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Regulation of M&A in the financial services industry

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Our forecasts for 2007 have been proven. GE Money, Citibank, HSBC and Scotiabank all acquired stakes in several leading Central American financial institutions, including BAC, Grupo Financiero Uno, UBC (Banco Cuscatlán), Primer Banco del Istmo and Costa Rica's wholly-owned national private banking bastion, Banco Interfin.

Banks and other financial intermediation institutions' (FIs') mergers are governed by diverse legislation, including corporate and regulatory Laws and regulations.

M&A regulatory implications

Although the Costa Rican regulator, the General Superintendent of Financial Institutions (SUGEF), does not have express statutory authority to either approve or reject an FI's acquisition (it only requires that it is sent notice of the transaction) regardless of whether it involves a stock purchase, a merger or an asset sale, in practice a bank already in operation does have to comply with SUGEF's provisions and obtain a favourable decision from it before carrying out certain acts. These include assigning or selling its shares totally or partially, modifying its capital stock, changing its corporate domicile or any other similar transaction.

The entity must also inform SUGEF of its ownership, so that SUGEF can determine who will be the ultimate beneficiary or direct owner after the acquisition. Also, the Financial Services Regulatory Council (Conassif) must approve true statutory mergers.

Approval by SUGEF

In cases where the transaction involves an ownership transfer of more than 10% of the FI's total equity, SUGEF must request information on the acquirer. It may exonerate acquirers such as public entities or international multilateral institutions, or if they are well-known entities whose stock is traded, from filing information.

Approval by Conassif

Conassif must give prior approval for the planned merger of any FI. On acquiring this approval, the FI must comply with the necessary corporate resolutions for completing the merger.

M&A from the corporate law perspective

Statutory procedures

Specific regulations apply to M&A activities, depending on the form these take. The procedure involves steps similar to merger regulations in other jurisdictions: (i) an agreement by each of the merging entities' shareholders; (ii) a merger agreement; (iii) the publication of the merger; and (iv) the issuance of the resulting entity's articles of incorporation.

M&A by acquiring a company's shares of stock is not expressly regulated, except through certain protections to minority shareholders and limitations to the transfer of share ownership interests.

Finally, bulk transfers of assets are regulated by a procedure whereby there is: (i) an agreement between seller and purchaser under statutory requirements; (ii) the transaction's documentation in a public deed; (iii) the transaction's publication, for the creditors' benefit; and (iv) a statutory escrow procedure for payment whereby the purchase price is deposited with an independent party (such as a notary) who holds funds and disburses them first to pay off any accredited creditors and then to the seller.

Minority shareholders' rights

Apart from the foregoing procedures, M&A activity requires parties to focus on minority shareholders' rights. Although Costa Rican law contains few protective provisions, it allows parties to create substantial minority shareholder protection. There are no special corporate minority shareholders' rights within the financial market-related laws and regulations.

For minority shareholders, Costa Rican corporate law provides basic information and participation rights that include: (i) a request for an inspection of corporate and financial records at any time, by giving notice in advance of or to prepare for a general shareholders' meeting; (ii) owners of at least 20% of the share capital may, at their own expense, demand an audit of the company's financial statements and operation; (iii) holders of a 25% stake may demand that the competent company directors or management convene a general shareholders' meeting; (iv) holders of a 20% stake may also demand a maximum 72-hour suspension of the general shareholders' meeting and also demand further information and clarification of any management issues to be decided at that meeting; and (v) a single shareholder may demand, if no annual meetings have been held for two consecutive periods, that a general shareholders' meeting be convened.

Also, to protect minorities, Costa Rican corporate law allows special restrictions to share transfer rights, including rights of first refusal, tag-along rights, drag-along rights and preemptive rights on stock issues. These provisions are not mandatory, but shareholders and partners may build them in to their corresponding corporate structures. At the moment, courts offer little case law in relation to these provisions, but as M&A activity continues to expand, enforcing these provisions and discussing them in judicial and arbitration proceedings will be a key source of law and regulation in the future.

The diversity of laws and regulations that apply to M&A in the financial sector – together with lack of practice in the areas of both corporate and financial regulation – will present market agents, regulatory authorities and practitioners in Costa Rica with significant challenges in the near future. So far, the Costa Rican regulatory authorities have followed a permissive stance, the result of a policy decision to welcome the entry of global financial participants into the market. The regulators' approach remains to be confirmed.

