GETTING THE DEAL THROUGH

Mergers & Acquisitions

in 66 jurisdictions worldwide

2014

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Mergers & Acquisitions 2014

Contributing editor:
Alan M Klein
Simpson Thacher & Bartlett LLP

Getting the Deal Through is delighted to publish the fully revised and updated fifteenth edition of *Mergers & Acquisitions*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Mergers & Acquisitions 2014 examines the law and regulation of business combinations and addresses the most important issues for international deals.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 66 jurisdictions featured. New jurisdictions this year include Angola, Mozambique, Panama, Portugal and Spain. Global and EU overviews are also provided.

Many legal disciplines come into play in large M&A deals. In particular, advisers must take account of competition regulation. This volume contains an appendix covering merger control rules across the world. For a more detailed analysis please refer to another volume of the *Getting the Deal Through* series: *Merger Control*.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingtheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise in this field. We would like to thank Casey Cogut of Simpson Thacher & Bartlett LLP for his stewardship of the title over the last fifteen years. We would especially like to thank and acknowledge Alan M Klein as contributing editor of this and future editions.

Getting the Deal Through
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May 2014

Global Overview 5
Alan M Klein
Simpson Thacher & Bartlett LLP

EU Overview 7
Richard Thexton and Rós Ní Dhubháin
Freshfields Bruckhaus Deringer LLP

Angola 10
António Vicente Marques
AVM Advogados

Argentina 15
Pablo Trevisán, Laura Bierzychudek and Walter Beveraggi
Estudio Trevisán Abogados

Australia 22
Neil Pathak, David Clee and Peter Feros
Gilbert + Tobin

Austria 30
Christian Herbst
Schönherr

Belgium 37
Sandrine Hirsch and Vanessa Marquette
Simont Braun

Bermuda 44
Peter Martin and Andrew Martin
MJM Limited

Bolivia 50
Carlos Pinto-Meyer and Cristian Bustos
Ferrere Abogados

Brazil 54
Vamilson José Costa, Ivo Waisberg, Antonio Tavares Paes, Jr, Gilberto Gornati and Stefan Lourenço de Lima
Costa, Waisberg e Tavares Paes Sociedade de Advogados

Bulgaria 60
Yordan Naydenov, Angel Angelov and Nevena Dzhurova
Boyanov & Co

Canada 68
Neill May and Rob Kallio
Goodmans LLP

Foreign Investment Review in Canada 75
Richard Annan, Calvin S Goldman QC and Joel Schachter
Goodmans LLP

Cayman Islands 79
Rob Jackson and Ramesh Maharaj
Walkers

China 84
Caroline Berube and Ralf Ho
HJM Asia Law & Co LLC

Colombia 89
Enrique Álvarez, Santiago Gutiérrez and Tomás Calderón-Mejía
Lloreda Camacho & Co

Czech Republic 98
Rudolf Rentsch and Petra Trojanová
Rentsch Legal

Denmark 105
Thomas Weisbjerg, Jakob Mosegaard Larsen and Martin Rudbæk Nielsen
Nielsen Nørager Law Firm LLP

Dominican Republic 111
Marielle Garrigó and Mariángela Pellerano
Pellerano & Herrera

England & Wales 114
Michael Corbett
Slaughter and May

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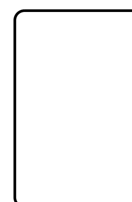

CONTENTS

France 124
Sandrine de Sousa and Yves Ardaillou
Bersay & Associés

Georgia 130
Revaz Javelidze and Eka Siradze
Colibri Law Firm

Germany 135
Gerhard Wegen and Christian Cascante
Gleiss Lutz

Ghana 143
Kimathi Kuenyehia, Sr, Kafui Baeta, Valery Atuwo and Atsu Agbemabiase
Kimathi & Partners, Corporate Attorneys

Hong Kong 149
John E Lange and David M Norman
Paul, Weiss, Rifkind, Wharton & Garrison / David Norman & Co

Hungary 155
David Dederick, Pál Szabó and Eszter Katona
Weil, Gotshal & Manges

India 161
Rabindra Jhunjhunwala and Bharat Anand
Khaitan & Co

Indonesia 170
Mohamad Kadri, Johannes C Sahetapy-Engel and Almira Moronne
Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)

Italy 176
Fiorella Federica Alvino
Ughi e Nunziante – Studio Legale

Japan 182
Ryuji Sakai, Kayo Takigawa and Yushi Hegawa
Nagashima Ohno & Tsunematsu

Kazakhstan 188
Azim Usmanov and Otabek Suleimanov
Colibri Law Firm

Kenya 193
Michael Kontos, David Wayumba and Fahreen Alibhai Bid
Walker Kontos Advocates

