

**AIJA Deal Points Survey - Market Standards for Share Deals  
(M&A Commission)**

**Munich 2016**

**Executive Summary of Panama**

Missuly Clark

Anzola Robles & Asociados  
Credicorp Bank Plaza, 26<sup>th</sup> floor, 50<sup>th</sup> street  
P.O. Box 0832-02325  
Panama City, Panama  
Phone: (507) 263-0003  
E-mail: [mclark@anzolaw.net](mailto:mclark@anzolaw.net)

General reporters:

Dr. Hendrik Thies (Friedrich Graf von Westphalen & Partner)  
Dr Karim Maizar (Kellerhals Carrard)  
Mr Robrecht Coppens (Loyens & Loeff)

## **1. General Statement**

Private acquisition activities, such as stock purchase or asset purchase, are not specifically regulated under Panama law, except in cases where the target company is a regulated entity, such as banks and insurance companies.

In the case of mergers, Panama law allows a company to be absorbed by another company or two companies to merge forming a new consolidated company. Once a merger becomes effective, the absorbed company ceases to exist as a legal entity and the surviving company assumes all the assets, rights, liabilities and obligations of the absorbed company. These mergers must be registered before the Public Registry of Panama to become effective.

In the last few years, Panama's increasing economy has attracted several investors in different industries, resulting in the increase of M&A activity. Most of the M&A activity in Panama involve foreign investors looking to acquire a domestic target company.

## **2. Summary of Transaction Details**

This year we are reporting 3 deals with a minimum value of US\$375,000.00. All the reported deals involved the acquisition of a 100% of the shares of the target company.

The 3 deals also involve foreign investors looking to acquire a domestic target company; however, in 1 of the deals the buyer was an individual in London and not a company.

In 2 of the deals there were no employees involved, while in 1 deal the company had less than 200 employees.

Auctions or hostile takeovers in an M&A transaction in Panama are not common. Hence, the deals do not involve auctions or other buyers.

## **3. Letters of Intent**

Most M&A deals in Panama involve the signature of a letter of intent ("LOI") or a memorandum of understanding ("MOU") between the parties, especially when the buyer is a foreign company.

Whenever signed, LOI and MOU's always contain an exclusivity clause. The exclusivity term is usually between 30 to 60 days, depending on the transaction.

Additionally, not all clauses of the LOI or MOU are binding. Clauses such as confidentiality, non-disclosure, expenses, among others, have a binding character, but not the remaining clauses.

## **4. Due Diligence**

All of our M&A deal involve a due diligence of the target company. The extent of the due diligence will depend if the company is a holding company or if it is an operating company in Panama. When it comes to a holding company, the due diligence only covers corporate matters, since the company does not operate.

In our experience, the due diligence reports are requested by the buyer, and hence, the results are disclosed by the legal counsel of the buyer.

Some companies prefer physical data rooms for the due diligence phase to reduce the risks of leaks of information, but most of our transactions involve a virtual data room. We always request the target companies to provide the due diligence information in a virtual database, to expedite the due diligence process.

Additionally, in our experience, no questions and answers procedures are performed. However, in some cross border transactions involving international laws firms, a Q&A procedure is performed, but rarely.

## 5. Purchase Agreement

There are notable differences in how local and cross-border deals are conducted in Panama. The type of purchase agreement used in Panama will depend if the transaction involves a domestic acquirer or a foreign acquirer. For example, with local acquirers, the purchase agreement tends to be a simpler document than a purchase agreement used with a foreign investor. The differences are mostly reflected in the amount of the representations and warranties, affirmative and negative covenants, indemnities, among others, which are more common in international-style purchase agreements.

Given that there are a larger number of transactions involving foreign acquirers, the international style of purchase agreement is used more often.

Below some aspects with respect to purchase agreements:

- Transaction Closings: The transactions are performed with simultaneous closings.
- Language of the Purchase Agreement: the purchase agreements are usually drafted in English, but in transactions involving both local buyer and a target company, the purchase agreement is drafted in Spanish for convenience of the involved parties.
- Purchase Price: Mergers or acquisitions are generally structured as either stock-for-stock transactions, stock-for-cash transactions, or a combination of both. The form of consideration is in most cases is cash-for-stock paid in installments and subject to retentions from the buyer for contingencies during a specific period of time. However, transactions that involve a holding company do not usually contain price retentions. The financing method used in the 3 reported transactions is unknown; however, M&A financing in Panama is usually provided by local and international banks, as there are no limitations in Panama on international lending.

