
THE MERGERS & ACQUISITIONS REVIEW

FIFTH EDITION

EDITOR
SIMON ROBINSON

LAW BUSINESS RESEARCH

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THE MERGERS & ACQUISITIONS REVIEW

Fifth Edition

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EDITOR'S PREFACE

After a prolonged period of uncertainty and decreased M&A activity, deal-making is undergoing something of a resurgence. Over the course of recent years, corporations across the world have been carefully navigating the economic downturn and attempting to consolidate their positions. In 2011 the market has proved more conducive to M&A and, at least in the first half year, confidence seems to be returning. Opportunities are seemingly limited to those companies and private equity houses that enjoy a stable financial basis. Governments have addressed the perceived failings of the regulatory framework and, for the most part, reforms have now been implemented. One of the underlying reasons for the drop in M&A was the drought of acquisition finance; without the necessary funding, few players were able to launch major takeover bids. However, the loan market appears to have gained a new lease of life and banks are adamant that they are willing and able to fuel well-conceived bids. The task that lies ahead of companies and funds is identifying truly value-generative targets and negotiating the new regulatory framework. There is increased emphasis on the views of shareholders following the financial crisis, and companies are best advised to gauge shareholder sentiment early. The provenance of M&A is undergoing a gradual shift, with deal-making in the Asia-Pacific region reaching its highest-ever level in 2010 and also representing its highest proportion of the total global value of M&A. In addition, the emerging markets are witnessing heightened deal activity, in particular the BRIC nations. These trends seem set to continue.

It would be premature, however, to suggest that M&A has completed a Lazarus-like revival. The recovery of deal-making is in its infancy and it is still highly susceptible to external forces. A number of major political and economic factors may impede sustained M&A activity, and could even force it to retreat. The sovereign debt tribulations in Europe, the weakening of the US economy, the 'Arab Spring' uprisings, the earthquake in Japan, rising commodity prices and global austerity measures all pose severe challenges. Given the fragile state of the global economy, such issues could well shackle the fledgling M&A revival. In short, economists remain uncertain about the health of M&A, and

although many commentators hope that it will continue to gather pace, albeit slowly, there are a number of variables that may waylay deal-making. Economists have not ruled out short-term stagnation in deal value and volume, as a precursor to the dawning of an M&A renaissance further down the line.

I wish again to thank all the contributors for their continued support in producing this book – one would hope that in this uncertain time the following chapters should provide cause for cautious optimism, while also reiterating some of the lessons from the recent lean years.

Simon Robinson
Slaughter and May
London
August 2011

Chapter 8

ARGENTINA

*Pedro Iván Mazer**

I OVERVIEW OF M&A ACTIVITY

Mergers & Acquisitions involving Argentine targets for 2010 and Q1 2011 amounted to more than \$25 billion, thus setting a record high. The foregoing is due mainly to the worldwide significant growing interest of investors in commodities, and to Argentina's impressive recovery from the crisis that it suffered right after the turn of the century. Within such context, Argentina's mainly commodity-based economy suffered only slightly the impact of the 2008 global financial crisis. This should not come as a surprise because the Argentine financial system that has been rebuilt in the aftermath of the 2001 crisis is strong, with almost no exposure to the types of products that created the financial crisis, and the Argentine new-Keynesian economic model is leveraged on consumption rather than credit.

Most of the relevant recent transactions took place within the oil, gas, power generation and mining sectors, which have welcomed new players that, in the aggregate, accounted for approximately 75 per cent of the amount of Argentine M&A transactions in 2010 and the first quarter of 2011.

Statistics show that Chinese companies, mostly state owned, have recently invested heavily in oil and gas assets, accounting in the aggregate for approximately 50 per cent of the amount of all 2010 and 2011 first quarter Argentine M&A transactions, while Canadian companies invested aggressively within the mining sector, accounting in the aggregate for approximately 15 per cent of the amount of all 2010 and 2011 first quarter Argentine M&A transactions. The Chinese have also shown interest in other areas such as port infrastructure, agribusiness and farming, and the rail network that are expected to create new inflow of transactions for the second half of 2011.

The figures pertaining to Chinese investments in 2010 are in large part related to Chinese giants CNOOC's (China National Offshore Oil Corporation) and Sinopec

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Group's (China Petrochemical Corporation) acquisitions of control or negative control in Pan American Energy Argentine Branch, and the Argentine assets of Occidental Petroleum, respectively. Canada's investments are scattered among several mining firms, but the deal that tapped the mining market was Goldcorp's acquisition of the Cerro Negro gold and silver mine from former Australian owners.

