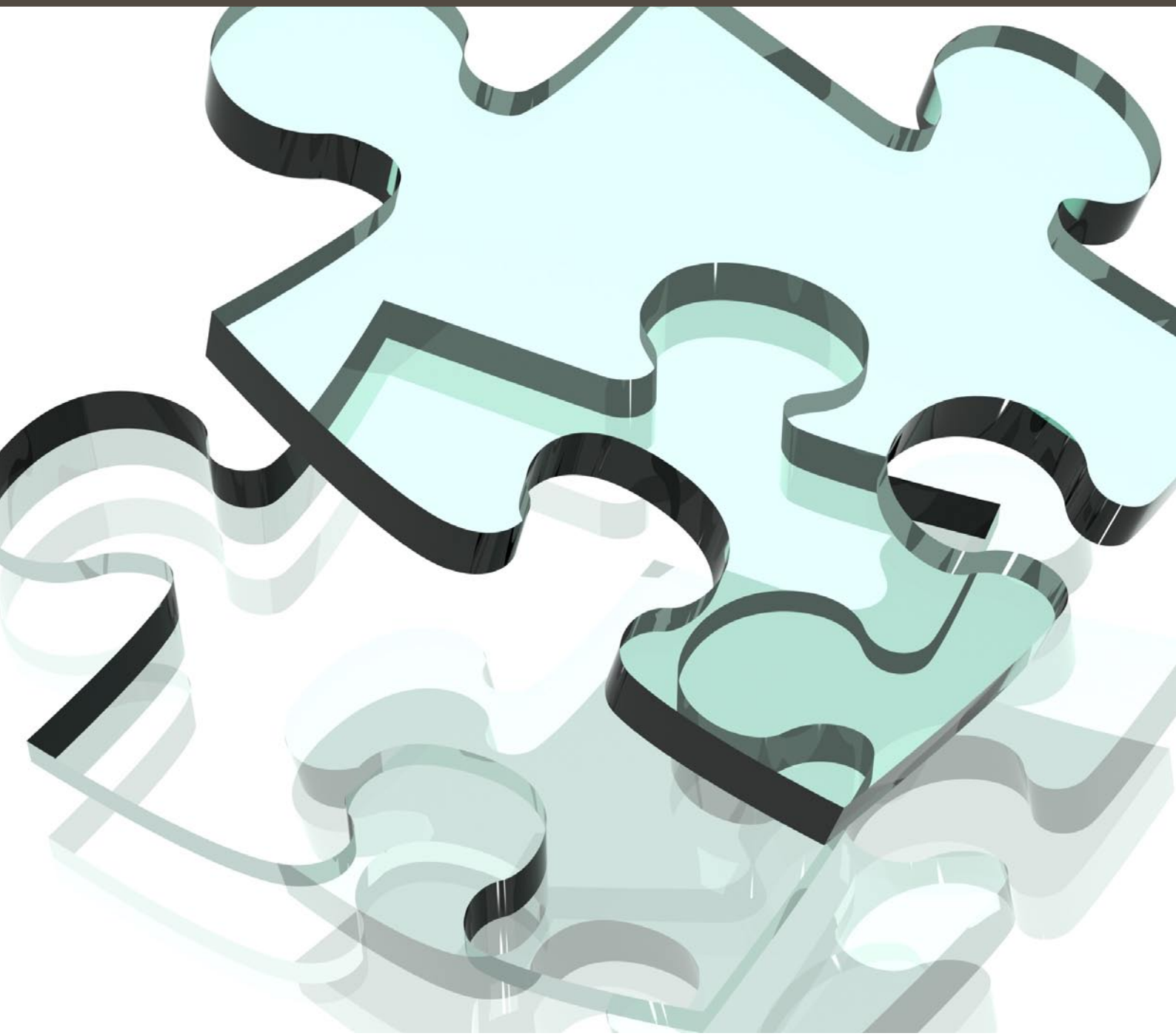
MERGERS & ACQUISITIONS

ANNUAL REVIEW **2014**



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Mergers & acquisitions

MARCH 2014 • ANNUAL REVIEW

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in mergers & acquisitions.

UNITED STATES

PATRICK HURLEY
MIDMARKET CAPITAL ADVISORS, LLC

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN THE US OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

HURLEY: We have fared better here in the US than other regions, particularly if the focus is the middle market and if the measure is aggressive bidding for companies available for purchase. Corporate buyers continue to set the tone and their appreciation for the discipline installed by private equity owners is readily proven by the willingness to pay impressive relative values for good businesses transformed through professional ownership into strong performers that can continue to grow within big public companies. The main factors driving deals today are earnings momentum and buyer hunger for growth. Strong operating performance of sellers and flush buyers with renewed confidence are a great combination.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

HURLEY: Financial buyers became strategic buyers as the competitive landscape has required add-on acquisitions to satisfy growth demands. The best deals for smaller companies often come from sponsor-owned platforms mandated to include acquisitions in their growth strategies. Unless a traditional strategic is frequently in the market, there is a risk for the seller that the strategic will be less nimble and subject to internal issues compared to the financial buyer with a deal-closing mentality. While M&A clearly matters to the business of operating companies deemed strategic buyers, M&A is the primary business of financial buyers. Both have to tend to the businesses they own, but the objective of exiting the investment in a relatively short timeframe is a significant difference.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

HURLEY: Leadership through the ownership change and in the period shortly following the deal is what matters most. Sellers who are professional owners usually plan for operating management continuity much better than owner-managers unlikely to realise how much change is inevitable after they have sold their business. Strategic buyers generally buy 100 percent and have the management resources to become responsible for what they buy. Both types hedge their risk through purchase agreement representations and warranties. Operating and business due diligence is equally important to the legal and accounting due diligence. Financial buyers routinely include operating partners in their diligence and have ejection clauses for continuing senior management to lose valuable financial opportunity if they should have known about potential problems. Most buyers routinely obtain quality of earnings assessments from third parties mandated to test the integrity of financial reporting. None of the standard due diligence can substitute for the buyer obtaining true commitment on the seller's part to making the acquisition successful for the buyer.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN THE US? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

HURLEY: Consensus seems to agree that the senior lending market is as competitive as it has ever been and that non-bank lending units almost exclusively serving financial sponsors are intensely competitive. Deal size has continued to be an issue because there is significantly less interest in small deals and all lenders seem to want to move upmarket. Most of the strategic buyers have little difficulty so long as they don't try to isolate the funding to non-recourse business units. That said, there doesn't seem to have been the squeeze on subordinated debt pricing that might have been expected, so that is an area where we would look for more improvement. Strategic buyers often don't have to be as concerned about capital structure unless the funding of an acquisition imposes on an already constricted capital structure.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

