AMERICAN BAR ASSOCIATION

International Law Section

INTERNATIONAL MERGERS AND ACQUISITIONS AND JOINT VENTURES COMMITTEE NEWSLETTER

MAY 2024

IMAJV Committee focuses on legal and practical issues relating to international and comparative merger and acquisition and joint ventures, including efforts to develop greater international harmonization of laws, regional and national approaches to issues relating to mergers and acquisitions and joint ventures; and developments in countries or regions that are implementing or changing their mergers and acquisitions and joint venture laws.

AMERICAN BAR ASSOCIATION
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International M&A and Joint Ventures Committee

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NOTE FROM THE COMMITTEE CHAIRS

Dear Committee Members,

We hope you all have had a great time at the annual conference in Washington, D.C. We are thrilled to present the 2024 edition of the International M&A and Joint Ventures (IMAJV) Committee's Newsletter.

Featuring insights from 27 authors across 14 jurisdictions, this edition delves into recent legal updates and the dynamic landscape of mergers and acquisitions and joint ventures in Brazil, Chile, China, Dominican Republic, El Salvador, India, Korea, Nigeria, Poland, Russia, Spain, United States, Uruguay, and Vietnam.

We extend our heartfelt gratitude to all the authors for their invaluable contributions. Special thanks are owed to our dedicated co-editors, Daniel Born Roman and Aline Jaskulski Wofchuk, as well as to the esteemed Chairs of the IMAJV Committee, Sarah Schwartz and Takashi Toichi. Additionally, we appreciate the continued support from Lavinia Cousin and Cecilia Barrero.

As a committee with more than 340 members worldwide, the IMAJV Committee is dedicated to fostering connections among practitioners and facilitating the exchange of ideas on legal and practical matters related to international mergers and acquisitions and joint ventures. Our activities include monthly conference calls, expert-led lectures, and knowledge-sharing sessions on pertinent hot topics.

The American Bar Association International Law Section (ABA ILS) continues to lead in developing international policy, promoting the rule of law, and educating international law practitioners. In 2024, we successfully hosted conferences in Houston, New Delhi, and Washington, D.C. We eagerly anticipate your participation in the ABA ILS's London Conference from November 13th to 15th, 2024, and the Singapore Conference in February 2025.

We are grateful to all committee members for their unwavering support and dedication to our mission. We look forward to seeing you all at our upcoming conferences and meetings.

Kind Regards,

Kelly Ian I Lei and Maria Bofill

Vice Chairs for Publications of the IMAJV Committee

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Tech Targets: A Practical Approach to Due Diligence

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Brazil

After the tech M&A spree of 2020 and 2021, the last two years proved challenging for the tech industry, with fewer deals and decreased volume[2]. Despite the sobering scenario of the past couple of years, analysts predict that more prominent players will focus on innovative startups to gain a competitive advantage and promote digital transformation in 2024[3]. Predictions are cautiously optimistic, pointing to increased technology deals prioritizing liquidity and working capital[4]. Higher scrutiny of these tech targets ultimately leads to a careful assessment of the company's overall status, considering financial and legal risks reflected in the due diligence process. This article presents a high-level view of the risks concerning tech targets (the "Target") with a multi-jurisdictional approach.

From a financial perspective, it is essential to carefully analyze the Service Level Agreements ("SLAs") executed with clients when Target renders software services. It is common for SLAs to contain fee discounts for the downtime of the platform (the time when the platform is inactive), commonly called "service credits". Analysts should flag the existence of service credits and the amounts discounted from fees to the financial teams since they can affect the flow of payments to Target by its clients and the engineering and product teams verifying Target's technical capabilities. The worse the overall performance of the platform, the more likely that service credits will be applied, thus affecting Target's revenue.

If Target is a fintech in the payments industry, additional watch-outs must be considered, including reserves, guarantee obligations, and chargeback rules. Target can request reserves from its merchant clients to cover for chargebacks (as explained further) or protect against default by setting aside a percentage of a client's monthly turnover. The existence - or not - of reserve obligations to Target's clients does not constitute certainty of payment or a red flag. This should be analyzed along with Target's pool of clients and their paying capacities, as well as Target's fee payment model (some companies deduct fees upon settlement of transaction amounts, while others charge fees at the end of the month). Contrary to reserves, some merchant clients may request a guarantee from Target to protect against Target's undue retention of transaction amounts. Such arrangements should also be verified, as they will influence Target's financial analysis.

Lastly, contract chargeback rules should be necessary if Target processes card payments. Chargebacks are requests made by final customers to return funds paid in a purchase (i.e., a request to cancel a credit card purchase). When reviewing the contracts with clients, it is crucial to assess the attribution of liability in a chargeback—whether payment of chargebacks is attributed to the client or the Target, which deadlines for chargeback disputes

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[2] Global Data, Q3 2023 update: M&A activity in technology in the US, (Oct. 26, 2023), https://www.verdict.co.uk/theus-m-a-activity-technology-industry/?cf-view.

[3] Stefano Endrizzi, Trends And Predictions For The M&A Sector In 2024, (Nov. 15, 2023), https://www.forbes.com/sites/forbesbusinesscouncil/2023/11/15/trends-and-predictions-for-the-ma-sector-in-2024/?sh=2eaf63857327.

[4] Brandon C. Parris;Spencer D. Klein, MoFo Survey: Tech M&A Poised for Upswing; Disruption and Competition Sharpen Focus for Dealmakers (Nov. 2, 2023), https://www.mofo.com/resources/news/231102-mofo-survey-tech-ma.

were agreed upon, and what was negotiated about chargeback after the termination of the contract.

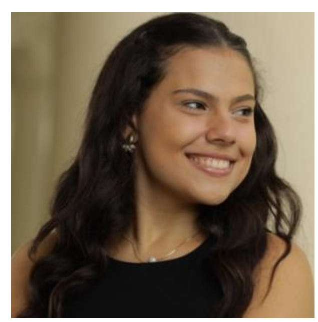
In addition to the financial watch-outs, cybersecurity risks are also relevant in the due diligence of tech companies. The first step in a legal assessment is to request Target's security certificates. The most common are PCI-DSS for companies processing card transactions and SOC and ISO 27001 certifications to assess the company's security controls and processes to manage data. This analysis demands a joint effort between legal and cybersecurity teams to understand the applicability of such certificates to Target's practice and the company's cybersecurity and data operations (from a practical perspective). As for Target's software, verifying if the company used open-source codes is essential. Under the open-source model, the code is typically made available royalty-free under a license that allows redistribution and modification by any individual. However, it can also come with certain licensing restrictions, such as demanding that any derivative software be open and available[5]. Moreover, any user in the network could have modified the open-source code used by Target with infringing code, and Target could have later incorporated the result into its software without knowledge of such infringement. One recommended practice to mitigate this risk is verifying if Target implemented policies to record the use of open-source code in software development[6].

Lastly, it is relevant to assess Target's compliance with specific regulations regarding its activities in all countries where it operates. Especially in the fintech space, there are many different players, such as acquirers, gateways, and payment aggregators. It is necessary to understand precisely where Target stands within this regulatory framework in each jurisdiction and certify that Target has obtained the proper licenses.

With so many particularities, a deep dive into each factor involving the due diligence of a tech target demands additional pages. This article intended to shine a light on the importance of a multidisciplinary approach when conducting due diligence on a tech target and to help practicing lawyers spot issues that can influence a tech target's revenue and final purchase price, as well as anticipate the purchasing client any legal risks that may affect the company's activities down the road.

Break-up Fee: a comparative analysis of its application in Brazil and the United States

Ana Carolina Gaspar[7]



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Brazil

[5] Sarah Schaedler et al, Open Source Software Licenses: Novel Case Explores Who Can Enforce Them (June 22, 2023), https://www.orrick.com/en/Insights/2023/06/Open-Source-Software-Licenses-Novel-Case-Explores-Who-Can-Enforce-Them

[6] DLA Piper, Intellectual property basics for startups: open source software, https://www.dlapiperaccelerate.com/knowledge/2017/intellectual-property-basics-for-startups-open-source-software.html.

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Considering the inherent risks and the substantial investments involved in M&A transactions, it's advisable to incorporate mechanisms in the project's structure to safeguard the parties if the deal fails. The importance of these tools is usually higher when the deal involves a listed company and when the parties expect a long gap between signing and closing. This article will focus on one of those mechanisms: the break-up fee.

The break-up fee or termination fee clause is a risk allocation mechanism establishing a disengagement price for the deal to be paid by one of the parties if they do not complete it. It is usually triggered by (i) breach of any obligation leading to contract termination, (ii) failure to secure approval from the shareholders and/or board or directors, or (iii) lack of approval of the transaction from governmental authorities.

When the risk to be protected is the commitment of the selling party to complete the deal, the selling party bears the break-up fee to protect the buyer from the possibility of the seller accepting a new proposal during the transaction, between signing and closing. If, however, parties wish to protect the risk of the purchaser losing interest in the deal due to causes not directly related to the negotiation, we may have a reverse break-up fee, providing the seller with the assurance that the purchaser remains motivated to complete the transaction, and compensating the seller's involvement in the failed transaction. If the risk to be protected is the potential non-approval of the transaction by a governmental authority, the buyer usually bears the break-up fee.

Brazilian market numbers show an increasing use of the break-up fee. According to a survey conducted by the consulting firm Dealogic[9], between 2003 and 2015, only 10 out of 2,000 M&A transactions in Brazil encompassed the break-up fee. However, since 2016, this trend has escalated, with at least six contracts incorporating the termination fee clause in a single year. In 2018, the average break-up fee was 8.2% of the transaction price[10]. By 2020, this average dropped to 7.4%, based on 13 transactions.[11] Even with this decrease, the Brazilian percentage remains above the international market average.[12]

An increasingly common practice in Brazil is the application of break-up fee clauses in transactions that require governmental authority approval – especially from Brazil's Central Bank ("BACEN") and the Administrative Council for Economic Defense ("CADE"), the Brazilian antitrust authority. This practice is more frequent in large-scale transactions due to market concentration risk since CADE must approve the transaction as a condition precedent to closing the deal. As parties mainly use the break-up fee to compensate for the transactional costs incurred for the transaction to be successful, the greater the risk of a veto by CADE, the higher the break-up fee tends to be.

The intriguing aspect of this event lies in the fact that the party responsible for indemnification assumes a high risk since the transaction's completion depends exclusively on a decision by an external regulatory body. This differs from the break-up fee motivated by a failure attributable to one of the parties.

[9] FILGUEIRAS, Maria Luíza. "Adoption of 'failure rate' grows in acquisitions in Brazil," Mar. 2018, Valor Econômico, São Paulo, available at https://valor.globo.com/financas/noticia/2018/03/20/adocao-de-taxade-insucesso-cresce-em-aquisicoes-no-brasil.ghtml.

[10] FILGUEIRAS, Maria Luíza. "Adoption of 'failure rate' grows in acquisitions in Brazil," Mar. 2018, Valor Econômico, São Paulo, available at https://valor.globo.com/financas/noticia/2018/03/20/adocao-de-taxade-insucesso-cresce-em-aquisicoes-no-brasil.ghtml.

[11] RAGAZZI, Ana Paula. "Agreement draws attention to high fines", Aug. 2021, Valor Econômico, São Paulo, available at https://valor.globo.com/empresas/noticia/2020/08/21/acordo-chama-atencao-paramultas-elevadas.ghtml.

[12] Lexis Nexis. "Market Standards: Average Termination Fee as Percentage of Deal Size," Dec. 2022, available at https://www.lexisnexis.com/community/insights/legal/b/practical-guidance/posts/market-standards-average-termination-fee-as-percentage-of-deal-size.

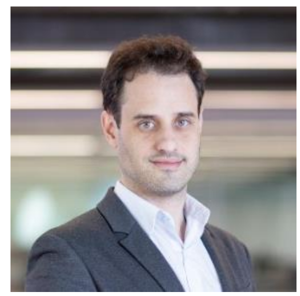
There has been a significant increase in the use of break-up fees in the U.S. as well. In April 2023, the investment banking firm Houlihan Lokey released the "2022 Transaction Termination Fee Study[13]" a comparative analysis of transactions announced in 2022 valued at over $50 million involving U.S. public companies, based on data from Refinitiv and S&P Capital IQ. The study, encompassing 140 transactions, revealed that: “In the 2022 Study, termination fees as a percentage of transaction value ranged from 0.3% to 6.2%, with a mean of 2.7% and a median of 2.6%”.

Along these lines, in November 2023, an article published by Paul, Weiss, Rifkind, Wharton & Garrison LLP indicated that the average break fee percentage amount stood at 3.1%, slightly below the preceding twelve months' average of 3.5%. Also, the average reverse break fees were 5.8%, in line with the last twelve months' average of 5.7%.[14]

When comparing the average percentage rate in Brazil and the U.S., the available data indicates that break-up fees adopted in M&A transactions in Brazil are higher (in terms of percentage of the transaction price). This difference may be associated with different risk perceptions in both countries. However, the fact is that the break-up fee has been assuming a growing presence as a risk management tool in M&A transactions in both jurisdictions. As the break-up fees evolve and gain broader application, their strategic deployment remains pivotal for parties to manage risks in complex M&A transactions properly.