Korea 199
Gene-Oh (Gene) Kim and Joon B Kim
Kim & Chang

Krygyzstan 204
Zhanyl Abdrakhmanova
Colibri Law Firm

Kuwait 208
Ibrahim Sattout and John Cunha
ASAR – Al Ruwayeh & Partners

Latvia 213
Gints Vilgerts and Vairis Dmitrijevs
Magnusson

Luxembourg 218
Alex Schmitt, Chantal Keereman and Philipp Mössner
Bonn & Schmitt

Macedonia 223
Emilija Kelesoska Sholjakovska and Elena Miceva
Debarliev, Dameski & Kelesoska Attorneys at Law

Malaysia 229
Wong Tat Chung
Wong Beh & Toh

Malta 235
Ian Gauci and Karl Sammut
GTG Advocates

Mexico 241
Daniel Del Río and Jesús Colunga
Basham, Ringe y Correa, SC

Morocco 247
Nadia Kettani
Kettani Law Firm

Mozambique 253
Hélder Paulo Frechaut
AVM Advogados

Nigeria 258
Theophilus Emuwa and Chinyerugo Ugoji
ÆLEX

Norway 264
Ole Kristian Aabø-Evensen
Aabø-Evensen & Co Advokatfirma

Pakistan 275
Bilal Shaukat and Shahbakht Pirzada
RIAALAW

Panama 281
Luis Chalhoub M and Jordana Fasano
Icaza, González-Ruiz & Alemán

Peru 285
Percy Castle and Carlos Carrasco
Casahierro Abogados

Portugal 291
António Vicente Marques
AVM Advogados

Romania 297
Simona Mares and Lucian Danilescu
Mares / Danilescu / Mares

Russia 304
Igor Akimov, Ilya Lifshits and Alim Oshnokov
EDAS Law Bureau

Saudi Arabia 309
O Ali Anekwe and Babul Parikh
Baker Botts LLP

Serbia 316
Nenad Stankovic, Dusan Vukadin and Sara Pendjer
Stankovic & Partners

Singapore 323
Ng Wai King and Mark Choy
WongPartnership LLP

Slovenia 331
Nataša Pipan Nahtigal and Jera Majzelj
Odvetniki Šelih & partnerji, o.p., d.o.o.

South Africa 338
Ezra Davids and David Yuill
Bowman Gilfillan

Spain 344
Isidro del Saz, Gonzalo Navarro and María Grañén
Roca Junyent, SLP

Switzerland 351
Claude Lambert, Dieter Gericke, Reto Heuberger and Gerald Brei
Homburger

Tajikistan 360
Denis Bagrov and Khujanazar Aslamshoev
Colibri Law Firm

Thailand 364
Ruengrit Pooprasert, Archaree Suppakrucha and Anaknong Chaiyasri
ZICOlaw (Thailand) Limited

Turkey 369
Tunç Lokmanhekim and Elif Çağla Yazdıç
ELİG Attorneys-at-Law

Ukraine 378
Galyna Zagorodniuk and Dmytro Tkachenko
DLA Piper Ukraine

United Arab Emirates 383
Michael Hilton and Mohammad Tbaishat
Freshfields Bruckhaus Deringer

United States 390

Alan M Klein
Simpson Thacher & Bartlett LLP

United States, Delaware 395

Rolin P Bissell and Elena C Norman
Young Conaway Stargatt & Taylor, LLP

Uzbekistan 401

Artem Klimenko and Ravshan Rakhmanov
Colibri Law Firm

Venezuela 406

Jorge Acedo
Hoet Peláez Castillo & Duque

Vietnam 410

Tuan Nguyen, Phong Le, Hanh Bich, Huyen Nguyen, Hai Ha and Thuy Huynh
bizconsult law LLC

Zambia 416

Sharon Sakuwaha
Corpus Legal Practitioners

Appendix: International Merger Control 422

David E Vann, Jr and Ellen L Frye
Simpson Thacher & Bartlett LLP

Argentina

Pablo Trevisán, Laura Bierzychudek and Walter Beveraggi

Estudio Trevisán Abogados

1 Types of transaction

How may businesses combine?