HURLEY: There are meaningful differences in a large geographical market like the US, but the variations between states and municipalities hardly compare to the cross-border issues that apply in other regions. Any US or international buyer of a US company is going to have some amount of local – state and city – legal representation at the very least. The level of involvement will be determined by the complexity of the particular transaction and condition of the company being purchased – ranging from standard approvals for licenses, taxes and perhaps environmental compliance as contrasted with creditor-related liens or intellectual property challenges. There are clear advantages to having local market knowledge to evaluate the ecosystem of suppliers, customers, workforce, regulation and even items such as tax incentives for job retention and investment.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

HURLEY: Access to the appropriate people within the target company and the necessary time before closing to do the detailed planning are particularly difficult when intermediaries control the sale process and the entire focus is on a race to conclude negotiations. There are various ways to work within these constraints, but the buyer usually doesn't have the opportunity to apply the depth of planning rigor that is customary for their other business units until after closing. The scope of authority for individuals responsible for the integration seems to take a while to settle in as people start to work together and tackle the inevitable unanticipated issues and begin to understand one another. Serial acquirers with systematic approaches are often less concerned about losing key people than financial buyers who have more pressure for short term operational improvement.

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Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN THE US GOING FORWARD?

HURLEY: The increased regulation of industry in the US has already made it more difficult and time consuming to negotiate and complete M&S transactions here. It is government regulation in general rather than M&A regulations that has and will continue to affect transactions and M&A activity overall. Anticipation of government regulation has delayed M&A and further investment in sectors ranging from energy production and transportation to telecommunications, industrial and consumer products as well as financial services. Healthcare and labour costs are other areas which are on the minds of business owners across the US. Antitrust scrutiny has become more of a concern than was the case under the previous administration, but is generally not a factor in middle market dealmaking.

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Patrick Hurley is a managing director at MidMarket Capital Advisors, LLC. Mr Hurley has served as global chairman of the Association for Corporate Growth and led its expansion into China, served two terms on the global board of the Family Firm Institute, currently serves on the board of American Refining Group, Inc. and has served on the boards of other privately-held and publicly-traded companies. Private company owners, boards of directors and various fiduciaries have relied upon his contributions as a trusted advisor on corporate finance, M&A and strategic issues for 35 years.

ARGENTINA

LAURA LAVIA HAIDEMPERGHER
M & M BOMCHIL

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN ARGENTINA OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

LAVIA HAIDEMPERGHER: M&A activity in Latin America during 2012 and 2013 increased, with Brazil leading the ranking. However, the situation for Argentina has been the opposite. The main factors affecting M&A flow are connected with uncertainty, devaluation, lack of clear rules, an ineffective and changing legal framework, and several *de facto* prohibitions to import goods and transfer of dividends outside the country. Additionally, foreign companies are no longer the main investors, at present local players lead existing transactions. The sectors that appear to be more active are energy, oil and finance – in the second half of 2012, 86 percent of deals were concluded in those areas. The financial sector was led by the acquisition of Standard Bank by Industrial and Commercial Bank of China. In 2013 the acquisition of 81 percent of the stock of the oil and gas company Compañía General de Combustibles de Argentina by Corporación America investment group was one of the major transactions in the field. The acquisition of Petrobras Argentina's stock in Edesur – a major energy company in Argentina – by Sociedad Argentina de Energía S.A. was also a relevant deal.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

LAVIA HAIDEMPERGHER: Unfortunately, due to the volatile business environment, companies are sceptical at the moment and it seems they are waiting for a change in the political and economic environment before they decide how and where to invest. Meanwhile, companies are conducting mainly intragroup restructurings or acquiring small portions of stock or specific assets in order to expand their businesses. As the next presidential elections will take place in 2015, it is predicted that transactions will continue their current decreasing trend, waiting for a change in the political and business scenario.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

LAVIA HAIDEMPERGHER: Usually, it is necessary to conduct a legal and financial due diligence. This is particularly important in the Argentinean market given the legal and regulatory uncertainty, and the controls affecting almost every aspect of the economy. When the buyer has no prior experience in the country, labour and tax aspects are the main areas to focus on. Additionally, due to the *de facto* prohibitions regarding imports, any buyer should consider whether the acquired company will depend on any material that has to be brought from abroad. Finally, the exchange rate and devaluation must be taken into account when drafting payment terms and conditions in the related agreements.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN ARGENTINA? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

LAVIA HAIDEMPERGHER: Despite the decrease in M&A transactions, there have been a few cases of bank financing, such as a AR$150m syndicated loan lent by HSBC Bank Argentina S.A., Industrial and Commercial Bank of China (Argentina) S.A., Banco Ciudad de Buenos Aires and Banco Hipotecario S.A., to BGH S.A. – a leading company in the electrical appliance field. Defining a capital structure will depend in general on the type of business to develop. Also, foreign investors should consider the possibility of obtaining more convenient loan rates from foreign banks. In this case, a proper analysis is advisable in order to avoid foreign exchange restrictions and withholdings when channelling the funds into the country.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

LAVIA HAIDEMPERGHER: Market knowledge is crucial, mainly due to a lack of certainty in the economic environment of countries like Argentina. It is highly recommended to seek advice from local attorneys with expertise in the target country and in the relevant field, due to the increasing complexity of the market. Local market knowledge will help to provide comfort in the current uncertain economic scenario and, sometimes, allow firms to take advantage of tax benefits available when choosing the business structure. Knowledge of the culture and language of the country are also relevant factors for a satisfactory outcome.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

LAVIA HAIDEMPERGHER: It is worth highlighting that most of the mergers that take place at present in Argentina are intercompany mergers by absorption, so early integration planning is not often seen. However, it is advisable to set up an integration plan in order to obtain greater value from the merger. Additionally, this aspect is often led by the management of the company. Lawyers are not particularly involved, mainly because the aspects to deal with are more cultural and operational, rather than legal in nature.

Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN ARGENTINA GOING FORWARD?

LAVIA HAIDEMPERGHER: The most relevant legal amendments affecting M&A are related to income tax law. As of September 2013, all the results derived from the transfer of depreciable movable goods, shares, quotas, equity participation bonds and other securities – 'valores' – are now subject to tax, regardless of the nature and residence of the beneficiary. In case of gains obtained by individuals and undivided estates resident in the country, a 15 percent tax rate will be applicable. When such income is obtained by companies domiciled or incorporated abroad it is possible to choose between a 13.5 percent effective tax

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rate over the gross amount of the payment, or a 15 percent tax rate over the net income arising from the transaction. The law does not set forth the tax rate applicable to non-resident individuals. When the owner and the purchaser of the shares, quotas or other securities are non-residents individuals or entities, the acquirer will be responsible for the income tax payment. Furthermore, the distribution of dividends made by foreign entities will be subject to income tax at the rate of 10 percent.

