

LATIN LAWYER REFERENCE MERGERS AND ACQUISITIONS 2020

Panama

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MARCH 2020

1 Has the level of M&A activity slowed, increased or remained flat in 2019 as compared to 2018, and what are conditions like today? In general terms, what level of activity is foreseen for 2020? What are the factors influencing the level of M&A activity – Economic? Political? Commodity prices? Weakness in currency? Stock market performance? Liquidity? Rule of law? Other?

According to the International Monetary Fund, the Republic of Panama remains among the most dynamic economies in Latin America and, as a key regional financial and business services hub (with a strategic location in Central America), it is expected to continue receiving significant investment inflows in the near term. In 2019, the Economic Commissions for Latin America and the Caribbean (ECLAC/CEPAL) announced that Panama received 51 per cent of the foreign direct investment (FDI) in the region. In 2018, FDI in Panamá grew 36.3 per cent and represented the amount of US\$46.578 million, positioning the country as the fifth recipient of FDI in Latin America and the Caribbean. Not surprisingly, M&A activity in Panama has remained stable over the past few years across an ample spectrum of industries, with important acquisitions occurring in 2018 and 2019 in the retail, telecommunications and banking sectors. Recent notable transactions include, in the banking sector, the merger of Banco Aliado with Banco Panamá and Banvivienda with Global Bank, in the retail sector, Corporación Favorita's public tender offer which resulted in the acquisition of 73 per cent of Grupo Rey and the purchase of a majority ownership in Ricardo Perez, SA, by ITOCHU Corporation. The telecommunication sector had various notable transactions such as the acquisition by Millicom of Cable Onda, SA and Telefonica's wireless network operator Movistar (Panamá).

In general terms, we expect M&A activity to continue in these and other sectors of the economy such as mining and energy, as Panama's ongoing GDP growth (in contrast with economic turmoil in other economies of the region) continues to attract FDI into the country.

2 Which industries do you expect will see the most M&A activity in 2020?

In the near term, we expect M&A activity to continue to be distributed across several industries, lead most likely by the traditional financial services (including banking) and telecommunications, media, and technology (TMT) sectors, followed by logistics, transportation, and distribution.

The growth of the banking and TMT sectors is largely due to the maturity of the Panamanian banking sector and the rapid changes in the TMT industry, respectively. In these sectors, we have witnessed many important deals, including the sale of Movistar and Cable Onda to Millicom in 2019 and new legislation approved in 2018, which allows for additional consolidation in the mobile phone industry with cable TV operators.

We also expect M&A activity to pick up in the retail trade and hospitality sectors to be the target of M&A activity, as the former experiments increased competition and weak demand and the latter is perceived ripe for consolidation given an oversupply in hotel room occupancy.

3 What types of deals do you expect to see?

We expect to see a higher level of outright acquisitions, followed by mergers, minority investments, and a few joint ventures. Outright acquisitions have historically been the leading type of M&A deal, and we expect that trend to continue, specifically in the banking and TMT sectors. However, in 2020 we expect to see an increase in joint-ventures in the food and retail industries, driven both by internal market-size limitations and increased industry-wise competition.

4 Discuss the level of M&A activity you have seen over 2019 and expect to see in 2020 of: (i) pure domestic deals; (ii) deals in your jurisdiction involving a domestic target and foreign acquirer from Latin America, or a foreign acquirer from outside Latin America; and (iii) deals involving a domestic acquirer and foreign target in Latin America or a foreign target outside Latin America.

The majority of M&A transactions in recent years have been in deals involving a domestic target and a foreign acquirer from Latin America, Europe or the United States. The Inter-American Development Bank estimates that Panama's GDP in 2020 will be 5.5 per cent as the national economy continues to recover, which will continue to make local companies more attractive targets for acquisitions. But given the high-level of acquisitions of domestic targets by foreigners in the last years, and the limited opportunity for internal growth due to Panama's market size limitations, there might be some decline in the number of outright foreign-led acquisitions across some sectors.

While we expect this trend to continue and that most of the M&A transactions taking place in 2020 will likely involve a domestic target and a foreign acquirer from Latin America, Europe or the United States, purely domestic deals activity across industries should not be understated, as local companies seek to consolidate to better compete amidst increased competition from new market entrants (usually large multinationals), or look to merge in order to position themselves as a viable targets for further acquisitions. Less frequent are deals involving a domestic acquirer and a foreign target in Latin America or outside of Latin America.

5 What is the level of private equity activity? Are domestic or international funds involved? What kinds of deals are they doing?

