may limit share transfers, they cannot prohibit transfers altogether.

3.3.2 Transfers of assets

Assets can be freely transferred, although certain assets that need to be registered may be the subject of special conditions of transfer or registration (e.g., vehicles, real estate, trade marks, etc.). To transfer assets in a going concern, seller and buyer may choose whether or not to follow the procedures established by the "bulk transfer law" (No. 11,867).

3.4 Formalities for Transferring Title to Shares or Assets

3.4.1 Transfers of title to shares

Transfer of shares must be notified by the seller to the board of directors of the target company, which must register it in the target company's share registry book (and stock certificates cancelled and new certificates issued). The transfer of shares of a stock corporation does not need to be registered with the PRC, while the transfer of quotas of a limited liability company must be. In some cases, the transfer of quotas of a limited liability company will also imply an amendment to the bylaws and such amendment will need to be registered with the PRC.

3.4.2 Transfers of title to assets

A transfer of a going concern must be proved through a written agreement between the buyer and the seller, which must then be registered with the PRC. The seller should deliver to the buyer a signed statement declaring:

- any debts (including loans)
- the name and domicile of each creditor
- the value of each debt
- the maturity date of each debt, if applicable

A notice of a transfer of a going concern must be published in the *Official Gazette* and in a local newspaper in each jurisdiction where the seller operates. For 10 days after publication of this public notice, creditors may oppose the transfer, requesting that an amount equivalent to their credits be withheld from the purchase price. The opposition of a creditor requires the buyer to deposit the amount of the creditor's claim in a bank account at an official bank for 20 days, during which term the opposing creditors have the right to pursue a court garnishment order for the amounts deposited. Once the 20-day period has elapsed, if the deposited amount is not attached, it can

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be withdrawn and the parties may execute the final purchase document and close the transaction.

Under the procedure for a transfer of a going concern, tax management considerations arise; that is, certain tax obligations must be complied with regarding the information to be disclosed to the local tax authorities (within a specific period of time), in order to limit the tax liability of the buyer.

3.5 Formalities for Mergers

The steps involved in a merger procedure (whether by consolidation or by absorption) may be summarized as follows:

- The execution of a preliminary merger commitment by the directors of the companies involved, which must include the following information:
  - grounds and purposes of the merger
  - merger balance sheet, prepared as from a date not more than three months prior to the preliminary merger commitment
  - exchange rate agreed upon by the merging companies
  - proposed bylaws of the new company or proposed amendments to the bylaw provisions of the surviving company
  - any restrictions on the management of the business of the merging companies and warranties to enable the continuance of business activities until the merger is registered with the PRC
- Approval of the preliminary merger commitment and the merger balance sheet by the shareholders of the companies involved
- Publication of relevant information regarding the merger in the *Official Gazette* and in a newspaper with a relatively wide circulation for the purpose of providing third parties (i.e., creditors) the opportunity to oppose the merger until their credits are secured or satisfied
- The execution of a final merger agreement, after the 15-day term to receive creditors' objections and within the term of 20 additional days (to levy attachments – i.e., via an embargo ordered by a judge – if an objection has been filed within the 15-day period for objections), which must provide for:
  - the corporate resolutions approving the merger;
  - a list of shareholders and creditors who have objected to the merger;
  - the special balance sheets and the consolidation balance sheets of the merging companies; and
  - any other agreements specified in the preliminary merger agreement.

- Registration of the merger with the PRC, at which point the merger becomes enforceable *vis-à-vis* third parties.

4. Regulatory Framework

4.1 Competition Law Considerations

A merger control regime was established for the first time by the Defence of Competition Law No. 25,156 in 1999 (DCL), and following an amendment to that Law with Law 26,993 in 2014, the Secretary of Commerce, advised by the Competition Defence Commission, became the enforcement regulator for the merger control regime. ("Commission" here for these purposes means both administrative agencies [i.e., the Secretary of Commerce and the Competition Defence Commission]).

Previously, the DCL was amended in 2001 with Executive Order 396/01 (EO 396), introducing major changes to the merger control system. The main purpose of the changes was to substantially reduce the number of transactions needing Competition Commission approval.

4.2 Merger Control Overview

Any merger that may have as its purpose or effect the limitation or distortion of competition in a manner that is detrimental to national economic interest is unlawful (s. 7, DCL).

4.2.1 Thresholds

Any merger that meets the definitions of "merger," taking into account the size of transaction and its territorial reach must be notified to the Commission.

The following transactions are within the scope of the DCL (and therefore must be notified):

- mergers of previously independent entities
- transfers of going concerns
- the acquisition of ownership rights in shares or equity interests, debts, or of any other rights in shares or equity interests that may entitle the holder to:
    - convert them into shares or equity participation, or
    - have the control, or a significant influence, over the internal decision-making process of the entity issuing them, and
- any other agreement or transaction that may:
    - legally or as a matter of fact, transfer to any entity or economic group the assets of another entity, or
    - grant to that entity or economic group the control of, or a significant influence on, the adoption of ordinary or extraordinary business decisions of the entity.

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Any of the above transactions must be reported to the authorities when the cumulative annual turnover in Argentina of the parties involved exceeds ARS200 million (Section 8 of the DCL, as amended by EO 396). For the purposes of this calculation, annual turnover means annual turnover in Argentina of the acquiring group plus the acquired company/ies.

"Cumulative business volume" means the total gross ordinary sales of goods and services of the newly combined entity during its last fiscal year, less any discount on sales, VAT and any other taxes directly related to business volume.

Cumulative business volume is calculated taking into consideration direct sales of the acquired entity itself, plus sales of any entity in which the acquiring group has significant interests.

One issue relates to turnover: for the purposes of calculating cumulative business volume, the turnover of the acquiring group of companies plus the turnover of the target company/ies must be taken into account, explicitly excluding the seller's turnover, and some detailed rules apply on how to determine whether a transaction must be notified or is exempt from the notification requirement.

In general, an exemption from notification applies if:

- the buyer has more than 50 percent of the equity in the target (generally with some exceptions)
- the value of the deal (transaction itself or assets involved) is not greater than ARS20 million
- as long as the acquiring group has not entered into any other transaction in the previous 12 or 36 months, in the same market exceeding the total amount of ARS20 million or ARS60 million respectively (i.e., the tribunal has to look at both periods: if acquisitions in the past 12 months do not add up to ARS20 million but acquisitions in the past 36 months exceed ARS60 million, then the transaction must be filed).

This is a vexed and highly technical area that the Commission has tried to clarify, with mixed success. When trying to decide whether to notify the Commission of a proposed merger or not, the facts must be analyzed (and referred to the Commission) on a case-by-case basis.

4.2.2 Penalties for noncompliance with notification requirements

Fines of up to ARS1 million apply per day until a required notification is made.

4.2.3 Time limits for notification

Notification to the Commission must be filed:

- before the merger is executed;
- within one week of the date the agreement is executed;
- within one week of the date of publication of the purchase offer; or

- within one week of the date of acquisition of a controlling participation, whichever occurs first.

Regulators have clarified when the one-week filing period starts running. In the case of the acquisition of shares in a company, the period starts on the date the acquisition of the ownership rights over the shares becomes effective, according to the share purchase agreement (i.e., when the transfer of the shares is notified to the target company under Article 215, CCL). This means that in practice, notification may take place up to one week from closing the transaction.

In a consultative opinion, the Commission has established that in some circumstances, transactions that are subject to mandatory filing may be closed before approval, but that they will not have any effect between the parties or *vis-à-vis* third parties until approval is granted. From a practical point of view, it is difficult to determine the effects of this interpretation in the case of a transaction that has already been closed and authorization for which is later denied. However, in controversial cases, it is advisable not to close before approval is obtained to avoid these uncertainties.

It takes one year or more to obtain clearance of a transaction from the Commission due to the many questions posed by the Commission that interrupt the 45-day approval period set out in the DCL.

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Argentinian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation	
Is a filing obligation voluntary or mandatory (i.e., are there penalties for failure to notify or for implementing a transaction without notification or approval)?	It is mandatory.
Timetable	
In practice, what is the timetable for clearance (in Phase I and Phase II review)?	Approximately 2 years in simple transactions with no anti-competitive effects (i.e., transactions that do not go beyond the F1 Form). Complex transactions may take several years.

4.3 Exchange of Competition-Sensitive Information and "Gun-Jumping" Issues

There are no specific provisions on gun-jumping in Argentine law. This is regulated by the general principles of the Competition Law on exchange of information between competitors as applicable to the specific situation.

4.4 Anti-Bribery, Corruption and Money Laundering

The Argentine Criminal Code penalizes any government official, member of the judiciary, prosecutor, etc., whether temporarily or permanently in the

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public function and any individual who engages in corrupt practices with government officials. The Argentine Criminal Code does not contain corporate liability provisions for acts of corruption (although it does provide for corporate liability for other crimes, such as money laundering).

Argentine federal anti-corruption laws are also in:

- the Public Employment Law (Law No. 25,164);
- the Ethics on Public Office Law (Law No. 25,188); and
- the Code of Ethics of Public Office (Decree No. 41/99).

These laws apply only to public officials.

The enactment of anti-corruption legislation is in general reserved for the National Congress. However, some provinces have passed Provincial Codes or Laws on Ethics that apply to provincial public employees.

Argentina has not passed an FCPA-type law as in other countries (e.g., Brazil).

4.4.1 Argentine Criminal Code: Key Provisions

The Argentine Criminal Code provisions regarding anti-bribery and corruption penalize the giving and accepting of benefits regardless of whether the public officers involved actually perform or abstain from performing their duties as a result of the benefit. Facilitation payments are prohibited. Further:

- *Bribery*: The Criminal Code prohibits government officials from receiving or accepting money or other benefits/gifts in order to do or not to do something related to their duties.
- *Influence peddling*: The Code further penalizes any person who requests or receives money or benefits/gifts, or accepts a promise of such, in order to make unlawful use of his or her influence before a government official.
- *Transnational bribery involving a foreign official*: Any person who offers or gives a foreign public official anything of value, promises or advantages, in order to carry out, delay, or not to do something related to their duties will be criminally liable.
- *Unlawful gifts*: Any government official, who, while in public office, accepts any benefit/gift given by reason of that position will be criminally liable. The person (individual) who presents or offers the gift is also subject to criminal prosecution. This crime does not require something being received in return from the government official
- *Financial bribery* (*financial sector-specific*): The Criminal Code also penalizes employees and officers of financial institutions and those operating in stock markets who allege false events or document false transactions in the accounts with the intent to obtain a benefit or cause losses.

4.4.2 Corporate Liability

The Argentine Criminal Code does not contain corporate liability provisions for acts of corruption. Therefore, in the case of crimes relating to the activity of a company, criminal liability will be attributed to directors, managers or, in general, to individuals directly involved in the crime.

However, there are some specific laws (i.e., Law No. 26,683 on Money Laundering; Law No. 26,733 on Stock-Market Crimes; and Law No. 26,735, which amends the Tax Criminal Regulation) that establish specific crimes for which companies can be held criminally liable (e.g., tax, exchange controls and money laundering matters).

4.4.3 Money Laundering

Federal Law No. 26,683 on Money Laundering provides sanctions including: fines, suspension of activities, bans on participation in public bids and state procurement of works, cancellation of legal registration, and loss or suspension of state benefits, when specific criminal acts are committed in the name of, or with the intervention of, or for the benefit of a legal entity.

4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Argentine law does not restrict or prohibit foreign investment. No prior governmental approval is necessary other than the authorizations needed for any domestic or foreign investor in a particular business activity (e.g., banking, insurance, etc.).

The main foreign investment provisions are set out in the *Ley de Inversiones Extranjeras* (Foreign Investment Law – i.e., No. 21,382/FIL) enacted in 1976 and amended to liberalize and deregulate foreign investment by Law No. 23,697 and the regulatory provisions of the Executive Order No. 1,853 (also enacted in 1993).

Investments may be made in various forms, including:

- foreign currency
- capital assets
- the proceeds of other investments
- proceeds that are subject to repatriation resulting from other investments made in the country
- capitalization of certain foreign credits
- certain intangible assets

If a foreign company is willing to acquire shares or quotas of Argentine commercial companies, Argentine regulations state that the foreign legal entity must be registered with the PRC.

4.5.1 Exchange Controls

Certain restrictions apply to gaining access to the local foreign exchange market and to transferring funds abroad. Certain foreign exchange and cross-

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border payment transactions are restricted or contingent upon Central Bank's prior approval. That said, the transfer of dividends based on an audited balance sheet does not require such prior approval.

4.6 Industry-Specific Regulations

To operate in certain business sectors, special authorization or licenses may be needed (e.g., broadcasting, telecoms, oil and gas, etc.).

4.6.1 Telecommunications and Media

The following laws and regulations compose the main legal framework for telecommunications in Argentina:

(i) Argentine Digital Law, Law No. 27,078 (the "**Digital Act**")

(ii) Audio-visual Communications Services Law, Law No. 26,522 ("**Audio-visual Communications Law**")

(iii) Law No. 19,798, Decrees No. 62/90, No. 1185/90, and No. 764/2000, and several resolutions issued by the regulatory authority from time to time

Although Law No. 19,798 and Decree 764/00 have been abrogated, their provisions will remain in place as long as they do not conflict with the Digital Act, and until new regulations are approved by the regulatory authority.

The telecom regulatory authority is the *Ente Nacional de Comunicaciones* (National Agency of Communications, ENACOM). This agency has been recently created and replaced the following three agencies: *Autoridad Federal de Tecnologías de la Información y las Comunicaciones*, (AFTIC); Secretaría de Comunicaciones (SC or SECOM); and *Comisión Nacional de Comunicaciones* (CNC). We mentioned these three prior existing agencies because several regulations in place still refer to them in their names or wording, and most of the regulations issued by them are still in place.

Investment restrictions

Under applicable regulations, and in the absence of any reciprocity treaty Argentina has entered into with another country recognizing mutual broadcasting benefits, broadcasting licensees are prohibited from:

- having any legal or corporate relation with foreign broadcasting entities and/or being directly or indirectly affiliated to any of such entities; and
- being subsidiaries or branches of foreign legal entities and/or conducting any activity or executing any agreement that would result in foreign capital dominance over the performance of the local entity.

Regulations also impose on broadcasting entities a minimum local corporate capital quota requirement—based on which broadcasting entities are prohibited from having in excess of 30 percent of both corporate capital and shareholder voting shares from or attributed to foreign sources. That percentage can be increased if there is a reciprocity treaty in place between Argentina and the country from which the foreign corporate capital originates.

Transfers of shares

As a general rule, regulations restrict broadcasting licensees from transferring their shares or quotas.

Exceptionally, ENACOM is entitled to authorize the transfer of shares or quotas for broadcasting licensees if their licenses are five years old (at least) and where the transfer would be necessary to ensure continuity of the service. In any event, broadcasting licensees are required to maintain the control of the original shareholders or quotaholders in the company, who must retain at least 50 percent of the company's votes and shares/quotas.

For the purpose of obtaining authorization to transfer shares or quotas, broadcasting licensees must file a letter of request and supplementary documents with the ENACOM, which will verify that the proposed shareholders and quotaholders comply with the regulatory requirements. Failure to comply with applicable regulations may trigger sanctions.

Transfers of assets

Assets necessary for the provision of the service in a regular manner are restricted from being transferred, embargoed or pledged. Only under special circumstances will ENACOM authorize the alienation of the assets, and then only if the purpose of the transfer is to improve the service.

4.6.2 Oil and gas

There has been many changes in the hydrocarbons industry in Argentina since the first oil discovery in 1907. The first decades were characterized by a state monopoly over hydrocarbons.

Argentina's first state-owned national oil company, *YPF Sociedad del Estado* (YPF) was established in 1922. YPF had the monopoly of oil and gas in the country, and international and local private oil and gas (O&G) companies had access to the industry mainly as service providers to YPF. At this stage, the federal government retained jurisdictional and regulatory control over Argentina's hydrocarbons, and the exploration, exploitation, manufacture, transportation and commercialization of oil and gas were regulated by the Hydrocarbons Law No. 17, 319 of 1967. The Hydrocarbons Law granted concession-based rights, opening up the possibility for privately held oil companies to enter into agreements to explore and exploit hydrocarbons.

Deregulation followed in the 1990s; and recently, acts of nationalization and major modifications have been made to the National Hydrocarbons Law that, as amended by Law No. 27,007, continues to be the most important Act now regulating the industry.

Deregulation

During the 1990s phase of deregulation, service agreements between YPF and oil and gas companies were converted into exploitation concessions, with the privatization of YPF by National Law No. 24,145 in 1992, whereby YPF became a private company and its shares were gradually sold to private parties.

In 1994, the National Constitution was amended, transferring eminent domain over natural resources to the provinces, but with no specific reference to

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jurisdiction over those resources. This introduced an element of doubt that created conflict between the provinces and the federal government.

Following (and in some cases, even before) the enactment of the Short Law, the provinces enacted legislation or executed agreements regarding hydrocarbons, which at times could have seemed to conflict with or circumvent the provisions of the Hydrocarbons Law. In this period also, hydrocarbon-producing provinces created their own provincially owned companies (POCs).

Many (but not all) of such conflicts were overcome in 2007, when National Law No. 26,197 (the Short Law) was enacted, transferring licensing control over hydrocarbons to the provinces. This led to the grant of many new sites to oil and gas companies in association with POCs.

In May 2012, the federal government enacted Law No. 26,741 (Nationalisation Law) declaring that 51 percent of the shares of YPF and Repsol YPF Gas SA (YPF Gas) would be expropriated. However, in the end, only shares held by a Spanish company, Repsol (and related parties) were expropriated. Under the Nationalisation Law, YPF and YPF Gas were to operate as private companies and YPF was entitled to seek internal and external financing, as well as sign joint ventures or other associative agreements with private, public, local, or foreign companies.

Recently, Argentina has been identified as having great potential for the exploitation of unconventional oil and gas specifically, having one of the world's most important reserves of shale gas in the so-called "*Vaca Muerta*" (literally "dead cow") Formation[2], generating positive expectations in the industry.

As recently as 2014, Law No. 27,007 was published in the *Official Gazette* on 31 October, introducing major changes to the regulatory framework, designed to promote the development of Argentina's unconventional oil and gas potential (the New Regime). Some of the changes include:

- fewer relinquishment obligations;
- the possibility of holding areas for longer periods by extending exploitation concessions for unlimited terms;
- rights to current concession-holders to access nonconventional concessions without having to compete in open public tendering;
- caps on royalties paid to the provinces;
- end of the provinces' and national government's powers to reserve vacant areas for national oil companies or POCs; and
- elimination of the "carry" provisions[3] included mostly in agreements between POCs and oil and gas companies during the "development" stage.

[2] The reserves are located in the central west part of Argentina in the Neuquina Basin, which includes the provinces of Neuquén, La Pampa, Río Negro and Mendoza.
[3] The "carry" provision basically indicated that oil and gas companies had to finance POCs' participation for the full term of the exploration permit or exploitation concession, and only if the

Acquiring exploration and production (E&P) rights

Licensing rounds

The Hydrocarbons Law establishes public bidding procedures as the system for the award of E&P rights. In this sense, the New Regime that amended the Hydrocarbons Law establishes that vacant areas must be offered to private parties via public bids, based on uniform bidding terms that the provincial and national authorities were required to draft within the first six months of the effective date of the New Regime (i.e., 31 October 2014; i.e., deadline 30 April 2015). Such uniform bidding terms have not yet been issued.

No nationality restrictions apply to holders of E&P rights, although applicants must register a domicile in Argentina, must have the required technical and financial capabilities and must fulfil any other condition set out in the individual bidding process.

Concession-based E&P rights

Either the relevant province or federal government (depending on the location of the site) can grant E&P rights through a bidding process to any individual or entity. The awardee/s will be the company or group of companies that offers the highest investment bid and then will be considered the title holder of the corresponding E&P right.

The E&P rights under the Hydrocarbons Law are:

- exploration permits (varies depending on whether a conventional, nonconventional or offshore target);
- exploitation concession (varies depending on whether is for conventional, nonconventional or offshore target); and
- transportation concession (granted and extended for a time period matching that of the associated exploitation concession).

Private transactions

Private transactions to acquire E&P rights such as sales of shares or assets are valid in Argentina. In the case of asset sales, the acquiring/assignee party will most likely need to be approved by the corresponding provincial or federal enforcement authority.

Argentina's unconventional oil and gas potential, especially in the province of Neuquén, has generated the execution of transactions of "farm-ins"/"farm-outs," whereby private companies holding exploitation concessions have associated with other oil companies with expertise in various exploitation techniques.

Restrictions on operations

Certain restrictions and sanctions apply to entities performing oil and gas activities in the Argentine offshore continental platform if they do not have authorization from the Argentine government for those activities—those

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oil and gas discovered were commercially viable could the oil and gas companies recover the financing with a portion of the revenues generated by the POCs participating interests in the area.

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sanctions being hefty fines, cancellation of hydrocarbons' rights or imprisonment of company managers involved in the breach (Law No. 26,659, as amended by Law No. 26,915, and Resolution 407/07 of the National Secretary of Energy). Although the sanctions are severe, their application and enforceability are debatable and must be analyzed on a case-by-case basis.

In practice, the only offshore area where companies may operate without an Argentine government permit is the Malvinas (known outside Argentina as the "Falkland Islands") area. Argentina currently has a sovereignty dispute with the United Kingdom, which currently has control over the islands. In this context, the United Kingdom has granted permits to companies to explore and exploit oil and gas in the Falkland Islands. At the same time, the Argentine government has established the restrictions and sanctions to try to discourage companies from operating in a territory claimed as Argentine but, in fact, is under UK jurisdiction.

4.7 Import/Export Controls

Individuals or corporations wishing to import or export goods into or from Argentina must generally be registered in the Importers and Exporters' Registry of the Customs Service.

Exceptions to the general registration requirement apply. The most important one is where an entity is only occasionally involved in foreign trade (in which case, it may seek authorization for each operation as it happens, without a general registration with Customs).

In general, in order to be registered with the Importer's Registry, the individual or corporation must be registered as a taxpayer with the Federal Revenue Service. In addition, any corporation wishing to register must prove its creditworthiness or financial standing, either by evidence of gross sales carried out during the immediately preceding year for an amount of ARS300,000; or be able to show a net shareholders' equity/net worth of an equal amount.

If such evidence cannot be provided, the corporation must post a performance bond instead to Customs for the sum of ARS30,000.

5. Transfer Taxes

5.1 Acquisition of Shares

The purchase of stock agreements with effects within the jurisdiction of the City of Buenos Aires are subject to stamp tax at the rate of 1 percent on the "economic value" of the transaction. Purchase of stock agreements with effect in other provinces would be subject to an approximately 1.5 percent stamp tax (rate varies depending on each jurisdiction).

5.2 Acquisition of Assets

Buenos Aires levies a stamp tax of 3.6 percent on real estate transfers. In other provinces, rates may differ. The stamp tax is a local tax that is normally triggered when land registration documentation is created or amended during a transfer of land, or where rights or obligations relating to land are amended or extinguished. Notary fees and costs are also payable on transfers of real

estate, at variable, negotiable rates, but capped at approximately 2.3 percent of the value of the land.

5.3 Mergers

If a merger meets certain requirements, it can be treated as a tax-free reorganization. Under that scenario, tax losses and tax credits of the absorbed entity or entities can also be transferred (again if certain requirements are met).

If a merger does not qualify as a tax-free reorganization, it will be deemed a taxable merger. The tax consequences of such a transaction would very much depend on the nature of the assets being transferred to the continuing entity.

5.4 Value-Added Tax (VAT)

The purchase of stock and, in general, real property transfers are not subject to VAT. However, VAT is applicable to construction activities carried out on real estate property (so the transfer of such construction activities/developer's work goes with the property, and is subject to VAT at the rate of 21 percent. Exemptions may apply depending on the purpose and duration of the construction works.

6. Employee Issues

6.1 Method of Transfer under Local Law

6.1.1 Acquisition of shares

Should the buyer come to possess the company through an acquisition of shares, and the target continues as the same legal entity, the buyer's liabilities or duties will be the same as those of the target's. In addition, the Employment Contract Law (ECL) establishes that the seller and buyer are jointly and severally liable for all labor obligations existing on the date of the transfer of any establishment to another company.

The ECL does not require giving any kind of notice to employees or unions.

6.1.2 Acquisition of assets

The ECL does not refer specifically to the acquisition of assets. The transfer of a business as a transfer of a going concern is similar to the transfer of employees under an acquisition of assets.

6.1.3 Transfer of business

The Labour Law refers to the transfer of an establishment, a notion that also comprises the transfer of a going concern. Case law of the Labour Appellate Court of the City of Buenos Aires has established that the buyer of an establishment is also liable for the seller's labor obligations arising from labor relationships terminated before the buyer's acquisition of the company (i.e., the buyer also liable for the debts to former employees terminated before the acquisition [e.g., backpay, payments due as a result of litigation, unfair dismissal, lack of duly registered employment relationship, etc.]).

The transfer of a going concern does not eliminate labor debts and/or claims of former employees. Creditors may enforce their claims against the buyer

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without urging them to register their claims in the transfer of a going concern proceeding for the remaining term. The statute of limitations limits labor actions to two years calculated from the date on which the claim arises (i.e., when the "wrong" first occurred, such as when an unfair termination occurred).

The parties need not notify employees about the closing of an M&A transaction or request their consent to go ahead with a deal. However, it is advisable to notify employees.

With transfers of a going concern, the transferee undertakes all employment contract obligations, and employees may not consider themselves dismissed as a consequence of the transfer, unless there is an abatement of the new employer's liability (e.g., if the buyer is not financially stable or different sections, department or branches of the target have been separated in a manner that reduces the employer's liabilities).

Section 12 of the ECL prohibits employers from suppressing acquired rights. Changes to the core aspects of the relationship need the employee's express consent and consideration.

6.1.4 Mergers

When a merger occurs, the duties of transferred employees must not be changed due to the merger and the absorbing entity must fully continue operations by transferring the entire technical and operational unit in order to achieve this. Where the transfer is of a going concern, the transferee company must acknowledge employees' rank and seniority and all rights related to their position. Both the transferor and transferee companies are jointly and severally liable for all labor-related obligations as of the transfer date. Obligations after that date generally attach solely to the transferee company, and last for two years after the date of closing (under the statute of limitations).

Employees can only oppose the transfer of their job when some type of damage has been suffered as a result of the transfer. The employees' consent to the transfer of their employment contracts to the transferee company is not required. They may claim constructive dismissal and demand payment of severance only: if they allege and prove that the transfer caused them damage or harm due to the undue alteration of their employment terms and conditions; if the transfer was fraudulent (a sham transfer) executed as an avoidance measure (to frustrate their rights); and/or, if the transferee company is not financially stable (i.e., insolvency of the transferee is a tangible possibility, based on the transferee's assets, credit and/or financial background).

On the other hand, if the transfer includes the personnel only, and does not include the going concern as a whole (called an "assignment of personnel"), the express acceptance in writing of all assigned employees will be required. Even where such acceptance has been obtained, assignor and assignee companies will be jointly and severally responsible for all liabilities stemming from the assigned employment relationship.

6.2 Approval or Consultation Requirements

There are no approval or consultation requirements.

6.3 Protection against Dismissal

6.3.1 Redundancies

Employees may also be terminated without cause (and thus entitled to statutory severance) by the seller or by the buyer. If termination takes place after the transfer of the establishment, the buyer must pay the severance based on the employee's accrued seniority/length of service.

Mass layoffs (redundancies) must be undertaken in compliance with a special procedure before the labor authorities (Local Ministry of Labour and/or Federal Ministry of Labour), with trade union involvement. The employer must then give evidence as to why the mass layoff is necessary. In such cases, the parties (employer and trade union) may agree on a reasonable severance pay package, which must be ultimately approved by the Ministry of Labour. Employees may challenge a settlement offer by an employee (and indeed, the labor courts do usually uphold such employee claims).

In all cases, employers are free to make additional payments (over and above the minimum and mandatory severance payments) to terminated or resigning employees. These additional payments are bonuses subject to income tax withheld by the employer at source for remittance to the tax authorities, but are exempt from social security contributions because they are considered extraordinary and exceptional bonuses (i.e., paid only on termination of the employment contract).

6.3.2 Penalties

If the transfer of employees is an "assignment of personnel" (as opposed to a transfer of a going concern) but the company does not properly comply with procedural formalities (say, e.g., not requiring acceptance by the employees of their written notice/offer), fines can be imposed on the buyer by the Federal Ministry of Labour. The fines will be in the range of 30 percent to 200 percent of the monthly national minimum subsistence wage, per affected employee. In practice, it is always best to have both the employee and employer sign a hard copy of the offer/acceptance document.

Brazil

Brazil

1.1 Overview

Brazil is a federal presidential republic composed of 26 states, one federal district and more than 5,000 cities. The federate states and cities have powers to approve their own laws on certain matters (e.g., state and municipal taxes or licenses), and so, laws may differ slightly from state-to-state/city-to-city.

1.2 General Legal Framework

As a general rule, the acquisition of a company or business in Brazil does not require government consent, except for merger control approval if the parties' gross annual turnover is above antitrust thresholds (see **4.2**), or where transactions involve regulated activities controlled by the government. However, the transaction may still trigger the application of various Brazilian laws and rules designed to protect the rights of the parties.

The primary sources of company law in Brazil are:

- the Civil Code (Law No. 10,406/2002), and
- the Corporations Law (Law No. 6,404/76).

The CVM (Brazilian Securities and Exchange Commission) has the authority to supervise and sanction the activities of all market participants, and sets the rules for securities trading on the stock exchanges.

1.3 Corporate Entities

Most nonresident investors choose to organize a business by setting up one of these two types of company:

- *Sociedade Anônima* (SA), a limited liability corporation, or
- *Sociedade Limitada* (*limitada*), a more flexible form of a limited liability company.

1.3.1 Corporations (*Sociedades Anônimas*)

In an SA, shareholders' liability is limited to the amount of capital invested by each shareholder.

An SA must have at least two shareholders, which may be entities or individuals. There are no residency or nationality requirements; however, a shareholder that is not a Brazilian resident must appoint an attorney-in-fact resident in Brazil vested with powers to receive court summons on its behalf.

At least 10 percent of the stated capital must be paid up in cash at the time of the SA's incorporation. No minimum capital is required, except to carry out certain regulated activities (e.g., for banking, insurance and trading companies).[1] The capital of the SA is divided into shares. According to the

[1] These are companies organized for the purpose of exporting products—on their own account or through third parties—which benefit from certain tax incentives.

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rights attributed to their holders, the shares may also be qualified as ordinary or preferred.

The holders of preferred shares can have full voting rights, no voting rights or restricted voting rights. The number of preferred shares without the right to vote or with restrictions on the exercise of a right cannot exceed 50 percent of the total number of shares issued by the SA. The holders of preferred shares with no voting rights or with restricted voting rights must be entitled to certain financial rights, such as the priority:

- to receive dividends, fixed or minimum
- to receive the reimbursement of capital, with or without a bonus, or
- both of these benefits.

The SA must be managed by a board of officers (*diretores*) with at least two members, all of which must be resident in Brazil (or if they are foreign nationals, they must hold permanent visas). A board of directors (*conselho de administração*) is not compulsory, unless the SA:

- trades its shares on the stock exchange or in “over-the-counter markets”;

  or
- has authorized capital.

Brazilian residency is not a requirement for members of the board of directors, provided that an attorney-in-fact who is a resident in Brazil is appointed and vested with powers to execute corporate documents and receive court summons on behalf of the nonresident director. The board of directors must have at least three members.

For a publicly held SA (*Sociedade Anônima de Capital Aberto*), Brazilian corporate legislation is more protective of the minority shareholders of preferred shares. Additionally, any publicly held SA must be enrolled with and comply with the rules and requirements of the CVM, and must as a result submit its balance sheet to independent auditors before their publication.

1.3.2 Limited liability companies (*Sociedades Limitadas*)

A *limitada* is a more flexible form of limited liability company. For this reason, the *limitada’s* structure is often used to incorporate wholly owned subsidiaries (including purchase vehicles for local acquisitions) in Brazil. The liability of quotaholders is also limited to the amount of the capital invested by each quotaholder, but if the capital is not fully paid in, liability is for the full amount of the company’s capital.

A *limitada* must have at least two quotaholders who can be entities or individuals. There are no residency or nationality requirements, but quotaholders who are not Brazilian residents must appoint an attorney-in-fact who is a resident in Brazil and is vested with powers to execute corporate documents and receive court summons on their behalf.

No minimum capital is required either upon incorporation or to carry out the business, except for specific activities. For example, the *limitada* cannot be used to carry out certain regulated activities such as banking and insurance. The capital is divided into quotas whose title is evidenced in the language of the articles of organization of the *limitada*. Such articles of organization (along with any subsequent amendments)are registered with the State Commercial Board. The capital may be increased only after the existing capital sum has been totally paid-in.

The *limitada* may be mana

ged by one or more Brazilian resident individuals (officers), who may or may not be quotaholders. The appointment of non-quotaholder officers is subject to the approval of:

- all quotaholders, if the corporate capital is not fully paid in; or
- quotaholders representing two-thirds of the corporate capital if the capital is fully paid in.

If an officer is a quotaholder, his or her appointment (in a separate document) will require the approval of quotaholders representing more than half of the company's capital. The officer's appointment (whether a quotaholder or not) is subject to the approval of quotaholders representing at least three-quarters of the company's capital.

Although not mandatory, the *limitada* may have an audit committee (*conselho fiscal*) composed of at least three members.

2. Acquisition Methods

The business may be acquired by the purchase either of the shares in the company that operates the business, or of the assets and liabilities pertaining to the business. Share acquisitions are more common than asset acquisitions in Brazil, as they are less burdensome from a bureaucratic point of view and, depending on the circumstances, can be more tax-efficient. Each type of acquisition has its own advantages and disadvantages, however, and the choice of the structure will largely depend on the circumstances of the transaction and, in particular, the parties' tax considerations.

2.1 Acquisition of Shares

From a transactional point of view, a share (or quota) transaction is much simpler and involves less documentation than an asset transaction. No individual transfers of title to the company's assets and inventory is required and no cumbersome formalities need be observed. Normally, public licenses and permits are not affected by a change in the control of the target company. As a general rule, unless a contract or agreement expressly requires prior consent before the transfer of control (which is common in contracts with the public sector, but not necessarily an obstacle), the company's rights and obligations under its contracts and agreements are not affected. A share acquisition also offers more flexibility in terms of tax planning.

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2.2 Acquisition of Assets

Asset acquisitions tend to be much more complicated than share acquisitions, as each asset and liability to be included in the sale has to be identified and transferred, either individually or by legal category (e.g., each equipment and inventory item must be described, valued and quantified in the transfer invoices to be delivered by seller to buyer). In some cases the issuance of these transfer invoices may trigger transfer taxes. The title to real properties is transferred through the registration of deeds that trigger the payment of tax and notarial fees.

The parties do not need to transfer the whole business and are generally free to select the assets and liabilities they wish to transfer. In general, the buyer is liable only for obligations acquired, which it assumes expressly in the purchase agreement. There are, however, certain exceptions where the buyer assumes certain liabilities of the seller by the operation of law (e.g., tax, labor and environmental liabilities. This risk of inheriting hidden liabilities, as well as the time-consuming procedural requirements tend to dissuade some buyers from using asset deals as an acquisition vehicle in Brazil.

Some public licenses and governmental permits may not be transferred along with the business, but must be applied for anew by the buyer. Buyers should therefore obtain all necessary governmental licenses before the completion of an asset deal, to avoid any interruption to business and the risk of incurring penalties.

