PRIVATE M&A

Ecuador

LEXOLOGY
Getting The Deal Through

Consulting editor
Davis Polk & Wardwell LLP

Private M&A

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Normally a typical transaction process initiates with a letter of intent or a memorandum of understanding outlining the key terms and conditions, after which the due diligence begins to assess the target company's financial, legal and operational status. The next step would be the negotiation and execution of a definitive purchase agreement based on the results of the due diligence. If required, one proceeds with obtaining the necessary regulatory approvals. Then, we would move to the closing of the transaction, which involves the transfer of ownership and payment. Finally, post-closing activities, including integration and compliance with any post-closing obligations.

The transfers of shares are made through a letter of assignment signed by the assignor and the assignee, which must be accompanied by the titles of the shares that are transferred. The signing officer of the target company must register the transfer in the company's corporate books, cancel the share titles and issue new titles in favour of the new owner of the shares. Technically, the transfer of shares is enforceable vis a vis third parties upon registration of the transfer in the corporate ledger. Stock transfers can generate capital gains tax that must be paid by the seller. However, when the seller is a foreign company with no tax residence in Ecuador, tax laws impose on the target company the obligation to file tax forms and pay capital gains taxes ion behalf of the seller. Tax indemnities and escrow arrangements are therefore a common feature in sale and purchase agreements.

Whether for private companies or public companies listed on a stock exchange there is not a legal time limitation for the process to take place. The duration of a typical transaction can vary but may take about eight to 12 months, depending on the complexity and size of the deal. This time frame comprises a due diligence period between 30 and 90 days, although the length of this period is subject to freedom of contract.

Law stated - 04 October 2023

Legal regulation

Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

In the Ecuadorian legal context the term merger means the process by which (1) two or more companies combine into a new single entity, or (2) an entity absorbs another entity that ceases to exist. While a merger requires regulatory approval, the acquisition of one or more entities that is effected through the transfer of shares issued by the acquired entity is not subject, in general, to any regulatory approval.

Regarding private companies, mergers are regulated in the Companies Law and the regulatory authority is the Superintendence of Companies, Securities and Insurance (SCSI), which must approve them. Acquisitions of assets and liabilities are not subject to approval by the SCSI. Mergers of publicly traded companies are regulated by the Securities Market Law and the regulatory authority is the SCSI.

Mergers of companies that are part of the financial sector are regulated by the Organic Financial Code and the regulatory authority is the Financial Policy and Regulatory Board.

Regarding antitrust and competition, there is a mandatory M&A notification regime when the economic operations exceed the thresholds established by law . The authority is the Superintendence of Control of Market Power.

The minimum thresholds that require mandatory notification are:

- If the sum of the total volume of sales in Ecuador of the participants in the transaction exceeds the amount determined by the Regulatory Board of the Competition Authority (currently US$85 million); and
- in the case of concentrations involving economic operators engaged in the same economic activity and, as a consequence of the concentration, an equal to or greater than 30 per cent quota of the relevant market of the product or service is acquired or increased within the country or in a geographic market defined within it.

Law stated - 04 October 2023

Legal title

What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

In Ecuador, a buyer acquires legal title to shares, a business or assets through a validly executed and registered purchase agreement. The level of assurance can be negotiated by the buyer through the terms of the agreement. Legal title does not transfer automatically by operation of law, and the agreement must explicitly provide for the transfer of ownership. There is a distinction between legal and beneficial title, and this can also be negotiated in the agreement. As a closing condition, the target's company legal representative should register the transfer in the company's corporate books, cancel the share titles and issue new titles in favour of the new owner of the shares.

Law stated - 04 October 2023

Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In the acquisition of shares in a company, the consent of all shareholders may be required unless the company's by-laws or shareholder agreements provide otherwise. Minority shareholders who refuse to sell can be squeezed out through statutory mechanisms or dragged along if permitted by the company's governing documents.

