



Mergers & Acquisitions

2019

Eighth Edition

Editors:

Scott V. Simpson & Scott C. Hopkins

glg global legal group

CONTENTS

General chapter	<i>The MAC is back: Material adverse change provisions after Akorn</i> Adam O. Emmerich & Trevor S. Norwitz, <i>Wachtell, Lipton, Rosen & Katz</i>	1
Country chapters		
Austria	Hartwig Kienast, Horst Ebhardt & Jiayan Zhu, <i>WOLF THEISS</i>	12
Belgium	Luc Wynant & Jeroen Mues, <i>Van Olmen & Wynant</i>	19
Brazil	Lior Pinsky & Gabriel Menezes, <i>Veirano Advogados</i>	25
Bulgaria	Yordan Naydenov & Dr. Nikolay Kolev, <i>Boyanov & Co</i>	32
Canada	Valerie C. Mann, <i>Lawson Lundell LLP</i>	42
China	Will Fung & Hao Lu, <i>Grandall Law Firm</i>	49
France	Coralie Oger, <i>FTPA</i>	54
Germany	Sebastian Graf von Wallwitz & Heiko Wunderlich, <i>SKW Schwarz Rechtsanwälte</i>	64
Hong Kong	Joshua Cole, <i>Ashurst</i>	72
India	Anuj Trivedi & Sanya Haider, <i>Link Legal India Law Services</i>	77
Indonesia	Eric Pratama Santoso & Barli Darsyah, <i>Indrawan Darsyah Santoso, Attorneys At Law</i>	83
Ireland	Alan Fuller, Aidan Lawlor & Elizabeth Maye, <i>McCann FitzGerald</i>	95
Ivory Coast	Annick Imboua-Niava, Osther Tella & Hermann Kouao, <i>Imboua-Kouao-Tella & Associés</i>	106
Japan	Hideaki Roy Umetsu & Yohsuke Higashi, <i>Mori Hamada & Matsumoto</i>	112
Luxembourg	Marcus Peter & Irina Stoliarova, <i>GSK Stockmann</i>	123
Malta	David Zahra, <i>David Zahra & Associates Advocates</i>	127
Mexico	Jaime A. Treviño Gonzalez, Carlos Alberto Chavez Pereda & Tracy Delgadillo Miranda, <i>JATA – J.A. Treviño Abogados</i>	140
Morocco	Dr Kamal Habachi, Salima Bakouchi & Houda Habachi, <i>Bakouchi & Habachi – HB Law Firm LLP</i>	147
Netherlands	Alexander J. Kaarls, Willem J.T. Liedenbaum & David van der Linden, <i>Houthoff</i>	155
Norway	Ole K. Aabø-Evensen, <i>Aabø-Evensen & Co</i>	167
Spain	Ferran Escayola & Rebeca Cayón Aguado, <i>Garrigues</i>	184
Sweden	Jonas Bergquist, Alban Dautaj & Katerina Madzarova, <i>Magnusson Advokatbyrå</i>	192
Switzerland	Dr. Mariel Hoch & Dr. Christoph Neeracher, <i>Bär & Karrer Ltd.</i>	201
United Kingdom	Michal Berkner, Ed Lukins & James Foster, <i>Cooley (UK) LLP</i>	205
USA	Nilufer R. Shaikh & M. Corey Connelly, <i>Pepper Hamilton LLP</i>	218

Mexico

Jaime A. Treviño Gonzalez, Carlos Alberto Chavez Pereda &
Tracy Delgadillo Miranda
JATA – J.A. Treviño Abogados

Overview

The main laws regulating M&A (mergers & acquisitions) and in general, all types of business combinations in Mexico, are: the Commerce Code, which generally regulates all commercial acts and transactions; the Federal Civil Code, regulating relationships between individuals and private or public companies; the Corporations Law, regulating company structuring and mergers; the Bankruptcy Law, regulating corporate restructuring; and the Law of Negotiable Instruments and Credit Transactions, which provides the legal framework for the possession and transfer of shares and other negotiable instruments. All of these laws have a nationwide scope of application in their Federal character.