3. Negotiation, Signing and Closing

3.1 Precontractual Obligations

Parties in a negotiation typically start with a letter of intent. Although in many cases, buyers may proceed in negotiations with sellers using such letters of intent (stipulating only a few provisions that are intended to be legally binding, like confidentiality and exclusivity), under Brazilian law, these precontractual letters will not necessarily have any legal effect because whether or not a letter will create legal obligations depends on the substance of what is said and not its format.

3.2 Customary Issues in Negotiating Acquisition Agreements

Brazilian parties to an M&A transaction may be very sophisticated or relatively inexperienced; the terms and conditions to be negotiated may vary a lot depending on the profile of the parties involved and their advisors (i.e., it is not uncommon to find Brazilian parties or counsels who are not fluent in English and have never been involved in any M&A transaction). The following is a brief overview of certain key provisions in typical Brazilian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking this.

Purchase Price		
1	Is a purchase price adjustment common? What type is common (e.g., debt-free, cash-free)?	Purchase price adjustments are common and may even be negotiated when signing and closing are simultaneous, in view

		of the length of time that may elapse from the date of the base balance sheet for valuation purpose and the actual closing. There are different types of price adjustments, including cash-free debt-free, working capital and NAV adjustments.
2	Is there a collar on the adjustment?	Collars are not common, but not unheard of either.
3	Who prepares the completion balance sheet?	This is usually prepared shortly after the transaction closing by the buyer or an independent appraiser appointed by the buyer.
4	Is the balance sheet audited?	Except for listed companies, multinational subsidiaries or entities involved in activities regulated by the government, most Brazilian companies are not audited.
5	Is an earn-out common?	Yes, especially in transactions where the sellers continue managing the target company after closing and in private equity transactions.
6	Is a deposit common?	No.
7	Is an escrow common?	The escrow account is the most common guarantee in private M&A transactions involving a Brazilian target business. A holdback is uncommon, even if in Brazil, an escrow account can only be maintained with financial institutions that charge fees for their services. In Brazil, it is common to have escrow funds applied in interest-bearing financial applications.
8	Is a break fee common?	No.
Conditions Precedent		
9	Is the Express Material Adverse Event (MAE) completion condition common?	Yes. But it is common to have transactions where signing and closing are simultaneous without condition.
10	Is the MAE general or specific?	It may be either. Sellers usually demand that it be specific.
11	Is quantification of MAE common?	No.

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Covenants, Access		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	It is for a maximum term of five years with a clear definition of the applicable territory. Non-competes are also foreseen by law. Waterfall and blue pencil provisions are not common. For enforceability, it is expressly provided that the party bound by the non-compete receives compensation.
13	Is non-solicit (of employees) common?	Yes.
14	Is non-solicit (of customers) common?	Yes, combined with non-compete.
15	Is broad access to books, records, management between sign and close common?	Yes.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common, as is the insertion of a clause requesting that the seller notify the buyer of any possible breach. This may trigger termination or price adjustment.
17	Is a separate tax covenant/indemnity or tax deed common?	Its is common to have specific tax indemnity included in the purchase agreement.
Representations and Warranties		
18	Materiality in representations—how is it quantified (e.g., by a dollar amount)?	Materiality qualifiers are common, but are often not quantified (other than specific warranties, such as contract value).
19	How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?	Knowledge qualifiers have become increasingly common and usually include actual knowledge or matters that should have been known upon due inquiry. Listing individuals is not common.
20	Is a warranty that there is no materially misleading/omitted information common?	Yes.
21	Is disclosure of the data room common?	Usually, the disclosure of the data room is not accepted as a liability limitation.
Repetition of Representations and Warranties		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at	Both are common. In some cases, the parties execute a closing memorandum or a similar document addressing any

	completion common?	amendments in the warranties and confirming those that have not been changed.
23	What is the applicable standard? True in all material respects? Material Adverse Effect?	Both are seen separately, but usually true and accurate in all material aspects.
24	Is double materiality common (e.g., where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation)?	Double materiality is usually avoided.
Limitations on Liability		
25	What is the common cap amount (as a percentage of purchase price)?	Buyer often starts negotiations, asking for a cap of 100% of the purchase price. Some obligations, such as non-compete, may have a higher cap, depending on the size of the deal. Lower caps may be negotiated.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually, the cap applies to all obligations of the agreement, except for certain obligations that, depending on the amount of the deal, may be excluded from the cap (e.g., non-compete or confidentiality obligations).
27	What are the common exceptions to the cap?	Depending on the size of the deal, non-compete/non-disclosure provisions.
28	Is a deductible or basket common?	Both are common. Varies case by case.
29	Is a *de minimis* common?	It varies case by case but not uncommon.
30	How long does liability survive? Are there any common carve-outs (e.g., fraud, tax, key warranties)?	Usually five years, in line with the statute of limitations for tax and labor liabilities. However, a reduced period is sometimes seen.
31	Is warranty insurance common?	No, as it is still an expensive tool only recently introduced in the Brazilian market.
Reliance		
32	Do financiers seek to rely on purchasers' due diligence reports?	Financers will read the purchaser's due diligence reports, but they may not rely only on these materials. It is not uncommon to have financers conducting a limited review and relying on their

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		own analysis of balance sheets and financials.
Set-offs against Claims		
33	Is a set-off against claims for tax benefits common?	No.
34	Are insurance proceeds common?	No.
35	Are third party recoveries common?	No.
Damages, Knowledge		
36	Is the obligation to mitigate damages common?	Uncommon, except that generally, sellers will ask buyers to commit to refrain from self-denouncing certain, unmaterialized pre-closing liabilities identified during the due diligence to the authorities after the closing.
37	Is exclusion of consequential damages common?	It is. By law, consequential damages are excluded.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge had no effect on warranty/indemnity?	These are usually claimed by seller, but often successfully resisted by buyers.
Dispute Resolution		
39	Does local law allow for a choice of governing law? What is the common governing law?	Brazilian law only allows for a choice of governing law where arbitration is the conflict resolution option in the contract. If litigation is chosen, it is not possible to make a choice of governing law. Where parties choose litigation, the jurisdiction of the proponent of the deal determines governing law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. The location varies case by case.
Stamp Duty		
41	If stamp duty is payable, is it normally shared?	No.

3.3 Formalities for Execution of Documents

3.3.1 Transfers of shares

There is no legal requirement for an agreement about the sale of the legal and beneficial title to shares to be made in writing. No cumbersome formalities need to be observed in connection with the purchase of shares, except for the execution of simple corporate documentation. Nevertheless, market practice in the majority of cases is for a share transfer to be

documented between the seller and the buyer by way of a written share purchase agreement.

3.3.2 Transfers of assets

As a general rule, a transfer of assets under Brazilian law does not need to be governed by a written agreement. However, written contracts may be required by law or in order to fulfil registration requirements, where applicable. For example, transfers of real property and intellectual property are normally required to be in writing as they are subject to registration. The title transfer of most assets and inventory is formalized through the issuance by the seller and delivery to the buyer of transfer invoices printed in accordance with Brazilian accounting rules and tax law.

3.4 Formalities for Transferring Title to Shares or Assets

3.4.1 Transfers of title to shares

Registered shares of an SA can be transferred by means of an entry in the nominative shares transfer book (*livro de registro de ações nominativas*), dated and signed by both the assignor and the assignee, or their legal representatives (Article 31, Corporations Law No. 6,404/76). Where the shares are maintained in a deposit account with a financial institution in the name of the holders, the transfer of book entry shares requires a written order by the assignor, and is effected by an entry made by the financial institution in its books, debiting the share account of the assignor and crediting the share account of the assignee.

In the case of a *limitada*, the transfer of quotas is formalized by registration with the competent State Commercial Board of an amendment to the articles of association providing expressly for the quota transfer executed by representatives (i.e., resident individuals) of both buyer and seller.

3.4.2 Transfers of title to assets

Asset acquisitions tend to be much more complicated than share acquisitions since each category of assets and inventory has to be transferred separately, in accordance with applicable legal requirements. For real property in Brazil, the transfer must be notarized and registered to be effective, *vis-à-vis* third parties, resulting in significant notarial fees and transfer tax, depending on the value of the property.

The seller will not be automatically released from its liabilities by transferring them to the buyer; but the consent of each individual creditor may be required for the seller to be effectively replaced by the buyer. The same is true with respect to any kind of contracts or agreements to be transferred to the buyer. The transfer of contracts with government agencies requires special attention, as in many situations, the transfer of the agreement may trigger regulatory issues in view of the fact that the seller won a public tender to be contracted - and, as a rule, cannot be simply replaced.

4. Regulatory Framework

4.1 Competition Law Considerations

The Brazilian antitrust landscape changed significantly in 2012, in particular in relation to thresholds for filing, the structure of the antitrust regulators and

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rules governing merger filings, with the coming into force of the New Competition Act (New Act).

The New Act established a pre-merger notification regime, which requires the parties to wait for the approval of the Brazilian antitrust authority, Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Economica* [*CADE*]) before proceeding with a transaction. There is no filing deadline, but transactions cannot be implemented before clearance by CADE, subject to heavy fines. The New Act provides an objective list of the transactions that need to be submitted for approval, namely:

- typical merger and acquisition transactions (acquisition of companies or part of companies, shares; even acquisition of minority shares; stock and assets)
- associative agreements (see **4.2**)
- consortia and joint ventures, except where formed in participating in a public bid.

4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Brazilian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e., are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Filing is mandatory for certain transactions (see thresholds at item 2, below). Mandatory notifiable transactions must be submitted for review before closing and parties involved in a transaction must keep their respective operations totally separate until CADE's final approval has been given. Parties that do not meet such requirements will be subject to gun-jumping fines (see **4.3**). On the other hand, transactions involving public takeover bids, as well as transactions carried out in over-the-counter or stock exchange markets, which are subject to mandatory notification, can be submitted for review after their announcement and can be consummated before CADE's clearance. However, decision-making rights attaching to the equity interest acquired via such

	transactions cannot be exercised before CADE's clearance. On the parties' request, CADE may grant authorization to the parties to exercise such rights.
Timetable	
2 In practice, what is the timetable for clearance (in first phase and second phase review)?	Depends on whether CADE reviews the transaction under the fast-track procedure or the ordinary procedure. The average approval time for a fast-track transaction is 20 calendar days from submission. CADE has an internal deadline of 30 calendar days to approve fast-track cases, which is usually met, but it is not legally bound to meet that deadline. After clearance, parties must wait an additional 15 days for a possible appeal before closing. Thus, closing schedules should allow for between 35 and 45 days for clearance in fast-track cases. The average time for an approval in the ordinary procedure is 70 calendar days as of the publication of the transaction in the *Official Gazette* (when the transaction is deemed complete).

4.2.1 Thresholds

Under the New Act, the thresholds for mandatory filings are as follows:

- one of the parties to the transaction must have revenues in Brazil, in the year prior to the transaction, in excess of BRL750 million; and
- at least another party involved must have revenues in Brazil in excess of BRL75 million.

The revenues to be considered are those of the parties' economic group (not just revenues of buyer and target). For the purposes of defining "economic group," according to the Brazilian regulations, one has to consider:

- all companies controlled directly or indirectly by the same parent company or individual; and
- all companies in which any of the companies identified in the first bullet holds a participation of at least 20 percent (directly or indirectly) in the corporate or voting capital.

Furthermore, in the case of investment funds for filing thresholds purposes, the "economic group" should comprise the following:

- the economic group of each quotaholder that holds (directly or indirectly), at least 50 percent of the quotas of the fund directly involved, either by individual participation or by shareholder agreement; or
- the companies controlled by the fund involved in the transaction and the companies in which such fund holds (directly or indirectly) at least 20 percent of the corporate or voting capital.

In addition to mergers, transactions subject to review include joint ventures, "associative agreements" and consortia. CADE's resolution defines "associative agreements" as those effective for more than two years and involving a horizontal relation (above 20 percent) or vertical integration (above 30 percent), or a sharing of risks, which results in interdependence between the contracting parties.

Subscription or acquisition of bonds, debentures and other securities convertible into shares must be notified to CADE if, upon conversion, the transaction falls within one of the mandatory notification events set out in the Brazilian antitrust legislation.

CADE can request the notification of any transaction that does not meet these thresholds up to one year after closing, with powers to order divestitures.

The maximum review period is 330 (calendar) days: 240 days for the "regular analysis" with a possible 60 days extension (at the request of the parties) or 90 days (due to a decision of CADE). If CADE does not issue a final decision within the 330-day period, the transaction is automatically approved (although this is not expressly provided in the New Act, it has been the position of CADE in practice so far). The regulation also provides a fast-track procedure for the review of simple cases that have no or very little possibility of causing competitive harm, such as:

- classic or cooperative joint ventures;
- substitution of an economic agent;
- low market share (less than 20 percent of horizontal overlap or less than 30 percent of market share in vertically integrated markets); and
- absence of a causal connection (less than 50 percent of horizontal overlap and HHI variation below 200).

The fast-track procedure is applied at CADE's discretion, and, although there is no formal deadline, CADE has fixed an internal and informal 30-calendar day period for review of these cases, which has been observed so far. Moreover, the regulation provides that acquisition of shares by the sole controlling shareholder will be exempt from notification. Finally, joint ventures, "associative agreements" and consortia formed to participate in public bidding processes are exempt from notification.

4.2.2 Non-compete

Ancillary non-compete clauses in merger transactions are subject to certain conditions under Brazilian law. Generally, these clauses must be limited to a certain geographic areas and have an expiry date, as follows:

- acquisitions: non-compete clause generally allowed up to five years
- joint ventures: CADE usually allows non-compete clauses for the duration of the joint venture, provided that they are restricted to the relevant market where the company is active.

In specific cases, CADE may approve transactions conditioned upon the deletion or modification of a non-compete clause, in order to ensure that competition will not be harmed. (This still applies under the new regime).

4.3 Exchange of Competition-Sensitive Information and "Gun-Jumping" Issues

Parties must not act in any way to implement the deal (e.g., change corporate structure or implement the buyer's management) until final clearance is obtained from CADE. Any transfer of assets or any influence of one party over the other, or any exchange of competitive-relevant information is prohibited, unless strictly necessary for the execution of the transaction agreements. Failure to comply with lead to the transaction being annulled and might subject the parties to fines ranging from BRL60,000 to BRL60 million, and may even provoke a cartel investigation by CADE.

Exceptions to this prohibition do exist however, in cases where:

- the transaction does not pose any immediate threat to competition;
- the measures to implement the transaction are entirely reversible; and
- the parties are able to prove that if the measures were not taken, the acquired company might suffer immediate and irreparable financial harm.

CADE has 30 days to review such pre-clearance requests.

4.4 Anti-Bribery, Corruption and Money Laundering

4.4.1 Anti-bribery laws

Brazilian authorities are closing ranks against corruption. The Brazilian Federal Police has carried out several special operations to combat corruption, money laundering and related crimes, resulting in the arrest of hundreds of individuals, and a number of foreign multinationals were implicated—including US companies and other companies subject to the FCPA or other similar foreign legislation. Often, information obtained by the Brazilian authorities is shared with foreign authorities.

In addition to anticorruption provisions established by the Criminal Code, Brazil enacted a new Anti-Bribery Law (Law No. 12,846/2013), which came into force on 29 January 2014.

The main features of the law are as follows.

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Liable parties

The following entities (legally or *de facto* organized, even if temporarily) will be strictly liable for the prohibited acts committed in their interest or benefit, exclusive or not under the Anti-Bribery Law:

- business organizations and sole proprietorships, incorporated or not, regardless of the type of organization or corporate model adopted;
- any foundations or associations of entities or persons (including voluntary organizations/charities); and
- foreign companies with offices, branches or other representation on Brazilian territory.

Prohibited acts

The Anti-Bribery law applies more widely than just to corruption. It also applies to other illegal conducts committed against local and foreign public administration. The following acts (if proven), are prohibited:

- to promise, offer or give, directly or indirectly, any undue advantage to a public agent, or to a third party related to that agent
- to finance, fund, sponsor or in any way subsidize the performance of wrongful acts provided for in the new law
- to make use of an individual or legal entity to conceal real interests or use deception to hide the identity of beneficiaries of acts performed
- in relation to public tenders and contracts, to:
    - thwart or defraud the competitive nature of a public tender procedure;
    - prevent or adversely affect the performance of any act of a public tender procedure;
    - remove or try to remove a tenderer by fraudulent means or by the offering of any type of inducement;
    - defraud a public tender or a contract arising from it;
    - to create, fraudulently or illegally, a legal entity to participate in a public tender or enter into an administrative contract;
    - to gain an undue advantage or benefit, fraudulently, from amendments or extensions of contracts entered into with public administration, without the authorization of law or in the public tender invitation or contractual instruments; or
- to manipulate or disrupt the economic and financial balance between the parties in contracts entered into with public administration; or
- to hinder investigation or auditing activities of public entities or agencies, or interfere with their work.

Sanctions

The sanctions set out in the Anti-Bribery Law are harsh, and these include:

- Administrative sanctions:
  - fines of 0.1 percent to 20 percent of the gross revenue of the legal entity that fiscal year (which in Brazil is the calendar year) previous to the initiation of administrative proceedings, excluding taxes; and never below the value of the advantage obtained (based on estimates); and
  - publication of the adverse decision.

  If it is not possible to use the criteria above, the fine will range from BRL6,000 to BRL60 million.

- Judicial sanctions:
  - seizure of assets, rights or valuables representing, directly or indirectly, the amount of the advantage or benefit gained from the infringement;
  - partial suspension or prohibition of the continuity of its activities;
  - compulsory dissolution of the legal entity; and
  - prohibition from receiving funds, subsidies, grants, donations or loans from public agencies and from public financial institutions controlled by the government, for a period of one to five years.

The application of these sanctions will not exclude additional sanctions being applied (e.g., under the Improbity Law [No. 8,429/92] or Public Procurement Law [Law No. 8,666/93]).

All administrative and judicial sanctions relating to loss of assets, rights or valuables will be applied under the theory of strict liability. This means that CADE need only show the illegal acts were committed for the benefit of or in the interests of the legal entity. The application of the remaining sanctions (e.g., fines, prohibitions on doing business, prohibitions from receiving lent public funds) requires a finding of fault or intent on the part of the entities involved.

Factors that will be taken into consideration in applying the sanctions include:

- the seriousness of the offence;
- the advantage gained or sought;
- whether the offence was fully or partially completed;
- the level of damages indemnified; and
- the negative effects produced by the offence.

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Anti-corruption due diligence is imperative to avoid successor liability for such acts of an acquired company pre-acquisition, since the Anti-Bribery Law establishes successor liability in the event of amendments to the articles of association, transformation, merger, acquisition or spin-off of the company. For mergers and incorporations, successor liability will be limited to payment of fines and full restitution of the damages, up to the limit of the assets transferred.

In line with anti-corruption legislation adopted in other countries (in particular, the United States and the United Kingdom), Brazilian law now expressly recognizes that companies with effective compliance programs in place and which cooperate with authorities for the investigation of the offences will be more favorably treated.

Leniency agreements

The Anti-Bribery Law allows public administration to enter into leniency agreements with the legal entities responsible for prohibited acts, provided they effectively collaborate with any investigation and with the administrative proceeding, and that such collaboration results in:

- the identification of those responsible for the violation, where applicable; and
- rapid collection of information and documents confirms that the illegal acts under investigation were committed.

Leniency agreements may only be executed when the following requirements are each fulfilled; the legal entity:

- is first to come forward and demonstrate its willingness to cooperate with the investigation of the illegal act;
- completely ceases its involvement in the investigated infringement from the date of the proposal of the agreement; and
- admits its participation in the offence and fully and permanently cooperates with investigations and administrative proceedings until their end.

Leniency agreements will not exempt a legal entity from its obligation to provide restitution for the damages caused. However, they will reduce the fine by up to two-thirds, and will exempt the legal entity of all administrative and judicial sanctions under the Anti-Bribery Law. The Anti-Bribery Law also allows public administration to enter into a leniency agreement with a legal entity responsible for committing illicit acts as described in Articles 86–88 of the Public Procurement Law (Law No. 8,666/93).

4.4.2 Money laundering rules

The concept of “money laundering” in Brazil encompasses any criminal offence or misdemeanor or tax evasion crime.

The AML Act is designed to prevent misuse of the financial system for the illicit acts it describes. It makes legal entities responsible for identifying customers and for maintaining records of transactions, and reporting

suspicious transactions. Failure to do any of these will render the entity liable to administrative penalties for noncompliance.

The Act also created the Council for the Control of Financial Activities (*conselho de controle atividades financeiras*; COAF or CCFA, the acronym in English), an agency under the Ministry of Finance responsible for the regulation and investigation of suspicious transactions that potentially involve money laundering. The CCFA has powers to impose administrative penalties.

The 1998 amendments to the law increased the number of individuals and legal entities that are obliged to inform CCFA of suspicious activities, as well as capture entities that have reporting duties (e.g., stock exchanges, commodities exchanges, derivative exchanges, banks, securities brokers and dealers, insurance companies, and factoring companies). Any transaction conducted with those entities involving assets that can be converted into currency exceeding BRL10,000 must be reported to the CCFA.

The Central Bank (BACEN) has published specific rules on money laundering prevention and on 24 July 2009 issued rulings and an administrative act on 11 February 2010 to enhance the anti-money laundering and terrorist finance system in Brazil.[2]

4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

4.5.1 Foreign investments

In general, Brazilian law does not prohibit or restrict the participation of foreign investment in business activities. With certain exceptions, foreign investors are free to establish any business in Brazil. Those few areas in which foreign investment is either totally prohibited or limited to minority interests include some telecoms and media segments. In these restricted areas, foreign investors may need to use different kinds of structures, including joint ventures and consortia, depending on their requirements.

Foreign investments must be registered with the Brazilian Central Bank's electronic system (SISBACEN) to enable the remittance of profits and/or interest on equity (*juros sobre capital próprio*) to foreign investors, as well as the repatriation of foreign capital invested in Brazil and the reinvestment of profits and/or interest on equity. There are also general rules governing the payment of royalties and technical assistance fees.

Foreign investment under the law include:

- items imported by entities with headquarters in Brazil as capital contributions (e.g., machinery, equipment)
- capitalization of credits against Brazilian companies held by foreign lenders, and
- the inflow of foreign funds to Brazil as capital contributions.

[2] Those rules were enacted in line with recommendations of the Financial Action Task Force (FATF), the intergovernmental body created to promote the development of international policies to combat money laundering and terrorist finance. Brazil has been a member of FATF since 2000.

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Registration of foreign direct equity investments

Foreign direct equity investment registration is carried out through SISBACEN by means of electronic registration (*registro declaratório eletrônico de investimentos externos diretos* – RDE-IED). After the foreign currency funds are exchanged into local currency or machinery is imported, the Brazilian beneficiary company or representative must electronically register the investment with SISBACEN (both in foreign currency and in the corresponding amount in local currency) within 30 days of the date of receipt of the funds. Registration allows payment of dividends and interest on equity to foreign investors, as well as repatriation of foreign capital invested in Brazil.

Reinvestments

Once taxed, and if not remitted abroad to the foreign investor, profits may be reinvested in the same company that generates the profits or in any other Brazilian company chosen by the foreign investor. The reinvestment must also be registered with SISBACEN. The amount of foreign currency registered as reinvestment is determined by the average exchange rate at the date of the relevant reinvestment and published by BACEN.

Repatriation of capital

When the foreign investor sells shares or quotas in the Brazilian venture or when the Brazilian company reduces its capital or is liquidated, the foreign investment can be repatriated in the relevant foreign currency free of taxes up to the proportional amount of foreign currency registered with SISBACEN.

For a capital reduction, the amount to be repatriated exceeding the value registered in foreign currency with SISBACEN represents a capital gain and is therefore taxed by withholding income tax deducted at source at the rate of 15 percent,[3] or 25 percent if the beneficiary is located in a low-tax jurisdiction (i.e., tax haven country).

If a foreign investor withdraws from its Brazilian subsidiary by assigning its quotas/shares in an amount exceeding that registered with SISBACEN, the exceeding amount will be considered a capital gain and subject to withholding income tax.

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[3] The Brazilian Presidency sanctioned, on 16 March 2016, Law No. 13,259/16, which converted into law the rules of Provisional Measure No. 692 of 22 September 2015 ("MP 692/15"). The final wording of Law 13,259/16 provided progressive rates for the levy of Personal Income Tax on capital gains earned as a result of the disposal of assets and rights of any nature. The progressive rates are the following: (i) 15% over gains that do not exceed BRL5 million; (ii) 17.5% over gains that exceed BRL5 million but do not exceed BRL10 million; (iii) 20% over gains that exceed BRL10 million but do not exceed BRL30 million; and (iv) 22.5% over gains that exceed BRL30 million. We highlight that the referred tax rates also apply to the disposal of an asset or right located in Brazil performed by nonresident individuals or legal entities.

It is important to note that paragraph 2 of Article 5, initially included in the Bill of Law of Conversion of MP 692/15, has been vetoed by the Presidency. Such rule provided that the new tax rates would be applicable for disposals that occurred as from 1 January 2016. However, this provision has been vetoed based on Article 62, paragraph 2, of the Federal Constitution, which provides that a Provisional Measure that implies in the imposition or increase of taxes (except the so-called "regulatory" taxes) will only produce effects in the subsequent financial year if it is converted into law up to the last day of the year in which it was enacted. Therefore, we believe there are good arguments to support that the new tax rates apply only for disposals occurring as from 1 January 2017.

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Colombia
Mexico
Peru
Venezuela

Financial tax

Any cross-border remittance of funds from or to Brazil is subject to taxation: the so-called IOF (*imposto sobre operações financeiras*); i.e., tax on financial transactions) is levied at the rate of 0.38 percent on the amount transferred as purchase price to the seller or as capital contribution to the purchase vehicle, at the time of the funds transfer. Other rates may apply to different kinds of transaction facilitating the funds transfer (e.g., certain cross-border loans).

4.6 Industry-Specific Regulation

Generally, foreign investors can establish a subsidiary in Brazil to carry out any kind of business, with some specific exceptions, such as:

- exploitation and use of deposits, mines and other mineral resources and of sources of hydraulic power;
- ship transportation of certain products;
- ownership and administration of media companies, limited to 30 percent of the voting capital. The participation of foreigners in such companies can be indirect by the bank, via a company incorporated under Brazilian law with headquarters in Brazil;
- investment in cable TV, limited to 49 percent of the voting capital;
- activities relating to defense and national security, and the practice of certain activities at border areas;
- the acquisition of rural real estate (a Brazilian company could be prohibited from purchasing rural property if foreign nationals or foreign companies control the majority of its capital. In addition, restrictions apply if the rural real estate is located in areas reserved for national security reasons or nature preservation reserves);
- national airline companies: On 2 March 2016, the Brazilian government published the Provisional Measure No. 714/2016 (“MP No. 714/16”),[4] which, among other matters, increased the limit of equity interest held by foreign investors in Brazilian airline companies for up to 49 percent of their voting capital, subject to the approval of the relevant aviation authority. Before the MP No. 714/16, the limit of equity interest allowed to foreign investors in Brazilian airline companies was only 20 percent. According to the new measure, the participation of foreign investors in the voting capital can even exceed the 49 percent limit if there is reciprocity between Brazil and the country of the foreign investor, based on air services agreements executed by both countries;
- health insurance, and
- the incorporation or acquisition of financial institutions in Brazil.

[4] The MP No. 714/16 is considered promulgated as of 2 March 2016, being immediately effective since then, but its enactment must be approved by the Brazilian Congress within a 60-day period, extendable for an additional 60 days. During this period, the Congress may amend its wording or even reject it, determining the effects of the acts performed while the provisional measure was in force.

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4.6.1 Banking and financial services

Foreign financial institutions are prohibited from opening new branches in Brazil and from increasing their equity interest in Brazilian financial institutions, unless authorized by an international treaty (providing for reciprocity), or the Brazilian government considers foreign participation to be in Brazil's best interests (Article 52, Transitory Constitutional Provisions Act (*ato das disposições constitucionais transitórias*) of the Brazilian Federal Constitution of 1988).

That said, the federal government does tend to treat most acquisitions of Brazilian financial institutions by foreign investors as being in the best interests of the country and in view of that, will investigate the controlling group. The procedure for institutions interested in participating in equity interests of Brazilian financial companies should present a formal request to the Central Bank, which will review it before submitting it for CMN approval, which in turn will forward it to the president of Brazil for final authorization by Decree.

The Central Bank will want to see information on the controlling group, including financial statements, corporate documents and any other information that it may deem appropriate. It will also want to know why and how the project will benefit the Brazilian economy.

The formalities and timing of Central Bank's approval depend on the structure of the transaction, but it is usually a very lengthy and bureaucratic procedure. For example, if the foreign interest is obtained via the issue of new shares rather than the purchase of existing ones, the new subscription amount must be deposited with the Central Bank prior to obtaining final approval for the change in control.

4.6.2 Telecommunications

The General Telecommunications Law establishes that as a precondition of becoming a telecommunications service provider, a company should be located, established and managed in Brazil under Brazilian laws. Indirect foreign investment is allowed, via a holding company established in Brazil.

4.7 Import/Export Controls

4.7.1 Import of products

Import transactions and financial and equipment leases for longer than a 360-day term must be registered with SISBACEN through the ROF system.

4.7.2 Exports of products and services

As a general rule, exports must be carried out with payment in respect of the exported products to the Brazilian exporter being made in Brazilian reais or foreign currency. There are very few exceptions where exports may be carried out without the exporter's payment, such as capital contribution through assets and temporary export.

Brazilian exporters can maintain abroad foreign funds received as payments for products and services that they exported. Those funds are to be used by the Brazilian exporter only for investments, financial investments or payments of its own obligations abroad. The exporter is expressly prevented from

lending such funds. The value of the funds, which can be maintained abroad in this way, may be up to the equivalent of the exporter's export income, although this cap may be modified at any time by the CMN.

The location of the funds held abroad by Brazilian exporters must be notified to the Federal Revenue Department (SRF) by means of a statement filed in accordance with Ruling (*instrução normativa*) No. 726/2007. Exporters that fail to comply with that Ruling or with applicable legislation, and those who fail to inform the SRF about the existence of such funds abroad, will be fined by SRF.

5. Transfer Taxes

5.1 Acquisition of Shares

In a direct share acquisition, none of the Brazilian transactional taxes (ICMS, IPI, PIS/COFINS) apply. The acquisition of shares generally triggers capital gains tax as there is no stamp duty in Brazil. The combined Corporate Income Tax (IRPJ) and Social Contribution (CSLL) rate generally applicable to capital gains of Brazilian entities is currently 34 percent. If the capital gain is recorded by an individual resident in Brazil, the tax rate will be 15 percent up to 31 December 2016, and from then on, it will vary from 15 percent to 22.5 percent depending on the amount of the capital gain.[5] It is common to see sellers reorganizing the corporate structure of the target company preclosing to ensure individuals are the entities selling the shares rather than a holding company.

In a share acquisition, even if both buyer and seller are non-Brazilian (i.e., taxpayers of jurisdictions other than Brazil), the capital gain recorded in the transfer of shares or quotas of Brazilian companies is subject to Brazilian taxes. In those cases, the buyer's local representative may be held personally liable if the seller's capital gain is not paid on closing. The rate of the capital gain tax will be 15 percent unless the foreign taxpayer is based in a blacklisted jurisdiction when the rate will be 25 percent.[6]

If all legal requirements are met, Brazilian legislation allows the buyer to benefit from the tax amortization of the goodwill paid in a direct share acquisition. To proceed with this amortization structure, the buyer generally justify the goodwill payment based on the future profitability of the acquired company. The goodwill amortization is not free of risk as tax authorities may challenge it. To be implemented, the goodwill amortization requires the use of a Brazilian purchase vehicle to record the goodwill locally and afterward to merge with the target company.

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[5] The Brazilian Presidency sanctioned, on 16 March 2016, Law No. 13,259/16, which converted into law the rules of Provisional Measure No. 692 of 22 September 2015 ("MP 692/15"). The final wording of Law 13,259/16 provided progressive rates for the levy of Personal Income Tax on capital gains earned as a result of the disposal of assets and rights of any nature. The progressive rates are the following:
- 15% over gains that do not exceed BRL5 million;
- 17.5% over gains that exceed BRL5 million but do not exceed BRL10 million;
- 20% over gains that exceed BRL10 million but do not exceed BRL30 million; and
- 22.5% over gains that exceed BRL30 million.

[6] We highlight that the tax rates referred to in footnote 4 above also apply for disposal of an asset or right located in Brazil performed by nonresident individuals or legal entities.

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5.2 Acquisition of Assets

Asset acquisitions are less common in Brazil because transactional taxes are incurred in addition to capital gains taxes. Although these taxes are often recoverable, they imply an upfront disbursement of cash. However, depending on the facts of the transfer, these taxes may not be recoverable, which generates an additional tax burden on the transaction.

The transactional taxes that may be payable are:

- taxes on gross revenues, PIS and COFINS on a noncumulative basis at the combined rate of 9.25 percent on the total amount of the revenues derived from the sale of assets other than permanent assets;[7]
- value-added taxes, ICMS and IPI, which apply mostly to inventory (18 percent[8] and variable rates, respectively, depending on the tariff classification of the products in question); and
- municipal tax on transfers of real estate, ITBI (generally 2 percent–5 percent, depending on the municipality).

5.3 Value-Added Taxes

Value-added taxes, ICMS and IPI are computed by these plants, facilities or branches of a company that engage in taxable transactions. These units are considered separate taxpayers for the purpose of the monthly tax computation. For both taxes, the amount due is calculated based on the difference between credits for goods entering the facility and debits for the goods sold or leaving the facility under other taxable circumstances. These value-added taxes may be avoided in an asset acquisition if the buyer acquires the business activity of an individual branch as a going concern (called the acquisition of an *estabelecimento comercial*). In this case, the transaction is considered as a change in the ownership of the establishment and does not trigger ICMS and IPI taxation.

Value-added taxes are generally not payable on the purchase of shares.

6. Employee Issues

6.1 Method of Transfer under Local Law

6.1.1 Acquisition of shares

In share acquisitions, there is no change in the employer/employee relationship. Change of ownership of the target company does not affect the rights of the company’s employees, nor the employment agreements between the company and its employees.

6.1.2 Acquisition of assets

The buyer’s liability in the labor sphere will always be the same, regardless of the fact that it has acquired shares, assets or merged part of its assets with

[7] With some exceptions (e.g., financial institutions and companies taxed by the “presumed income method.” which are subject to PIS/COFINS at 3.65%).
[8] Sale of inventory within the State of São Paulo. Interstate transactions are usually subject to a 12% rate.

seller. The transfer of the company's ownership as a whole is not needed to trigger liability succession. The buyer will inherit all liabilities and obligations to employees that the seller had, even if the transfer involved just one establishment or one line of business of the seller. Case law suggests certain prerequisites for the buyer to inherit the seller's employee liabilities, namely, that:

- the establishment (as a production unit) is transferred from one holder to another; and
- the employees' employment is not interrupted.

That said, in more recent court decisions, the second requirement has been found to be unnecessary, and the first requirement by itself has been sufficient to characterize successor liability.

Two articles of the Brazilian Labour Code (CLT) provide for the assumption of labor liabilities:

- *Article 10*: "modification in the corporate structure of the company shall not affect the rights of the company's employees'; and
- *Article 448*: "modification in the ownership or corporate structure of the company shall not affect the employment agreements entered into between the company and its employees."

These legal provisions also apply to the transfer of assets, resulting in the transfer of employees together with the business.