Law stated - 04 October 2023

Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

There are certain assets and liabilities that may pose challenges when attempting to exclude them from a business transfer by agreement between the parties, however, an agreement is possible if the assets and liabilities that should be excluded, goes through a prior transfer to the seller or whoever the seller determines. For assets and liabilities that

cannot be excluded, be aware of the following considerations:

- Tax liabilities: In the sale and purchase of shares or ownership interests, or any other capital-representative rights, all rights and obligations are transferred, meaning that all assets and liabilities are included. In the case of the transfer of businesses where assets and liabilities are transferred, typically enabling licences or mining titles, for example, should also be transferred; it all depends on the business being transferred. In the case of a sale of assets and liabilities, rights and obligations related to taxes, such as tax credits or tax-related payable obligations, or any other tax that, as of the transaction date, is the responsibility of the seller, generally cannot be transferred.
- Employee liabilities: Employee liabilities, such as unpaid wages, social security contributions and labour-related claims, may not be easily excluded from a business transfer. Ecuadorian labour laws protect employees, and in some cases, buyers may inherit these liabilities when acquiring a business. Consultation with employees is not required, however, if the target company has a collective bargaining agreement, the conditions should be consulted.

Regarding consents and notifications, the following are required:

- Regulatory approvals: In certain industries, specific regulatory approvals or licences may be required for the transfer of assets or liabilities. For example, businesses in the financial, telecommunications or energy sectors often require approvals from sector-specific regulatory bodies.
- Contractual consents: Contracts with third parties, such as customers, suppliers or lenders, may contain change-of-control provisions that require consent or notification before transferring the business or its assets.

Law stated - 04 October 2023

Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

There are legal, regulatory and governmental restrictions that can affect the transfer of shares in a company, a business, or assets. These restrictions vary depending on the nature of the transaction and the specific industry involved.

- Foreign ownership restrictions: Ecuador has certain restrictions on foreign ownership in specific industries, particularly in strategic sectors such as telecommunications, where national social media outlets may not, in whole or in part of their shareholding, directly or indirectly belong to foreign organisations or companies domiciled outside of the Ecuadorian State or to foreign citizens, except for those foreign citizens who reside regularly in the national territory. Foreign investors may need to comply with specific requirements and obtain government approvals to invest in these sectors.
- Regulatory approvals: Transactions in certain industries may require consent from specific regulators or governmental bodies. For example, acquiring a significant stake in a bank may require regulatory approval, as well as acquiring control in a telecommunications company.

Transactions in specific industries, particularly those related to natural resources and critical infrastructure, may be

subject to public or national interest considerations. This can include assessments of the transaction's potential impact on national security, competition and the environment.

Law stated - 04 October 2023

Are any other third-party consents commonly required?

The necessity for third-party consents may depend on various factors, including the company's by-laws, shareholder agreements and the specific terms and conditions of the transaction. Here are some common scenarios where third-party consent may be required:

- Shareholder agreements: shareholder agreements often contain provisions that require the consent of other shareholders before shares can be transferred to third parties. These agreements may include pre-emption rights, rights of first refusal or other mechanisms that give existing shareholders the opportunity to acquire the shares before they are sold to external parties.
- Corporate by-laws: The bylaws of a company may also contain provisions related to the transfer of shares. If the by-laws require shareholder approval or specify conditions for share transfers, then compliance with these provisions is essential.
- Majority or supermajority shareholder consents: Depending on the ownership structure and the company's by-laws, certain transactions or decisions may require the consent of a majority or supermajority of shareholders. For example, amending the company's by-laws or merging with another entity may require such consent.
- Industry-specific regulations: in some industries, such as banking or finance, regulatory authorities may require approval for changes in ownership or share transfers. Shareholder consent may be necessary to comply with regulatory requirements.
- Contracts and agreements: If the company has contractual agreements in place that involve third-party consent clauses, such as supplier contracts or financing agreements, those consents may be required before a change in ownership takes place. The transaction can still take place even without these approvals; however, the consequence would usually be the immediate termination and fulfilment of the obligations.