As to manufacturing and services industries, recent M&A investments in those areas have been characterised by Argentine investors taking the lead, who have become more entrepreneurial as a result of a consumption boom and the high revenues derived from exports of commodities. Some of the sectors other than the agribusiness, mining, energy and oil and gas that are receiving significant investors' attention are infrastructure, construction, clean energy, biofuels and wineries. Within this latter field, one of the remarkable investments has been Grupo Bemberg's two-tranche acquisition of Grupo Peñaflores, which exports wines to more than 80 countries.

The financial sector has not seen much movement lately, but there have been a few outstanding deals, such as Banco do Brasil's acquisition of a controlling stake in Banco Patagonia from former Argentine controlling shareholders, and Banco Itau's acquisition of Banco Comafi. As to Argentine banks it is worth mentioning the acquisition of Banco Privado by Banco Macro.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A transactions are mainly governed by the Argentine Commercial and Civil Codes, and the statutes related thereto.

Deals generally comprise assets or stock. Regardless of certain technicalities, we may say that, for legal purposes, at least when it comes to representations and warranties regarding indemnification provisions – which is the key issue in transactions of this nature – significant M&A transactions (generally adopting the form of mergers, stock purchase agreements, bulk assets sale and purchase agreements¹ and like agreements) may be assimilated to sale and purchase agreements.

Within such legal framework, M&A agreements involving closely held companies do not count with a specific regulation as to representations and warranties vis-à-vis indemnification provisions other than the generic regulation for sale and purchase of

1 Bulk assets purchase and sale agreements are regulated under a specific law (Federal Law No. 11,867, also referred to as the 'Transfer of Goodwill Law') contemplating liabilities vis-à-vis indemnification, but our analysis will overlook such law since the procedure provided thereunder is optional, and not very much used when it comes to significant transactions. Such a procedure comprises (1) publication of the main features of the deal in both the Official Gazette and a regular newspaper; and (2) a time limit for creditors to oppose to the deal. Once the opposing creditors have been satisfied or given adequate guarantees, and the deal has been closed, the purchaser is no longer liable for contingent liabilities arising after the time limit for opposition of creditors.

goods and assignments of rights.² The regulations related to M&A agreements involving public companies do not differ, for practical purposes,³ much from regulations applicable to closely held corporations.

In fact, the prevailing experts' opinions and case law⁴ tend to agree that, in principle,⁵ a plain stock purchase agreement containing no express representations and warranties cannot be regarded as comprising any seller's implied representations and warranties other than those related to the seller's ownership in the relevant stock and lack of liens and encumbrances thereto. For instance, in such a case there would be no implied representations as to conformity of the net worth of the targeted company with the information reflected within the company's financial statements. However, we must take into consideration that the foregoing is not a conclusive matter, since some minority case law⁶ considers that when M&A agreements contain provisions expressly indicating that the deal comprises a certain specific stock stake, then it should be deemed that the transaction was closed under certain implied representations as to conformity between the target company's financial statements and its net worth.

Experience indicates that in a scenario where only very few or 'soft' express representations and warranties are made, the complex nature of the contingent liabilities arising after the closing of the transaction will determine that indemnification claims based upon breach of the representations will in most cases⁷ be challengeable with sound grounds. An example of a soft sole representation that could be challenged could be the following: 'the financial statements of the Company that have been closed as of [date] accurately reflect in all material respects the financial situation and liabilities of the Company as of such date'. Thus, M&A agreements containing few or soft express representations and warranties, or both, tend to constitute insufficient protection for the party benefiting from the relevant representations and warranties.

In light of the foregoing, when negotiating M&A agreements comprising Argentine targets, it is advisable to: (1) demand thorough, extensive and detailed representations and warranties from the other party on the whole array of subjects that may relate to contingent liabilities; and (2) make sure that the representations and warranties are adequately linked to enforceable indemnification provisions.

2 There is a debate among experts on whether the transfer of stock ought to be assimilated to a purchase and sale (since it involves the delivery of the share certificates) or an assignment of rights (for ownership to the relevant share certificates is inextricably related to shareholding rights).