Thus, the purchaser of the business will always be entirely responsible for labor-related debts and obligations arising from the acquired business, and conversely, the seller may not be held responsible after closing for the payment of these labor-related debts and obligations. An exception to this rule occurs when the sale was made to avoid payment of labor rights and other creditors of the seller, in which case both seller and buyer will be considered jointly liable for the payment of outstanding obligations.

Any contractual clauses that purport to exclude a buyer's liability will be null and void before the labor courts, since the assumption of agreements by the new holder arises by operation of law. But any clauses agreed upon between seller and buyer in relation to the seller's responsibility for preclosing liabilities will be effective in relation to the parties to the agreement only (so that in the event of labor claims, the buyer would have to take legal action against the seller to recover the sums involved)—but not in relation to third parties.

6.1.3 Transfer of business

In the case of asset acquisitions involving the transfer of a business as a going concern (i.e., the acquisition of a *estabelecimento commercial*), Brazilian labor law allows either the continuation or the termination of the employment relationship.

In these cases, the transfer of employees does not necessarily require the termination of the employment agreements (which triggers certain labor rights and severance payments). Instead, labor law allows the transfer of such agreements to the acquiring company. The concept is that the employees are

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transferred together with the assets, as a part of the economic activity. The transfer proceeding is very simple and is formalized by amending the employee's labor ID (*carteira de trabalho*: a form of booklet listing all employee's jobs) and the company's files on each employee. The new employer is the legal successor of the employees' labor liabilities.

The parties of an asset acquisition could alternatively agree that the seller will terminate its employees who will be immediately rehired by the buyer. Although this procedure is very expensive for the seller (who will generally be reluctant to accept this alternative) and does not completely exclude potential succession labor liabilities for the buyer, it will give the buyer some comfort by reducing the amounts that may be claimed by the seller's former employees in future.

If the parties agree to terminate and rehire the employees, the termination procedure requires an advance notice of a period from 30 to 90 days, depending on the length of service of the employee with the seller. Alternatively, it requires the payment of compensation in lieu of that notice period, together with other severance payments (e.g., Christmas bonus, annual vacation pay. Also, since the termination is not instigated by the employee, the seller will be required to pay a fine equivalent to 50 percent of the Severance Fund account balance (*fundo de garantia por tempo de service*/FGTS). This is a blocked bank account in the name of the employee administered by a governmental bank where the employer deposits monthly 8 percent of the employee's remuneration. This blocked account can only be released to the employee in rare circumstances provided by applicable law.

Generally, these rules apply to all employees, including senior or management employees, especially if they have very limited powers. In any event, either in the termination and rehire scenario, or in the straight transfer of employees, the employees' current employment conditions cannot be modified in a way that adversely affects the employees. Although it is possible to change a few conditions of the employment relationship, no changes can negatively affect the employee (e.g., except in exceptional cases, salaries cannot be decreased). Because of Article 448 of the CLT (see **6.1.2**), any change in the compensation of the employee or in his or her employment conditions:

- requires the employee's express consent in writing; and
- must not cause any loss (financial or otherwise) to the employee.

6.2 Protection against Dismissal

The concept of "at-will" employment is recognized in Brazil. Both employee and employer–company may terminate the employment relationship at any time for any reason, with or without cause.

Termination with cause is only possible if the fault committed by the employee is one of those listed in the CLT (which sets out an exhaustive list of possibilities).

Brazilian employees are always entitled to some severance pay upon termination. The amounts of the severance and labor rights will depend on whether the employee has been terminated for cause or not, and whether the termination is effected by the employer or the employee.

The basic and routine severance payments on termination without cause are:

- compensation (i.e., salaries and fringe benefits) due until the day of termination;
- accrued vacation leave credits based on one month's remuneration per year of employment; when termination occurs before a full year is completed, calculated on a pro-rata basis;
- vacation bonus, equal to one-third of one month's remuneration; when termination occurs before a full year is completed, calculated on a pro-rata basis;
- pro-rata Christmas bonus or "13th month salary" equal to 1/12th of the employee's monthly remuneration; when termination occurs before a full year is completed, calculated on a pro- rata basis from 1 January until the day of termination, equivalent to at least 15 days' remuneration; and
- 50 percent of the balance of the employee's Severance Fund bank account (FGTS).

The employer will also need to pay a number of payroll taxes calculated on some of the above benefits.

Prior notice for employees' termination must be proportional to the length of time the worker served the employer, capped at 90 days. Employees who have up to one year's service with the same company are entitled to 30 days' notice. However, for those employees with more than one year of service with the same company, the notice period is three days for each year of employment up to a maximum of 60 additional days.

Chile

Chile

1.1 Overview

As Chile continues to demonstrate economic and political stability and to integrate with international markets, its treatment of foreign investment and the impact of its laws and legal system on investment decisions are likely to be of increasing interest to overseas investors. Chilean laws are structured to encourage foreign investment by providing a stable and certain regulatory framework, which will allow foreign investors to compete on equal terms with local businesses. With the exception of certain industries, which are deemed to be in Chile's national interest, 100 percent foreign ownership of investments is possible.

1.2 General Legal Framework

The main bodies of legislation relating to companies in Chile are the Commerce Code, Law No. 3,918 (on limited liability companies) and Law No. 18,046 (on stock corporations) and its regulations, all of which provide for the basic legal framework and the most important provisions governing Chilean corporate entities and M&A activity.

1.3 Corporate Entities

The main types of corporate entities available in Chile are:

- limited liability companies/partnerships (*Sociedades de Responsabilidad Limitada*/SRLs);
- stock corporations (*Sociedades Anónimas*/SAs); and
- limited liability stock companies (*Sociedades por Acciones*/SpAs), the newest legal vehicle used in Chile. SpAs were only introduced into Chilean legislation in 2007, but have soon become one of the most common vehicles with which to structure a business in Chile, given the flexibility it affords its shareholders in structuring the company's management and the fact that it is the only legal entity in Chile that permits only one shareholder.

This handbook focuses on privately held companies' M&A, and while some of the issues may also be faced by publicly traded companies, it should be noted that there are substantial differences between the laws and regulations that apply to publicly traded and those that apply to privately held companies.

1.3.1 Limited liability companies/partnerships

The SRL is the most commonly used business entity in Chile. Like SAs, the liability of members is limited and, unlike many foreign partnerships, the entity is legally distinct from the partners. Accordingly, partnership losses may not be set off against partners' other incomes. The liability of partners is limited to the amount of their capital contributions to the partnership or a greater amount if agreed on in the partnership deed.

A minimum of two partners is required and a maximum of 50 partners is permitted. A partnership is automatically dissolved if there is only one partner. Foreign legal entities may be partners.

The partnership deed will set out how the partnership is to be managed. Management powers may be exercised by one or more of the partners, a board of directors or by a third party. Any amendment or modification to the partnership deed, including change of partners, modification of the corporate purpose, or to the powers of management, must be agreed to by unanimous consent of all the partners.

1.3.2 Stock corporations

An SA may be either public/open or private/closed. It is public if its shares are registered (either voluntarily or as mandated by law) with the Superintendency of Securities and Insurance (SVS), and an SA will be required to register its shares if it has at least 500 shareholders or more than 10 percent of its issued capital is held by more than 100 shareholders. Shareholders who hold more than 10 percent of the share capital are excluded for the purpose of this final calculation. All other SAs are private, with the exception of insurance and reinsurance companies, pension fund administrators and other regulated entities, which are known as "special SAs" and which, even if private/closed in their own structure, are subject to the same rules applicable to public/open SAs.

Public/open and special SAs are subject to the surveillance of the SVS. In the case of public/open SAs, as issuers that publicly offer their shares, both the company itself (issuer) and its securities (shares) must be registered with the SVS.

Public SAs must also prepare annual reports and audited annual financial statements, and distribute at least 30 percent of net profits (unless all shareholders agree otherwise). These requirements do not apply to private SAs.

A minimum of two shareholders is required in an SA, which is automatically dissolved if all its shares are held by one sole entity or person for an uninterrupted period of 10 consecutive days. Management is in the hands of a board of directors, formed by a minimum of three directors in the case of private/closed SAs and by a minimum of five for public/open SAs. Directors may be of any nationality.

An SA's capital is set out in its bylaws and may consist of contributions of cash or property. Shares may not be issued as payment for personal services or for the formation of the SA. Capital must be subscribed for and paid in within three years. The board of directors cannot restrict share transfers and the bylaws of public SAs cannot limit the free transfer of shares. However, shareholder agreements restricting transfer (and other) rights are permitted and must be registered with the SA and made available to other shareholders and interested third parties.

1.3.3 Limited liability stock companies

The SpA is a relatively newly created legal entity. It is a hybrid vehicle that has the basic structure of an SA but some of the flexibility of an SRL. In this sense, SpAs have fewer restrictions than SAs (e.g., in connection with restrictions to protect minority interests). For these reasons, they are especially useful to capital ventures or seed capital enterprises. Generally, they receive the same tax treatment as SAs. Like SAs, the liability of

shareholders is limited. Accordingly, company losses may not be set off against its shareholders' other incomes.

SpAs are the only type of legal entity in Chile where 100 percent direct ownership can be achieved because they do not need to have a minimum of two shareholders to exist. Foreign individuals or foreign entities may be shareholders of a Chilean SpA.

Importantly, the formation documents may restrict the transfer of shares and may establish the minimum or maximum amount or percentage ownership that a single shareholder may have, either directly or indirectly through one or more affiliates or other related parties. Likewise, the formation documents may include mandatory put or call option rights in favor of another shareholder, the company or even a third party, if certain conditions are met. For these purposes, any buyer of shares in an SpA is required to expressly state in the purchase agreement that it accepts the bylaws of the company at the time of the transfer.

SpAs may be transformed into SAs or SRLs at any time by resolution of the shareholder(s).

2. Acquisition Methods

In Chile, a business can be acquired either by a share (or "interests," in the case of an SRL) purchase or an asset purchase. Mergers and spin-offs are permitted under Chilean law.

2.1 Acquisition of Shares

Generally, all that is required to transfer the shares in an SA or an SpA is a private share transfer form or a public deed executed by both seller and buyer (in compliance with certain mandatory formalities as set out in the regulations to the Stock Corporations Law), followed by registration in the shareholders' registry of the company. A share certificate may or may not be issued, at the option of the new shareholder. A share purchase agreement is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction.

In the case of an SRL, each partner owns a "*pro-rata*" participation or interest in the capital of the company that is not evidenced in "shares" (nor in "quotas" or any other "unit"). Generally, reference is made in the bylaws of the SRL to the amount of capital that has been actually subscribed to and/or paid by each partner, and it is also possible to state such partner's ownership percentage in the company, by taking the amount subscribed to by the partner and dividing it by the total authorized capital of the company. Therefore, the transfer of ownership (participation or interests) in an SRL implies an amendment of the company's bylaws, which requires the unanimous consent of all partners. The transfer and bylaws amendment must also be carried out by a public deed, an excerpt of which will be then registered in the Commerce Registry and published in the *Official Gazette*.

2.2 Acquisition of Assets

When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. For some assets, this will simply

be a case of delivering the asset to the buyer, but in other cases, the formalities are more prescriptive, as is the case of assets subject to registration (e.g., real estate property, intellectual property, motored vehicles or mining concessions). It will therefore be necessary to record the agreement in a public deed or include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with. As with a share acquisition, there is usually an asset purchase agreement to record the respective rights, obligations and liabilities of the parties.

2.3 Mergers/Other Acquisition Methods

Alternative corporate structures are available to merge or consolidate companies in Chile, with different rules applying to SRLs on the one hand, and to SAs and SpAs on the other. Mergers between different types of companies are allowed.

There are two main types of mergers in Chile – statutory and non-statutory mergers.

Statutory mergers are only regulated with respect to SAs (although the same rules apply also to SpAs). In a statutory merger, a resolution approving the merger (as well as some other materials supporting the merger) must be adopted at a special shareholders' meeting and must carry a majority vote of at least two-thirds of the shares entitled to vote (for each of the entities involved in the merger). Where SpAs are involved, the applicable quorum will be as established in its bylaws or, if the bylaws are silent on the issue, the same rule as that applicable to SAs will apply. Dissenting shareholders will have the right to require the corporation to buy their shares (withdrawal right), at net book value in the case of private/closed SAs and market value in the case of public/open SAs.

A non-statutory merger is achieved when 100 percent of the shares/interests in an SA or SRL, respectively, is held by one sole shareholder/partner. The same rule may also apply to an SpA as long as its bylaws expressly contemplate this possibility.

Although it is not expressly regulated, Chilean law also allows for a merger of an SRL. As with any other amendment to its bylaws, a merger requires the unanimous consent of all partners.

As a general rule, mergers proceed by cancelling the shares/interests of the "absorbed" company, transferring the absorbed company's assets and liabilities to the "absorbing" one, and issuing shares/increasing the capital in the absorbing company and giving that shares/interests to the shareholders/partners of the absorbed company.

Normally, tax benefits such as accrued losses cannot be transferred from the absorbed corporation to the absorbing corporation, but tax effects must be determined on a case-by-case basis.

3. Negotiation, Signing and Closing

3.1 Customary Issues in Negotiating Acquisition Agreements

This is a brief overview of certain key provisions in typical Chilean purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking here.

Purchase Price		
1	Is a purchase price adjustment common? What type is common (e.g., debt-free, cash-free)?	Purchase price adjustments are common. All types seen, including working capital adjustment, cash-free debt-free, NAV adjustments, earn-out adjustments and others are common.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares the completion balance sheet?	Usually the buyer; sometimes the target company.
4	Is the balance sheet audited?	Not necessarily, although generally seen in practice.
5	Is an earn-out common?	It is more common in private equity transactions where sellers continue to manage the target company after closing, but also in M&A transactions. It is less common where seller completely exits.
6	Is a deposit common?	Both deposit and escrow are reasonably common.
7	Is an escrow common?	Reasonably common.
8	Is a break fee common?	No.
Conditions Precedent		
9	Is the Express Material Adverse Event (MAE) completion condition common?	Yes.
10	Is the MAE general or specific?	Both seen.
11	Is quantification of MAE common?	Although seen, it is fairly uncommon.
Covenants, Access		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Yes. Waterfall provisions are uncommon.
13	Is non-solicit (of employees) common?	Yes.

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14	Is non-solicit (of customers) common?	Yes.
15	Is broad access to books, records, management between sign and close common?	Yes.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	It is common to update disclosure schedules, but it is normally limited to things like lists of contracts. Notification of possible breach is common. In cases of material breach, there is the right to adjust purchase price or to terminate the agreement.
17	Is a separate tax covenant/indemnity or tax deed common?	It is common to have tax indemnity; it is usually included in the purchase agreement.
Representations and Warranties		
18	Materiality in representations – how is it quantified (e.g., by a dollar amount)?	Materiality qualifiers are commonly seen, although not usually quantified (except by certain sophisticated sellers).
19	How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?	All alternatives can be seen, although it is usually limited to actual knowledge and due inquiry of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Yes, but sophisticated sellers try to avoid it.
21	Is disclosure of the data room common?	Yes, but it is generally resisted, except in auctions.
Repetition of Representations and Warranties		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion is common, as are bring-down certificates.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects is common, but there is often a carve-out for some fundamental representations, which must be absolutely clean and true.

24	Is double materiality common (such as where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation)?	Double materiality is usually avoided.
Limitations on Liability		
25	What is the common cap amount (as a percentage of purchase price)?	This depends on the type of deal. In general, buyer will ask for 100%, but it is possible to negotiate this down. It may range from 15% to 100% (mostly less than 100%).
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Both are seen regularly, but it depends on the sophistication of the parties (it most commonly applies to the whole agreement, but for certain specific carve-outs).
27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g., title, capitalization, authority). Also, tax, labor, environmental and specific areas of concern are usual exceptions as well, sometimes with specific higher caps. Separate caps can be negotiated. Normally, gross negligence and willful misconduct are also excluded.
28	Is a deductible or basket common?	Both are common.
29	Is a *de minimis* common?	Yes.
30	How long does liability survive? Are there any common carve-outs (e.g., fraud, tax, key warranties)?	General survival of 18–24 months is common. It is also common to carve out labor, tax, environmental and some specific areas of concern. Fraud is covered by law.
31	Is warranty insurance common?	No. No insurance policies in Chile can be automatically redeemed after the breach.
Reliance		
32	Do financiers seek to rely on buyer's due diligence reports?	It is uncommon.
Set-offs against Claims		
33	Is a set-off against claims for tax benefits common?	No.
34	Are insurance proceeds common?	It is increasingly common for those actually received.

35	Are third-party recoveries common?	It is increasingly common for those actually received.
Damages, Knowledge		
36	Is the obligation to mitigate damages common?	Yes.
37	Is exclusion of consequential damages common?	Yes.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge had no effect on warranty/indemnity?	Acquisition agreements are normally silent in this regard.
Dispute Resolution		
39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, but subject to Chilean public policy rules. Common governing law is Chilean law and New York law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. Santiago Chamber of Commerce is normally appointed, or alternatively, ICC or AAA in New York or Miami.
Stamp Duty		
41	If stamp duty is payable, is it normally shared?	No stamp duty is payable.

3.2 Formalities for Execution of Documents

3.2.1 Transfers of shares

Share transfers must be granted in writing by either a public deed (signed before and authorized by a notary public) or a private instrument signed in front of two witnesses of legal age, a notary public or a stockbroker. All parties involved must be properly identified by their respective ID numbers. Market practice in the majority of cases is for a share transfer to be additionally documented between seller and buyer by way of a written share purchase agreement (SPA).

The transfer of interests in an SRL imply an amendment of its bylaws and must be performed via a public deed signed in front of and authorized by a notary public. An excerpt is then registered in the Commerce Registry and published in the *Official Gazette*.

3.2.2 Transfers of assets

In a transfer of assets, written contracts or public instruments may be required by law or to fulfil a registration requirement. Each individual asset needs to be transferred in accordance with the formalities that apply to the transfer of that type of asset. In the case of certain types of assets, the formalities are more prescriptive (e.g., for real estate property, intellectual property, motored vehicles or mining concessions). It is therefore necessary to record the

agreement in a public deed or to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with. As with a share acquisition, there is usually an asset purchase agreement to record the respective rights, obligations and liabilities of the parties.

3.3 Formalities for Transferring Title to Shares or Assets

3.3.1 Transfers of title to shares

Shares transfers must be granted in writing by either a public deed or a private instrument signed in front of two witnesses of legal age, a notary public or a stockbroker. On execution of the transfer agreement, the transfer will be valid between the parties. However, the transfer will not be effective against the company and third parties until notified to the company and registered in the shareholders' registry.

The company cannot refuse to register a transfer of shares and is obliged to register it without further formalities (unless the transfer is not in compliance with the basic formalities prescribed by the law).

3.3.2 Transfers of title to assets

An assets purchase agreement will frequently only require a signature by or on behalf of the parties. However, it may also be necessary for the agreement – or an ancillary document – to be executed as a public deed or to be authorized by a notary public, and then registered with the competent registrar due to formalities applicable to that particular kind of asset (e.g., real estate property, intellectual property rights, mining concessions and motored vehicles).

4. Regulatory Framework

4.1 Competition Law Considerations

Chilean antitrust law is contained in Decree Law No. 211 on the Protection of Free Competition of 1973, as amended (the "Competition Law"). The Competition Law applies to all "economic agents or groups of economic agents," including all categories of people and entities, public or private, local or foreign. Although the Competition Law mainly applies to acts within Chile, it extends to foreign activities that have anti-competitive effects in Chile.

The Competition Law is intended to cover all anti-competitive conduct and is designed to promote and defend free competition in markets. Article 1 provides that, "*[i] infringements against free competition in economic activities must be corrected, prohibited, and punished …*". Article 3 prohibits "*acts, agreements, or conventions that hinder, restrict or impede free competition, or which tend to produce said effects.*"

Among the actions that will be construed as hindering, restrictive or impeding free competition, the Competition Law lists the following actions:

- Express or tacit agreements between economic agents, or concerted practices between them, which confer to them market power and which consist of fixing sale prices or purchase prices, restrictions on output, allocation of territories or market quotas, excluding competitors or bid-ridding processes

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- Abusive exploitation by a company or a group of companies under a single controller of a dominant position in the market by price-fixing, imposing tying arrangements, allocating territories or market quotas, or other similar abuses
- Predatory practices, or unfair competition, with the intention of increasing or maintaining a dominant position

The *Fiscalia Nacional Económica* (FNE) is the governmental agency in charge of investigating and challenging breaches of competition and with enforcing the Competition Law. The FNE also leads the advocacy and promotion of free competition, as well as provides technical support to the competition tribunal (TDLC). The TDLC is the judicial body, subject to the authority of the Supreme Court of Justice, which will hear and resolve adversarial and non-adversarial competition cases. The TDLC also resolves consultations that the FNE or any private or public entity may submit for its review. It can issue punitive, restrictive or corrective measures.

4.2 Merger Control Overview

This is a brief overview of the merger control process currently in force (including timetables for clearance) in a typical Chilean purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Although this will change in the near future, with regard to mergers and acquisitions, a significant feature of the Chilean system is that it does not require premerger filing. If in doubt, parties may request a voluntary consultation with the TDLC.

As already anticipated, this merger control system will be significantly modified in 2016 as a result of a bill sent by the Chilean government to Congress, and which is expected to be approved in the first semester of the year. According to that bill, a new mandatory merger control system is to be implemented, and therefore, the parties to a concentration operation that surpasses certain thresholds (yet to be determined by the Ministry of Economy) will have the obligation to file with the FNE certain information describing such concentration operation and its potential effects. The bill indicates that, when the FNE receives a complete notification, it will have 30 business days to decide whether it approves the operation unconditionally or if the operation will be subject to certain conditions, or if an additional period is necessary to perform a thorough investigation. In this last case, the FNE will have up to 90 additional business days to carry out a more detailed revision. During this second stage of the investigation, interested third parties may participate (e.g., competitors, clients, suppliers and consumer associations). The new mandatory merger control system is expected to come into force in the second semester of 2016.

A reference to the merger control system currently in force is shown in the table that follows:

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e., are there penalties for failure to notify or for implementing a transaction without notification or approval)?	It is voluntary. However, if the filing is not performed, there is a risk that the transaction may be subject to a challenge by the FNE or an affected party afterward, if that transaction is considered harmful to competition. The FNE has published internal guidelines to inform the market of its position on merger control processes, and in which cases, it will consider a transaction might be harmful to competition. This include variables, such as the market share of the merging parties, the market conditions, barriers to entry, etc.
Timetable		
2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	For FNE filings: 3 months, approximately. For TDLC filings: Average time for clearance is approximately 8 months. If that decision is challenged before the Supreme Court, it may be extended by an additional 6–8 months.

4.3 Exchange of Competition-Sensitive Information and "Gun-Jumping" Issues

No specific rules apply in Chile to the exchange of competition-sensitive information and "gun-jumping" in pre-acquisition negotiations between companies. However, principles of common sense and reasonable behavior should apply. So, while no conduct will be illegal *per se*, conduct that actually harms competition or has the potential to do so could be considered to be unlawful. Thus, if in an exchange of competition-sensitive information in preliminary negotiations, such exchange can be justified on legitimate business grounds, it should generally not be considered a cause for concern by the antitrust authorities.

4.4 Anti-Bribery, Corruption and Money Laundering

Chile has adapted local laws to meet international standards on anti-money laundering. The main legal instrument is Act No. 19,913, which defines the offense of money- and asset-laundering as the concealment or disguise (in any way), of the illegal origin of goods, knowing that they stem, either directly or indirectly, from criminal activities (as described in a closed list of criminal

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offenses). The list of criminal offenses are as provided for in various Acts, including:

- Illegal Trafficking of Narcotic and Psychotropic Drugs (Act No. 19,366)
- Terrorist Conduct and Penalties (Act No. 18,314)
- Weapons Control (Art. 10, Act No. 17,798)
- Securities Market Law (Title XI)
- Decree No. 3 of 1997, issued by Ministry of Finance, containing General Banking Act (Title XVII)
- Criminal Code (Title V, Book II, para 4, 5, 6 and 9), and
- Criminal Code (ss 141–2, 366*qáter*, 367 and 367*bis*).

The Anti-Money Laundering Act makes it unlawful for any person to acquire, possess, hold or use goods with the intention of profiting from them while being aware when they received them of their illegal origin. The Act also established a new Financial Analysis Unit (FIU) (*Unidad de Análisis Financiero*) within the Finance Ministry, to which suspicious transactions must be reported. Mandatory FIU reporting applies to businesses, including the following:

- Banks and financial institutions
- Brokerage firms
- Financial lease companies
- Securitization companies
- General fund-managing companies
- Investment fund-managing companies

The SVS has issued regulations under the Act to flesh out some of the details relating to the prevention of money laundering and financing of terrorism (Ruling No. 1809, 10 August 2007, as amended by Ruling No. 1853 of 2 October 2007 and by Ruling No. 2070, 19 April 2012), which are applicable only to those entities under the SVS' surveillance (i.e., public/open and special SAs).

In addition, Law 20,393 sets forth: "The criminal liability of legal entities regarding money laundering, terrorism financing and bribery crimes." These criminal offenses, which capture the actions of any legal entity (local or foreign) include:

- money laundering crimes (s. 27, Law No. 19,913);
- the financing of terrorist crimes (s. 8, Law No. 18,314); and
- bribery crimes, including bribery of foreign public officials (ss. 250–51*bis*, Criminal Code).

Businesses can be exempted from liability for these criminal offenses incurred by its officials or employees, if they can prove that they have adopted adequate methods of supervision and control in accordance with theprescribed in Law 20,393, including, among other actions, the appointment of a compliance officer.

4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Chilean laws are structured to encourage foreign investment by providing a stable and certain regulatory framework to allow foreign investors to compete on equal terms with local businesses. With the exception of certain industries, which must have Chilean national ownership (in the national interests), 100 percent foreign ownership of investments is possible.

4.5.1 Exchange controls

Chilean foreign exchange legislation consists of the Central Bank Act No. 18,840 (CBA), and is supplemented by the Compendium of International Foreign Exchange Regulations enacted by the Central Bank of Chile (the “Exchange Regulations”).

The CBA sets out certain types of international exchange operations (IEO), which may be limited or restricted by the Central Bank. The Exchange Regulations detail those limits and restrictions that are currently in place (and which can be varied from time to time by the Central Bank). The concept is that the CBA empowers the Central Bank to decide on whether to apply or not certain foreign exchange restrictions from a list of restrictions provided for in the CBA. The CBA expressly establishes that the effects of IEOs conducted abroad, and to be complied within Chile (e.g., a capital contribution to a Chilean company, with disposition of funds abroad), will be subject to Chilean laws.

At present, only three types of restrictions mentioned in the CBA have been implemented by the Central Bank (see below), but there is always the possibility that the Central Bank will decide to also apply some of the other restrictions. The current principle, therefore, is total freedom for foreign exchange transactions: i.e., complete freedom to acquire and make payments abroad using foreign currency, from Chile and vice versa. Entities and individuals are free to purchase, sell, keep, remit abroad and bring into Chile foreign currency (with a few reporting duties that may apply).

According to the Exchange Regulations currently in force (since March 2002), only three types of restrictions/limitations apply:

- Foreign exchange transactions, which must be conducted through the Formal Exchange Market (e.g., a commercial bank) and reported to the Central Bank of Chile, such as:
    - foreign exchange transactions performed by insurance and reinsurance companies formed in Chile (Chapter VII, Exchange Regulations);
    - investments, deposits and loans made abroad by Chilean resident individuals in excess of USD10,000, (Chapter XII, Exchange Regulations); or

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  - capital contributions, investments, deposits and loans made from abroad and into Chile in excess of USD10,000 (Chapter XIV, Exchange Regulations).

- Foreign exchange transactions that must be conducted through the Formal Exchange Market, but not reported to the Central Bank (e.g., license and royalty payments abroad regardless of the sums involved (Chapter VIII, Exchange Regulations)

- Other foreign exchange transactions, which must be reported to the Central Bank (e.g., payments relating to imports and exports - Chapters IV and V, Exchange Regulations)

As noted above, the Central Bank has the authority (under Article 49 of the CBA) to regulate and impose stricter restrictions on foreign exchange operations (i.e., mandatory repatriation of funds, mandatory conversion of foreign currency into Chilean pesos, a reserve requirement). The Central Bank of Chile may at any time re-establish these restrictions.

In case of infringement, the CBA provides for different administrative, civil and criminal penalties for the individuals and entities that infringe the aforementioned restrictions and limitations. The Central Bank analyzes the particular facts and circumstances and imposes a penalty it considers appropriate on a case-by-case basis.

Funds invested in Chile through the foreign exchange rules may be repatriated abroad at any time, as well as profits arising from those investments.

4.5.2 Foreign investment approvals and notifications

As a general rule, Chilean law does not require investors to obtain any foreign investment permits or licenses, other than for specific industry sectors (e.g., insurance, banking and telecoms).

New Foreign Investment framework contained in Law 20,848

Until 31 December 2015, foreign investment was regulated principally by the Foreign Investment Statute (Decree Law N° 600) (the “Statute”), administered by the Foreign Investment Committee, and Chapter XIV of the Foreign Exchange Regulations of the Chilean Central Bank, administered by the Central Bank.

However, as of 1 January 2016, the Statute was replaced with the new foreign investment framework contained in Law 20,848 (the “New Foreign Investment Law”). The New Foreign Investment Law, among other things, replaced the Foreign Investment Committee established by the Statute, with the new Foreign Investment Promoting Agency (FIPA), which complies with OECD standards.

The New Foreign Investment Law did not modify or alter the Exchange Regulations issued by the Chilean Central Bank. In fact, the foreign investments that seek to benefit from the New Foreign Investment Law need to be registered under the Exchange Regulations.

Neither the New Foreign Investment Law nor the Exchange Regulations impose any domestic ownership requirements (i.e., 100 percent foreign ownership is possible), with the exception of certain particular industries where Chilean national ownership is required (in the national interests). However, the New Foreign Investment Law does impose a domestic requirement, in which the foreign direct investment should, either directly or indirectly, give control of at least 10 percent of the voting shares or rights in the Chilean company receiving the foreign investment.

Certificate of Foreign Investor under the New Foreign Investment Law

The New Foreign Investment Law states that the FIPA is the successor of the Foreign Investment Committee for all legal purposes. The foreign investor may request a certificate from the FIPA confirming the status of the authorized foreign investor.

The New Foreign Investment Law defines “foreign investor” as any individual or legal entity formed abroad, not residing nor domiciled in Chile, that has a foreign direct investment in Chile.

It also defines “foreign direct investment” as the transfer of foreign currency or assets into Chile, owned by the foreign investor or a related company, in an amount equal to or greater than USD5 million, through the transfer of freely convertible foreign currency, the contribution of physical assets, the reinvestment of profits, the capitalization of loans, technology in different ways that can be capitalized, or credits associated with foreign investment of related companies. Further, that which transfers to Chile an amount equal to or greater than USD5 million and which is materialized through the acquisition of, at least, 10 percent of the voting shares or rights in the Chilean company receiving the investment is considered foreign direct investment.

The foreign investor’s application with the FIPA must provide evidence of the materialization of the investment in Chile and contain a detailed description of the investment, including its amount, purpose and nature.

If the foreign investor’s application complies with all legal requirements, the FIPA will issue a foreign investment certificate within 15 days from the date of the application submission.

The New Foreign Investment Law grants certain rights to foreign investors whose investments have been recognized by a certificate issued by the FIPA, including: (i) the right to remit abroad the transferred capital and the net profits generated by the investment, upon fulfillment of relevant tax obligations; (ii) access to the formal (banking) exchange market to settle or obtain foreign currency; and (iii) the right not to be discriminated against when compared to domestic investors. The New Foreign Investment Law grants the above rights without requiring authorization from any foreign investment regulatory entities.

Until 31 December 2015, under the Foreign Investment Statute, which was administered by a Committee chaired by the Minister of Economy, foreign investment had to be reflected in a foreign investment contract signed by the foreign investor and the Chilean State. The foreign investment contracts executed on or before 31 December 2015 are still in full force and effect.

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Entry and Type of Capital Contributions

Under the previous Statute, investments had to be brought into Chile within three years of foreign investment approval for non-mining projects (which could be extended to up to eight years for projects over USD50 million) and within eight years for mining projects (which could be extended to up to 12 years if exploration was required). The New Foreign Investment Law eliminates such deadlines for the entry of foreign investment.

Repatriation of Capital and Profits under the New Foreign Investment Law

Under the previous Statute, capital contributions could only be remitted overseas after one year of entering Chile, and only from the proceeds from the sale or liquidation of all or part of the assets, business, shares or rights representing the investment. Capital comprising reinvested profits was not subject to the one-year restriction.

The New Foreign Investment Law eliminates such restrictions on the repatriation of capital.

The foreign investor may purchase the foreign currency required to repatriate capital and net profits from the local formal currency market, once it has complied with all tax obligations in relation to such repatriation.

Nondiscrimination

Under the New Foreign Investment Law, some important advantages that were guaranteed on the Foreign Investment Statute remain in force. One of these advantages is the prohibition of arbitrary discrimination toward foreign investors. Like the Statute, the New Foreign Investment Law prohibits the discriminatory treatment of foreign investments, which are subject to the laws generally applicable to domestic investments. Laws are deemed discriminatory if the foreign investor is excluded from the whole or major part of a specific productive activity, or if he or she is refused access to a free trade zone or special regime despite complying with the conditions imposed on local investors.

Foreign Exchange Regulations (Chapter XIV)

All foreign investment must be effected under Chapter XIV of the Foreign Exchange Regulations, which is administered by the Central Bank. Investments under the Foreign Exchange Regulations may only consist of foreign currency. The minimum investment is USD10,000. The Exchange Regulations do not require the foreign investor to enter into a contract with the State of Chile, nor do they limit or restrict the repatriation of the capital invested in Chile or of the profits obtained from such investment. However, the Exchange Regulations do not afford the foreign investor with the guarantees and investor protection measures contained in the New Foreign Investment Law.

Neither the New Foreign Investment Law nor the Exchange Regulations impose any domestic ownership requirements (*i.e.*, 100 percent foreign ownership is possible), with the exception of certain particular industries, where Chilean national ownership is required (in the national interests). The New Foreign Investment Law imposes a domestic requirement by which the foreign direct investment should, either directly or indirectly, give control of at

least 10 percent of the voting shares or rights in the Chilean company receiving the foreign investment.

4.5.3 Import/export controls

All types of goods and services may be imported by any individual or entity, except a limited number of specifically prohibited items.

Imports must be registered with the National Customs Service by the filing of a Declaration of Entry (DIN) prior to bringing the goods into Chilean territory and comply with all applicable laws and regulations. Import proceedings are generally straightforward if import prices are consistent with market levels (to combat transfer pricing, Customs may not approve imports at undervalued prices). Normally, imports must be shipped within 120 days after the license is granted.

All types of goods and services may be exported by any individual or entity (provided the exports comply with applicable laws and regulations), except a limited number of specifically prohibited items. For example, some agricultural products may be subject to seasonal restrictions. Customs must be notified in advance of exports with the exception - among others - of transactions of up to USD2,000 free on board or authorized by certain government bodies, when particularly sensitive products are at issue (e.g., copper, which requires authorization by the Copper Commission).

Foreign currency proceeds of export sales (net of related overseas expenses) do not have to be returned to Chile, and if returned, do not need to be converted into local currency. If not returned to Chile, the exporter is obliged to inform the Central Bank of the foreign exchange transaction involved in such export operation.