The level of private equity activity in Panama is increasing, although still a small percentage of total M&A activity in Panama given the size of the market. In recent years international private equity funds have been investing in Panama in certain specific industries, principally in the energy, mining, and hospitality and services industries. Although private equity interest in Panama remains high, many deals in other sectors fail to perfect given the potential returns vis-à-vis the relatively small market size.

6 Is acquisition financing available for deals? Where is financing coming from? How much concern do you have that an increase in interest rates or risk of a recession will limit the availability of financing?

Acquisition financing is available for deals in Panama, and domestic financing for deals, particularly for asset-backed purchases, are on the rise. In 2015, Moody's (Baa2), Standard & Poor's (BBB) and Fitch Ratings (BBB) assigned Panama an investment-grade rating, which has since upgraded by Moody's (Baa1), Standard & Poor's (BBB+) and Fitch Ratings (BBB). Coupled with its internationally recognised banking centre, a robust and well-regulated securities market, and the use of the dollar as legal tender that eliminates currency exchange risk for investors in developed countries, Panama is an important hub for financial services, including acquisition financing. However, given that most M&A activity involves foreign investors looking to acquire a domestic target, it is often the case that such foreign investors have secured their acquisition financing abroad, although we are seeing an increased willingness and participation of domestic banks in the financing of M&A deals.

7 How open is your country to investments and acquisitions by foreign buyers? Is there a level playing field when foreign and domestic bidders compete to buy the same domestic target company?

Generally, there are no restrictions to foreign ownership in Panama. In addition, Panama does not have a central bank, nor does it have any currency controls or restrictions on the free flow of capital into and out of the country. As a result, foreign direct investment continues to be a principal driver of M&A activity, with most of the larger mergers and acquisitions in the past decade have been by foreign buyers in a wide range of local industries.

Due to issues of national security and national interest concerns, however, ownership of local companies by foreign governments or nationals is restricted in certain industries including aviation, radio and TV, and retail trade, with some exceptions. Nonetheless, there is generally a level playing field when foreign and domestic bidders compete to buy the same domestic target company.

8 Are corruption and compliance concerns affecting M&A activity? Are there industries where this is a particular issue?

At a macro level, studies conducted by non-governmental organizations have generally concluded that government corruption, and negative perceptions of such corruption, have an impact on overall levels of FDI in a country. Although difficult to measure, Panama is no exception to this general rule. Corruption scandals and the reintroduction of Panama in the FATF's grey list and its introduction in EU tax haven blacklist have likely impacted the overall level of FDI in Panama, and consequently, have manifested themselves in M&A deals through greater scrutiny by foreign buyers at the due diligence stage in regards to sellers' disclosure on reporting requirements, violations or compliance with regulatory permits and licences, and adherence to anti-corruption regulations. In heavily regulated industries, foreign buyers are also increasingly requiring that sellers divulge (and that their local attorneys inquire about) the process by which permits and licences were initially obtained by the target company. During the contract negotiation stage, foreign buyers are insisting on including more FCPA, OFAC and related statute-specific reps, even when such compliance concerns are not shared by local sellers and specific corruption-related reps are not typically found in local law agreements.

Moreover, owing to recent corruption scandals, certain regulatory authorities in the energy, telecommunication, securities, and banking sector have taken extra precautionary actions that have impacted M&A transactions in regulated sectors.

9 How big a part of M&A activity is the restructuring of financially troubled companies? Have you seen more of this in 2019 as compared with 2018? What are the prospects for 2020?

The restructuring of financially troubled companies has not been a large part of M&A activity in Panama in recent years. However, we have seen an increase in 2019 as compared to 2018, and anticipate further increases in 2020, as heavily leveraged and cash-strapped distressed targets look to sell off assets via asset purchase agreements to avoid Panama's generally untested reorganisation and bankruptcy laws.

10 Does your country's bankruptcy law permit the reorganisation of the debtor as a going concern, and the acquisition of the entity out of bankruptcy? Are you seeing much activity in this area?

On 9 May 2016, a new insolvency law was enacted and entered into force on January 2017, which allows for reorganisation of a financially troubled company as a going concern, with the aim of further protecting good faith debtors, and further consolidating and regulating the disparate, outdated and limited bankruptcy statutes dispersed throughout our civil and commercial codes. The new law establishes the necessary elements to go forth with a reorganisation proceeding, to protect the credit and the survival of any business in difficulties. In practice, the probability of an acquisition of a Panamanian entity out of reorganisation or liquidation is not likely, and to our knowledge, there has not been any relevant such acquisition since the enactment of the new insolvency law.

11 Has there been any increase in public company M&A?

No, a public tender offer involving a public company in Panama is exceedingly rare, with one notable exception: in January 2019, the first successful public tender offer (OPA) pursuant to the Panamanian securities laws was made in approximately 10 years, in one of the most recent innovative transactions. Pursuant to such tender offer, Corporación Favorita acquired 73 per cent of Grupo Rey's equity, one of the leading supermarket chains in Panama.

12 How well protected are minority shareholders in public companies? What recent developments have there been as relates to independent directors, special committees, independent advisers, fairness opinions?

Panama has few statutory protections for minority shareholders. Some regulated industries (such as the financial services sector) require independent directors and the implementation of special committees, such as audit committees, however, there have not been a significant new development in these areas. In practice, and where possible, minority investors should seek the protection of their rights, in both public and private companies, through carefully negotiated shareholders' agreement. In addition, Law 56 of 2017 requires the appointment of women to the board of directors of government institutions, government-owned companies, financial intermediaries and certain regulated companies, among others, in percentages that increase annually from 2018 (10 per cent) to 2020 (30 per cent).

13 Has there been any increase in shareholder activism and hostile takeovers? Are international hedge funds active in your market? What defences are target companies permitted to adopt?

We have not perceived an increase in hostile takeovers or shareholder activism in Panama. However, in 2019 there was one notable exception: the creditor of a controlling shareholder of a Panamanian holding company listed in the NYSE and other foreign stock exchange undertook remedial measures upon breach by such shareholder. These measures consisted in the appointment of an independent third party that would indirectly exercise the voting rights of such majority voting shareholders in the listed company.

That said, given the limited local precedents on hostile takeovers, defensive arrangements that may be implemented by target companies have not been thoroughly explored or developed.

14 Have directors, management and controlling shareholders changed how they conduct themselves in M&A deals? What kind of fiduciary duties do directors, management and controlling shareholders have under the laws of your jurisdiction? From your experience, are directors, management and controlling shareholders more diligent today in their review of M&A transactions and other matters?

Yes, in general terms, the board of directors and top management of operational Panamanian companies, and especially those in regulated industries, have become significantly more professional and sophisticated, and are therefore more likely to be concerned about issues like negative publicity, shareholder criticism, regulatory pressure and liability from potential litigation, whether or not in the context of an M&A transaction.

It is also worth mentioning that the influx of foreign and strategic buyers to Panama has brought with it a wealth of managerial expatriate talent over the past decade. Consequently, over this same period, Panama has also seen a modest rise in the number of international directors serving on local corporate boards, adding wealth and diversity of experience and backgrounds to the companies they oversee. The unprecedented level of growth experienced by Panama in the past decade has coincided with a rise in the number and sophistication of “family offices”. These family offices increasingly rely on a professional cadre of managers and independent directors to oversee the diverse and significant investments of these family-owned investment vehicles.

15 Should directors, management and controlling shareholders be more concerned today about negative publicity, shareholder criticism, regulatory pressure, shareholder lawsuits and liability from potential litigation?

Yes. Following an era of unprecedented government corruption and the global scandal publicly known as Panama Papers, the recent administrations have attempted to erase public perceptions of entrenched corruption and lack of action against money laundering activities, respectively, and bringing to justice those accountable for mismanaging public finances and amending its laws to strengthen the fight against money laundering. Consequently, Panama is also experiencing an unprecedented period of regulatory scrutiny across all industries, coupled with a new sense of purpose and urgency by civil society and watchdog groups. In that context, management and controlling shareholders are, and should be, more concerned today about negative publicity, and particularly, due compliance with regulatory and licensing issues, and transparency in both private and public transactions.

16 Are there major differences in how domestic and cross-border deals are being conducted? For instance, does the type of purchase agreement used in your jurisdiction differ significantly from the international style of agreement? If so, which type is being used more often?

There are still notable differences in how domestic and cross-border deals are conducted. The type of purchase agreement used in Panama depends a great deal on the nature of the transaction. If the transaction involves a domestic acquirer and a domestic target, it is very likely that the purchase agreement will be a far simpler document than a purchase agreement used when the acquirer is a foreign investor. The differences are mostly reflected in the amount and scope of the representations and warranties, and the affirmative and negative covenants, which tend to be more comprehensive in international-style purchase agreements.

The size of the transaction will also have a bearing on the type of purchase agreement that is finally used. As a general rule, foreign investors tend to feel more comfortable using international-style purchase agreements, most often governed by New York law and using both New York counsel and Panamanian counsel in its drafting and negotiation. Cross-border deals driven by foreign strategic investors usually have longer survival periods for indemnities and more prevalent use of escrow agreements. Given that there are a larger number of transactions involving foreign acquirers, the international style of the purchase agreement is being used more often.

