Global Private M&A Guide - Limited External Content - Peru

Common deal structures

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# What are the key private M&A deal structures?

Key deal structures for private M&A transactions are the acquisition of shares or assets, investments involving majority or minority stakes, and corporate reorganizations (e.g., merger, spin-off and simple reorganization/hive-down).

The acquisition of shares or assets is usually undertaken by a negotiated acquisition. The private share or asset purchase agreement is drafted setting out the terms and conditions of the acquisition, as well as the representations, warranties, covenants and liabilities of the parties.

It is also common to see the acquisition carried out by means of an investment in the target company by the investor. As a consequence of the investment, the target company's capital stock will be increased, new shares will be issued in favor of the investor and the other shareholders' percentage of participation in the target company will be reduced.

Regarding corporate reorganizations, the following points should be taken into consideration:

A merger occurs where two or more companies consolidate as one single entity. A merger can be conducted in either of the following ways:

Merger of two or more companies to create a new independent and separately incorporated company (and where the two merging companies cease to exist).

One company takes over the entire business of the other company so that the target company ceases to exist.

In both cases, the new entity or the remaining company receives all of the assets, liabilities, rights and debts of the company or companies that cease to exist, and the former shareholders of such companies receive newly issued shares in the new or remaining company.

A spin-off is a type of corporate reorganization that consists of the segregation of assets, debts-and-assets and/or business lines by a company to transfer them to another company, which may be already incorporated or may be incorporated as a result of the contribution of that block of assets, debts-and-assets and/or business lines. In either case, the shares to be issued by the company receiving the segregated block under that equity contribution must be issued to the shareholders of the company transferring the block. Spin-offs may also be used to segregate business lines or activities and assign them to specific shareholders, instead of pro-rata the original distribution.

A simple reorganization is the segregation of assets, debts-and-assets and/or business lines in order to transfer them to another company. The company that receives the assets, debts-and-assets and/or business lines must issue new shares (if applicable) for the contributing company.

Auction processes are frequently seen in Peru for medium-to-large transactions. Small transactions are usually conducted through bilateral negotiations.

Negotiation usually includes, from the seller's side, the delivery of a "teaser" to potential buyers. This is followed by the execution of a nondisclosure agreement. Commonly, the next steps for the seller are to deliver a process letter to potential buyers and to negotiate a nonbinding bid or term sheet (i.e., a list of relevant terms with their corresponding definitions and conditions) with them.

In some limited cases, authorizations or permits must be obtained prior to closing M&A transactions (For further information, see the "Approvals/registrations" section in the "Quick reference guide" section above).

# Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The General Corporations Law contemplates the different types of corporate vehicles that investors may use to carry out economic activities in Peru. The most common entities or vehicles are the following:

Corporations (under their regular form or as closely held corporations) (Sociedad Anónima (SA) and Sociedad Anónima Cerrada (SAC))

Limited liability companies (Sociedad Comercial de Responsabilidad Limitada (SRL))

Branches (Sucursales)

The first two options are usually used by investors wishing to incorporate a subsidiary in Peru and provide limited liability for shareholders or partners. The branch is a vehicle that lacks legal personality and is used as an extension of a parent company. The parent will ultimately be responsible for obligations incurred by the branch.

In September 2018, a new corporate form, the simplified closely held corporation (Sociedad por Acciones Cerrada Simplificada (SACS)), was created and is now available to investors who are individuals. SACS can be incorporated through a simplified (electronic) process, provided that the founders are able of using a qualified electronic signature (firma digital).

# What are the different types of limited liability companies?

Limited liability companies resemble closely held corporations. Both types of entities require a minimum of two, and allow a maximum of 20, shareholders. Limited liability companies, however, do not issue shares (the capital is represented by quotas) and do not have a board of directors. Although closely held corporations can have a board, it is not compulsory. The procedures for incorporating are the same as for a corporation (SA).

The law does not establish a minimum amount of capital to incorporate a company, although some industries establish some minimum requirements and limit the corporate forms that can be used (e.g., banking and insurance sectors only allow corporations). The initial cash contribution for incorporation must be deposited in a local bank (contributions in kind are also permitted but are subject to particular rules).

Shares may not be issued in limited liability companies, as the capital is divided into participation quotas. Certain limitations may apply to transfers of these participation quotas, such as a right of first refusal in favor of the existing partners of the company and the company itself. In addition, to be valid and effective, any transfer of participation quotas must be formalized in a public deed and registered in the Public Registry.

The recently added form of a "simplified closely held corporation" (SACS) is, to some extent, similar to limited liability companies and traditional corporations but reduces certain formalities and terms associated with incorporation and administration at the expense of providing less flexibility. For example, shareholders may only be individuals.

# Is there a restriction on shareholder numbers?

There is a minimum of two, and a maximum of 20, quota holders (in limited liability companies) or shareholders (in closely held corporations). The corporation (under its regular form) has a minimum of two, and a maximum of 750, shareholders. If the corporation has more than 750 shareholders it must convert into a sociedad anónima abierta (and be registered in the public registry of the securities market superintendence).

# What are the key features of a share sale and purchase?

The acquisition of shares is mostly undertaken by privately negotiated acquisition. The most common provisions found in a share purchase agreement relate to representations and warranties, covenants and indemnification clauses.

It is also quite common to see buyer protection clauses, which usually take the form of a negotiated warranty and indemnity coverage from the seller. The terms of the protection will vary from transaction to transaction, but it is quite standard to expect that limits will be negotiated on any such terms protecting the seller, including claim thresholds and caps, time limits and adjustments for items disclosed or accounted for. Other types of guarantee (e.g., placing funds in escrow or a guarantee trust, holding back part of the purchase price and security interests) are also common.

# What are the key features of an asset sale and purchase?

The acquisition of assets is conducted by a privately negotiated acquisition by means of an asset purchase agreement. According to the General Corporations Law, if the book value of the assets to be sold by the seller company represents more than 50% of its share capital, a shareholders' meeting approving the transfer of assets is required. Transfers below this threshold would not typically require shareholders approval.

Transfers of businesses by way of an asset sale are not independently regulated in Peruvian law, so they must be implemented considering the specific regulations applicable to the transfer of each element of the business (assets, rights, contracts, obligations, etc.).

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