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THE GUIDE TO MERGERS AND ACQUISITIONS

THIRD EDITION

Editors
Paola Lozano and Daniel Hernández

The Guide to Mergers and Acquisitions

Third Edition

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Publisher's Note

M&A activity continues to grow exponentially across Latin America – both in terms of volume of deals and their complexity. As Paola Lozano and Daniel Hernández of Skadden, Arps, Slate, Meagher & Flom LLP point out in their introduction to this third edition of *The Guide to Mergers and Acquisitions*, this is putting even more pressure on practitioners to say abreast of current topics and emerging trends in this complex and fast-moving environment.

Latin Lawyer and LACCA are therefore delighted to publish this latest edition of *The Guide to Mergers and Acquisitions*. It aims to meet this need by bringing together the knowledge and experience of leading experts from a variety of disciplines to provide guidance that will benefit all practitioners working across the region. The guide also carries an insightful roundtable on the impact of political instability on dealmaking, bringing together voices from a variety of jurisdictions to offer advice and key takeaways on how to navigate this mercurial landscape.

My thanks to the editors Paola Lozano and Daniel Hernández for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

It is our great pleasure to have worked with so many outstanding individuals to produce *The Guide to Mergers and Acquisitions*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Infrastructure and Energy Investment* and *The Guide to Corporate Crisis Management*, as well as our jurisdictional references and our new tool providing overviews of regulators in Latin America.

Contents

Introduction

Paola Lozano and Daniel Hernández[1]

M&A activity, comprising transactions involving mergers, acquisitions, dispositions and other corporate arrangements that entail the combination or consolidation of two or more businesses or the transfer of interests in a business, is a global industry worth trillions of dollars annually worldwide and billions of dollars annually in Latin America. In the region, deal volumes and values have followed a path of exponential increase in the past 30 years, despite the cyclical nature of M&A and the volatility of the political, social and macroeconomic environments in many Latin American countries. With increasing deal volumes and a broader range of market participants, the sophistication of legal counsel, business people, bankers and other advisers has also increased significantly. M&A in the region is constantly evolving and requires all participants to monitor current topics, new trends and a complex and changing environment. Advisers are required to stay abreast of recent developments, in addition to providing deep substantive knowledge of technical legal matters, to add value to their clients. New challenges resulting from a dynamic, ever-changing landscape demand rigorous attention to the many variables that may impact an M&A transaction. Such variables include, in addition to the proposed terms of a particular deal, market conditions, regulatory and legal changes, relevant case law and arbitral precedents, and newly implemented structures and technical contractual features developed by seasoned parties and advisers around the world, especially in deeper, more developed M&A markets.

1 Paola Lozano is a partner and Daniel Hernández is an associate at Skadden, Arps, Slate, Meagher & Flom LLP.

This guide is designed to provide an overview of certain critical aspects of current M&A dealmaking from the perspective of a highly qualified and diverse group of experts in their field throughout the larger markets in Latin America, as well as from the United States and Spain. This guide is not meant to be an academic description of applicable laws or contract terms and conditions typically included in M&A agreements. Instead, we selected current topics of interest in areas of recent and expected continued evolution, as well as certain factors that we believe may drive increased M&A activity in the years to come, with the aim of creating a valuable resource for executives, board members, investors and attorneys (both in private practice and in-house counsel) as they embark on an M&A transaction.

The years to come will likely be marked by challenging economic, political and social conditions impacting the globe at large and Latin America in particular. M&A practitioners will be required to adapt as governments and markets respond to current inflationary trends, a looming global recession, depreciation of local currencies against the US dollar, the gas and energy crisis created by the Russia–Ukraine conflict, continued worldwide polarisation, the rise of populist movements to power and the continued economic and social effects of the covid-19 crisis, including its long-lasting impact on supply chains.

Part I of this guide is an edited transcript of a roundtable discussion moderated by Paola Lozano of Skadden, on the impact of social unrest and political instability in M&A dealmaking, held in September 2021, at a time when the worst and most widespread global healthcare crisis the modern world has known, covid-19, required all M&A counsel to reassess priorities, focus on substantive and immediate issues (many unprecedented), quickly adapt to a new reality, and get creative in the use or development of tools to address the negotiation, execution, consummation, and in some cases, termination and amendment of M&A transactions.