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Laura Lavia Haidempergher joined M & M Bomchil in 2003. She has been actively involved in M&A, reorganisations, companies counselling, complex arbitrations, financing transactions, capital markets, and corporate, bankruptcy, and commercial law matters. She obtained her law degree from Universidad de Buenos Aires in 1993. In 2002, she obtained a Master in Business Administration (MBA) degree at Universidad del CEMA, which she completed at San Diego State University (USA) due to her academic merits. Miss Haidempergher is a Ph.D. candidate at the Law School of Universidad de Buenos Aires. She is an active contributor to a number of local and international publications.

VENEZUELA

LUISA ACEDO DE LEPERVANCHE
MENDOZA, PALACIOS, ACEDO, BORJAS, PÁEZ PUMAR & CÍA

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN VENEZUELA OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

ACEDO DE LEPERVANCHE: The economy of Venezuela is deeply troubled and in the last 18 months has deteriorated significantly. There is an exchange control system, in force since 2003, which within the last year has seen the following huge distortion – the main official exchange rate is VEF 6.3 per USD 1, while in the parallel market you need more than VEF 80 to buy USD 1. There is another official exchange rate (SICAD), where the government convokes specific economic sectors and then sells to them a limited amount of foreign currency, at an exchange rate determined by the authorities each time – it is currently VEF 11 per USD. In the last year, inflation reached over 50 percent. The 'scarcity index' – basic items that are out of stock at any given time, as measured by the Venezuelan Central Bank – is nearly 30 percent. All this has been caused by the government's misguided policies, and the situation would be worse if oil prices were not around USD 100 per barrel. For ideological reasons, the government is very hostile to the private sector, including international corporations, thus making productive processes very difficult. A wave of expropriations and nationalisations – since 2007 – has contributed to the lack of productivity, as well as bureaucratic holdups and inefficient administration. In addition, the government seems to have cash flow problems – public finances are very opaque under the current regime. On the other hand, the Venezuelan economy is driven by the USD 100 per barrel oil bonanza, generating opportunities for investors even in the midst of difficulties. In addition, the Venezuelan consumer market is important and many global companies profit from their presence here. Also, the government directly contracts out infrastructure construction and oil related services and industrial establishments to international actors.

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Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

ACEDO DE LEPERVANCHE: The current environment has adversely affected the appetite for M&A in Venezuela, with exceptions. In general terms, it is a buyers' market. We see international corporations selling their Venezuelan subsidiaries and we are also seeing liquidations of local companies, when before they might have been sold. In global operations, there are grave concerns over Venezuelan subsidiaries.

Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

ACEDO DE LEPERVANCHE: A thorough due diligence is indeed indispensable. Such due diligence is needed not only to gauge the precise situation of the target companies, but to give an overall view of the Venezuelan environment, and detailed knowledge of the regulations and market conditions of the specific area of business of the company.

Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

ACEDO DE LEPERVANCHE: A key factor is the selection of attorneys. Both sellers and buyers should carefully consider the available firms, taking into account factors such as past experience in M&A operations, specifically in due diligence processes. Attorneys should be bilingual or have a good level of English. In addition to local knowhow, the attorneys should have a clear understanding of international business customs and standards to be able to work with – and explain the local situation to – foreign participants. For instance, labour legislation in Venezuela is very protective of workers' rights and privileges. Buyers need to be well advised since these issues may have heavy financial consequences, which may not be obvious in a superficial due diligence revision.

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Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN VENEZUELA? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

ACEDO DE LEPERVANCHE: The Venezuelan banking and finance environment is modern and sophisticated. Even though it is highly regulated, it has managed to survive in the very hostile atmosphere that affects all private sector enterprises, including banking. On the other hand, the capital markets sector has practically disappeared as a consequence of the government's handling of the exchange control system. Again, our advice would depend on the specific target.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

ACEDO DE LEPERVANCHE: In Venezuela, a common post-merger obstacle is the very restrictive and worker-oriented legislation on labour matters, including regulations on safety at work, which are very strict and impractical. So a thorough understanding of the labour workforce structure before the M&A operation is necessary to plan the post-merger integration. Although taxes are not very different in scale from international standards, there are obligatory additional 'parafiscal contributions'. These contributions are destined to furnish funds to the government for priority purposes. In some cases, they apply to all corporations – for instance, the contributions destined for public housing, or for workers education. In other cases, they apply only to companies in specific areas, such as tourism; or to companies whose earnings go over a determined threshold. Again, it is very important to be aware of the total fiscal contributions which apply to the resulting entity in a specific operation.

Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN VENEZUELA GOING FORWARD?

ACEDO DE LEPERVANCHE: In Venezuela, M&A transactions are affected by the general situation, more than by specific M&A regulations. A very important factor is the exchange control system. International companies in Venezuela find it virtually impossible to obtain foreign currency at the official exchange rate for repatriation of dividends or capital. Indeed, although the right to do so is contemplated by the law, in practice the exchange control authorities do not grant the necessary permits and

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authorisations to acquire foreign currency for such purposes. In addition, until February 2014 it was forbidden to acquire foreign currency outside the mechanisms established by the exchange control system. Non-compliance was a crime – it was even forbidden to publicise the parallel market rate. However, in February 2014, a new system was announced: SICAD II, where individuals and corporations are supposed to be able to exchange currencies in a freer manner, although under supervision. Regulations are pending, so the new system is still not in force. There seems to be a deep divide in the government with regard to this liberalisation of the exchange controls, so the final form of the new system is still not clear. However, as part of such liberalisation, on 19 February 2014 the law which criminalised foreign exchange was derogated and a new and less restrictive law came into force. This is good news.

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Luisa Acedo de Lepervanche joined Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía. in 2000. She studied at Universidad Católica Andrés Bello (Lawyer, 'Summa Cum Laude', 1981; Goldschmidt Legal Procedure Award, 1980), and was Professor of Contemporary World History at Universidad Metropolitana between 1998 and 2006. Ms Acedo de Lepervanche has authored several articles on corporation law and co-authored two books on the same subject. She has written articles on insurance law, securities transactions, capital markets, arbitration and project financing. Ms Acedo de Lepervanche speaks Spanish, English and French.