M&A transactions in the payments market

Pedro Eroles[15]



Marcus Fonseca[16]

Júlia Viana[17]

Brazil

A decade ago, on October 9, 2013, Brazil enacted its Payments Law, Law No. 12,865, which regulates the general principles and rules applicable to the Brazilian Payments System and establishes essential concepts for the structure adopted in the scope of Brazilian payments, such as payment schemes and payment institutions.

[13] Houlihan Lokey. “2022 Transaction Termination Fee Study,” April 2023.
Paul, Weiss, Rifkind, Wharton & Garrison LLP, “M&A at Glance,” Nov. 2023, available at https://www.paulweiss.com/media/3983984/maag_november_2023.pdf.

[14] Paul, Weiss, Rifkind, Wharton & Garrison LLP, “M&A at Glance,” Nov. 2023, available at https://www.paulweiss.com/media/3983984/maag_november_2023.pdf

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Financial regulation in Brazil can be considered one of the most innovative in the world. Law No. 12,865 – together with the advantages of new technologies - has contributed to this innovative scenario by promoting digital financial inclusion, providing benefits to consumers, and fostering innovation and competitiveness within the payments market, creating opportunities for society by facilitating access to new financial products.

Law No. 12,865 brought legal protection to the Brazilian Payment System by improving the legislative framework and allowing payment institutions (not considered financial institutions) to offer payment services through instruments used in Brazil specifically for this purpose. The Central Bank of Brazil has supervisory powers over the Brazilian Payment System and has taken a proactive approach to fostering competition, reducing regulatory costs (at least in the early years of Law No. 12,865) to enable the entrance of new players in the once-concentrated payments market.

Such legal innovation has resulted in a proliferation of local fintechs[18] and the creation of different business models in Brazil. According to the Fintech Report published by Distrito[19], between 2016 and 2021, an average of 154 fintechs emerged per year, and, among the 1,289 start-ups analyzed, the credit category stands out, followed by payment methods, back-office activities, digital services, and technologies such as cryptocurrencies and investments.

Over the years, the Central Bank of Brazil has gradually raised regulatory costs for payment institutions. However, it has done so without losing sight of the purpose of allowing innovation and competition, and the Brazilian market remains one of the most innovative in terms of new business and the creation of financial products. This has allowed players (incumbents and entrants) to prosper, resulting in a trend of consolidation and triggering a robust internal movement of mergers and acquisitions of fintechs operating in this market.

The reasons for M&A deals are many, and it is possible to identify transactions that involved traditional financial institutions acquiring new fintechs to expand their business or improve their technology infrastructure, or even national or international players that acquire already consolidated institutions in Brazil as a faster route to enter into the Brazilian payments market. Implementing an M&A-based expansion strategy in the financial institutions and services sector is also intended to remedy shortcomings and fill gaps to offer increasingly suitable solutions to customers.

Between January and June 2023, 661 M&A transactions were announced in Brazil. The financial institutions and services sector is the second largest in transaction volume (14.8%) after the technology sector, which leads with 17.5% of transactions[20]. The same report highlights that M&A opportunities continue to arise, particularly the activity of strategic investors, and it is expected that the number of transactions, which was announced to be 1,600 transactions during the year, will be maintained.

October 2023 was the first month since June 2022 to show growth in the accumulated total, with 1,516 M&A transactions in the last twelve months. In October 2023, 133 transactions were carried out, an increase of 5.6% compared to October 2022 and an investment of BRL 25.3 billion[21].

Therefore, the Brazilian mergers and acquisitions market holds a range of opportunities corresponding to the expansion of financial and payment services in Brazil.

[18] The term “fintech” is not a legal concept in Brazil and is used in the market to refer to newly emerged payments and financial institutions that make heavy use of technology to offer services.

[19] Distrito, Fintech Report 2023, https://materiais.distrito.me/report/fintech-report.

[20] Kroll, LLC, Report “M&A Brasil – Janeiro – Junho 2023”, (Jul. 3, 2023).

[21] Portal de Fusões e Aquisições, Fusões e aquisições: 133 transações em outubro/23, (Nov. 26, 2023), https://fusoesaquisicoes.com/acontece-no-setor/fusoes-e-aquisicoes-133-transacoes-em-outubro-23/.

Transition Minerals: cross-border M&A in Brazil and Chile

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Pedro Novo Bergh[23]

Chile and Brazil

Introduction

Brazil and Chile are relevant producers and exporters of mineral resources, giving the mining sector significant importance in their GDPs and positive trade balances[24]. The two countries also have large reserves of mineral substances, such as lithium, copper, manganese, and others, used in electrification of vehicles, the so-called "transition minerals". Although these countries have several similarities, the way each of them regulates the exploration and exploitation of minerals significantly impacts the cross-border mergers and acquisitions ("M&A") scenario.

Cross-border M&A transactions involving mining companies are common in Brazil and Chile due to abundant mineral resources and export-oriented policies, usually with foreign companies or private equity funds seeking to acquire companies and/or assets in Brazilian and Chilean territory.

Mining Sector Context in Brazil and Chile

Brazil and Chile have globally recognized mining companies recently involved in cross-border acquisitions to expand their operations. In Chile, the National Copper Corporation of Chile ("Codelco"), a state-owned company, is the world's largest copper producer[25]. In Brazil, Vale S.A. stands out as one of the world's largest iron ore producers, founded by the Brazilian government in 1942[26].

The contrast between these two industry leaders offers valuable insights into regulatory aspects and protectionist practices on cross-border M&A transactions within the mining sector. While Codelco was established as part of a significant nationalization process of the domestic mining industry during the 1960s and remained a state-owned company[27], Vale was privatized in 1997 and subsequently became a listed company with a global presence on multiple stock exchanges, such as Brazilian Stock Exchange, New York Stock Exchange and Spanish Stock Exchange[28].

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[24] "Mineração cresceu 6% no primeiro semestre do ano," Agência Brasil, Jul. 19, 2023, https://agenciabrasil.ebc.com.br/economia/noticia/2023-07/mineracao-cresceu-6-no-primeiro-semestre-do-ano.

[25] "Which countries produce the most copper?," World Economic Forum, Dec. 12, 2023, https://www.weforum.org/agenda/2022/12/which-countries-produce-the-most-copper/.

[26] Brazil, Vale, https://www.vale.com/brazil.

[27] Historia, Codelco, https://www.codelco.com/nosotros/la-corporacion/historia.

[28] Check Out Our Company, Vale, https://www.vale.com/en/check-out-our-company.

Mining Regulation in Brazil and Chile

Brazil's mining sector operates under a concession regime whereby permission is granted by the state to interested parties for the exploration and exploitation of mineral resources[29]. Under the Brazilian federal constitution, companies carrying out mining activities must be established under Brazilian law and have their headquarters and administration in the country[30]. However, there is no restriction on the majority of the corporate capital being foreign, except in the border areas (i.e., a 150-kilometer strip along the country borders). It is also worth noting that the country does not limit the exploration and/or exploitation of critical or strategic minerals to public-owned companies, thereby encouraging foreign investment in the sector. These minerals, including lithium, cobalt, graphite, and rare earth, are crucial for the ongoing energy transition and have recently attracted relevant investments from China, Australia, Canada, and other jurisdictions[31].

In Chile, the mineral exploration and exploitation regime is similar to Brazil's, as state concessions are granted to private companies[32], and there are no restrictions on foreign acquisitions of companies holding mineral concessions. Unlike Brazil, the Chilean government is still dominant in the mineral sector. The government has recently proposed greater regulation and state participation in critical minerals, such as lithium, for the energy transition[33].

Lithium mining in Brazil and Chile

Lithium is a critical mineral for the ongoing energy transition. It is crucial for enhancing battery performance, durability, and density and developing green technologies[34]. Due to its importance, the mineral also became the main target of foreign investment geopolitical disputes[35], which makes its regulation a critical factor in whether or not it encourages the flow of foreign currency through transactions with mining companies.

Chile is currently the world's largest producer of lithium[36]. However, its exploitation is limited to companies that obtained their concessions before 1979 or through production lease agreements with the state-owned company Production Development Corporation of Chile ("CORFO"), which holds most of the country's lithium mining rights concessions. Additionally, in April 2023, the current government announced its National Lithium Strategy, which proposes the creation of a National Lithium Company to negotiate partnerships with the private sector[37]. This public-private relationship aims to allow the state to participate in the lithium production cycle and hold a majority stake in mines considered of greater strategic value to the state, being an active and decisive player in the development of the mineral in the country.

On the other hand, the Brazilian government has been focusing on providing greater economic freedom to national or foreign private entities and actively encouraging private exploration and exploitation of critical and strategic minerals, the value of which has been increasing worldwide.

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[29] Article 176, Constitution of the Federative Republic of Brazil, Oct. 05, 1988, https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf.

[30] Article 176 § 1º, Constitution of the Federative Republic of Brazil, Oct. 05, 1988, https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf.

[31] Cecilia Barría, "A corrida pelos 'minerais do futuro' que podem pôr em risco segurança nacional," BBC News, Apr. 26, 2022, https://www.bbc.com/portuguese/geral-61175455.

[32] Article 392, Constitutional Organic Law On Mining Concessions (Law No 18.097, dated Jan. 07, 1982, effective Jan. 21, 1982), Chile, https://www.bcn.cl/leychile/navegar?idNorma=29522.

[33] Estrategia Nacional del Litio, Chile, https://www.gob.cl/litioporchile/

[34] "Lithium", Royal Society of Chemistry, https://www.rsc.org/periodic-table/element/3/lithium#:~:text=The%20most%20important%20use%20of,heart%20pacemakers%2C%20toys%20and%20clocks.

[35] Cecilia Barría, "A corrida pelos 'minerais do futuro' que podem pôr em risco segurança nacional," BBC News, Apr. 26, 2022, https://www.bbc.com/portuguese/geral-61175455.

[36] "Which countries produce the most copper?," World Economic Forum, Dec. 12, 2023, https://www.weforum.org/agenda/2022/12/which-countries-produce-the-most-copper/.

[37] Estrategia Nacional del Litio, Chile, https://www.gob.cl/litioporchile/.

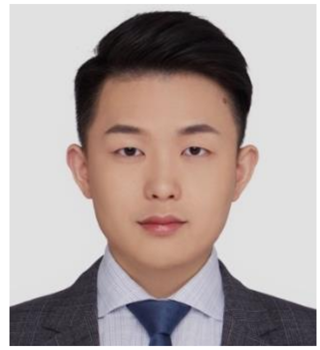
Brazil has the world's seventh-largest lithium reserves[38] and has excelled in this field recently. In 2022, the Brazilian government lifted the restriction on lithium exports[39]. It established the Inter-Ministry Committee for the Analysis of Strategic Mineral Projects, in which the Ministry of Finance can actively assist companies with exploration projects to obtain the necessary environmental licenses[40].

Conclusion

Brazil's favorable treatment of the exploration and exploitation of transition minerals made the country an attractive target for national and foreign companies interested in operating in the Brazilian mining sector, presenting opportunities in the M&A market.

Therefore, despite both countries being significant players in global mineral production, the differences in regulation and state approach between Chile and Brazil can significantly impact cross-border transactions. These differences offer substantial insights into the impact of regulatory and legal factors on cross-border M&A in the mining industry, affecting the approaches taken by companies in the dynamic mineral market of South America.

China Reforms its Regulatory Regimes on Foreign Investment



Zelong Rao[41]

China

Attributed to implementing the reform and opening-up policy, China embraced an influx of international capital and thus gained significant economic growth over the past 40 years. Nowadays, with the escalation of geopolitical tensions and the trend of de-globalization, especially when the United States enacted the Foreign Investment Risk Review Act[42] and designated the People's Republic of China as one of the foreign adversaries[43], China correspondingly amended its strategy on utilization of foreign investments. While simplifying the foreign investment procedures and expanding the foreign access industry areas to a certain extent, China also launched the regulatory system for the national security review of foreign investment.

[38] Brasil exporta a primeira remessa de lítio verde, Ministry of Mines and Energy, Jul. 27, 2023, https://www.gov.br/mme/pt-br/assuntos/noticias/brasil-exporta-a-primeira-remessa-de-litio-verde.
[39] Marcela Ayres and Rafaella Barros, "Brazil eases rule on lithium exports amid rising demand", REUTERS, Jul. 07, 2022, https://www.reuters.com/markets/commodities/brazil-eases-rule-lithium-exports-amid-rising-demand-2022-07-07/.
[40] Article 03, Decree No 16.060, Mar.24, 2021, Brazil, https://www.gov.br/mme/pt-br/assuntos/secretarias/geologia-mineracao-e-transformacao-mineral/pro-minerais-estrategicos/ctapme-2/decreto-10657-de-24-de-marco-de-2021.pdf.
[41] Graduated from the East China University of Political Science & Law and then worked at Zhong Lun Law Firm for four (4) years in cross-border M&A. Active member of the World Law Group. Currently continuing the post-graduate study at the New York University School of Law.
[42] China Foreign Investment Risk Review Modernization Act (Law No 115-232, 132 Stat. 2173) (2018).
[43] China Code of Federal Regulations, art. 15 §7.4(a)(1), https://www.ecfr.gov/current/title-15/part-7/section-7.4#p-7.4(a)(1).

