Bolivia

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Bolivia's M&A legal framework

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The legal framework related to M&A in Bolivia is based on the Constitution (in effect since February 7 2009), the Commerce Code, and other related laws and legislation which refer specifically to the activities of regulated entities and sectors.

The constitution guarantees the right to private property and acknowledges the full development and performance of entrepreneurial activities based on the fundamental right of association and enterprise. Furthermore, the constitution establishes a restricted zone of 50 kilometres from the border lines with other countries where there are no rights for private property of land, water, soil and subsoil for foreign individuals, thus limiting the right to acquire any interests within such security zone, unless the state specifically declares such activity by law of Public Need and Usefulness, which must necessarily be approved by the Plurinational Legislative Assembly (Congress).

Insofar as M&A is concerned, and mainly referring to the impact of such operations on competition, the current Constitution expressly establishes the prohibition of private monopolies or oligopolies, or both, as well as any association, agreement, covenant or business whose purpose is to control the exclusivity of the production and commercialisation of goods and services.

Commerce Code

The Commerce Code regulates the acquisition of enterprises and establishes that such acquisitions be preferably performed by economic blocks or units; if this is not possible, the acquisition must be performed detached from its different material and immaterial elements.

The Commerce Code also establishes that the purchaser subrogates all rights and obligations that such company would have acquired or contracted up to the moment of the transfer. In any case, the liability of the seller ceases once the prior requirements have been fulfilled, which include a notification to all its creditors by certified letter or other means, as well as a publication on a nationwide newspaper.

To this effect, must be pointed out that such requirements are applied specifically in the event of a transfer of an enterprise as an economic unit or business, and does not refer to the purchase of capital shares or participations, which is regulated specifically pursuant to each type of company.

Furthermore, the Commerce Code regulates all mergers; it acknowledges both mergers and takeovers. Among the primary legal requirements, this code establishes the need to execute a merger agreement between the parties involved, as well as the construction of special balance sheets to the date thereof; this is an obligation that must be fulfilled by all the parties involved.

Once such requirements have been fulfilled, a final agreement is drafted, which must include the consent resolutions of each party in addition to a list of all shareholders that would have invoked their right to withdraw from the respective company, a list of all creditors of each company that would have filed an objection to the merger, the terms and conditions for the merger and the inclusion of the special balance sheet drafted to such effect.

The Commerce Code also states that during the merger process the managers of the new company or the acquirer will act as the representatives of the liquidated companies. It also establishes that the merger agreement may be dismissed as long as the final agreement has not yet been executed and no damage has been done to the companies, shareholders and third parties.

Bolivian legislation expressly prohibits the merger of competing companies that are subject to regulation if such merger has the purpose to establish, promote or consolidate a dominant position within a specific market. Affected markets include telecommunications, electricity, hydrocarbons, transportation, and water.

Notwithstanding the foregoing, Bolivian laws also provide for an exception: pursuant to a resolution issued by the respective agency or regulatory authority through a Supreme Resolution, such prohibition is waived if the mergers would contribute to the improvement of production, distribution of goods and services, or promote the technical and economic progress thereof, in direct benefit of the end-users, and which do not in any way try to eliminate the competition.

Moreover, the acquisition of shares or participations that result in a change of effective control of regulated companies, which in turn are the titleholders of concessions, licences or other similar administrative authorisations, must be made under express authorisation of the regulating agency of each sector without which the change of effective control cannot be executed.

M&A financing

A common practice in Bolivia has been to finance mergers and acquisitions with funds of the purchasing party or through local commercial banks whose covenants correspond to those of the regional banking system; interest rates for investment capitals are around 5% per year and the guarantees comprise of the assets and cash flow of the new company. It must be pointed out that only in few cases have funding sources been channelled through the stock market, mainly due to the little development and importance thereof.

Insofar as the world financial crisis, Bolivia is much less indebted and has greater international reserves (approximately $7 billion), thus no great financial problems are foreseen.

However, the economy will show a decrease in the flows of international trade and exports that will affect the chances of merger agreements within industrial companies where Bolivia has concentrated its production force.