Financial and corporate

Recommended firms
Tier 1
Arias & Muñoz
BLP Abogados
Consortium Laclé & Gutiérrez
Zürcher Odio & Raven
Tier 2
Facio & Cañas
Lara López Matamoros Rodríguez & Tinoco
Pacheco Coto
Tier 3
Aguilar Castillo Love
Batalla Abogados
Feinzaig Scharf & van der Putten
Nassar Abogados
Tier 4
Quirós & Asociados Central Law
Lexincorp
Oller Abogados
Pacheco Odio & Alfaro

The advent of the global financial crisis saw Costa Rica's tourism sector grind to a halt, and an industry once held as a model in the region felt the tightening purse strings of world travellers and investors alike. Though the prospect of recovery is all but certain, the immediate strain has caused legal problems for ventures created in the golden years of Costa Rica's tourism industry. As one lawyer laments: "Every single project in financing is now a litigation case. The partners are fighting and the investors are fighting."

But there's good news for foreign investors in the insurance and telecoms industries, as the government partially opens its state monopolies to private competition in accordance with the recently-signed Cafta (United States-Dominican Republic-central America Free Trade Agreement). While the anticipated bonanza of foreign investment was delayed by the global crisis and reluctant lawmakers, the telecoms industry in particular has seen some movement in 2009. Interest in the insurance sector has been significantly less, but lawyers expect that to change as the world economy recovers.

Most of the large international players in the telecoms market, like Telefónica, Dicell, América Móvil and Millicom, have either created local companies or forged alliances with existing regional players to carve a share of the market, but the secretive nature of this process makes it difficult to tell exactly who is bidding. Perhaps the only people who know the true players involved are the lawyers that represent them, and they are understandably tight-lipped. Local companies Amnet, Ticom and Worldcom were the first to make advances to the government in early 2009.

The latter part of 2008 saw renewed interest from the government in exploring a merger of the three main national banks – Banco Nacional de Costa Rica (BN), Banco de Costa Rica (BCR) and Bancrédito – which have seen their collective market share drop by nearly half since the banking industry was deregulated in 1996. To investigate the option the government set up a committee headed by the finance minister to examine the benefits and drawbacks of a merger, the results of which are expected some time this year. Most lawyers see the merger of all three banks as unlikely, though they do not dismiss the chance of a two-way merger between the smaller Bancrédito and one of the larger banks.

Arias & Muñoz

Rival partners are quick to admit that Arias & Muñoz has the infrastructure in place to provide counsel throughout central America. Though there is a sense the Costa Rica office may be suffering from the downturn in local real-estate development, the presence of partners José Antonio Muñoz and Pedro Muñoz in Guanacaste gives them an edge over their competitors there.

The firm's multinational banking clients have brought it financing roles on several recent transactions. One competitor singles out partner Vicente Lines as a particularly competent lawyer: "If you are lucky enough to have Vicente on the other side, things will go smoothly."

Arias & Muñoz has been active in recent months representing the multilateral lender IIC (Inter-American Investment Corporation) on loans to small and medium-sized enterprises in Costa Rica. As recently as June 2009 Lines and a team of associates structured a $1.5 million loan from IIC to Costa Rican sustainable forestry company Maderas Cultivadas. The team conducted the due diligence and drafted the loan's structure, including a security package and disbursement schedule.

In the final quarter of 2008 the firm finalised the restructuring of a loan to the development consortium Autopistas del Sol for the long-delayed construction of a highway between San José and Caldera. The firm represented Spanish lender Caja Madrid in its partnership with the Central American Bank for Economic Integration and the recent restructuring adds $36 million to the original project financing amount of $261 million.

Leading lawyers

Vicente Lines
José Antonio Muñoz
Pedro Muñoz

BLP Abogados

BLP ascends to the top tier this year on recommendations from its competitors who characterise the firm as a young and energetic player in Costa Rica's financial law market. As one rival states: "They are aggressive in a positive way."

In keeping with recent trends, BLP continues to woo associates from other firms and government bodies. The hirings reflect the firm's expectations for growth in administration law and litigation practice areas. In spite of recent growth in San José, the slumping real estate market forced BLP to close its Guanacaste office last year.

Particular praise is given to partner David Gutiérrez, who is considered a top-notch lawyer in any jurisdiction, and lateral attorneys note that the 2007 addition of partner Eduardo Calderón has been an asset. These affirmations are echoed by the firm's clients, and one interviewee with a longstanding relationship with the firm says: "It is rare to have a law firm over many years that consistently pleases you."

The global downswing took a toll on Costa Rica's booming tourism industry, and in October 2008 BLP counselled world travel management company BCD Travel as it exercised an opportunity to take over its local partner Supracolor de Costa Rica.

In the second half of 2008 the firm advised global campus network Laureate Education in the local acquisition of Universidad Americana and Universidad Latina – two of the largest private universities in Costa Rica, with more than 13 campuses in the country.

Leading lawyers

Eduardo Calderón
David Gutiérrez

Consortium Laclé & Gutiérrez

As the Consortium network continues its push to consolidate its regional offices into a unified firm, Costa Rican lawyers have a sense that the local partners have yet to fully integrate into the central structure. Competitors suggest the individualistic nature of Costa Rica's legal market is hampering the process. The firm has a solid presence in banking and finance, particularly through the reputation of partner Rolando Laclé Zúñiga.