Shortening the Negative List for Foreign Investment Access

The Negative List[44] is one of China's management models that refers to special administrative measures for the access of foreign investment in specific industries or areas, constituted by two parts: prohibited investment and restricted investment. In summary: (a) Foreign investors shall not invest in the sectors where foreign investment is prohibited, e.g., mining, tobacco, and news organizations, etc.; (b) For the restricted investment areas, foreign investors shall conform to the investment conditions, such as shareholding limits and senior management requirements. For instance, the foreign share ratio for most value-added telecommunications services shall not exceed 50%; (c) For the areas beyond the Negative List, no extra approval is required as the Chinese government grants national treatment to the foreign investor.

The Chinese government launched the Negative List model in 2017 and has periodically amended it. The latest revision of the Negative List relieved over half of the restrictive measures in the 2017 edition, demonstrating China's continued willingness and ongoing efforts to attract foreign investment and stimulate economic growth. For most global capital investors and strategic investors, the scope of direct investment in Chinese domestic industries through M&A transactions has further expanded.

Establishing a New National Security Review Mechanism

On the other hand, China has amended its security review regime by promulgating the Measures for the Security Review of Foreign Investment[45]. Compared to the previous national security review system, the new national security review ("NSR") mechanism broadened the transaction coverage and specified a more defined review process.

Under the Measures for the Security Review of Foreign Investment, the following industry sectors require a foreign investment governmental report[46]:

a. investment in the arms industry, an ancillary to the arms industry;

b. any other field related to national defense security and investment in an area surrounding a military installation or an arms industry facility; or

c. investment in essential agricultural products, vital energy and resources, critical equipment manufacturing, necessary infrastructure, essential transportation services, essential cultural products and services, substantial information technology and Internet products and services, critical financial services, key technology, or any other important field related to national security, resulting in the foreign investor's acquisition of actual control of the enterprise invested in.

Where the reported foreign investment passes security review, the foreign investor then may invest; otherwise, it may not make invest, or if it has invested, it shall dispose of its resultant equities or assets within a specified period and take other necessary measures to restore the state before the investment and eliminate the adverse effect. Under certain circumstances, the security review may be passed conditionally, subject to mitigation factors.

Nevertheless, after the promulgation of Measures for the Security Review of Foreign Investment, China still needs to issue corresponding implementation rules to specify the terms therein, including defining those industrial sectors that may trigger NSR. In practice, foreign investments in specific sensitive industries like semiconductors, AI, and data centers are more likely to trigger NSR.

[44] China Special Administrative Measures (Negative List) for Foreign Investment Access (2021), order No. 47 of the National Development and Reform Commission, (issued Dec. 27, 2021, effective Jan. 1, 2022).

[45] China National Development and Reform Commission, order No. 37, (issued Dec. 19, 2020, effective Jan. 18, 2021).

[46] Id., art. 4.

In the international investment markets, some may say the People's Republic of China modeled its Security Review Measures after the Committee on Foreign Investment regime in the United States. For instance, both of them established governmental bodies with which parties can report and which will make national security decisions. The concepts of "control" are similar and are tied to the ability of the foreign investor to influence the enterprise.[47] However, at the current stage, the procedures, criteria, and considerations of the Chinese government during NSR are not as publicly transparent as those of the United States. Therefore, it is still advisable for foreign investors to continuously monitor changes in NSR regulations and practices in China and conduct NSR assessments when contemplating the M&A transaction involving Chinese factors.

Under the volatile global condition, China's cross-border M&A market presents considerable opportunities and challenges. It's essential to provide a balanced view and conduct thorough compliance research to assess risks and develop a well-informed strategy to navigate the complexities of the Chinese market.

Collaborative Synergy: A Legal and Strategic Analysis of Business Consortiums in the Dominican Republic

Alfonso Lomba[48]

Dominican Republic

In the evolving global commerce landscape, business consortiums have become essential for collaborative, temporary ventures in the Dominican Republic. Consortiums preserve the autonomy of participating entities while uniting them towards shared objectives and resource pooling. They are legally defined as "contracts used by two or more entrepreneurs, whether natural persons or legal entities, engaged in similar or complementary economic activities"[49]. The goal is to create a shared framework that strengthens the business capabilities of its members, enabling them to undertake projects that would be challenging to accomplish on an individual basis.

The country regulates consortiums through common law norms and supplementary regulations. Article 1832 of the Dominican Republic Civil Code defines a consortium as a partnership embedded in a contract "by which two or more people agree to put anything in common, with the sole purpose of sharing the benefit that may result from it"[50]. Parties must

[47] The Role of National Security in the U.S.-China Battle Over Foreign Direct Investment (Oct. 16, 2023), https://www.foxrothschild.com/publications/the-role-of-national-security-in-the-u-s-china-battle-over-foreign-direct-investment.

[48] Graduate attorney of the Universidad Católica Madre y Maestra (PUCMM) in the Dominican Republic with postgraduate courses at Université du Québec à Montréal, Québec, Canada (Masters Degree of Business Administration) and at OMG Institute (Master's degree in Strategic Legal Law). Member of the Bar Association of the Dominican Republic and the Society of Trust and Estate Practitioners. As head of the Corporate, Investment, and Structuring Departments, his practice is mainly dedicated commerce, finance, and corporate transactions

[49] Álvaro Bolívar Freire Guerrero, Los Alcances y Limitaciones del Consorcio Empresarial en la Legislación Ecuatoriana (2011), http://repositorio.puce.edu.ec/handle/22000/4546.

[50] Dominican Republic Civil Code of 1876, art. 1832.

represent these arrangements in writing,[51] and could be project-oriented, focusing on singular initiatives. Consortiums should serve a lawful purpose, being an association contracted in the common interest of the parties, and their associates would contribute money, goods, or their industry.[52]

The General Law of Commercial Companies and Limited Liability Individual Enterprises (Law No. 479-08) further acknowledges the figure of "accidental or partnership entities", and its description aligns with what is commonly recognized as a consortium. "Accidental or partnership entities constitute a contract by which two or more persons who are merchants take an interest in one or several specific and temporary commercial operations, which must be executed by one of them in their own name and under their personal credit, with the obligation to account and divide among their partners the profits or losses in the agreed proportion. These entities do not have legal personality and a name, assets, and social domicile. They will not be subject to formal requirements or registration and may be proven by all means."[53]

The lack of legal personality in consortiums raises questions about their ability to contract, assert rights, and execute dispositional acts. This is compounded by the absence of exclusive legislation governing them. Article 150 of Law 479-08 clarifies that third parties acquire rights and assume obligations about the consortium's manager, the business's sole owner in external relations.

Law 322 of 1981 stipulates that a foreign person must be associated with a national company or a mixed capital company to participate in contests, lotteries, or any other form of award[54]. This piece of legislation is the leading promoter of consortiums.

The tax regime for consortiums is outlined by Article 2 of the General Direction of Internal Taxes ("DGII"), General Norm No. 05-2009, issued on March 31st, 2009, stating that all companies and commercial entities recognized in Article 3 of Law 479-08 are considered legal persons, while Paragraph I of the aforementioned Article 3 acknowledges the accidental entity as a commercial entity, which means that this type of entity is assimilated to those considered as legal entities. Article 16 of the norm in question says: "Obligation of an RNC. The accidental or participation entities will have an RNC independent of that of each of the Legal or Natural Persons that comprise it. They must separately comply with all the fiscal obligations established in the Tax Code, Regulations, and General Norms applicable to a legal person, including the payment of the tax on assets."

To register in the "State Registry of Suppliers", the General Directorate of Public Procurement ("DGCP"), in its resolution 72/2013, Article 1, stipulates that any submission will require, among others, "the original notarial act by which the consortium is formalized, including its purpose, the obligations of the parties, its duration and the capacity of exercise of each member of the consortium, as well as their general information."

The formation of a consortium is strategically motivated by the desire for resource optimization and enhanced market reach. It enables smaller Dominican firms to collectively access markets and opportunities beyond their capacity. However, the success of consortiums hinges on their governance. Melissa Silié, in her article "Consortium and their regulation in the Dominican Republic"[55], emphasizes that effective decision-making processes, transparent operational policies, and equitable resource distribution are essential to prevent conflicts, which derived from the dispersed legal framework of the consortiums.

[51] Dominican Republic Civil Code of 1876, art. 1834.
[52] Dominican Republic Civil Code of 1876, art. 1833.
[53] Dominican Republic General Law of Commercial Companies and Individual Limited Liability Companies of 2008, art. 149.
[54] Dominican Republic Law No. 322 (1981).
[55] Melissa Silié Ruiz, Los Consorcios y su Regulación en la República Dominicana (2020), https://abogadosdq.com/los-consorcios-y-su-regulacion-en-la-republica-dominicana/#_ftn3

Business consortiums in the Dominican Republic represent a sophisticated and increasingly essential approach to collaborative enterprise. Their efficacy hinges on a delicate equilibrium of strategic alignment, legal compliance, and robust governance. As the Dominican market continues to integrate into the global economy, these consortiums are poised to play a central role in its commercial and economic progression.

The Role of Technology and Innovation in El Salvador's M&A Landscape

Francisco Murillo[56]

El Salvador

Introduction

In recent years, El Salvador has witnessed a remarkable transformation in its mergers and acquisitions ("M&A") landscape, fueled by the rapid integration of technology and innovation. As the global business environment evolves, the nation positions itself as a hub for digital advancements, attracting investors and fostering a dynamic ecosystem for mergers, acquisitions, and joint ventures. This article delves into the pivotal role that technology and innovation play in shaping El Salvador's M&A landscape, exploring how they are reshaping deal dynamics and driving the attention of investors toward tech startups and disruptive companies.

Tech Startups and Disruptive Companies as Attractive Targets

One of the most notable shifts in El Salvador's M&A landscape is the growing interest in tech startups and disruptive companies. These entities are not only reshaping traditional industries but are also becoming magnets for investment. The agility and innovation embedded in these startups make them attractive targets for established corporations seeking to stay ahead in the rapidly evolving market.

Investors increasingly recognize the potential of El Salvador's tech ecosystem, prompting a surge in M&A activities in the technology sector. The influx of capital into startups and disruptive companies is a testament to their innovative solutions and a signal of confidence in the country's ability to nurture and support such ventures. A notable example of this synergy is the entry of Delivery Hero through acquiring the Hugo app in El Salvador, marking a significant milestone in the tech companies' sector and the M&A landscape[57].

The Role of Fintech in M&A

The financial technology (fintech) sector has emerged as a critical player in El Salvador's M&A landscape. With the government's push towards financial inclusion and the adoption of cryptocurrencies, fintech startups garner significant attention from investors. The integration of digital payment systems, blockchain technology, and innovative financial services has disrupted traditional banking models and attracted the interest of both local and international investors.

[56] Graduated as a Lawyer from Dr. José Matías Delgado University, accredited as a Notary by the Supreme Court of Justice, with studies in Legal Tech & Startups from the IE Business School, Bloomberg Tax Author, active contributor of the World Bank Group, as well as the World Justice Project, active member of the International Bar Association, and accumulating nearly 14 years of experience at Central Law, have enabled the legal leadership of national and international clients.

[57] Fátima Romero, "El mercado de delivery se reordena en El Salvador; Hugo App termina operaciones" (January 10, 2023), https://www.bloomberglinea.com/2023/01/10/el-mercado-de-delivery-se-reordena-en-el-salvador/.

The quest for technological innovation and the potential for financial inclusion and economic empowerment drive mergers and acquisitions in the fintech sector. The dynamic nature of fintech startups makes them appealing targets for traditional financial institutions looking to enhance their digital capabilities and stay competitive in an evolving market.

Revolutionizing M&A with Legislative Initiatives

The Salvadoran government's role in creating a conducive environment for technology-driven M&A is crucial. Regulatory reforms and incentives aimed at fostering innovation and entrepreneurship are key. The government's efforts to improve digital infrastructure and the legal framework for startups and tech companies enhance investor confidence and facilitate M&A activities.

A pivotal development in 2023 is El Salvador's legislative push toward technological empowerment. The "Law for the Promotion of Innovation and Technological Manufacturing" exemplifies this, offering extensive tax exemptions for fifteen years. This law notably facilitates software and hardware creation, encompassing income, property, capital gains, and import tariffs. The Bill for the Promotion of Innovation and Technological Manufacturing further underscores the country's commitment to fostering a tech-driven economy. Providing tax incentives for specific investments in the technology sector, aims to enhance El Salvador's competitiveness and sustainable economic development. The Ministry of Economy, as the governing entity, plays a crucial role in operationalizing this law, indicating a concerted governmental effort to boost the tech industry[58].

This groundbreaking legislation offers total exemptions from income tax, income tax withholdings, municipality taxes on net assets, capital gains payments, and import and export duties for tech projects. The eligibility criteria for this law are inclusive, extending to both national and international, legal, and natural persons, with a valid Qualification Agreement from the Ministry of Economy as a prerequisite.[59]

The 'Zero Tax' Law defines specific sectors within the tech industry that are eligible for these benefits. These sectors include software and computer systems analysis, consultancy, programming, cloud services, artificial intelligence, massive data analysis, cybersecurity solutions, manufacturing of technology equipment, semiconductors, robotics, nanotechnology, and production of aircraft and unmanned vehicles. [60] This targeted approach signifies a strategic move to position El Salvador as a hub for technological innovation and development.

