

Market Intelligence

M&A 2020

Global interview panel led by
Simpson Thacher & Bartlett LLP

Publisher

Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager

Dan Brennan
dan.brennan@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: [shutterstock.com/g/photofriday](https://www.shutterstock.com/g/photofriday)

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Research Ltd
ISBN: 978-1-83862-417-0

Printed and distributed
by Encompass Print
Solutions

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Argentina

Fernando S Zoppi is a corporate attorney primarily focused on M&A and business law. He regularly advises clients on a variety of domestic, regional and cross-border transactions, including M&A, joint ventures and other business associations, private equity and venture capital, foreign investments, project finance and financings.

Mr Zoppi obtained his LLM degree from Columbia University's School of Law (New York) in May 2004. He graduated (with honours) from University of Buenos Aires in December 1999. He was a foreign associate at O'Melveny & Myers, LLP (NY). He was also associated with Latham & Watkins, LLP (NY). Mr Zoppi was a partner at Perez Alati, Grondona, Benites, Arntsen & Martinez de Hoz. In 2018, he founded Martínez de Hoz & Rueda.

Mr Zoppi has been an assistant professor at University of Buenos Aires. He has also lectured at the Instituto Universitario ESEADE. He is admitted to practise law in Argentina and is a member of the Bar Association of the City of Buenos Aires.

Tomás Dellepiane is an associate at Martinez de Hoz & Rueda. He focuses his practice on corporate law and M&A. He regularly advises clients on the setting up of corporate vehicles, corporate structures for a M&A deals, joint ventures and other business associations and other corporate law matters.

Mr Dellepiane obtained a masters in law and economics degree from Universidad Torcuato Di Tella (Argentina) in 2017. He graduated from University of Buenos Aires in 2010. He was an associate at Perez Alati, Grondona, Benites, Arntsen & Martinez de Hoz. In 2018, he joined Martínez de Hoz & Rueda.

He is admitted to practise law in Argentina and is a member of the Bar Association of the City of Buenos Aires.

1 | What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

M&A activity in Argentina remains modest. This is consistent with the relatively low levels of foreign direct investment (FDI) in the country in the past several years compared to those of other countries in Latin America. After reaching a record of US\$23.988 billion in FDI and 243 M&A deals (announced) in 1999, FDI and M&A deals have consistently decreased. According to public data, FDI amounted to only US\$6.244 billion in 2019 and 83 M&A deals were announced in the same year.

The general view is that the covid-19 pandemic will reduce M&A activity in Argentina (and the region) by at least 50 per cent. Most recent data seems to support this view, as the total number of M&A deals announced, as at 31 July 2020, is only 23.

However, there are some encouraging signs suggesting that M&A activity will pick up in the medium term, these being:

- the size of the Argentinian economy (still third in Latin America after Brazil and Mexico);
- the relatively declining value of local assets and distressed opportunities;
- the recent restructuring of the sovereign and sub-sovereign debt; and
- competitive advantages in certain key areas, which may mark an increase in the flow of deals by the first quarter of 2021.

Such recovery, however, is certainly dependent on the government implementing some structural reforms, including in the tax system, foreign exchange market, labour regulations and reduction of fiscal deficit.

2 | Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

There has been tremendous interest in local energy assets in the past five to seven years, which in turn led to an impressive number of M&A transactions (both in terms of deal number and deal volumes) and greenfield projects in the sector. Argentina's energy rebirth is based fundamentally on the development of shale gas and shale oil projects in the Neuquén region, as well as renewable energy projects (mainly wind and photovoltaics, driven by strong governmental incentives), throughout our territory. Energy independence, energy costs reduction and climate change mitigation are the main drivers.



Fernando
S Zoppi

Tomás
Dellepiane

Several local and international companies have shown a particular interest in shale oil and shale gas projects in Vaca Muerta (a rock formation in the province of Neuquén, where a large oil and natural gas was discovered in 2010 and is now considered to be one of the largest shale fields in the world).

Furthermore, the Argentinian government conducted an offshore bidding round to award exploration permits over offshore blocks generated substantial foreign investment (including investors from the United States, Japan, Norway, Germany, the United Kingdom and Qatar) and the government received bids for a total investment in excess of US\$1 billion. Blocks were awarded in the Austral, West Malvinas and northern portion of the Argentina Basin, covering around 200,000 square kilometres.

