

Market Intelligence

M&A
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Global interview panel led by Simpson Thacher & Bartlett LLP

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Argentina

Fernando Zoppi is a corporate and business law attorney with more than 20 years of experience representing clients in a variety of cross-border transactions in Argentina and Latin America. He is particularly versed on Mergers and Acquisitions, Private Equity and Venture Capital.

Educated and trained in Argentina and the USA, Fernando is praised for his practical approach in solving complex legal issues. He is fluent in Spanish and English.

Fernando is admitted to practice in Argentina. He is a member of the International Bar Association (IBA), the City of Buenos Aires Bar Association, and the Columbia Alumni Association.

Key clients include Exxon Mobil, Trafigura, DeltaPatagonia (Gulf), Amancay Partners, Linzor Partners, Sun Dreams, Hyatt Hotel & Casino, Schlumberger, CAPEX (Grupo CAPSA), Interbarga, Imagine Communications.

Fernando is also a regular contributor to local and international legal publications and has regular appearances in media. He is co-author of *Ley General de Sociedades - Comentada* (Comments on Argentine Corporate Law), Horacio Roitman and Editorial Astrea (soon to be released).

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 since 2019. This is consistent with poor levels of foreign direct investment (FDI) in the country in the past several years compared to other countries in Latin America. After reaching a record of US\$23.988 billion in FDI and 243 M&A deals (announced) in 1999, followed by remarkable peaks in 2005 to 2007 (with an average of 160 transactions per year), FDI and M&A deals have consistently decreased. According to public data, FDI amounted to only US\$6 million in 2020, 38.1 per cent less than 2019. A similar trend can be expected for 2021; current governmental policies, weak economic performance and the covid-19 pandemic is expected to reduce M&A activity in Argentina by at least 40 per cent.

However, there are some 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 a possible agreement with the International Monetary Fund (IMF); and
- competitive advantages in certain key areas, which may mark an increase in the flow of deals in the near future.

Additionally, M&A activity in Latin America has shown evidence of recovery within the first trimester of 2021, led by transactions in Brazil, Mexico, Colombia and Chile, where levels of M&A and initial public offerings (IPOs) have begun to recover to levels close to the period prior to the covid-19 pandemic.

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. A large number of the transactions that took place in 2020 and the first semester of 2021 relate to energy assets.



Argentina's energy market is based fundamentally on the development of shale gas and shale oil projects in the Neuquén region, as well as renewable energy projects throughout our territory (mainly wind and photovoltaics, driven by strong governmental incentives between 2015 and 2019). Green hydrogen projects are being assessed and may trigger interest from investors in the short term. Energy independence, energy cost reduction and climate change mitigation are the main drivers. 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 deposits of oil and natural gas was discovered in 2010 and is now considered to be one of the largest shale fields in the world). Indeed, Congress is currently evaluating a bill to promote hydrocarbon activity levels in Argentina.

Mining has also shown certain growth during the last year. For instance, Canadian Cerrado Gold acquired the Don Nicolas Mining company for U\$45 million and the Chinese company Jiangxi Ganfeng Lithium acquired an extra 1 per cent ownership of Minera Exar SA for U\$16 million, thus owning 51 per cent of the company's shares. Lithium related projects currently concentrate a great deal of attention from local and international players.

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 technology sector has also shown great potential. As of August 2021, 11 Argentine companies reached the 'unicorn' category (a record number in Latin America after Brazil). According to the Merval (local stock market) index, the communications sector is the sector which has been most stagnant in 2021.

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

Some of the most relevant deals in the past 12 months include the acquisition of Chinese Sinopec's oil and gas assets by Compañía General de Combustibles, the exit of acquisition of Chilean CMR Falabella (retail) from Argentina, the sale of EDENOR (one of the local electricity distributors), the acquisition of the local operations of Walmart by the Argentine businessman De Narvaez and the recently announced JV between Trafigura and Vista Oil & Gas to develop shale oil projects in Vaca Muerta (Neuquén).