There are several types of business combinations in Argentina, whose purpose is to enhance the profitability and productivity, access to the market and comprehensive reorganisation of the company after restructuring the legal aspects. Some types of combinations are:

- collaboration agreements, where companies join their efforts to carry out common business that they would not be able to carry out separately due to the lack of operative, technological or economic capacity. Thus, companies divide work, tasks and responsibilities without losing their legal independence and without merging the rest of their activities. Under Argentine law, there exist different types such as temporary companies' groups, business collaboration groups and cooperation groups;
- distribution agreements are another type of business combination, where the producer of a product or the provider of a service that has reached a level of efficiency in its specific activity resorts to other companies who have organised themselves to carry out such task or role. Within this wide notion we find distribution agreements, as well as agencies, concessions, franchising, trademark licensing and other agreements;
- mutual guarantee companies, formed by two or more companies (small businesses) and individuals or corporations who undertake to make capital contributions with the purpose of facilitating the request of credit for the former, providing them with guarantee and technical, economic and financial advice. It is an association strategy between big companies and small businesses;
- stock holding (legal internal control): this takes place by means of the purchase of stock or corporate participation, where the organic-corporate situation of the companies remains the same. The holder of a stock of shares, by which it controls the company, sells stock to a third party, or to another stockholder, for a certain price, and the corporate entity does not change its internal structure at all. In an indirect way, the sale of stock can lead to the company being dependent on the interests of the new holder or the groups of companies to which the purchaser belongs; however, the formal scheme of the company is not changed;
- a derivation of the acquisition of corporate participations is the formation of groups of companies (external control), namely, where several companies operate under the control of one of them (holding or parent company), either in the case of a combination by means of contractual relationships or by corporate structures, aimed at obtaining a better profitability situation in the market;
- another possibility is the creation of a commercial establishment and its later sale where the holder sells an asset of its property to a third party, for a certain price;
- in recent years, businessmen and companies have begun to use trusts as a means of organising a different business (mainly, collateral trusts and management trusts); and
- combinations also take place by means of spin-offs and mergers, to which we refer below.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws that govern business combinations are:

- Act No. 19,550 – Law of Corporations (LC);
- the Commercial Code;
- Act No. 25,156 – Competition Law;
- Act No. 26,005 – Cooperation Groups;
- Decree No. 649/1997 and Act No. 24,475 – Income Tax Law and its Regulatory Decree No. 776/1995, as amended;
- Act No. 24,441 – Trust Law;
- Act No. 24,467 – Regulations for small and medium-sized enterprises and mutual guarantee companies; and
- Act No. 26,831 – Capital Markets Act.

After the foregoing, we should point out that the methods most used in Argentina for business combinations are the merger of two or more companies and spin-offs, and that, in practice, there are several ways to transfer assets and liabilities that are similar to these but lacking one or more of the characteristic features of said methods.

As regards mergers, the LC establishes two main types: mergers, when two or more companies are dissolved without winding-up in order to constitute a new company; and mergers by means of absorption, when an existing company absorbs one or more different companies, which are dissolved without being wound up. The merged or incorporated companies are dissolved but are not wound up. Their assets and liabilities become part of the new company, in the first case, or of the incorporating company, in the second case.

The LC also regulates spin-offs as a process whereby a company transfers all its assets and liabilities as a whole, or a part of such company that by itself is a productive unit, in order to constitute one or more companies, or in order to transfer these to an already existing company, or in order to participate with an existing one in the formation thereof, and the holders of the company subject to spin-off are therefore included in the successors; in the case of a total transfer of the assets and liabilities, the company subject to spin-off is then dissolved.

3 Governing law

What law typically governs the transaction agreements?

General rules on contracts contained in both the Commercial Code and the Civil Code will apply; however, in cases where companies take part (such as merger, spin-off, etc), the rules contained in the

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LC shall also apply. Nevertheless, the Civil Code establishes that a contract is the law for the parties assuming that public order is not violated.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

As regards corporate reorganisation (merger and spin-off procedures) it should be considered that, for the purposes of obtaining acknowledgement of the resolutions of partners or stockholders before third parties (alien to the company), the resolutions adopted will have to be filed with the relevant surveillance authority which, for the City of Buenos Aires, is the Corporations Surveillance Authority, acting within the Federal Ministry of Justice and Human Rights. In other places the relevant authority is the Registry of each province or the Corporations Surveillance Authority of each province.

In several areas of the economy, the relevant surveillance authorities also require that the companies acting therein shall obtain their prior approval for conducting a merger process. If the company is listed and the reorganisation procedure is conducted through a merger or spin-off, the Rules of the Argentine Federal Securities Commission (CNV) and the Rules of the Buenos Aires Stock Exchange (BASE) will apply.

Also, the Financial Entities Act (Act No. 21,526), regulating individuals or private or public entities that carry out intermediation between the supply and demand of financial resources on a regular basis, establishes that the Argentine Central Bank shall be in charge of reviewing and authorising the merger of entities governed by the act.

In the field of insurance, the Insurance Surveillance Authority will have to authorise the merger of insurers (Act No. 20,091).

Subject to the thresholds, formalities and other terms established under the Competition Law, certain concentrations might be subject to compulsory notification to the National Competition Commission (CNDC).

Although there are certain tax and fiscal benefits, legal provisions have not been consistent, and therefore they should be analysed at the time of carrying out such reorganisation. Specifically, as regards income tax, the law grants a benefit on the results that may arise as a consequence of the reorganisation, considering that they are not affected by this tax for a period of at least two years as from the reorganisation. Most of the jurisdictions (provinces) levy a stamp tax on the formalisation of the merger or spin-off. However, the impact of the stamp tax has to be analysed in each particular case.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

In general, corporate reorganisations (mergers, spin-offs) require a publicity procedure aimed at protecting the rights of third parties.

Thus, the LC establishes very specific rules: notices have to be published in the Official Gazette and in a national newspaper. Such notices must state:

- the name, principal place of business and the registration data of each company with the Public Registry of Commerce;
- the capital stock of the new company or the amount of the increase in the corporate capital of the incorporating company;
- an assessment of the assets and liabilities of the merging companies, stating the date thereof;
- the name, corporate type and domicile agreed for the company to be constituted; and
- the dates of the prior undertaking to merge and the corporate resolutions approving it.

Some publicity requirements must also be fulfilled as regards the transfer of a commercial establishment; such notices must be published for five days in the Official Gazette of the relevant place and in one or more newspapers of the place where the business is located. The announcement must contain:

- information about the ongoing concern;
- the name and domicile of the transferor and transferee;
- the name and address of the broker (if any); and
- the notary public participating in the transaction.

As regards non-public stock purchase agreements, no publicity is required because they constitute private agreements, which are then entered in the corporate books.

Regarding takeover bids, together with the filing with the Argentine CNV, the bidder shall publish at least once in the gazette of the Buenos Aires Stock Exchange or the self-governed entity at which the stocks are listed, and for at least three days in a newspaper of regular circulation in the Argentine Republic, the essential terms and conditions of the takeover bid and the domiciles where it shall be available in order to be consulted by the interested parties and any other information of the company issuing the shares for the bid that has not already become public domain, and whether such information was received by the company from third parties or was prepared by the bidder itself, that is relevant to make a decision regarding the acceptance or rejection of the bid (CNV General Resolution No. 330/99).

Additionally, upon the expiration of the general term for the takeover bid, the bidder and the agents involved in the transaction, as the case may be, shall report the results to the Securities Commission and the stock exchange or self-governed agency at which the stock is listed. This information shall be disseminated by means of its immediate publication in a newspaper of regular circulation in the Argentine Republic (CNV General Resolution No. 353/2000).

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There is no requirement for accessing non-public companies and becoming a partner or stockholder. However, it should be taken into account that pursuant to Argentine corporate law, any relationship, whatever the degree of participation among companies, will imply certain rights because it gives the shareholder the right to require information, among other rights.

The LC thus regulates the relationship and control regime among companies, from the perspective of the subordination position among companies and establishes certain information duties when a company owns more than the 25 per cent of the capital stock of other company. The sole relationship between companies, a situation of control or belonging to an economic group, does not violate any legal rule. Only when the latter leads to a general infringement of the law or violates the rights of third parties is the relationship reprehensible.

On the other hand, pursuant to Competition Law the concentration transactions that meet certain thresholds and cause change of control must be notified to the Antitrust Authority and in this case the parties should provide a list of all shareholders, quota-holders or owners of capital stock that hold a participating interest greater than 5 per cent, among other matters.

Moreover, Resolution No. 604/2012, enacted recently by the National Securities Commission, establishes information duties with regard to the shareholders that hold a participating interest greater

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than 5 per cent in corporations that make public offering, including legal entities, trustee and individuals, local and foreign.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors must always act in the interest of the company and according to the by-laws and the LC provisions.

The LC establishes principles regulating the behaviour of the manager – 'good faith' and 'loyalty' – but also a legal standard 'to act as a good businessman'. Both parameters impose on the manager the obligation to carry out his or her duty with the aim of obtaining the highest possible income and results for the company, without following any motivations that are personal or alien to the corporation.

In general, it should be pointed out that pursuant to Argentine law, managers bind the company only as regards those acts that are not clearly alien to the corporate purpose. Non-fulfilment of their duties shall make them joint and severally liable for the damages caused by their act or omission.

Apart from these wide notions, civil law liabilities and those specific to the LC for particular cases apply.

With regard to mergers in particular, managers of the companies concerned must accomplish several acts, such as executing a prior undertaking to merge (ad referendum of the relevant shareholders' meeting), which shall be the beginning of a series of acts that shall conclude with the registration of the merger. They shall also prepare a special balance sheet in order to enable an adequate exchange relation, and a consolidated balance sheet. The manager shall also be in charge of cancelling registration of the dissolved companies and fulfilling the publicity requirements for protection of the corporate stockholders.