The agribusiness sector also offers opportunities, and the prices of commodities have been recovering well in the past few years. This sector is critical to the Argentinian economy, as its failure would trigger a cascade effect on the industrial, chemical, technology and services sectors. The number of deals in the sector is stable in the past few years and shows great potential.

3 | What were the recent keynote deals? What made them so significant?

Some of the most relevant deals in the past two years include the US\$650 million joint venture between ExxonMobil and the state-owned energy giant Qatar Petroleum (as a result of which Qatar Petroleum acquired a 30 per cent stake of ExxonMobil's subsidiaries in Argentina) to develop multibillion projects in Vaca Muerta (2018).

International trader Trafigura has also completed a deal worth more than US\$250 million to start downstream operations in Argentina (in association with its affiliate Puma Energy). Interestingly, a new regional player – DeltaPatagonia – also acquired a network of 125 service stations from YPF, which will be operated under the Gulf Oil trademark.

Other relevant deals include the acquisition by private equity fund Advent of 51 per cent of the capital stock of Prima Medios de Pago SA (a leading player in Argentina's merchant acquiring, payment processing and electronic bill payment market) in a transaction worth approximately US\$700 million and US\$1.2 billion.

The largest deal of 2020 so far has been the US\$350 million acquisition by Shell and Equinor from Schlumberger (worldwide leading oilfield service provider) of a 49 per cent participating interest in an exploitation concession located in Vaca Muerta (Bandurria Sur), which was followed by Shell and Equinor acquiring YPF's 11 per cent participating interest in the same concession.

4 | In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

Most transactions in Argentina generally involve cash considerations. Due to foreign exchange regulations enacted by the local Central Bank, a key aspect of every M&A transaction is the negotiation of contractual provisions regarding currency and place of payment (a buyer would typically prefer to be paid in US dollars or euros in a bank account outside Argentina).

Only a small portion of the M&A deals involve payments in shares or other types of securities issued by the acquirer or otherwise (including as a result of earn outs) and some transactions include some type of deferred or financed purchase price.

“The current administration introduced several amendments to the foreign exchange regime.”

5 | How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

The main recent changes include certain amendment to the Argentinian Companies Law to allow for single shareholder corporations (SAUs) and simplified stock companies (SASs), which are corporations incorporated in an expeditious and online procedure. Both SAUs and SASs are aimed at promoting start-ups and entrepreneurial activities in Argentina.

The current administration (which took office in December 2019) introduced several amendments to the foreign exchange regime and reinstated foreign exchange restrictions to acquire foreign currency and to transfer of the proceeds outside Argentina (including in the form of corporate dividends).

There have been important changes in tax regulation with an impact on M&A transactions. The general rule is that local companies are now taxed on their worldwide income tax at a corporate level at a 30 per cent corporate income tax rate. The taxable income is determined by deducting all allowable expenses from the entity's gross income (including interest and salaries). Expenses incurred abroad are also



deductible, provided that the taxpayers can demonstrate that they were incurred for purposes of generating taxable income. The corporate tax rate is scheduled to be 25 per cent for fiscal years beginning after 1 January 2021.

Further, dividends distributed by Argentinian companies to their foreign shareholders are subject to withholding tax depending on when the distributing company earned the profits out of which the dividends are paid:

- for income earned in fiscal years beginning on or before 31 December 2017, there is no withholding tax (provided the profits had been taxed at company level);
- for income earned in fiscal years beginning on or after 1 January 2018 and on or before 1 January 2021, dividends are subject to a 7 per cent withholding tax; and
- for fiscal years beginning after 1 January 2021, dividends will be subject to a 13 per cent withholding tax.

Dividends are not deductible from income tax in any case. Gains arising from the sale or transfer of shares are:

- subject to corporate income tax at the same tax rate if made by a local entity;

- subject to a special capital gain tax of 15 per cent if made by a resident individual; and
- subject to a capital gains tax of 15 per cent if made by a non-resident (non-residents may also opt to pay a 13.5 per cent on the sale price).

As a general rule, the sale of equities listed in the local stock exchange and American depository receipts or global depository receipts are tax exempt for individuals, regardless of residence and non-resident entities.