3 The main differences when considering M&A that involve public companies as target is that when the transaction involves the acquisition of a stake of control or high influence (namely a stake in excess of 35 per cent of the voting power) of a public company, in some cases it will be mandatory to launch a tender offer in the form of a takeover bid.

4 *Rocha, Ramón et al v Puente, Osvaldo*, CNCom, Sala C, 14-6-88.

5 That is to say, in absence of wilful intention.

6 Among other cases, *Corrales Francisco v De Rosso, Celestino Luis*, CNCom, Sala A, 18-6-93.

7 Among other cases, *Erosa, José O. et al v Marengo Di Moriondo, Eugenio et al*, CNCom, Sala C 16-12-97.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Argentine Law No. 26,425, enacted in December 2008, terminated the private pension funds system and created a state-run integrated social security system. This had an impact in the capital markets sector, as the private pension funds were the only substantial institutional investors in the capital markets of Argentina. As a result of this law, the equity held by the private pension funds in several Argentine listed companies was transferred and assigned to Argentina's Social Security Agency ('ANSES'), which became the most important institutional investor in Argentina.

Therefore, ANSES now holds substantial, though minority equity stakes at several companies⁸ listed at the Buenos Aires Stock Exchange. The government has expressed that it wishes to adopt a more prominent role at the companies where ANSES holds stock, and to use the ANSES 'excess' of liquidity to fund infrastructure investments, develop social security programmes, and subsidise loans to small and midsize industrial companies.

In this respect, lately some of Argentina's publicly held companies have been challenging what they regard as government's increasing intervention and official attempts to gain influence in their decisions. In addition to the ongoing three-year old conflict between the government and the big media corporations, a sour dispute has recently arisen between giant steelmaker Siderar and the government, when a Siderar dividend payment was blocked by a judge after a series of incidents that critics linked to the government's campaign to tighten influence over leading companies.

As a result, a 2010 dividend payout of approximately \$360 million did not go out as planned by the company, which had seemingly intended to ignore a ruling by the stock market controlling authority that effectively annulled the payment by holding a shareholders' meeting as void. In addition, the recently appointed intervening judge argued Siderar was not entitled to pay dividends using funds from reserves that had been set aside for future dividend payments. Whatever the merits of that argument, the judge's action was construed as a victory for the government, and Siderar promptly appealed against the ruling.

The dispute erupted after the government passed Decree No. 441/11 to eliminate a rule that had limited the state to exercise no more than 5 per cent of voting rights on company boards, even when its stakes were greater. In the case of Siderar shareholders' meeting, at the time of execution of the Decree, the shareholders' meeting had already been called and the period for depositing the shareholders' stock with Siderar's board for shareholders who intended to attend the meeting and vote had already elapsed. Even though ANSES had only deposited a 5 per cent stock stake to vote at the meeting, in light of the above mentioned Decree, it intended to vote with all of its stock (registered and unregistered for the meeting), which was denied by the board and the majority's shareholders. In such respect, ANSES also nominated a representative to be appointed at Siderar's board, a move that was opposed by the controlling shareholders.

8 ANSES currently owns equity stakes in 42 companies (in 32 of such companies ANSES's stake exceeds 5 per cent of the capital stock and voting rights).

Certain rumours say that if the official party wins the October 2011 presidential election, it will pursue new measures to gain higher influence at the boards of companies where ANSES holds the right to appoint at least a regular member.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The drivers behind most of the recent M&A transactions in Argentina are related to a geopolitical strategy of acquisition of primary assets, which involves mainly oil, gas, minerals and agricultural commodities. Such strategy reflects a new world environment, where access to energy resources and food will be crucial.

In the oil and gas scenario, besides the large Chinese investments, state-owned companies from other countries (e.g., Statoil from Norway), and lately private companies such as Russia's Lukoil have shown a lot of interest in Argentine oil and gas assets too. Such a significant interest is also fuelled by reports issued by the US government indicating that Argentina has the third largest reserve of tight gas and shale gas in the world.

A lot of foreign interest can also be seen in the agribusiness field, where lately Chinese companies have begun to show interest. As an example, Heilongjiang Beidahuang Nongken Group Co, China's biggest farming company, has recently announced that it plans to invest \$1.5 billion to develop 300,000 hectares of land that are not being farmed, and expand a port in Argentina's southern region. Also, Los Grobo, one of Argentina's leading agribusiness companies, is launching an IPO in Brazil, and the significant amount of requests it has received from potential investors has led this company to evaluate an early termination of the road show.

