

Perspectives

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Latin American Firms Pursue Global Status

Once targets, Latin American businesses are increasingly the acquirors in the international M&A market.

**BY FRANK AQUILA
AND SERGIO GALVIS**

Although the Latin American economies have weakened along with the rest of the world, the long-term outlook for the region is extremely positive. As the global economy improves, the pace and size of Latin American M&A deals will surely increase. For decades, the term "Latin American M&A" has simply meant U.S. or European companies acquiring businesses in the region. With Latin American companies now regularly making acquisitions around the world, that is no longer the case.

Given the emergence of Latin American companies as acquirers, the issues, challenges and requirements for deals in other parts of the world are now hot topics in the region. Latin American dealmakers are quickly realizing that just like other significant transactions, international acquisitions present a



**InBev's acquisition of Anheuser-Busch attests to the business savvy and financial firepower existing today among Latin American companies and will be followed by more similar deals in the years to come, the authors say.
(Photo: Anheuser-Busch InBev)**



Frank Aquila, partner in the Mergers and Acquisitions Group of Sullivan & Cromwell LLP

full range of issues that are more complex than those presented in regional deals. Whether the transaction is large or small, early identification of key issues is the hallmark of the most successful deals.

PUBLIC DISCLOSURE

The extent of public disclosure outside Latin American regarding transactions is often a surprise. Given how important it is to properly handle disclosure, it is vital to identify these requirements upfront. It should be recognized that disclosures in other jurisdictions may trigger disclosure requirements at home, impact key transaction terms and deal strategy, as well as affecting the regulatory approval process.



Sergio Galvis, head of Sullivan & Cromwell LLP's Latin American Practice and a member of the firm's Mergers and Acquisitions Group

Although not unique to cross-border transactions, leaks regarding a possible transaction can generate intense speculation in the media and trigger disclosure obligations under stock exchange rules. This is what happened when InBev's bid for Anheuser-Busch was leaked before a formal offer had even been made. While the InBev/Anheuser-Busch deal went forward, premature disclosure often kills deals that are in early stages. When and where appropriate, it is wise to hire a communications firm that knows the relevant markets. Money spent on a good PR firm is typically money well spent.

LITIGATION POTENTIAL

The risk of litigation in an acquisition of a public company outside Latin America is high. This is particularly true for transactions in the United States, where deals will likely be subject to a heightened standard of review under state corporate law. Unfortunately U.S.-style M&A litigation is spreading to other jurisdictions. In Spain, for example, the long-running hostile battle for the electric utility Endesa, triggered extensive litigation both in Spain and the United States as the various potential acquirers and the target jockeyed for advantage.

Before proceeding too far with a potential transaction, all possible litigation scenarios must be analyzed and understood. Given the disruptive potential of litigation and the invasive nature of discovery, time and effort spent at early stages preparing for potential litigation will yield significant dividends as the deal moves forward.

Regardless of whether litigation is likely, parties in cross-border transactions always need to agree on the governing law of their agreements and how disputes will be resolved. Given the range of issues and potential for litigation, it is routine for parties in cross-border transactions to engage counsel in multiple jurisdictions.

REGULATORY APPROVALS

The regulatory notifications and approvals required for a given transaction vary by jurisdiction and industry, as well as by transaction structure and size. The nature and extent of the required approvals will impact the timing and certainty of closing. While no two situations are the same, Latin American acquirers should consider these key requirements when making an acquisition in the United States:

Exon-Florio Act: Exon-Florio grants the U.S. President the authority to block or suspend a merger or acquisition by a non-U.S. entity if there is “credible evidence” that a “foreign interest exercising control might take action that threatens to impair the national security.” Most Latin American acquirers are aware of Exon-Florio and the related requirements to notify the Committee on Foreign Investment in the United States (“CFIUS”) if the transaction could impact U.S. “national security.” In addition, the Foreign Investment and National Security Act of 2007 (“FISIA”) is now in effect in the United States. FISIA requires heightened scrutiny of acquisitions by “foreign government-controlled” entities or involving U.S. “critical infrastructure”. If the political sensitivities are likely to be high, advance planning is essential when a CFIUS filing is required.

Hart-Scott-Rodino: Hart-Scott-Rodino (“HSR”) is the U.S. antitrust/competition review process for acquisitions. HSR applies whether the acquisition is made by a U.S. or a non-U.S. acquirer and may even apply to transactions outside of the United States between two non-U.S. entities.