A new antitrust law was passed by Congress on May 2018. An important change introduced by this new law lies in the timing of antitrust clearance. While the replaced regime established an ex-post control (ie, transactions were reviewed after closing), the new law establishes an ex-ante control (ie, transactions are now reviewed prior to closing). The Antitrust Law requires that transactions in which the aggregate business volume of all companies involved in the deal in Argentina is higher than certain threshold (US\$27 million as of July 2020) be approved by the Antitrust Authority prior to closing, subject to certain exemptions such as the 'first landing' safe harbour. The new antitrust law has not been yet fully implemented, so certain aspects of the antitrust procedure are still governed by the old regulations.

Finally, several amendments were made to the capital markets law. In particular, the new law amends the regime for mandatory tender offers (as discussed in question 7).

6 | Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

As commented in question 1, FDI decreased in the past several years. However, foreign investors are still regularly involved in M&A transactions in Argentina. There are no specific approvals required for foreign investors to conduct business in Argentina, except in some limited sectors as is the case in many other countries. For example, foreign investments in real estate (rural lands or land adjacent to country borders) requires regulatory approval or are subject to restrictions in certain cases. In some other sectors, foreign investments are subject to specific red tape procedures.

In some regulated industries (such as financial services, insurance, telecommunications, aviation, oil and gas, mining and utilities), governmental approval is necessary to transfer either control of, or a relevant portion of the shares of, a company operating in those industries.

7 | Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activism is not part of the corporate scene in Argentina. The local capital market is rather small (even compared to other Latin American countries) and only a few companies are listed in the Buenos Aires stock exchange. Even for listed companies, shareholder activism is insignificant as these company generally list a small portion of their capital stock (generally, 10 to 30 per cent). Public M&A deals represent a quite small portion of local M&A activity.

Argentinian capital markets are governed by the Securities Law No. 26,831, as amended and supplemented by the Productive Financing Law No. 27,440 and a set of rules issued by the National Securities Commission. These regulations include provisions regarding minority shareholders' rights and (mandatory and voluntary) tender offers, competing offers, squeeze-out tender offers, voluntary delisting, among other matters.

Generally, a mandatory tender offer at an equitable price is required to be made by a person who, acting individually or jointly with other person, has effectively reached the control of a listed company. A person will have, individually or together with other persons, a controlling interest when:

- they directly or indirectly reach a percentage of voting rights equal to or greater than 50 per cent of the listed company, excluding from the calculation those shares that belong, directly or indirectly, to the affected company; or
- have obtained less than 50 per cent of the voting rights of a company but otherwise act as controlling shareholder.

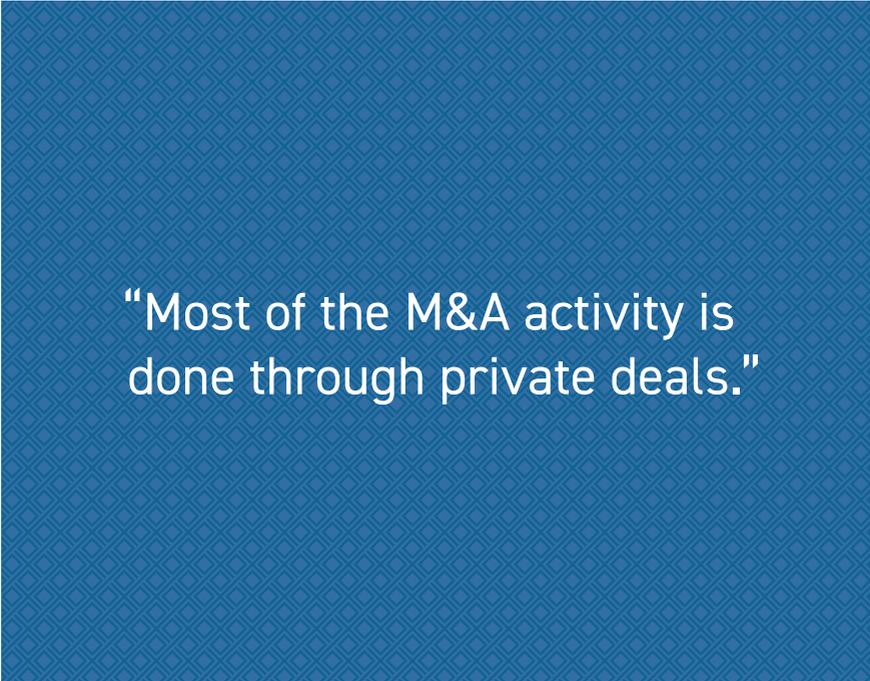
The regulations now clarify that the tender offer must be launched upon acquisition of control.