It is important to note that the specific requirements for third-party consent can vary widely based on the company's structure, governing documents and the industry in which it operates. When engaging in an M&A transaction or share transfer in Ecuador, it is crucial to conduct thorough due diligence to identify any existing agreements or legal obligations that may trigger the need for third-party consent.

Law stated - 04 October 2023

Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

The transfers of shares are made through a letter of assignment signed by the assignor and the assignee, which must be accompanied by the titles of the shares that are transferred. The signing officer of the target company must register the transfer in the company's corporate books, cancel the share titles and issue new titles in favour of the new owner of the shares. Technically, the transfer of shares is enforceable vis a vis third parties upon registration of the transfer in the corporate ledger.

If a transaction requires prior approval from an antitrust or competition law perspective, the fees for such an approval

would depend on the value of the transaction.

Law stated - 04 October 2023

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

In M&A transactions, both buyers and sellers often appoint various advisers to assist with the transaction. These advisers can provide specialised expertise and services that are critical to the success of the deal. Here's an overview of these advisers and some typical terms of their appointment:

- Financial advisers: The typical terms of engagement with financial advisers often include fees based on a percentage of the transaction value or a fixed fee. These fees can vary depending on the complexity and size of the deal.
- Accountants: This is a crucial role in conducting financial due diligence, reviewing financial statements and identifying potential financial risks. They are typically engaged on a fee basis, with fees based on the scope and complexity of their work.
- Due diligence specialists: Including legal due diligence experts, industry-specific consultants and environmental experts, may be engaged to conduct comprehensive due diligence reviews. They are usually engaged for a fixed fee or an hourly rate, depending on the scope of their work.
- Tax advisers: Typically charge fees based on the complexity of the tax planning required for the transaction. The terms may include provisions for ongoing tax compliance and reporting.
- Labour advisers: Actuaries can play a critical role in a transaction. They will provide guidance and analysis on labour-related issues that may arise during a transaction. This includes assessing employment contracts and benefits, potential labour disputes and compliance.

Parties typically negotiate fee structures and terms to align with the nature and complexity of the transaction. The key is having clear and detailed engagement agreements defining the scope of work, fees and other terms.

Law stated - 04 October 2023

Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

There is a general obligation derived from the Ecuadorian Civil Code , where the parties involved in negotiations, including those related to transactions, should conduct themselves in good faith. The principles of good faith and fairness are recognised in the legal system and play an essential role in contractual relationships and negotiations.

Directors and officers are expected to act in the best interests of the company and its shareholders when considering and negotiating transactions. They should avoid conflicts of interest and make informed decisions that benefit the company.

Law stated - 04 October 2023

Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

Find an overview of the typical documentation involved in these types of acquisitions:

- Letter of intent: This letter explains all the preliminary details of the transaction. The parties shall define whether the letter is binding or non-binding.
- Share purchase agreement: Central document when acquiring shares in a company. This agreement outlines the terms and conditions of the share transfer, including the purchase price, payment terms, representations and warranties, and any post-closing obligations.
- Business purchase agreement: This agreement is typically used when acquiring an entire business, which may include assets, liabilities, contracts and employees. This agreement covers the sale and purchase of all business assets and often includes provisions related to the transfer of employees, leases, intellectual property and other key assets and liabilities.
- Asset purchase agreement: Commonly used agreement when the transaction involves the purchase of specific assets rather than the entire business. This agreement outlines the terms and conditions of the asset transfer, including the assets to be transferred, purchase price and any related representations and warranties.
- Due diligence reports: Buyers often conduct due diligence and findings within the reports shall include detailed information about the target company or business. These reports cover financial, legal, operational and regulatory aspects and help the buyer assess the risks and benefits of the acquisition.
- Escrow agreements: In some cases, parties may enter into escrow agreements to address contingencies or performance-based considerations related to the transaction. These agreements are usually performed by a fiduciary.