- MAC Clause: Most purchase agreements contain a MAC clause; however, the 3 deals submitted by us do not have a MAC clause, because they were smaller companies.
- Representations and Warranties: All the deals have extensive representations and warranties, except for holding companies that have standard representations and warranties. At the closing of the transaction, the representations and warranties are repeated and certification issued by the target company is usually required as a deliverable.  
In the case of tax representations, these are very common in purchase agreements, as well as tax indemnity clauses.
- Limitation of Liability: 1 of the reported deals has a limitation of liability, but the other 2 do not have a limitation of liability.
- Disclosures: It is common to have disclosures against warranties; however, there are also warranties included in the purchase agreement that are standard and do not involve a disclosure.

## 6. Conditions Precedent

All of the M&A transactions have conditions precedent to closing.

- Percentage of deals with/without merger filings as CP and information on percentage of jurisdictions: A stock acquisition transaction filing is not required under Panama law, unless the target company is a regulated entity, such as insurance companies or banks. Notwithstanding the above, the stock purchase transaction must be registered in the stock registry book of the target company to be effective and valid.  
In the case of mergers, these must be registered before the Public Registry of Panama to become effective.
- Percentage of deals with/without third party consents as CP: Aside from the corporate resolutions authorizing the execution of the purchase agreement, no third party consents are required.
- Percentage of deals with/without certain funds clause as CP: None of our deals have a funds clause.
- Percentage of deals with/without the bring-down of warranties as CP: Most of our deals involve a bring-down of warranties.
- Percentage of deals with/without MAC clause as CP: Transactions involving a foreign buyer usually contain a MAC clause; however, in cases when there is a purchase of shares of a holding company, MAC clauses are not usually included.
- Percentage of deals with/without seller's legal opinions as CP: Transactions involving a foreign buyer usually have an obligation to deliver legal opinions as a CP; however, in cases when there is a purchase of shares of a holding company

or a small company, no legal opinions are required. 2 of the reported transactions did not involve the delivery of a legal opinion, and 1 involved the delivery of a legal opinion.

- Percentage of deals with/without retention of key employees as CP: Only 1 of our reported deals involved the retention of key employees. The retention of employee is more common in the acquisition of bigger companies. This is not an issue in the acquisition of holding companies.
- Information on opinion coverage: The opinions usually cover the validity and enforceability of the purchase agreement and the perfection of the acquisition.

## **7. Non-Competition/Non-Solicitation/Restrictive Covenants**

Non-competition and non-solicitation clause are commonly used in the acquisition of operational companies. When there is an acquisition of holding companies, this type of clauses are not used.

On the other hand, affirmative and negative covenants are commonly used in all types of M&A transactions in Panama.

## **8. Governing law & Jurisdiction**

All the stock purchase agreements include a clause in connection with the governing law and jurisdiction. These transactions are governed by Panama law.

Depending on the amount of the purchase price and the confidential nature of the transaction, arbitration is often used; however, in cases where the purchase price is not significant and there are no confidentiality matters in hand, the disputes may be resolved in court.

The arbitration clauses include the arbitration center and procedure, language, place and number of arbitrators. We always recommend our clients to include a clause to submit to arbitration at a proceeding administered by the *Centro de Conciliación y Arbitraje de la Cámara de Comercio, Industria y Agricultura of the Republic of Panama* (“Center”).

The wording of the arbitration indicated that the arbitration shall take place in Panama City, Republic of Panama and proceedings shall be in Spanish unless the parties to the dispute agree otherwise. The dispute shall be resolved by a panel of three (3) arbitrators. Each party to the dispute shall appoint an arbitrator from the list of arbitrators approved by the Center. The Center shall appoint the third arbitrator who will preside the panel.

In some cases, mediation is required before arbitration; however, this will depend on the requirement of the client.

## **9. General Information**

As Panama's growing economy continues to attract significant foreign direct investment, multinational corporations seeking to take advantage of the country's unique geographical position, its free market system and investor-friendly climate, will cause the prevalence of cross-border mergers and acquisitions in Panama to increase. Based on the above, most of our deals have a cross border element.

Additionally, we confirm that none of our deals have been referred by another AIJA member.

## **DISCLAIMER**

*General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.*

*AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.*

*The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.*