According to a report of a UN agency, the largest outflows of transnational companies in Argentina were in the services sector. Some examples include; retailer Walmart, which was sold to Argentinian capital, airline services company LATAM, which announced that it is leaving its operations in the country and retailer Falabella, which has also closed its local activity.

Technology-wise, new funding rounds and venture capital fund investments gave rise to three new Argentine 'unicorns'; front-end software provider Vercel, advertising holding company Aleph and whiteboard company Mural. Also, SPAC CF Acquisition Corp acquired Satellogic, a nano satellite company, which will be included at Nasdaq for US\$850 million.

The largest deal of 2020 was 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.

As of July 2021, the largest deal of the year is the acquisition of Empresa Distribuidora y Comercializadora Norte Sociedad Anónima (EDENOR SA) by the Vila-Manzano and Filiberti Group for a reported price of US\$100 million.

“Only a small portion of the M&A deals involve payments in shares or other types of securities issued by the acquirer or otherwise.”

- 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.



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

Recent changes include General Resolution IGJ No. 08/2021 which modified certain requirements and criteria for the registration of foreign companies that wish to establish a branch in the City of Buenos Aires or to hold shares of companies incorporated locally. The registration of sole proprietorships whose sole shareholder is a foreign sole proprietorship will not be admitted.

Furthermore, 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).

In addition, there have been important changes in tax regulation with an impact on M&A transactions. Since January 2021, companies are now taxed on their worldwide income tax at a corporate level from 25 to 35 per cent of their 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. Exported goods have also suffered modifications in withholding taxes.

Dividends distributed by Argentinian companies to their foreign shareholders continue to be 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).

Finally, on the labor law side, the current administration implemented certain temporary measures that could have a significant impact on M&A deals as they translate into higher transaction costs. These measures include a prohibition on dismissing employees and higher severance payments.

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

As previously mentioned, FDI decreased in the last few years. Currently, local investors are more active than foreign players in M&A transactions. Despite this foreign investors have always been, and still remain at a lower degree, active in Argentina.

There are no specific approvals required for foreign investors to conduct business in Argentina other than some restrictions on acquiring certain types of real estate (rural lands or land adjacent to country borders). In some other sectors, foreign investments are also 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 few companies are listed in the Buenos Aires stock exchange. Even for listed companies, shareholder activism is insignificant as these companies generally list a small portion of their capital stock (10 to 30 per cent). Public M&A deals represent a 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 persons, 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

“Most of the M&A activity is done through private deals. These may involve shares, assets or a combination thereof.”

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 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. Generally speaking, share deals are preferred over asset deals for tax 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. The policies implemented by this administration are far from restoring confidence of the local and international business community. For example, the mentioned foreign exchange controls, the temporary prohibition to lay-off employees without cause and the new corporate law requirements for foreign shareholders are affecting economic activity in general and the M&A deal flow.

Argentina's need for foreign investments and a new expected agreement with the IMF may, however, trigger some legislative changes in the right direction, including a new hydrocarbons law (that may contemplate tax incentives and preferential foreign exchange treatment for investors).

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 business community seems to agree that the country may take several years to return to pre-pandemic levels.

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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?

We are currently working on a distressed M&A; our clients are two of the financial creditors at a local oil & gas company that plan to acquire its entire financial debt and main assets (including an oil & gas concession in the *Vaca Muerta* area, one of the most important shale oil and shale gas plays in the world). The transaction required putting together a strong team composed of specialist on M&As, capital markets, debt restructurings, tax and regulatory matters. This is one of the most complex transactions we have ever worked as it involves, on top of the typical M&A work, efficient tax planning and corporate restructuring, a debt restructuring, an extension of the governmental concession and approvals from different governmental agencies at a federal and provincial level.

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Led by Simpson Thacher & Bartlett LLP, this *M&A* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

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