While the core documents mentioned above are commonly used in acquisitions, the specific terms and conditions within these documents can vary significantly based on the parties' negotiation and the particulars of the transaction.

Law stated - 04 October 2023

Are there formalities for executing documents? Are digital signatures enforceable?

Under Ecuadorian law, contracts and legal documents are typically executed in writing. While there are no specific requirements for the format of a written document, it should clearly express the parties' intentions and include essential terms and conditions.

Signatures of the parties are required to make the document legally binding. Signatures can be handwritten or digital, depending on the circumstances and the parties' agreement.

In some cases, notarisation and registration may be required for specific types of documents, such as real estate transactions. Notarisation involves the authentication of signatures by a notary public, and registration involves recording the document with the appropriate government authority to provide notice to third parties.

Ecuador recognises the legal validity and enforceability of digital signatures, having the same legal effect as handwritten signatures. To ensure the enforceability of digital signatures, it is essential that they comply with the requirements set forth in the Electronic Signature Law . These requirements include the use of a qualified electronic

signature, which is issued by a certified provider and verified through digital certificates.

Law stated - 04 October 2023

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The typical scope of due diligence in Ecuador includes financial, legal, regulatory and operational aspects. Sellers may provide due diligence reports to prospective buyers; however, buyers often conduct their independent due diligence instead of relying solely on reports produced for the seller. The terms and conditions, including the length of the due dilligence process, are often negotiated by the parties.

Law stated - 04 October 2023

Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

Liability for pre-contractual or misleading statements is based on general principles of contract law and misrepresentation. Under Ecuadorian contract law, parties to a contract are required to act in good faith during negotiations. Misrepresentations or false statements made by the seller during pre-contractual negotiations can lead to liability if the other party relies on those statements to their detriment. A party can be held liable for misrepresentation when the following elements are present: (1) there was a false statement, representation or omission of material fact; (2) the false statement was made with the intent to induce the other party to enter into the contract; and (3) the other party relied on the false statement and suffered harm or damages as a result.

Parties to a contract have the freedom to negotiate and include terms and conditions in their agreements. This includes provisions that may limit or exclude liability for pre-contractual statements or representations. While parties can attempt to limit liability through contractual provisions, there may be limitations on the extent to which liability can be excluded or disclaimed, especially if the misrepresentation was made intentionally or involved fraud.

Law stated - 04 October 2023

Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Certain information about private companies and their assets are publicly available through the Superintendency of Companies, Securities, and Insurance, the Property Registry, the Internal Revenue Service and the Social Security and court lawsuits in place. Buyers typically conduct searches to obtain information about a target company's financial status, legal standing, encumbrances certificates, fulfilment of legal obligations and ownership structure before entering into an agreement.

Law stated - 04 October 2023

Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

In M&A transactions, sellers typically make representations and warranties about the condition of the assets, the business and other relevant matters. The transaction documents, including the purchase agreement, often contain provisions related to representations, warranties and the allocation of risk between the buyer and the seller. These provisions may specify the consequences of a breach and any limitations on the buyer's ability to bring claims.

Particularly in the context of claims based on misrepresentation or breaches of warranties and representations, the buyer's actual or deemed knowledge can have a significant impact, since if they are aware of certain issues before closing and proceed with the transaction, it may be more challenging to later claim damages for those known issues. This is because, in general, a party cannot claim to have been misled or defrauded by the seller regarding information that it was already aware of (actual knowledge). If the buyer is deemed to have knowledge of certain facts, it may impact the buyer's ability to claim that the seller made misrepresentations or breached warranties regarding those facts. Buyers are generally expected to exercise due diligence and investigation to discover relevant information, and their ability to bring claims for misrepresentation or breach of warranties may be influenced by their knowledge and reliance on representations.

Law stated - 04 October 2023

PRICING, CONSIDERATION AND FINANCING

Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

The determination of pricing is typically a matter of negotiation between the buyer and the seller, and various pricing mechanisms may be used depending on the preferences of the parties involved. The use of closing accounts is the most common method for price determination. It is important to note that the choice of pricing mechanism is typically addressed in the purchase agreement and is subject to negotiation. The agreement will specify the relevant financial metrics, the methodology for adjustments and any applicable caps or thresholds.

Law stated - 04 October 2023

Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash payments are a common form of consideration in M&A transactions in Ecuador. Buyers may pay the purchase price entirely in cash, either as a lump sum at closing or through instalment payments as agreed upon by the parties. In some transactions, the consideration may involve the issuance of shares or equity in the acquiring company to the seller. This is more commonly seen in transactions involving corporate restructurings, mergers or acquisitions of a controlling interest in a company. Also, earn-outs are contingent payments based on the future performance of the acquired business. Sellers may receive additional consideration if certain predetermined financial or operational milestones are achieved. Depending on the specifics of the transaction, other forms of consideration may be negotiated. These could include assumption of liabilities, non-cash assets or a combination of different forms of

consideration.

Regarding the question of whether there is an overriding obligation to pay multiple sellers the same consideration, it generally depends on the terms negotiated by the parties and the structure of the transaction. There is no specific legal requirement under Ecuadorian law that obligates buyers to provide identical consideration to multiple sellers; however, there is one to pay a reasonable value for the shares. In a merger transaction, the absorbed companies, at the time of deciding on the merger terms, must determine the established value for the acquisition of shares or social participations. The by-laws of the target company as well as relevant shareholder agreements should be also considered.

Law stated - 04 October 2023

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

The use of earn-outs, deposits and escrows can be valuable tools for managing risks, providing incentives and facilitating complex M&A transactions in Ecuador. These mechanisms are typically negotiated and documented in the purchase agreement or other transaction documents to specify the conditions, timing and release of funds or assets. A fiduciary would be commonly used for such procedures.

Law stated - 04 October 2023

Financing

How are acquisitions financed? How is assurance provided that financing will be available?

The acquisitions can be financed through a combination of buyer equity, debt financing and seller financing. Assurance that financing will be available is typically provided through lender commitments and financial arrangements made by the buyer.

Law stated - 04 October 2023

Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

There are no specific restrictions preventing a seller from providing financial assistance to a buyer in connection with a transaction in Ecuador. However, the terms of such assistance would need to comply with applicable laws and regulations.

Law stated - 04 October 2023

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Transactions in Ecuador can be subject to various closing conditions, which are typically negotiated between the parties. Common conditions may include obtaining regulatory approvals, shareholder consent and fulfilment of certain contractual obligations. The strength of these obligations can vary based on the subject matter of the condition. Customarily closing conditions include the following:

- Regulatory approvals: The transaction may be subject to obtaining regulatory approvals as a condition precedent, such as antitrust or competition clearances and industry's specific regulatory approvals or licences, for example, businesses considered as strategic sectors by the government, such as energy and sectors, in which case, without obtaining such prior approvals, the transaction cannot be completed. The buyer and seller may have obligations to cooperate in obtaining the necessary regulatory approvals, including providing required information and documents. In some cases, they may agree to divest certain assets or make other concessions to secure regulatory clearance.
- Third-party consents: Although unusual, closing may be subject to obtaining consents from third parties, such as customers, suppliers or landlords. The party responsible for obtaining the consents (typically the seller) will be obligated to use best efforts to secure them. This may include providing information to third parties and negotiating with them. The buyer may assist in this process where necessary.
- Due diligence: The buyer's due diligence review may be a closing condition to ensure that the buyer is satisfied with the target company's financial, legal and operational status. The seller is often obligated to provide access to information and personnel for the due diligence process. The buyer is typically obligated to complete the review within a specified period.
- Title and ownership: The buyer may require confirmation of clear title and ownership of the target company's assets. The seller is obligated to provide evidence of clear title and ownership for the assets being transferred. Any encumbrances or liens must be disclosed and resolved.
- Contractual obligations: The purchase agreement may specify certain contractual obligations that must be met by the parties before closing. The parties must fulfil these obligations, which could include the execution of ancillary agreements, the resolution of pending disputes or the satisfaction of specific performance criteria. For example, extinguishing prior debt and loans with related parties such as companies' shareholders and inter-company's loans.