UNITED KINGDOM

MICHAEL E. HATCHARD
SKADDEN, ARPS, SLATE, MEAGHER & FLOM

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN THE UK OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

HATCHARD: The market has shown increasing resilience but deal completion remains sporadic. There is a wall of interest in deals however as we approach Q2. Strategic opportunity is a principal driver. Valuation expectations have converged somewhat. Deal resistance at board level has diminished and been replaced by concern over effective utilisation of significant cash piles that earn next to nothing on deposit. Pharma has been a standout sector driven in part by patent expiry back fill and in part by fiscal opportunity. Oil majors and commodity miners have been engaged in non-core disposals as marginal returns in developing environments drive the need for streamlined investment.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

HATCHARD: Strategic buyers have had the advantage of low borrow costs, significant cash reserves and synergy headroom plus growth stagnation that is driving demand. Strategic rationale, suitable pricing and certainty are fundamental in their evaluation of targets. Financial buyers are driven by the natural cycle that would follow a quiet investment period, with surplus funds to invest although the diminished capacity to leverage and the challenge to compete with strategics has demonstrated itself in more complex club deals where they can be engineered.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

HATCHARD: In the UK public sector, target protection through break fees or other security commitments has been off the table since 2011. Not so in other EU jurisdictions where break fees and deal implementation commitments are an important element of deal structuring. Third party protection and a return to stakebuilding strategies are beginning to emerge as replicants or alternatives to the protection formerly available from targets in UK public deals. Early disclosure obligations and the automatic PUSU trigger have also forced higher levels of preparedness and investigation ahead of approach in UK public deals. In private deals, diligence has long been essential although other tools have grown in significance, most apparently insurance. Refinements to the protection afforded by post-closing adjustment techniques continue to allow a balance between exhaustive investigation and pragmatism. The style of M&A construction, in particular greater evidence of post-closing cooperation and joint venture is another significant form of risk management.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN THE UK ? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

HATCHARD: Debt support is there and relatively economical but the assumption in modelling is for a greater percentage of equity than pre credit crunch. Equity has been surprisingly visible as direct deal consideration in public deals despite the dilution implications, partly as a function of the more conservative debt environment and in part reflecting the appetite of investors to remain in the opportunity where they can understand the strategic vision and are hungry for performing investments. The weight of cash on balance sheet and the inability to achieve acceptable returns without investment has re-balanced the corporate appetite to fund with debt.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

HATCHARD: In any regulated sector it is fundamental. As a general rule, if strategy is the driving consideration, the presumption of an acute awareness of the relevant markets is implicit. Market diligence is much more evident in the line-up of advisory resources. Opportunity is also more likely to develop into real deals if there is a relationship, not least in merger transactions.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

HATCHARD: Anti-trust and commercial sensitivity are two material inhibitors. Anti-trust sensitivities will curtail the extent to which information sharing, which is fundamental to effective integration planning, can be undertaken. Protection of valuable corporate information is another drag on the process, while satisfaction of conditions to closing remains an uncertainty. Integration execution is fundamental, and requires a commitment to field effective resources and commit the necessary costs that will shave synergy benefits short term but often distinguish successful M&A from failures. Realistic headcount in management and suitable retention packages and prospects for key transitional management are also important factors.

Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN THE UK GOING FORWARD?

HATCHARD: In the public acquisitions environment, the obstructions to target transaction support – through break fees and other commitments – has been frustrating but navigable. The timing pressure created by the automatic put up or shut up regime has changed pre-approach procedures significantly. This demonstrates itself in levels of preparedness but also in the nature of the approach when made and associated contingency preparation.

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Michael Hatchard is the head of the English law practice at Skadden. He has extensive experience in joint ventures, mergers, strategic investments and divestments, including transactions governed by the UK or other European takeover regimes. His practice also has included financial restructurings, refinancings and reorganisations. Mr Hatchard also has extensive experience advising companies, boards and individual directors on a broad range of corporate governance matters and legal and regulatory responsibilities, including contentious public meetings, disclosure, directors' duties, and individual director liability and protection.

SWITZERLAND

STÉPHANE KONKOLY
BURCKHARDT LTD

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN SWITZERLAND OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

KONKOLY: Even though the aggregate number of deals was relatively stable, 2013 saw a multiplication of small deals – below CHF 100m – compared to the previous years, without any large-cap, multi-billion transactions. Sellers as well as buyers increasingly focused on consolidation of core businesses and on vertical integration when acquiring or divesting assets. M&A activities remain strong in the pharma and life sciences sectors as well as for financial services and consumer goods, while the number of private equity deals seem to stagnate and transactions in the IT and industrial sectors tend to slow down. It is worth noting that the long-awaited consolidation in the private banking sector did not fully take place; however, the financial burden of the latest regulatory measures might fuel M&A activities in this area quite soon.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

KONKOLY: 'Back to basics' tends to characterise the appetite of strategic as well as financial buyers in the last few months. Following the financial crisis and the credit crunch, the M&A market is not experiencing as many highly leveraged deals as it did in the past. Financial buyers will look for specific investments fitting their existing portfolios or neatly adjusted to their industry focus instead of thriving for the highest possible yield. Strategic buyers follow the same trend, fundamentally searching for targets which would create added value though vertical integration around their core business. They will mostly look for targets with lean balance sheets and will quite often insist on purchasing a business on cash-free basis and excluding real estate, and will request an asset deal instead of a share deal if necessary.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

KONKOLY: Due diligence became such a recognised standard over the years that a buyer would usually not enter into any M&A transaction without conducting a due diligence review, unless – and even though reports are quite often limited to red flag issues – it has very strong reasons to do so, for instance in case of distressed sales. As a second step, the buyer should request the seller to grant extensive representations and warranties with as little exclusions as possible – limited to issues specifically disclosed – and extended warranty periods. Finally, securing the recovery of damages following a breach of the contract, be it through payments mechanics, escrow, price adjustment or bank guarantee, is key to minimise financial consequences of a transactional risk. Over the last years, M&A insurance providers increasingly prospected the Swiss market, with limited success. All these measures will however not protect the buyer against integration risks.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN SWITZERLAND? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

KONKOLY: In spite of the global financial instability and the ever growing capital requirements for financial institutions, especially in Switzerland, late signs show that the situation is slowly improving and that banks are more open to provide acquisition financing, albeit to tougher conditions – such as stricter financial ratios and broader securities – than in the past. Acquirers of a Swiss target must be aware of the Swiss legal provisions, including tax laws, which limit the use of the target's financial capacity or assets to secure repayment of the acquisition financing. Capital markets, for instance through the issuance of bonds, might be a valuable alternative for those sophisticated buyers which cannot or are not willing to finance an acquisition through free cash or equity.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