Another hot spot for M&A investments is the Mendoza wine region, which keeps growing in reputation and has seen many success stories. Europeans⁹ have invested continuously in that area during the last few years, and together with the Argentines they have transformed the Argentine wine markets, with the malbec variety as a worldwide rising star. The most relevant transaction within this field during 2010 was not performed by Europeans, but instead, it was Argentine Grupo Bemberg's acquisition of Bodegas Peñaflor in a two-tranche transaction that comprised more than \$500 million in aggregate.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Among the larger transactions that have recently taken place in Argentina was China National Offshore Oil Corporation's ('CNOOC') acquisition of control or negative control in Argentine based oil and gas company Pan American Energy ('PAE'), which is an important player within the upstream industry. The acquisition was performed through two unrelated tranches. The first tranche relates to a transaction of \$3.1 billion

9 Such as for instance the 'Clos de los 7' joint venture of worldwide famous French winemakers, and 'Salentein' an Argentine winery owned by Dutch owners, that has come to a very prestigious position within the Argentine market.

involving the acquisition of a 50 per cent stake in Bidas Energy Holdings, a company owning a 40 per cent stake in PAE, while the second tranche relates to Bidas Energy Holdings' \$7.059 billion acquisition of the remaining 60 per cent stake in PAE from British Petroleum, who had to sell those shares after the 2010 Gulf of Mexico oil spill.

Another Chinese state-owned company that performed a large acquisition was Sinopec Group, which purchased all of Occidental Petroleum's Argentine assets in a share transfer deal worth \$2.450 billion. This is also a deal related to the oil and gas upstream sector, which has lately seen a lot of M&A action, in light of rumours that changes to the regulatory framework should come soon. Another reason for such a noticeable interest in Argentine oil and gas resources is that Argentine players in the upstream market have conducted very few exploration projects during the last decade, while experts calculate that Argentina has substantial reserves that may be easily turned into productive areas due to new technologies. For instance, renowned international oil and gas consulting firms have recently issued reports stating that Argentina is expected to have one of the largest reserves of shale gas and tight gas in the world.

As to the oil and gas downstream industry, CNOOC, in one more move of Chinese purchasing power, has agreed to buy all of Exxon Mobil Argentine refining assets and gas stations under the ESSO brand for approximately \$800 million, which will turn CNOOC into a fully integrated player within the Argentine oil and gas market.

Other Chinese investment in Argentina that was announced during 2010 relates to plans for allocation of a substantial investment to the country's rail network and the possibility of the participation of China Railway International in the construction of a new underground railway line in Buenos Aires, with Eximbank China financing.

There have also been substantial transactions in the mining sector, including Canadian firm Goldcorp's acquisition of the Cerro Negro gold and silver mine located in Santa Cruz (southern Argentina) for an amount of \$3,400 million. However, in light of recent discoveries, the rising stars for mining investments are the lithium mines located at the north-west of Argentina, due to the great value of lithium for the IT industry.

Other sectors such as banking and finance, malls and supermarkets, and wineries have also seen substantial M&A, but those deals are easily outsized by the large figures of the oil, gas and mining deals.

This new wave of M&A investments in Argentina has different characteristics to prior M&A investment waves:

- a* During the last several years, Argentine M&A used to be focused on the manufacturing industries, and on the services industries (such as financial and insurance), while now oil, gas and mining transactions, jointly comprise approximately 75 per cent of the aggregate value of Argentine M&A.
- b* The new players involved in oil, gas and mining transactions are in many cases making strategic purchases, with a long-term view rather than aiming at obtaining an interesting ROI ratio in the short term. As a result of the foregoing, the historical sources of foreign investments in Argentine M&A targets (US and Spain) have lost substantial ground to other non-traditional players, which may be explained in part by how the 2008 financial crisis has impacted some countries more than others. Additionally, Asian countries' increasing economic interest in natural resources-rich Argentina is mainly based on practical goals of opening new markets and guaranteeing a supply of necessary input as their political strategy.

- c Lately, it is also common to see mezzanine financing or two-tranche acquisitions involving call options, when the new players wish to obtain further insight from the target business prior to actually completing an acquisition.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

After the 2001 economic crisis in Argentina, most Argentine M&A deals have not been leveraged upon traditional credit, since domestic interest rates are high. In fact, the whole Argentine economy is not leveraged on credit. Hence, some important buyouts that took place during recent years have been leveraged on funds from sources different than traditional credit.