Conclusion

In 2023, El Salvador stands at the forefront of a technological revolution within its M&A landscape. The combination of legislative support, tax incentives, and a focus on high-growth tech sectors positions the country as an attractive destination for M&A activities and joint ventures. These developments foster a vibrant ecosystem for technological innovation and signal El Salvador's emergence as a competitive player in the global tech industry. As the country continues cultivating a tech-friendly environment, its M&A landscape is poised for dynamic growth, offering lucrative opportunities for local and international investors.

[58] EY, "El Salvador's Bill for the Promotion of Innovation and Technological Manufacturing encourages investment in tech companies, includes tax benefits" (April 18, 2023), https://globaltaxnews.ey.com/news/2023-0728-el-salvadors-bill-for-the-promotion-of-innovation-and-technological-manufacturing-encourages-investment-in-tech-companies-includes-tax-benefits.

[59] Goodlife, "El Salvador passes a "Zero Tax" Law for Tech Start Ups" (April 22, 2023), https://goodlifeelsalvador.com/2023/04/22/el-salvador-passes-a-zero-tax-law-for-tech-start-ups/.

[60] Goodlife, "El Salvador passes a "Zero Tax" Law for Tech Start Ups" (April 22, 2023), https://goodlifeelsalvador.com/2023/04/22/el-salvador-passes-a-zero-tax-law-for-tech-start-ups/.

IP Licensing and the Role of Smart Contracts in M&A and Cross-border Transactions

Muskan Pipania[61]

Prakhyat Gargasya[62]

India

In the dynamic legal realm, exploring the transformative potential of Smart Contracts in Intellectual Property ("IP") licensing within the context of mergers and acquisitions ("M&A") and cross-border transactions is a subject of profound interest. Intellectual Property, in this landscape, stands as a critical linchpin acting as a cornerstone for businesses, aiming to secure competitive advantages and foster innovation amid the intricacies of an ever-evolving business environment.

As businesses transcend borders, engage in M&A endeavors, or embark on Joint Ventures, the strategic utilization of IP becomes paramount.

Traversing the intricate web of economic transactions within the South Asian region, spanning the territories of India, Pakistan, Bangladesh, Sri Lanka, Nepal, and Bhutan, unfolds a varied panorama of industries, ranging from the spectrum of technology and pharmaceuticals to textiles and agriculture. Within this kaleidoscope, the significance of intellectual property rights, spanning patents, trademarks, and copyrights, takes center stage in asserting market supremacy and nurturing the crucible of innovation.

Within this framework, IP licensing acts as a crucial bridge, enabling companies to capitalize on existing IP assets, venture into new markets, and generate revenue through carefully crafted Licensing Agreements.

However, in the intricate world of M&A and Cross-Border Transactions, where businesses strive to strategically leverage, share, and monetize their IP assets, traditional approaches to IP licensing have faced challenges such as complexity, delays, and a noticeable lack of real-time transparency.

Amidst the dynamic realm of technology, this situation is on the edge of transformation, particularly with the emergence of Blockchain Technology. The introduction of blockchain signifies a pivotal paradigm shift, presenting "**Smart Contracts**" as a formidable tool poised to revolutionize transactional intricacies.

Exploring the strategic role of IP in Cross-Border Transactions, this article examines how Smart Contracts enhance IP licensing with seamless enforcement and heightened transparency. It also delves into how Smart Contracts automate the licensing process, unveiling key elements—Innovation, Automation, and Transparency—shaping the global future of IP transactions.

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[62] Legal Graduate with B.A. L.L.B Hons. from RMLNLU, India. Bar Council of India member, he leads the Investment and Corporate Structuring Departments. His practice is exclusively committed to navigating complexities in these areas.

Smart Contracts: Transforming Law

Smart contracts, coded directly on Blockchain, are self-executing agreements. The embedded "**Smart Information**," like a song or image, encoded in digital form within the file itself, poses as an effective rights management tool that ensures coordination and enforcement of agreements between network participants without relying on conventional legal contracts. [63] Thus, offering a transformative solution to the challenges associated with IP licensing.

Here's how Smart Contracts are re-shaping the landscape:

- **Automated Licensing:** Smart contracts streamline licensing by automatically executing terms, ensuring seamless transfer of IP rights. This automation removes the necessity for intermediaries, minimizing delays and potential friction points. Additionally, it provides **conditional enforcement** by executing actions based on specific conditions. For instance, the release of IP rights might depend on achieving milestones, completing payments, or obtaining regulatory approvals, offering a flexible and secure framework, particularly beneficial for Cross-Border Transactions.

- **Efficiency and Compliance:** In Cross-Border Transactions, legal and regulatory differences between jurisdictions can be significant. Smart contracts, with their automated nature, can serve as a bridge, enhancing trust and efficiency across borders by seamlessly adhering to local regulations. By embedding legal requirements into the code, these contracts automatically adjust to applicable rules, reducing non-compliance risk.

- **Multi-Language Support:** Given the linguistic diversity, smart contracts can incorporate multi-language support, enabling parties to transact in their preferred languages. This enhances accessibility and reduces the risk of misunderstandings.

- **Immutable Recordkeeping with Real-Time Transparency and Traceability:** Blockchain's decentralized nature guarantees immutable recordkeeping upon smart contract execution, establishing a tamper-resistant ledger. This transparent record minimizes fraud risk and enhances sensitive information security, which is crucial for cross-border compliance and due diligence. Simultaneously, blockchain's structure enables real-time transparency and traceability, providing immediate access to IP license status and terms. This transparency reduces the likelihood of misunderstandings and disputes, instilling trust in M&A or JV deals and expediting transaction timelines.

- **Automated Royalties:** Smart contracts can automate the calculation and distribution of royalty payments based on pre-defined conditions, cutting administrative burdens and minimizing the risk of errors or disputes.

- **Currency Agnosticism:** Smart contracts can handle transactions in various currencies, ensuring that payments, royalties, and other financial aspects of IP licensing agreements align with the currencies of the involved parties.

Challenges and Considerations

The evolution of IP transactions is intricately tied to the convergence of innovation, automation, and the robust foundations laid by smart contracts. However,

[63] A.R. Mukhtarova, N.I. Lesnova, Smart contracts in international trade in services in the field of intellectual property, 105, Atlantis Press 523, (2019).

while the potential benefits are significant, challenges like legal framework and standardization of smart contract templates, securing the blockchain infrastructure for sensitive IP information, and the necessity for broader industry adoption must be acknowledged.

As businesses increasingly adopt this transformative technology, they not only open avenues to discover novel opportunities to enhance operational efficiency and transparency but also position themselves as forward-looking leaders by adeptly navigating the intricacies of a progressively interconnected global marketplace.

In furtherance of the same, it's crucial to consider the actual semantics of the platform and write secure code beforehand while drafting smart contracts. This pre-emptive approach is vital as the vulnerabilities of a smart contract lie in its code, highlighting the importance of thorough consideration before deploying it on the network. [64] The future promises a redefined landscape where the seamless integration of technology and legal expertise profoundly shapes the trajectory of IP Transactions. Anticipating the future, collaborative endeavors involving legal experts, technologists, and businesses are imperative. These efforts are essential to surmount challenges and fully unleash the untapped potential inherent in smart contracts within the realm of IP licensing.

Therefore, as blockchain technology continues to develop, the synergy between IP licensing and smart contracts is poised to redefine the landscape of IP transactions in the years to come.

Key Considerations in M&A Transactions in Korea for Foreign Investors

Paul Jihoon Choi

Jungok Yun[65]

Korea

The Korean M&A market has been enjoying steady growth throughout the past decade – in particular, 2021 saw the most transactions in history by total transaction value. As transactions in Korean equity continue to rise, so is the benefit that would be derived by having a keen understanding of critical considerations in M&A transactions targeting Korea, which we highlight as follows:

Merger Filing

When a foreign investor acquires securities in a Korean corporation or forms a joint venture in Korea, and if such transaction or activity meets certain thresholds set out under Article 11 of the Monopoly Regulation and Fair Trade Act

[64] A.R. Mukhtarova, N.I. Lesnova, Smart contracts in international trade in services in the field of intellectual property, 105, Atlantis Press 523, (2019).

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("MRFTA"), such foreign investor must complete a merger filing with the Korea Fair Trade Commission. Broadly, such thresholds are[66]:

a. the foreign investor (including affiliates) and the domestic (i.e., Korean) corporation (including affiliates) have total assets or turnover of KRW 300 billion or more and KRW 30 billion or more (respectively), or vice versa[67]; and if the transactions conducted by persons triggering the above threshold involve;

b. in case of share acquisitions, if the amount of shares in a domestic corporation acquired by the foreign investor is 20% or more (in case of publicly listed corporations, 15% or more)[68], or if a person who owned 20% or more in a domestic corporation (15% or more for publicly-listed corporations) acquires additional shares in such company and becomes the largest shareholder[69]; or

c. if forming a new corporation, when becoming the largest shareholder[70].

Involved parties should complete a merger filing within thirty days after the completion of the merger. However, if any party involved in the merger transaction has total assets or turnover of KRW 2 trillion or more, parties will be required to complete the merger filing before the completion. A pre-closing report generally requires about two months to complete.

Foreign Exchange Report

When a foreign investor acquires shares in a privately held domestic corporation (including the acquisition of shares through the formation of a joint venture corporation), such foreign investor must complete a securities acquisition report with a competent foreign exchange bank before the acquisition.[71]

The above foreign exchange report obligation does not arise when a foreign investor acquires shares in a publicly listed domestic corporation. However, in such cases, the foreign investor must establish a dedicated investment account at a competent foreign exchange bank and must conduct the transaction through such a dedicated investment account.[72]

Fundamental Considerations in Avoiding Shareholder Disputes

Any corporation with a capital of KRW 1 billion or more must form a board of directors by appointing three or more registered directors and nominating one of the directors as the representative director. As the representative wielding chief authority on behalf of the corporation, the representative director has decision-making authority on all matters not reserved for the board or the shareholders and the authority to convene board and shareholder meetings.

However, even where a foreign investor holds a significant portion of the equity in a Korean corporation, and even when such a foreign investor has control over the majority of the board, there are many cases in which the representative director is left to be appointed by a Korean shareholder, citing various reasons.

Under such conditions, if the Korean-appointed representative director fails to convene a board or shareholders meeting despite a request from the foreign investor, even when the foreign investor has the majority of the voting shares and the board, the foreign investor is often prevented from causing the

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[66] The same merger filing obligation arises in certain concurrent directorships, mergers, or business transfer cases. However, we refrain from covering those thresholds for the sake of simplicity of this discussion.
[67] Korea Monopoly Regulation and Fair Trade Act (Law No. 19510; partially amended as of 20 June, 2023), art. 11(1), 18(1) and 18(2).
[68] Korea Monopoly Regulation and Fair Trade Act (Law No. 19510; partially amended as of 20 June, 2023), art. 11(1)(1).
[69] Korea Monopoly Regulation and Fair Trade Act (Law No. 19510; partially amended as of 20 June, 2023), art. 11(1)(2)..
[70] Korea Monopoly Regulation and Fair Trade Act (Law No. 19510; partially amended as of 20 June, 2023), art. 11(1)(5).
[71] Korea Foreign Exchange Regulation, art. 7-32(2).
[72] Korea Foreign Exchange Regulation, art. 7-36, 7-33(1)(1).

board or the general meeting of shareholders to render necessary resolutions properly, and must usually resort to lengthy litigation to enforce its will. This creates immense frustration and distress on the part of the foreign investor.

The following measures should be diligently considered to minimize such risks:

a. Directly appoint the representative director.

b. If a) is not possible, have the company appoint two representative directors with equal representative authority and grant the foreign investor the right to appoint one of such representative directors.

c. Amend the articles of incorporation (constitution) of the company to grant one of the directors, separately empowered at a board meeting, the authority to convene board meetings.

d. Amend the articles of incorporation (constitution) of the company to grant the authority to convene general meetings of shareholders to the director separately empowered to convene board meetings as noted in c).

e. Stipulate specific penalties [73] in the shareholders' agreement or the joint venture agreement for the counterparty-shareholder if such counterparty-shareholder does not cooperate with the convocation of a board meeting or a general meeting.

A discerning knowledge of such procedural requirements and governance considerations will be highly beneficial for foreign investors investing in Korea.

The Role of Corporate Restructuring in Energy Transition in Nigeria

Peace Adeleye[74]

Nigeria

Introduction

Energy transition presents many twists and turns to the extant energy industry in Nigeria. This is so because a transition presupposes the phasing out of fossil fuels or, in a broader context, the phasing- out of carbon dioxide. Most companies in the energy sector (particularly the upstream oil and gas industry) deal with and burn fossil fuels, resulting in carbon dioxide. Hence, to properly phase out fossil fuels, remodeling or adopting a corporate restructuring option to include renewables in the traditional energy business is essential. This article examines the role corporate restructuring plays in Nigeria's energy transition with particular emphasis on Nigerian laws.

Corporate Restructuring in Nigeria's Energy Industry

Corporate restructuring is the broad name for a business strategy enterprise undertaken by a company to achieve its objectives. Usually, the aim may be to optimize the business for profit. Besides optimizing profit, a company may restructure to diversify to other industries. The corporate

[73] Considering that contractual penalties may be enforced in Korea, specifying specific amounts of penalty to be paid for such breach of obligation is not only possible but commonly practiced.

[74] Peace Adeleye is a Senior Associate in Kenna Partners, a premium-service corporate commercial law firm in Nigeria. She has extensive knowledge in energy, projects, tax, infrastructure and construction. She is a member of the firm's energy and tax practice units. Peace can be contacted by email at padeleye@kennapartners.com.

restructuring may be internal and/or external.[75] Internal corporate restructuring occurs when a company looks inward instead of outward for its business optimization. Some examples of internal corporate restructuring include arrangement on sale and arrangement on compromise, to name a few. However, external corporate restructuring includes mergers and acquisitions, takeovers, etc.[76]

The decarbonization movements have led to some industry shifts that are accentuating the role corporate restructuring plays in the energy transition. In 2022, Shell announced its acquisition of a Nigerian solar energy company. It also noted that this acquisition aligns with its carbon emission reduction objectives.

Role of Corporate Restructuring in Nigeria's Energy Transition

In 2021, the Nigerian *Climate Change Act 2021* was enacted and signed into law.[77] The law seeks to reduce Nigeria's greenhouse gas ("GHG") emissions and ensure that Nigeria achieves net zero by 2060. The law seeks to impose greenhouse gas emission targets on the Nigerian economy's defined sectors and to introduce carbon taxes to attain this objective. Although the modalities for implementing the GHG targets and the carbon taxes are yet to be determined, its prospective implementation, while fostering Nigeria's decarbonization, may also disrupt the current practices of existing fossil fuel companies in Nigeria. For example, fossil fuel companies in Nigeria would have to reduce their GHG emission to a target level or risk the imposition of taxes.

In anticipation of a possible implementation of the Act, existing oil and gas companies in Nigeria may explore the privileges afforded by corporate restructuring options in diversifying their businesses to renewables or decide to invest in CCS technologies.[78] Such diversification would enable them to build capacity and perhaps develop a working business model for using renewable energy in Nigeria.[79] In addition, such diversification would help to mitigate any possible risk arising from the implementation of the *Climate Change Act.*

Relevant Laws for Corporate Restructuring in Nigeria

With a prospective increase in M&A deals in Nigeria due to the energy transition, it is essential to state that there are varying sectoral and general regulations regulating corporate restructuring in Nigeria. The application of the laws is, however, dependent on the corporate restricting option adopted. Some of the existing laws (relating to the oil and gas industry) include:

a. The Investment and Securities Act;

b. The Federal Competition and Consumer Protection Act 2018;

c. The Petroleum Industry Act 2021 and its extant regulations and guidelines; and

d. Companies and Allied Matters Act 2020

Conclusion and Recommendation

As Nigeria seeks to attain its net zero goal by 2060, exploration and production companies who still desire to participate in the Nigerian environment may decide to explore the opportunities presented by corporate restructuring devices. Such companies

[75] Qing Ma & Susheng Wang, "Internal v. External Restructuring – Boundary of the Firm with an Endogenous Firm Structure", SOCIETA ITALIANA DI ECONOMA (SIECON), January 2017, https://www.siecon.org/sites/siecon.org/files/oldfiles/uploads/2017/04/Qing.pdf.
[76] Fabian Ajogwu, SAN, Mergers & Acquisition in Nigeria: Law & Practice, 1 (1st ed. 2011).
[77] Climate Change Act 2021, Law of the Federation of Nigeria (Acts and Subsidiary Instrument) 2022 Vol. 1 (A245 – 268).
[78] This is an alternative to divestment of oil and gas assets. Empirical data suggests that there has been a surge in divestment in the Nigerian oil and gas industry. Although some have attributed these divestments to a hostile economic environment.
[79] Drew Stevenson et al., "The Energy Transition and the Implications for M & A," PWC, https://www.pwc.co.uk/industries/power-utilities/insights/the-energy-transition-and-the-implications-for-m-a.html.

may decide to scale up their gas businesses or diversify their businesses to include renewables to prepare for the possible risks inherent in implementing the *Climate Change Act.* Adopting any preferred corporate restructuring option is no doubt dependent on the strategic business objective of the company. However, it is essential to note that some legal nuances may arise where one corporate restructuring option prefers the other. International oil and gas companies in Nigeria need to seek local legal assistance in structuring deals relating to their preferred structuring option.

Lock-up period and right of first offer. Controversies in clauses in M&A contracts in the fuel market in Europe – case study

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Malgorzata Kieltyka[81]

Poland

Lock-up and right of first offer are key clauses in M&A contracts, especially in dynamic markets. Although these caveats serve specific purposes, they have sparked controversy in practice. Often included in M&A agreements, lock-up limits the possibility of selling assets for a specified period. In the context of fuel markets, applying this caveat may be controversial. On the one hand, it ensures stability and protects against sudden changes in ownership, but on the other hand, it may hinder market reactions. The second issue is that the right of first offer, which intends to provide a privileged offer for a given party to purchase an asset before an offer to others, may hinder the entry of new entities into the market and impede its development.

A controversial M&A agreement on the fuel market in Poland

In the fuel industry of the Polish jurisdiction, there has been a questionable disposal of assets of a refining company. The effect of the transaction was to create a situation (intentional or unintentional) in which the minority shareholder blocks the majority shareholder. This is the state of affairs:

1. undesirable - because it violates the proportion of power in the company; and
2. non-standard - because usually, the aim is to distribute power in the company in proportion to the number of shares (the desired effect is to bring the power in the company closer to the proportion of the profit achieved from the share in relation to other shareholders).

In 2018, Polish Joint-Stock company "O." announced plans to purchase Joint-Stock company "L." but it had to meet the requirements set by the European Commission. During the explanatory proceedings, the European Commission collected extensive data and feedback from competitors and customers of the merging companies and expressed its concerns that this would lead to market monopoly and harm competition. In response, Company "O." made several proposals, primarily the sale of 30 per cent of shares in the "L." refinery with an

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accompanying large package of management rights and the disposal of nine fuel depots to an independent logistics operator and the construction of a new jet fuel import terminal that would be transferred to this operator. Finally, in 2022, the Commission consented.

The fuel and energy market as a regulated market

The fuel and energy market is regulated, which means that transactions such as the analyzed one are subject to review (in this case, it was the consent of the European Commission and the Polish Office of Competition and Consumer Protection).

The Commission approved the proposed purchasers of the assets sold as part of the implementation of the remedial measures specified in Regulation (EC) No. 139/2004 regarding the conditional consent to the concentration consisting in the takeover by the Company "O." of control over the Company "L."

Purposes of the lock-up clause

The Company "O." aimed to block the foreign investor from selling the purchased shares for three years. Using a lock-up clause typically protects against a foreign investor's too-quick sale of shares. This issue is critical in times of rapid changes in energy industry dynamics. Parties to a lock-up agreement intend to avoid a scenario in which a group of shareholders or one majority shareholder takes the company public and sells it to investors, escaping with the profits. Only after this period has expired can shareholders sell their shares freely. Volatility or a sharp decline in a company's share price can cause investors to lose confidence. Lock-up agreements, therefore, help maintain market confidence in investing in the company. In M&A, these agreements can serve as a sign of commitment for the acquiring company, reassuring other stakeholders of the new owner's long-term intentions and providing stability in the typically turbulent post-merger period. Lock-up agreements may potentially work to the detriment of minority shareholders because insiders cannot sell their shares, so minority shareholders could find themselves in a difficult position if the share price falls. It creates a situation in which the minority shareholder, through lock-up, blocks the majority shareholder. On the one hand, this violates the proportion of power in a capital company. This is unconventional because the intention is usually to distribute power in the company in proportion to the shares. The Polish legal system regulates these issues by Article 338 §1 of the Commercial Companies Code[82]. However, a breach of such an agreement by a shareholder does not affect the validity of the action performed; therefore, the sale of shares will be effective. This is under Art. 57 §1 of the Civil Code[83].

Applying the right of first offer

In the context of the right of first offer, the Company "O." tried to ensure that it had the right to be the first to receive offers to purchase the sold shares. As in the case of lock-up, the Polish Commercial Companies Code regulates this issue in Art. 338 §2[84]. Under Art. 600 §1 of the Polish Civil Code[85], the eligible shareholder receives a binding offer to purchase the shares, which means that if the offer presented is accepted, it will acquire the shares on previously agreed terms. The right of first offer gives higher priority to shareholders with these rights

[82] Poland Commercial Companies Code (act of September 15, 2000), art. 338 §1: "An agreement limiting the disposal of a share or a fractional part of a share for a specified period of time is permissible. The limitation on disposal may not be established for a period longer than five years from the date of conclusion of the contract".
[83] Poland Civil Code (act of April 23, 1964), art. 57 §1: "The right to transfer, encumber, change or abolish a right cannot be excluded or limited by a legal act if, according to the law, the right is transferable".
[84] Poland Commercial Companies Code (Act of September 15, 2000), art. 338 §2: "Agreements establishing the right of pre-emption or other right of priority to purchase shares or a fractional part of shares are permitted. Restrictions on disposal resulting from such agreements may not last longer than ten years from the date of conclusion of the agreement".
[85] Poland Civil Code (act of April 23, 1964), art. 600 § 1: "By exercising the right of pre-emption, a sales contract is concluded between the obligated and the entitled person with the same content as the contract concluded by the obligated party with a third party, unless a specific provision provides otherwise. However, the provisions of the contract with a third party aimed at preventing the right of pre-emption are ineffective against the entitled person".

(usually investors) to potentially purchase the shares before their sale to a third-party buyer. This allows shareholders to acquire a larger stake in the company and prevents unwanted shareholders from purchasing shares by offering a higher price. A key issue for shareholders when negotiating agreements is to limit the transfer of shares to third parties who may be competitors or parties with whom cooperation is undesirable. In this respect, Poland applies the Act of July 24, 2015, to control certain investments (Journal of Laws 2023.415), which introduces control of foreign direct investments in Poland. Accordingly, the President of the Polish Office of Competition and Consumer Protection may block certain transactions if an investor is from outside the OECD or the European Economic Area.

Conclusions

In summary, the nature of lock-up and right of first offer in M&A agreements emphasizes the balance needed to navigate the energy market. Although lock-up provides a sense of stability and continuity, its accuracy and rigidity can be challenging when flexibility and adaptation to market dynamics are so important. The situation is similar to the right of first offer, which aims to protect existing stakeholders. However, there is concern that this makes it difficult for new entities to enter the market and does not support innovation.

Option and convertible loan agreements as legal and financial instruments aimed at the protection of the investor's interests and risk mitigation within venture investing

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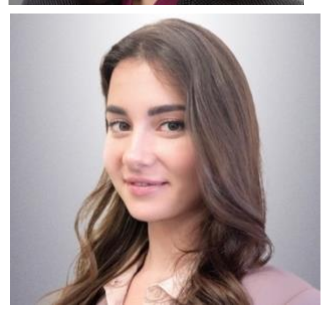
Anna Grosheva[87]

Valeria Schepkina[88]



Russia

Investment activity, in general, poses significant capital loss risks to investors; venture investing, in particular, also requires consideration of the urgent need for a substantial initial investment inflow in high-tech start-ups. In response, legislative alterations have introduced mechanisms such as option agreements ("Option") and convertible loan

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agreements ("CLA") into the Russian legal system in 2015 and 2021 respectively. The latter gives the investor a choice of reclaiming the made contribution as a loan when a start-up fails or, otherwise, becoming a shareholder ("Shareholder Right").

This article will present a comparative analysis of the mechanisms above and the peculiarities of their implementation based on Russian corporate law and entrenched judicial practice.

Option Agreement

The Option vests the investor with the future right to enter into a sale and purchase agreement of the company's shares ("SPA") at a fixed price by accepting the irrevocable offer directed by the Option seller[89]. Protection of the investor's rights is guaranteed by (i) the irrevocability of the offer and (ii) the unilateral nature of the acceptance right. The investor may follow put or call Option scenarios within venture investing.

Call Option

The Call Option lets the investor take a so-called wait-and-see position and fulfill its Shareholder Right provided the company achieves the anticipated financial results (profit level, KPI, etc.). Thus, there is a possibility of fixing the share price ("Strike Price") and, in turn, excluding the burden of foreign exchange rate and market fluctuations at the acceptance date.

Put Option

By entering a Put Option, the investor already holding a company's share reserves a so-called exit right if the company does not reach the anticipated financial results. Thus, the investor is entitled to have the company buy back its share at the Strike Price and, as a result, hedge the risks of future price fluctuations.

Convertible Loan Agreement

The CLA entitles the investor to choose whether to become a shareholder or reclaim the contribution made as a loan.

The set-off of the investor's loan requirements against its obligation to pay the shares' amount when entering the start-up fulfils the shareholder's right. This right is based on the unanimous decision of the general meeting/sole shareholder to increase the charter capital of the company or issue additional shares in case of a limited liability company ("LLC") and a joint-stock company ("JSC") respectively, on the ground of the investor's application[90].

At the same time, the investor implements the conversion right by directing the relevant requirement of the charter capital increase or additional shares' issuance to the notary public or the registrar, respectively, provided the term is due and the conditions set out in the CLA are fulfilled[91].

Still, before 2021, the CLA mechanism applied via the conclusion of a loan agreement accompanied by entering into a shareholders' agreement and the Option as well as a set-off agreement.

The introduction of the CLA as a separate agreement (i) provides automatic conversion unless the borrower claims its objection towards the investor's entry into the company, and (ii) makes conversion more transparent due to the obligation to register the CLA in the Russian legal entities' registry ("USRLE").

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89 Civil Code of the Russian Federation No. 51-FZ of 1994, art. 429.2 (ed. of July 24, 2023).
90 Federal Law "On Joint Stock Companies" No. 208-FZ of 1995, art. 32.3 (ed. of August 08, 2023).
Federal Law "On Limited Liability Companies" No. 14-FZ of 1998, art. 19.1 (ed. of June 13, 2023).
91 Federal Law "On the Securities Market" No. 39-FZ of 1996, art. 27.5-9 (ed. of June 04, 2023)
"Fundamentals of Legislation of the Russian Federation on Notariate" No. 4462-1, of 1993, art. 103.13 (ed. of July 24, 2023).

On the other hand, the newly introduced CLA triggered certain risks for the investor. Firstly, in case of objection from the borrower, the investor's shareholder right is at risk of being blocked due to the mere fact of the objection's submission to the notary public or the registrar. At the same time, the CLA claims fall under the exclusive jurisdiction of state courts without the right to arbitrate.

Comparative analysis of the CLA and the Option

Firstly, in contrast to the Option concluded between shareholders and investors, in the case of the CLA, the start-up itself is the CLA party. Thus, the prerequisite of the CLA conclusion is a start-up's state registration.

The CLA requires additional steps once the Parties fulfill the Option conditions and conclude the SPA by accepting an irrevocable offer. These steps may include the charter capital increase or the issuance of additional shares and must be followed up by the registration of relative changes in the company's articles of association.

Furthermore, unlike the Option conclusion, the CLA is subject to state registration with the USRLE.

Overall, the Option seems more favorable from the investor's point of view than the CLA mechanism. Such an inference is drawn from (i) the CLA borrower's right to block the investor's Shareholder right, (ii) strict terms of the CLA set out by the law, and (iii) an ensuing need to resort to additional corporate mechanisms to protect the investor's interests under the CLA.

Regulation of goodwill in Spain and its impact on M&A transactions

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Spain

Introduction

Understanding goodwill in Spain is fundamental in navigating the landscape of mergers and acquisitions ("M&A") within the country's business framework. Defined as the difference between the acquisition price and the reported net book value or estimated fair value of a firm, goodwill in Spain, known as "fondo de comercio," embodies future economic benefits from acquired assets.

This article primarily underscores the prominence of top clients in this context, crucially impacting Share Purchase Agreements. Valuation challenges persist despite rigorous due diligence, prompting adaptive measures to mitigate uncertainties. Earn-outs, integrated strategically into transaction structures, serve as incentives, compelling sellers to showcase undervaluation in initial goodwill pricing. Negotiating earn-out clauses necessitates strategic foresight to sustain client relationships and maintain seller-buyer equilibrium. These aspects, alongside the complex interplay of conduct of business clauses, significantly influence the goodwill valuation landscape and taxation implications for the seller within the Spanish context.

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Challenges in Valuation

The valuation of goodwill in Spain presents a substantial challenge. Despite rigorous due diligence typically undertaken by purchasers, accurately determining its value and identifying potential legal risks associated with top clients remains complex. To mitigate these risks, purchasers commonly adopt several preventive measures:

- Rigorous examination of top clients' contracts to uncover changes in control clauses or any provisions that might enable contract termination.

- Engagement of the management team post-acquisition, notably observed in service-oriented companies, to ensure a seamless transitional phase.

- Negotiation of conditions precedent mandating the seller to procure consent from top clients before the final closing of the transaction.

Addressing Uncertainties

Despite meticulous due diligence and preventive measures, uncertainties persist. Earn-outs emerge as a widely embraced tool strategically integrated into transaction pricing structures to defer the valuation of goodwill.

In this regard, the earn-out serves as a powerful incentive, motivating sellers to retain existing top clients and proactively engage them, thereby enhancing profitability. Given that earn-outs are usually based on EBIT or EBITDA, the sellers are committed to demonstrating that the goodwill was undervalued in the initial price and that they deserve the earn-out.

Best Practices in Negotiating Earn-out Clauses

Negotiating earn-out clauses demands strategic considerations to sustain and activate top clients:

- Ensuring top clients do not perceive the target company as undergoing a transformation process becomes relevant. To maintain these crucial relationships, the target's management team must continue to deliver the same high standard of service that customers are accustomed to. To achieve this objective, we strongly advocate for parties to include a conduct of business clause. This clause will delineate the seller's rights and responsibilities, emphasizing optimizing profits generated from top clients, among other mutual obligations.

- At times, these conduct of business clauses, alongside other elements, present a challenge in distinguishing whether the earn-out primarily reconciles disparities in goodwill valuation or operates as an incentive extended to the seller in their post-closing role. This detailed scrutiny and the ability to demonstrate that the earn-out stems from a discrepancy linked to goodwill valuation hold substantial significance within the Spanish framework. It's crucial to note that this determination notably influences the taxation implications for the seller.

- Viewing this from the seller's standpoint, preserving the required level of autonomy is pivotal to meeting the service expectations of top clients. This autonomy grants the seller the authority to manage resources and devise go-to-market strategies based on their experience and the shared objective of maximizing profits.

- From the buyer's perspective, ensuring the seller comprehends the primacy of preserving and activating relationships with top clients remains imperative. After receiving the initial price, the seller might be inclined to divert focus to other projects, potentially delegating the task of maximizing top client profits to key employees. To diligently monitor this aspect and take prompt corrective measures, it is our experience that including an intervention right is crucial. This provision empowers the pre-deal buyer to dissuade the seller from redirecting attention elsewhere. Following the deal's closure, this tool enables an analysis of performance levels and, if a decline is detected, allows the buyer to retract the autonomy granted to the seller. Subsequently, parties can proactively adopt new strategies to prevent any loss of top clients.

Conclusion

Navigating the realm of goodwill valuation in Spain – focusing on top clients – requires a nuanced understanding of its intrinsic complexities. The evaluation process involves different challenges despite comprehensive due diligence efforts. Earn-outs emerge as pivotal tools, compelling sellers to showcase undervaluation in initial goodwill pricing while maintaining and enhancing client relationships. However, including the conduct of business clauses adds complexity, blurring the line between goodwill reconciliation and seller post-acquisition incentives. This nuanced landscape significantly influences taxation and valuation dynamics for sellers, underscoring the importance of meticulous analysis and substantiation of goodwill-related discrepancies. From seller autonomy to buyer intervention, parties must maintain a delicate equilibrium to sustain top-client relationships while aligning mutual objectives. These strategic considerations and the dynamic interplay between various clauses underscore the intricate nature of goodwill valuation and regulation in Spain's M&A sphere, warranting astute navigation and strategic implementation for successful transactions.

Role of ESG as a factor in Mergers & Acquisitions of USA

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United States of America

While Environment, Social, and Governance (“ESG”) started as a disclosure mechanism intending to make companies responsible entities, ESG has surfaced as a significant factor in the sale and purchase of entities, too. Now, companies look at ESG as a considerable criterion for determining potential target companies as much as they look at the target’s turnover and economies of scale.

This shift is motivated by the current positive sentiment of investors and consumers who wish to associate themselves with responsible and sustainable businesses. Keeping aside the flaws of defining and evaluating ESG, which warrants discussion elsewhere, this sentiment has stirred the pot to create an inclination towards positive ESG entities. ESG has also been identified as one of the top three enterprise risks [94], followed by

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[94] Aon, M&A Risk in Review 1H 2023, Part 2: Risks and Regulations,

technological and political uncertainty, reflecting the market's emphasis on ESG. To avoid being caught up at the receiving end of scams involving fund misappropriations, human rights violations, unethical conduct, manipulating emission standards and oil spills, etc., ESG-positive companies provide a haven to the concerned investors.

Companies, to meet their forecasted ESG standards, are not just making changes in their organization organically but also looking to meet those forecasts by acquiring ESG-positive companies.[95] Others are considering ESG as a factor when acquiring or merging with other entities.

Consequently, while performing due diligence, the ESG of the target is also evaluated, and investors factor the concerned ESG risks into the decisions and the value of the enterprise.

Factors why ESG has emerged as a significant factor:

- **Creation of synergy**: Aligning with companies with similar policies towards ESG helps them magnify the effect and result of the combination. It also helps in a smooth transition in cases of merger, e.g., Exxon Mobil's announcement to acquire Denbury Inc. in July 2023 to utilize Denbury's experience in carbon capture and utilization.[96] On the other hand, companies that have negative ESG look for companies with favorable ESG so that the combined effect of the acquisition can paint a positive image in the market.[97] E.g. an oil company buying a renewable energy company.

- **Demand of investors**: Perhaps the most crucial reason why ESG has recently become a factor is that investors have been demanding high standards of ESG and their desire to be associated with ethically run companies. So, to keep the investors' concerns at bay, acquirers look for companies that are ethically run and have positive ESG.

- **Government scrutiny**: Several regulators and government bodies now seek ESG performance details through reporting mechanisms, making companies conscious of these parameters, now available in the public domain.[98] This move of the governments is given the environmental targets that they have committed to at international forums and conventions[99] among other considerations.

- **Avoiding the risk of litigation and reputational risk:** Non-disclosure or non-commitment to ESG often leads to a risk of future litigations that can lead to bankruptcy and tarnishing of the parent company's image. The government could also require disclosure of ESG practices in retrospect, exposing the resultant company to unanticipated litigation risks for yesteryears.

- **Enhanced stakeholder value**: Choosing healthy ESG target companies attracts 'woke' or conscious investors who will

p.16, https://img.response.aonunited.com/Web/AonUnited/%7Bb77ac375-5deb-4273-b7b8-e69237d388c0%7D_M_A_Risk_in_Review.07-13-23_v5.pdf?_gl=1*fht9v6*_ga*OTY1MTQ2NzQ1LjE3MDU4Njk3NzE.*_gid*MjEyNTEwMzAzMy4xNzA1ODY5Nzcx.

[95] Aon, ESG Factors are Carrying Increasing Importance in Mergers and Acquisitions Dealmaking (Sept 15, 2023), https://www.aon.com/en/insights/articles/esg-factors-are-carrying-increasing-importance-in-mergers-and-acquisitions-dealmaking.

[96] Vinson & Elkins, The Evolving Role of ESG in M&A- Balancing Risks and Opportunities (2023), p.2. https://media.velaw.com/wp-content/uploads/2023/09/26145313/Report-Navigating-the-ESG-Landscape-in-MA-Balancing-Risks-and-Opportunities_Brochure_LMD23_D3_v16-2.pdf.

[97] Ronald Cohen and George Serafeim, How to Measure a Company's Real Impact, Harvard Business Review (Sept. 2020).

[98] Multiple jurisdictions have introduced mandatory disclosure requirements, e.g., TCFD (UK), CSRD & EU Taxonomy, SEC Taxes & Incentives Carbon pricing, Plastics Tax, Sugar Tax, ICE Phase Outs etc. (US) (Edelman Trust Barometer 2020, Morningstar).

[99] Deloitte, An ever Increasing Focus on ESG is impacting M&A Valuations and Processes (Feb., 2023) https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Finance/ie-fas-increasing-focus-on-ESG-is-impacting-MandA.pdf.

invest long-term in the target and the parent company. It also reduces employee attrition rate, promotes healthy corporate governance (so there are chances of past fraudulent activities), and creates a positive image in the community. This increases consumer support for the enterprise, [100] leading to increased price premiums[101] and higher shareholder returns.

- **Competitive advantage**: Target's strong positive ESG performance reflects on the parent company. Future opportunities, increased shareholder returns [102], and different avenues of financing and investment are attracted, leading to a competitive edge in the long term. On the contrary, companies with challenged ESG performance may suffer higher costs of raising capital[103] or unfavorable financing terms.

- **Obtaining higher valuation**: Since ESG is a decisive criterion in capital allocation by many investors, both the target and the acquirer can utilize the positive ESG performance to increase their valuations in the market. This is because "investors perceive value in businesses that align with environmental protection, societal well-being, and strong corporate governance."[104]

- **Tax consideration**: Most environment and socially impactful businesses are eligible for tax rebates that can help reduce the cumulative tax the resultant company pays. For instance, the US Inflation Reduction Act, which aims to support investment in energy transition and renewable technologies, can be used by acquirers to look for suitable targets.