5. Transfer Taxes

5.1 Acquisition of Shares

No stamp or registration or any other similar taxes or charges are payable under the laws of Chile in connection with the execution, delivery, performance or enforcement of a share acquisition.

5.2 Acquisition of Assets

According to Chilean law, the acquisition of assets is not subject to transfer taxes or any other similar taxes.

The sale of used vehicles is subject to a municipal tax of 1.5 percent of the purchase price or the fiscal valuation of the vehicle, whichever is higher. This municipal tax must be borne by the buyer.

5.3 Mergers

No stamp or registration or any other similar taxes or charges are payable under the laws of Chile in connection with the execution of a merger.

5.4 Value-Added Tax

The sale of inventory of a Chilean company will be subject to VAT at a rate of 19 percent. The sale of fixed assets, including vehicles, is subject to VAT at

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19 percent, only if acquired by the seller within four years from the date of the sale (unless the normal tax depreciation period has elapsed before that date). Fixed assets and vehicles must also be detailed in the corresponding Chilean invoices. VAT assessed on sales must be declared and paid by the seller within the first 12 days of the month, following the month of the sale. Taxpayers authorized to electronically issue invoices must declare and pay VAT within the first 20 days of the month, following the month of the sale. Accounts receivables and intangible assets are not subject to VAT.

As a general rule, the sale of used vehicles is exempt of VAT, unless:

- it corresponds to the inventory of new cars or to the fixed assets of the company; or
- its acquisition generated a fiscal VAT tax credit for the seller.

As a general rule, the acquisition of vehicles will not generate a fiscal VAT credit for the buyer unless the line of business of the buyer is the trade and/or rent of vehicles, or if the Regional director of the IRS allows the expense as a deductible item (Art. 23 No. 4, VAT Law).

6. Employee Issues

6.1 Method of Transfer under Local Law

6.1.1 Acquisition of shares

Regarding labor and social security issues, any amendment - in whole or in part - to the ownership, possession or tenancy of a company, must not affect the rights and liabilities of employees (as provided in both their individual and collective employment agreements) and must remain in effect with the new employer (Art. 4, Labour Code).

6.1.2 Acquisition of assets

If the sale involves the sale of specific assets, but not of the entire business of the seller or an operative line or division of that business, any labor contingency will continue to be borne by the seller. However, if the proportion of the assets sold implies a “*de facto*” acquisition of the entire business or a part of the business operations, a transfer of the entity will be deemed to have occurred for labor law purposes. In this case, the individual labor contracts between employees and employer, and any collective employment agreements between employer and any labor union, will remain unaffected but with the new employer–buyer becoming liable for all labor and social security contingencies (Art. 4, Labour Code). Therefore, employees are transferred to the buyer with the same seniority as they held at the time of the acquisition, and will still be entitled to the same rights and benefits as pre-transfer.

6.1.3 Transfer of business

If the buyer acquires a considerable part of the assets or an operative division or line of business of a company, it will be deemed as the new employer of the employees associated to said assets, division or line of business, and will thus be liable for all employment and social security obligations related to those employees. Thus, and given that this transfer of employees is effected

automatically, by the sole operation of the law, no new employment agreements need to be executed.

6.1.4 Mergers

A merger of two or more companies implies a change of the employer's ownership, making Article 4 of the Labour Code applicable. Thus, the merger will not alter the rights and obligations of the employees under their individual or collective employment agreements, which remain in full force and effect under the new employer entity.

6.2 Approval or Consultation Requirements

According to Chilean Labour Law, there is no obligation of approval or consultation. Labor authorities, employees, unions or other employee representatives have no right whatsoever at law to be informed and consulted merely because the employer company is going to change hands, whether it is a transfer of business, a merger, an acquisition of assets or any other figure.

6.3 Protection against Dismissal

6.3.1 Redundancies

If the buyer intends to make any employees of the target business/company redundant, it should carefully consider their rights to statutory compensation and to protection against dismissal.

Employees who enjoy special protection against dismissal (and cannot have their employment contracts terminated on the grounds of business necessity or "at will") are:

- union representatives (during the term of their position and for six months after the end of it);
- non-union employees' representatives (during the term of their position and for six months after the end of it, except if they have a fixed-term employment contract);
- employees who participate in the formation of a union (as of 10 days prior to the formation and for 30 days after it, up to a total maximum of 40 days);
- employees' representatives on safety committees (*Comites Paritarios*) for the term of their position;
- pregnant women (during pregnancy and for one year after the expiry of the maternity leave period);
- employees taking family leave (for births and deaths);
- parents on parental leave;
- employees involved in collective bargaining (from 10 days before the presentation of the proposal to 30 days after the execution of the collective contract; members of the Bargaining Unit who are not Union directors may not be dismissed within 10 days of the presentation of

the proposal and until 60 days after the execution of the collective contract); and

- employees on sick leave (*licencia médica*).

In these cases, the employer may not terminate the employment contract without the prior approval of the Labour Court, but such permission will not ever be granted in cases of termination on the grounds of business necessity or “at will.”

The employment contracts of union representatives, non-union employees’ representatives and employees’ representatives on safety committees may be terminated without the Labour Court’s prior approval only when closure of a business involves the dissolution of the entire company.

6.3.2 Penalties

The failure to consult or to obtain employee approval carries no penalties, as there is no obligation to consult or to obtain approval under Chilean law.

Penalties for breaching legal protections against dismissal include obliging employers to reinstate wrongfully terminated employees and to pay remuneration from the date of termination and until the date of reinstating the employee (where appropriate), including all social security contributions accrued within that period. Additional penalties may be applied if the dismissal is considered unlawful, an infringement of fundamental rights or an unlawful union practice.

Colombia

Colombia

1.1 Overview

Colombia is the third largest country in Latin America in terms of population after Brazil and Mexico, and it has the fourth largest economy. It has a largely urban population, with over 70 percent living in cities, the largest being the capital city of Bogotá DC, followed by Medellin, Cali and Barranquilla. Colombia has a highly skilled and competitive workforce, with well-qualified and experienced executives.

1.2 General Legal Framework

The Colombian Commercial Code is the principal legal framework that sets out the legal vehicles that are available to investors interested in undertaking commercial business in Colombia. These structures include the incorporation of closed entities whereby the liability of the owners or shareholders is unlimited, and where other entities' liability is, as a general rule, limited to the amount of the contribution of the investor.

1.3 Corporate Entities

Unless there are specific or particular reasons, on a case-by-case basis, for a foreign entity to assume unlimited liability, the most suitable way to carry out businesses in Colombia is to set up a subsidiary, either a simplified corporation, a corporation or a limited liability company. These entities limit, as a general rule, the liability of the investor to the amount of its contribution (with exceptions for each kind of company). Another way to carry out businesses in Colombia is via the establishment of a branch of a foreign company, which is deemed a commercial establishment of the foreign entity in Colombia.

1.3.1 Simplified stock corporations (*Sociedad por Acciones Simplificada*)

These companies were introduced into Colombian law in December 2008 to facilitate the incorporation of formal corporate structures, inspired by the Delaware LLC, the French SAS and single ownership models previously provided for under Colombian law. These entities are appropriate for business groups, smaller single-owner operations and joint ventures, as the rules governing their operations and management are very flexible. However, they cannot be used to set up the corporate structure of banks, insurance companies or publicly traded companies. These companies can have an unlimited term and do not need to list in their bylaws the specific corporate activities they will be engaged in and, therefore, are entitled to undertake any permitted commercial activity. Given their flexible and streamlined structure, these simplified stock corporations have been very popular since their introduction. The incorporation of a simplified corporation usually takes around two to three weeks, from the date all documents required for the purpose are received in order to proceed with the registration process at the Chamber of Commerce.

A simplified stock corporation may have a single shareholder. The liability of the shareholders is limited, in principle, to the amount of their capital contributions. The capital structure is very similar to the traditional form of corporation and consists of authorized, subscribed and paid-in capital. In addition, a two-year window is given in which to pay subscribed capital and

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no minimum percentage of capital needs to be paid on subscription (as applies to traditional corporations). In a simplified stock corporation, a board of directors can be appointed (but is not mandatory), and the company may appoint a single manager (legal representative), so the number of officers can be kept to a minimum.

1.3.2 Corporations (*Sociedad Anónima*)

This is the most appropriate entity in Colombia for public trading and for entities that are normally regulated, such as banks and insurance companies. A minimum of five shareholders (either individuals or entities) is required to establish a corporation. No shareholder may hold 95 percent or more of the shares of a corporation at any time. As a general rule, the liability of each shareholder is limited to the amount of its capital contribution. The capital of the corporation is divided into shares of equal value. On incorporation, at least 50 percent of the authorized capital must be subscribed for, and at least one-third of the value of the issued shares must be paid. The remainder must be paid within one year from the date of incorporation.

A corporation must have a board of directors consisting of at least three principal members and three alternates who do not need to be shareholders and who are appointed by the shareholders. A corporation must also have a legal representative, usually the general manager, who must have at least one alternate. The day-to-day operations of the corporation are generally entrusted to the manager, who must always act within the powers granted in the bylaws.

1.3.3 Limited liability companies (*Sociedad de Responsabilidad Limitada*)

A minimum of two partners (either individuals or entities) contributing capital is required to form a limited liability company. The maximum number of partners permitted is 25.

As a general rule, the liability of the partners is limited to the amount of their capital contribution; however:

- the bylaws may provide for a greater responsibility of some or all of the partners;
- a Supreme Court decision has ruled that the partners of a limited liability company are jointly and severally liable for the labor obligations of the company's employees; and
- tax law provides that partners of a limited liability company are jointly and severally liable for all income tax obligations of the company.

The capital of the company is divided into quotas of equal value. It must be entirely paid-in on its incorporation. Each quota grants each partner one vote. Partners are entitled to transfer their quotas, which must be formalized by means of an amendment to its bylaws and, when doing so, all other partners have a statutory right of first refusal in the amount of their existing participation unless the bylaws provide otherwise.

Companies may choose to have a board of directors, but this is not mandatory; therefore, all decisions may be adopted directly by the partners and the general manager, if they have been granted such authority. A limited

liability company may be managed directly by the partners or they may decide to appoint a legal representative, usually the general manager, who must then have at least one alternate. As in the case of corporations, the manager must always act within the powers granted to him or her in the bylaws.

2. Acquisition Methods

Acquiring a business in Colombia may take several forms. What follows summarizes the main legal issues in acquiring an ongoing business by way of the three most common transactions seen in Colombia:

- The purchase of shares
- The purchase of assets
- Mergers

2.1 Acquisition of Shares

As a general rule, shares are freely negotiable unless a right of first refusal in favor of the current shareholders is agreed on or in the case of simplified corporations when a prohibition on the transfer of shares is incorporated in the bylaws. Partners (in a limited liability company) have a statutory right of first refusal in the amount of their existing participation unless the bylaws provide otherwise.

Title to shares in a corporation or a simplified corporation is transferred to the buyer from the seller by the agreement of the parties. For the transfer to be effective *vis-à-vis* third parties and to be formalized, the transfer must be registered by the company in its stock registry (which it will be required to do once it has received the duly endorsed share certificates or a letter from the seller requesting that the operation be recorded).

On the other hand, the transfer of quotas in a limited liability company needs to be formalized by means of an amendment to its bylaws duly registered before the Chamber of Commerce.

2.2 Acquisition of Assets

In Colombia, there are two principal ways to undertake a transfer of assets:

- By the transfer of a commercial unit or ongoing concern (commercial establishment), which consists of a group of assets that are allocated by an entity to form a separate commercial unit, registered as such before the Chamber of Commerce; certain special procedures and rules will apply to this kind of transfer (including rules regarding liability between the transferee and transferor)
- By transfer of the individual assets not organized nor registered as a commercial unit before the Chamber of Commerce

Unless otherwise stipulated, the sale of commercial establishments will be deemed to take place over the commercial establishment as an economic unit without requiring the parties to specify each of the assets being transferred. No special voting majorities are required by law to dispose of a major part of

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an establishment's assets (although the bylaws do usually establish rules regarding such asset transfers).

In the case of the transfer of individual assets, no special procedure needs to be followed for the transfer of assets. Such transfer will be governed by the asset purchase agreement entered into between the parties. However, note that the formalization of the transfer of assets will need to be undertaken following the rules to transfer each specific asset (e.g., real estate needs to be transferred by means of a public deed and must be appropriately registered).

The following considerations should be taken into account in connection with the transfer of assets:

- Labor liabilities: The entity transferring the assets and the entity receiving such assets will be jointly and several liable for the obligations incurred prior to the transfer of the employees.
- Tax liability: As a general rule, tax liabilities will not be transferred to the entity to which the assets are transferred; only real estate taxes and vehicle taxes would be carried over. In Bogota, some liability for the transferee in local revenue tax (ICA) may arise if the asset deal transaction is structured as a sale of a commercial unit.
- In a simplified corporation, a global transfer of assets will be considered when the proposed transaction is thought to transfer assets and liabilities that represent 50 percent or more of the liquid assets of the company on the date of the transfer. This transfer must be: i) approved by general assembly with a simple majority vote; and ii) registered before the Chamber of Commerce.

2.3 Mergers

In a merger, the surviving company assumes all assets, obligations and liabilities of the absorbed company or companies. When any company holds more than 90 percent of the outstanding shares of a simplified corporation, the controlling company may absorb the controlled simplified corporation through an expedited process. This process will not be applicable whenever the merger needs to be approved by the Superintendence of Companies.

3. Negotiation, Signing and Closing

3.1 Pre-Contractual Obligations

According to the Colombian Commercial Code, in the pre-contractual phase, the parties must act in good faith and must pay for any damages caused when they do not comply with this provision. This phase includes several steps, which will be taken before the contract is executed, including commercial offers, counter-offers, negotiations and bidding processes. Precedents in Colombia have established several behaviors, which will be taken into account to determine if the parties have acted in good faith. The parties:

- must provide accurate and sufficient information—a key factor influencing the decision to execute a contract;

- must not create false expectations about the execution of a contract if they know that the contract will not be executed; and
- will be bound by confidentiality obligations regarding the information obtained in a negotiation phase even if a contract is not executed as a result of that process.

3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in a typical Colombian purchase agreement. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking here.

Purchase Price		
1	Is a purchase price adjustment common? What type is common (e.g., debt-free, cash-free)?	Purchase price adjustments are common. All types are seen, including working capital adjustment, cash-free debt-free. However, locked box accounts are uncommon in less complex deals.
2	Is there a collar on the adjustment?	Collars are not common, but not unheard of either.
3	Who prepares completion balance sheet?	This is usually prepared by the target company.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	It is not yet common, but more so in acquisitions of assets.
6	Is a deposit common?	No.
7	Is an escrow common?	Increasingly common.
8	Is a break fee common?	No.
Conditions Precedent		
9	is the Express Material Adverse Event (MAE) completion condition common?	It is increasingly common, especially when there is a long period between signing and closing.
10	Is the MAE general or specific?	The MAE definition is usually general and forward-looking, but sometimes includes specific carve-outs.
11	Is quantification of MAE common?	It is increasingly common.
Covenants, Access		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	It is increasingly common due to relaxation of the competition authority's policy on the subject.
13	Is non-solicit (of employees) common?	Yes.

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14	Is non-solicit (of customers) common?	Yes (in conjunction with a noncompete).
15	Is broad access to books, records, management between sign and close common?	Common, except in concentrated markets (in which case full access is granted only after the competition authority has cleared the transaction or to the "clean team," which is an impartial third party bound by strict confidentiality protocols regarding the critical sensitive information submitted by the seller).
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules and notification of possible breach is becoming increasingly common.
17	Is a separate tax covenant/indemnity or tax deed common?	It is common to have tax indemnity, usually included in the purchase agreement.
Representations and Warranties		
18	Materiality in representations—how is it quantified (e.g., by a dollar amount)?	Materiality qualifiers are commonly seen but are often not quantified (other than specific warranties e.g., contract value). It is preferable to have a quantified materiality threshold.
19	How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?	Knowledge qualifiers are not uncommon, but usually applicable to specific representations. These are usually limited to actual knowledge after due inquiry of specific individuals.
20	Is a warranty that there is no materially misleading/omitted information common?	Sophisticated sellers try to avoid providing such information–and if pressured, will acknowledge if limited to fraud or intention to mislead.
21	Is disclosure of the data room common?	Its is generally resisted and is not common.
Repetition of Representations and Warranties		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Yes, by a bring-down certificate.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects.

24	Is double materiality common (e.g., where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation)?	Double materiality is usually avoided.
Limitations on Liability		
25	What is the common cap amount (as a percentage of purchase price)?	Ranges are typically around 15% to 20% of purchase price.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	It usually does just to misrepresentations and sometimes to special indemnities.
27	What are the common exceptions to the cap?	Fraud, fundamental representations (e.g., title, capitalization, authority) and specific areas of concern are some. It has become increasingly common to leave FCPA or anti-bribery representations uncapped.
28	Is a deductible or basket common?	Baskets are becoming widely accepted, deductibles less so.
29	Is a *de minimis* common?	It has become increasingly common.
30	How long does liability survive? Are there any common carve-outs (e.g., fraud, tax, key warranties)?	General survival of 18–36 months is common. Tax, labor and environmental are liabilities usually tied to expiration of statute of limitations.
31	Is warranty insurance common?	No.
Reliance		
32	Do financiers seek to rely on purchaser's due diligence reports?	It is becoming more common.
Set-offs against Claims		
33	Is a set-off against claims for tax benefits common?	It is becoming more common.
34	Are insurance proceeds common?	It is becoming more common.
35	Are third-party recoveries common?	It is becoming more common.
Damages, Knowledge		
36	Is obligation to mitigate damages common?	It is becoming more common.

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37	Is exclusion of consequential damages common?	Yes (although it is probably unnecessary in most cases, as under Colombian law only direct, damages are indemnifiable).
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge had no effect on warranty/indemnity?	Agreement is usually silent on this point.
Dispute Resolution		
39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, if disputes under the agreement are validly referred to in international arbitration (which requires a significant connection with a jurisdiction other than Colombia (e.g., a party incorporated abroad). In addition to Colombian law, New York law is a popular choice.
40	Is litigation or arbitration more common? If arbitration, where?	Domestic arbitration under Bogota Chamber of Commerce Rules is more common. In larger deals arbitration under ICC rules, litigation will be held in a venue that is considered neutral.
Stamp Duty		
41	If stamp duty is payable, is it normally shared?	No stamp duty applies.

3.3 Formalities for Execution of Documents

3.3.1 Transfers of shares

It is increasingly common for purchases of stock to be documented in US or English style share purchase agreements, which include stipulations that international investors are accustomed to, such as representations and warranties from the sellers regarding the shares and the target company, covenants and the relevant indemnification obligations.

The disposal of quotas of a limited liability company will require other partners to waive their right of first refusal, as well as to approve the transfer of quotas to a third party by means of a bylaws amendment, which requires at least the affirmative vote of 70 percent of the company quotas. On the other hand, the sale of shares of a traditional or simplified corporation to a third party may require other shareholders to waive their right of first refusal if the company's bylaws have a provision in this regard, but a bylaws amendment will not be required.

3.3.2 Transfers of assets

The sale of assets must be in writing and if the sale involves real estate, it must be incorporated into a public deed, which must be registered with the

real estate registry. If the sale does not involve real estate, it may be carried out by a public deed or private document.

3.4 Formalities for Transferring Title to Shares or Assets

3.4.1 Transfers of title to shares

Title to shares in a corporation is transferred to buyer from seller by mere agreement of the parties. For the transfer to be effective *vis-à-vis* third parties, the transfer must be registered by the company in its stock registry. This registry will be made once the duly endorsed share certificates have been received or when a letter from the seller requesting that the operation be recorded is received.

3.4.2 Transfers of title to assets

If the transfer of assets is undertaken through a transfer of a commercial establishment, the seller must deliver a financial statement of the establishment, properly identifying the liabilities that must be duly certified by a public accountant. The document evidencing the sale of the establishment must be registered with the corresponding Chamber of Commerce. Notice of sale must be given to all creditors of the establishment through publication in newspapers. Creditors have a term of two months to oppose the sale of the assets (by registration with the commercial registry) and to demand guarantees or securities for the payment of their credits.

3.5 Formalities for Mergers

The company's shareholders (or partners) must approve the proposed merger agreement. Unless otherwise provided for in the bylaws, the decision must be approved by a simple majority of the shareholders/partners represented at the meeting. The proposal for a merger must be available to the shareholders for at least 15 business days prior to the meeting where the decision is made. Absent or dissenting shareholders/partners may withdraw from the company within eight days following the meeting where the merger agreement is approved, if their rights are adversely affected.

Once the merger has been approved, the legal representatives of each of the participating companies must: (a) publish basic information about the merger (i.e., identification of participating companies, amount of assets and liabilities, and a summary explanation of the valuation mechanism used) in a newspaper; and (b) notify all creditors of the merger. Within a 30 business-day period, the company's creditors will be entitled to demand sufficient and satisfactory guarantees for the payment of their credits and the merger process may be suspended until sufficient guarantees are presented or until payment of the credits, if necessary, has been made.

Administrative authorizations may be required, if any of the merging companies are subject to government surveillance (i.e., by the Financial Superintendence or the Superintendence of Companies) or meet certain conditions, such as having pension liabilities on their balance sheet or having registered goodwill pending amortization.

Upon authorization from the government, if required, the companies must incorporate the agreed-upon merger into a public deed (or into a private document if the absorbing entity is a simplified stock corporation and there is no transfer of real estate property), together with the financial statements and

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other documents related to the merger, and amend the surviving company's bylaws. This must be registered with the Chamber of Commerce and all pertinent notifications must be made.

When any company holds more than 90 percent of the outstanding shares of a simplified stock corporation, the controlling company may absorb the controlled simplified stock corporation through an expedite process. This expediting process will not be applicable whenever the merger has to be approved by the Superintendence of Companies.

4. Regulatory Framework

4.1 Competition Law Considerations

Any transaction resulting in an economic concentration in at least one market in Colombia, in the form of a merger, acquisition, joint venture, spin-off, agreement, or any sort of business that results in the economic merger of two or more entities, which are engaged in the same economic activity or are in the same line of production or distribution with respect to a final product or service that is sold in Colombia, will be subject to Colombian merger control regulations.

An economic concentration of a local company or enterprise by a foreign company will be subject to antitrust clearance if the transaction has effects directly or indirectly (through distributors or imports) in the Colombian market. Likewise, economic concentrations taking place outside of Colombia, but having effects in the Colombian market (directly or indirectly) may also be subject to prior antitrust report and clearance by the Superintendence of Industry and Commerce (SIC).

The parties involved (not just the buyer) must inform the SIC and require its prior consent on a transaction when an economic concentration fulfils the following criteria (according to Law 1340/09 and Rule 12193/13 of the SIC):

- Subjective criterion: Triggered if the transaction has the effect of concentrating one or more markets in Colombia—i.e., when two or more undertakings to the transaction are involved in the same activity (horizontal effects) or when the transaction has the potential to create vertical links in one or more markets in Colombia—i.e., when the parties to it are part of different links in a production chain (vertical effects), regardless of the legal structure used; and

- Objective criterion: Triggered when the parties involved in the transaction (not just the Colombian entities) report a combined value that exceeds legal thresholds on operational turnover or total assets as established annually by SIC (during the fiscal year prior to closing; the legal threshold is described below).

This control is exercised by the SIC regardless of the legal structure of the transaction through which the parties achieve the consolidation, merger or integration. The SIC may either authorize (fully), subject to commitments or remedies, or reject the transaction.

4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Colombian purchase agreement.

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e., are there penalties for failure to notify or for implementing a transaction without notification or approval)?	It is mandatory. Fines are imposed for implementing transactions without clearance. The SIC may also order the reversal of the operation if it considers that if the transaction had been notified, it would not have obtained clearance on the grounds of being restrictive of free competition.
Timetable		
2	In practice, what is the timetable for clearance (in first phase and second phase review)?	The SIC is entitled to issue a decision in Phase I, if it considers that it has all the evidence to conclude that the transaction does not affect free competition in the relevant Colombian markets. Phase I lasts for 30 business days, starting on the date the SIC receives the required information. If the SIC considers that the operation requires an in-depth analysis, it will enter a Phase II evaluation in which the parties will have to submit additional information. In Phase II, the SIC will have an additional 3 months to review the information, from the moment additional information is filed by the parties. In practice, this second stage can be extended for several months when the SIC identifies potential competition issues or when the information submitted by the parties is not complete enough to allow the SIC to undertake its review. If it turns out that the transaction can be unconditionally cleared in the second phase, the SIC may also grant clearance earlier than the average timing for the review period.

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An economic concentration carried out between two or more businesses in the same relevant market or in complementary markets in Colombia will require express and prior clearance from the SIC, when either of these two conditions are met:

- When the turnover of the parties (including their corporate group and foreign companies) jointly considered is equal to or higher than the equivalent to 100,000 national monthly minimum legal wages, as reflected in their balance sheet and financial statements for the prior fiscal year to the submission of the filing document to the SIC; or
- When the total assets of the parties (including their corporate group and foreign companies) jointly considered is equal to or higher than the equivalent to 100,000 national monthly minimum legal wages, as reflected in their balance sheet and financial statements for the prior fiscal year to the submission of the filing document to the SIC.

So, in order for transactions to be reported in 2015, the relevant threshold (for both turnover and total assets) will be calculated using the national monthly minimum legal wage in effect in 2015 (COP644,350 per month) multiplied by 100,000, or COP64,435 million.

Even though the merger control regime does not establish a territorial approach to the turnover and assets for the merger analysis, according to Resolution 12193 of 2013 issued by the SIC, this analysis should include the income and assets of the parties and of the companies related to the parties by virtue of a control situation, on a worldwide basis (including foreign companies).

4.2.1 Simplified notice procedure—Fast-track

When the combined shares of the parties to the transaction is below 20 percent in all of the markets and segments potentially affected, a simplified notification procedure and a fast-track (implied) approval is available. In these cases, the transaction will be deemed to be approved upon the filing of a notice.

4.2.2 Timetable

On the average, antitrust clearance can take between two and eight months, unless the transaction triggers a possible undue restriction of free competition, in which case the procedures could take longer.

The SIC has a period of five years, from the date of the notice given by the parties, to review any implied approval and challenge it, should the SIC decide that the conditions for the implied approval were not satisfied by the parties upon submission.

4.2.3 Penalties

If an economic transaction is closed or implemented in Colombia without or prior to obtaining the mandatory clearance by the SIC, the closing will be deemed a breach of Colombian antitrust provisions and the SIC could impose the following administrative fines:

- Up to 100,000 times the national minimum monthly legal wage against the parties involved. For FY 2016, this value is equivalent to approximately USD23 million.
- Up to 2,000 national minimum monthly legal wages against the managers, directors, legal representatives and any other individuals authorizing, executing or simply allowing the antitrust violation. For FY2016, this value is equivalent to approximately USD459,000.

If the SIC determines that the parties committed a violation of the antitrust regulation by engaging in the transaction without its approval, affected third parties that can prove a link between the transaction and the damages caused as a result of it may initiate an action before the ordinary courts, requesting compensation for the damage that the party is able to quantify. If the damages are caused to 20 people or more, these people could initiate a class action.

Further, the SIC is entitled to order the reversal of the economic transaction if it believes that if the transaction had been notified, it would not have obtained clearance on the grounds that it could restrict free competition.

4.3 Exchange of Competition-Sensitive Information and "Gun-Jumping" Issues

If the parties engage in conduct that can be perceived as economic concentration before obtaining clearance from the SIC, (e.g., hiring personal from the other party, etc.), such conduct would be deemed "gun-jumping" and will be subject to the penalties and sanctions described above.

Further, the exchange of sensitive information between the parties (e.g., price information, commercial conditions, clients, etc.) could trigger the violation of antitrust provisions and could be sanctioned with fines as described above. It is therefore advisable for parties to not exchange information between them, but with their counsel or with the counsel to the other party.

4.4 Exchange Control, Foreign Investment Restrictions and Trade Regulation

The *Banco de la República* (the Central Bank) is the authority on monetary and exchange matters.

Under the Constitution and foreign investment regulations, foreign investment in Colombia will receive the same treatment as an investment made by Colombian nationals. The conditions for reimbursement of foreign investment and remittance of profits in effect at the time the investment is registered may not be changed so as to affect foreign investment adversely, except on a temporary basis when the international reserves are lower than the value of three months' worth of imports. Any investment made by a person that does

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not qualify as a resident of Colombia for foreign exchange purposes will qualify as foreign investment, provided it meets the requirements below.

4.4.1 Exchange controls

"Compensation" accounts

Unless the law specifically permits otherwise, the general rule is that payments between Colombian companies or individuals must be made in Colombian pesos. However, payments between overseas foreign currency accounts duly registered with the Central Bank, known as "compensation" accounts are also permitted.

In general, Colombian banks do not offer foreign currency accounts. However, Colombian residents are allowed to maintain accounts in foreign currency abroad for the performance of all types of operations. If the account is used to perform controlled operations, the foreign currency account must be registered with the Central Bank as a "compensation" account and the movements of these accounts must be reported to the Central Bank and to the tax authorities on a monthly or quarterly basis. Failure to do so within the legal term will trigger fines for the account holders.

Controlled operations

All foreign currency, for the operations listed below, must be acquired or handled through the so-called "exchange intermediaries" (i.e., Colombian banks, some financial institutions and foreign exchange intermediation companies, formerly known as exchange houses) or by using registered offshore accounts:

- Import and export of goods
- Foreign loans and related earnings
- Foreign investments in Colombia and related earnings
- Colombian investments abroad and related earnings
- Financial investments in securities issued or assets located abroad and earnings related to them, except when investment is made with currency originating from "free market" operations (i.e., operations that the law does not require to be made through the exchange market)
- Guarantees in foreign currency
- Derivatives

All other foreign currency operations may be made through the exchange market or the so-called "free market." In general, Colombia regulations do not allow for the set-off of the payment obligations resulting from these transactions.

Exchange declaration

Colombian and foreign residents who perform an exchange operation through the Colombian exchange market must complete and file an exchange declaration.

The exchange declaration must be submitted to a commercial bank or an authorized financial institution, which will then forward it to the Central Bank. In some cases, the law will require filing of the exchange declaration directly with the Central Bank.

Foreign loans

Colombian residents may obtain loans in foreign currency from Colombian banks or from any overseas entity, and may use such currency for any legal purpose. The parties are free to agree on the terms and conditions of the loan. All foreign lenders must register with the Central Bank, either simultaneously with, or prior to, disbursement. The debtor must register the foreign debt with the Central Bank.

Direct intercompany loans granted by non-Colombian parent companies to their Colombian subsidiaries are permitted. Colombian subsidiaries may also loan funds to their foreign parent companies or affiliates.

4.4.2 Foreign investment approvals and notifications

Under Colombian exchange control provisions, any investment made by a nonresident foreigner in Colombia will qualify as foreign investment. Foreign investments in Colombia do not require prior government approval. However, transactions that involve investment from abroad must be channeled through the exchange market on the date of the transaction and will be automatically registered or must be reported to the Central Bank within a specified term. Registration of the foreign investment enables the foreign investor to have access to the foreign exchange market in order to purchase convertible currency with which to remit dividends and to repatriate the investment. Failure to report or register will cause the imposition of exchange control fines. Registry of foreign investment must be annually updated with the Central Bank.

If a purchase of shares is carried out between two nonresident foreigners, the transaction will qualify as foreign investment and, thus, must be registered in the Central Bank as a foreign investment substitution.

4.4.3 Industry-specific regulation

A special regime is available to domestic and foreign companies operating in: the exploration and production of oil and natural gas; the mining of coal, nickel and uranium; or the rendering of technical services with regard to oil exploration and production. Under this regime, these companies are allowed to denominate their transactions and receive payments in foreign currency in Colombia. Conversely, they cannot access the exchange market to acquire foreign currency, except to remit the proceeds from the sale of oil, gas and services inherent to the sector and paid in Colombian pesos to them. Branches of foreign companies in this sector cannot directly incur foreign debt.

Companies domiciled outside Colombia that want to enter into oil contracts must establish a Colombian branch that complies with the formalities of the Colombian Commercial Code.

4.4.4 Import/export controls

Payment of imports must be made through the exchange market. Imports may be financed by the supplier of the product, by foreign financial institutions, and by Colombian banks and other authorized financial institutions.

Income from exports must be received through the exchange market. Advance payments and pre-financing of exports are permitted.

5. Income Tax and Other Transfer Taxes

5.1 Income Tax and Capital Gains

The transfer of shares and other assets deemed as fixed assets that have been held for two years or more by the taxpayer (whether local or foreign) is subject to capital gains tax at a 10 percent rate. If the holding period of this type of assets is less than two years, income derived from these is subject to income tax, CREE (Income Tax on Fairness) and the CREE surcharge. Income tax, CREE and CREE surcharge add up to 39 percent (2015), 40 percent (2016), 42 percent (2017) and 43 percent (2018).

If the assets (shares included) are transferred by a foreign entity and the purchaser is a Colombian withholding agent, a 14 percent withholding tax applies and the seller must file an income tax return in Colombia. The seller can credit the income tax withheld at source against final income tax liability.

5.2 Other Transfer Taxes

The current rate of stamp tax is 0 percent. No transfer taxes are payable on the acquisition of shares in Colombia.

The transfer of real estate entails the payment of:

- registration tax at a rate of 1 percent;
- registration rights of 0.5 percent; and
- notary fees of 0.3 percent in respect to assets that must be transferred through a public deed (mainly, real estate), plus value-added tax (VAT) on the notary fees.

A tax withholding of 2.5 percent will be made on the value of an asset transfer when the transaction is between Colombian entities.

Registration tax applies to any document or contract that is required by law to be registered in the Real Estate Registry Office.

This tax is departmental (departments in Colombia are territorial subdivisions roughly equivalent to the states), and will be collected by the Real Estate Registry Office on behalf of the relevant department.

The various departments have the discretion to set the rates for the registration tax within parameters determined by law. For documents or contracts registered with the Real Estate Registry Office, rates can range from 0.5 percent to 1 percent of the value stated in such documents or contracts.

5.3 Mergers and Splits

For tax purposes, mergers and splits may qualify as acquisitions or reorganizational mergers and splits.

5.3.1 Acquisition mergers and splits

Acquisition mergers and splits will be income tax neutral as long as they meet the following conditions:

- Acquisition mergers and splits take place between unrelated companies.
- The effects for the companies involved are as follows:
  - There is no taxable income and the law considers that no transfer has taken place for tax purposes.
  - The tax cost and the nature of the transferred assets are the same for both recipient and transferor.
  - If the recipient transfers the assets within the two years following the contribution, it will not be able to compensate accumulated tax losses or presumptive income surpluses in the period when the merger or split takes place.
- For the shareholders, no transfer takes place for tax purposes as long as:
  - the owners of at least 75 percent of the shares of the original company continue as owners of the resulting entity;
  - the shareholders' consideration must be at least 90 percent in shares of the resulting entity; and
  - if the shareholders transfer the shares at any time before the second taxable period following the period in which the merger or split was finalized, they must pay income tax on the transfer or assignment plus an additional 30 percent. In any case, the income tax can never be lower than 10 percent of the value of the shares.

5.3.2 Reorganizational mergers and spinoffs

Reorganizational mergers and splits will be income tax neutral as long as they meet the following conditions:

- Reorganizational mergers and spinoffs take place between related companies.
- The tax effects for the companies involved are as follows:
  - There is no taxable income and the law considers that no transfer has taken place for tax purposes.
  - The tax cost and the nature of the transferred assets are the same both for transferee and transferor.

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- For the shareholders, no transfer takes place for tax purposes as long as:
  - the owners of at least 85 percent of the shares in the original company continue as owners of the resulting entity;
  - the shareholders' consideration must be at least 99 percent in shares; and
  - if the shareholders transfer the shares at any time before the second taxable period following the period in which the merger or split was finalized, they must pay income tax on the transfer or assignment plus an additional 30 percent. In any case, the income tax can never be lower than 10 percent of the value assigned to the shares.

These conditions are applicable to international mergers and spinoffs if the resulting entities are national entities.

5.3.3 Taxable mergers and splits

Mergers and spinoffs that are not in compliance with the above requirements will constitute a transfer for tax purposes and will be taxed according to the rules on transfer of assets contemplated in the Tax Code.

5.3.4 Mergers and spinoffs between nonresident foreign entities

The transfer of assets in Colombia as a result of a merger or split abroad will be taxed in Colombia unless the Colombian assets represent 20 percent or less of the total value of the assets of the group to which the intervening parties in the reorganization operation belong.

5.4 Value-Added Tax

VAT is not payable on the purchase of shares. The transfer of fixed assets will not trigger VAT.

6. Employee Issues

6.1 Method of Transfer under Local Law

6.1.1 Acquisition of shares

When a business is transferred through a stock purchase, this transaction will not involve a change of employer. Therefore, employees and their conditions, benefits and entitlements are unaffected.

6.1.2 Acquisition of assets

If the transaction is structured as an asset purchase that entails the transfer of personnel, it would be considered an employer substitution if the parties have not previously assigned or terminated the employment agreements. This would operate automatically, by virtue of law, upon execution of an asset purchase agreement and the transfer of personnel.

The main effects of the employer substitution are the following:

- The employment agreements of employees are not modified, suspended or terminated, and all risks, duties and liabilities will be transferred to the purchaser.
- The purchaser must therefore match the salaries and benefits the employees were receiving.
- If the incoming employees have enjoyed different employment benefits compared with those of the purchaser's existing employees in comparable job roles (in terms of rank/seniority, skills, qualifications, among others), the purchaser could be forced to harmonize these by offering all employees the most favorable conditions (unless otherwise agreed with all employees, "old" and "new").
- All employees' seniority must be maintained for all legal purposes.
- The pension liability of the seller will be transferred to the purchaser.
- The former and the new employer would be considered jointly and severally liable for all labor obligations relating to the existing employment agreements (for both target and purchaser) at the time the employer substitution takes place. Therefore, the new employer will be responsible for the obligations that come into effect after the substitution occurs. If the new employer assumes payments regarding labor obligations that the old employer was forced to recognize, then the new employer can recover them from the old employer, unless agreed otherwise.

The transferred employees will not be legally entitled to refuse the change of employer or to demand payment of any social benefit or redundancy or severance pay due as a result of the employer substitution. If they do not wish to work for the new employer, they can resign, as any employee is legally entitled to do.

6.1.3 Assignment of employment agreements

By virtue of the principle of the "autonomy of the parties private will," it is viable for a contracting party (old employer) in an employment relationship to be substituted by a third party (new employer) in every labor obligation by an assignment in the employment agreement. Such assignment implies that all obligations, rights and legal benefits inherent to the nature and conditions of the employment agreement are transferred to the new employer, unless agreed on otherwise. This means that, before an employer substitution occurs, the current employer will be able to assign the employment agreements to the purchaser and regulate the terms and conditions of that assignment in a private document.

In order for the assignment to be fully effective legally, the employees' consent to any such change of employer must be obtained. Assuming consent is granted by the employees, such an assignment will have the same effects as an employer substitution, namely:

- The labor relationship continues uninterrupted.

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- The old employer and the purchaser are jointly and severally liable for any labor obligations and employer liabilities up until the date of assignment.
- The employees' length of service is maintained for all legal effects.

The advantage of an assignment is that the new employer can insert in advance any change or modification it wishes to perform to the employment agreements by means of an assignment agreement signed by the old employer, the new employer and the transferred employee. This means that the new employer might, for example, be able to reduce employees' wages or agree to new benefits.

6.2 Approval or Consultation Requirements

In case of transfers via employer substitution, the seller is not legally required to give notice of the closing of the transaction to the employees or request their consent to it. Nonetheless, it is advisable to notify affected employees that their employment agreements have been or will be transferred to a new employer by indicating the date on which it occurred or will happen, as the case may be. It is not unlawful to inform employees after the employment agreements that they have been transferred to the new employer.

6.3 Protection against Dismissal

6.3.1 Redundancies

Under Colombian legislation, an employer may not dismiss without just cause, in the same semester, a certain percentage of employees (depending on the size of the total workforce) except with prior authorization from the Ministry of Labour. The closing of operations, totally or partially, is prohibited for employers that do not have prior authorization from the Ministry of Labour.

There is no obligation to consult with works councils unless this has been agreed on under individual employment agreements or in the collective bargaining agreement.

6.3.2 Penalties

Mass layoffs of employees without authorization will be ineffective. If this occurs, the employees must be reinstated, legally, with back-payment of salaries and social benefits accrued but not paid during the time unemployed.

Finally, note that Colombian legislation affords special privileges to protect certain employees from being dismissed, in which cases termination of employment can be carried out only with just cause and with prior authorization from the Labour Court or the Ministry of Work.

This could apply, for example, to:

- employees who, by 1 January 1991, had rendered more than 10 years of service under the same labor contract;
- pregnant women or women on maternity leave;
- employees with medical problems or physical limitations;

- employees with union privileges (i.e., founders or directors of unions members of the claims committee and employees who have filed a claim of petitions by means of which a collective negotiation begins aiming to reach a collective bargaining agreement); or
- employees who have filed a labor harassment complaint during the six months prior to the termination.

Mexico

Mexico

1.1 Overview

Mexico, whose official name is the "United Mexican States," is a federal republic comprising 32 states, including Mexico City. The federal government comprises three branches: the executive, legislative and judicial. The head of the executive branch is the president, who is elected by popular vote for a six-year term. Legislative power is vested in the Chamber of Deputies and the Senate, whose members are elected for three- and six-year terms, respectively. The judicial branch consists of a Supreme Court of Justice, circuit courts and district courts. Each of the 32 states have local laws and regulations, as well as its own executive, legislative and judicial authorities.

Mexico has a civil law system based on Continental European legal tradition stemming from Roman law and Napoleonic principles. Under this system, basic legal principles are largely codified in civil, commercial, criminal, judicial and procedural codes. Judicial precedents are not binding, except for federal courts' decisions under certain circumstances.

1.2 General Legal Framework

General matters pertaining to M&A transactions are regulated at federal level by several laws, including the:

- Commerce Code;
- General Law of Commercial Companies (GLCC);
- Securities Market Law;
- Foreign Investment Law (FIL); and
- Competition Law.

Certain matters pertaining to the transfer of particular assets, such as real estate, are regulated by the civil codes of the state where the real estate is located, and by local environmental, zoning and other administrative laws. The parties to an M&A transaction in Mexico may also agree to be subject to non-Mexican law. Thus, an acquisition agreement may be subject to foreign laws.

1.3 Corporate Entities

Among the most commonly used forms of business organization regulated by the GLCC are:

- Corporations:[1]
    - *Sociedad Anónima*/SA or
    - *SA de Capital Variable*/SA de CV); and

[1] The GLCC was recently amended to create, effective as of September 14, 2016, a new type of entity named "Simplified Shares Company" (*Sociedad por Acciones Simplificada* or SAS). The SAS has limitations that might render it unpractical for use by non-Mexican investors. These limitations include: (i) it can only be incorporated by individuals (and not by legal entities); and (ii) its total annual income cannot exceed for 2016, of approximately US$ 275,000. This limit will be updated annually.

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- Limited liability companies:
  - *Sociedad de Responsabilidad Limitada*/S de RL, or
  - *S de RL de Capital Variable*/S de RL de CV).

These entities offer limited liability, which means that the shareholders or members are insulated from liability up to the amount of their contributions at the entity level.

The Securities Law contemplates several forms of business organizations, including:

- stock corporations for the promotion of investment (*SA Promotoras de Inversión de Capital Variable*/SAPIs);
- Listed SAPIs (*SA Promotoras de Inversión Bursátil*/SAPIBs); and
- publicly held corporations (*SA Bursátiles*/SABs).

Although the choice of business entity depends on many factors, in practice, if the entity is going to be a wholly owned subsidiary, non-Mexican investors frequently form an S de RL de CV because that form of business organization can be tax efficient (e.g., in the United States, that entity is considered a "pass-through" entity for federal income tax purposes). In the context of a joint venture arrangement, SAPIs are increasingly used in Mexico since it offers more flexibility than an SA de CV or an S de RL de CV with respect to corporate governance matters, including allowing the issue of different classes of shares, the establishment of voting restrictions and/or stock transfer restrictions.

1.3.1 SA de CV

The SA de CV is equivalent to a corporation in other jurisdictions. There must be at least two shareholders to incorporate an SA de CV. Unless otherwise limited by the FIL, the GLCC allows the shareholders of any given corporation to be Mexican and/or a foreign national (individual or legal entity).

Shares in stock, the certificates of which are considered negotiable instruments under Mexican law, represent the capital stock of corporations. The SA and SA de CV differ in at least one significant aspect: the SA only has a fixed capital and thus, any subsequent increase or decrease to such capital requires amendment to the bylaws. On the other hand, the charter and bylaws of an SA de CV divides the capital in two portions: the minimum fixed portion and the variable portion, the latter which may be unlimited. In this scenario, the variable portion of its capital stock may be increased or reduced without amending the bylaws. In view of the foregoing, foreign investors prefer to organize their business activities in Mexico under the form of an SA de CV rather than through an SA, as there is more flexibility in increasing or reducing the corporation's capital stock without any other formalities.

Upon incorporation, a corporation must have fully subscribed capital stock in an amount freely set by the shareholders in the corporation's charter and bylaws (minimum fixed capital) and at least 20 percent of their capital contribution paid in cash. Note that we do not recommend incorporating a corporation with a contribution in-kind as there are specific rules to follow

(e.g., the shares paid through a contribution in kind shall remain in the corporation's treasury [in deposit] during a two-year term). If, within such term it appears that the value of the assets contributed is 25 percent lower from when the contribution was made (as a result of a second valuation), the shareholder would have to pay the difference of the value to the corporation.

The corporation's management may be vested in one (sole administrator) or more directors (board of directors). If the board of directors has three or more members, the individual shareholder or group of shareholders owning 25 percent or more of the corporation's capital stock have the right to appoint at least one member of the board. The corporation will be legally represented by its sole administrator or board of directors, and its authority will be contained in the corporation's bylaws or conferred by the shareholders.

The sole administrator or board of directors will be vested with the authority to appoint one or more general or special managers. By its nature, that appointment may be revoked at any time by the corporation's sole administrator, board of directors or by the shareholders.

To supervise the administration of the corporation, the GLCC provides for the existence of a statutory auditor (*comisario*) to be appointed directly by the shareholders. The main task and duty of the statutory auditor will be to oversee the corporation's management for the benefit of the shareholders. As in the case of managers, there are some statutory limitations contemplated by the GLCC in appointing a statutory auditor of any given corporation, which seek to ensure the auditor's independence from the corporation's management.

1.3.2 S de RL de CV

An S de RL de CV is equivalent to a limited liability company in other jurisdictions. There must be at least two members to organize an S de RL de CV and a limit of 50 members is set by the GLCC. The GLCC allows the members of any given limited liability company to be Mexican and/or foreign.

Upon organization, a "limited liability company" (LLC) must have fully subscribed capital with at least two equity quotas with a value of at least one Mexican peso (MXN1) each (minimum fixed capital), as established by the members in the company's charter and bylaws, and at least 50 percent of that capital contribution must be fully paid. The capital of LLCs is divided into equity quotas, which by law are not considered negotiable instruments. The assignment of equity quotas, as well as the admission of new members to participate in the LLC's social capital, requires a prior favorable resolution of the majority of its members, unless the company's bylaws establish a higher percentage. The treatment of the minimum fixed and variable portion of the capital in an S de RL and in an S de RL de CV is similar to the treatment of that in an SA de CV, as outlined in the second paragraph of Section **1.3.1**. Thus, it is preferable to organize a business in Mexico under the form of an S de RL de CV rather than as an S de RL.

The LLC's management may be vested in one (sole manager) or more managers (a board of managers), either of which can be freely removed by company members at any time. Where two or more managers are entrusted with the management of the LLC, they must act as a board of managers. The LLC is legally represented by its sole manager or board of managers, and its

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authority established in its bylaws or conferred by the members. An S de RL de CV need not have a statutory auditor (GLCC).

1.3.3 SAPI

An SAPI is a type of corporation regulated by the Securities Law. SAPIs are a form of corporate entity created by the Mexican Congress in 2006 to accommodate private equity investments and to act as a joint venture vehicle. By contrast to other forms of entities in Mexico, an SAPI places greater emphasis on capital contributions rather than the identity of the shareholders/members. SAPIs need not register their securities with the National Securities Registry.

1.3.4 SAPIB

An SAPIB is a type of SAPI that must register its securities in the National Security Register of the Mexican Stock Market for a transitional period. SAPIBs may operate for a maximum of three years before transforming to an SAB. The purpose of this three-year period or registration is to give the SAPIB time to adopt the corporate governance and administration measures that are required for an SAB. SAPIB securities may be traded with or without a public offering and may be acquired by any party, including institutional or qualified investors.

1.3.5 SAB

An SAB is a type of corporation that adopts specific governance regulations provided for by Securities Law to offer capital and securities on the Mexican Stock Market. The entity must register its shares with the National Security Register, and add to its corporate name the word "*Bursátil*" or the abbreviation "B."

2. Acquisition Methods

In Mexico, a business can be purchased by:

- share purchase;
- asset purchase;
- a merger; or
- a combination of those transactions.

Either structure has specific issues that need to be considered by the seller and the buyer during the negotiation process. There are certain key differences between a stock/share acquisition and an asset acquisition. The principal distinction between the two is that in share acquisitions, the buyer will assume the entire liability from the target company. In contrast, in an asset acquisition, the buyer will generally only be liable for the assets acquired (subject to an exception with respect to the acquisition of a business as a going concern, as referred to in the last paragraph of **5.2**).

In an asset transaction, the seller might need to obtain the consent of a contracting party to transfer certain contracts to the buyer. In a stock/share acquisition, contracts are generally unaffected by the transfer of shares, except if the contract contains a change of control provision. Similarly, the

licenses, permits and authorizations of the target company will remain unaltered in a share acquisition. In contrast, in an asset acquisition, certain permits and authorizations held by the target company could be difficult to transfer because of the need to obtain the consent of the issuing government agencies. In some cases, it will be necessary to obtain a new permit or authorization.

Since in an asset acquisition, the buyer can choose the assets it wishes to acquire and the liabilities it wishes to assume, due diligence in an asset acquisition is generally narrower, as it usually involves verifying the title to the corresponding asset(s) and the seller's compliance with legal requirements applicable to the import, use or sale of the relevant assets. In contrast, due diligence in a stock acquisition context requires a complete and comprehensive review of the affairs of the target company to limit the risk that the buyer might assume liabilities that it does not wish to assume.

2.1 Acquisition of Shares

Under Mexican laws, from a corporate perspective, the acquisition of shares is one of the least complicated acquisition procedures that non-Mexican buyers may use to transact with Mexican sellers. Generally, all that is required to transfer the legal title to the shares in a stock corporation (SA de CV) is:

- execution of a stock/share transfer agreement;
- endorsement and delivery to the buyer of the relevant stock certificate(s); and
- registration of the new shareholder in the company's stock registry book.

Similar requirements apply to the acquisition of membership interests in limited liability companies (S de RL de CV), except that:

- the members of the company issuing the equity quotas must approve the transfer of quotas to a third party at a members' meeting; and
- the endorsement of the stock certificate is not required since an S de RL de CV does not issue negotiable stock certificates.

2.2 Acquisition of Assets

Under Mexican laws, the transfer of assets is generally documented in an asset purchase agreement (APA). The APA must follow the requirements applicable to the transfer of these particular assets. Generally speaking, the transfer of movable assets requires an invoice issued in accordance with Mexican tax laws. The transfer of ownership of real estate requires a notarial deed prepared by a notary public and the registration of the deed with the public registry of property (PRP) for the location of the transferred real estate property.

2.3 Mergers

Under Mexican law, two or more entities can merge either by integration or by absorption. A merger by integration involves the formation of a new entity by

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one or more entities, which merge, integrate and consolidate with a new entity, resulting in the extinction of the integrated entities. In a merger by absorption, two or more entities merge into one, which will be the resulting entity. The merged entities are extinguished and cease to exist upon transfer of their assets, liabilities and capital to the surviving or resulting entity.

3. Negotiation, Signing and Closing

3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Mexican purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking here.

Purchase Price		
1.	Is a purchase price adjustment common? What type is common (e.g., debt-free, cash-free)?	Purchase price adjustments are common. Purchase price adjustment; working capital adjustment; NAV; earn-out adjustments; adjustments due to labor severance or liability or pension benefit obligations are all common.
2.	Is there a collar on the adjustment?	Neither collar nor materiality thresholds are common in acquisitions involving non-listed entities.
3.	Who prepares completion balance sheet?	This is usually prepared by the target company or a third party (i.e., accounting firm or appointed independent appraiser).
4.	Is the balance sheet audited?	Not necessarily.
5.	Is an earn-out common?	It is fairly common
6.	Is a deposit common?	It is uncommon but could be agreed upon.
7.	Is an escrow common?	Yes.
8.	Is a break fee common?	Yes.
Conditions Precedent		
9.	Is the Express Material Adverse Event (MAE) completion condition common?	Yes.
10.	Is the MAE general or specific?	It may be either.
11.	Is quantification of MAE common?	It is possible.
Covenants, Access		
12.	Is a non-compete common? Do you use waterfall/blue	Yes.

	pencil provisions?	
13.	Is non-solicit (of employees) common?	Yes.
14.	Is non-solicit (of customers) common?	Yes.
15.	Is broad access to books, records, management between sign and close common?	It is common, subject to prior execution of confidentiality agreements.
16.	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	This is not common but could be agreed upon.
17.	Is a separate tax covenant/indemnity or tax deed common?	It is not common to have separate tax covenants or indemnities. Specific tax indemnities are commonly included in the purchase agreement.
Representations and Warranties		
18.	Materiality in representations – how is it quantified (e.g., by a dollar amount)?	Materiality qualifiers are commonly seen but not often quantified. Materiality could be difficult to define.
19.	How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?	Knowledge qualifiers are more common now. These are mostly limited to actual knowledge of top management or key personnel.
20.	Is a warranty that there is no materially misleading/omitted information common?	Yes.
21.	Is disclosure of the data room common?	No.
Repetition of Representations and Warranties		
22.	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Yes, both items are common.
23.	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material aspects.
24.	Is double materiality common (e.g., where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more	No.

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	representation)?	
Limitations on Liability		
25.	What is the common cap amount (as a percentage of purchase price)?	100%
26.	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	It applies to the entire agreement.
27.	What are the common exceptions to the cap?	Representations and specific areas of concern are common exceptions.
28.	Is a deductible or basket common?	Both are common.
29.	Is a *de minimis* common?	Yes.
30.	How long does liability survive? Are there any common carve-outs (e.g., fraud, tax, key warranties)?	General survival of 12–36 months is common. Tax, labor and environmental are usually tied to the expiry of statute of limitations period (normally 5 years).
31.	Is warranty insurance common?	No.
Reliance		
32.	Do financiers seek to rely on buyer's due diligence reports?	No.
Set-offs against Claims		
33.	Is a set off against claims for tax benefits common?	No.
34.	Are insurance proceeds common?	No.
35.	Are third-party recoveries common?	No.
Damages, Knowledge		
36.	Is the obligation to mitigate damages common?	No.
37.	Is exclusion of consequential damages common?	This is not common. Consequential damages are not provided under Mexican law.
38.	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge had no effect on warranty/indemnity?	No.

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Dispute Resolution		
39.	Does local law allow for a choice of governing law? What is the common governing law?	Yes, parties may choose governing law. Normally , it is where the buyer selects.
40.	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common when applicable law is not Mexican. Arbitration can take place in Mexico or outside Mexico.
Stamp Duty		
41.	If stamp duty is payable, is it normally shared?	No stamp duty applies.

3.2 Formalities for Execution of Documents

3.2.1 Transfers of shares

The transfer of shares or quotas/membership interests of a Mexican company is documented in a stock/share transfer agreement (SPA). Subject to the restrictions set out in FIL and its regulations, the buyer of stock issued by a Mexican company may be a Mexican or non-Mexican individual or legal entity. As in other jurisdictions, the choice of acquisition vehicle (e.g., Mexican or non-Mexican entity, joint venture company, etc.) is typically influenced by tax considerations.

3.2.2 Transfers of assets

The transfer of assets is generally documented in an APA. The formalities for the transfer of assets are referred to at **3.3.2**. Given certain tax and labor-related formalities applicable in Mexico, a Mexican company is typically used as the acquisition vehicle for assets located in Mexico.

3.3 Formalities for Transferring Title to Shares or Assets

3.3.1 Transfers of title to shares or quotas

Shares in a corporation type of entity (SAPI or SA de CV) are transferred by endorsement and delivery of the share certificate to the buyer. The name, nationality, domicile and tax identification number of each buyer-entity must then be included in the shareholders' registry book of the target company. It is also important that the buyer considers, prior to the acquisition of the shares, any formalities for the transfer of shares set out in the target company's bylaws. That procedure may include, for example, a notice to the board of directors, right of first refusal or other formalities.

The membership or equity interests in a limited liability company (S de RL de CV) are transferred by means of a quota purchase agreement, with the prior consent of at least a majority of the members of the company. The name, nationality, domicile and tax identification number of each buyer must be included in the members' registry book of the target company. It is also important that the buyer considers, prior to the acquisition of the membership or equity interests, any formalities for the transfer of memberships or equity interests set out in the target company's bylaws. That procedure may include, for example, a notice to the board of managers, right of first refusal or other formalities.

3.3.2 Transfers of title to assets

The APA must address the requirements applicable to the transfer of the relevant assets, including the following:

Movable assets

An APA involving the transfer of movable assets should include:

- an assets/liabilities schedule, which must set out the assets that will be transferred from the seller to the buyer;
- a purchase price allocation schedule identifying, individually, all of the assets to be transferred; and
- as a closing deliverable, invoices representing the transferred assets.

The invoices must list unit price, quantity, make, model, serial number and other necessary details to permit the proper identification of the item or asset. If the movable assets are subject to encumbrances, it may be necessary to execute releases before a Mexican notary public.

Immovable assets/real estate

Where the transaction involves the acquisition of real property, certain legal formalities should be followed based on the civil code rules of the municipality where the property is located. The purchase should be formalized in the presence of a Mexican notary public, and a notarial deed evidencing that transaction issued. The notary public should include in the notarial deed a description of the property's boundaries, whether the property is subject to liens or other encumbrances, the purchase price, etc. The notarial deed must be registered with the public registry of commerce of where the property is located.

In addition, the seller and the buyer should take into account and properly address in the APA any situations in which the seller might be subject to transfer restrictions that could serve as obstacles to the transaction, such as:

- where a seller has provided to the shareholders or members the right to refuse the transfer of assets; or
- where the approval of a creditor is needed for the transfer of the assets under a finance or credit agreement entered into by the seller.

3.4 Formalities for Mergers

Mergers, either by absorption or integration, must be approved at a shareholders'/members' meeting, and by the execution of a merger agreement. The minutes of the meeting and the merger agreement must be formalized in a notarial deed that must be registered with the Public Registry of Commerce. It will also be necessary to publish an extract of the merger agreement in the electronic system of the Ministry of Economy, along with the entities' balance sheets.

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Mexican law provides for two possible methods to effect a merger:

- The adoption of the merger agreement by the shareholders or members of all the entities involved, then the consummation of the deal, which will occur immediately upon the recording of the merger agreement with the Public Registry of Commerce, as long as the consent or payment (or deposit for payment in a banking institution) of all creditors of the merging entities have been obtained, or a provision for payment is included in the merger agreement; or (alternatively)
- The consummation of the merger after three months of the date of the merger agreement's registration with the Public Registry of Commerce, as long as no creditors object.

4. Regulatory Framework

4.1 Competition Law Considerations

The new Federal Law of Economic Competition (FLEC) or Mexican Competition Law became effective in July 2014. In accordance with the FLEC and the recent amendments to Article 28 of the Mexican Constitution (published 11 June 2013), the Telecommunications Federal Institute (IFETEL)[2] and the Federal Economic Competition Commission (FECC)[3], are the government agencies that act as competition regulators in Mexico. The FECC and IFETEL (referred to together as the New Competition Authority (NCA) are both independent agencies with their own legal, administrative, technical and operative powers, as well as autonomy.

4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Mexican purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1.	Is a filing obligation voluntary or mandatory (i.e., are there penalties for failure to notify or for implementing a transaction without notification or approval)?	It is mandatory.

[2] FLEC regulator for telecommunications, radio and TV industries sectors.
[3] FLEC regulator for any other sector or market not covered by IFETEL.

Timetable		
2.	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	The NCA may clear a transaction earlier if the deal does not raise competitive concerns and in particular, where the parties have engaged in pre-notification discussions. In practice, the clearance decision may be obtained prior to the 60 working-day deadline (usually within 20–30 working days in straightforward cases with no antitrust concerns). Only in extremely rare cases will the NCA actually extend the term to resolve or investigate matters for an additional 40 working days.

For the purposes of the sections that follow, (in general terms):

- A concentration is defined as any merger, acquisition or other action by which companies, associations, shares, equity quotas, trusts or assets in general are accumulated.
- A prohibited concentration is defined as a merger, acquisition or other action between any persons or entities, whether competitors or not, having the purpose or effect of diminishing, damaging or preventing competition in identical, similar or substantially related goods or services.

The FLEC identifies certain issues that the NCA must consider in determining whether a concentration is prohibited, such as the possible market power or price-fixing capabilities resulting from the concentration. The NCA can condition the approval of a proposed concentration on the restructuring of the transaction to avoid anti-competitive consequences, or can order the partial or full unwinding of a prohibited concentration.

4.2.1 Procedure

The NCA must be given prior notice of a proposed concentration if the underlying transactions:

- have a value in the Mexican Republic exceeding 18 million times the nationally set daily minimum wage for Mexico City (DMW);[4]
- involve the accumulation of more than 35 percent of the assets or shares in an entity whose assets or sales in Mexico exceed 18 million times the DMW; and/or
- imply an accumulation of assets or capital stock in the Mexican Republic in excess of 8.4 million times the DMW, and involve persons or entities whose combined assets or annual sales in Mexico exceed 48 million times the DMW.

[4] The current DMW is MXN73.04 as of 1 January 2016.

Upon notification, the NCA has 60 business days to rule on the reported concentration. This 60-day term will restart if the NCA finds it has to request additional basic information and/or additional economic information. If the NCA does not respond within the 60 days, the transaction will be deemed approved.

As a competition regulator, the NCA has broad investigatory and enforcement powers. It may: initiate administrative procedures on its own or at the request of third parties; investigate and resolve such cases; and issue administrative penalties. It may also refer criminal cases to the District Attorney. The NCA can also issue binding opinions in antitrust matters.

4.2.2 Penalties

In addition to the obligation to dismantle prohibited concentrations, parties found to be in violation of the FLEC may be subject to administrative penalties in the following amounts:

Fines for breaches of the FLEC		
Action	**Fine**	
Carrying out a prohibited concentration	≤ 8% of the annual income of offender	
Failure to notify a reportable concentration	≤ 5% of the annual income of offender	
Direct/Indirect participation in a prohibited concentration in the capacity of ‘representatives’ of the offenders	≤ 200,000 times the DMW (approximately USD860,000) plus prohibition to act as director, representative or manager of any company for a term of up to 5 years	The FLEC does not expressly define what kind of representation is required here, so this penalty may be applicable to any individuals involved directly or indirectly in the violation.
Inducing, provoking or participating in a prohibited concentration	≤ 180,000 times the DMW (approximately USD777,000)	
Breach of NCA order to discontinue acts deemed as a prohibited concentration	≤8% of the annual income of the offender	
Note: Recidivism or a relapse in complying with any of these obligations may entitle the NCA to double the fines.		

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4.3 Exchange of Competition-Sensitive Information and "Gun-Jumping" Issues

4.3.1 Exchange of competition-sensitive information

The FLEC regulates two main kinds of illegal monopolistic practices:

- Absolute monopolistic practices (those that take place among competitors [e.g., price-fixing, market segmentation, restriction in the offering of goods, bid-rigging and/or any exchange of information with the aim of accomplishing any of those results]); and
- Relative monopolistic practices (among any undertaking with any of its suppliers, clients or distributors).

Absolute monopolistic practices are prohibited per se and any legal act or contract that attempts to implement them will be deemed null and void. Thus, any exchange of sensitive information with competitors would, in principle, qualify as an absolute monopolistic practice and the undertaking involved may be subject to a sanction of up to 10 percent of its annual income generated in Mexico, in addition to any potential criminal and/or civil liability. Likewise, the personnel directly involved in an absolute monopolistic practice may be subject to fines of up to approximately 200,000 times the DMW (approximately USD860,000) and may face criminal prosecution (personnel directly involved in this kind of monopolistic practice may be subject to a criminal penalty of up to 10 years of imprisonment - please refer to Article 254*bis* of the Federal Criminal Code).

4.3.2 "Gun-jumping" issues

Global merger control laws need to be taken seriously, as merger control authorities around the world have developed an appetite for investigating and punishing companies for failure to notify reportable transactions or for implementing a transaction in breach of standstill obligations. In this, Mexico is no exception, with the NCA ready to penalize or block transactions pending investigation of antitrust consequences.

Under the FLEC, parties submitting merger control filings with the NCA should wait until the authority clears the reported transaction before proceeding to closing. If the parties do not report a notifiable transaction to the NCA or decide to proceed to closing without NCA approval, those undertakings could be subject to a fine of up to:

- 8 percent of annual income generated in Mexico if the relevant operation is ultimately considered as a prohibited concentration; and/or
- 5 percent of annual income for failure to notify a reportable transaction.

4.4 Anti-Bribery, Corruption and Money Laundering

Mexico is a party to several international conventions regulating anti-bribery, including the Inter-American Convention against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against

Corruption. At the national and federal levels, Mexico has enacted several anti-corruption laws.

4.4.1 Federal Criminal Code

The Federal Criminal Code has prohibited bribery since 1931. Both public servants and private parties may be guilty of the crime of bribery, which punishes:

- "The public servant (PS) who, directly or indirectly, solicits or receives unduly for the PS or another person, money or any other gift, or accepts a promise, to do or refrain from doing any just or unjust act in relation to the PS's functions," and
- "Whoever spontaneously gives or offers money or any other gift to any of the persons described in the foregoing paragraph, to cause any PS to do or refrain from doing any just or unjust act related to the PS's function."

The crime is punishable by imprisonment of between two and 14 years, with a statute of limitation period of eight years from the commission of the crime. The crime of bribery can only be committed by individuals, not companies. The crime is relatively rarely proven, however, since evidentiary requirements for proof of the crime are difficult for the state to meet.

4.4.2 Federal Anti-Corruption Law for Government Procurement (Anti-Corruption Law)

The Anti-Corruption Law, which came into force in June of 2012, is an administrative law that applies both to individuals and companies, whether Mexican or foreign, that directly or indirectly (e.g., through a "commission agent") participate in procurement proceedings with federal government entities. Under the Mexican Commercial Code, a commission agent acts according to specific instructions from its principal, who is liable for the agent's actions, from both a civil and administrative law perspective.

Among the most relevant prohibitions of the Anti-Corruption Law are the following, which cover both direct and indirect activities:

- Promising, offering or providing money or any other benefit to a public servant or a third party, in order to induce that public servant to perform or refrain from doing any action related to their duties or those of another public servant, for the purpose of obtaining or retaining any benefit or advantage, regardless of whether the money or benefit was actually accepted or received and regardless of the result. This specifically includes benefits to third parties who are in any way involved in the preparation of the government contracting process.
- Colluding with one or more of the parties subject to the Anti-Corruption Law, taking any action that involves or is intended to obtain an unlawful benefit or advantage in any procurement process; and/or
- Performing any action intended to avoid complying with requirements or rules in a procurement process.

For any of these cases, the agent engaging in the prohibited behavior will be sanctioned, along with its principal.

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The sanctions are as follows:

- Individuals: maximum fine approximately USD375,000 or 35 percent of the value of the agreement; the individual may be disqualified from participating in federal government procurement processes for up to eight years; and
- Companies: maximum fine approximately USD14.9 million or 35 percent of the value of the agreement; the company may be disqualified from participating in federal government procurement processes for up to 10 years.

4.4.3 Administrative responsibility of the public servants law

This 2002 law provides as follows:

> Article 8(XII)—Every public servant (PS) has the following obligations: To abstain, during the PS's exercise of his or her functions, from soliciting, accepting or receiving, directly or indirectly, money, real or personal goods by transfer at a price 'notoriously' inferior to its ordinary market price, or any donation, services, employment, position or commission for him/herself or for [related persons] from natural or corporate persons whose professional, commercial or industrial activities are directly governed, regulated or supervised by the relevant PS in the performance of the PS's employment, office or commission and that involve a conflict of interest … .

The obligation continues for one year after the PS has left office.

4.4.4 Procurement law

Government entities are prohibited from receiving proposals or awarding contracts to any individual with whom, or any company in which, any of the public servants involved in the government procurement process has a personal family or business interest (Article 50).

4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

4.5.1 Exchange controls

Mexican law does not impose any general restrictions or limitations on the remittance of dividends or repatriation of capital. No exchange controls exist in Mexico.

4.5.2 Foreign investment approvals and notifications

In a share sale, where the target's bylaws do not include a clause allowing foreign (i.e., non-Mexican) participation, the existing shareholders or members should amend the bylaws to authorize foreign participation. However, there are limits on foreign investment participation set by Mexican law in relation to certain regulated businesses. Under the FIL, a foreign investor may acquire more than 49 percent of the equity of an existing company owned by Mexican investors, without the prior approval of the National Commission of Foreign Investments (NCFI), as long as the target company is not engaged in a restricted activity and the total value of the

assets of that company does not exceed certain monetary thresholds established annually by the NCFI. Currently, this threshold is MXN3,810,816,212.47. See also **4.2.2.**

Nonvoting shares

Mexican companies may issue nonvoting shares, which are considered a "neutral investment." Foreign investors may acquire these shares, with certain limits established by the FIL. The process of issuing these shares begins with the approval of the Foreign Investment Commission of the release of ordinary participation certificates representing not more than 49 percent of the voting stock. The certificates represent economic rights.

National registry of foreign investments

The FIL and its regulations provide that companies with foreign investments (whether subject to approval or not) are required to file several notices regarding the operations of the companies' financial status and other relevant information with the National Registry of Foreign Investments (NRFI). Mexican companies with foreign investments are required to register with the NRFI within 40 business days of the date of their respective incorporation. That registration must be regularly renewed to maintain good standing. They are required to file a notice, within 40 business days, of any change with the NRFI, in the case of changes to the original information submitted to the NRFI. If a company does not comply with this requirement, it will be subject to administrative fines.

In essence, the obligations are as follows:

1. The obligation to file an annual economic report with the NRFI will be triggered should those with such duty reach, at the relevant fiscal year, an amount equal or higher to that provided by the NCFI, of MXN110 million, on at least one of the following headings: **Total Assets** (initial and/or final, **Total Liabilities** (initial and/or final), **Income** (whether in Mexico or abroad) or **Outcome** (whether in Mexico or abroad.

   The annual economic report must be filed in accordance with the following calendar schedule, according to the first letter of the corporate name of those with this filing obligation:

   a) From letters A to J, in **April** every year; and

   b) From letters K to Z, in **May** every year.

2. The obligation to file a quarterly economic report with the NRFI will be triggered should those with such duty reach an amount equal or higher to the amount fixed by the NCFI, that is MXN20 million, in any of the following three scenarios:

   a) When new contributions are made or such contributions are withdrawn, as long as they do not affect the capital stock of the company; or

   b) When the last fiscal year has retained earnings and disposition of accumulated retained earnings; or

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c) When there are payable or receivable loans: with any subsidiary that is a resident abroad; with the holding company that resides abroad; with foreign investors who reside abroad and who participate as partners or shareholders; and with foreign investors who reside abroad and who are part of the corporate group to which the individual, foreign entity or Mexican company which files the report, belongs to.

The quarterly report shall be filed within the ten (10) business days following the end of each quarter.

3. The quarterly compliance duties include an obligation to keep corporate information updated, in the following cases:

   a) Every modification to the corporate name, tax address and corporate purpose or scope, must be notified without exception.

   b) The change to the capital stock (increases or reductions) and changes related to the capital structure must be filed in the event that the change is equal to or exceeds MXN20 million. Changes to the capital structure must have supporting documentation that shows the amount of the operation (such as agreements).

These notices must be filed quarterly, within ten (10) business days following the end of each quarter.

In accordance with the FIL, a foreign company:

- that wishes to carry out commercial acts in Mexico on a regular basis; or
- that wishes to set up a presence in Mexico (and provided it is not subject to any specific sector regulations) ,

— must obtain the approval of the Ministry of Economy to establish and register a branch in Mexico. An application must be submitted to the Ministry, which must rule on the application within 15 business days of the day on which the application was submitted.

Real estate

Mexican law establishes certain restrictions on land ownership by foreign investors in Mexico.

- Restricted zones: Foreign individuals and entities may not hold the direct title to real estate in Mexico located within 100 kilometres of the border or 50 kilometres of the coastline (the restricted zone, under the Mexican Constitution). However, individuals and entities may hold beneficial interest in real estate within the restricted zone via a Mexican trust. Real estate trusts in Mexico cannot last longer than 50 years and its trustee must be a Mexican bank.

  Mexican companies with foreign equity participation may hold direct title to real estate located in the restricted zone if they engage in

nonresidential activities (FIL). If they engage in residential activities, they may hold the real estate in trust (i.e., they may not hold the direct title to real estate in a restricted zone).

- Non-rural land outside the restricted zone: Under Mexican law, foreign individuals and Mexican companies with foreign equity participation may hold the direct title to non-rural land located outside the restricted zone.
- Rural land outside the restricted zone: Foreign individuals may hold direct title to rural land located outside the restricted zone. Mexican companies with foreign equity participation may hold the direct title to rural land, provided ownership of that land is represented by special “Series T” shares. Foreign investors may not own more than 49 percent of the “Series T” shares issued by the respective company.
- Quantitative restriction of land ownership: The Mexican Constitution and regulatory agrarian legislation establish limits to the amount of rural land a person may own and protect against expropriation for communal use. For example, generally the maximum area of irrigated land that may be protected from expropriation is 100 hectares per person. For lands subject to seasonal use and un-irrigated pastures subject to agricultural harvest, the maximum area that can be protected is 200 hectares.

  Under the Constitution, a Mexican corporation may own and protect up to 25 times the land area that one individual is permitted to protect.

  Under certain circumstances and if certain requirements are met, a landowner may protect an area that exceeds the above limits (e.g., if he or she is improving the quality of the land by installing irrigation or drainage systems).
- IMMEX or *Maquiladora* Programme: A Maquiladora or IMMEX company is a Mexican company authorized by the Ministry of Economy to operate under an IMMEX programme to manufacture finished products for further exportation and/or to render export services using raw materials, parts, components, machinery and equipment temporarily imported under the programme.

  The Mexican *maquiladora* programme was introduced over 30 years ago by the Mexican government to promote employment in Mexico. The *maquiladora* industry in Mexico is governed by the Decree for the Promotion of the Manufacturing, Maquiladora and Export Services Industry (the *Maquiladora* Decree or the IMMEX Decree) and the Income Tax Law, as amended. Under the *Maquiladora* Decree, a foreign investor will qualify to operate under *maquiladora* status only if it has a corporate presence in Mexico. A Mexican corporation that qualifies for *maquiladora* status may have up to 100 percent foreign ownership. The great majority of *maquiladoras* (also known as IMMEX companies) are wholly owned subsidiaries of foreign corporations.

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4.6 Industry-Specific Regulation

The FIL lists certain economic activities that are:

- reserved to the Mexican State;
- reserved to Mexican nationals or Mexican companies without foreign equity participation;
- subject to quantitative foreign investment limitations; and
- subject to prior approval if the foreign investor wishes to own more than 49 percent of a company engaged in those activities.

4.6.1 Activities reserved for the Mexican State

In compliance with the Mexican Constitution and as a reflection of historical concerns regarding private investment, the FIL reserves certain strategic areas for the Mexican State. Neither Mexican nor foreign investors may engage in these areas of economic activity.

These include:

- Exploration and extraction of petroleum and other hydrocarbons
- Transmission and distribution of electricity as a public service
- Nuclear energy generation
- Industries involving radioactive minerals
- Industries involving telegraphs
- Radio telegraphy
- Mail services
- Issuance of money
- Minting of coins
- Control, supervision and surveillance of ports, airports and heliports
- Certain other areas expressly specifically legislated for

4.6.2 Activities reserved for Mexican investors

The FIL establishes certain economic activities that are open exclusively to Mexican investors (Mexican nationals or Mexican companies with a foreign exclusion clause [*cláusula calvo*]). These areas include:

- Domestic transportation by land of passengers, tourism, and freight/shipping cargo, excluding messenger and courier services
- Development of banking institutions under the terms of the corresponding governing law

- Professional and technical services reserved for Mexicans under the corresponding legislation

Foreign investors cannot participate in any of these activities, directly or indirectly, through any agreement or corporate structure or scheme, except by owning especially approved "neutral" shares (which have no voting rights and limited corporate rights), or as otherwise approved by the NCFI.

4.6.3 Activities with foreign investment equity limitations

The FIL establishes foreign ownership limits in certain companies, activities and types of shares.

Foreign ownership	Regulated activities
≤10%	· Cooperative companies for production
≤ 25%	· Domestic and specialized air transport; air-taxi transport
≤ 49%	· Production/sale of explosives, including firearms, cartridges, ammunition, fireworks (except purchase/use of explosives for industrial and extractive purposes, and preparation of explosive mixtures for related uses) · Printing/publication of newspapers for exclusive distribution within Mexico · "Series T" shares in companies owning agricultural, cattle-raising and forest lands · Freshwater and coastal fishing; fishing in the exclusive economic zone, excluding aquaculture · Comprehensive port management · Piloting services to vessels in inland interior navigation · Shipping companies operating commercial vessels for navigation in interior waterways and between domestic ports (excluding tourist ferries; use of dredging machines and devices for port construction, maintenance and operation) · Supply of fuel and lubricants for ships, airplanes and railroad equipment · Some specified telecommunication services

Foreign investors may not own more than the permitted percentage of equity in a Mexican company engaged in any of the activities in the Table at **4.6.3**. These limits may not be surpassed either directly or through any type of agreement or corporate structure or scheme, except via ownership of "neutral" shares (see **4.6.2**), and unless otherwise provided for by international treaty (e.g., the North American Free Trade Agreement in the case of financial services).

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4.6.4 Activities subject to pre-approval of 49 percent+ foreign investment

Prior approval is required before a foreign investor can own more than 49 percent of a company engaged in any of the following activities:

- Port services to vessels engaged in interior navigation (e.g., towing, mooring)
- Overseas shipping
- Companies authorized to operate public aerodromes
- Private education services (preschool, elementary, middle school, high school, college or any combination)
- Legal services
- Construction, operation and use of railways and public railroad transport services

These foreign investors required to obtain prior approval to own 49 percent+ of a new or existing Mexican company must file an application with the NCFI, which has 45 business days from the day the filing to issue its ruling. If the NCFI does not rule within 45 days, the application will be deemed approved.

4.7 Import/Export Controls

4.7.1 Import controls

Since the enactment of NAFTA in 1994, import controls have significantly eased in Mexico. Most products no longer require prior import permits, and import duties have been reduced. Duties are generally assessed on the transaction value of the products imported into Mexico and may be reduced and/or deferred under the import and export programmes enacted by the Mexican government (e.g., IMMEX Programme) or Free Trade Agreement (FTA).

Generally, under the Mexican Customs Law, importers must be registered in the general importers' registry and secure an import license to start processing import and export transactions. To register in the importers' registry, the importer entity must:

- be registered in the federal taxpayers' registry;
- have an advanced electronic signature (FIEL) and a confidential electronic identification password, from the tax administration service; and
- be able to provide the name and license number of the individuals that will act as Mexican customs brokers authorized by the importing company to carry out customs operations on behalf of the company.

4.7.2 Export controls

Mexican law currently imposes restrictions on the export of certain goods under the 2011 Export Control Regulation, which introduced export controls on military and "dual-use" goods specified in the Wassenaar Arrangement List of Dual-Use Goods and Technologies and Munitions. As in other jurisdictions,

"dual-use" items are items that, while principally having a commercial application, are deemed sensitive because of their potential to be used in military or other sensitive applications.

To determine whether a specific product falls within the Export Control Regulation, a Mexican exporter must refer to the Export Control Regulation and to specific administrative regulations issued by different government entities. However, where an item is listed both in any of the abovementioned regulations and also in the Export Control Regulation, the obligation set out in the administrative regulations issued by the Ministries of Economy, Energy, Health and Defence (if any) should prevail.

5. Transfer Taxes

5.1 Acquisition of Shares

5.1.1 Income tax

Generally, under domestic tax law, the transfer of shares (or equity interests/quotas) of a Mexican company is subject to Mexican income tax, regardless of the country where the sale takes place. Additionally, the transfer of shares (regardless of the tax residency of the issuer) will be subject to income tax in Mexico if the book value of those shares is represented, directly or indirectly, in more than 50 percent of real estate property located within Mexico.

Non-Mexican residents who transfer shares in Mexican companies are subject to a 25 percent tax on the gross proceeds of the sale or to 35 percent tax on the net gain derived from the sale, if the foreign resident opts for this tax and has a local representative in Mexico. Note that this net gain taxation treatment is not an option for foreign sellers domiciled in a tax haven jurisdiction or a jurisdiction with a territorial taxation system.

Net gain is determined by subtracting the seller's tax basis in the shares sold (adjusted for inflation and for other factors as determined by the Income Tax Law) from the gross sale proceeds. If the transferor elects to be taxed at 35 percent on the net gain derived from the sale, the party transferring the shares or quotas must appoint a legal representative in Mexico and must file a tax return with respect to the sale, as well as a fiscal notice and certification (*dictamen fiscal*) signed by a Mexican certified public accountant to certify that the gain reported on the tax return has been correctly calculated.

Where transactions are made between related parties, the certified public accountant must certify in the *dictamen fiscal* that the adjusted tax cost of the shares has been calculated correctly and that the shares have been properly valuated in accordance with the arm's-length principle set out in the Mexican tax law for the purposes of determining the shareholder's gain or loss on the exchange.

Under certain conditions, it may be possible to request permission from the tax authority to defer payment of taxes on transfers of shares in reorganizations between members of the same group of companies. That permission must, however, be requested (and granted) before the transfer of shares.

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Mexico has entered into more than 50 tax treaties to avoid double taxation. Depending on the tax residence of the transferor, therefore, some treaties may provide a reduction on the tax rate or an exemption on taxes applicable on transfers of Mexican shares.

5.1.2 Value-added tax (VAT)

The purchase or sale of shares (or equity interests/quotas) of a Mexican company is not subject to VAT.

5.2 Acquisition of Assets

5.2.1 Income tax

The transfer of assets is a taxable event in Mexico and can trigger income tax for the seller/transferor (assuming a gain is obtained). From the buyer's perspective, a purchase of assets is the route to fastest tax recovery (via deducting expenses, depreciation or amortization). Inventory is deductible in the year it is sold; the principal depreciation rates are:

- Computer equipment — 30 percent
- Automobiles — 25 percent
- Office equipment and machinery — 10 percent
- Building/construction works — 5 percent.

Under applicable Mexican tax laws, goodwill is deemed as an intangible good, so in acquisitions involving intangible assets, it will be important to review the nature and type of intangibles that will be acquired. Caution must be exercised when goodwill is involved as part of the acquisition, since it cannot be amortized, even when acquired from third parties, and while it may be subject to VAT, VAT paid is not recoverable.

5.2.2 VAT

VAT is triggered on a cashflow basis and applies to the purchase of assets (tangible or intangible) – and can be recovered during the course of the Mexican transferee's operations. A few sales transactions qualify for exemption from VAT, and some others are zero-rated (as opposed to attracting the standard VAT rate of 16 percent). With respect to real estate, VAT is levied on the purchase price of properties.

5.2.3 Real estate-related taxes

The purchase and sale of real estate is subject to real estate transfer tax payable by the person or entity that acquires the real property. The applicable tax rate varies depending on the location of the property (rates range from 1.5 percent to 4.9 percent). The real estate's tax base is calculated on the highest of the purchase price, the value registered with the land registry office and the property's fair market value. In addition, as noted in **3.3.2**, the transfer of ownership of real estate requires a notarial deed prepared by a notary public and the registration of the deed with the PRP. The PRP will charge registration fees to record the notarial deed.

5.2.4 Acquisition of a business as a going concern

According to the Mexican Federal Tax Code, acquirers of going concerns or businesses could be deemed jointly and severally liable with the seller for past tax obligations of the seller and its business. Therefore, the acquisition should be structured to mitigate the acquirer's exposure to that risk of joint and several liability. For instance, in certain circumstances, it may be advisable to break down the various components of the going concern – such as inventory, fixed assets, accounts payable and receivables, employees, goodwill (or a covenant not to compete) – and have different entities in the buyer group purchase/acquire each of those components. Or else, only certain assets could be acquired, attracting joint and several liability for only those essential parts of the business.

6. Employee Issues

6.1 Method of Transfer under Local Law

6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the buyer therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company. Although not common, collective bargaining agreements (CBA) may include change of control provisions that could trigger notification, consultation or special rights in favor of employees of the target company involved in a share purchase transaction. Thus, it is advisable to review relevant CBA to determine if, in fact, it does contain any such rights.

6.1.2 Acquisition of Assets

On a transfer of assets, the labor implications will vary depending on the case. Under certain binding court precedents, if the majority or all of the assets required for the employer's operation is transferred as a result of the deal, then an automatic employer substitution occurs. If only certain assets are transferred to the buyer, only the employees whose employment activities are related to those assets may be subject to an employer substitution. Therefore, in practice, two methods exist for the transfer of employees to an acquirer of assets:

- Employer substitution
- Termination and rehire

Employer substitution

In the employer substitution situation, the "substitute employer" (i.e., the buyer of the assets or its designee) will assume liability for salaries, benefits, length of service bonuses and all other employment conditions of the employees of the target company. Thus, the employees continue their employment contract unchanged. In addition, due to a recent court precedent in Mexico, the following conditions must apply for an employer substitution to be valid and enforceable:

- The substitute employer must acquire the assets related to the activities performed by the transferred employees.

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- The activities in which the employees are involved should be continued by the substituted employer.

When an employer substitution takes place, employees are, in principle not entitled to severance pay, as long as the new employer assumes and honors all of their former employment conditions and benefits. In the event that the substitute employer cannot match all the previous working conditions, the substitution of the employer will not be enforceable, and employees may therefore terminate the employment relationship "for cause." In that case, the employees will be entitled to receive the compulsory severance pay provided for in the FLL.

Although the consent of the employees is not technically required for an employer substitution, both former and new employers must inform transferring employees of the change, in writing. Note that under the FLL, the outgoing and new employers are jointly liable for labor obligations including unpaid social security contributions for a period of six months after the effective date of the employer substitution.

Termination and rehiring

If the employment substitution method does not apply to the corresponding asset and sale transaction, the following alternatives are available for the transfer of employees. These alternatives must be carefully evaluated and negotiated, as these may have implications (e.g., costs of terminating the positions of some employees).

Termination and rehiring without recognition of seniority

If a seller terminates its employment relationship with employees and the buyer then rehires them, without acknowledging the length of their service (seniority) with the former employer, the employees would be treated as new hires by the buyer, who would be free to establish new terms and conditions of employment (and in turn, the employees would be, of course, free to accept those conditions of employment, or refuse).

However, because under Mexican law, an employer may not terminate the employment relationship with an employee absent a statutory "just cause" of termination, the employees will be entitled to mandatory severance pay required under the FLL (see below) and the termination agreement must also be approved by the relevant Conciliation and Arbitration Board.

This alternative may seem, on its face, to entail less risk for and costs to the buyer, as the buyer will not be assuming the liabilities and termination costs of the transferred employees. However, it could turn out to be more costly for the seller, because of the requirement to pay mandatory severance. Thus, in an asset deal, in practice, the determination as to which party will pay termination costs, or how the parties will split those costs will be significant, and should be carefully negotiated.

Termination and rehiring with recognition of seniority

If the seller terminates its employment relationship with employees and then the buyer rehires those employees acknowledging the length of their service (seniority) with the transferor:

- The employees should receive all unpaid salaries, holidays, bonuses, etc. that accrued with the seller, but not, at the time of termination, the mandatory severance pay required under the FLL (see below).
- The buyer may establish new rates of pay and conditions for the employees after rehiring.

After closing the transaction, if and when the buyer terminates the employment relationship with the relevant employees, the buyer will be required to pay mandatory severance calculated on the total length of service of each employee (including length of service of the employee with a former employer [i.e., pre-dating the seller]).

This alternative requires:

- the consent of the employees, who must sign a resignation letter;
- the employees' acknowledgment of receipt of full payment of wages owed; and
- the execution of a termination agreement between seller and employees, ratified by the Labour and Conciliation Board.

Should the employees not consent, the termination of the employment relationship will be deemed to be a dismissal without "just cause" and the employees will be entitled to the mandatory severance payment.

Mandatory severance

Mexican employers may not freely dismiss employees without cause (FLL). To dismiss an employee and avoid liability for payment of mandatory severance, a Mexican employer must:

- be able to prove, in a labor court if necessary, that the dismissal was for a statutorily defined "just cause"; and
- give the employee, directly or through the Labour Board, prompt written notice of the dismissal and the "just cause."

"Just cause" in the context of termination of the employment relationship includes the employee's:

- immoral conduct;
- conduct relating to sexual harassment;
- repeated absenteeism; or
- unauthorized disclosure of trade secrets (non-exhaustive list under the FLL).

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In the event of litigation, if the employer fails to prove the grounds for dismissal on a termination with cause, the employer must make the following severance payments:

- Three months' "aggregate" salary (including base salary, plus all other benefits paid to the employee whether in cash or in kind during the last year of services, such as bonuses, commissions, vehicle, stock options, etc.)
- A seniority premium, equal to 12 days per year of service (capped at twice the minimum wage)
- Back pay from the date of the alleged dismissal up until the final resolution issued by the Labour Board is fulfilled. Back wages have a cap of 12 months. In relation to that period, the defendant must pay a monthly interest rate of 2 percent over 15 months capitalized at the payment date. The cap to back wages applies only to labor suits started as of 1 December 2012 (effective date of the reform to the Mexican Federal Labour Law)
- Accrued benefits

Note that severance payment is an unwaivable employee's right and any agreement stating otherwise would be null and void. However, severance payment can be negotiated with the employee depending on the specific circumstances, even during the litigation process.

6.2 Approval or Consultation Requirements

6.2.1 Share purchases

The FLL does not grant any special rights to employees of a target company whose shares are sold to a buyer in a share purchase transaction. However, it is advisable to review the employment agreements of the employees and any CBA to ascertain if these documents include a change of control provision that would trigger any notification, consultation or other special rights. Depending on the case, as a practical matter, it is usually advisable to discuss any change of ownership with the head of the senior management department and/or union to maintain good working relationships.

6.2.2 Asset purchases

The employer substitution method does not require the approval of employees, as long as the substitute employer recognizes their salaries, benefits, length of service and matches all of the conditions of the employment offered by the outgoing employer. The termination and rehire method does require the employee's consent to formalize termination of the employment relationship with the seller, and thereafter, with the buyer or its designee, as new employer. In addition, the rehired employees should execute a new employment agreement with the new employer.

6.3 Protection against Dismissal

If the buyer intends to make any employees of the target business redundant, the buyer should consider carefully the employees' rights to mandatory severance, since employer may not freely dismiss an employee without paying severance (under the FLL).

Peru

Peru

1.1 Overview

The Peruvian legal system follows civil law principles. Its constitutional and legal framework opens the economy to private investment, which is carried out in the context of a social market economy. It also promotes competition and allows foreign investment in any type of company.

The Peruvian Constitution provides that the State's role in business activities should be subsidiary and authorized by law, for reasons of public interest. This means that the State will supervise and promote free competition, repressing any conduct that restricts this, including any kind of practice that could jeopardize free economic competition, such as the establishment of monopolies or abuse by investors of a dominant position in certain sectors of the economy.

In the early 90s, investment guarantees were introduced, such as the right to hold foreign currency, the removal of restrictions on the remittance of foreign currency and dividends abroad, and the repatriation of capital. The Peruvian Constitution also guarantees that there will be no discrimination or differential treatment of any kind as between local and foreign investors on matters including (but not limited to) currency exchange, pricing, and export and import of goods rights.

1.2 General Legal Framework

The General Corporations Law contemplates the different types of corporate vehicles investors may use to carry out economic activities in Peru. Investors are free to choose from the various types of corporations set out in the General Corporations Law, the most common entities of which are:

- corporations (under their regular form or as closely held corporations);
- limited liability companies; and
- branches.

The first two options are usually used by investors wishing to incorporate a subsidiary company in Peru and provide limited liability to shareholders or partners. The branch is used as an extension of a parent company and the parent will ultimately answer for obligations incurred by the branch.

1.3 Corporate Entities

Corporations and limited liability companies are the two main legal vehicles chosen by investors with which to conduct their business in Peru. Note that in both cases:

- the law does not establish a minimum amount of capital, although, some industries (e.g., banking and insurance sectors) establish some minimum requirements; and
- the initial cash contribution for incorporation must be deposited in a local bank (contributions in kind are also permitted but are subject to particular rules).

1.3.1 Corporations (*Sociedades Anónimas/*SA)

The corporation is the preferred form of legal structure for doing business in Peru. It provides limited liability and is structured to allow the separation of management from ownership. For its incorporation, it requires a minimum of two shareholders (either local or foreign individuals or companies).

The capital of corporations is represented in shares, and there are no limitations on their transfer, except as otherwise agreed on by shareholders in the bylaws or shareholders' agreement (SHA).

The governing bodies of the corporation are the shareholders' meeting, the board of directors and the general manager (due to tax considerations, the general manager must be a Peruvian national or a foreigner with a working permit). Summons to the shareholders' meetings must be made by publication in a local newspaper. All shareholders with voting rights may unanimously agree to gather in a shareholders' meeting without a previous summon.

In addition, the General Corporations Law includes two special types of corporations:

- "closely held" corporations (*sociedades anónimas cerradas/*SAC)
- publicly held corporations (*sociedades anónimas abiertas/*SAA)

Closely held corporations have the following characteristics:

- It must have a minimum of two and maximum of 20 shareholders.
- Certain rules apply to the transfer of its shares, such as the shareholders' right of first refusal (although agreements in the company's bylaws or SHAs to the contrary are allowed), and in some cases, the consent of the company (this should be agreed in the company's bylaws).
- The shares in a closely held corporation cannot be listed in a stock exchange.
- This type of corporation may or may not have a board of directors.
- Non-presence shareholder meetings are allowed (i.e., meetings can be carried out by electronic or telephone conferences).
- The summons to a shareholder meeting are made by personal notifications, including emails. Note that summons cannot be made by newspaper announcement.

Publicly held corporations have the following characteristics:

- All shares must be registered in the Public Registry of the Securities Market.
- No limitations apply to the transfer of shares, and any agreement purporting to restrict the transfer of shares will not be enforceable against the company.

- The company is subject to supervision by the securities market regulator (*Superintendencia del Mercado de Valores/*SMV).
- If a corporation meets any of the following conditions, it must be incorporated as, or be adapted to a publicly held corporation:
    - It has made an initial public offering of shares or convertible bonds into shares.
    - It has more than 750 shareholders.
    - Over 35 percent of its capital belongs to 175 or more shareholders, excluding shareholders whose individual holdings do not reach 0.2 percent of the capital or exceed 5 percent of the capital.
    - All shareholders with voting rights unanimously approve the adoption of this regime.

Except for these special rules, closely held corporations and publicly held corporations are subject to the same rules applicable to ordinary corporations.

1.3.2 Limited liability companies (*Sociedades Comerciales de Responsabilidad Limitada/*SRL)

As its name implies, the limited liability company gives limited liability to its partners. It is incorporated with a minimum of two and a maximum of 20 partners.

Shares may not be issued in this type of corporate vehicle, as the capital is divided into participation quotas. Certain limitations apply to transfers of these participation quotas, such as a right of first refusal for the partners of the company. In addition, to be valid and effective, any transfer of participation quotas must be formalized in a public deed and registered in the Public Registry.

Its structure is similar to the closely held corporation, except that there is no board of directors.

1.3.3 Branches (*Sucursales*)

A branch is not an independent legal entity, but an extension of its parent company. The parent company holds the rights and is held accountable for the obligations of the branch. The parent company must appoint at least one legal permanent representative in Peru (due to tax considerations, the general manager must be a Peruvian national or a foreigner with a working permit). However, for tax purposes, a branch is treated as an independent company separate from its parent.

2. Acquisition Methods

The acquisition of shares or assets is usually undertaken by a negotiated acquisition. The private share or asset purchase agreement is drafted, setting out the terms and conditions of the acquisition, as well as the representations, covenants and liabilities of the parties.

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It is common to see the acquisition carried out by means of an investment in the target company by the investor. As a consequence of the investment, the target company's capital stock will be increased, shares will be issued in favor of the investor and the percentage of participation in the target company of the other shareholders reduced.

The acquisition of shares in a company listed on the Lima Stock Exchange (*Bolsa de Valores de Lima/*BVL) may be undertaken by a negotiated acquisition with the controlling shareholder, subject to mandatory tender offer regulations, or by a tender offer regulated by the SMV and the BVL.

2.1 Acquisition of Shares

The acquisition of shares is mostly undertaken by a privately negotiated acquisition. The most common transaction documents involved are listed in the following table.

Documentation in private negotiated share acquisitions	
Corporate	
Share Purchase Agreement (SPA)	
SHA	This is required only in partial acquisitions.
Escrow Agreement	
Others	Additionally, several ancillary transaction documents will be prepared depending on the nature of the deal, which may include noncompete agreements, management agreements, bring-down certificates, share ledger entries and officer resignation letters, among other documents.
Financing	
Loan Agreement	This is most commonly a senior facility agreement.
Security Agreement	This is an agreement by which a security interest over the shares or assets of the target company, including cash flows is created. The most common types of security agreements are: (i) mortgages (*hipotecas*) (a security granted over real estate); (ii) security interests over movable assets (*garantías mobiliarias*) (a security interest over movable assets (either tangible or intangible); including shares); (iii) trusts (*fideicomisos*) (a security interest by which the owner of the assets (e.g., real estate, movable assets (including shares), cash flows) to be granted as collateral transfers to them under trust to a trustee (a regulated entity authorized to act as trustee) who manages and holds such collateral as trustee for the benefit of the beneficiaries of the trust); and (iv) escrow accounts (*cuentas escrow vía comisión de confianza*).

The most common provisions found in an SPA relate to representations and warranties, covenants and indemnification clauses.

It is quite common to also see buyer protection clauses, which usually take the form of a negotiated warranty and indemnity coverage from the seller. The terms of the protection will vary from transaction to transaction, but it is quite normal to expect that limits will be negotiated on any such terms protecting the seller, including claim thresholds and caps, time limits and adjustments for items disclosed or accounted for. Other types of guarantees (e.g., placing funds in escrow or guarantee trust, holding back part of the purchase price and security interests) are also common.

Acquisitions of shares in a listed company or shares registered with the securities superintendence

The acquisition of shares in a listed company or a company with at least a class of shares with voting rights registered with the SMV can be undertaken, either:

- by a negotiated acquisition with the controlling shareholder, subject to a subsequent mandatory tender offer (regulated by the SMV and BVL); or
- by a tender offer (regulated by SMV and BVL).

Where the acquisition is negotiated with the controlling shareholder, the documents to be prepared and clauses included in these are quite similar to those provided in a private acquisition. However, both in the case of a negotiated acquisition and where the acquisition is conducted by a tender offer, the Peruvian Securities Market Law provisions and the tender offer regulations must be followed.

The Peruvian Securities Market Law and tender offer regulations require any person who directly or indirectly acquires (in one or a series of transactions) a “substantial interest” (defined below) in a company that has at least a class of shares with voting rights registered with the SMV, to submit a tender offer (*oferta pública de adquisición*) (a “mandatory tender offer”).

The person who directly or indirectly intends to acquire (in one or a series of transactions) a “substantial interest” is required to submit a mandatory tender offer prior to acquiring the “substantial interest,” unless that person is acquiring the substantial interest:

- indirectly
- in a public secondary offering of securities;
- in a single transaction; or
- in no more than a series of four consecutive transactions in a period of three years,

where the tender offer must be made following the acquisition of the “substantial interest” when the earlier of the following occur:

- Four months from the date on which the substantial interest is acquired; or

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- Five calendar days from the date the valuer entity files the valuation report determining the minimum price of the shares that can be offered.

"Substantial interest"

A "substantial interest" in a company is acquired when a person (either an individual or a company) acquires or intends to acquire a number of common shares that:

- will result in that person beneficially (directly or indirectly) owning 25 percent, 50 percent or 60 percent of the outstanding shares with voting rights of a company in one or a series of transactions; or
- will allow that person to:
  - appoint the majority of the directors of a company; or
  - amend the bylaws of a company.

2.2 Acquisition of Assets

An acquisition of assets is conducted by a private negotiated acquisition by means of an asset purchase agreement. According to the General Corporations Law, if the assets to be sold by the seller represent more than 50 percent of its capital, a shareholders' meeting approving the transfer of assets is required.

The following table summarizes the main differences between acquisitions of assets as opposed to acquisitions of shares under Peruvian regulations.

	Acquisition of shares	Acquisition of assets
Risks	Risk is higher for buyer. Buyer acquires the assets, liabilities (existent and contingent), patrimony; contracts, employees, and all that comprise the business of the target company.	Risk is lower for buyer. Buyer "cherry picks" the assets of the company to acquire. Liabilities of seller are not assumed by buyer, except under certain specific cases (labor and tax liabilities and, in certain cases, environmental liabilities).
Due diligence	More complex due diligence (must include target company and its entire business) is necessary.	Less complex due diligence (includes only information on the assets to be acquired and in certain cases labor, tax and environmental liabilities) is needed.
Representations and warranties	There is greater scope of the representations and warranties. This may result in price adjustments or in assignment of a	There is limited scope of the representations and warranties. It is less common to have price adjustments or the establishment of escrow accounts.

	Acquisition of shares	Acquisition of assets
	percentage of the price in an escrow account.	
Limitations to the transfer	Approval of shareholders' meeting is not required for transfer of shares; nonetheless, shares may be subject to a right of first refusal of shareholders or a "tag-along" right (see **3.3.1**).	If assets to be transferred represent more than 50% of target company's share capital, the approval of shareholders' meeting is required for the transfer of the assets.
Implementation	A shorter time frame to implement the transfer (execution of SPA and record of the transfer in target company's share ledger is sufficient) is needed.	A longer time frame to implement the transfer is needed, as it is necessary to: · transfer each asset; · obtain any corresponding licenses, permits or authorizations; and · assign the contractual position in the agreements related to that asset. Additionally, as applicable, the title to the asset acquired may have to be registered in the Public Registry.
Tax treatment[1]	Income tax for seller is 5% to 28% or 30% (depending on seller's characteristics). No value-added tax (VAT) applies (and no property tax [*Alcabala*: see **4.2**]) as well.	Income tax for seller varies from 5% to 28% or 30% (depending on seller's characteristics). VAT applies for movable assets and property tax (*Alcabala*) applies in the case of properties.

2.3 Mergers/Other Acquisition Methods

2.3.1 Mergers

A merger occurs where two or more companies are consolidated into a single entity. A merger can be conducted in either of these ways:

- Two or more companies are merged to create a new independent and separately incorporated company (and where the two merging companies cease to exist).

[1] See **4**. "Transfer Taxes" for more information.

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- One company takes over the entire business of the other company so that the target company ceases to exist.

In both cases, the new entity or the remaining company receives all the assets, liabilities, rights and debts of the companies[2] that cease to exist, and the shareholders of the companies ceasing to exist receive outstanding shares in the new or remaining company.

2.3.2 Spin-off

A spin-off is a type of corporate reorganization that consists of the segregation of assets, debts and assets, and/or business lines by a company to transfer them to another company, which may be already incorporated or may be incorporated as a result of the contribution of that block of assets, debts and assets and/or business line. In either case, the shares to be issued by the company receiving the segregated block under that equity contribution must be issued to the shareholders of the company transferring the block.

2.3.3 Simple reorganization

A simple reorganization is the segregation of assets, debts and assets, and/or business lines, in order to transfer them to another company. The company that receives the debts and assets, and/or business lines must issue new shares (if applicable) to the contributing company.

3. Negotiation, Signing and Closing

3.1 Pre-Contractual Obligations

Negotiation usually includes, from the seller's side, the delivery of a process letter to potential buyers. This is followed by the execution of a nondisclosure agreement. Commonly, the next steps, for the seller are to deliver a "teaser" to potential buyers and negotiate a nonbinding term sheet (i.e., a list of relevant terms with their corresponding definitions and conditions) with them. In a second round of negotiations, and once the best offer has been identified, a binding memorandum of understanding or letter of intent will be executed with the chosen purchaser, including the most relevant conditions of the acquisition (i.e., price, price adjustments, object of the transaction, due diligence, means of payment and shareholder agreement provisions, among others.). A civil action may be pursued by an injured party if the negotiations break down in breach of good faith obligations by another party, but the alleged damage must be proven.

3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Peruvian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking here.

Purchase Price		
1	Is a purchase price adjustment common? What type is common (e.g.,	Purchase price adjustments are common. Cash-free debt-free and working capital are the most common

[2] As a whole and by universal title.

	debt-free, cash-free)?	adjustments.
2	Is there a collar on the adjustment?	Neither collar nor materiality thresholds are common.
3	Who prepares completion balance sheet?	This is usually prepared at closing by target company or seller. After closing, it is usually reviewed by seller or an audit company.
4	Is the balance sheet audited?	Not necessarily. Historical balance sheets for completed fiscal years are often audited. Interim balance sheets are typically unaudited.
5	Is an earn-out common?	This is uncommon, although occasionally agreed.
6	Is a deposit common?	This is uncommon, but could be agreed.
7	Is an escrow common?	It is relatively common.
8	Is a break fee common?	No.
Conditions Precedent		
9	Is the Express Material Adverse Event (MAE) completion condition common?	Yes.
10	Is the MAE general or specific?	The MAE definition is usually general and forward-looking, but sometimes includes specific carve-outs.
11	Is quantification of MAE common?	It is uncommon, although we have seen it in small deals.
Covenants, Access		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Yes. Waterfall provisions are uncommon. Blue pencil provisions are commonly included in the severability clause of an agreement.
13	Is non-solicit (of employees) common?	It is common for a 2 to 3-year term (in conjunction with a non-compete).
14	Is non-solicit (of customers) common?	It is common for a 2 to 3-year term (in conjunction with a non-compete).
15	Is broad access to books, records, management between sign and close common?	It is common, subject to prior execution of confidentiality agreements.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common while notification of possible breach is not. Accuracy of warranties at closing is a common condition precedent.