Law stated - 04 October 2023

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

In Ecuadorian M&A practice, the obligations placed on a buyer or seller to satisfy closing conditions can vary depending on the specific terms negotiated in the purchase agreement. These conditions are typically detailed in the agreement and specify the actions or requirements that must be fulfilled before the closing of the transaction. The strength of these obligations can indeed vary based on the subject matter of the condition and the parties' negotiations. The following are some common types of closing conditions and typical obligations associated with them:

- Regulatory approvals: The transaction may be subject to obtaining regulatory approvals as a condition precedent, such as antitrust or competition clearances, in which case, without obtaining such prior approvals, the transaction cannot be completed. The buyer and seller may have obligations to cooperate in obtaining the necessary regulatory approvals, including providing required information and documents. In some cases, they may agree to divest certain assets or make other concessions to secure regulatory clearance.
- Third-party consents: Closing may be subject to obtaining consents from third parties, such as customers, suppliers or landlords. The party responsible for obtaining the consents (typically the seller) will be obligated to use best efforts to secure them. This may include providing information to third parties and negotiating with

them. The buyer may assist in this process where necessary.

- Due diligence: The buyer's due diligence review may be a closing condition to ensure that the buyer is satisfied with the target company's financial, legal and operational status. The seller is often obligated to provide access to information and personnel for the due diligence process. The buyer is typically obligated to complete the review within a specified period.
- Title and ownership: The buyer may require confirmation of clear title and ownership of the target company's assets. The seller is obligated to provide evidence of clear title and ownership for the assets being transferred. Any encumbrances or liens must be disclosed and resolved.

Law stated - 04 October 2023

Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

In Ecuadorian M&A practice, pre-closing covenants are commonly agreed upon by parties in purchase agreements, particularly in more complex transactions. The scope and nature of these covenants can vary based on the transaction's unique circumstances. Some common types of pre-closing covenants and considerations related to breaches and remedies are:

- Operational covenants: Outlines actions that the target company and seller agree to take (or refrain from taking) in the period leading up to closing. They may include commitments to operate the business in the ordinary course, maintain certain financial metrics, and refrain from entering into significant contracts without the buyer's consent.
- Access to information: The seller often commits to providing the buyer with access to certain information and personnel for the purpose of conducting due diligence.
- Employee matters: Pre-closing covenants related to employees may address matters such as the retention of key employees, the treatment of employee benefits and compliance with employment laws.
- Regulatory compliance: The parties may agree on covenants related to obtaining regulatory approvals, permits or licences required for the transaction.
- Notification and consent: Covenants may require the parties to notify third parties, such as creditors, customers, suppliers or landlords, of the impending transaction and seek their consent where necessary.
- Delivery of documents: The seller may be required to deliver certain documents, records and contracts to the buyer at or before closing.

The purchase agreement typically specifies remedies for the breach of pre-closing covenants, and the chosen remedies can vary based on the nature and significance of the breach. Common remedies include the following:

- Termination of the agreement: If a party materially breaches a pre-closing covenant or cannot fulfil the obligations within the agreement, for example, not obtaining the prior authorisation of the Antitrust approval, the other party may have the right to terminate the agreement. This could result in the cancellation of the transaction.
- Damages: The non-breaching party may also seek damages as compensation for losses incurred due to the breach. The agreement may specify the calculation and limitations on damages.
- Indemnification: The purchase agreement may include indemnification provisions requiring the breaching party to indemnify the non-breaching party for losses resulting from the breach.

