
Argentina

Negotiated M&A Guide

Corporate and M&A Law Committee

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1. Introduction

Mergers and acquisitions of privately held companies in Argentina are essentially regulated by two sets of laws: (i) corporate law (generally governed by Argentina's Companies Law Nbr. 19,550, as amended, hereinafter "ACL"), and (ii) antitrust law (governed by Argentina's Antitrust Law Nbr. 25,156, as amended, hereinafter "AL"). Transactions involving public companies are also regulated by the capital markets law (governed by Argentina's Capital Markets Law Nbr. 26,831, as amended, hereinafter "CML"), certain specific resolutions and regulations issued and enforced by the Argentine Securities and Exchange Commission (locally, "CNV") and the corresponding stock exchange or OTC market ("Securities Regulations"). In addition, depending on the industry and/or type of business entity, many administrative rules and regulations briefly mentioned below may also be taken into consideration.

(a) Corporate Law

In Argentina, the most commonly used types of business entities are corporations (*sociedad anónima* or S.A.) and limited liability companies (*sociedad de responsabilidad limitada* or S.R.L.). However, there are certain specific rules that should be taken into consideration when analyzing any M&A structure or acquisition. For example, according to the Section 30 of the ACL -as amended by the Argentina's Civil and Commercial Code which is in force since September 2015-, corporations may participate in other corporations and also in limited liability companies. Pursuant to Sections 31 and 32 of the ACL, direct participation and cross-participation between companies is regulated within certain amounts.

Also, in the recent past, the ACL has been amended by the Argentina's Civil and Commercial Code in order to introduce in Argentina's legal regime the figure of the single shareholder corporation (*sociedad anónima unipersonal* or S.A.U.). This entity type is regulated by ACL and it could be set up for a human or a legal entity (in both cases, local or foreign), but never by another single shareholder corporation. Additionally, in 2017 was enacted the Argentina's Entrepreneur Capital Support Law Nbr. 27.349 which regulates the incorporation of "simplified corporations" (*sociedad anima simplificada* or S.A.S.). This new type of entity could be set up by one or more persons (both human or legal) by digital media and digital signature. The registration of S.A.S. before local Office of Corporations takes only 24 hours. As such, the general purpose of this new entity types (S.A.U. and S.A.S) is to increase and promote the entrepreneur activities in Argentina.

On the other hand, the transfer of assets as a "business unit basis" may be effected as such or by compliance with certain bulk transfer regulations. In this regard, ongoing business transfers are specifically regulated by law Nbr. 11,867, which sets forth the mandatory steps to be complied with in order to proceed with this kind of transaction. The purpose of complying with the bulk transfer law is to limit the liability of the purchaser regarding any contingencies of seller relating to the assets involved in the transaction. Therefore, to provide appropriate notice to third parties (i.e. potential or current creditors), a process of legal notices and specific terms has been set forth by the law, in order to allow third parties to be notified and, if required, oppose the transaction until the debts are duly guaranteed or covered.

With respect to foreign investors which intend to participate in an M&A transaction in Argentina, although no specific restrictions apply to them, the ACL sets forth a registration system for foreign entities intending to participate as a shareholder in local companies or to incorporate a local branch of the foreign entity. Under this registration scheme, foreign entities must request registration before the local Office of Corporations or Public Registry of Commerce, as applicable, depending on the jurisdiction. Regulations applicable to such registration vary according to the provincial jurisdiction in which the target company is incorporated. As a rule, foreign companies must prove that they effectively exist abroad, are in good standing in their governing jurisdiction and have sufficient non-current assets or other type of investments to demonstrate that they carry on activities outside of Argentina. Additionally, investors located in certain low tax or off-shore jurisdictions may be denied registration by the local Office of Corporations, or further information may be requested from controlling investors so as to comply with local regulations.