Private equity

Acquisitions made through private equity offers two types of benefits:

(i) the investor must contribute with only a part of the capital for the acquisition; and

(ii) under the assumption that the return rate of investment is greater than the average costs of the debt interest rates, the returns of the financial sponsor will be significantly greater.

This type of funding may be used in Bolivia and the funds could be provided by different co-investors (private equity) to reach the needed amount to perform the acquisition. Furthermore, several lenders may join together and establish a syndicate to contribute the necessary funds to fund the operation.

Although information on M&A transactions are rarely made public, it would be safe to state that the great merger operations are primarily financed through bank loans.

Financial and corporate

Recommended firms
Tier 1
Bufete Aguirre
Tier 2
CR&F Rojas
Estudio Jurídico Gerke
Guevara & Gutiérrez
Moreno Baldivieso
Quintanilla Soria & Nishizawa
Tier 3
Criales Urcullo & Antezana
Indacochea & Asociados
Mendieta Romero & Asociados

While Bolivia's lawyers are quick to point out the nation's ability to grow its GDP - as much as 3% in 2009 - at a time when many world economies shrank, few are so quick to heap praise on the shoulders of President Evo Morales. But the controversial leader is beginning to gain ground among Bolivia's middle class, evidenced by his strong showing in the December 2009 election. With the rate of Bolivia's recent economic growth higher than it has been in over three decades and the nation's banks flush with liquidity, all indications say something must be going right with the president's socialist economic agenda. Yet as one of South America's poorest countries, there may be a sentiment among the populace that Bolivia has nowhere to go but up.

On the heels of his victory at the polls Morales nationalised the Bolivian power sector, assuming ownership over the country's two largest international providers as well as its two largest locally-owned electricity companies. The move places 80% of the countries electricity production in the hands of the government and consolidates the president's control of the energy sector, corresponding with his assumption of the oil and gas industry in 2008.

Though the hydrocarbon nationalisation raised tax revenues by $1.3 billion, financial lawyers say the action will be more damaging to Bolivia's economy in the long run by alienating important international investments needed to develop the country's hydrocarbon production capabilities. Strangely, the government seems to agree. The Morales administration has already reached agreements with Petrobras and Repsol YPF that will provide $1.6 billion toward the development of the Caipipendi gas fields, and is negotiating a joint venture with Russia's Gazprom and state-owned YPFB.

With the 2009 constitution in place, Bolivia's attorneys await additional legislation to define how their mining and energy clients will operate with the government, which is expected to come in the beginning of 2011. With no precedent regarding the implementation of articles governing mining contracts, lawyers must proceed carefully and leave plenty of room for amendments should they encounter roadblocks from regulators down the line.

Of particular interest are Bolivia's immense lithium deposits, and the largest international players seem prepared to suffer any risk to secure a piece of the pie. Already, Japanese and French consortiums have proposed competing joint ventures to develop the deposits, and have signalled their willingness to abide by conditions set forth by the mining ministry ensuring battery manufacturing operations remains within Bolivia's borders.

Bufete Aguirre

Competitors raise questions about whether a six-lawyer law firm can be considered a leading firm in Bolivia, but when pressed admit Aguirre's reputation, important clients and participation in landmark deals place Bufete Aguirre in the legal market's top tier. Peers attribute much of the firm's success to its ability to stay above the political fray over its 70-year history. According to one peer, "They have been able to avoid some of the problems other firms have not." In a sign of imminent growth, the firm is moving into a larger office in the recently developed southern part of La Paz.

The father-son team of Fernando and Ignacio Aguirre earns praise from clients for bringing a balance of seniority and youthful energy to the negotiating table. As one client sums it up, "They are a perfect combination of experience and ability."

In 2009 the firm advised US power generator Tenaska's majority-owned subsidiary Hidroelécrica Boliviana in structuring a debt swap that allows the hydroelectric plant to extend its debt term by three years. The transaction also involved a placement of new securitised bonds that raised $90 million - a sizeable transaction for the Bolivian capital markets.

In an example of the firm's prominence among Bolivia's traditional investors, partner Carolina Aguirre helped reorganise Grupo Alcos away from its family-owned structure by revising the pharmaceutical company's bylaws and creating a trust for future investments. The deal required complex negotiations with shareholders across many branches of the family tree.