When the prior undertaking to merge is executed by managers representing the will of the majority of the corporation (namely, they are the majority stockholders), non-approval by the shareholders' meeting could give rise to a claim against those managers and partners who acted abusively, and therefore their liability would arise.

On the other hand, pursuant to Competition Law, some concentration transactions must be notified to the Antitrust Authority. In this case, the legal representatives of the parties must fulfil filing and information duties.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

To answer this question, a distinction must be made between reorganisations and mergers, acquisitions and cooperation contracts.

Reorganisations and mergers

Under the laws and regulations in force, any reorganisation (merger, spin-off, transformation, etc) requires the approval of the shareholders' meeting. Focusing this analysis only on the main types of partnerships, as regards the necessary majorities to adopt a resolution, the following quorums are necessary.

In limited liability companies, the articles of incorporation may establish the quorum required for it to merge or be part of a spin-off as 50 per cent of the capital stock, which means that the total capital stock is computed for such decisions rather than the number of the shareholders attending the meeting. In the absence of any such provision in the articles of incorporation, the rule of the supplementary provision should be applied, meaning that the vote of three-quarters of the capital stock shall be required. In the case of corporations, these decisions are made at special meetings; therefore, at meetings on first call, the presence of shareholders representing 60 per cent of the shares entitled to vote is required, whereas on second call the presence of the holders of 30 per cent of the shares entitled to vote is necessary. However, these percentages may be modified in the by-laws. Regarding the necessary majorities, the affirmative vote of the majority of the holders of shares entitled to vote attending the meeting is required.

In the case of stock corporations, the shareholders of the non-surviving company who have voted in the shareholders' meeting against such action or did not attend the meeting at which such action was approved have appraisal rights may withdraw from the company and receive the value of their shares, determined on the basis of the company's most recent audited balance sheet.

Appraisal rights must be exercised within five days following the adjournment of the meeting in which the resolution was adopted if the dissenting shareholders voted against the resolution, or within 15 days following the adjournment if the dissenting shareholders did not attend the meeting.

The rules regarding appraisal rights in mergers apply to spin-offs when the necessary amendments to by-laws have been made.

Adjournment is not admitted when the company makes a public offering of its shares and the shares that the shareholders are to receive are admitted for public offering. They may withdraw if registration under such systems is waived or denied. The dissenting shareholder in these cases has a simple way of leaving the company: by selling its shares at the stock exchange or by other means of public disposal.

Acquisitions

Under the general principles of the LC, the transfer of shares is free and is carried out in two stages: first between the parties, and then before the company, by giving due notice and recording the transaction in the corporate books, which also formalises the transfer with respect to third parties.

Cooperation contracts

These types of transactions do not demand the approval of shareholders, who, according to the organisation and the characteristics of the deal, shall be duly notified when they are carried out.

The legal means most often used to perform a transfer of shares are the purchase or the assignment of rights. In both cases, a private instrument is sufficient to execute the transaction, without the need to resort to signature certification, even though it constitutes a useful precaution.

The corporate by-laws may establish transfer restrictions, provided they do not entail a transfer prohibition. Generally, transfer restrictions are intended to safeguard or prevent the admission to the company of persons who do not seek the same original interests of the shareholders, or to preserve the original group's cohesion.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

The unsolicited (hostile) acquisition of shares, or a takeover bid (OPA), is specifically regulated by the Capital Markets Act (conf Act No. 26,831) and CNV's General Resolution No. 401/2002.

The purpose of OPAs is to offer to purchase the shares entitled to vote of companies admitted to the public offering system (listed companies), and may be either voluntary or mandatory. Among the latter, an OPA is required when the acquisition of shares entails taking control over the company – either directly or indirectly – and also in cases of withdrawal from the public offering and quotation systems, as well as in other cases specifically mentioned in the applicable laws and regulations.

OPAs are intended to ensure the transparency that is required in the public offering of listed shares, and seeks to offer all investors – particularly all minority investors – the option of selling their

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shares if a change in the company's control occurs or if substantial modifications are made with respect to the capital stock, establishing a uniform price for the purchase price of the shares. This is due to features of the Argentine market, in which the percentages of capital invested through the public offering of shares are small, whereas the shareholding control remains in the hands of a few shareholders.

The regulations in force establish a procedure seeking to ensure equal treatment among shareholders regarding the acquisition conditions, the terms within which the bid addressees should make a decision, the obligation to provide detailed information and the publicity of the bid, the irrevocability or conditioning terms of the bid and of the enforceable guarantees, among other issues.