KONKOLY: Local market knowledge remains a very important factor when the main purpose of the acquisition is to expend the buyer's geographical presence or the scope of its products – goods, services, and so on. This is particularly true for a country like Switzerland where at least three cultures, languages and ways of doing business cohabit. However, this criterion tends to be less relevant when the buyer aims to reinforce its core business through vertical integration of the target, as it is quite often the case in the current economic and financial environment. In such a context, it is more important to ascertain whether, and how, the target's activities will fit in the buyer's value added chain in order to create the additional benefits sought for.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

KONKOLY: I see three common obstacles – over-confidence, inattentional blindness and lack of communication. Managers driving the acquisition process might see the closing of the transaction as the ultimate goal and are often overconfident that the post-merger integration will naturally ensue from the acquisition, thus failing at setting up integration plans early enough. Surely, they might also lack the necessary information on integration risks which are not covered by the traditional legal, financial and tax due diligence. By overly focusing on hard factors such as figures and processes, managers tend to forget that integration is mainly a question of soft factors – for instance, how employees feel in the integrated entity and the new business culture. Finally, integration plans, when they exist, are often not clearly shared with – and therefore not understood by – the relevant persons and the resulting insecurity can cause a lack of productivity, in the best case, or the loss of key employees.

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Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN SWITZERLAND GOING FORWARD?

KONKOLY: Recent developments include changes in the Swiss takeover law which entered into force in May 2013. Among other new provisions, the takeover law now prohibits the payment of a control premium in public takeover transactions and allows the regulatory authority – the Takeover Board – to suspend the voting rights and to forbid the purchase of further securities in the target company if a person has breached its obligation to launch a public tender offer. In January 2014, new insolvency rules were implemented which should positively impact the acquisition of distressed entities. The buyer of a business out of insolvency proceedings – through an asset deal – is now allowed to choose the employees it will take over together with the business. Previously, all employees linked to the acquired business were automatically transferred to the acquirer.

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TURKEY

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Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN TURKEY OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

KILINÇ: M&A Activities in Turkey within the last 12-18 months have been stable even though Turkey has faced difficult political developments and fluctuating exchange rates. The main reason for stability has been the privatisation of the some major government enterprises, especially in the area of electricity and gas distribution. The factors driving deals are the political situation, exchange and interest rates, government incentives, a friendly climate for foreign investment and economical parameters in the competitive markets. Aligning with the recent developments in the global energy markets, the Turkish energy market has been the most active sector in the field of M&A activities. That said, the privatisation of electricity and natural gas distribution entities have been the major force behind the stability of Turkish M&A market.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

KILINÇ: It is our belief that a number of significant factors positively affect the appetite of prospective financial buyers for M&A. For example, Turkish companies indicate more potential of growth than their European counterparts, with the contribution of Turkey's geopolitical and strategic importance. With Turkey being a hub between two continents, Turkish companies can export textiles, agricultural products, food and beverage consumables to the Russian Federation, C.I.S. countries and the European Union with lower costs. Also it is imperative that buyers verify the transparency and profitability of accounts and the management of the potential target company. Therefore, it is safe to say that growth potential, profitability, and the volume of potential customers are some of the most fundamental aspects of a business when identifying a prospective target.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

KILINÇ: It is a must for a buyer to seek the professional assistance of competent and internationally experienced consultants especially in the areas of M&A, corporate law, tax law and administrative law, and more specifically in the area that target company operates. Without any doubt, due diligence is the most important phase of the project. Experts in the areas of financial, legal and tax due diligence should be employed regardless of the cost, so that the transactional risks can be minimised.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN TURKEY? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

KILINÇ: Taking the economical and financial stability Turkey has seen in the last 12 years into account, M&A deals have received a great amount of support from banks and financial institutions. The interest rates and exchange rates have been stable so that buyers could easily financed projects. However, after the 2008 global financial crisis, it has become more difficult to finance M&A projects due to lack of financial resources and incentives. Our profound advice for acquirers would be to balance equity capital and debt capital, considering the current financial atmosphere. Of course, both have pros and cons regarding risks as well as rewards, however due to expected uncertainty in the political and financial climate, a more careful and balanced approach should be taken.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

KILINÇ: Entering a foreign market without any local knowledge is one of the major mistakes a buyer can make. For instance, if a buyer engages in a commercial transaction in the wine producing business without knowing the high tax rates and special taxes imposed on the latter in Turkey, the buyer may not receive the profit that may be received in another jurisdiction.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

KILINÇ: I also agree that early integration planning is of paramount importance to delivering the benefits of a merger. However, in my experience most early integration plans fail to meet their high expectations. The main reason for these failures is that early plans may not foresee significant problems before the relevant departments of parties' begin working collaboratively. To illustrate, an early integration plan might assume that the IT programs of both companies are compatible, though they may not. In reality, most companies' use programs specifically tailored to their needs. Such problems may postpone the merger for months. Above all, early integration plans can only work if the key personnel of each party work closely to achieve a common goal.

Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN TURKEY GOING FORWARD?

KILINÇ: The New Turkish Commercial Code came into effect on 1 July 2012. Amendments were made to the NTCC promulgated in the Official Gazette on 30 June 2012 and consequently become effective. The main goal of the NTCC is to develop a corporate governance scheme that meets international accepted standards – to assure transparency, align Turkey with EU and other supranational standards, and to create an extremely business friendly environment, providing an impetus to the

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Turkish market. Most significantly, within the M&A market, a business can be incorporated in a day by a single shareholder irrespective of nationality or residency. Foreign entities or persons may even govern a company without being present in Turkey by joining shareholders' meetings, or cosigning documents via electronically means as stipulated in the relevant legislation. Moreover, the Capital Markets Board of Turkey publishes communiqués on a regular basis to assist and guide investors and financial actors in the market.

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SINGAPORE

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SHEARMAN & STERLING

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN SINGAPORE OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

TANG: There has been a fairly steady flow of mostly small to mid-cap transactions – typically under $250m – in the last 18 months. Geo-political factors, such as the current unrest in Thailand and impending elections in Indonesia, are temporarily suppressing current transaction flow in the affected countries, with market actors adopting a wait-and-see approach. Two clear trends have arisen – Singapore continues to be the most prolific outbound investor in Southeast Asia and Singapore companies are clearly favouring investments into North America and Brazil, with a significant increase in the value of transactions into the Americas over 2012 numbers. Singapore investors are capitalising on the attractive valuations and gradual recovery in the US while hedging their positions in China. Our clients making outbound investments have found the logistics, clean tech and telecommunications sectors in the US and Brazil to be particularly attractive in the last year or so.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

TANG: Like everywhere else, strategic investors here typically prioritise synergies and growth opportunities, while financial buyers seek to maximise returns in a fixed time frame and look for a defined path to exit. For strategic deals in Southeast Asia, that frequently means prioritising legal and commercial due diligence to determine if anticipated synergies are sustainable going forward, or whether revenue streams will likely decrease, for example, as a result of implementing the acquirer's compliance standards and regulatory regime. Such diligence findings factor heavily into evaluating the proposed business model and negotiating the purchase price. For Singaporean or Southeast Asian financial investors investing in pre-IPO US companies, mapping

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a path to exit requires a good grasp of exit limitations specific to US listed companies, such as the contractual lock-ups and registration rights negotiated with the issuer and other investors, as well as the statutory registration requirements and related exemptions under the US securities laws.

Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

TANG: Thorough due diligence is certainly one indispensable step in minimising transactional risk. Particularly in Southeast Asia, due diligence should extend beyond a narrow examination of the target and include the ultimate sellers, their backgrounds and any broader socio-political factors that may influence the deal outcome. For example, having a sense of whether a regulator will favourably view a particular transaction and acquirer or partner – or the exit from the market of a particular seller – can significantly change the balance of leverage in a transaction and speed up or delay the process. Mechanisms such as escrows, price holdbacks or adjustments can be used in the transaction documents to allocate risk in a highly nuanced manner. Other aspects of minimising transaction risk include having deep local knowledge and adequate upfront attention to post-integration planning.

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Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN SINGAPORE? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

TANG: The situation has improved in the last 18 months or so – there is a fair amount of liquidity in the Singapore market and generally in the Southeast Asian markets, with corporates being well cashed up and banks lending at reasonable rates, so that affordable deal financing is available. There is also a rising sense of business confidence among market players and an increasing appetite for engaging in acquisitions using the funds that many companies raised through bond offering bonds in the last few years. Designing an optimal capital structure is very much specific to the particular transaction and industry – it typically involves a combination of debt and equity, but the amount of leverage can vary widely. Also, financing from development banks, if available, can be on significantly better terms than from commercial lenders but often introduces complexity in the form of conditionality and ongoing restrictive covenants.

Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

TANG: Local market knowledge is critical, especially where the outcomes on country-specific issues such as licensing and labour law requirements often have a direct and significant impact on deal economics. For example, if mandatory severance and service payments to employees are required in connection with a transaction – as they are in Indonesia – we would seek to structure the deal to trigger as few of such payments as possible. Being able to quantify the likely costs associated with such payments is crucial to successfully negotiating economic terms. Also, foreign ownership restrictions and licensing requirements in regulated industries not only affect the ability to complete a transaction, but the commercial viability of the business going forward, for example, whether the target will remain dependent in the long-term on licenses retained by the sellers. In such industries, regulatory uncertainty can also directly affect the investor's ability to exit.

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Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

TANG: Determine post-acquisition steps before signing – 'hidden' expenses, such as those associated with setting up new entities, applying for operating licenses, leasing office or warehouse space and hiring employees can add significantly to acquisition costs. These should be factored into the acquirer's valuation assessment. Also, don't ignore cultural differences upfront or leave them until after closing. These can be significant, even in intra-regional transactions – Southeast Asia is far from being one homogenous market. In a cross-border transaction with some degree of management or shareholder continuity, key governance principles should be agreed prior to signing, with particular emphasis on addressing any cultural differences, for example, with respect to how disputes should be resolved. Plan for the worst case scenario and consider whether to build in exit provisions such as put or call rights using a defined valuation metric in the event a deadlock cannot be resolved by amicable consultation or escalation to senior management.

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Shirin Tang, a counsel in the M&A Group of Shearman & Sterling's Singapore office, has advised on a wide range of cross-border transactions and was based in the firm's New York office for over five years. She regularly represents multinational corporations, private equity firms and global investment and commercial banks in their M&A transactions around the world. Ms Tang received an LL.M from Harvard Law School and an LL.B. from the National University of Singapore. She has been named by Chambers Asia Pacific in its rankings for Singapore Corporate/M&A and has also been mentioned in the Asia Pacific Legal 500 and IFLR1000.

INDIA

KARTIK GANAPATHY
INDUS LAW

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN INDIA OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

GANAPATHY: Factors contributing to diminished M&A activity in the financial year 2013 to 2014 included a slowing domestic economy, high lending rates, an unstable currency, policy uncertainty and concerns regarding India's rate of continued economic growth. The difficulty of doing business in other BRICs and developing economies and the attractiveness of India as a continuously growing consumer market are significant factors driving deals in India. The pressure, particularly on cash rich companies which have been conservative over the last few years to do deals may also prompt increased M&A activity. Manufacturing, oil and gas, digital media, IT, consumer focused business and pharmaceuticals appear to be sectors in which notable M&A activity can be expected.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

GANAPATHY: Given the lower level of M&A activity in 2013, we believe that 2014 could see a significant increase in M&A action particularly by global players. The gradual stabilisation of the currency and key stock indices in the second half of 2013 offer promising signs, and coupled with a positive sentiment should lead to the resurgence in M&A activity. However, the upcoming general elections are currently delaying deals, with many preferring to wait and watch for possible policy changes. While identifying a prospective target, buyers appear to scrutinise growth prospects, consolidation of the investment, leveraging economies of scale, intellectual property and the availability and expansion of markets. Proper maintenance of financial records, and legal and statutory compliance is always inviting to acquirers. The availability of exit opportunities is also a significant consideration.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

GANAPATHY: Identification and mitigation of risk is the key to a transaction. Acquirers need a detailed understanding of the macro environment including political, economic and regulatory risks that might affect deal viability. An appreciation of the history of the target, its financials, management, culture, goals and operations are crucial to successful deals. In-house M&A teams with little experience of the target market should draw on expertise from external advisers on the ground. The due diligence process is critical and comprises several elements. Companies must scrutinise financial accounts in order to assess the performance and cash flows, and validate projections made by management. They must ensure the existence of robust financial controls and checks, assess the potential for operating synergies, and check whether the business is free from serious legal or tax risks. It is only by gathering this information that an acquirer can have a realistic insight into the future value of the business, and identify 'black holes' that could impact value. Legal due diligence is seen by many as critical in identifying such risk factors and potential deal breakers.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN INDIA? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