Leading lawyers

Fernando Aguirre
Ignacio Aguirre

Moreno Baldivieso

In addition to holding a significant portion of the IP market, competitors do not deny that in a period of decreased activity Moreno Baldivieso remains "truly active" in the corporate market.

Clients compliment partner Andrés Moreno Gutierrez for his thoroughness and ability to get things done in the Bolivian legal system. Referring to a missed deadline that could have derailed a transaction, one client notes, "This late filing was possible because Andrés was taking care that the waivers were in place."

Moreno Baldivieso represents some of the more active foreign players in the mining and hydrocarbon industry, including Argentine oil and gas developer Techint and Pan American Silver, which has had its shares bolstered on the production of the San Vicente silver and zinc mine. In 2009, Moreno Baldivieso helped the Toronto-listed mining company raise $60 million from shareholders through an interest-bearing loan agreement, and is now drafting a bond offer to fund the second phase of the San Vicente mine, which it operates on a joint venture with the Bolivian government.

The firm is also representing the Argentine subsidiary of Spanish hydrocarbon producer Repsol YPF in the re-domiciliation of its holding companies, continuing despite the nationalisation of the country's gas industry. The firm's experience in re-domiciliation transactions played a part in their selection to structure the $150 million operation.

Leading lawyers

Ramiro Moreno Baldivieso
Andrés Moreno Gutierrez

Quintanilla Soria & Nishizawa

The 35-year-old firm has a reputation among competitors for high fees, but as one peer says, "They have a certain amount of clients, but they keep those clients." Partners Eduardo Quintanilla Ybarnegaray and Santiago Nishizawa Takano are leading lawyers in the mining, energy, and financial transactions market.

One corporate counsel holds high esteem for Nishizawa. "He is the only one that provides a reliable service, is always available and understands the merge between common law and commercial law."

Apex Silver emerged from bankruptcy in 2009 as Golden Minerals, and Quintanilla advised the American mining company in all aspects of the restructuring of subsidiaries still involved with the massive San Cristobal mine and other Bolivian operations. The restructuring includes a capital increase to exploration firm Silex Bolivia and air transport service Aerolípez in the amount of $2.2 million.

The firm is also representing multilateral investor Locfund, which recently underwent an international corporate restructuring. In addition to handling the Bolivian aspects of the restructuring, Quintanilla has negotiated several loan agreements with local development funds, totalling $2.5 million. The firm additionally helped negotiate a loan and shareholder agreement on behalf of the Inter-American Development Bank to the Bolivian microenterprise developer Ecofuturo.

Leading lawyers

Santiago Nishizawa Takano
Eduardo Quintanilla Ybarnegaray

Indacochea & Asociados

Far from the government seat of La Paz, the city of Santa Cruz stands as a sort of second capital for Bolivia's business and farming community, and Indacochea is the only firm with an independent office to be ranked among the nation's top law firms. As one peer says of founding partner Ricardo Indacochea, "He is a great lawyer and the only real corporate lawyer that works in Santa Cruz."

Owing to the role they played in privatising the oil and gas industry in the 1990s, competitors contend that Indacochea took a hit when President Morales re-nationalised the companies they helped incorporate. Still, the firm found regional work in the agricultural sector representing El Tejar in a 2009 restructuring, during which Bolivian shareholder ET Montero Agropecuaria sold its stake in the Argentine farm operator to English equity fund Capital Group for $150 million.

Leading lawyers

Ricardo Indacochea
Mariana Pereira N

Mendieta Romero & Asociados

Gonzalo Mendieta Romero holds a special distinction among Bolivia's lawyers as a talented young attorney with senior statesman potential. With a strong academic background at the Bolivian Catholic University, peers say Mendieta's reputation as an adept arbitrator belies his mere ten years experience in the market. "He is quite active in market," one rival says, "and my impression is that he's a very clever lawyer."

In December 2009 Mendieta advised long-standing client and Glencore subsidiary Sinchi Wayra in acquiring an interest in the mining company Sociedad Minera Metalúrgica Reserva for approximately $5 million. Mendieta also represented Sinchi Wayra last year in the nationalisation of an antimony smelting operation in the Potosi department of south-western Bolivia.

Leading lawyers

Gonzalo Mendieta Romero