There are also other complementary laws (and their respective rules and regulations) that may apply depending on the nature of the transaction, the entities involved, and their corporate purpose and nationality, such as the Securities Market Law, the Federal Antitrust Law, the Federal Labour Law and the Foreign Investment Law. Likewise, some specific industry-oriented laws and regulations may be applicable in certain cases, depending on the industry in which the participating companies may be involved in. This set of laws and, particularly, the relevant regulations that govern typical M&A transactions in Mexico, have not been subject to major amendments in the past year, except for the launching of an electronic filing system which should be completed upon the transfer of the equity of a participating company; this is detailed more fully below.

Transaction agreements in Mexico may be governed by a foreign law, as is common in global acquisition transactions, while it is also common for them to be governed by Mexican federal or state laws of the location of the acquired assets. The Commerce Code and the Federal Civil Code are the main laws governing these types of transactions; however, local laws from Mexico City and from the states of Nuevo Leon (with Monterrey as its capital city), Jalisco (with Guadalajara as its capital city), and most recently the states within the El Bajío area, are considered to be the most sophisticated local jurisdictions, and are regularly used to govern M&A transactions taking place therein.

The most common structures for M&A transactions in Mexico are (i) traditional legal merger, (ii) asset purchase, and (iii) equity purchase, the last two being the chosen structures for the most significant M&A deals in 2018. Mexican laws do not prohibit nor explicitly regulate hostile takeovers of companies, and although uncommon in Mexico, they can be feasibly implemented. In this type of takeover, the target company's main defence would have to be agreed on and detailed in its corporate bylaws, as the board of directors has limited powers and must keep a neutral approach over a potential takeover.

Financial institutions, bank syndicates and the stock market (lately, in particular through institutional investors like pension funds, investment vehicles such as CKDs, CERPIs and

SPVs, and real estate investment trusts) all greatly support fund access for these transactions. Transactions among private companies are commonly governed only by the interests of the parties; while by contrast, transactions involving public companies (companies with shares registered at the Mexican Stock Exchange) are subject to some restrictions and approvals by the National Banking and Securities Commission.

It is worth mentioning that there are certain specific industries that are subject to additional restrictions and regulations. Among the most restricted industries are transport, oil & gas exploration (although recently deregulated, as we discuss later in this chapter), trade, telecommunications and banking. Although less restricted, some other activities and sectors are subject to special regulations when there are foreigners involved, such as insurance, explosives, newspapers, air transport services, border administration services and others.

Additionally, there are special programmes designed to encourage investments and new development in specific industries. The manufacturing and development sectors are among those incentivised, in addition to industries benefiting from various international treaties approved by the Mexican government.

The steady economic growth of the country in recent years and the introduction of new investment vehicles into the Mexican market caused an increase in M&A activity. New growth areas across the country offering infrastructure and skilled human capital, and the looming presence of a private equity and venture capital funds market, have steadily attracted foreign capital into different investment areas such as the energy, mining and technology fields, fostering new and vibrant industries in the country.

Notwithstanding the foregoing, the number and value of transactions sharply decreased in 2018 compared to the year before, but can regardless be considered a positive year when all of the externalities are factored in. Throughout 2018, Mexico was perceived as a risky venture and uncertainty loomed around the 2018 presidential elections, and around the repeal of NAFTA (the North American Free Trade Agreement) and negotiations of its replacement, the T-MEC.

In July of 2018, Andres Manuel Lopez Obrador, or “AMLO” as he is commonly known, won the Mexican Presidency by a landslide, following two failed attempts, and also secured a qualified majority in the Congress and most local congresses. A left-winger and generally described as a populist and nationalist, AMLO’s political agenda, along with the country’s long presidential transition period, both had a significant role in the decrease of the number of deals in the second half of 2018. This trend has somewhat continued into the first months of his presidency, as the market is still adjusting to the new status quo.

Significant deals and highlights

In 2018, the Mexican M&A market registered 212 deals with a total value of US\$8.64bn, representing a 24% decrease in value and a 12% decrease in the number of deals compared to 2017. In a number of deals, the leading sectors were Mining (32), Real Estate (29), Financial (25) and Energy (19). February through July were the most active quarters for M&A, registering 128 deals in total, while November was the least active month with a total of only nine deals.