(b) Antitrust Law

Regarding antitrust regulations, the AL sets forth the general regulations applicable to all corporate types. Additionally, the AL and its regulatory decree Nbr 396/01, as amended, as well as the corresponding resolutions of the Antitrust Commission, determine the minimum threshold, prerequisites and procedure for an M&A transaction to be submitted before the Antitrust Commission for prior antitrust control and approval.

(c) Other Laws and Regulations

Transactions involving public companies are governed by the CML. The CML as well as the different regulations issued by the CNV, must be complied with to proceed with an M&A transaction involving a public company.

In addition, depending on the industry in which the target company operates, whether private or publicly owned, certain specific administrative regulations may apply. Some of these regulated business sectors include: (i) oil and gas; (ii) energy; (iii) media and broadcasting; (iv) renewable energies; and (v) transport. Regulations frequently require prior government authorization for a transfer of shares or merger, especially if the transaction would result in a change of control.

(d) Tax Laws

Depending on the type of transaction, different tax laws may apply at different tax levels: national, provincial and municipal. Income tax resulting from mergers, spin offs and ongoing business transfers is governed by the Income Tax Law Nbr. 20,628 (hereinafter the “ITL”). Those transactions, if conducted following certain specific ITL rules, may be considered as tax free reorganizations and therefore exempt from income tax as well as other national taxes that may apply to such transactions.

The new regulation set forth by Law Nbr. 26,893 sets forth that capital gains resulting from the sale of shares or quotas of local companies is subject to taxation. The capital gain shall be taxed at a 15%, over net sell, rate if the transferor is a local resident and at 13.5%, over gross sale, if it is a foreign resident. There are certain alternatives for foreign residents to determine the capital gain effectively obtained. This capital gain tax would not be applied for capital gains obtained when selling publicly traded shares.

Regarding value added tax (“VAT”), transfers of an ongoing business could be taxed at a rate ranging from 10.5% to 21%. Transfer of inventories and any other asset may also be subject to VAT.

At the provincial level, and in almost all jurisdictions, stamp tax applies to the execution of most transactional documents at rates ranging from 0.8% to 3%, depending on the type of transaction. However, a few Supreme Court rulings have challenged the applicability of this tax to certain specific types of documents (i.e. offer letters).

Argentina has entered many tax treaties with several countries. M&A transactions, as well as the business continuance and tax impact, may be reduced by taking advantage of such tax treaties. Tax planning is generally accepted in Argentina, with the only exception being situations that evidence treaty shopping or manifest abuse to treaty regulation.

2. Structure of the transaction

There are many options available to structure an M&A transaction in Argentina, having regard to the local target company's tax and corporate status, as well as the different regulations applicable to each transaction. Before entering into any transaction, both parties should consider the different aspects of the transaction, including the current accounting, tax and legal status of the target company. Target companies with real estate property as their main assets (for example farmlands) would probably require both parties to consider a share purchase or a tax-free reorganization. If the target company has the

benefit of special tax regimes or has tax losses which may be used in the future, a transfer of the ongoing business or a share purchase could prove beneficial to buyer.

Buyers commonly analyze the target company from different perspectives. Accounting, tax and legal contingencies are considered to decide which structure provides for cost efficiency and contingency limitations. Since local regulations do not establish any or mandatory structure for M&A transactions, both parties may negotiate and determine the structure that suits them best. Notwithstanding, there are some legal and accounting matters that may influence such decision.

As mentioned above, the type of business conducted by the target company, the corporate structure of the parties involved, as well as the characteristics of its main assets, are key factors to decide which structure will be more efficient for the transaction. As noted above, target companies involving real estate properties are commonly acquired by means of a share purchase. This kind of acquisition allows buyer to acquire control of the real estate property and avoid unnecessary delays in the transfer of real estate title before the local land registries. From an accounting perspective, and considering the depreciation rules currently in force under Argentine GAAP, buyers also look to take advantage of the book value of the property and its corresponding depreciation. Share purchase transactions allow buyers to assume the control of the target company minimizing any impact on the market.