Having represented Citigroup locally in the merger with financial groups Uno and Cuscatlán, Consortium has a powerful client in the banking community. In July 2008 the firm advised Citibank on the latter's part in a $100 million syndicated loan to Costa Rican retailer Grupo M, which sought to increase its network of stores in the region. Citibank put up a $65 million tranche with a five-year term.

Riding the crest of Grupo M's wave of expansion, Consortium represented the IFC (International Finance Corporation) in a $50 million loan to the company to expand its operations in El Salvador, Guatemala and Honduras.

Partner Mario Quesada Bianchini led Consortium's regional team that advised the US government's OPIC (Overseas Private Investment Corporation) in a multijurisdictional loan to financial services provider BAC/Credomatic. The $225 million loan is to be used for developing low-income housing and small and medium-sized businesses in central America, and was arranged by Citibank in an innovative partnership with the US government.

Leading lawyers

David Arturo Campos
Rolando Laclé Zúñiga

Zürcher Odio & Raven

Rival attorneys debate whether the merger between Zürcher Montoya & Zürcher and Bufete Odio & Raven is working out for the partners. There is however a consensus that the firm maintains a top-tier presence, though the firm's core practice in real estate will take a significant hit in the development bust. Within the hotel industry, Zürcher retains such high-profile clients as Hilton Papagayo, Courtyard and Four Seasons.

Rather than go the regional route many of their competitors have taken, the partners of Zürcher have opted to maintain an independent profile in Costa Rica. They are the local representative for the Bomchil group, an association of independent law firms in Central and South America. The structure allows them to keep their distinct identity while providing the benefit of referrals from the associated firms.

One client of Zürcher that has been active recently is Amnet, which was recently approved as an operator in the opening of the Costa Rican telecoms market. Other corporate clients include IBM, BMW and Shell Oil Company.

Leading lawyers

Francisco Chacón
Claudio Donato Monge
Alberto Raven Odio

Other ranked firms

With offices in six central American countries – more than any other integrated regional firm – **Aguilar Castillo Love** traces its history in Costa Rica back to the country's independence.

While competitors note that the firm isn't particularly visible in the market, managing partner John Aguilar-Quesada has been busy representing an international cellular service in several matters related to its bid to enter the telecoms sector.
Leading lawyers: John Aguilar-Quesada

While the firm is lacking in size, competitors have praise for the partners of **Batalla & Asociados**. As one attorney puts it: "They like law – they like to practise law and they like to study law." One competitor goes so far as to suggest that if there was another firm they would like to merge with, it would be Batalla. Alejandro Batalla is singled out for his background in administrative and public law.

Last April, partner Rodrigo Zelaya's team represented Scandinavian lenders Norfund and the Finnfund in their joint debt financing of CIFI (Corporación Interamericana para el Financiamiento de Infraestructura), a regional non-bank lending institution, for $18 million.
Leading lawyers: Alejandro Batalla and Rodrigo Zelaya

Considered by competitors to be a leading firm in aviation law, **Nassar Abogados** has developed a presence throughout the region consisting of offices in five Central American nations. Though its presence in Costa Rica's transactional market is small, the firm performed the regional due diligence process leading up to cellular provider Comcel's acquisition of Navega last March. Over 2008 and 2009 the firm advised Panama's Global Bank in the structuring of loan agreements amounting to approximately $35 million.
Leading lawyers: Tomás Nassar

Rafael Quirós Bustamante of **Quirós & Asociados Central Law** is commended by clients for his co-operative style. "He is more the negotiator than the confrontational type," one client says, "[which] I prefer in my counsel". Competitors credit Quirós with quickly developing the Central Law regional network following the lead of Arias & Muñoz. Quirós has a background in the insurance sector specifically, advising the day-to-day legal work of the national teachers' association's savings and loans operation as well as healthcare provider Roche Servicios.
Leading lawyers: Rafael Quirós Bustamante and Ignacio Beirute Gamboa

The former practice of partner André Tinoco is the latest addition to the regional umbrella of the **Lexincorp** network. Competitors note that partner Arnoldo André's exposure in Costa Rica's business community is an asset to Lexincorp's presence in the jurisdiction.In the second half of 2008 the firm advised Emerson Process Management, a division of technology developer Emerson, on free-trade zone tax incentives and documentation necessary to establish an operation in Costa Rica.
Leading lawyers: Arnoldo André

Competitors observe that **Oller Abogados** is strong in public law, and commend partner Pedro Oller for operating a very well-planned office. The firm boasts a corporate client list that includes Experian, Western Union and Copa Airlines. Recently, the firm advised the China National Petroleum Corporation in the negotiation of a 25-year term joint venture agreement with the Costa Rican petroleum refinery known as Recope.