The parties acting as buyers in Mexican M&A in deals that closed in 2018 are mainly from Mexico, the United States of America and Canada, which jointly represent 154 of the total 212 deals. While 18 buyers were not disclosed, the remaining 40 deals were closed by buyers from European, South American and Asian countries, as well as from Australia.

The most significant M&A deals that occurred in Mexico during 2018 are highlighted below by size and scope:

- a) Chilean company Atlas Renewable Energy acquired its first solar project in Mexico, *Proyecto Solar Guajiro*, for approximately US\$1.3bn, which will generate around 300 GWh of clean energy per year. This project was originally awarded to SunPower Corp. by the Federal Electricity Commission in the first-ever power auction held in Mexico.
- b) GGI Inv SPV, a special purpose vehicle created by the shareholders of Mexican auto part manufacturer Rassini, acquired the latter's floating stock in the Mexican Stock Exchange Market for approximately US\$761m.
- c) Canada Pension Plan Investment Board and Ontario Teachers' Pension Plan Board acquired a 49% stake in Concesionaria Autopista Guadalajara-Tepic, a Mexican infrastructure company, for approximately US\$407m.
- d) The Hyatt Regency Hotel with 756 rooms in the exclusive Polanco district in Mexico City was acquired by Mexican investor Fernando Chico Pardo for approximately US\$405m, a record hotel deal in Mexico. The deal included land adjacent to the hotel, where a Park Hyatt concept will be constructed.
- e) Total and Statoil, two French-based oil companies, acquired the 60% stake previously owned by Cobalt International Energy in the North Platte discovery located in the Gulf of Mexico for approximately US\$359m. Previously being the owner of a 40% stake, this transaction now secured Total a 60% overall stake, while Statoil owns the remaining 40%.
- f) Magenta Infraestructura, a Spanish subsidiary of the Australian fund IFM Investors, acquired a 14% stake in the infrastructure company OHL México for approximately US\$359m. With this deal, IFM Investors became the controlling shareholders of OHL Mexico, now named Aleatica.
- g) Mexican stockholder Tenedora CL del Noroeste acquired from Albertsons Companies its 49% stake in Casa Ley, a Mexican retailer, for approximately US\$345m.
- h) China Minsheng Investment Group, a Singapore-based company, acquired a 100% stake of the Latin-American operations of South African insurance group Old Mutual for approximately US\$300m, which included the company's operations in both Mexico and Colombia.
- i) UK-based Perenco Oil & Gas International Ltd. acquired a 49% stake in the Mexican operations of British oil company Petrofac for approximately US\$274m, including the development of three oil fields in the Gulf of Mexico.
- j) The multinational retail corporation Walmart acquired Cornershop for approximately US\$225m. Cornershop is a leading online marketplace for on-demand delivery in Mexico and Chile, and this deal represents an important step for Walmart in accelerating the company's omni-channel capabilities and growth in Latin America.

Key developments

As explained above, the laws and regulations governing the M&A market in Mexico did not undergo any major changes in 2018. With respect to the main laws, an amendment to the Corporations Law now impacts M&A transactions as it created a new obligation for all Mexican commercial companies to publish a notice in an electronic system managed by the Ministry of Economy any time there is a transfer of equity within the company.

Before such amendment became effective in December 2018, whenever there was an acquisition transaction that involved the purchase of shares or equity interests of a Mexican company, such Mexican company should register the transfer of shares or equity interests in a shareholders' or members' registry book kept by the management body of the company. With the amendment made to the Corporations Law, besides registering the transfer in the respective registry book, the Mexican company is also bound to file a notice of such transfer registration in the abovementioned electronic system.

Additionally, a new proposal to amend the Corporations Law was filed by a minority party in August 2018 before the Mexican House of Representatives and is still under discussion. If approved, the Corporations Law would be amended to allow the incorporation of single-member *sociedades anónimas* and *sociedades de responsabilidad limitada*, companies that currently need to have at least two members. The only Mexican corporation that can currently have one single member is the simplified stock corporation, which can only be incorporated by one or more individuals and its total annual revenues cannot exceed an amount of approximately US\$250,000. At the time of writing, it is uncertain if such proposed amendment will be ultimately approved.