Challenges to the usage of ESG as a factor

ESG has been criticized for being a "woke" strategy that considers political and unachievable goals over shareholders' interests. The ESG parameters can't be standard for each company, nor can their outcomes be conclusive. Parameters set by JP Morgan Chase and Wells Fargo differ from those considered by Goldman Sachs and Blackrock. Similarly, these parameters can't be used across sectors. ESG also can't be quantified. Given these significant roadblocks in defining and setting parameters for ESG, the value of ESG has faded over time. ESG, when practiced by companies, is often costly, time-consuming, and resource-consuming, taking away precious time and opportunities from the hands of corporate management.

Navigating the Acquisitions as a lawyer through the ESG conundrum

As an acquirer's lawyer, intensive due diligence on the target's ESG policies and plans is imperative. ESG due diligence differs from the conventional industry-specific due diligence that non-legal consultants and experts conduct.[105]

To deliver effectively, the lawyer must inquire about the expectations of the acquirer, including the negotiables and non-negotiables of ESG. The acquirer's organizational standards must be studied to provide a seamless transition and the most suitable partner. Starting from the government reporting

[100] Porter Novelli, Purpose Perception: Implicit Association Study (2021), https://www.porternovelli.com/wp-content/uploads/2021/02/Porter-Novelli-Purpose-Perception-Implicit-Association-Study.pdf.

[101] Compared to conventionally marketed products, sustainability-marketed products received a price premium of 39.5%, NYU Stern Center for Sustainable Business (CSB), CSB Sustainable Market Share Index, (2020).

[102] Cole Horton and Simon Jessop, Positive ESG performance improves returns globally, research shows, Reuters (Jul. 28, 2022).

[103] KPMG ESG Due Diligence Survey Study, Most U.S. investors want a dedicated ESG due diligence product that can analyze risks and opportunities (2023), https://info.kpmg.us/news-perspectives/industry-insights-research/kpmg-esg-due-diligence-survey-2023.html.

[104] Mayank Jaswal, Anuj Suneja, Why Environmental, Social and Governance factors are gaining Prominence in M&As (June 5, 2023), VCCircle, https://www.vccircle.com/thegrowing-significance-of-environmental-social-and-governance-in-m-a.

[105] See further, Sasha Stepanova, The role of ESG factors in shaping M&A deal value and reputation, International Bar Association (May 11, 2023), https://www.ibanet.org/Role-of-ESG-factors-in-shaping-M&A-deal-value-and-reputation.

mechanisms, lawyers can meander through the internal policies, plans, and strategies, past and future agreements, past and possible violations, probable litigations and legal liabilities, supply chains, human rights concerns, etc., should be viewed through the lens of all ESG elements.

If the acquirer is a publicly listed company, past reports with the regulatory authorities may make the lawyer's work easier. However, lawyers should beware of companies' 'greenwashing' tactics. This eye for scrutiny substantially increases if the target is a private company. Compliance costs for companies required to meet net-zero mandates should also be considered. For instance, a potential target overstated "the percentage of its revenue and customer base tied to clean energy," and a due diligence exercise discovered that "the target's decarbonization roadmap would cost around $300 million, making the valuation assumptions unworkable".[106]

Past and future financing avenues must also be scrutinized through the lens of ESG. Performance and future projections of the concerned sector in which the target company operates can also be seen from an ESG perspective, which will help the lawyer generate forecasts and anticipate regulatory moves. Identifying ESG risks and challenges associated with the sector, countries involved, and their political systems is also essential to ESG due diligence.

Reports and interviews with key managerial personnel often would not be enough. Ground reality can be effectively unearthed by site inspections and interactions with the relevant stakeholders, as well as with the members of the local community.

Unlike other parameters, ESG cannot be evaluated with a standard set of inquiries since there is no one-size-fits-all formula for it. Since more suitable methods of incorporating ESG in the company's valuation have yet to evolve, lawyers must innovate to provide the client with the optimal answer.

Concluding Remarks

Whether it is 'conscious capitalism' [107], woke capitalism, or stakeholders' approach to corporate governance or corporate citizenship,[108] all point to the rising demand for making companies more sustainable and responsible. Governments of around 130 countries have committed to net zero by or before the year 2050,[109] pushing the regulators to facilitate scrutiny of more and more companies on ESG components. Many European banks have pledged to curb financing certain fossil fuel-based enterprises,[110] making those companies unviable for takeovers and increasing their capital costs. Similarly, the US government is encouraging investment in renewable energy by pooling in investment.[111] Many international frameworks and guidelines have helped in understanding the ESG perspective in business.[112]

Explaining the significance of ESG to the CEOs of the world, Blackrock's famous CEO Larry Fink wrote in his Annual CEO Letter, "Stakeholder

[106] Deloitte, Four ways ESG is reshaping M&A - How ESG is influencing M&A valuation, risk, and more (Jun. 2023) as quoted in Vinson & Elkins, The Evolving Role of ESG in M&A- Balancing Risks and Opportunities, Fall 2023, p.5.
[107] E. Napoletano, Environmental, Social and Governance: What Is ESG Investing?, Forbes Advisor (Dec. 4, 2023), https://www.forbes.com/advisor/investing/esg-investing/
[108] Leo Strine, Good Corporate Citizenship We Can All Get Behind? : Toward A Principled, Non-Ideological Approach To Making Money The Right Way, Harvard Law School Forum on Corporate Governance (Dec 21, 2022).
[109] Deloitte, An ever increasing focus on ESG is impacting M&A valuations and processes, (Feb. 2023), p.2.
[110] Sanne Wass, European banks cut fossil fuel financing, unlike North American peers – report, S&P Global, (Mar 30, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/european-banks-cut-fossil-fuel-financing-unlike-north-american-peers-8211-report-69564218.
[111] The White House, Fact Sheet: Biden-Harris Administration Launches Historic $20 Billion Competition to Catalyze Investment in Clean Energy Projects and Tackle the Climate Crisis (Jul. 14, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/14/fact-sheet-biden-harris-administration-launches-historic-20-billion-competition-to-catalyze-investment-in-clean-energy-projects-and-tackle-the-climate-crisis/.
[112] United Nations Guiding Principles on Business and Human Rights (UNGPs), Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, EU Draft directive on corporate sustainability due diligence (CSDDD), EU Corporate Sustainability Reporting Directive (CSRD), etc.

capitalism is not about politics. It is not a social or ideological agenda. It is not 'woke.' It is capitalism, driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to prosper."[113]

While ESG has a growing influence in Mergers and Acquisitions worldwide, there is an urgent need to uniformize the definition and parameters of ESG in order to generate comparable data for investors and the public to comprehend and use in the right direction. Till then, lawyers must innovate!

The Live Nation and Ticketmaster Monopoly: a review of the DOJ's ongoing investigation into Live Nation Entertainment

Nastassia Merlino[114]

United States of America

In early 2023, prompted by Live Nation Entertainment's potential abuse of power in the live music industry, the Department of Justice initiated an antitrust investigation into its businesses[115]. On January 24th, 2023, the U.S. Senate Committee on the Judiciary held a hearing titled "That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment", which addressed the lack of competition in the primary and secondary event ticketing markets and Live Nation Entertainment's near monopoly of the multibillion-dollar live music industry[116].

The Live Nation and Ticketmaster 2010 Merger

Since their merger in 2010, events promoter and venue operator Live Nation and ticket sales giant Ticketmaster have dominated the entertainment industry, as they now control an estimated 70% of the ticketing and live event venues market[117]. Live Nation and Ticketmaster merged in 2010 under the condition of a consent decree, which resulted in Ticketmaster becoming a wholly-owned subsidiary of Live Nation[118]. This consent decree, which resulted from the 2010 Final Judgement[119], would forbid Live Nation from retaliating against venues that refused to use Ticketmaster as their ticketer for ten years following the merger until 2020 to ensure healthy market competition[120]. However, the Department of Justice led its first investigation into Live Nation in 2019 and alleged their violation of the consent decree[121]. Thus, they began an enforcement

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[113] Blackrock, Larry Fink's 2022 Letter to CEOs, The Power of Capitalism (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter#:~:text=Stakeholder%20capitalism%20is%20not%20about,is%20the%20power%20of%20capitalism.

[114] Nastassia Merlino is a Corporation LLM candidate at NYU School of Law and serves as a Graduate Editor for the NYU Journal of Law & Business and as a Graduate Research Fellow at the NYU Pollack Center for Law & Business. She graduated from NYU with a Master's in Music Business after graduating with her First Degree in Law (magna cum laude) and Certificate in Transnational Law (summa cum laude) from the University of Geneva in Switzerland.

[115] David McCabe and Ben Sisario, "Justice Dept. Is Said to Investigate Ticketmaster's Parent Company," THE NEW YORK TIMES (November 18, 2022), https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html.

[116] U.S. Senate Committee on the Judiciary, "That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment", U.S. SENATE COMMITTEE ON THE JUDICIARY (January 23, 2023), https://www.judiciary.senate.gov/committee-activity/hearings/thats-the-ticket-promoting-competition-and-protecting-consumers-in-live-entertainment .

[117] Emily Lorsch, "Why Live Nation and Ticketmaster dominate the live entertainment industry," CNBC (January 25, 2023). https://www.cnbc.com/2023/01/25/the-live-nation-and-ticketmaster-monopoly-of-live-entertainment.html.

[118] Emily Lorsch, "Why Live Nation and Ticketmaster dominate the live entertainment industry," CNBC (January 25, 2023). https://www.cnbc.com/2023/01/25/the-live-nation-and-ticketmaster-monopoly-of-live-entertainment.html.

[119] United States of America, et al. v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc., 2020 US Dist LEXIS 28931 [DDC Jan. 28, 2020, No. 1:10-cv-00139-RMC].

[120] Emily Lorsch, "Why Live Nation and Ticketmaster dominate the live entertainment industry," CNBC (January 25, 2023). https://www.cnbc.com/2023/01/25/the-live-nation-and-ticketmaster-monopoly-of-live-entertainment.html.

[121] U.S. Department of Justice Office of Public Affairs, "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster," US DOJ Office of Public

action of an antitrust decree, which resulted in a settlement between Live Nation Entertainment and the U.S. government. The Department of Justice's Antitrust Division successfully extended the Final Judgement consent decree by five and a half years to 2025. It clarified certain prohibited conducts, which will "help deter additional violations and allow for easier detection and enforcement if future violations occur"[122]. Nearly four years later, the Department of Justice started investigating the giant again due to exorbitantly high ticket prices.

The Senate Permanent Subcommittee on Investigations' subpoena to Live Nation Entertainment

In November 2023, the Senate Permanent Subcommittee on Investigations ("PSI") issued a subpoena to Live Nation Entertainment seeking documentation regarding Live Nation and Ticketmaster's business practices, ticket prices, and fees for tickets to live events[123]. While the PSI had already contacted Live Nation Entertainment seeking such documents in March 2023, the giant failed to comply with PSI's requests voluntarily and refused to produce critical documents for the Subcommittee's inquiry[124]. In its letter to Live Nation CEO Michael Rapino, Subcommittee chair Senator Richard Blumenthal also sought additional documentation, including "records related to Live Nation/Ticketmaster's failure to combat artificially inflated demand fueled by bots in multiple, high-profile incidents, which resulted in consumers being charged exorbitant ticket prices"[125]. The subpoena seeks to better understand Ticketmaster's unfair practices and misuse of monopoly power by requesting "annual financial data related to fees, the company's recommendations for ticket pricing, business strategies regarding ticket pricing, secondary ticketing, and bots, communications relating to high-profile incidents in 2022, and customer research and surveys regarding ticket pricing and fees"[126].

Ticketmaster's High Ticket Prices

The recent world tours of Taylor Swift and Beyonce highlighted the ongoing issue of exorbitantly high ticket prices resulting from Live Nation's decade-long merger with Ticketmaster[127]. With hour-long wait lines, websites crashing, and tickets that are impossible to get, Live Nation Entertainment's monopoly becomes more challenging to ignore as consumers call for the breakup of the giant[128].

There are three main identifiable reasons for the surge in ticket prices. First, "average ticket prices have more than tripled since the mid-90s, even before they hit the resale market, in part due to increasingly elaborate productions for major arena tours"[129]. The second reason is that additional fees for concert tickets can be as high as 78% of the ticket price itself, thus driving up the customer price even further. Venues, promoters, artists, and Ticketmaster

Affairs (December 19, 2019), https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

[122] U.S. Department of Justice Office of Public Affairs, "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster," US DOJ Office of Public Affairs (December 19, 2019), https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

[123] Dan Mangan, "Senate committee subpoenas Live Nation, Ticketmaster after months-long probe", CNBC (November 20, 2023), https://www.cnbc.com/2023/11/20/senate-subpoenas-live-nation-ticketmaster-amid-investigation.html.

[124] Richard Blumenthal, "Subpoena Cover Letter to Live Nation", UNITED STATES SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS (November 16, 2023). https://www.hsgac.senate.gov/wp-content/uploads/2023-11-16-Blumenthal-Subpoena-Cover-Letter-to-Live-Nation.pdf.

[125] Richard Blumenthal, "Subpoena Cover Letter to Live Nation", UNITED STATES SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS (November 16, 2023). https://www.hsgac.senate.gov/wp-content/uploads/2023-11-16-Blumenthal-Subpoena-Cover-Letter-to-Live-Nation.pdf.