It should be noted that such regulations establish the duties and obligations of the management bodies of companies whose shares are subject to an OPA (requiring their opinion on the bid, the prices and considerations, ensuring their impartiality, expressly forbidding them from hindering the normal process of the OPA, and ordering them to give prevalence to the stockholders' interests above their own); they also establish restrictions regarding the tendered price, which should be justified and reasonable (and should not stand below the price committed with the controlling shareholder, or below the price paid by the purchaser in transactions conducted 90 days before the OPA); they provide for the possibility of competing bids and the applicable system, giving the original bidder the chance to improve its bids; and finally, they also allow the companies to exclude themselves from the mandatory OPA system, by means of an express resolution ordering that a clause allowing such possibility be included in their corporate by-laws.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Applicable rules do not establish the payment of any compensation in the event of withdrawal from or frustration of the purchase of stock by means of the system of OPAs for companies that publicly trade their stock. However, public offerings for the purchase of stock are, in principle, non-revocable, and the offeror must post security in advance (as cash, cheques, government securities or guarantees issued by a financial entity) securing fulfilment of the obligations arising therefrom. Offerors shall also be hypothetically subject to liability pursuant to the law on damages.

In the case of transactions regarding companies that are not publicly traded, free contracting rules and compensation or sanctions for withdrawal or non-fulfilment of the negotiations can (and usually are) agreed upon. Even if there is no agreement in that regard, withdrawal of negotiations can imply pre-contractual or contractual liability and give rise to compensation for damages due to the frustration of the rights and expectations or reimbursement of costs.

As regards the limitations or protection actions, during an OPA the management body must remain neutral, and it must refrain from carrying out any act alien to the ordinary activities of the company or that might disturb the development of the offer. In any event, as discussed in question 9, publicly traded companies may decide to be excluded from the binding OPA system by means of an express decision taken by the shareholders' meeting and including the relevant provision in the corporate by-laws.

Exclusivity of the negotiations for a determined period of time can (and usually is) agreed upon, in order to avoid offers from third parties.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Restrictions would usually come from the field of Competition Law. The procedure for the notice and authorisation by the relevant controlling authority is expressly established for OPAs. However, the following cases are also notable:

- for certain industries or services, prior authorisation by the relevant controlling authority (banks, insurance companies, etc) is required. Also, in the case of public utilities or essential services provided by the government, regulations for each service usually establish notice or authorisation procedures to be fulfilled before controlling authorities;
- as regards foreign companies, the Corporations Surveillance Authority currently requires the fulfilment of important requirements for authorising registration;
- certain prior requirements and steps are also required for the purchase of real property by foreigners (individuals and corporations) in border areas; and
- Act No. 26,522 has regulated ownership of the media (among which radio broadcasting services, audio-visual and digital producers companies are included), whereby the participation of foreign individuals or corporations or those controlled by foreign individuals or corporations cannot exceed 30 per cent (of capital stock and votes) in accordance with Act No. 25,750.

Moreover, some national authorities (such as Customs, the Administration of Public Income Tax Bureau Office, and the central bank) have adopted certain restrictions on importations and exportations, payment of dividends, capital repatriation and foreign exchange. In that sense, recently, the Central Bank (BCRA), by the Communication 'A' 5539 dated 02/10/2014, established that any international transfer to a foreign bank account shall receive the previous authorisation of the BCRA.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The procedure for the various types of takeover bids and exchanges of securities was established by the CNV and is based on principles such as full disclosure, transparency, efficiency, investor protection, equal treatment among investors and protection of financial institutions and intermediaries.

The adopted regulations allow public offerings to be arranged in the form of a purchase and sale, or an exchange, or both transactions at the same time, except in those cases where only cash is accepted in consideration thereof, and to allow the bidder to determine freely how much he or she pays, except for offers for the withdrawal of public offerings or exclusion offerings and certain limitations established by the CNV, as well as the form of payment, leaving the final decision in the hands of the shareholders.

The offering may be irrevocable or subject to conditions, in which case the conditions must be objective and must appear clearly and conspicuously in the bid prospectus. For example, the bid may be conditioned on the acceptance reaching a minimum capital volume.

The acceptance statements shall be irrevocable and will be considered null if they are subject to any condition.

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13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

It depends on the agreement of the parties, but in general the transaction is not subject to the financing. It means that in general the buyer enters into two different operations. In principle, the seller should fulfil information duties.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Within the social legal scheme, there are no mechanisms in place for the exclusion of minority shareholders. However, it establishes the possibility of excluding stockholders, regardless of their shareholdings.

In this respect, under the LC, any stockholder may be excluded with reasonable cause, in the general partnership, *sociedad capital e industria, participación*, in limited partnerships, in the limited liability company and the general partners in the *comandita por acciones*. Any agreement to the contrary shall be null and void. The exclusion right is extinguished if it is not exercised within a 90-day term as from the date on which the grounds for the separation were notified. If the exclusion is decided by the company, the action will be exercised by its representative, but if the exclusion refers to managers, it shall be exercised by the person appointed by the remaining shareholders. In both cases, the temporary suspension of the rights of the shareholders whose exclusion is sought may be decided by court order. If the exclusion is exercised individually by one of the shareholders, the proceedings shall be heard upon the summons of all the shareholders.