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17	Is a separate tax covenant/indemnity or tax deed common?	It is common to include a specific tax covenant/indemnity in the purchase agreement.
Representations & Warranties		
18	Materiality in representations—how is it quantified (e.g., by a dollar amount)?	Materiality qualifiers are commonly seen but are not often quantified (other than specific warranties [e.g., contract value]).
19	How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?	Knowledge qualifiers are usually based on constructive knowledge (after due inquiry), although actual knowledge standard also used. This is commonly limited to a list of specified persons or group of persons (selling shareholders and key managers and directors).
20	Is a warranty that there is no materially misleading/omitted information common?	This is not common, although seen when buyer has a strong bargaining position.
21	Is disclosure of the data room common?	This is common if seller has a strong bargaining position.
Repetition of Representations & Warranties		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at signing date and closing date is common. Bring-down certificate at closing is also common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	Both are accurate; “in all material respects” standard and MAE standard are common. There are often carve-outs for some fundamental representations, which must be absolutely “clean and true.”
24	Is double materiality common (e.g., where a materiality qualification is included in the bring-down condition to one party’s obligation to close as well as in one or more representation?	Double materiality is usually avoided.
Limitations on Liability		
25	What is the common cap amount (as a percentage of purchase price)?	This depends on the type of transaction, but it usually ranges from 5% to 30%.

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Chile
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Caps commonly apply to indemnification obligations in the whole agreement (although breach of seller's/target's covenants are often carved out from the cap). Other limitations on liabilities (such as baskets) commonly apply only to representations and warranties. Specific representations and warranties or other items in the agreement may have different cap amounts.
27	What are the common exceptions to the cap?	Fraud is usually excepted from the cap. Certain fundamental representations and warranties (e.g., authority, capitalization, due organization and title) are also commonly excluded. Breaches of seller's/target company's covenants are also often carved out from the cap.
28	Is a deductible or basket common?	Baskets are common.
29	Is a *de minimis* common?	Yes.
30	How long does liability survive? Are there any common carve-outs (e.g., fraud, tax, key warranties)?	It typically lasts 18–36 months. Common carve-outs include taxes, capitalization, due authorization and organization, and ownership of shares and fraud—and these are usually tied to the expiry of statute of limitations.
31	Is warranty insurance common?	No.
Reliance		
32	Do financiers seek to rely on purchaser's due diligence reports?	It is uncommon but occasionally requested.
Set-offs against Claims		
33	Is a set off against claims for tax benefits common?	Yes.
34	Are insurance proceeds common?	Yes.
35	Are third-party recoveries common?	Yes.
Damages, Knowledge		
36	Is the obligation to mitigate damages common?	Yes.
37	Is exclusion of consequential damages common?	Yes.

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38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge had no effect on warranty/indemnity?	It is common to include both "sandbagging" and "anti-sandbagging" provisions.
Dispute Resolution		
39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, parties may choose the governing law. Peruvian law is agreed upon in most transactions, although New York law is sometimes seen in very large deals.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. Arbitration is usually conducted in the Lima Chamber of Commerce or in the American Chamber of Commerce of Peru.
Stamp Duty		
41	If stamp duty is payable, is it normally shared?	No stamp duty applies.

3.3 Formalities for Execution of Documents

3.3.1 Transfers of shares

In the case of the transfer of shares issued by a corporation, there is no particular formality to be complied with in order for the transfer to be valid and effective. The transfer of the shares must be recorded in the target company's share ledger. If certificates have been issued, they should be endorsed to the purchaser or cancelled. Note that first refusal rights or other rights related to the transfer of shares (e.g., a "tag-along" right) must be honored if these have been set in the target company's bylaws or previously agreed on by the shareholders.

Transfers of quotas issued by a limited liability company must be documented in a public deed and registered with the Public Registry in order to be considered valid and effective.

3.3.2 Transfers of assets

The transfer of assets is more complex than the transfer of shares (see Table in **2.2**). Depending on the type of asset, the transfer may be formalized either in a private document (e.g., transfer of intangibles such as trademarks) or in a public deed (e.g., transfer of real property). In the case of movable assets, the transfer is determined by physical delivery or the contractually agreed delivery method of the asset by the seller to the purchaser.

Moreover, in some cases, authorizations or permits must be obtained prior to the acquisition. In addition, after the acquisition, registration in the relevant registries or before the corresponding authorities must also be made.

3.4 Formalities for Transferring Title to Shares or Assets

3.4.1 Transfers of title to shares

The transfer of title to shares is valid with only the agreement of the purchaser and seller. However, that transfer must be recorded in the target company's share ledger in order for the transfer to be effective before the issuing company. Also, if certificates have been issued, they should be endorsed to the purchaser or cancelled.

3.4.2 Transfers of title to assets

The transfer of title to assets depends on the type of asset. In the case of movable assets, the transfer of title is determined by the physical delivery or the contractually agreed delivery of the asset by the seller to purchaser. The title to rights or other intangibles is transferred by the sole agreement of the parties (although, in some cases, authorizations or registrations must be obtained). For real estate, the transfer of title is valid and effective with the sole agreement of the purchaser and seller in respect to the transfer of the asset (unless otherwise agreed).

In order to become of public knowledge, the transfer of title to real property must be registered with the Public Registry of Real Estate, in the corresponding public file of the transferred property. Title to certain movable assets may also be registered with the Public Registry.

3.5 Formalities for Mergers

A merger, in either of its forms, must be approved by the board of directors (if applicable) and by the shareholders' meeting of both companies involved in the merger (qualified quorum and qualified majority approval are required). In that meeting, the proposed merger plan (which must be prepared by the management of the companies involved and previously approved by the companies' boards of directors, if applicable) and an effective date for the merger must be approved.

Once approved, the merger agreement must be published three times, with an interval of five days between each notice, in the *Official Gazette* and in another local newspaper. According to the General Corporations Law, creditors of the companies involved will have the opportunity to oppose the merger agreement within a 30-day window from the last publication date of the merger agreement (the opposition right period). Once the opposition right period has lapsed, and assuming no creditor of either of the companies involved has exercised its opposition right, the management of each company must issue an statement confirming this situation, which will be enclosed to the corresponding Merger Public Deed.

Finally, a Merger Public Deed must be prepared and the corresponding documentation filed with the Public Registry. Registration of a merger usually takes 14 business days, but this term may be extended if the registrar comments on the documentation filed.

The Merger Public Deed must include the following documents:

- Copies of the agreements resolved by the shareholders' meetings

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- The new company's bylaws or amendments to the bylaws of the surviving company of the merger
- The effective date of the merger
- Notices published
- The management's statement regarding the lapse of the opposition right period, confirming that no creditor has exercised its opposition right (as appropriate). Note that if a creditor has exercised its opposition right, then the company must file a judicial resolution attesting that the company has paid the corresponding debt or has granted a corresponding guarantee to that creditor.

4. Transfer Taxes

4.1 Acquisition of Shares

The acquisition of shares is not subject to any specific Peruvian tax.

However, income tax does apply to capital gains obtained on transfers of shares by companies or individuals. According to the Peruvian Income Tax Law (ITL), a capital gain is obtained when income is generated as a consequence of the sale of capital goods (i.e., not goods that are acquired in the normal course of business).

The capital gain is calculated by subtracting, from the price agreed upon for the shares (which for tax purposes must not be lower than their fair market value and in any event, the net value per share), the tax basis the transferor has on said shares (this is, the cost incurred by the transferor when it acquired the shares). Once capital gain is determined, the tax rate is applied.

In the case of capital gains obtained from the transfer of Peruvian shares, the Peruvian income tax rate applicable will vary, depending on different factors (e.g., if transferor is domiciled or not domiciled in Peru, if it is an individual or a company, if the shares are transferred or not through the BVL): see the table that follows.

Seller	Tax rate	
Domiciled individual	5%	Effective rate
Non-domiciled individual	30%	5% if the transfer of shares takes place through the BVL
Domiciled company	28%[3]	
Non-domiciled company	30%	5% if the transfer of shares is performed through the BVL

Starting on 1 January 2016, the capital gain generated by companies or individuals (domiciled or not domiciled in Peru) for transfers of shares carried out through the Lima Stock Exchange will be exempt from income tax if these two conditions are met: (i) On a 12-month period prior to the transfer, the seller or its related parties have not sold shares that represent 10 percent or

[3] The tax rate in force in 2016. Through 2017 and 2018, the tax rate shall be 27%; while, since 2019 onwards, the tax rate shall be 26%.

more of the total shares issued by target company; and (ii) The shares transferred are considered to have "market presence" (as defined by the applicable regulations).

It is important to note that the transfer of shares through a corporate reorganization (where all the parties involved are domiciled companies) may be made at book value. If so, no capital gain will be generated by the transferor and, thus, no income tax will apply as a result of said transfer.

4.2 Acquisition of Assets

The ITL does not tax the acquisition of assets. However, the *Alcabala* Tax (transfer of real estate tax) applies to the gratuitous or onerous transfer of real-estate property.[4] The tax will be paid by the transferee. The tax rate of 3 percent is applied to the value of the property agreed on by the parties or the self-appraisal value determined by the municipality of the district where the property is located, whichever is greater.

As a general rule, capital gain resulting from the transfer of these assets performed by companies or individuals will be levied with income tax.

Assets transferred under a corporate reorganization may be subject to income tax, depending on whether or not the parties involved in the reorganization agree on the revaluation (to market value) of that asset (with or without tax consequences).

- Revaluation of assets (to market value) with tax consequences: If the parties agree to the revaluation of assets with tax consequences, the difference between the agreed-on revaluated value and the tax basis (determined according to the ITL) will be taxed under ITL as capital gain. In this case, when taxing the transferred assets, the transferee will have a step-up basis on the acquired asset (equivalent to the revaluated value at which the asset was transferred).
- Revaluation of assets (to market value) without tax consequences: If the parties involved in the reorganization agree on the revaluation of the assets without tax consequences, the difference between the revaluated value and the transferor's tax basis on the assets will not be taxed under the ITL, provided that the gain resulting from said transfer is not distributed. The ITL establishes the cases in which the revaluated value of the assets is deemed to be distributed. Under this alternative (revaluation of assets - to market value - without tax consequences), the transferee's tax basis on the acquired asset will be the same as what the transferor had (prior to the revaluation).
- Non-revaluation of assets: If the parties involved in the reorganization agree not to revaluate the assets subject to transfer, no income tax consequences will be triggered upon the transfer of said assets.

[4] Gratuitous transfers are made without any profit or advantage received or promised as a consideration for it. Onerous transfers are those in which something is given or promised as consideration.

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4.3 Value-Added Tax

Peruvian VAT applies at a rate of 18 percent, among other transactions, to the sale of goods within Peruvian territory and to first transfers of real estate property by construction companies. Note that, according to the Peruvian VAT Law, the term "goods" pertains to most assets, except certain goods such as shares, quotas, securities and cash. The tax basis will differ depending on the operation performed: so, for the sale of goods and first transfers of real estate property by the construction company or developer, the tax basis will be the consideration agreed upon by the parties.

Transfers of assets within a corporate reorganization do not qualify as "sales" according to the VAT Law and, thus, are not taxed with VAT.

5. Employee Issues

5.1 Method of Transfer under Local Law

5.1.1 Acquisition of shares

When purchasers acquire shares in a target company, they also acquire (inherit) all of its employees, including any outstanding labor-related liabilities, such as salaries, length-of-service compensation (*compensación por tiempo de servicios*), compensation for arbitrary dismissal and other mandatory benefits employees may be owed, including unpaid employee contributions payable by the employer (seller) to the Private Pension System Fund and National Pension System, as applicable, and associated interest and costs.

5.1.2 Acquisition of assets

In assets acquisitions, under Peruvian regulations, the buyer might be affected by rules enforcing the mandatory observance of labor "credits" (liabilities). That is to say, an acquiring company may be held liable for payment of the full amount of any unpaid labor liabilities to the employees of the selling company, and creditors (employees) can enforce payment of these debts against buyer, as can be seen in the following examples:

- If the seller-employer has been declared insolvent, resulting in the dissolution and liquidation of the company or its bankruptcy, the right of the employees to such labor credits includes the assets transferred by the seller-company within six months preceding the declaration of insolvency of the seller-employer (i.e., employees will be able to file for the foreclosure of said assets in order to collect their credits).

- When the termination of an employment relationship is the result of employers acting willfully and intentionally against the company's interests or fraud (i.e., when the employer:

  - unreasonably obstructs/delays/disrupts/hinders/frustrates production, harming production/business to the point of enforcing the company's demise/closure;

  - transfers/diverts key business assets to third parties or to different sites to start new business; or

  - when the employer disappears/abandons the workplace).

5.1.3 Transfer of business

Those involving transfers of employment relationships

In this scenario, since the employment relationships are not terminated, the acquiring company inherits all labor liabilities and must acknowledge all employee rights, including not only employees' rank and seniority but also any labor-related liability between the transferor company and the transferred employee. By virtue of the acquisition, the acquiring company is liable for the previous employment liabilities (which it should pay off with its assets—previous, acquired and future assets, within the terms established by law for each particular case).

Those not involving transfers of employment relationships

Acquiring companies may be obliged to pay labor liabilities to the employees of the selling company, those liabilities being granted priority ranking over other obligations of the acquiring company (e.g., severance payments).

The rules for the acquisition of assets (see **5.1.2**) also apply.

5.2 Approval or Consultation Requirements

No law or regulations apply in Peru.

5.3 Protection against Dismissal

5.3.1 Redundancies

Peruvian regulation permits the employment relationship to be terminated for "objective causes" (among other reasons). Dismissal for objective causes is also known as "collective dismissal" and it is permitted in the following scenarios:

- Acts of God or *force majeure*
- Economic, technological, structural (i.e., that job role is no longer needed) or similar reasons
- Dissolution, liquidation or bankruptcy of the company
- Group restructuring

An "economic, technological, structural or similar" ground for collective termination is not an allowable exception, unless it affects at least 10 percent of the total number of employees of the entity. If it involves less than that percentage, mass termination must be conducted individually per employee and for certain proven reasons.

To make these terminations effective, the procedures established by law must be followed, which may involve a notice to or the approval of the Labour Authority.

5.3.2 Penalties

If a dismissal of an employee (or employees) is not justified (i.e., because it is not based on a legal cause or it is successfully challenged by the employee in court), the employee(s) will be entitled to severance (unfair dismissal

compensation) equal to 1.5 times their monthly salary for each year of service, plus pro-rata part payments up to a maximum of 12 monthly salaries for employees under indefinite term relationships. In fixed-term employment contracts, the severance payment will be 1.5 times the monthly salary for each month until the contract was due to expire, up to a maximum of 12 monthly salaries. Severance must be paid by the employer within 48 hours of the employee's termination.

Pursuant to the decisions of the Constitutional Court, employees dismissed without cause may refuse severance payment and may instead demand reinstatement. This alternative does not apply in the case of personnel who were hired for management or trust positions at the beginning of their employment relationships, who may only make a demand for severance payment. However, employees who were promoted to such positions of management or trust and were dismissed without cause may sue (as an alternative to the severance payment) for reinstatement to the position they held before their promotion (note that the employer must reinstate the employee at a wage equal or higher to the last wage the latter received as an employee of the company).

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Venezuela

1.1 Overview

Industrial and commercial activities in Venezuela may be carried out in virtually any form, ranging from an individual entrepreneur to all forms of legal entities. Regardless of the form adopted, formalities must be complied with when establishing a company in Venezuela.

1.2 General Legal Framework

The Venezuelan Commercial Code is the principal legal framework that sets out the legal vehicles that are available to investors interested in undertaking commercial business in Venezuela. These structures include the incorporation of closed entities whereby the liability of the owners or shareholders is unlimited, and other entities whereby liability is, as a general rule, limited to the amount of the contribution of the investor.

1.3 Corporate Entities

A corporation is the legal entity preferred by commercial enterprises with which to carry out their projects. Investors choose to organize a business by setting up one these types of companies: stock corporations (*Sociedad Anónima*), limited liability companies (*Sociedad de Responsabilidad Limitada*), general partnerships (*Sociedad en Nombre Colectivo*), simple limited partnerships (*Sociedad en Comandita Simple*) or stock limited partnerships (*Sociedad en Comandita por Acciones*). Another way to carry out business in Venezuela is via a branch of a foreign company, which is deemed a commercial establishment of the foreign entity in Venezuela.

1.3.1 Stock corporations (*Sociedad Anónima*)

As a general matter, any name available in the Commercial Registry may be used for a corporation. The words *Sociedad Anónima* or *Compañía Anónima*, or the corresponding initials “S.A.” or “C.A.” must be added to the desired name of the company. In order to use the name, it must first be reserved in the commercial registry. However, based on the current practice followed by the Commercial Registry Office, the name of a corporation cannot include words in English or the word "Venezuela".

Although the initial amount of the capital stock of a corporation is unlimited, it must be subscribed to in full, and at least 20 percent thereof paid in upon incorporation. The capital stock of a corporation must be represented by nominative shares.

At least two shareholders, individuals or legal persons must sign the Articles of Incorporation to form a corporation. The company’s Articles of Incorporation are generally drafted with sufficient scope for them to also serve as the company’s bylaws. The single document comprising the Articles of Incorporation and bylaws must be submitted to the Commercial Registry, together with the bank deposit slips evidencing the payment, in whole or in part, of the par value of the shares, and in the case of foreign investors, the documents evidencing the transfer of foreign exchange or the importation of goods into the country. Furthermore, the Commercial Registry could request additional documents, such as the working or business visa of the foreign directors and/or officers being appointed. Once registered with the

Commercial Registry, the Articles of Incorporation must be published in a local daily newspaper. After this, the company will be considered validly incorporated.

The supreme authority and control of the corporation is vested in the Shareholders' Meeting, which has the power to appoint the administrators and/or members of the Board of Directors of the company. The administrators' powers are assigned to them by the Articles of Incorporation and they need not be shareholders of the company.

The profits of the company are distributed pursuant to a resolution adopted by the Shareholders' Meeting or the Board of Directors. At least 5 percent of the net profits of the company must be set aside annually to constitute a legal reserve.

1.3.2 Limited liability companies (*Sociedad de Responsabilidad Limitada*)

The limited liability company (S.R.L.) is an entity whose capital is divided into participation- denominated quotas. Under no circumstance may the quotas be represented by shares or marketable securities. The incorporation of limited liability companies is subject to the same rules as corporations. Any name available in the Commercial Registry may be used, and the words *Sociedad de Responsabilidad Limitada* or the corresponding initials "S.R.L." must be added. As mentioned above, based on the current practice followed by the Commercial Registry Office, the name of a limited liability company cannot include words in English or the word "Venezuela".

The capital of limited liability companies cannot be less than VEF20.00 and not more than VEF2,000.00. The capital must be totally subscribed to and at least 50 percent thereof must be paid in if the payment is in cash, and 100 percent if in kind. The capital is divided into quotas, which are fractions of equal amounts of not less than VEF1.00 and which must always be multiples of VEF1.00 The transfer of quotas may be subject to specific restrictions, which makes this type of entity useful for US income tax planning purposes.

The quotaholders are jointly and severally liable for a term of five years for the veracity of the value assigned to contributions in kind in the Articles of Incorporation. Each quotaholder has one vote for each quota owned. The profits of the company are distributed to the quotaholders at the end of the fiscal year, pursuant to a resolution adopted by the Quotaholders' Meeting or the Board of Directors.

The management is subject to the same rules for corporations. The administrators are jointly and severally liable both to the company and to third parties for violations of the law and the Articles of Incorporation, as well as for any other infringement while in office.

1.3.3 General partnerships (*Sociedad en Nombre Colectivo*)

A general partnership is an organization of persons whose obligations are guaranteed by the unlimited liability of the partners. Although the liability of the partners is unlimited, it is of a subsidiary nature, as no action can be taken against any of them personally without first having exhausted remedies against the partnership. The formalities for the organization of a general partnership are governed by the same rules as those for corporations and

limited liability companies, although the Articles of Incorporation are simple and only an extract thereof must be registered and published.

1.3.4 Simple limited partnerships (*Sociedad en Comandita Simple*)

In the case of a simple limited partnership, the company's obligations are guaranteed by the unlimited joint and several liability of one or more general partners, as well as by the limited liability of the limited partners. A limited partnership is formed in the same manner as a general partnership, and partners whose liability is unlimited are subject to the same rules as the partners in a general partnership. Partners with limited liability are liable for the partnership's obligations only up to the amount of their capital contributions and they are prohibited from managing the partnership.

1.3.5 Stock limited partnerships (*Sociedad en Comandita por Acciones*)

This limited partnership is one in which the ownership of the limited partners is divided into shares. The rules applicable to limited partners are essentially the same as those applicable to corporations and the rules applicable to the general partners are essentially the same as those applicable to general partnerships.

1.3.6 Branches

The documents required for establishing a branch of a foreign company are: the Articles of Incorporation and bylaws of the company; an abstract of the corporate law of the country or state where the company is incorporated; a resolution of the Board of Directors of the company authorizing the establishment of the branch and declaring the capital to be assigned to the branch; and a general power of attorney authorizing a person in Venezuela to carry out the steps necessary to establish the branch. These documents must be duly legalized or apostilled and translated into Spanish by a Venezuelan certified public translator, and then registered and published.

2. Acquisition Methods

Acquisitions are normally made in Venezuela through either asset or share purchases, which are governed by the general principles of contract law. Acquiring a business in Venezuela may take several forms. What follows summarizes the main legal issues in acquiring an ongoing business by the three most common transactions seen in Venezuela: the purchase of shares, and the purchase of assets and that of mergers. Besides the buyer and seller's specific commercial considerations, the choice between a share transaction and an asset transaction is influenced mainly by tax considerations and the need, if any, to avoid the assumption of hidden liabilities by operation of law.

2.1 Acquisition of Shares

The seller normally prefers a share purchase since it usually provides more latitude for tax minimization. From the buyer's perspective, a share purchase may be attractive if the target company has significant tax loss carry-forwards. Such losses continue to be available to offset the income of the target company after the acquisition.

The absence of a value-added tax in the case of a share transaction may also be regarded as an advantage by the buyer.

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As a general matter, the regulations concerning public offerings for the acquisition of shares define "significant equity participation" as a number of shares representing 10 percent or more of the listed company's stock. These regulations cover tender offers made in cash or kind in the context of both hostile and non-hostile takeovers.

2.2 Acquisition of Assets

The buyer will typically find an asset transaction more advantageous. This is because the buyer may obtain a stepped-up tax cost basis for depreciable or amortizable assets, including goodwill, equal to the purchase price and through the proper use of bulk sales rules, as well as avoid exposure to certain liabilities not otherwise expressly assumed in the purchase agreement.

To the extent that the asset transaction has been taxed, there is no tax on dividends distributed by the seller. This means that the shareholders of the seller will not have an additional tax burden when ultimately receiving the proceeds of an asset transaction. In the case of an asset transaction, however, the selling company's tax loss carry-forwards are not available to the buyer.

2.3 Mergers

Statutory mergers, though provided for in the Venezuelan Commercial Code have, in practice, been used sparingly, if at all. This is due to the inadequacy and ambiguity of the statutory rules and to the absence, until the amendment of the 1991 Income Tax Law, of any tax rules governing the cost basis of assets acquired through statutory mergers. In a merger, the surviving company assumes all assets, obligations and liabilities of the absorbed company or companies.

3. Negotiation, Signing and Closing

3.1 Pre-Contractual Obligations

Parties in a negotiation typically start a letter of intent. Although in many cases, buyers may proceed in negotiations with sellers using such letters of intent (stipulating only a few provisions that are intended to be legally binding like confidentiality and exclusivity), under Venezuelan law, these pre-contractual letters will not necessarily have a legal effect because whether or not a letter will create legal obligations depends on the substance of what is said and not its format. In the pre-contractual phase, the parties must act in good faith.

3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Venezuelan purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking here.

	Purchase Price	
1	Is a purchase price adjustment common? What type is common (e.g., debt-free, cash-free)?	Purchase price adjustments are common. All types are seen, including working capital adjustment, cash-free debt-free and NAV adjustments.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	This is usually prepared by target company.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	Yes.
6	Is a deposit common?	No.
7	Is an escrow common?	Yes.
8	Is a break fee common?	No.
	Conditions Precedent	
9	Is Express Material Adverse Event (MAE) completion condition common?	Yes.
10	Is the MAE general or specific?	Both are seen.
11	Is the quantification of MAE common?	Yes.
	Covenants, Access	
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Yes. Waterfall/blue pencil provisions uncommon.
13	Is the non-solicit (of employees) common?	Yes.
14	Is the non-solicit (of customers) common?	Yes.

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15	Is broad access to books, records, management between sign and close common?	Yes.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Yes. The consequence will vary depending on each negotiation.
17	Is a separate tax covenant/indemnity or tax deed common?	Yes.
Representations and Warranties		
18	Materiality in representations—how is it quantified (e.g., by a dollar amount)?	Materiality is generally quantified by a specific amount.
19	How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?	Knowledge qualifiers are increasingly common.
20	Is a warranty that there is no materially misleading/omitted information common?	Yes.
21	Is disclosure of data room common?	Yes.
Repetition of Representations and Warranties		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion is common. Bring-down certificates not very common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and correct.
24	Is double materiality common (e.g., where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation)?	No.

Limitations on Liability		
25	What is the common cap amount (as a percentage of purchase price)?	This will depend on each transaction.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Commonly to the entire agreement.
27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g., title, capitalization, authority). Often tax, labor and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
28	Is a deductible or basket common?	Both are common.
29	Is a *de minimis* common?	Yes.
30	How long does liability survive? Are there any common carve-outs (e.g., fraud, tax, key warranties)?	General survival of 18-36 months is common. Tax, labor and environmental liabilities are usually tied to expiry of statute of limitations time period.
31	Is warranty insurance common?	No.
Reliance		
32	Do financiers seek to rely on purchaser's due diligence reports?	No.
Set-offs against Claims		
33	Is a set-off against claims for tax benefits common?	No.
34	Are insurance proceeds common?	No.
35	Are third-party recoveries common?	No.

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Damages, Knowledge		
36	Is there an obligation to mitigate damages?	No.
37	Is there exclusion of consequential damages?	Yes.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	No.
Dispute Resolution		
39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. The governing law will depend on each transaction.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. ICC.
Stamp Duty		
41	If stamp duty is payable, is it normally shared?	No, normally Buyer will pay for stamp duties.

3.3 Formalities for Execution of Documents

3.3.1 Transfers of shares

There is no legal requirement for an agreement in the sale of the legal and beneficial title to shares to be made in writing. No cumbersome formalities need be observed in connection with the purchase of shares, except for the execution of simple corporate documentation. Nevertheless, market practice in the majority of cases is for a share transfer to be documented between the seller and the buyer through a written share purchase agreement.

3.3.2 Transfers of assets

The sale of assets must be in writing and if the sale involves real estate, it must be incorporated into a public deed, which must be registered before the real estate registry. If the sale does not involve real estate, it may be carried out by a public deed or private document. Certain assets may be subject to value-added tax.

3.4 Formalities for Transferring Title to Shares or Assets

3.4.1 Formalities for shares

The Venezuelan Securities Market Law contains the general rules for the acquisition of stock of public companies. The approval of the National

Superintendent of Securities is required when a person or group of related persons intends to acquire, in one or several transactions, a number of shares of a listed company that is deemed to represent a "significant equity participation." In this case, a public tender offer must be made and all shareholders are afforded an opportunity to sell their shares on a pro-rata basis. The acquisition of shares of licensed banks or other financial institutions is governed in Venezuela by the Law of Banks and Financial Institutions. The transfer of shares of financial institutions must be registered with the Superintendence of Banking Sector Entities regardless of the percentage of shares involved. The direct or indirect transfer of shares that represent 10 percent or more of the capital stock of a financial institution requires the prior authorization of the Superintendence of Banking Sector Entities.

3.4.2 Formalities for assets

Under Venezuelan law, a sale of assets will be deemed to be a bulk sale (or sale of a going concern) if, as a result of such transaction, the seller will no longer carry out the business involving the transaction. If the sale of the assets implies the ceasing of one or more of lines of business of a company, then such a sale will also be deemed to be a bulk sale of assets for Venezuelan purposes. In this respect, please note the following:

a) Buyer and seller are jointly liable for all the liabilities of seller related to the business that is being transferred. This joint liability may be overcome if notice of the sale is published in a newspaper prior to the sale of the business, in compliance with Article 151 of the Venezuelan Commercial Code. The purpose of this notice is to allow all creditors of the seller's business to obtain payment or security of payment of their receivables.

b) According to Article 151 of the Venezuelan Commercial Code, in the event of a bulk sale, it will be necessary, prior to the transfer of the assets, to publish three notices announcing the bulk sale. Each notice must be published with a separation of 10 days. Ten days must also elapse after the publication of the third notice. The publication must be made in a local newspaper. The consequence of the absence of (or incorrect) publications is that both the seller and the purchaser become jointly liable *vis-à-vis* the creditors of the seller. Notwithstanding the foregoing and although not mandatory, in practice, it is likely that the officers of the Commercial Registry will require the publication of the three notices in order to move forward with the registration of the bulk sale agreement (please see item c).

c) The document evidencing the bulk sale must be registered with the Commercial Registry. Furthermore, the bulk sale will become effective before third parties after the registration with the Commercial Registry of the document evidencing the sale is complete. Although the publications of the sale referred to above are not mandatory, we know of at least one case in which the officers of the Commercial Registry, in exercise of their arbitrary powers, would not allow the registration of the document evidencing the bulk sale until the corresponding publications had been made.

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d) The registration of the bulk sale document may take between eight and 10 weeks, provided that that the officers of the Commercial Registry do not raise any comments or request additional information/documentation.

e) The bulk sale of assets must be notified to the Tax Authorities (i.e., SENIAT, and to any other tax agency as well, such as the Venezuelan Social Security Institute [IVSS], the National Institute for Cooperative Socialist Education [INCES], the National Bank of Housing and Habitat [BANAVIH] and any relevant Municipality). The notification of the bulk sale of assets may trigger a tax audit. This will not necessarily pose adverse consequences for the selling company, but it should be prepared for such audit.

3.5 Formalities for Mergers

Besides the Venezuelan Commercial Code rules on statutory mergers and the rules governing public offers in general, transfer of employment contracts, bulk sales and competition rules prohibiting certain economic concentrations, there is very little legislation governing mergers and acquisitions in Venezuela.

3.6 Requirements for Registration and Permits

3.6.1 License for business activities (municipal business license)

The license for business activities is an authorization to carry out commercial activities of industry, trade, services or that of a similar nature within the jurisdiction of a municipality. This license must be obtained prior to the installation of the business establishment or the beginning of its activities. Defaulting on the obligation to obtain the license is penalized in accordance with the applicable municipal ordinance, penalties of which run from fines to the closure of the business establishment. The rules regulating the municipal business tax, which is a tax on the commercial activities of industry, trade, services or that of a similar nature carried out within a municipal jurisdiction vary, depending on the municipality; therefore, in each case, it is essential to refer to the applicable ordinances of the municipality where the activity is carried out.

3.6.2 Registration of foreign investment

All foreign capital investments in Venezuela that comply with the requirements set forth in Venezuelan legislation must be registered with the National Center for Foreign Trade (“Cencoex”). The rights conferred to foreign investors pursuant to the Venezuelan legislation in force will come into effect from the time in which the Foreign Investment Registration is granted. Basically, these consist of the rights to remit dividends and repatriate capital, pursuant to the applicable laws and regulations on exchange control currently in force in Venezuela. To register the investment, the foreign investor must submit to Cencoex evidence of the entry of foreign currency, or physical or tangible goods, or technological contributions, as a contribution to the capital stock of the company. Once the investment is registered, the investor must update the investment each year and notify Cencoex of any amendments regarding the investment.

3.6.3 Sole tax information registry ("RIF")

Legal entities, individuals and entities without legal capacity, whether domiciled or not, that are or may be subject to the payment of Venezuelan income tax or other federal taxes administered by the National Integrated Customs and Tax Administration Service ("Revenue Service") by virtue of their assets or activities, are required to obtain a RIF. Even if the legal entities and individuals are not subject to federal taxes, they are required to obtain a RIF if they must carry out formalities before any entity or body of the Venezuelan Public Administration. Taxpayers must apply for registration with the RIF through the website www.seniat.gob.ve within 30 business days from their incorporation or commencement of activities and file some documents with the Revenue Service to complete the procedure. Once registration is completed, the taxpayer is given a number that must be indicated on all of its receipts, bills, invoices and contracts. It must also be indicated in all communications to Venezuelan governmental offices (federal, state or municipal), as well as in its accounting books, trademarks, labels, packaging and printed advertising, and in such other documents required by the Revenue Service. The RIF must be updated every three years or whenever there has been a change in the information provided to the Revenue Service.

3.6.4 Sole registry of persons that develop economic activities ("RUPDAE")

In order for companies to carry out any sort of economic activity, they must be registered with the *Registro Único de Personas que Desarrollan Actividades Económicas* (RUPDAE), which is carried by the National Superintendence for the Defense of the Socioeconomic Rights (*Superintendencia Nacional para la Defensa de los Derechos Socioeconómicos* - SUNDDE).

4. Regulatory Framework

4.1 Competition Law Considerations

The Decree with Rank, Value and Force of Antimonopoly Law ("Antimonopoly Law") prohibits economic concentrations that restrain trade or result in a dominant market position. The Antimonopoly Superintendence is empowered to enjoin a prohibited economic concentration and to order its subsequent divestiture and apply substantial penalties.

Because any agreement, understanding, act or conduct that violates the Antimonopoly Law is void and unenforceable, potential entrants to Venezuelan markets should carefully consider the way the rules set forth in the Antimonopoly Law will affect, and sometimes limit, their business decisions.

The Antimonopoly Law became effective on November 18, 2014. To a very large extent, it maintains the dispositions set forth in the Law to Promote and Protect the Free Exercise of Competition modeled on Articles 81 and 82 of the Treaty of Rome and the body of rules subsequently developed that comprise the competition law of the European Union (EU). For this reason, subject to certain *caveats*, the EU competition law may be looked to as a primary source of precedent for the application and interpretation of the Venezuelan Competition Law. However, the singular characteristics of the Venezuelan market, and the differences in the legal methods applied in Europe and Venezuela must always be taken into account. To a much lesser extent than European law, elements of United States antitrust laws were also

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reflected in the Venezuelan competition legislation, and may, therefore, serve as a guide for the development of Venezuelan rules on the subject.

The Antimonopoly Law is intended to create an environment where competition may prosper and abusive practices are eliminated. As in other countries that have adopted an approach based on the EU competition law, the underlying purpose is to create efficiency of allocation, reduce costs for the benefit of consumers, and promote innovation and technological development. For this reason, the Antimonopoly Law gives the Antitrust Agency (Superintendence) authority to exempt certain agreements or practices that *prima facie* are uncompetitive when applying the prohibitions set forth in the Antimonopoly Law.