From a seller's perspective, there are two main aspects to be analyzed: (i) the reduction of tax impact and (ii) the post-closing contingencies and liabilities with respect to the transferred business.

Regarding the first aspect, tax free reorganizations not only provide advantages to the buyer, but also allow sellers to reduce the direct tax impact of the transaction. Spin-offs, mergers and certain other structures authorized by the ITL provide sellers with a very low tax impact as the transfer of assets derived thereof will not be taxed at the national tax level and most provincial tax levels. The tax efficiency of direct share purchase structures will depend on each seller's condition.

Sellers may face post closing liability in tax free reorganizations. Argentina's tax authority (hereinafter "AFIP") has established an information regime regarding tax free reorganizations. This information regime allows AFIP to review the tax-free reorganization and, in certain cases such as fraud, challenge the entire structure. In such case, seller and target company will be held liable by AFIP, regardless of any private agreement reached by the parties.

Buyers and sellers are usually interested in avoiding unnecessary intervention from the Central Bank when it comes to payment schedules for the transaction. Structures involving any kind of financial loan from abroad will likely cause the intervention by the Central Bank which is the enforcement authority for foreign exchange regulations.

3. Pre-Agreement

(a) Letter of Intent

Letters of intent, as well as memorandums of understanding, although not mandatory are very common in M&A transactions in Argentina. Their main purpose is to describe in detail the preliminary terms and conditions under which the transaction and its preliminary negotiations will be conducted. These documents are commonly used by the parties to establish the different steps and terms to be complied with to close the transaction as well as to define certain matters like price, conditions precedent, due diligence, and other pending issues to be negotiated in the final agreements.

It is also common that certain obligations regarding the M&A transaction be described in a letter of intent. In this regard, the parties may describe certain conditional obligations regarding the transaction, the failure of which to fulfill may generate different responsibilities and may subject the breaching party to a claim from the other party. Such responsibility could be considered as a pre-contractual responsibility or a contractual responsibility, depending on the document's content and extent.

In most cases, the parties to a letter of intent will agree that the terms of the letter of intent will not be legally binding; however, it may be the case that some terms and conditions included in the letter of intent may be legally valid and binding on the parties. Also, the Argentina's Civil and Commercial Code has recently incorporated the figure of the "pre-agreement responsibility", which protects the non-breaching party of the direct consequences of any arbitrary default of the breaching party consisting in leaving the negotiation period without any reasonable reason.

The basic content of a letter of intent may include: (i) the description of the target company, its business and a description of its assets (particularly when the assets of the target company are material to the transaction), and any other specific information that the parties consider essential; (ii) the acquisition price or a range of values subject to the result of the due diligence process; (iii) the basic terms of the transaction to be followed by the parties until closing (i.e. if a due diligence is to be performed, the extent and term for such due diligence, cost allocation, etc.), and (iv) the conditions precedent to closing. Additionally, and depending on the intention of the parties, exclusivity and confidentiality provisions as well as cost and disbursement allocation may also be included. Provisions to determine which sections of the letter of intent will remain in effect between the parties, even if the transaction does not close, may be agreed upon.

The execution of a letter of intent provides several advantages, such as establishing a basis for negotiation of the final transaction documents as well as securing certain material aspects of the deal. Additionally, in some cases the letter of intent may provide a penalty for withdrawing from the transaction without cause, which may deter a party from taking such action.

Finally, and as an alternative to the execution of a letter of intent, the parties may execute other non-binding documents, such as term sheets, to describe the transaction's essential terms.

(b) Lock-up (or voting) agreements with major shareholders

Lock up agreements and voting agreements are binding and legal under Argentine law and are frequently executed among the shareholders of target companies in M&A transactions in Argentina. The binding effect between executing shareholders has been ratified by several court rulings. Additionally, as set forth by Article 214 of the ACL, lock up restrictions can also be validly included in a target company's by-laws. Such restrictions may be expressly included in share certificates. Notwithstanding the above, statutory lock up restrictions provide that the lock up restrictions may not include a full sale prohibition.