Acquisitions worth several hundred or thousand million dollars are generally beyond the range of purchases performed by private equity funds and are usually financed abroad. Most Argentine private equity acquisitions are financed directly by the foreign limited partners. Private equity funds sometimes provide leverage to the purchaser to pay the purchase price or to carry out post-money investments to expand the business of the target company. Domestic IPOs and debt issuances are also a way of obtaining financing for companies to invest in new ventures, within a tax efficient framework. International IPOs and debt issuances are also a way of obtaining financing for companies and funds to invest in Argentine companies, such as for instance, the case of Adecoagro's recent NYSE listing.

In any case, another relevant factor to the financing of transactions in the Argentine M&A arena is that Argentine exporters of agribusiness commodities collect revenues that grow steeply from year to year, thus deriving liquidity that needs to be reinvested and fuels investments in other areas.

As a consequence of the foregoing, despite the lack of sufficient credit from Argentine financial institutions, in Argentina the aggregate investment is in a range of approximately 23 per cent of the gross domestic product. Such a rate is not bad, but it will probably turn out to be insufficient to maintain an annual GDP growth in the range of 8 per cent for much longer.

Some private equity funds are also looking into investing in mezzanine debt rather than in equity. This kind of investment provides attractive risk-return ratios and allows pre-defined exit upon loan amortisation, or even conversion into equity upon certain conditions. It may also be combined with options for equity-debt swaps. In Argentina this figure is currently facing certain regulatory restrictions, but upon adequate structuring it may be used within the applicable legal framework.

At the end of 2010 and the first quarter of 2011, we saw more interest from private equity funds looking for 'value', as compared to other Latin American countries, such as Brazil.

VII EMPLOYMENT LAW

Employment relationships in Argentina are generally governed by different Labour Laws (particularly by the Employment Contract Law, as amended; 'ECL'), collective bargaining agreements ('CBA') and the individual terms of labour contracts entered into between employers and employees. Pursuant to the ECL, employees are entitled to all the benefits set forth in the Argentine Labour Laws and in the applicable CBA. These laws are considered as 'public policy'. Hence, their provisions may not be altered by any private agreement between employers and employees, unless such change provides the employee with better employment conditions. As a consequence thereof, labour and social security law contingent liabilities usually rank second (only after tax contingencies) within the amount of contingent liabilities generally arising from M&A deals.

Depending on the legal structure of a transaction, a purchase of assets or shares may result in the acquiring party inheriting labour law related liabilities of the acquired company.

When a transaction involves the transfer of the bulk assets of a company or part of them comprising a business division, the acquiring party must honour the labour conditions of the transferred employees (seniority, salary, working category, etc.). Thus, all the existing obligations are transferred to the acquirer and no agreement to the contrary can be enforced against the employee, even if such obligations are based on agreements existing or terminated at the date of the transfer of assets. Additionally, both the acquiring party and the seller could be jointly and severally liable for any labour or social security law infringement originated before and during the transfer.

Although Argentina has a Transfer of Goodwill Law providing for publications in the Official Gazette and a time limit for creditors to demand payment or guarantee to their credits, the procedure contemplated therein is not mandatory, and not very much used when it comes to large transactions. The reason for not relying upon the procedure is that it generally triggers undesired consequences, and, therefore, when the seller has a sound financial position, parties to M&A deals choose to rely upon representations linked to indemnification provisions. Therefore, it becomes crucial for the buyer to demand extensive representations and warranties from seller, and to make sure that the same are adequately linked to enforceable indemnification provisions.

On the other hand, when dealing with stock transactions, the purchaser shall still receive the indirect impact of any labour and social security law liabilities of the target company, since such liabilities shall directly impact the financial statements of the target company, and, thus, the purchaser's dividend or profits. Therefore, in the cases of stock purchases it is also necessary to seek adequate relief in respect to labour law related liabilities. The only way to achieve that is through extensive representations and warranties from seller, which must be linked to enforceable indemnification provisions.

Additionally, please note that when considering stock transactions, the labour conditions of the personnel (salary, working category, working day, seniority, etc.) may not be altered as a consequence of the transaction. The decision to acquire the target and the assessment of the appropriate price of the transaction must be based on a clear and full view of the target. In light of the foregoing, besides any representations and indemnification provisions to be agreed within M&A agreements, it is advisable to perform a thorough due diligence on all labour related matters prior to entering into

an M&A transaction. Such due diligence should comprise at least, verifying compliance with:

- a* the due registration of the personnel;
- b* the compliance of the regulations set forth in labour laws relating to:
 - employees' files;
 - labour books and related documents required under labour laws;
 - working day tables;
 - labour agreements;
 - salary receipts; and
 - labour terminations;
- c* the payment of employees' salaries and indemnifications;
- d* the adequate classification of employees;
- e* the occupational hazards obligations;
- f* the granting of employees' benefits; and
- g* the registration and compliance with labour laws related to the employees of the companies' contractors or subcontractors and to the personnel hired by contingent staff providers.

VIII TAX LAW

i Tax efficient deals: stock purchase v. assets purchase

Argentine M&A transactions adopt the form of stock purchase agreements more often than the form of purchase of bulk assets and business. The reason is that capital gains on the sales of stock are tax-exempt in those cases where the sellers are individuals or non-residents, while bulk assets purchases are, in principle,¹⁰ chargeable. Moreover, it is necessary to take into consideration that in the cases of bulk assets purchases, unless a 'transfer of goodwill procedure' is pursued to give the creditors a chance to oppose, the buyers are jointly and severally liable, along with the sellers, for contingent liabilities.

ii Comparison of tax effects in asset transactions and stock transactions

- a* When it comes to tax treatment the procedure is simpler in stock transactions, which do not entail substantial tax costs.
- b* In stock transactions, the tax losses and tax credits (other than income tax) of the target company are indirectly 'transferred' to the buyer. Assets deals do not comprise a transfer of tax losses from seller to buyer, except in cases of tax free corporate reorganisations.
- c* Also, in stock transactions, the target company's liabilities, including tax liabilities, are indirectly 'acquired' by the buyer. When it comes to asset deals (1) the business's non-assessed tax and social security liabilities are not transferred from the seller to the buyer if the notice to the Federal Tax Authority is performed prior to the

¹⁰ The exception is related to tax-free corporate reorganisation procedures that may be conducted pursuant to the Income Tax Law, its regulatory decree and certain ancillary provisions, when certain requirements are met.

transfer of the assets and if the Federal Tax Authority does not object within a certain period of time; and (2) the business assessed tax and social security liabilities are transferred to the buyer.

- d* In stock transactions, the buyer benefits from the depreciation terms of the target company's assets. As regards asset deals, the buyer depreciates the acquisition cost of the portion of the purchase price corresponding to the fixed assets and inventory, while the rest of the purchase price is regarded as goodwill of the buyer and, except for assets with a specified term of use, is not subject to depreciation.
- e* While in principle no step-up is applicable in the value of the underlying assets at stock deals, when it comes to asset deals a step-up could be applicable.
- f* If the acquisition is made by a foreign company or an Argentine individual person, the potential sale of the Argentine company's shares is exempt from Argentine income tax. In contrast, sale of assets is subject to income tax unless the sale qualifies as a tax-free corporate reorganisation.

iii Tax-efficient shareholding structures

In principle, dividends paid by Argentine companies are not subject to local income tax regardless of the shareholder's country of residence. Dividend distributions which have not paid income tax at a corporate level are subject to an equalisation tax, which applies when accounting profit exceeds leviable income at the corporate level.

However, the impact of equalisation tax, if any, can be minimised if the shareholders are residents of a country that has a double taxation treaty in place with Argentina. Currently, Argentina has 18 double taxation treaties¹¹ in force, which generally grant tax benefits to the foreign beneficiary generating Argentine income, such as those relating to withholding tax on the payment of dividends or interest. Those double taxation treaties also establish rules for determining the deductibility of interest payments for the domestic taxpayer. Some treaties even grant additional benefits related to net-worth tax.

If the foreign country levies capital gains and dividends received from abroad, an intermediate holding company resident at a different jurisdiction is sometimes used to defer such a tax, and also take advantage of a more favourable tax treaty with Argentina. However, double taxation treaties contain treaty shopping provisions that may restrict the ability to structure a deal in a way designed for the sole purpose of obtaining tax benefits.

iv Domestic branch of a foreign company

As an alternative to owning stock of an Argentine company, a foreign buyer may structure the acquisition through an Argentine branch of a foreign company. Argentina does not impose additional taxes on branch profits remitted to the foreign headquarters. Argentine branches and corporations are levied similarly at the federal and provincial levels. If the Argentine business is expected to make losses initially, a branch may be convenient, for,

11 With Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland and the UK.

subject to the tax treatment applicable at the company's headquarters jurisdiction, the losses may be set off with the profits of the foreign company at a consolidated level.

v Choice of acquisition funding

A buyer using an Argentine corporate vehicle to carry out an acquisition may fund such corporate vehicle with debt or equity. The advantages of debt are, among others, the potential tax-deductibility of interest for the Argentine entity, reduced withholding tax on interest payments, and deduction of exchange differences.