In the case of corporations, the same law specifically establishes that the by-laws may provide that the subscription rights corresponding to shares in arrears shall be sold, or that their rights shall be terminated.

Nevertheless, under the 'Public Offering Transparency System', Decree 677/2001 establishes a specific system of residual stakes. This system determines the following. When a corporation is under almost total control: any minority shareholder may, at any time, demand that the controlling party make an offering to purchase all minority shareholdings; and within a term of six months as from the date when it became almost completely controlled by another person, the latter may issue a unilateral statement of its decision to acquire the total remaining corporate capital held by third parties.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Other than as set forth by applicable antitrust rules, Argentina lacks specific rules regulating mergers or spin-offs among companies governed by the laws of different countries. However, legal doctrine has considered that the absence of such rules does not prevent their performance; to such end, it is believed that the rules of positive law of the different countries involved should be harmonised, but there is no unanimous consensus regarding what law should be applied.

However, there is a treaty with Brazil approved by Act No. 23,935, promulgated on 10 March 1991, that creates a statute for Argentinian–Brazilian bi-national corporations to govern the treatment and operation of those organisations with the aim of stimulating the integration at a regional level. Under Mercosur law, there is also a statute aimed at fostering cooperation between the parties in competition matters ('Understanding on Cooperation between the Authorities of Defence of Competition of the Mercosur Member States for Enforcement of their National Competition Laws'), promulgated on 7 July 2004 and approved by Resolution No. 100/2004.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Under the LC, mergers and spin-offs require the performance of a special procedure.

First, special and consolidated balance sheets of the participating companies must be prepared, which shall be made part of the preliminary merger agreement to be executed by the legal representatives. Thereafter, legal notices will be published in the official gazette convening the meetings of the companies involved, where the shareholders shall accept or reject the merger (or spin-off). Then, publications must be made (for three days in the official gazette of each company's jurisdiction and in a national newspaper) in order to notify third parties of the extent of the reorganisation. Third parties shall be given a term of 15 calendar days from the date of the latest publication to object to it. If any creditor files an objection, the LC gives such creditor an additional term of 20 calendar days for it to obtain a legal attachment. This means that upon the expiration of the 20-day term (if any objection is filed), the final merger or spin-off agreement may be executed, which will later need to be registered with the Corporations Surveillance Authority.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Under Argentine law, there are no business combinations subject to additional regulations and statutes. Nevertheless, in regulated sectors it is usually also necessary to obtain the approval of the regulatory body according to their specific regulations (telecommunications, natural gas, electricity, etc). The Competition Law determines a specific proceeding whereby a report or opinion is required from these entities on the effect of the merger on the market, but those reports or opinions are not binding upon the Commission.

Furthermore, certain industries will also have to fulfil special notices particular to their application or surveillance authorities, such as insurance companies, publicly traded companies and financial entities (see question 11).

In general, as regards the area of competition law, economic concentrations will have to be submitted for analysis to the Tribunal for the Defence of Competition (until the tribunal is established, this function is carried out by the Competition Commission). Concentrations must be submitted in advance or within a week as from the date of execution of the agreement, publication of the purchase or exchange offer, or acquisition of a control stock. The tribunal shall decide within 45 days as from the relevant request and documentation being filed whether to authorise the transaction, make the transaction subject to the fulfilment of any conditions to be established by the tribunal or deny authorisation. Upon expiration of the term without a resolution, the transaction shall be deemed authorised. It should be noted that, in practice, the terms are significantly extended.

18 Tax issues

What are the basic tax issues involved in business combinations?

Regarding taxation, when a merger takes place all tax losses and benefits of the acquired company are transferred to the surviving company. This means that the profits or losses of the fiscal year recorded as of the closing of the year and the credits and debits are passed on to the new legal entity. Unless a company has been dissolved, the legal and tax relationships cannot disappear by reason of

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Update and trends

In 2013, a draft bill to reform the Civil and Commercial Codes was prepared. It includes changes to corporate law and consumer law. The draft bill has been approved by the House of Representatives and will be passed on to the Senate for its consideration.

Also, there are some draft bills to modify Act 25,156 with regard to the thresholds for merger filing and the creation of the Tribunal for the Defence of Competition, among other things. In its 2013 annual report, the Argentine Antitrust Commission made a commitment to reduce the time taken to approve a merger.