Furthermore, in 2018, the Mexican Congress enacted the Law to Regulate Financial Groups and the Law to Regulate Financial Technology Institutions, commonly known as the Fintech Law, which provides a framework for the emerging Mexican fintech sector, by regulating the operation of crowdfunding activities, payment platforms, as well as certain financing business models and transactions.

A new stock exchange began operations in Mexico during 2018, known as the *Bolsa Institucional de Valores*, or BIVA, which already lists 105 issuers and will compete with the Mexican Stock Exchange, the latter being the country's operating stock exchange since 1894. BIVA was created upon noticing that the bond market and stock market were not growing at the same rate, and it seeks to entice more companies to go public in Mexico, increase investments and help economic growth.

Industry sector focus

- a) **Energy industry.** Since the energy reform in 2014, the Mexican energy market and the power sector have opened up to foreign and private opportunities, fully transforming the sector's landscape from a couple of state-owned monopolies and private services companies, to a vibrant industry with multiple local and foreign players developing large projects. Consistent with the nationalist approach of the new federal administration, the previous years' successful oil and gas E&P bids, as well as the clean energy auctions, have been officially cancelled or suspended, which will undeniably challenge the investment momentum achieved in previous years, but which at the same time opens the door for the development of a more mature M&A market in the sector. The country's largest acquisition of 2018, which represents 15% of the total value of the M&A deals closed last year, was the sale of a solar farm that was awarded in the first-ever power auction held in Mexico, and other remarkable acquisitions were based around oil exploration portfolios that were awarded in the oil rounds held by Mexican authorities.
- b) **Mining industry.** For nine consecutive years, Mexico has occupied the first position in World Silver Survey's top silver-producing countries, and is among the top 10 producers worldwide of 16 different minerals such as lead, graphite, gold and copper. Ten of the most important mining companies operating in the country reported total

sales of approximately US\$27.113bn, and 14% of the total M&A activity in 2018 belongs to the mining industry. Mexico is the preferred destination for mining exploration in Latin America and the fourth worldwide, which can be appreciated in the M&A activity in the country, where the mining sector has been among the top sectors leading the number of M&A deals for the past four years.

- c) **Real estate industry.** Since 2011 with the appearance of real estate investment trusts, commonly known as *FIBRAs*, which were created to finance the acquisition and construction of real estate properties, the real estate industry in Mexico has been in continuous growth. In 2018, these types of trusts closed 14 M&A deals in Mexico, almost half of the 29 deals closed in the sector. Industrial parks, commercial properties and tourism also represent a major portion of the real estate industry, one of the major M&A deals in 2018 involved the acquisition of a hotel for a record amount of approximately US\$405m. This industry creates approximately three million jobs and generates annual revenues of approximately US\$260 billion, representing 14% of Mexico's GDP along with the construction industry.
- d) **Financial industry.** Several amendments to the laws and regulations governing the financial sector in 2014 have contributed to the financial growth in Mexico, and the technological advances in financial services have led to the creation and further regulation of 238 startup fintech companies in Mexico, becoming Latin America's leading country in the financial technology industry. As of 2018, 106 companies from the financial sector are in the 500 most important Mexican companies ranked last year. The industry is expected to continue growing in 2019, since the Mexican Ministry of Credit and Public Finance announced in January 2019 a plan to boost the financial sector by modifying the investment plan for the retirement fund administrator companies, encouraging voluntary savings and creating a new tax regime for initial public offerings and the acquisition of corporate bonds.
- e) **Automotive and components industry.** Mexico is an attractive location for the manufacturing of automobiles and components, offering competitive labour costs and a strategic location for business, having several of the most significant worldwide brands investing in large plants or expanding its current ones. The M&A activity in this industry sector presented a sharp decrease in 2018 due to the uncertainty around the negotiations of NAFTA, the T-MEC, and any potential trade barriers which could ultimately be imposed by the U.S. for cars imported into such country from Mexico. This is a key sector of the Mexican economy, which should be closely monitored for future investment and growth opportunities in the country.

The year ahead

For 2019, the Mexican M&A market seems bound to increase, both in number and value of transactions, taking into consideration that two main uncertainty factors that heavily impacted 2018 activity, have been, to some degree, settled. Mexico, the U.S. and Canada seem poised to agree on a renovated NAFTA, the T-MEC, which although bringing changes to the last couple of decades' status quo, will nevertheless foster improved investment in the region. Meanwhile, past the uncertainty of the radical change brought by AMLO's victory, the dust seems to have settled and transactions that were put on hold are now being restarted and are expected to close within the following months.