In the case of loans granted by foreign entities, thin capitalisation rules may apply to interest paid under such loans. However, most double taxation treaties include a non-discrimination clause under which thin capitalisation rules do not apply to interest payments made to the treaty's other party.

Where thin capitalisation rules apply, if the total amount of interest bearing liabilities exceeds twice the net worth of the Argentine borrower at the end of the fiscal period, the portion of interest that exceeds the foregoing threshold is not deductible for income tax purposes and is treated as dividends.

The tax impact of financing can also be reduced by using publicly placed financial trust notes or publicly placed debt notes, both of which may be tax-efficient if certain conditions are met.

vi Reorganising after an acquisition

Argentina's Income Tax Law provides for three different types of tax-free corporate reorganisation procedures: merger, spin-off or transfer within the same economic group. The law sets forth special provisions required to achieve a tax-free reorganisation in which the assets and tax status of a company may be transferred with neither income tax nor VAT, and, in certain cases, turnover tax and stamp tax.

For a merger or spin-off to qualify as a tax-free reorganisation under Argentina's Income Tax Law, and for the tax status to be assigned to the surviving company, the following conditions must be met:

- a* The owners of the previous company or companies must have held at least 80 per cent of their capital in the two years prior to the reorganisation.
- b* The capital participation existing prior to the reorganisation must be maintained for a specified time thereafter.
- c* The companies must have been conducting related business activities prior to the date of reorganisation.
- d* The same or related activities of the previous company must be continued for at least two years as from the date of the reorganisation.
- e* A sworn statement must be filed with the Federal Tax Authority.

When seeking a transfer within the same economic group to qualify as a tax-free reorganisation, the need of fulfilling related activities prior to the tax-free reorganisation, the requirement of conducting business prior to the tax-free reorganisation and certain capital requirements do not apply.

IX COMPETITION LAW

i General legal framework

The Argentine legal framework related to merger control is contemplated under Federal Law 25,156 (such law, as amended and supplemented, the 'Antitrust Act').

The Antitrust Act, which was enacted in 1999, introduced the merger control procedure and ordered the creation of the Tribunal for the Defence of Competition. However, the latter has never been constituted, and instead all antitrust matters related to the Antitrust Act, including mergers' control, are currently analysed by the National Commission for the Defence of Competition ('CNDC'), and later enforced by the Internal Trade Secretariat ('the Secretariat'), under the Ministry of Economy and Production.

Furthermore, Resolutions 40/01 and 164/01 issued by the Secretariat of Competition, Deregulation and Consumer Defence in 2001 supplement the Antitrust Act. In such respect, Resolution 40/01 reflects the 'Guidelines for Merger Control Filings', comprising the information required to be submitted to the CNDC for merger control, while Resolution 164/01 comprises the 'Substantive Guidelines for Merger Control', explaining the antitrust criteria for the analysis of merger transactions. Finally, Resolution 26/2006 of the Secretariat of Technical Coordination (a body later replaced by the Secretariat) regulates the requests for advisory opinions in merger control procedures.

ii Scope of mergers falling under the mandatory filing procedure

Merger control is exercised over any 'business concentration of enterprises', which must be construed as the acquisition of control over one or more companies, business units, going concerns or assets from which an independent turnover can be identified, by means of a merger, the transfer of a going concern, the acquisition of property or any share rights (where such acquisition gives the acquirer control or substantial influence over the enterprise) or any act or agreement that transfers to a person or economic group a decisive influence on the resolutions relating to the ordinary or extraordinary management of a particular business.

Section 8 of the Antitrust Act imposes a mandatory filing in terms such that business concentrations, must be notified to the CNDC when the aggregate yearly turnover of the involved parties (construed as including the acquirer¹² and the target or the merging parties, but not the seller) in Argentina exceeds 200 million pesos.