GANAPATHY: On 6 November 2013, in an attempt to bolster its regulatory powers in the wake of the global financial crisis, the Reserve Bank of India (RBI) released the framework for the setting up of 100 percent subsidiaries by foreign banks in India. The new framework requires foreign banks to create separate legal entities, having their own capital base and local board of directors. The RBI's final rules provide a foreign bank nearly the same freedom as a private sector bank in opening branches if it takes the form of a local subsidiary. Foreign banks entering India would drive local banks to become more efficient and encourage mergers and acquisitions. In addition to this, the RBI is considering new applications for banking licenses based on the Bimal Jalan panel report.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

GANAPATHY: Buyers often feel the need for a local presence well in advance of doing M&A in the country. One has to understand the unique and diverse nature of the Indian market which is essentially a collection of several large markets with very distinct characteristics. In several instances, acquirers feel that their detailed knowledge and expertise in their home market will translate directly to the target market. However, gaining an understanding of regulatory policies in different states, regional market practices and social norms is a time consuming process, and it is advisable that the same be analysed with the help of local expertise. For an acquirer that is new to India, an independent view of the commercial and regulatory environment is often critical to obtaining a proper sense of forecast assumptions and to evaluate present and future competitive position in any sector.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

GANAPATHY: Acquirers sometimes fail to realise that integration requires not only extensive planning, but also persistent and unrelenting execution and follow through. The challenges in integration planning often manifest themselves in integration of information systems, human resources, policies and procedures, and being able to effectively achieve operational cohesiveness. Other challenges include overcoming language, cultural and leadership barriers, particularly related to communication and handling people. One has to pay attention to the unique features of each deal and the distinct set of complexities involved, as there is no 'one size fits all' approach. Acquirers often fail to clearly define the deal's primary sources of value and its key risks, and end up not setting clear priorities for integration.

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Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN INDIA GOING FORWARD?

GANAPATHY: The new Direct Tax Code introduces a number of constructive measures including a reduction in tax rates. However, the Code has also incorporated general anti-avoidance rules (GAAR) which may have an adverse effect on both Indian and offshore M&A involving Indian subsidiaries. Recent government initiatives such as the retroactive taxation of transactions have added to the regulatory complexity of conducting M&A in the country. Often, regulatory approvals can take time, particularly before final clearances are in place from all state and central regulatory bodies. The lack of coordination among the various government departments continues to be a challenge when closing deals. The Companies Act 2013 is expected to clear certain grey areas with respect to M&A with new definitions. However, the impact of the broader definitions on popular structuring practices may need to be evaluated.

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NEW ZEALAND

CATHY QUINN
MINTER ELLISON RUDD WATTS

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN NEW ZEALAND OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

QUINN: There has been a healthy improvement in New Zealand M&A activity levels over the last 12-18 months. The improving New Zealand and global economic environment, coupled with high business confidence, contribute to the increased appetite for M&A in New Zealand. We have seen more interest from both offshore entities and private equity firms looking for M&A opportunities, whether to expand operations, diversify earnings or exit investments in a positive market. The strength of the Asian economies and, in particular, their demand for quality food products has driven much of our M&A and capital markets work in the recent years, and we expect it will continue to do so in the near future. In terms of active sectors, overseas investments in New Zealand, especially from China, continue to remain strong. The capital markets sector remains active – we are likely to see more IPOs in 2014 – and the upstream energy, agriculture, protein, Iwi, aquaculture, and infrastructure and construction sectors are also likely to be increasingly active in 2014.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

QUINN: Broadly speaking, when identifying a prospective target, buyers typically look for sustainable earnings, growth prospects, solid management and a target that fits their long-term business strategy.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

QUINN: Due diligence is both an indispensible part of the acquisition process, and the most fundamental step a buyer can take to minimise transactional risk. At a minimum, a buyer should undertake legal and financial due diligence, as well as looking closely at the target's operations from a commercial perspective. A thorough understanding of the target's business enables identified issues to be considered and accounted for in both pricing considerations and in sale documentation, therefore keeping transactional risks at minimum for the buyer. New Zealand is seeing a trend of buyers taking warranty insurance for transactions that may contain uncertain risks – for example in the environmental space. This essentially removes the risk and liability from the policy holder, while still allowing the parties to negotiate the transaction documents amicably. The policies are reasonably priced and allow the parties to quickly progress what are sometimes pretty difficult negotiations around warranties and risk allocation in general.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN NEW ZEALAND? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

QUINN: The M&A financing market has gone through a slower patch in New Zealand over the last few years but a number of deals were still concluded over that period. We are now seeing an uptick in activity at a time when banks have plenty of appetite to lend to quality borrowers on sensible acquisitions. Strong borrowers are pushing for some of the borrower friendly structures that were common in the past and pricing has generally been competitive. Senior only funding is common for smaller to mid-size transactions but we are seeing mezzanine funds present on some of the larger transactions.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

QUINN: Local market knowledge is crucial when it comes to closing deals, especially in a tough economic environment. Having the right advice about transactional processes in the target's country is key to ensure transaction time frames are accounted for, and met, especially in relation to regulatory approvals. The contacts, goodwill and insights of local advisers are valuable for investors in a tough economic environment where time frames and competitive processes can change the deal dynamics quickly.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

QUINN: A failure to define the target company's areas of value and risk often feeds into a failure to set priorities for integration. Integration needs to be led by the acquirer – the target's people should not be expected to integrate themselves without the guidance of the acquirer as to its strategy. Uncertainty can also have undesirable consequences. Cultural integration – that is, the way things are done – is also a common obstacle. Failure to address cultural issues has an impact on how people feel about the new environment and can lead to talented personnel drifting away. Equally, many companies wait too long to migrate systems or put new organisational structures in place. Quite often this leads to poor business performance. These obstacles can be avoided or at least minimised by early integration planning. Things like setting clear priorities, making commitments and ensuring managers and key personnel are not distracted from the core business during the merger process are the key to post-merger success.

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Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN NEW ZEALAND GOING FORWARD?

QUINN: The enactment of the Overseas Investment (Australia) Amendment Regulations 2013 provides higher consent thresholds for Australian investors wishing to invest in 'significant business assets' in New Zealand. The amendment exempts certain Australian investors from the requirement to obtain consent under New Zealand's overseas investment regime – by raising the threshold for Australian non-government investors, who wish to obtain a 25 percent or more ownership or controlling interest in significant business assets, from $100m to $477m. The development is a positive one and is likely to drive further trans-Tasman investments in the future. In addition, the New Zealand Commerce Commission has released revised M&A guidelines relating to M&A acquisitions involving competitors, including guidelines on mergers between competing buyers. The new guidelines will hopefully assist with otherwise complex competition law issues that may need to be addressed in M&A transactions.