Law stated - 04 October 2023

Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Parties to a transaction can typically terminate the agreement after signing (but before closing) under certain circumstances, subject to the terms and conditions specified in the purchase agreement. In some cases, termination may not be available or may not be the practical solution for a particular circumstance, in which case seeking for damages as compensation for losses may be the preferred solution.

The ability to terminate the agreement is often governed by the terms negotiated between the parties and may include specific termination rights and conditions, under certain circumstances such as a material breach of covenants or representations, failure to satisfy closing conditions, mutual agreement, change in circumstances or force majeure, failure to obtain regulatory approvals, among other similar considerations. The specific termination provisions, including the conditions, notice requirements and remedies upon termination, are typically outlined in the purchase agreement.

Law stated - 04 October 2023

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees and reverse break-up fees are used in Ecuadorian M&A practice, particularly in larger or more complex transactions. The terms of break-up fees and reverse break-up fees can vary based on the specific transaction and the negotiation between the parties. The amount of the break-up fee is typically negotiated between the parties and is expressed as a percentage of the purchase price or a fixed amount. Similar to break-up fees, the amount of the reverse break-up fee is negotiated between the parties and is typically expressed as a percentage of the purchase price or a fixed amount.

Law stated - 04 October 2023

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

Sellers typically give representations, warranties and indemnities to buyers. These provisions specify various matters, such as the accuracy of financial statements, absence of litigation and compliance with laws. While the scope and specific terms can vary based on negotiations, here is an overview of their usual scope.

Representations and warranties

These statements are meant to be true at the time they are made and serve as a basis for the buyer's decision to proceed with the transaction. Their scope can be extensive and cover a wide range of matters, including financial statements, the absence of undisclosed liabilities, the validity of contracts, compliance with laws and the condition of

assets. If a representation or warranty is breached, the buyer typically has the right to seek remedies such as indemnification for losses resulting from the breach. The specific remedies, such as the quantum of recourse, may be outlined in the purchase agreement and can vary based on negotiation.

Indemnities

Often used to address specific risks or known issues identified during due diligence. They may cover matters such as tax liabilities, pending litigation or breaches of specific contractual obligations. The remedy for a breach of an indemnity is typically a direct payment from the seller to the buyer to cover the losses or liabilities for which the indemnity was provided. The terms and conditions of indemnities are usually outlined in the purchase agreement.

While Ecuadorian law does not explicitly define the legal distinctions between representations, warranties and indemnities, these terms are generally understood and used based on international M&A practices. However, it is essential to clearly define these terms and their implications in the purchase agreement to avoid potential disputes.

Law stated - 04 October 2023

Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

Limitations on a seller's liability under a sale and purchase agreement are commonly negotiated between the parties. These limitations may include caps on indemnity claims, materiality, time limitations for bringing claims and exceptions for fraud or intentional misrepresentations.

Law stated - 04 October 2023

Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Transaction insurance, including representation and warranty insurance, is becoming increasingly common in global M&A transactions; however, remains unusual in transactions in Ecuador.

Law stated - 04 October 2023

Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Depending on the complexity of the transaction and when specific ongoing obligations are necessary to ensure a smooth transition and the realisation of certain objectives, parties may agree to post-closing covenants. These covenants can relate to ongoing cooperation, non-competition or the satisfaction of specific conditions or obligations following the closing.

Law stated - 04 October 2023

TAX

Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Stock transfers can generate capital gains tax (10 per cent of the profit generated by the transaction) that must be paid by the seller. However, when the seller is a foreign company with no tax residence in Ecuador, tax laws impose on the target company the obligation to file the tax forms and pay the capital gains taxes in substitution of the seller. In addition, the profit on the transfer of a business and assets are subject to corporate income tax at a general rate of 25 per cent on the generated profit, payable by the seller.