17 Have there been changes in the process for how M&A transactions are conducted in your jurisdiction?

No specific changes have taken place in Panama in regard to how M&A transactions are conducted. Business combinations in Panama are typically structured as share or asset purchases, tender offers or mergers, but other structures can also be used. One example is the capitalisation of shares of two operating companies to a holding company incorporated for that purpose with joint participation in the holding company. In the case of publicly traded companies, combinations usually involve a two-step process that begins with a tender offer (either for shares, cash or a combination of both) followed by an actual merger.

18 How level is the playing field for domestic and international bidders?

It is widely perceived that domestic and international bidders have a level playing field in local M&As. However, domestic buyers usually tend to have a greater tolerance than international buyers for risk surrounding tax and labour matters in M&A transactions, due to their familiarity with these issues, but this isn't usually a deciding factor that could give them an edge over international buyers. M&A transactions are usually determined by the price and the certainty of closing.

That said, foreign buyers are advised to build-in additional time and efforts in managing the due diligence process with domestic sellers, in order to ensure a smoother process surrounding disclosures, particularly when dealing with the purchase of family-owned companies.

19 For international buyers and investors looking at deals in your jurisdiction, what are the three most important pieces of advice you have and what are the three most important pitfalls that should be avoided?

As must be the case for most jurisdictions, the three key things that potential buyers and investors in Panama should do are:

- to acquaint themselves as much as possible during the early negotiation stages of any possible acquisition with the target company, the industry in which it operates, and the legal and any regulatory requirements within the industry in which the target company conducts its business;
- upon the progress of the negotiations, to conduct a thorough due diligence exercise in respect of the target company (legal, financial, labour, licences, corporate, etc) and try to have it take place onsite as much as possible, limiting the amount of information exchanged online via virtual data rooms; and to obtain feedback and information from local sources and make sure to get the best local professional advice possible (both legal and financial, including tax).

20 Have there been any significant regulatory developments affecting M&A – your country's securities exchange commission, antitrust regulators, tax authorities, Central Bank, other regulators that review deals etc?

Buyer and sellers must be aware that the local tax authority has recently ramped up audit and enforcement of the capital gains tax, particularly in high-profile transactions. With Panama's coffers suffering a decline in tax receipts, the Panamanian tax authority has also shown a tendency in recent years to review and sometimes conduct a full tax audit of local targets, usually upon the announcement of signing or closing of a deal. Recently, the National Assembly enacted Law. No. 70 dated 21 January 2019, which modifies the criminal code and sanctions as a crime the act of tax evasion in excess of US\$300,000.

Where consolidation is taking place in certain industries (commodities, retail), the antitrust regulator has also shown a willingness to take a closer look at purely local deals involving (ie, where the buyer normally does not have presence in the country, such antitrust regulatory scrutiny is less of a concern) buyers to seek greater protection on tax representations and indemnities.



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Andrés N Rubinoff is a partner of the firm regularly advising clients on M&A transactions, having participated in some of the largest and most relevant ones recently taking place in the country. Recent transactions worth mentioning include: counsel to Grupo Rey in the sale of 73 per cent stake in Rey Holding Corp to Corporación Favorita; counsel to United Continental Holdings, Inc on a two+ year-long complex joint venture deal with Colombia-based Avianca Holdings and Panama's Copa Holdings; represented the shareholders of Cable Onda in the sale of 80 per cent of Cable Onda to Millicom, counsel to Assicurazioni Generali in an asset sale agreement with respect to its Panamanian operations to ASSA Compañía de Seguros; counsel to Inchcape in its acquisition of Grupo Rudelman. Prior to joining the firm, Mr Rubinoff worked as an associate with Greenberg Traurig, PA in Miami. He also worked as a senior research associate for the Corporate Executive Board Company, Washington, DC. Mr Rubinoff has a JD from the University of Miami School of Law, and a bachelor of science from Georgetown University. He is admitted to Panama and Florida.



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Mr Yap Endara regularly advises clients on M&A transactions, having recently participated in the sales of Cable Onda (main telecom provider), Grupo Rey (leading supermarket chain), Assicurazioni Generali (Panama Branch) (local leading insurer), Suzuki distribution and Bonlac (leading beverage company). He regularly advises United Airlines as creditor to Avianca's majority shareholder. He has also participated in the financing of major infrastructure works, including local ports, airports and a subway.

Mr Yap Endara has been actively engaged in the development of the new FinTech industry in Panama, as technology is redefining the financial services sector worldwide.

He has been an adjunct professor of banking law at the Universidad Católica Santa María la Antigua and has lectured at the University of Panama. Prior to joining the firm, Mr Yap Endara worked as a pupil at barrister chambers in London. Mr Yap Endara has a bachelor of laws from Santa Maria La Antigua University, an LLM from University of Cambridge and a master's in public policy from Blavatnik School of Government, University of Oxford.



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