8 | Take us through the typical stages of a transaction in your jurisdiction.

The local steps in a M&A process follow the international market practices.

Typically, M&A transactions start with the execution of a non-disclosure agreement (NDA) between the parties. Depending on the complexity of the transaction, the parties may negotiate and execute a memorandum of understanding or letter of intent (commonly non-binding for the parties) to establish the general framework of the transaction and its main terms and conditions.

Once the NDA is executed, it is expected for the purchaser to conduct due diligence of the target in order to identify possible contingencies and make a valuation of the target company or assets to be transferred. Due diligence usually covers



“Most of the M&A activity is done through private deals.”

the legal, accounting, tax, financial and technical areas. The scope of the audit will depend on various factors, such as the time and cost assigned, and will ultimately be conditioned by the activity carried out by the target company.

Usually, the target's information is uploaded in a virtual data room and in-person meetings are held with the key managers of the target to discuss the main issues that may arise from the due diligence. Once the due diligence is completed (or when it is already in an advanced stage), the parties start to negotiate the transaction documents.

As mentioned, most of the M&A activity is done through private deals. These may involve shares, assets or a combination thereof. Share deals are preferred over asset deals for tax and foreign exchange considerations.

Share deals are undertaken through stock purchase agreements that generally follow international standards for private transactions. These agreements can be subject to foreign law and jurisdiction (including foreign arbitration tribunals). This is generally the case in transactions for high-end Argentinian companies. However, there are some aspects that will necessarily depend on and be governed by Argentinian laws (eg, matters relating to the consummation of transactions, certain matters covered by local securities regulations, labour laws and regulatory requirements).

9 | Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

Since the presidential elections took place in December 2019, the local market conditions have deteriorated and the new administration has taken several measures that have not yet restored the confidence of the local and international business community.

The reinstatement of foreign exchange controls (which includes restrictions to acquiring foreign currency and the transfer of proceeds outside Argentina), the temporary prohibition to lay-off or suspension of employees without cause and other recent legal changes, and the worldwide pandemic, are affecting the economic activity in general and the M&A deal flow.

The restructuring of the sovereign debt and a new programme with the International Monetary Fund may serve as basis for critical and long-term structural reforms (such as the tax system, labour laws and the foreign exchange regime).

10 | What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

It is certainly difficult to predict how much the covid-19 pandemic will affect the local economy in general and the M&A activity in particular. The local and international business community seems to agree that a strong recession is increasingly likely. The hit should be hard in the short term and this is particularly true for certain countries (especially those in the periphery like Argentina) and industries. Many deals in the pipeline have been pulled or delayed.

However, the world keeps spinning, as do the local and international markets. Distressed assets, declining valuation, divestitures and the long-term view of strategic investors will create opportunities that lead to the recovery in the M&A market.

Fernando S Zoppi

fernando.zoppi@mhrlegal.com

Tomás Dellepiane

tomas.dellepiane@mhrlegal.com

Martinez de Hoz & Rueda

Buenos Aires

www.mhrlegal.com

The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The structure of the transaction plays a fundamental role, not only because of the potential tax efficiencies that can be achieved, but also because structure can make a big difference from a foreign exchange standpoint (eg, payment of purchase price, future distribution of corporate profits). Structure can also mitigate regulatory risks (ie, avoid unnecessary governmental filings or approvals) and reduce the impact of contingencies associated with the target company or assets.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

In our view, there are three fundamental pillars:

- a full services law firm, with high-quality teams across the different practice areas that may be relevant to the transaction;
- a deep understanding of business drivers, potential risks and legal environment for the transaction; and
- a counsel that can lead the transaction with a practical approach to add value in a cost-effective fashion.

What is the most interesting or unusual matter you have recently worked on, and why?

A few months ago, our firm represented Schlumberger – the leading oilfield services provider – in the disposal of its subsidiary in Argentina (which owned a world-class asset, an exploitation concession in the ‘Bandurria Sur’ block located in Vaca Muerta, the province of Neuquén). The deal is the largest M&A transaction in Argentina in the past 12 months. In addition to the general complexities of a large M&A deal with a high component of regulatory issues, the transaction was challenging not only because there were two different purchasers that joined forces to become the winning bidder for the asset, but the deal process also required the negotiation of acquisition agreements with two other bidders up to the very last moment. The deal was closed shortly before the World Health Organization declared the pandemic.

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