Law stated - 04 October 2023

Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

The profit on the transfer of a business and assets are subject to corporate income tax at a general rate of 25 per cent on the generated profit, payable by the seller. Transactions involving a transfer of shares or a total transfer of the business, are exempt from value added tax (VAT). However, if the transaction only involves a partial transfer of the business, where all assets and liabilities are not transferred, the transaction would be subject to a 12 per cent VAT, which should be invoiced and paid by the seller.

Law stated - 04 October 2023

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

When acquiring shares in a company, the employee's employment continues with the same employer. If the target company has a collective bargaining agreement, its conditions should be consulted. In the case of acquiring a business or assets, employees are not automatically transferred, their consent is required. Employees who refuse to transfer are entitled to termination without cause and severance payment by their employer, which is generally equivalent to 1.25 monthly salaries based on the compensation paid for the last complete month of work per each year of work, with a minimum of 3.25 monthly salaries and a maximum of 25 monthly salaries. Enhanced severance applies to certain employees.

Law stated - 04 October 2023

Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

There are no obligations to notify and consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets. However, if the target company has a collective bargaining agreement, its conditions shall be consulted.

Law stated - 04 October 2023

Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

Transfer of a business does not produce the automatic transfer of the employees allocated to such business. The employee is entitled – at his or her will – to continue rendering services to the new employer under exactly the same conditions as with the previous employer, or to be considered terminated as in case of a dismissal without cause and to be paid the applicable severance. Notwithstanding the foregoing, in practice it is common that if the receiving entity does not maintain the exact same benefits of the delivery entity, similar or equivalent benefits can be granted to the employee, as long as this does not represent a decrease to the employee.

Law stated - 04 October 2023

UPDATE AND TRENDS

Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

Business climate: Since May 2021, Ecuador has been the only country in the Latin American region that combines investment opportunities with a pro-business political climate. The Ecuadorian government has taken concrete steps and legal reforms aimed at promoting private investment as the key economic priority. The ability to sign investment protection agreements with the government protects investors from unilateral government decisions having the ability to appoint international arbitration for dispute resolution, among several tax incentives for investors. Freedom of contract is another key factor for creating a trend of investors looking to Ecuador with renewed interest.

The resource potential of the country: Due to its geographical location, Ecuador can be a key point for doing business in the Andean countries and South America. Ecuador is becoming the new mining frontier, with most of its territory largely unexplored and available for mining permits. Abundant water resources and geological conditions are also promoting a new wave of investments in private-public partnerships projects for renewable energies.

Law stated - 04 October 2023

Jurisdictions

Austria	Schindler Attorneys
Brazil	Campos Mello Advogados
Cyprus	G C Hadjikyprianou & Associates LLC
Denmark	Gorrissen Federspiel
Dominican Republic	Guzmán Ariza
Ecuador	Tobar ZVS
Egypt	Soliman, Hashish & Partners
Finland	Waselius & Wist
Greece	Karatzas & Partners Law Firm
Hong Kong	Davis Polk & Wardwell LLP
Indonesia	Makes & Partners
Italy	bureauPlattner
Japan	Mori Hamada & Matsumoto
Latvia	VILGERTS
Malaysia	Foong and Partners
Myanmar	Myanmar Legal MHM Limited
Netherlands	Bird & Bird LLP
Norway	Aabø-Evensen & Co
Philippines	Zambrano Gruba Caganda & Advincula
Romania	MPR Partners
Serbia	Stankovic & Partners NSTLaw
Singapore	WongPartnership LLP
South Korea	Yulchon LLC
Switzerland	Homburger
Turkey	Turunç

USA	Davis Polk & Wardwell LLP
Zambia	Dentons Eric Silwamba Jalasi & Linyama