Non-U.S. companies will almost always require more time to prepare a first-time HSR filing. In transactions where there appears to be an antitrust issue, it is also important to prepare for the possibility of a “second request” from either the U.S. Department of Justice or the U.S. Federal Trade Commission. Latin American companies unfamiliar with the “second request” process are often surprised by the enormous amount of effort necessary to comply with a “second request”. It is also important to know that documents in languages other than English will need to be translated before filing.

Stock Exchange Requirements: The buyer of a company listed on the NYSE or other U.S. securities exchange will undoubtedly require advice about the exchange’s listing rules and associated notification and delisting requirements. Certain of these notifications and approval processes require the parties to a cross-border transaction to provide extensive or

sensitive personal information concerning their officers and directors.

In addition, companies from Latin America need to be aware of reporting requirements (such as Schedule 13D in the US) that may be triggered by the accumulation of shares in a target company. Moreover, acquirers need to bear in mind the stringent insider trading rules and market manipulation rules in the United States and similar restrictions in other jurisdictions.

Most countries in which Latin American businesses will make acquisitions have their own regulatory requirements with respect to antitrust/competition, stock exchange and other filings. Understanding the processes, as well as the issues raised, should be particularly high on the list when considering an acquisition in Europe, Japan or China. It is important to remember that most large international transactions will require filings in more than one country and coordination is essential. Two of the most common requirements found in transactions outside the US, that should also be considered, are (1) monetary authority filings/approvals and (2) works council approvals.

ACQUISITION CONSIDERATION

As any dealmaker knows, cash versus stock is often a key issue in international M&A transactions. Even though Latin American capital markets have matured significantly over the past decade, the use of stock outside of the region will likely require extensive discussion regarding the financial, legal and practical implications of such a decision. These issues are numerous and complex, but they must be addressed early in the process since using acquirer stock will likely have a significant impact on timing. It is easy to understand why most of the larger acquisitions by Latin American companies, notably Vale's acquisition of Inco, Tenaris' acquisition of Maverick Tube and Camargo Correa's acquisition of Argentina's Loma Negra, were all done as cash transactions.

The use of stock consideration by a Latin American acquirer can negatively impact the acquirer's stock price as a result of the "flow-back" following closing. Many institutional investors in the US and Europe, notably pension and mutual funds, are required to hold a certain percentage of their assets in the shares of domestic companies or to track a particular domestic stock indexes such as the S&P 500 or the FTSE 100. As a result, these investors may be unwilling to accept stock consideration from Latin American companies or will have to sell the stock received in the deal quickly following closing. This "flow-back" can lead to a rapid, and sometimes significant, decline in market price for the stock of the acquirer.

CORPORATE GOVERNANCE

Parties to a cross-border transaction should also be cognizant of cultural differences regarding corporate governance. The style of board decision-found among companies in various Latin American countries is not

ubiquitous. In many countries in the region, boards meet much more frequently and are much more deeply engaged in the day-to-day operations of businesses than their counterparts in the United States or Europe. Among other issues, the parties should consider the applicable fiduciary duties, board independence and related requirements, as well as rules related to holding board and shareholder meetings.

Understanding corporate governance practices in the target company's home country is essential both in preparing for the process and developing an approach that will be positively received by the target. For example, it is important to recognize that negotiated merger agreements subject to shareholder approval tend to be the norm in the United States, rather than tender offers made directly to shareholders which are routine in Latin America. This sort of market intelligence is essential to success in cross-border deals.

COME OF AGE

The Latin American multinational has truly come of age. InBev's acquisition of Anheuser-Busch and Vale's unsolicited acquisition of Canada's Inco, besting North American rivals Falconbridge and Phelps Dodge, attest to the business savvy and financial firepower existing today among Latin American companies. Moreover, in today's environment, a number of countries and businesses in the region are experiencing a relatively less severe downturn than in North America and Europe. With stronger balance sheets and liquidity positions, Latin American acquirers will likely find further acquisition opportunities in stressed global markets.

In short, in the years to come, there will be many more deals involving companies from Latin America acquiring their formerly larger competitors in the United States, Europe and Asia. The companies from the region that engage in advanced planning and early identification and understanding of the key deal drivers will likely be among the biggest winners on the cross-border M&A scene.

Frank Aquila is a partner in the Mergers and Acquisitions Group of Sullivan & Cromwell LLP. Sergio Galvis is head of Sullivan & Cromwell LLP's Latin American Practice and is a member of the firm's Mergers and Acquisitions Group. They wrote this column for Latin Business Chronicle.