In February 2014, the Antitrust Commission initiated four market investigations on the pharmaceutical market and the vertical relations in the industry; sales of consumer goods in supermarkets and hypermarkets and the vertical relations in the industry; raw materials for construction; and raw materials for industry.

Finally, this year, the Federal Administration of Public Revenues established a new regime regarding certain information that related entities must file and the Ministry of Finance approved a new information regime regarding prices that companies will have to inform on a regular basis every month.

the company's restructuring. Instead, they are to be maintained, on the newly formed company, or the acquiring company, in its capacity as a person capable of holding legal rights and obligations that necessarily continues being the holder of rights and obligations.

Reorganisation processes are affected by various taxes at different stages and benefit from certain exemptions or incentives. Therefore, they are expressly covered by the Income Tax Law, the Value Added Tax Law and the Fiscal Codes of the different jurisdictions (where the tax treatment varies according to each jurisdiction).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The LC contains no regulations in this respect. Thus we refer to the rules and regulations of the Labour Contract Law (Act No. 20,744).

As in the taxation field, once the reorganisation has been completed, the general rule is to preserve the labour rights and obligations that existed prior to the commencement of the reorganisation process. Thus, the general concept is that upon any type of transfer, the successor or acquiring party shall assume all the obligations that corresponded to the transferor under the labour contract at the time the transfer was performed, including those originated as a consequence of such transfer. The labour contract, in such cases, shall continue with the successor or acquiring party, and the employee shall conserve the seniority acquired from the transferor and the rights in connection thereto. Both shall be joint and severally liable for the obligations arising until the time of transmission.

In general terms, business reorganisation generates a transfer of entrepreneurial power to the continuing company in its capacity as new employer. Therefore, except in specific cases, there is no fraud with respect to the employees to allow them to be considered dismissed by virtue thereof.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In Argentina, bankruptcy and financial reorganisation proceedings apply to companies undergoing economic difficulties. There is also a third option, arising from the latter, which is the out-of-court composition agreement, more flexible as regards formalities and execution, but with similar effects.

Within bankruptcy proceedings, there is the option to sell a company or its ongoing facilities. Also, if the exploitation of the company is to cease, there is the possibility of selling the assets in different ways: the company as a unit, and the assets of the facilities of the bankrupt as a whole. The sale of the company or its facilities in any way needs to be ordered by a judge and may be carried out by public auction or bid. Conversely, transactions with a bankrupt company and any third party including related companies, within the 'suspicion period' (two years before adjudgment of bankruptcy or the date established to that end) can be declared void as regards creditors if they are detrimental to them and if the person executing the act knew about the debtor's cessation of payments. Certain acts are also considered automatically void by law.

The debtor's suggested plan may include the organisation of a company with certain creditors, capitalisation of credits, issuance of bonds changeable into stock, assignment of stock to other companies, and other types of reorganisation of the debtor company (this also applies to the out-of-court composition agreement).

There is a possibility for creditors and interested third parties to acquire the whole shares or quotas of the capital stock of the debtor and suggest a composition plan to the rest of the creditors, by means of the 'Argentine cramdown' – which, although inspired by US law, is clearly different. Basically, this procedure establishes that the hearing judge opens a registry of interested parties for the purchase of the

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company upon the debtor's failure to obtain the necessary approvals; if there are any registered parties, the company shall be assessed and the third parties will have to obtain approval from the creditors within the statutory terms; in such case, there shall be a compulsory transfer of the debtor company to the third party obtaining such approvals, under the conditions to be established.

In the case of companies that are related or form an economic group, they can file jointly for insolvency proceedings, as long as one of them is undergoing economic difficulties (cessation of payments) that may adversely affect the other members of the group; special proceedings apply, which may be unified for the whole group. In no case shall the claims of the parent companies be entitled to vote in the suggested composition plan. Also, in the case of bankruptcy, it can be extended to the parent or related companies, under certain circumstances (deviation of the corporate interest, undue submission to a unified direction for the benefit of the parent company or the economic group, etc).

With regard to Competition Law, acquisition of liquidated companies is exempt from the compulsory notice established for combinations.

Lastly, it is worth mentioning that within the scope of the City of Buenos Aires, where the rules of the Corporations Surveillance Authority apply, a merger by incorporation cannot be registered if the net assets of the incorporating company are, or become, negative and no express decision duly overcoming the arising dissolution has been adopted by the shareholders' meeting approving the merger.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Penal Code defines corruption as a crime under chapter IV, articles 256 to 259, modified by the Act No. 25,825. This crime is punishable by imprisonment from one to six years and a lifetime ban on performing certain activities.

In addition, agreements usually include a specific section about anti-corruption in order to ensure compliance with all applicable laws, regulations and codes of practice and to secure a warranty that the parties will not give or offer to give money or anything else of value to a government official in order to influence the obtaining or retention of business.

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