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MIDDLE EAST & NORTH AFRICA

ZIAD EL-KHOURY
SQUIRE SANDERS

Q HOW WOULD YOU DESCRIBE M&A ACTIVITY IN THE MIDDLE EAST & NORTH AFRICA OVER THE LAST 12-18 MONTHS? WHAT FACTORS ARE DRIVING DEALS IN THE CURRENT MARKET? ARE CERTAIN SECTORS MORE ACTIVE THAN OTHERS?

EL-KHOURY: M&A activity has been on the rise in the MENA region over the last 12-18 months, with 2013 deal values reaching their highest since 2008. Deal activity regained momentum in 2012, where the total value of transactions increased by 76 percent on those from the previous year, and further increased by 30 percent in 2013. One of the recent deals is Arqaam's acquisition of Bahraini-based Instrata. The majority of M&A activity took place in the Gulf Cooperation Council (GCC) countries, with the merger of Dubai Aluminium (Dubal) and Emirates Aluminium (Emal) to create the US$15bn Emirates Global Aluminium in the UAE, the largest deal to complete in 2013. Qatar, Saudi Arabia, and Kuwait have also witnessed significant M&A activity. Beyond the GCC, political instability has limited M&A activity; nonetheless, one of the major deals in 2013 was an inbound transaction in Morocco, in which Etisalat's acquired a 53 percent stake from Vivendi in Maroc Telecom in a deal worth €4.2bn.

Q HOW WOULD YOU CHARACTERISE THE APPETITE OF STRATEGIC AND FINANCIAL BUYERS FOR M&A? BROADLY SPEAKING, WHAT FUNDAMENTAL ASPECTS OF A BUSINESS ARE THEY LOOKING FOR WHEN IDENTIFYING A PROSPECTIVE TARGET?

EL-KHOURY: Strategic and financial investors have a strong appetite for companies that can expand their customer base and geographic reach. Inbound M&A transactions are attractive in certain MENA region countries where the economy has dipped and the valuations are low. As a result, strategic investors also look for a niche service or product that may only need the proper financing and management to achieve large scale growth. Other considerations include whether a company has feasible plans to grow revenue and good distribution networks. However, given the above factors, one of the main drawbacks to a prospective target is a company entangled in litigation.

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Q WHAT STEPS SHOULD A BUYER TAKE TO MINIMISE TRANSACTIONAL RISK IN A DEAL? IS THOROUGH DUE DILIGENCE AN INDISPENSABLE PART OF THE PROCESS?

EL-KHOURY: Due diligence is an integral part of executing any merger or acquisition deal. Investors continue to rely on due diligence to establish the reliability of financial information. All legal risks must also be reviewed including a company's corporate status, licenses, assets, contracts, securities, intellectual property, employees and employment contracts. All of these issues can affect the valuation of a prospective target and significantly change the economic potential of a merger or acquisition. In the GCC, it is particularly important to review the licenses of the business, as sometimes an entity may only be licensed to carry out a very specific activity. To overlook an issue of this nature can affect the acquirer's future plans for the company. The due diligence process allows an acquirer to really understand whether the business is as it appears. Improper due diligence has been a significant factor in failed merger deals.

Q HAVE YOU SEEN AN IMPROVEMENT IN THE BANKING AND FINANCE ENVIRONMENT TO SUPPORT M&A DEALS IN THE MIDDLE EAST & NORTH AFRICA? WHAT IS YOUR ADVICE TO ACQUIRERS ON DESIGNING AND NEGOTIATING THE OPTIMAL CAPITAL STRUCTURE?

EL-KHOURY: The growth in M&A transactions is particularly due to outward and domestic growth facilitated by wealth funds and the financial sector. An increase in the value and volume of deals over the past two years can be credited to an improvement in the banking and finance environment, and we expect the range of financing options to continue to increase in 2014. Acquirers should be aware of local conditions, especially in the GCC countries, that require a local partner to own a minimum stake in a locally-based entity. This stake can be as high as 51 per cent, and can be the main driver in designing and negotiating a capital structure. As a result, in certain countries where allowed, we can assist our clients in executing security packages or share pledge agreements to allow our foreign client to benefit from additional authority and profits from its acquisition of a stake in a GCC-based entity.

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Q HOW IMPORTANT IS LOCAL MARKET KNOWLEDGE WHEN IT COMES TO CLOSING DEALS IN A TOUGH ECONOMIC ENVIRONMENT?

EL-KHOURY: Local market knowledge is very important especially in terms of valuing a company, and assessing revenue potential. The political and economic environment is sensitive to current events and can easily affect the terms and outcome of a deal. Therefore, it is important to assess such risks when evaluating a potential merger or acquisition. Moreover, from a legal standpoint, the MENA region is continuously adapting to its evolving economy and regulators are constantly working to issue legislation to effectively govern it. The regulators in GCC countries are particularly active in sanctioning merger and acquisition deals, and often approve certain mergers by struggling companies especially in the banking and real estate sectors.

Q MOST EXPERTS AGREE THAT EARLY INTEGRATION PLANNING IS VITAL TO DELIVERING THE BENEFITS OF A MERGER. WHAT ARE THE MOST COMMON OBSTACLES THAT ARISE IN THIS CONTEXT?

EL-KHOURY: Early integration planning is vital to a successful merger. The entities must strategically plan for risks arising from lack of synergy, particularly with regard to financial and organisational structures, in order to plan for optimal growth. In the MENA region, inbound acquisitions must also account for cultural differences in carrying out business and executing lines of command. Often a change in management and staff is necessary to execute the transaction's main goals; however, in the GCC, requirements for minimum employment quotas of local nationals may prevent the acquiring entity from making widespread changes of personnel. While cultural and staff integration must rank highest in the priorities ladder, early planning for product, customer and supply integration and rationalisation cannot be underestimated.

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Q COULD YOU OUTLINE ANY RECENT DEVELOPMENTS IN M&A REGULATIONS THAT WILL AFFECT TRANSACTIONS IN THE MIDDLE EAST & NORTH AFRICA GOING FORWARD?

EL-KHOURY: Regulation in the GCC is in general evolving to maintain and increase investment in the region. Just a year ago, Qatar issued a new Central Bank Law (QCB Law) which includes regulation of mergers and acquisitions of financial institutions. The QCB Law maintains that the Qatar Central bank must authorise the merger or acquisition of any financial institution. The UAE also issued a new competition law in early 2013 which significantly impacts M&A transactions by requiring control clearance for any M&A transaction that exceeds a specific market share threshold for the relevant industry sector – to be decided in the implementing regulations – and affects competition, in particular by creating or enhancing a dominant position in any market. The execution of such new regulations should ease investor risk in the completion of M&A transactions in these countries.

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