Voting agreements are valid and binding among the parties, provided certain provisions set forth in the ACL are met. Voting agreements may include certain restrictions, as well as the express consent granted to one shareholder by the others to determine specific matters or exercise veto powers. The parties could also legally agree that their voting rights will be exercised by an empowered person to be appointed and instructed by them.

Notwithstanding the binding conditions agreed to by the parties, voting agreements are not binding or enforceable against the target company. For example, if a shareholder who has executed a voting agreement breaches the agreement by voting in a different manner at a shareholders meeting, then the target company may not challenge the validity of such vote. Consequently, any violation of a voting agreement, and any dispute in this regard, shall be resolved by the parties to the agreement.

Regarding voting agreements as a pre-closing document in an M&A transaction, if a violation of such agreement affects the buyer, then a pre-closing indemnification clause may be triggered if such a clause was agreed by the parties. If no such clause was agreed between buyer and sellers, then the rules of the Argentine Civil and Commercial Code apply by default to determine sellers' responsibility for such breach.

4. Acquisition Agreement

(a) Holdback and escrows

Holdbacks and escrows clauses are frequently used in M&A agreements in Argentina. These sorts of clauses provide some protection to buyer in connection with undisclosed liabilities or contingencies of the target company. Both provisions are accepted and binding under Argentine law.

Escrow deposit clauses are usually structured as a mechanism by which buyer and sellers agree to transfer funds or documents (target company's shares or promissory notes) to a third party (escrow agent or notary public) to be held by the third party until certain obligations described in the agreements have been fulfilled and, in some cases, to administer such funds or such documents pursuant to both parties' instructions. Such instruction will depend on the fulfillment or not of the agreed terms and conditions by the parties. In this regard, both parties may agree that: (i) a third party, such as an arbitrator, will issue a notice to the escrow agent once, in his or her sole discretion, the agreed conditions are fulfilled; or (ii) a formal notice will be sent by both parties to the escrow agent once the agreed conditions are fulfilled or a certain period is completed. The parties may also agree that any interest generated by money deposited in an escrow account belongs to one party or the other, depending on the outcome of the transaction.

An escrow provides both parties with a reliable and secured payment mechanism. Sellers will have the comfort that funds will be deposited with a third party on the closing date and will not depend on the buyer's financial situation at the time of payment. From buyer's perspective, it provides a more secured indemnity structure since it allows immediate access to funds that would otherwise be paid to sellers, to respond to any claim from a third party or contingency that may arise after closing.

Regarding the formal implementation of an escrow, it is common to execute a separate escrow agreement from the acquisition documents. If an institutional escrow agent is involved (for example, a financial institution or trust entity), it usually has its requirements to act as escrow agent. If a notary public is appointed as escrow agent, then the form of the escrow agreement is usually negotiated by the parties with the notary's intervention. Cost is usually a relevant factor when appointing an escrow agent.

Although the escrow deposit agreement in Argentina is not expressly regulated by civil or commercial law, it is governed by diverse regulations. It is considered a guaranty deposit agreement as regulated by article 1356 and subsequent of the Civil and Commercial Code (which includes rules of a special mandate with its own set of instructions (article 1319 and subsequent of the Civil and Commercial Code)). Additionally, the escrow agreement may be a fiduciary agreement and will be consequently governed by those regulations.

Holdbacks are also common in M&A agreements in Argentina. There are different mechanisms which may be agreed by the parties. Both parties could agree that all or part of the purchase price will be paid in installments and grant buyer the right to setoff an amount arising from an indemnifiable claim against a portion of the purchase price to be paid. It is customary for the parties to agree to a partial payment on the closing date and a final payment on the expiry of the statute of limitation of the different possible claims. If the indemnification claims exceed the final payment, the parties could agree to additional guarantees and security. As a general rule, the amount to be held by buyer and paid later depends mostly on the result of the due diligence previously conducted.

There are no specific regulations regarding holdbacks in Argentina. Additionally, there are no legal requirements with respect to the interest to be accrued on a withheld amount and, consequently, the parties could agree that the amounts withheld by buyer could accrue interest. As part of the acquisition agreement the parties could agree on the payment schedule which will provide the parties with proper indemnification. It is also common that holdbacks are combined with some protection for sellers regarding the final payment of the withheld amount. In this regard, a pledge over the target company's shares owned by buyer or a promissory note in favor of sellers is commonly granted to secure due payment.

Regarding the time schedule of both the holdbacks and the escrow, it is recommended to consider the statute of limitations of the different claims that the target company could be responsible for. Tax, labor and social security claims are the main areas commonly considered to define the extension of an escrow agreement or the holdback repayment schedule.

(b) Representations and warranties

Representations and warranties of sellers and buyer in M&A agreements in Argentina could basically be divided into three groups: (i) authorizations and consents regarding the transaction, (ii) compliance or fulfillment by the target company with applicable law, and (iii) the conduct of the target company business before closing. The representations and warranties to be granted will mainly depend on the result of the due diligence. The wording of representations and warranties clauses customarily seen in English written agreements may need to be specially revised for use in Argentina as certain terms and definitions may not strictly comply with local Argentine regulations.

Regarding the first group, both buyer and sellers usually represent and warrant that they have obtained all the necessary internal consents and approvals to execute the documents and proceed with the transaction. With respect to sellers which are corporate entities and depending on the transaction implications, it is common to hold a board of directors meeting approving the transaction and authorizing its representatives to execute the transaction documents. Although it is not mandatory under Argentine law because the authorized officers of a selling company may execute documents without any special authorization (i.e. the chairman of the board), it is common to require each seller to expressly represent and warrant that it has conducted the above mentioned corporate approval. Sellers are also required to represent and warrant that they have no special restriction (whether legal or contractual) to dispose of the asset they are transferring. Companies subject to reorganization or bankruptcy procedures must request special judicial authorization to sell their assets. Buyers are also required to represent and warrant that all internal authorization have been complied with to proceed with the transaction.

Regarding any governmental authorization to be obtained, it is also common that both parties represent and warrant that no governmental authorization is required. Special reference must be made to the antitrust controls to be conducted by the Antitrust Commission. Antitrust regulations determine certain thresholds that, if reached, provide for prior administrative approval before the transaction may close. Under Argentine antitrust laws, a transaction will be subject to prior administrative approval if the combined business volume of the involved companies exceeds AR\$ 200,000,000 (approx. US\$ 11,4 M.) In addition, as mentioned in above, M&A transactions within certain regulated industries may require prior approval from the applicable administrative body. A new Antitrust Law is being discussed at the Argentine Congress and is very likely that the threshold mentioned above change dramatically in the near future.

The second group of representations and warranties are those related to the legal compliance of the target company. These representations will be made by the sellers as controlling shareholders.

From a legal accounting perspective, it is also common to require sellers to represent and warrant that the financial statements have been prepared and filed according to general accepted accounting principles applicable in Argentina. This representation could also include a copy of the target company's last three annual financial statements, duly filed and registered. With respect to this representation it is also common to require sellers to represent and warrant that the target company's financial statements reflect the target company's current financial status.

Sellers are also commonly required to represent and warrant that all applicable regulations relating to companies generally, and to the target company specifically, have been complied with. Sellers are required to represent and warrant to buyer that the target company has complied with applicable regulations such as tax, labor, environmental and corporate regulations. With respect to compliance with tax law, it is advisable to include, as a schedule, tax returns for the past five years as well as a description of any tax audit or litigation. Labor representations usually include a list of employees, including salary and a list of claims asserted against the target company. During the recent past, environmental law, money laundering and anti-terrorism law and related administrative regulations in Argentina have become

a key matter with respect to representations and warranties to be given by both sellers and buyers. It is also worth mentioning that the Congress is discussing a new law on criminal responsibility for corporations, as required by OECD, and is very likely that such law would be in force by the end of 2017.

With respect to legal action representations, the acquisition agreement would usually include a list of legal actions of which the target company has been notified. This list must include a description of the main aspects of each claim (such as its cause, the claimed amount and any interest accrued). Buyer will commonly require that an estimation of the result of the claim from sellers' legal counsel is included to determine the possible contingency. About specific regulations applicable to a target company, a specific representation should be requested by buyer with respect to the target company's compliance with such regulations.

Other important representations from sellers relate to real estate assets, if any, owned by the target company. In this regard, it is worth mentioning that because real estate property titles in Argentina, as well as any restrictions to their transfer thereof, are publicly registered, it is customary to include a representation stating that the target company has good and marketable title to its properties and, to include as an annex, a copy of the duly registered title.

The third group of representation and warranties are those related to the conduct of the target company's business, which will acquire increased relevance in those situations where the execution date and the closing date are different. Regarding "*ordinary course of business*" statement, it has raised some issues with respect to its interpretation by Argentine courts. Therefore, it is important to describe in detail the meaning given by the parties to the phrase "*ordinary course of business*".

Statements with respect to insurance policies which secure the assets and the operation of the target company are also included as representations of the sellers. It is also important to include a general representation regarding insurance claims made by the target company as well as the due payment of the corresponding insurance premiums.

A final comment regarding the responsibility regime arising from the non-fulfillment or misrepresentation by sellers should be mentioned. Under Argentine Civil and Commercial Law applicable to M&A transactions, joint and several liabilities among sellers is not presumed. Therefore, a special clause should be included in the agreements to set forth such joint and several liabilities. From sellers' stand point, if a joint and several liability clauses is included in the acquisition agreement and buyer proceeds against one seller only, then that seller would have a claim against the other sellers in proportion to what the other sellers should have borne of such claim.

(c) Covenants of the buyer and seller

While representation and warranties are statements made by the parties on behalf of themselves or the target company, covenants are included in M&A agreements to describe actions that the parties or the target company must take after or on or before closing. In this regard, there are two main categories of covenants: (i) negative covenants, which consist of certain actions the parties must refrain from taking and (ii) affirmative covenants, which consist of actions to be taken by the parties. Both kinds of obligations are duly regulated in articles 724 and subsequences, and chapter 3, sections one and two of the Argentine Civil and Commercial Code. Accordingly, under Argentine law their inclusion in an M&A agreement is legal and binding.

Covenants made by the parties are more relevant in transactions where the execution date and closing date are different. In this regard, during the period between the execution date and the closing date, the sellers and the target company usually assume certain negative and affirmative covenants with respect to the target company business. With respect to transactions subject to consent by governmental authorities, it is common that both parties assume the obligation to obtain such authorization.

Pre-closing negative covenants for sellers usually refer to the business of the target company. Covenants in this regard will be binding during the period between the execution date and the closing date and may be legally enforced. Commonly, the parties use certain objective parameters to determine how this covenant will be fulfilled. The “*ordinary course of business*” is one of the most commonly used parameters. Although the idea of an ordinary course of business is not expressly regulated by Argentine law, there are some actions of which will be considered as an action taken out of the ordinary course of business, such as approval of extraordinary dividends, change of corporate purpose or security granted over any of the target company assets.

Regarding post closing negative covenants for sellers, they could be related to the sellers’ activities after closing, such as non-compete obligations. Such obligations are legal and binding under Argentine law, although court decisions have limited their scope in time and geographic area.

Pre-closing affirmative covenants for sellers usually relate to access to, and investigation of, the target company, the accomplishment of the required authorizations for the transaction as well as the fulfillment of the conditions precedents to closing, if any, agreed between the parties. Similar covenants could also be assumed by buyer since the fulfillment of some of those actions will require buyer’s cooperation.

Post closing covenants for buyer commonly relate to any post closing payment schedule agreed among the parties. This kind of covenants are commonly related to earn out payment mechanisms which depend on how buyer manages the target company business. In this regard, the parties could agree that buyer will manage the target company’s business in a pre-arranged way.

(d) Conditions precedent to closing

Buyer and sellers want to ensure that payment of the purchase price and the transfer of the shares are duly executed only when they are comfortable with all aspects of the transaction. For such purposes, the transaction closing is commonly subject to the fulfillment of certain conditions precedent. Such conditions precedent turns the obligations assumed by the parties in the agreement into a conditional obligation. This kind of conditional obligations are duly regulated by articles 1123 and subsequences and 1160 of the Argentine Civil and Commercial Code.

During the pre-closing stage, it is common to state that closing will be subject to the completion by buyer, and its counsel (if applicable), of a complete due diligence. The actual completion shall be commonly subject to the sole discretion of the buyer.

It is also customary for buyer to request an opinion from sellers’ legal or accounting advisor. This opinion will be related to the legal and/or accounting status of the target company as well as its good standing. The main purpose of such document is to provide the parties with a document issued by professional counsel because of the due diligence process.

Finally, there are certain transactions in which the fulfillment of the condition precedents depend on the actions of third parties. In those transactions, it is advisable for buyer to state that as a condition precedent to closing sellers must deliver a document stating that all the conditions precedent to closing have been duly fulfilled. This document will provide the parties with more certainty regarding the closing date, as well as a reaffirmation of the representations and warranties made by sellers.

(e) Indemnification provisions

The main purpose of indemnification provisions in M&A agreements is to allocate responsibility and costs in case any party fails to fulfill, or partially fulfills, any of the obligations it has assumed in the transaction documents. Since the obligation assumed by buyer is commonly linked to the execution of the documents and the payment of the purchase price, indemnifications provisions are usually granted by sellers and/or the target company. However, if buyer makes a misrepresentation or does not fulfill any of the obligations

it has assumed, then the indemnifications provisions will state the process pursuant to which sellers shall be indemnified.

It is customary to include in the indemnification provisions a set of statements and conditions in order to clearly establish how the indemnification process will work. First, it is common to state that any breach, loss, contingency, whether intentional or not, known or not known by sellers, derived from actions or omissions prior to the closing date, will provide the non-defaulting party the right to claim indemnification from the other party or parties. In some agreements, the parties may also state that the indemnification provisions will be triggered only if a claim filed against the target company generates or results in loss or damage to the target company or to buyer. In those cases, it is very important to define a loss or a damage for this purpose and whether a third-party valuation method will be used. Secondly, it is also customary to state that any cost, expense or attorney fees associated with the defense of a third-party claim shall be assumed by the party that caused such expenses. In such case, the parties could agree to limit such reimbursement.

Sellers may require that their indemnification obligations be limited either with a time limit or a limit on the amount to be paid. This will provide certainty to sellers. In this regard, indemnification provisions will include a description of the non-fulfillments, misrepresentations or target company's contingencies which will trigger sellers' indemnification obligations. It is also important to mention that, under Argentine law, it is legal and binding for the parties to set forth that seller will be responsible for such consequences not known or undisclosed at closing.

Regarding limits to indemnification it is common to establish indemnification thresholds, either for individual claims or claims in the aggregate. If an aggregate threshold is established for all claims, there could be different ways to limit sellers' indemnification. For example, a threshold could be used as a basket, which means that once the threshold is reached, then sellers will be responsible for all the amounts claimed. As an alternative, the threshold could work as a cushion or deductible, meaning that the seller will be responsible only for any amount claimed above the threshold, once it is reached. The parties could also negotiate a cap, as well as other kind of conditions, for individual claims or for all claims in the aggregate. In this regard, it is also common to include in indemnity provisions that buyer is required to notify sellers within a determined period about the existence of a claim. It could also be agreed that sellers could take part of the defense of the claim and negotiate its resolution directly with the claimant.