The Antitrust Law applies to persons or groups of persons conducting economic activities within Venezuela, with the exception of: (i) base organizations of the popular power subject to the Organic Law of the Communal Economical System; (ii) public or mixed capital companies of strategic character; and (iii) state-owned companies that provide public services.

4.2 Merger Control Overview

The repealed Law to Promote and Protect the Free Exercise of Competition of 1992 did not require mandatory notifications or authorizations in order to execute economic concentration operations. However, the Antimonopoly Law (which repealed the Law to Promote and Protect the Free Exercise of Competition of 1992) establishes that the notification, evaluation and approval procedures regarding economic concentration operations will be instituted in the respective Regulation that must be enacted. It is not clear if there will be a change in respect to the obligation to notify and/or request authorization for the realization of some or all concentration operations. In this sense, it is necessary to wait for the Regulation to be issued.

Under the previous repealed law, companies could voluntarily notify and request an evaluation from the Antitrust Agency of an economic concentration operation. Likewise, the Antitrust Agency could perform *ex-officio* investigations of such operations.

4.2.1 Thresholds

The Antitrust Agency established a threshold of 120,000 tax units. Only operations that surpassed said threshold could voluntary request evaluations or could be controlled by the Antirust Agency. Because this threshold is quite low, the Antitrust Agency has the power to control a significant number of economic concentrations.

As mentioned above, under the regime of the repealed law, there were no mandatory notifications or authorizations in order to execute economic concentration operations. Under the Antimonopoly Law, It is not clear if there will be a change in respect to the obligation to notify and/or request authorization for the realization of some or all concentration operations.

4.2.2 Penalties for non-compliance with notification requirements

Since notification was not mandatory under the repealed law, no sanctions were applicable. Because the Regulations of the Antimonopoly Law regarding

notifications/authorizations have not been issued, it is unclear what will be the notification/authorization requirements or if there will be applicable sanctions according to the law.

4.2.3 Time limits for notification

Since notification was not mandatory under the repealed law, there were no time limits for notification. As mentioned above, because the Regulations regarding notifications/authorizations have not been issued, it is unclear what will be, if any, the notification/authorization process and time limits.

4.3 Exchange of Competition-Sensitive Information and "Gun-Jumping" Issues

Exchange of competition-sensitive information and "gun-jumping" issues (i.e., coordination between merging parties on prices or terms to be offered to customers for sales prior to closing the merger, or allocating customers for sales to be made prior to closing), are prohibited by the Antimonopoly Law, if these impose a limit/restriction to effective competition.

4.4 Anti-Bribery, Corruption and Money Laundering

The law against corruption includes all the crimes of administrative corruption, except for transnational bribery and extortion. It does not include crimes of private corruption. This Law was amended on November 2014 with 11 new articles and two new crimes: transnational bribe and private corruption (bribe). As a complement to the Law against Corruption, this new policy was established to fight administrative and private corruption with intelligence capabilities, as criminal police to prevent, repress and nullify corruption crimes, etc. It depends directly on the president of the republic.

4.4.1 The Venezuelan Criminal Code: key provisions

The Venezuelan system of criminal law is based on the European codified system. The characteristics of Venezuelan criminal legislation are unique and complex, and these vary according to the nature of the typified criminal conduct. Venezuela abolished the death penalty for all crimes in 1863 and currently, the maximum term of imprisonment is 30 years.

In addition to the Criminal Code of 1915, which has been partially amended in 1964, 2000 and 2005, Venezuela has many other special criminal laws (more than 80). In November 2014, this number was increased with important reforms of 45 laws under the Enabling Act, several of them with new crimes and increasing the penalties of prison and fines, etc.

Venezuela also ratified: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the Inter-American and the United Nations Organization Treaties against Corruption; and the American Convention against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives and other Related Minerals, among others.

4.4.2 Corporate liability

The most important criminal laws for private companies and corporations are: the Criminal Law of the Environment; the Exchange Control Law; the crimes typified and criminal precaution on money laundering contained in the Organic Law against Organized Crime and Financing Terrorism; the Organic

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Law on Drugs; the Organic Tax Code; the Law against the Crime of Smuggling; the Law on the Institutions of the Financial Sector (Banking); the Fair Prices Law; the Law Against Corruption; the Organic Law on Prevention, Job Conditions and Environment; and the Informatics Crimes Law, among others.

4.4.3 Money laundering

The Organic Law against Organized Crime and Finance of Terrorism establishes money laundering as a special crime, when capitals come from any kind of "illicit activities" typified in this Law, such as drug trafficking, corruption, environmental crimes, frauds, kidnapping, extortion, banking crimes, smuggling, tax crimes and others. There are several regulations to prevent money laundering in the banking, insurance and capital market sectors. This law authorizes undercover investigations.

4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

4.5.1 Exchange Controls

In 2003, the Venezuelan government imposed a foreign exchange control system. In 2005, the Law against Illegal Foreign Exchange Transactions was issued by the government to regulate the exchange control (the "Exchange Control Law"). Subsequently, the provisions of the Exchange Control Law have been modified during 2008, 2010, 2013, 2014 and 2015 ("Exchange Control Regulations").

The Exchange Control Regulations are not deemed to be a general abrogation of the constitutional principle of economic freedom (Constitution, Article 112). Under this principle, parties to ordinary commercial transactions may freely agree upon and execute any commercial transaction not expressly prohibited by a legal or statutory provision.

Except for few limited cases, to date, the Exchange Control Regulations do not prohibit or otherwise restrict individuals and legal entities from: (i) maintaining foreign currency accounts with foreign banks and/or brokers; and/or (ii) disposing of or using the foreign currency maintained in such accounts, provided that such funds are not subject to mandatory sale to the Central Bank of Venezuela (CBV). Also, individuals and legal entities are allowed to maintain funds in foreign currency in local accounts with licensed banks ("Local F/C Accounts").

Neither the Exchange Control Regulations nor the Exchange Control Law involves a general abrogation of the principle of legality of obligations in foreign currency set forth in Article 128 of the Law of the CBV. Under Article 128 of the Law of the CBV, foreign currency obligations are payable with the equivalent amount of legal tender at the rate of exchange on the date of payment, unless the parties specifically agree otherwise.

Article 128 of the Law of the CBV supports the legality of obligations denominated in foreign currency even after the enactment of the Exchange Regulations, in the absence of a specific legal provision to the contrary. The general principle set forth in Article 128 of the Law of the CBV has been limited in few cases, mainly related to real estate transactions.

There are mainly two mechanisms that enable companies and individuals to legally acquire foreign currency under the Exchange Control Regulations: (i) to apply for authorizations to purchase foreign currency with Cencoex (formerly the Foreign Currency Administration Commission) through the Protected Foreign Exchange System ("DIPRO"); and (ii) to apply to purchase foreign currency or foreign currency-denominated securities though the Complimentary Currency System ("DICOM"), which is a floating complementary system applicable to all other concepts that are not subject to the DIPRO. It is important to highlight that the applicable exchange rate for the purchase of foreign currency will depend on: (i) the concept for which the request is being made; and (ii) the mechanism through which the transaction is carried out, as described below.

a. Purchases through the DIPRO: In order to obtain access to foreign currency through the DIPRO, individuals and companies domiciled in Venezuela must: (i) register with Cencoex; and subsequently (ii) file an application to purchase foreign currency ("AAD") each time they want to make a purchase. Each AAD application must be accompanied by a set of requirements and documents set forth in the applicable Orders issued by Cencoex. In this regard:

    i. The DIPRO Exchange Rate only applies to certain limited items expressly provided for in the Exchange Control Regulations. Such items are mainly related to the acquisition of foreign currency to pay for import transactions of "essential goods" into Venezuela, such as food products, medicines and raw materials for these sectors.

    ii. Individuals and companies do not have access to purchase foreign currency from the CBV through Cencoex for activities not expressly recognized by the Orders.

    iii. Cencoex is vested with broad discretionary powers to approve or reject AAD applications. Therefore, the Exchange Control Regulations do not create rights to obtain foreign currency. That is, although the applicant may satisfactorily meet all of the requirements set forth therein, there is no certainty that it will actually be able to acquire the foreign currency requested. In addition, the granting of an AAD and the liquidation of funds under an AAD is subject to: (i) Cencoex's discretion; (ii) the availability of foreign currency as set forth by the CBV; and (iii) the general guidelines approved by the president of the republic in the Ministers Council.

    iv. From a practical standpoint, it should be noted that in view of the ample discretionary powers granted by the Exchange Control Regulations to Cencoex and the current economic situation in Venezuela, at this time, the expectation to receive authorizations to acquire US dollars at the DIPRO Exchange Rate is very limited, even in the case of import transactions of "essential items" as defined above.

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b. Purchases through the DICOM: DICOM was created on March 9, 2016 and is governed mainly by Exchange Agreement No. 35.[1] In connection therewith, on February 10, 2015, the Venezuelan government implemented an official exchange mechanism-denominated Marginal System of Foreign Currency ("SIMADI"). At least from a regulatory standpoint, SIMADI was conceived as an open currency exchange market not subject to limitations. The Official Exchange Rate resulting from SIMADI fluctuates on a daily basis, depending on the market conditions ("SIMADI Rate"). In practice, however, in view of the current Venezuelan political and economic circumstances, the limited offer of US dollars for sale and the discretional powers granted to the Central Bank of Venezuela as the governmental authority managing this mechanism, SIMADI has not been operating as an open and transparent mechanism, and the possibilities of purchasing foreign currency through this Official Exchange Mechanism are also very limited.

The functioning of SIMADI was extended for thirty (30) days counting from the date that Exchange Agreement No. 35 was published, while a new mechanism not yet defined starts operations. Agreement No. 35 does not include any specific information on how this new DICOM system will operate, but analysts are afraid that the system will be very much a continuation of the SIMADI system, but with an increased exchange rate. The new DICOM mechanism would have a floating exchange rate.

4.5.2 Foreign investment approvals and notifications

Foreign investments in Venezuela are governed by Decree No. 1,438 with Rank, Value and Force of the Law of Foreign Investments ("LFI"), published in Official Gazette No. 6,152 Extraordinary dated November 18, 2014. The LFI was enacted by the president of the republic in execution of the Enabling Law dated November 19, 2013. The LFI declared foreign investments subject matter of public interest.

The LFI abrogates and substitutes all existing laws and regulations regarding foreign investments in Venezuela, including, among others: (i) Decree 2,095, which issues the Regulations for the Common Treatment Regime of Foreign Capital over Trademarks, Patents, Licenses and Royalties, published in Official Gazette No. 34,930 dated March 25, 1992; (ii) Decree 356 with Rank, Value and Force of Law of Promotion and Protection of Investments; (iii) Decree No. 1.867 of the Regulations on the Law of Promotion and Protection of Investments; and (iv) in general, all legal and sub-legal provisions against the LFI.

The LFI granted a term of one (1) year to the National Executive to issue the regulations on the law; and a term of six (6) months to Cencoex to enact the necessary rulings regarding the transfer abroad of foreign investments, in order to develop the contents on exchange control matters.

The LFI ordered the elimination of the Office of the Superintendent of Foreign Investments ("SIEX"), the entity formerly responsible for governing foreign investments in Venezuela, and created the system of foreign investments, which is composed by the following entities:

[1] O.G. No. 40.865 of 9 March 2016.

- A Governing Entity, which is the ministry of the people's power with competence in trade matters. The governing entity establishes the policies for fulfilling the purposes of LFI.
- An Implementing Entity, which is Cencoex. The implementing entity is responsible for implementing the criteria, forms, requirements, rules and proceedings in the matter of foreign investments. Likewise, Cencoex has ample inspection powers with which to verify compliance with LFI and foreign investments regulations in force, and be able to coordinate activities with the bodies and entities of the National Revenue Administration, Foreign Relations and other pertinent entities for such purposes. The legal representation of Cencoex is entrusted to its president. Within the duties and responsibilities of Cencoex is bringing to the Governing Entity's consideration the adjudge on the merit of the Registration of Foreign Investments and its update, as well as the approval of the registration of technology transfer agreements.
- A Sanctioning Entity, which is the ministry of the people's power with competence in finance matters.

4.6 Industry-Specific Regulation

4.6.1 Telecommunications

Telecommunications has become one of the best developed areas in Venezuela. The spiraling growth in telecommunications, especially through mobile telephony and the need to receive and send different types of content, as well as the growth of this sector worldwide have made telecommunications a strategic sector for private investors and for the Venezuelan government. The Venezuelan government has increased its participation in the telecommunications market by nationalizing *Compañía Nacional Teléfonos de Venezuela* ("CANTV") and its mobile telephony subsidiary MOVILNET.

CANTV is the largest provider of national and international fixed telephony, mobile telephony, and Internet in Venezuela. It was founded in 1930 and nationalized in 1973, then privatized again in 1991 and finally nationalized in 2007 through the purchase of the entirety of its shares by the Venezuelan State. However, in the Venezuelan market, there are nationwide providers of fixed and mobile telephony, Internet and subscription TV, wholly owned by private capital.

In Venezuela, the law that governs the exploitation of telecommunications networks and services is clearly differentiated from the law that regulates content. The regulations regarding the establishment and exploitation of networks and that with regard to the provision of telecommunications services are contained in the Organic Law of Telecommunications ("OLTEL"), and the regulations on the content are set forth in the Venezuelan Law on Social Responsibility in Radio and TV.

According to the OLTEL, the establishment and exploitation of telecommunications networks and the provision of telecommunications services require an "administrative authorization." Additionally, if any of these activities involves the use of the radio electric spectrum, the interested party must apply for a "concession." The administrative authorization and the

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concession are granted by the National Telecommunications Commission (*Comisión Nacional de Telecomunicaciones* or CONATEL).

Applicants for an authorization or a concession must be domiciled in the country. Foreign investments in the telecommunications sector are only restricted in the area of radio and TV broadcasting.

The acquisition, in whole or in part, of companies that hold administrative authorizations for setting up and exploiting networks and for providing telecommunications services, agreements for the merger, division, transformation or creation of affiliates that exploit telecommunications services, when these imply changes in the control thereof, and any business transactions that implies a direct or indirect change in the shareholding or financial control thereof, must be approved by CONATEL in order to become effective, with the favorable opinion of the Superintendence for the Promotion and Protection of Free Competition ("Pro-Competencia").

Telecommunications equipment and devices are subject to approval and certification. Equipment and devices manufactured or assembled in Venezuela must be approved and certified by CONATEL, through national or foreign certification entities recognized for this purpose. In CONATEL's opinion, imported equipment approved or certified by an internationally renowned entity will not require new approval or certification in Venezuela. To this end, CONATEL will keep a public register of the national and foreign entities recommended to certify and approve telecommunications equipment. Additionally, CONATEL will publish a list of approved trademarks and models and their use, which will be considered automatically approved if the assigned use is observed.

4.6.2 Oil and gas

Oil activities have suffered major restructuring over the last years. The current oil policy is based on the consideration that certain oil activities can only be performed by either wholly owned state entities or mixed companies (*empresa mixta*), in which only a limited private participation is allowed under the 2001 Organic Law of Hydrocarbons ("OLH"), as amended by law reprinted in the Official Gazette No. 38.493 on 4 August 2006. This is also the case of the activities related to the primary activities pursuant to the Organic Law Reserving to the State the Goods and Services related to Primary Hydrocarbon Activities ("OLR"), published in the Official Gazette No. 39.173 on 7 May 2009.

The mixed company system established by the OLH with respect to oil activities reserves some activities and eliminates the pre-existing reserve over other activities. The purpose of the OLH is to regulate all hydrocarbon-related activities, for which it differentiates four types of activities: (i) primary activities; (ii) refining of natural hydrocarbons; (iii) industrialization of refined hydrocarbons; and (iv) marketing.

Private participation and investments are allowed to carry out primary activities with state participation and control, if the National Assembly has approved the terms and conditions under which the activities will be conducted. The National Assembly maintains the power to modify the proposed terms and conditions or establish new ones at its convenience. Primary activities include exploration for natural hydrocarbon reservoirs and

extraction of hydrocarbons in their natural state, as well as their initial collection, transportation and storage.

The OLH defines refining as distilling, purification and transformation activities of natural hydrocarbons for the purpose of increasing their value. It also provides that activities related to the internal and external marketing of natural hydrocarbons and products set forth by the executive branch of the government will remain reserved to the state by means of a decree. These activities may be performed by the state or by state-owned oil companies.

The activities reserved by the OLR to the state shall be carried out directly by the republic through Petróleos de Venezuela, S.A. (“PDVSA”) or through the subsidiary designated thereby for such purpose, or through mixed companies under PDVSA’s or its subsidiary’s control.

Companies must obtain a license from the Ministry of Petroleum and Mining in order to carry out primary activities established in the OLH.

The duration of mixed companies has a maximum of 25 years, renewable for a period that must be agreed by parties and that may not exceed 15 years. This extension must be requested after half of the term granted to carry out the activities has passed and five years before its expiration.

Related hydrocarbon activities include: (i) those of water, vapor or gas injection, which allow for an increase in the wells’ energy and to improve the recovery factor; (ii) gas compression; and (iii) those related to the activities in Lake Maracaibo, such as: motor boats for the transportation of personnel, divers and maintenance; barges with cranes to transport material, diesel, industrial water and other supplies; tugboats; flat barges, buoys, cranes, refuse, laying or replacement of underwater pipes and cables; and maintenance of ships at shipyards and docks of any kind.

The OLR sets forth that the ministry responsible for oil matters, formerly the Ministry of the People’s Power for Energy and Oil (“MPPEP”), now the Ministry of the People’s Power for Petroleum and Mining (“MPM”), will determine, by means of a resolution, the goods and services of companies or sectors that will fall within the reserve.

The MPPEP issued Resolution No. 051, published in Official Gazette No. 39.174 on 8 May 2009 (“Resolution 051”), in which the services of companies or sectors and goods included in the reserve established in Articles 1 and 2 of the OLR are mentioned, as well as those companies affected by the takeover and control measures. It is worth noting that in Resolution 051, the MPPEP reserves the right to establish other goods and services provided by companies or sectors, and companies affected by the OLR.

It also issued Resolution No. 054, published in Official Gazette No. 39.177 of 13 May 2009, which states that the following goods and services are affected by the reserve established in the OLR: (i) Pigap II compression gas service, El Tejero, State of Monagas; and (ii) Jusepín compression gas service and Furrial gas injection, State of Monagas. By means of Resolution No. 054, the companies that render direct or indirect services to the abovementioned sectors and goods are also affected.

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Thereafter, the MPPEP issued resolutions No. 65 (Official Gazette No. 39.181, 19 May 2009) and No. 67 (Official Gazette No. 39.183, 21 May 2009), whereby it listed a number of private entities subject to the OLR.

4.7 Import/Export Controls

4.7.1 Import controls

In Venezuela, there is generally an open system of imports where no permit or prior license is required from the authorities, and importers are not required to be registered in any registry. However, the importation of certain products may require a prior license, permit, certificate of quality, delegation and certificates of origin (such as a health permit from the Ministry of Health and/or from the Ministry of Agriculture, or a license from the Ministry of Defense). Imported goods are classified as: (i) taxable, (ii) non-taxable; (iii) prohibited; (iv) reserved; and (v) subject to restrictions, registration or other requirements. To determine if a permit or license is required for specific goods, you must refer to the Organic Customs Law, the Organic Customs Law´s Regulations and the Customs Tariff Schedule.

As of 2014, a new reform to the Organic Customs Law was carried through, which imposes a drastic change to the importations regime. The Organic Customs Law creates new types of Import returns, one of which is called the Advanced Information Return for importations. This new return must be provided when carrying through any kind of import, but depending on the means of transportation, with a maximum anticipation of 15 days and a minimum of one day before the arrival of the goods (air and ground transportation) and a maximum anticipation of 15 days and a minimum of two days after the arrival of the merchandise (for maritime transportation). The presentation of this return does not exempt the importer from the obligation to provide the Final Customs Return. The importer may exceptionally, *pre-liquidate* the correspondent customs tariffs through this Advanced Information Return for importations.

As a requisite imposed under the current exchange control system, in order to obtain foreign currency from the Central Bank of Venezuela at any of the preferential official exchange rates, importers of all goods that are not included in the “essential goods list” must first request and obtain “Non-Production Certificates” or “Insufficient Production Certificates” from the corresponding Ministries, depending on the nature of the goods imported. In addition, importers must declare to the customs authorities the origin of the foreign currency used to cover importation costs. Registration with the Ministry of Health is required to be able to import health products, cosmetics and foodstuffs. To import products that are similar to Venezuelan products subject to mandatory quality standards, the products must be registered to a special register maintained by the Ministry of Industries or the Ministry of Trade.

In order to avoid penalties due to improper tariff classification, it is advisable that importers obtain the product’s proper customs tariff classification from the customs authorities prior to importation. Article 40 of the General Regulations on this subject matter allows any person to ask about the tariff classification of any good. The request for tariff classification must be made separately, one request per product or good. This request must be submitted to the Nomenclature Division of the Tariffs Management of SENIAT’s National Customs Intendance. All answers to the requests are public and fully valid,

and they grant legal certainty to the requesting party, provided the goods are the same as those subject to the customs transaction.

Restrictions may be imposed on the import of certain products or - on those that come from certain countries as a response to reciprocal treatment. The customs authorities are also empowered to establish reference prices for calculating import duties.

Prior to importation, the importer must submit, along with the import manifest, certain permits, certificates and licenses pertaining to the merchandise to be imported, according to the previous Customs Schedule.

The Customs Tariff Schedule provides for the obligation to submit, together with the import manifest, the Certificate of Registration issued by the Autonomous Service for Standardization, Quality, Metrology and Technical Regulations ("SENCAMER") of the Ministry of Commerce. This obligation only applies to goods that are subject to mandatory CONVENIN standards, Technical Regulations or both.

The Customs Schedule also includes a list of the goods for importation and national transit that are subject to CONVENIN Standards. It is important to verify that the products that are to be imported comply with such standards.

Besides import duties, importers must pay 1 percent of the value of goods as a customs service fee, as well as a value-added tax, which is currently 12 percent of the customs value.

Venezuela is a signatory of the Marrakesh Treaty, and therefore applies all multilateral agreements that are part of that treaty.

Imported goods subsidized in the country of origin or dumped in Venezuela are subject to anti-dumping or compensatory duties under the Law against Unfair Practices in International Trade (the "Anti-Dumping Law"). Under the Anti-Dumping Law, any person who produces similar goods in Venezuela may request an investigation of imported goods by the Anti-Dumping and Subsidies Commission.

Imports may also be subject to commercial safeguard measures that are applied pursuant to the provisions set forth in the Venezuelan Safeguard Law, in various regional treaties to which Venezuela is a party, and in the WTO Safeguard Agreement.

4.7.2 Export controls

The exportation of Venezuelan products is generally exempt from regulatory requirements. However, there is a limited list of products (certain components of the basic food list, strategic products, radioactive products and fertilizers) that are subject to prior export licenses. Certain other products (gold, cocoa, coffee, fruits, vegetables, flowers and certain drugs, among others) are subject to special permits and/or registration requirements. Most of these licenses are established in the second annex of the Customs Tariff Schedule.

Other requirements for exports include: health permits for agricultural products; sanitation permits for animal origin products; phyto-sanitation certificates for vegetable products; and a certificate of origin, as evidence that the exported product has actually been produced in the country.

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The export incentive consisting of export bonds has been eliminated except for some agricultural products.

Exports are deemed to be sales for income tax purposes. Although exporters are subject to value-added tax, the applicable rate is zero.

Exporters of capital goods and services of domestic origin have the right to recover the fiscal credits on the acquisitions of goods and services related to exportation. However, in order to obtain said recovery, it is necessary for the exporter to register in a special exporters register created by the Tax Administration.

In Venezuela, customs duties are not applied to exports. However, exporters must comply with all administrative customs formalities, which require the use of a customs agent. The customs service fee is 1 percent of the value of the exported merchandise.

As a requisite imposed under the current foreign exchange control system, exporters are obliged to sell up to 40 percent of the foreign currency obtained from exports to the Venezuelan Central Bank at the official rate.

5. Transfer Taxes

5.1 Acquisition of Shares

The taxable income of a share transfer of a domiciled corporation is determined by the difference between the tax cost basis of the shares (adjusted for inflation, if applicable), and the purchase price paid by the buyer. Standard corporate rates are applicable to net profits. If the shareholder can claim the benefits of a double taxation convention, the capital gain may be exempt from income tax liability, depending on the specific convention.

A flat-rate tax of 1 percent applies to the gross sales price of shares disposed of through a Venezuelan stock exchange, irrespective of whether the shareholder realized a gain or loss on the transaction. This tax must be withheld by the broker.

5.2 Acquisition of Assets

In structuring a transaction, while income taxes may be minimized in both share and asset acquisitions, special care must be taken to avoid gift tax implications. Due to the high levels of inflation, historical cost is significantly lower than market value and, consequently, an asset purchase at market value may result in significant future tax savings based on inflationary adjustments for tax purposes.

5.3 Value-Added Tax

The absence of a value-added tax in the case of a share transaction may also be regarded as an advantage by the buyer. In the case of asset acquisitions, a value-added tax is applicable to the portion of the purchase price allocable to tangible personal property, which may create a cash flow problem for the buyer unless the buyer's existing or projected sales volume is relatively high.

6. Employee Issues

6.1 Method of Transfer under Local Law

6.1.1 Acquisition of shares

In the event of a share purchase, the relationship between the entity and its employees is not affected.

6.1.2 Acquisition of assets

In an asset purchase, the buyer becomes the substitute employer of the employees transferred as a result of the transaction. The buyer in this case becomes liable by operation of law for all pre-existing labor obligations. This includes, among other items, all seniority and vested termination indemnities. An employee who resigns as a result of the asset transaction (for considering it not convenient to his or her interests) would be entitled to receive the indemnities provided for in the law as if the employment relationship had terminated for reasons not attributable to the employee.

The transferor is jointly and severally liable with the substitute employer for all the labor rights that the transferred employees have accrued for up to a term of five years as of the date of the change of the employer (or as of the date the respective judgment becomes final in the event of judicial claims). Thereafter, only the substitute employer continues to be liable. In the event of a transfer of employees incidental to an asset transaction, notice of such transfer must be given to the affected employees, the competent Labor Inspector’s Office(s) and the union(s) of which any of the employees involved is a member.

When a substitution of the employer occurs, the labor relationships in principle continue, the new employer assumes the labor liabilities accrued prior to the employer substitution, and the affected workers may, under certain circumstances and during a certain period, resign with cause and claim payment of indemnification as if they had been dismissed without cause. The previous employer will be jointly and severally liable with the new employer for a maximum period of five years counted as of the date of the change of the employer or of the written notice thereof to the workers.

6.2 Approval or Consultation Requirements

In case of transfers via employer substitution, the seller is not legally required to give notice of the closing of the transaction to the employees or request their consent to it. Nonetheless, it is advisable to notify affected employees that their employment agreements have been or will be transferred to a new employer by indicating the date on which it occurred or will happen, as the case may be. It is not unlawful to inform employees after the employment agreements have been transferred to the new employer.

6.3 Protection against Dismissal

6.3.1 Redundancies

The employment relationship may be terminated by dismissal, retirement or resignation, mutual agreement, or for reasons beyond the control of the parties. The dismissal, retirement or resignation may be justified or unjustified. However, under the Organic Labor and Workers Law ("OLWL"),

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there is an absolute labor stability system pursuant to which protected workers may not be dismissed without just cause. Dismissal of protected workers without cause is null and void, but the workers have the option to retire or resign, collecting the additional unjustified dismissal indemnity(ies) that may apply. Most workers, with a few exceptions, are protected by the absolute labor stability system.

There are also several cases of special labor protection, which protects certain workers against dismissals, deterioration of conditions and transfers without just cause previously proven before and authorized by the competent Labor Inspector. Under a Presidential Decree, the most recent version of which by the time this work is published is to be effective until 31 December 2015, most workers, with a few exceptions, enjoy this special labor protection.

According to the OLWL, workers in general are entitled to the payment of a salary (with a minimum salary set from time to time by the National Executive in accordance with certain rules of the OLWL), profit sharing (or a year-end bonus in lieu thereof in certain cases), vacation days, vacation bonus, seniority benefits, rest days and holidays, overtime or night work surcharge, and to indemnities in the event of justified resignation or unjustified dismissal. Pregnant workers, as well as the corresponding father under an employment relationship, have special protection and cannot be dismissed during pregnancy or during the two years following child birth without justified cause previously proven before the Labor Inspector of the jurisdiction. Female workers are also entitled to pre- and post- birth leaves, breastfeeding leaves, and certain leaves for health control during the pregnancy. The father, regardless of his marital status, will also qualify for certain paternity leave paid by the Social Security System.

During the infant's first year, the mother or father has the right to one day of paid leave per month for the infant's medical control visits.

6.3.2 Penalties

Mass layoff of employees without authorization will be ineffective, the legal consequence being that the employees must be reinstated with back-payment of salaries and social benefits accrued but not paid during the time unemployed.

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APPENDIX A

BROAD PRINCIPLES OF INFORMATION EXCHANGE AND 'GUN-JUMPING'

Because a transaction may be subject to review by anti-trust/competition authorities locally or around the world, and because discussions between competitors or potential competitors can be misconstrued, it is important that the parties to a transaction take extensive precautions to comply with all applicable antitrust/competition laws as they negotiate the transaction agreement and between signing and closing.

1. Creating Documents about the Transaction

1.1. All notes, minutes and other documentation of any kind whatsoever created by the parties to a transaction, their affiliates and consultants in connection with a transaction are likely to be reviewed by those competition authorities whose prior consent is required to implement the transaction.

1.2. For example, both the US[1] and EU[2] pre-merger notification forms require production of all studies, surveys, analyses, and reports prepared by or for an officer or director for the purpose of evaluating or analysing the acquisition, including market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. Accordingly, all documents that have been prepared to date that might fall within the scope of this requirement should be identified for submission and new documents that might fall within the scope of the requirement should be prepared in 'draft' so they can be reviewed by counsel before finalisation.

1.3. Furthermore, participants in negotiation and implementation task forces should recognise that any notes they take or emails or memos they write during the course of negotiations about the transaction agreement or between signing and closing can be obtained by antitrust authorities in the course of their review of the transaction. Notes should therefore be kept to a minimum and should not address issues that are competitively sensitive.

2. Coordinated Activities by the Parties

2.1. Under antitrust/competition laws, parties who are competitors are required to act as competitors until any transaction between them is closed.

2.2. The period before closing of a transaction usually involves three business stages: negotiations; due diligence; and transition (or integration) planning. Because parties who are competitors are expected to act as competitors until the transaction is closed, the permissible scope of coordinated activities between the parties is limited during the pre-closing period.

2.3. There are two antitrust principles to bear in mind when negotiating transactions and taking implementing steps before closing. First, pre-closing coordination between the parties may violate the merger control laws of those countries where clearance is required before closing. Most merger control regimes provide for a period which prohibits the parties from integrating their operations before the antitrust/competition review has been completed or before a waiting period has expired. Penalties for non-

[1] Item 4(c) of the Notification Form required to be submitted by parties to transactions satisfying the notification thresholds of the US Hart-Scott-Rodino Antitrust Improvements Act of 1976.
[2] See 5.4 of Form CO relating to the Notification of a Concentration pursuant to Regulation (EC) No 139/2004.

compliance often include substantial fines.[3] Second, any joint activities between the parties prior to closing will be subject to review under applicable competition laws that prohibit contracts, combinations and conspiracies that unreasonably restrain trade. Because the parties remain competitors until the transaction has closed, any interim restrictive agreements between them could be illegal. The laws prohibiting restrictive agreements are applicable throughout the pre-closing process, even after merger control clearance has been obtained or any merger control waiting periods have expired.

2.4. As a general rule, prior to closing the parties should act as independent entities and not make any joint business decisions until the transaction has closed. Similarly, neither party should base any of its independent business decisions on competitively sensitive information, discussed more fully below, that is obtained from the other party in the course of negotiations, due diligence or transition planning. Where European authorities suspect that these rules have not been respected, they can and do carry out unannounced inspections or 'dawn raids' to verify the nature of any infringement.

3. Exchanging Competitively Sensitive Information

3.1. The exchange of competitively sensitive information between competitors should be carefully structured and monitored to avoid any illegal conduct and to minimise the risk that such information will be used inappropriately if the transaction is aborted.

3.2. The parties to a proposed transaction typically exchange a wide variety of information when negotiating a transaction, conducting due diligence, and planning the integration of operations. Access to competitively sensitive information is often necessary for planning and valuing the transaction, but, as a general rule, the exchange of such information between competitors or potential competitors can raise antitrust/competition issues even if the parties do not engage in joint business activities prior to closing the transaction. The more information the parties exchange about their prices, costs, customers, strategies, etc., the more likely it is that competition may be threatened in the interim between negotiations and closing. The antitrust/competition authorities have expressed concern that such exchanges can enable the parties to coordinate their pre-closing activities without any express agreement. They have also expressed concern that the parties might use such information in an anticompetitive way if the transaction is ultimately abandoned.

3.3. Given these concerns, some safeguards are necessary to allow the parties to agree and implement their transaction within the letter and the spirit of the antitrust/competition laws. Such safeguards are intended to ensure the parties do not exchange competitively sensitive information and reduce the risk that either party would use any information to influence its interim operations or to harm the other party if the transaction is aborted.

3.4. The parties should limit the information that they exchange to what is relevant and necessary to negotiating the transaction agreement, the due diligence process, and transition planning, in order to avoid any suggestion that the transaction is a 'sham' attempt to engage in collusive behaviour.

3.5. The parties should limit the collection, exchange and dissemination of competitively sensitive information to those employees responsible for negotiating the transaction.

[3] In the US fines for so-called 'gun-jumping' activity are up to $16,000 for each day the parties are in violation. In the EU, the European Commission may impose penalties of up to 10% of the aggregate turnover of the parties involved.

Ideally, none of those employees should be responsible for the day-to-day business decisions or oversight of the overlapping business, thus reducing the risk of anti-competitive use of such information.

3.6. The parties can minimise the antitrust/competition risk by using an independent third party (e.g. a consulting firm) to collect, filter, and assess competitively sensitive information without disclosing such information to the other party. If necessary and relevant to the transaction, such information can be provided on a confidential basis subject to a confidentiality agreement with an independent third party for analysis and review. While the third party may not then exchange the information with the parties, it could provide a summary or redacted version of the information and advise the parties based on that information.

3.7. The parties should request advice from legal counsel when difficult situations arise. There is often a way to achieve the parties' goals without creating undue antitrust/competition risk.

4. Communicating with the Media

4.1. Discussion in the media of the proposed transaction by representatives of the parties can have extremely negative implications on the antitrust/competition analysis of the transaction unless carefully structured in consultation with legal counsel. The specific concern is that statements may be attributed to the transaction participants which might draw undue attention from antitrust/competition authorities, or more significantly, contradict an antitrust position that the parties may wish to assert. Accordingly, all media contact should be vetted by legal counsel.

5. Other Safeguards

5.1. Legal counsel need not be present at each meeting between the transaction participants, nor does legal counsel need to be consulted with respect to each joint activity. However, any questions regarding the scope of permissible information exchange and coordinated activity should be brought to the attention of legal counsel immediately. Safeguards, additional to those referred to in these guidelines, can be designed in consultation with legal counsel to limit the antitrust/competition law exposure within the context of proposed transactions.

APPENDIX B

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