Mexican companies will continue to be attractive to foreign investors considering the peso's devaluation and their recent growth and development under the new and renovated

productive sectors developed under the structural reforms implemented by the previous administration.

The logistics sector has been quietly and steadily growing and is naturally destined to undergo M&A activity as key players look to strengthen their position in this emerging industry, as it is intertwined with the e-commerce sector. Similarly, a typical safe bet, the activity in the real estate sector is expected to increase in 2019, as more REITs (*FIBRAs*) enter the market and look to grow their portfolios.

Finally, the energy industry will be impacted by the cancellation of the E&P oil bidding rounds and of the clean energy auctions, as no new projects are expected to be explored, financed and built by private parties. However, the success of previous auctions may foster the development of a secondary acreage market and M&A in both the oil & gas sector and the power sector in Mexico, which would be certainly welcomed by the industry. In general, blocks that were awarded to oil companies have a large acreage and hold multiple potential exploration targets, enabling the possibility of partnerships and joint ventures between oil companies for their production or for the acquisition of exploration portfolios. We saw some glimpses of this secondary market in 2018, via farm-ins of onshore blocks and the sale of entire exploration portfolios to foreign E&P groups. Likewise, M&A activity is assured to boom around awarded projects for the development of clean energy power plants, a very attractive and rapidly growing sector globally.



Jaime A. Treviño Gonzalez

Tel: +1 713 963 3677 / Email: jtrevino@jata.mx

Managing Partner and Founder of JATA. Throughout his more than 25 years of professional experience, Jaime has represented multiple global companies in their operations in Mexico, and participated in complex financing transactions, mergers and acquisitions, corporate governance, anti-trust, contracts and securities transactions, both in Mexico and representing Mexican clients in transactions in Latin America, Europe and the Caribbean. Before founding JATA, he worked as corporate counsel for Cemex S.A.B. de C.V., and as a foreign associate at the New York Office of Skadden, Arps. He is a member of the American Bar Association and of the U.S.-Mexico Bar Association.



Carlos Alberto Chavez Pereda

Tel: +52 81 8335 4200 ext. 113 / Email: cchavez@jata.mx

Senior Associate at JATA. Carlos has provided legal advice to a number of foreign and domestic companies in the structuring of mergers and acquisitions, joint ventures, financings and cross-border transactions across several industries, as well as in the development and implementation of anticorruption compliance programmes and confidentiality and data privacy strategies. He has also counselled Mexican and international companies in connection with their oil & gas, and power market activities, as well as their negotiations and dealings with Mexican regulatory bodies. He is a member of the Mexican Bar Association. He graduated from the Law School of the Universidad de Monterrey and obtained an LL.M. degree and a Certificate in Business Law from Duke University.



Tracy Delgadillo Miranda

Tel: +52 81 8335 4200 ext. 112 / Email: tdelgadillo@jata.mx

Senior Associate at JATA. Tracy's legal practice is specialised in the areas of corporate advisory, negotiations, contracts, foreign investment and regulatory matters. Tracy has advised JATA's foreign clients in planning the most suitable structures for the incorporation of their Mexican legal entities, preparing and advising on international and national agreements and has performed several due diligence processes and participated in international M&A and financing deals. She graduated from the Law School of the Universidad de Monterrey with an LL.M. and obtained a master level 1 diploma in International Business Law from the Panthéon-Assas University.

JATA – J.A. Treviño Abogados

Monterrey Office, Av. Gomez Morin 955 Sur., Despacho 500, San Pedro Garza Garcia, N.L., 66279, Mexico

Tel: +52 81 8335 4200

Houston Office, 1700 Post Oak Blvd, 2 BLVD Place, Suite 600, Houston, 77056 Texas, USA

Tel: +1 713 963 3677

URL: www.jata.mx

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

- **Alternative Real Estate Investments**
- **AI, Machine Learning & Big Data**
- **Banking Regulation**
- **Blockchain & Cryptocurrency Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fintech**
- **Fund Finance**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Mergers Control**
- **Pricing & Reimbursement**

Strategic partner:

