

Ecuador

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Mergers and acquisitions in Ecuador

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In general terms, mergers and acquisitions of commercial companies in Ecuador are governed by Ecuadorian corporate legislation. If the companies are listed on the stock exchange, stock exchange legislation is also applicable. Mergers and acquisitions of financial institutions and insurance companies are governed by special rules and are subject to Superintendency of Banks' approval, with a few exceptions.

Commercial companies

Mergers of commercial companies are regulated by the Law on Companies. A merger may take place in one of two ways:

- (a) two or more companies join for the purposes of creating a new company which succeeds them in their rights and obligations (simple merger); or
- (b) one or more companies are absorbed by another company which continues to exist (merger by takeover).

For a merger of any company into a new company, it is necessary to agree on its dissolution, and then to transfer all the corporate assets to the new company. In the case of merger by takeover of one or more companies by another existing company, the existing company must likewise acquire the assets of the company or companies taken over by means of a capital increase in an appropriate amount.

In the case of a simple merger, the fundamental effect is the appearance of a new juridical person which succeeds the rights and obligations of the merged companies. In the case of a merger by takeover, the buyer undertakes the target company's liabilities, and must assume the responsibilities inherent to liquidators with respect to the target's creditors.

For the purposes of an acquisition, it is possible to apply the sale of all the goods or articles of merchandise of the businessperson, as regulated by the Commercial Code. In practice, this concept has been legally used to buy and sell all the assets and liabilities of a businessperson or of the branch of a foreign company to a third party. Another possibility for acquiring a commercial company is through the transfer of shares or quotas.

Financial institutions

Acquisitions and mergers of financial institutions are subject to special rules. Financial institutions must be authorized by the Superintendency of Banks to amend their by-laws, to merge with other companies, to spin off, or to transfer all of their assets. The Superintendency of Banks has specific legal authority to qualify or reject share transactions if they exceed 6% of the company's capital stock. In general, purchases of shares in the financial sector – in the case of an acquisition seeking to control the company – exceed the 6% limit imposed by law and so the Superintendency's participation is mandatory.

On the other hand, rules pertaining to mergers of financial institutions include two kinds of mergers:

- (i) Regular mergers agreed and carried out by institutions having no deficit in their technical equity. These mergers must be approved by means of a resolution from the Superintendent of Banks.
- (ii) Extraordinary mergers ordered by the Banking Board with respect to one or more financial institutions having a deficit in their technical equity.

In accordance with the General Insurance Law, a merger between insurance companies or between reinsurance companies must be approved by the Superintendency of Banks and is governed by procedures established by the Banking Board.

Insurance companies are authorized by the General Insurance Law to assign part of their portfolio to another insurance company or

companies authorized to operate in Ecuador in the lines of insurance that are the subject matter of the assignment. In this case, there is no need for the Superintendent of Banks' authorization. However, the Superintendent's prior approval is required if the entire portfolio is being transferred.

The foregoing is a simple explanation of the main forms of mergers and acquisitions in Ecuador, although there may also be other more imaginative and specialized systems for acquiring business locally.

Financial and corporate

Recommended firms

Tier 1

Bustamante & Bustamante
Pérez Bustamante & Ponce

Tier 2

Coronel & Pérez
Quevedo & Ponce
Romero Arteta Ponce

Ecuador appears to have entered into a difficult period. New president Rafael Correa has been described as a radical left-wing politician, who seems bent on taking his direction for national economics from the model created in Venezuela by Hugo Chávez. This would mean the nationalization of energy industries, particularly the oil companies, and more.

Ecuador joins fellow Andean nation Bolivia in moving down this road. Unlike Bolivia, however, market insiders feel that the Ecuadorian reforms being proposed are more radical, and much closer to what is going on in Venezuela. The latter at least has the petrodollars to keep it above water for the short-term, but Ecuador doesn't have the same level of oil reserves. Natural gas, another Ecuadorian commodity, is not prized as highly as petroleum.

Direct foreign investments are needed but the administration has begun seizing assets of oil companies. It has also been reported that Ecuador is planning to default on outstanding government debt. These are not good signs for international investors – like Venezuela and Bolivia, direct foreign investment in Ecuador has declined.

There are plenty of potential areas for investment in Ecuador, but obviously they are not getting the needed capital infusions. Ports, energy and mining are some of the industries where work is being neglected, abandoned or simply not started for lack of financing. One financial lawyer said: “Our traditional areas of business have been relatively quiet.”

Still, work is plentiful for some at the moment. Much of it is finishing existing projects, like the SABMiller acquisitions, but there are glimpses of fresh financial legal work. Several multinational worldwide acquisitions have had a ripple effect, creating work for M&A teams handling the deals in Ecuador. Procter & Gamble’s worldwide acquisition of Gillette was one; others include the Bayer-Schering merger and the Clorox buyout of Colgate-Palmolive’s bleach business. All were non-Ecuadorian companies that had operations in the country that needed to be integrated.

The reality is that Ecuador is essentially a two-firm market. Either Pérez Bustamante & Ponce, or Bustamante & Bustamante, or both will participate in any transaction of significance in the country. And there is very little room for expansion with the current administration’s policies.

Bustamante & Bustamante

As one of the two premier law firms in Ecuador, Bustamante & Bustamante has been able to keep itself busy despite government machinations in the commercial markets. The firm celebrated its 50th anniversary last year by participating in a couple of the most significant deals in the country, in terms of both size and impact.

The Inter-American Development Bank and the Ex-Im Bank have been clients for more than 30 years, so Bustamante & Bustamante was naturally invited to represent the two financial agencies along with the Overseas Private Investment Corporation and Export Development Canada in a deal for the new airport in Quito. The group put together a financing package totalling \$400 million for Corporación Quiport, the administrators of the new Quito airport. This is a crucial deal for the country’s infrastructure, as the old airport is unable to expand to accommodate new traffic.

Despite the dearth of project finance activity in the market, Bustamante & Bustamante was able to participate in yet another such deal last year. The firm’s client, the Hong Kong port developer Hutchinson Port Holdings, won the concession to build a new container terminal at the port of Manta, the country’s only deep-water port. This was worth some \$350 million, although the total could reach up to \$523 million.

These two deals demonstrate how Bustamante & Bustamante was able to help its international clients, even in a challenging market. Both deals have the ancillary benefit of being projects that are vital to the country’s long-term economic outlook.

The one partner at the firm who has been singled out for praise is Juan Carlos Bustamante. A partner at a rival firm said: “Juan Carlos Bustamante is one of the best attorneys in Ecuador.”

Leading lawyers

José Rafael Bustamante
Juan Carlos Bustamante

Pérez Bustamante & Ponce

The only other financial law firm capable of handling significant commercial or financial transactions, Pérez Bustamante & Ponce has done the seemingly impossible. In a market that has limited foreign investment, the firm managed to find itself in several of the largest worldwide M&A deals of the past 12 months.

Procter & Gamble acquired Gillette in a deal announced in 2005 but transpired throughout 2006 before closing earlier this year. Pérez Bustamante was the local adviser to the acquirers for the Ecuadorian segment of the \$57 billion worldwide takeover. This deal was a harbinger for similar deals for the firm throughout 2006.

In October 2006, international brewer SABMiller announced its intentions to purchase Compañía de Cervezas Nacionales and Cervecería Andina. The brewer further announced that it would also purchase Agrilsa Agrícola e Industrial, a subsidiary of Cervecería Andina. As in the earlier Gillette acquisition, Pérez Bustamante represented the buyer in deal, which had a combined value of \$54 million for all three acquisitions.

Finally, in December, Clorox announced that it had agreed to purchase the bleach business of Colgate-Palmolive in six countries across North and South America and the Caribbean, including Ecuador. The cumulative value of the deal was \$126 million, and again, Pérez Bustamante advised the acquirers.

M&A might be the firm’s strongest practice area, but it also participated in the financ-

ing for Ecuador’s new airport. While Bustamante & Bustamante was on the other side of the table, Pérez Bustamante represented Corporación Quiport, the administrator for the current airport and responsible for building the new one.

On a troubling note, the firm admits that new work is in short supply. It will have to look for new opportunities to participate in once the deals in the pipeline are finished. Considering the marketplace, this might be worrisome, but it very well may be that Pérez Bustamante’s reputation will give the firm leverage in finding those new deals.

Leading lawyers

Rodrigo Jijón
Pablo Ortiz-García
Sebastian Perez-Arteta
José María Rumazo
Jaime Zaldumbide