[126] Dan Mangan, "Senate committee subpoenas Live Nation, Ticketmaster after months-long probe", CNBC (November 20, 2023), https://www.cnbc.com/2023/11/20/senate-subpoenas-live-nation-ticketmaster-amid-investigation.html.

[127] Moises Mendez II, "Why Everyone's Mad at Ticketmaster Right Now", TIME (August 18, 2022). https://time.com/6207167/ticketmaster-ticket-prices-expensive-backlash/.

[128] Chris Eggertsen, "Taylor Swift Fan Files New Lawsuit Against Ticketmaster, Live Nation Over Eras Tour Presale," BILLBOARD (December 22, 2022). https://www.billboard.com/pro/taylor-swift-fan-sues-ticketmaster-live-nation-eras-tour-presale/.

[129] Moises Mendez II, "Why Everyone's Mad at Ticketmaster Right Now", TIME (August 18, 2022). https://time.com/6207167/ticketmaster-ticket-prices-expensive-backlash/.

will then split up these fees. Finally, Ticketmaster retains as much as 90% of tickets for the secondary market, thus making it increasingly difficult to find tickets[130]. The secondary market includes artists' fan clubs, credit card companies, promoters, radio stations, and resellers who buy tickets in bulk and resell them through bots at high markups ranging from an average of 50% to 7,000%[131].

While confident performers have attempted to cut out Ticketmaster from the process to make their tickets more accessible and affordable to fans, Live Nation Entertainment dominates the industry to such an extent that it becomes almost impossible to operate without them.

Conclusion

What lies ahead for Live Nation Entertainment is unclear. While the live ticketing industry could benefit from new entrants, Live Nation Entertainment controls such a high percentage of the industry that competitors have little to no leverage against the giant. As we are nearing the end of their renewed consent decree, the Department of Justice will have to find a solution to preserve performers' and consumers' interests from such monopolistic power.

An Overview of Directors' Liability in Uruguayan M&A Transactions

Eugenia Ciganda [132]

Igal Guertein [133]

Uruguay

In the intricate business realm, mergers and acquisitions ("M&A") are pivotal in growing, expanding, and establishing companies within the market. In Uruguay, akin to numerous jurisdictions, the accountability of directors in these processes holds utmost significance. Decision-making, conducting thorough investigations, and adhering to are crucial elements that Uruguayan companies' directors must consider at each phase of an M&A deal. This approach protects the company's interests, shareholders, and other stakeholders.

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[130] Moises Mendez II, "Why Everyone's Mad at Ticketmaster Right Now", TIME (August 18, 2022). https://time.com/6207167/ticketmaster-ticket-prices-expensive-backlash/.

[131] Moises Mendez II, "Why Everyone's Mad at Ticketmaster Right Now", TIME (August 18, 2022). https://time.com/6207167/ticketmaster-ticket-prices-expensive-backlash/.

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In Uruguayan companies, shareholders often hold directorial positions, especially in family-owned businesses. Here, the convergence of shareholder and director roles is customary. Usually, shareholders sell the entire parcel of shares, lessening the relevance of directors' roles per se as they become the interested party.

However, in other scenarios, directors' roles become much more relevant, mainly when shareholders take a step back and the actual business operation relies on these board members. In such instances, where directors' roles transcend mere shareholder interests, they play a crucial part in decision-making processes. They face intricate challenges arising from diverse shareholder motivations, which are sometimes divergent or conflicting in nature.

During the initial phases of an M&A deal, after formalizing confidentiality agreements and preliminary understandings between involved parties, selling shareholders usually inform the company's board of directors about the potential transaction. At this stage, directors and management assume fundamental roles, facilitating the transaction by providing essential information for due diligence. Simultaneously, they ensure the seamless continuity of regular business operations, cautioning not to disclose the potential transaction to the entire company. Balancing these dual responsibilities often creates a challenging scenario, demanding a delicate equilibrium between transactional demands and the imperative of sustaining day-to-day business functions.

It is crucial to comprehend the scope and contours of directors' responsibilities within Uruguayan companies as governed by Law 16.060. Sections IX and X delineate the obligations of directors, elucidating qualifications for directorial roles, conduct expectations, and duties towards the company, shareholders, and third parties.

Article 83[134] of Uruguayan corporate law mandates that directors act with loyalty and prudence akin to that of a competent businessperson (diligence of a good businessman). A failure to adhere to these standards renders directors potentially liable to face corporate claims filed by the company, shareholders, or creditors. This liability arises if directors contravene legal provisions, bylaws, and regulations or discharge their duties with an abuse of authority, fraudulent intent, or gross negligence, as stipulated under Article 391.[135]

While lacking a precise legal definition, the conceptualization of the "good businessman" standard holds substantial relevance. Our doctrine asserts that this standard is an objective and abstract criterion, intending to establish the reasonable behavior expected from a diligent administrator placed in the same situation as the evaluated person.[136] Additionally, the notion of the "good businessman" encompasses genuine professional responsibility, taking into account various factors such as the size and purpose of the company, generic and specific directorial functions, and the circumstances under which the director should have acted.[137]

Moreover, directors bear an obligation of loyalty, demanding unwavering allegiance to the company's best interests. They are mandated to avoid conflicts of interest meticulously, refrain from using company information for personal gain, engage in direct or indirect business dealings with the company, or pursue ventures that might compete with the company.

Specific scenarios provide exemptions for directors from liability, as outlined in Article 391, such as

[134] Uruguay Business Companies Act (Law No 16.060) (1989), art. 83.
[135] Uruguay Business Companies Act (Law No 16.060) (1989), art. 391.
[136] Olivera García, R., Responsabilidad del administrador societario: Ley de sociedades comerciales estudios a los 25 años de su vigencia 944 (2015).
[137] Olivera García, R., Responsabilidad del administrador societario: Ley de sociedades comerciales estudios a los 25 años de su vigencia 944 (2015).

expressly opposing a motion's vote or being unaware of a transaction made by other directors, provided this unawareness is not due to negligence.[138]

Furthermore, as outlined in Article 392[139], our legislation extinguishes directors' liability in specific situations. To enact this exemption, shareholders must explicitly approve the directors' actions, which must be aligned with the law, company bylaws, and regulations. Typically, the Sale and Purchase Agreement ("SPA") includes provisions regarding the director's appointment, and as a condition to closing, it's common to require the sellers' approval of the director's appointment.

In conclusion, M&A processes present strategic opportunities and pose complex challenges for company directors. Prudent management, regulatory compliance, thorough due diligence, and transparency are crucial elements that directors must consider when fulfilling their duties and safeguarding the company's and its shareholders' interests in these processes. Seeking legal, financial, and specialized advice becomes critical to ensure success and integrity in M&A transactions in Uruguay.

A comprehensive understanding of directors' responsibilities in these transactions is imperative to ensure informed and ethical decision-making, thereby promoting companies' long-term sustainability and growth in Uruguay's dynamic business landscape.

Navigating Legal Complexities in Vietnam's Thriving M&A Landscape: A Transactional Law Perspective

Trang M. Le[140]

Vietnam

Being one of the fastest-growing economies in the world with an average GDP growth rate of 5.68% in the last five years,[141] Vietnam has become a favored destination for foreign investors among Southeast Asian countries.[142] As of December 2022, foreign investment capital has reached US$274 billion, constituting 62.5% of the total investment in the country.[143] Manufacturing and processing leads in sector-wise investments, capturing 59.3% of the total investment capital, followed by real estate and energy.[144] The Vietnamese Government aims to increase the number of Fortune 500 companies with a business presence in Vietnam by 50% by 2030.[145]

Among several market entry options, many foreign investors opt to establish joint ventures or engage in mergers and acquisitions in Vietnam. Instead of setting up solely owned local companies, these forms

[138] Lapique Luis, Manual de Sociedades Comerciales 383 (2019).
[139] Uruguay Business Companies Act (Law No 16.060) (1989), art. 392.
[140] Trang M. Le – Master of Law student from the University of Pennsylvania Carey Law School, Class of 2023. She is a qualified lawyer in Vietnam with five years of working experience as a transactional lawyer in the Mergers & Acquisitions practice group in the Vietnam office of a Chicago-headquartered international law firm. The views expressed herein are exclusively those of the author and do not necessarily reflect the positions of her academic institution or any affiliated organization.
[141] Yahoo Finance, "20 Countries with Highest Rate of Economic Growth in 5 Years" (August 12, 2023), https://finance.yahoo.com/news/20-countries-highest-rate-economic-121800158.html.
[142] Foreign Investment Agency, Doing Business in Vietnam 2022.
[143] Foreign Investment Agency, Report on Foreign investment in Vietnam in 2022 (December 22, 2022), https://fia.mpi.gov.vn/Detail/CatID/457641e2-2605-4632-bbd8-39ee65454a06/NewsID/8dde962e-b940-4ac3-987e-df6d0346aeb3.
[144] Foreign Investment Agency, Report on Foreign investment in Vietnam in 2022 (December 22, 2022), https://fia.mpi.gov.vn/Detail/CatID/457641e2-2605-4632-bbd8-39ee65454a06/NewsID/8dde962e-b940-4ac3-987e-df6d0346aeb3.
[145] Decision No. 667/QD-TTg, Prime Minister of Vietnam, art. 1, § II.2.c (June 2, 2022).

of investment enable foreign investors to leverage the experience of their local partners in the Vietnamese market. When dealing with local joint-venture partners or sellers, most foreign parties rely on extensively negotiated transactional documents, i.e., joint-venture agreements, share purchase agreements, shareholders' agreements, and similar contracts. These documents typically utilize contract templates based on common law principles. Unfortunately, using standard common law contract templates without a thorough review from a local legal perspective may make specific provisions unenforceable.

In any M&A deal involving foreign investment in Vietnam, a crucial step is for the target company to file specific reports with the competent licensing authority, notifying changes to its shareholding structure upon completing the transaction. Failure to comply with these reporting requirements may mean the Vietnamese licensing authority has not legally recorded or recognized the transaction. Problems can arise if the sell-side or local party refuses to cooperate with the foreign investor-buyer in fulfilling the necessary charter amendments or reporting/registration requirements with the licensing authority. To prevent such issues, well-advised foreign investors should be aware of licensing hurdles, make charter amendments, and complete reporting/registration requirements as conditions precedent to closing in most M&A transactions.

However, even with such conditions precedent, investors using call option, put option, or convertible loan agreements may face challenges enforcing their rights if the defaulting party refuses cooperation. Share transfers triggered by these options or conversion rights require changes to the target company's ownership structure, involving charter amendments and notifications to licensing authorities. Unfortunately, the current Enterprise Law and related legal documents often mandate the defaulting party's signature for these submissions to licensing authorities. Refusal to cooperate may obstruct the formal recording of the share transfers upon the investor's exercise of call/put option or conversions of the relevant loan to shares in the target company. Although legal recourse through court or arbitration is possible, the existing law does not explicitly mandate licensing authority to change corporate registration information solely based on a court decision or arbitration award.

Setting aside licensing concerns, employing common law contract terms in M&A and joint-venture agreements in Vietnam without a comprehensive assessment from local legal perspectives may make certain contract terms unenforceable. One topic of debate among Vietnamese legal scholars concerns the use of "liquidated damages" in contracts governed by Vietnamese law. Until 2015, Vietnam's civil code generally recognized only actual losses and did not explicitly stipulate the parties' rights to pre-determine the amount of damages. The currently effective Civil Code of 2015 opens the doors for the legal recognition of liquidated damages by stating that "a party in breach must compensate for the entire damage caused *unless* otherwise agreed between the parties".[146] However, in practice, the enforceability of liquidated damages in Vietnam remains questionable. Recent court decisions indicate that some Vietnamese courts render liquidated damages clauses unenforceable unless the plaintiff provides evidence of the losses.[147] This can be unfair to the aggrieved party who requires a liquidated damages provision to protect themselves from difficult-to-measure losses.

As another example of unenforceability issues, applying foreign law as the governing law of M&A and joint-venture transactions in Vietnam could face challenges in Vietnamese courts. In a recent dispute where the parties agreed on applying Singapore law to the transaction, a Vietnamese court refused to

[146] Vietnam Civil Code of 2015, art. 13, 360.
[147] Judgment No. 15/2016/KDTM-GDT, People's Supreme Court of Vietnam (September 7, 2016). Judgment No. 11/2020/KN-KDTM, People's Supreme Court of Vietnam (June 9, 2020).

enforce a foreign arbitration award that awarded damages to the foreign investor by using Singaporean law on damages. The court reasoned that the damages provision of the M&A agreement pertains to damages arising from the parties' ownership of shares in the Vietnamese entity and, as such, must be governed by Vietnamese law.[148]

Challenges in the legal system and contract enforcement don't necessarily make investments in Vietnam less attractive; foreign investors should be aware of these challenges and seek sound advice to navigate them. For instance, enforcement issues with call/put options and convertible loan agreements can be addressed by incorporating adequate guarantee measures from the counterparty, ensuring enforceability in case of default. Parties can mitigate the risk of unenforceability arising from differences between common law contract terms and Vietnam's civil law system by appropriately localizing contract terms, with careful review by local legal counsels from a Vietnamese law perspective.

[148] Judgment No. 09/2023/HD-PT, High People's Court in Hanoi

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