With respect to time limitations for claims made by buyers, they are commonly tied to the representations and warranties made by sellers. Therefore, it is common to agree that such representations and warranties will survive until a certain date or during a certain period after closing. Once this time limit is exceeded (e.g., without any claim being asserted), buyer will not have any right to claim indemnification from sellers. It is also binding and legal for the parties to agree that some of the claim categories will not be included in the indemnification timing or monetary limits.

Time limits are usually determined having regard to the statute of limitation applicable to each claim. As an example, local tax regulations set forth that AFIP may review and challenge filed tax returns for a period of five years after the applicable filing date. Therefore, buyer commonly requires that the representation and warranty made by sellers regarding tax matters survive until the expiry of this five-year period. Buyer could also be interested in not limiting the breach of tax representations with a cap since a claim filed and won by AFIP could also generate interest and penalties that could be not calculated at closing.

Indemnity remedies are commonly related to the payment of the purchase price. If the parties agree that part of the purchase price will be withheld or paid over time (installments), then in the event of an indemnification claim, it may be satisfied as a set-off against such withheld or deferred payments. If an escrow has been established, then the indemnification claim may be satisfied from the funds held in escrow. It is very important to clearly describe the procedure to be followed by the parties and the instructions to be sent to the escrow agent. Both options will provide either buyer or the target company with the necessary funds to assume the contingency and if additional funds are required, those could be claimed against sellers, depending on the wording of the agreement.

Special reference shall be made to those cases in which the parties do not reach an agreement or have certain differences regarding how to defend the target company from a claim made by a third party. Buyer is commonly required to give formal notice of a claim to sellers. Once delivered, the agreement should set forth how the parties will deal with the claim. Sellers' intervention in the defense of claims should be regulated by the agreement, as well as the possibility of making a settlement.

(f) Dispute resolution

The parties usually decide the applicable law and dispute resolution method having regard to where they and the target company are located. The cost of the different procedures is also usually considered by the parties. Argentine applicable regulations do not prescribe any restriction regarding applicable law to M&A agreements or any specific restriction to choose a dispute resolution method. Therefore, the parties are free to agree on any applicable law and alternative dispute resolution methods

Due to the cost and time delays arising from judicial procedures, the parties usually agree to submit their disputes to arbitration of law. The arbitration could be conducted either in Argentina or in any other foreign jurisdiction. The parties could also prescribe an institutional or ad hoc tribunal and, in the last case, could define how the members of the tribunal will be appointed. The arbitration tribunal appointment, the rules under which the tribunal will resolve conflicts and the enforcement and validity of the rules issued by the tribunal can be privately agreed by the parties and if required, enforceable before a court of law.

Local transaction disputes could be submitted to the decision of certain specific arbitration tribunals, for example, the Buenos Aires Stock Exchange permanent arbitration tribunal. A specific tribunal could proceed under its own rules or other rules such as the International Chamber of Commerce. Notwithstanding the above, the local Civil Procedure Code sets forth different limits with respect to arbitrators' powers during arbitration. For international transactions, tribunals such as the American Arbitration Association or the International Chamber of Commerce are frequently appointed.

Alternatively, a dispute could be submitted to the local commercial courts. In this regard, it is important to mention that as the agreement is related to commercial matters, local commercial regulations would apply. It is also worth mentioning that if the parties do not set forth any alternative dispute resolution method or applicable law, then the commercial court procedure would apply. Finally, as required by local procedural regulations, a mandatory conciliation stage must be conducted by the parties before any judicial process is initiated. In case the parties reach a settlement, such settlement must be filed before the court for its final approval and eventual enforcement.

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