Mergers meeting the above threshold and not otherwise exempt under the Antitrust Act must be notified to the CNDC for its review before, or within a week of, the closing of the transaction. In such respect, there are no filing fees.

Section 10 of the Antitrust Act contemplates exemptions to the mandatory filing requirement as follows:

12 An acquirer must be construed as comprising the acquirer and its affiliates (companies controlling, controlled by, or under common control with, an acquirer).

- a* acquisition of firms in which the purchaser already holds control (even though the Antitrust Act does not make reference to control but to certain equity threshold, the applicable case law has clarified that such a provision must be construed as making reference to control);
- b* acquisition of a single enterprise by a foreign investor that does not own shares or assets in Argentina;
- c* acquisition of bonds, debentures, shares with no voting rights or certificates of indebtedness;
- d* acquisition of liquidated companies; and
- e* acquisitions of domestic business or assets with a price and value not exceeding 20 million pesos, unless in the last 12 months transactions were entered in the same market that, in the aggregate exceed this threshold, or 60 million pesos in the last 36 months.

iii Consequences of non-compliance with the mandatory filing – fines

Failure to notify within the mandatory required term may result in fines of up to 1 million pesos for each day of delay. Recently, the CNDC has imposed considerable late filing fines.

iv Court appeal

The parties to a transaction have the right to a judicial review of CNDC decisions forbidding the transaction or imposing restrictions. The scope of the judicial review is unrestricted, and the competent court in Buenos Aires is the Federal Court of Appeals in Civil and Commercial Matters, while in the case of each province the jurisdiction lies in the corresponding Federal Appeals Court. However, an appeal does not suspend the effects of the relevant orders or resolutions.

X OUTLOOK

Much has changed after the Argentinian economic crisis at the end of 2001. Argentina's small economy has quickly recovered, and now, helped by the tailwind of the increased price of commodities, the high economic interest of Asian countries and the recovery of the global economy, it seems to be on a right track. We have reason to believe that the tailwind will keep on blowing steadily for some time and that any party winning the 2011 presidential elections will take the measures that are needed to maintain the right track. Investors seem to agree, since private equity funds and state-owned companies are looking once again at what Argentina has to offer for business. We think that institutional investors, still a little sceptical will follow them for new investments.

For the past eight years or so Argentina has been following very simple rules conforming to a new Keynesian model: large public expenditure triggering consumption, thus generating full employment, combined in a circular way. The policy has resulted in annual GDP growth of 8 per cent on average (except for 2009, when figures are affected by the global financial crisis). All of it within a context of balanced public accounts (characterised by fiscal and trade surpluses), and solid financial markets. The foregoing has been possible in a considerable extent due to the rising prices of commodities, which

account for a substantial part of Argentina's surpluses despite the also growing public expenditures.

In such respect, the Argentine macroeconomics panorama for the following years seems favourable, since several of the most renowned financial institutions at a worldwide level are forecasting that prices of commodities (particularly when it comes to agribusiness commodities, and oil, gas and energy commodities) will keep on increasing at a steep pace. They say that the factors that fuel such an increase may be explained greatly by the fast rural migration to cities that is taking place in China, India and elsewhere in Asia.

Within such a scenario, several experts have indicated that relative values and terms of exchange of primary goods and services as we have known them during the last 60 years or so are starting to invert themselves so that they will end up being similar as they were at the dawn of the 20th century, when primary goods had a relative higher value than services (as compared to values at the end of the 20th century).

Therefore, we are of the opinion that things are on the right track in the Argentine M&A scenario, but the good news is that we believe that they will only get better.

Appendix 1

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Pedro Iván Mazer is a member of Alfaro-Abogados, a corporate and financial law firm from Argentina and one of the top mergers and acquisitions law firms in the country. Mr Mazer obtained his LLB degree at the School of Law of the Universidad de Belgrano in 1998 and was admitted in that same year to the Buenos Aires Bar Association. He has post-graduate degrees in Corporate Law (1999) and Oil and Gas (2003) from the Universidad de Buenos Aires, and a Masters in Business Law (2009) from the Universidad Católica Argentina. He speaks Spanish as a native language and is fluent in both English and Portuguese. His main areas of expertise comprise Corporate Law, M&As, Antitrust, and Capital Markets. He has participated in landmark cross-border M&As and multi-million dollar debt restructurings launched at an international level. He has written articles that have been published in several Argentine and foreign legal publications. For more information, visit www.alfarolaw.com.

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