A panel of leading M&A practitioners based in Argentina, Brazil, Chile, Colombia, Mexico, Peru and Spain addressed the then current social and political climate in the region and its direct and indirect impact on M&A activity. The panel discussed regulatory changes that may impact dealmaking in the region, providing a useful detailed overview of the specific political and social landscape in some of the major Latin American markets, as well as specific contractual issues that have or may become relevant or need to be addressed in the current environment. Among others, the panel touched on issues such as deal certainty, ESG investing, increase in carve-out deals, regulatory changes and merger control regimes, as well as hot industries such as energy, infrastructure and fintech. The roundtable also touched on the perspective and perception of foreign investors,

leveraging the participation of Iván Delgado from Pérez-Llorca in Spain and Paola's and Skadden's experience from the US perspective, and on the drivers of current high levels of deal activity (record-breaking in some cases), which may be based on an asymmetry in risk perception and more optimistic expectations than what is perceived by local actors. Among such factors, the participants shared their views on the role played by entrepreneurs, venture capital and private equity funds in driving deal activity. Finally, the panel discussed the expectations for 2022 M&A activity and some of the challenges and drivers that could impact the market appetite for local targets, many of which materialised, until the cycle started changing and new world order issues emerged.

Part II examines Latin American M&A transactions from the perspective of various types of market participants and how their involvement deeply impacts the nature of the process and the terms of the transactions.

Federico Grebe, Rafael Boisset, Claudia Barrero and Martín Cruzat of Philippi, Prietocarrizosa Ferrero DU & Uría in Chile, Colombia and Peru discuss the particularities of M&A transactions involving multilatinas, and their impact in the region and beyond. This chapter underscores the relevance of multilatinas in the recent evolution of the Latin American M&A market as strong drivers of transaction volume. Their very practical approach to dealmaking and ability to quickly adapt to particular market conditions have made them increasingly competitive, as compared to other global players interested in Latin American targets.

Maurizio Levi-Minzi, Peter A Furci, Andrew M Levine and Jonathan Adler of Deveboise & Plimpton LLP in New York address M&A transactions involving private equity funds and other institutional investors, including intrinsic challenges thereof and recommended protections in partial acquisitions.

Jared Roscoe of SoftBank and Stephen Pelliccia of OpenStore in Miami discuss certain transaction terms expected by a US-based venture capital fund in their investments in Latin America and the need to adjust certain forms developed in Silicon Valley to the factual circumstances and complexities of the region.

Sergio Michelsen, Darío Laguado and Ángela García of Brigard Urrutia in Colombia provide a practical overview of M&A deals involving family-owned businesses, and the many particularities and complexities involved in such transactions. The chapter describes deal dynamics, as well as substantive issues prevalent when representing a family-owned business or its counterparties in a transaction, including the need to ascertain early on the power structure and the alignment of interests and objectives within the family group.

Lina Uribe García and Juan Pablo Caicedo De Castro of Gómez-Pinzón in Colombia discuss the challenges faced when undertaking M&A transactions involving governments or government-owned entities, including a comprehensive overview of the regulatory intricacies of privatisations in Colombia. As noted by the authors, the current political and economic landscape and the fiscal deficit facing governments across the region will likely be responsible for an increase in the number of privatisations in the years to come, despite the recent rise to power of left-leaning governments in various countries in the region.

We close Part II with the insight provided by senior Latin American M&A investment banker Nicolas Camacho of Credit Suisse in New York, who gives us an overview of the critical role of investment bankers in assessing, structuring, organising and conducting an M&A transaction, particularly in the context of international sell-side-auctions of Latin American businesses.

Part III covers types of transactions and evolving trends that are fairly new to Latin America and that we expect will continue to increase in volume, size and importance, potentially becoming a helpful driver of the resurgence of M&A in post-pandemic times.

Francisco Antunes Maciel Müssnich, Monique Mavignier and Ana Paula Reis of BMA Barbosa Müssnich Aragão in Brazil discuss public company M&A, hostile takeovers and shareholder activism from the perspective of the Brazilian market. The chapter underscores the larger size and depth of the Brazilian capital markets, as compared to other jurisdictions in Latin America, and highlights the relationship between the evolution of the trading markets and the development of additional types of M&A transactions that are common in developed markets but nascent in Latin America, such as hostile takeovers.

Fulvio Italiani and Giancarlo Carrazza of D'Empaire in Venezuela discuss distressed M&A from the perspective of the Venezuelan market. The authors provide an interesting overview of lessons learned from the Venezuelan experience that may become more relevant as distressed M&A may become more relevant with economic challenges driven by political instability and social unrest. The authors also offer an interesting overview of recent changes in the Venezuelan M&A space, as the market gradually transitions from a predominantly distressed environment to more normalised dynamics.

Randy Bullard, Giselle C Sardiñas, Diego Rodriguez and Karina Vlahos of Morrison & Foerster in Miami address the incorporation of global environmental, social, and governance (ESG) practices and standards into Latin American deal-making, consistent with increased global attention to sustainability, ESG and impact investing. The authors provide a valuable overview of this trend in various countries in the region and discuss in detail how such trend impacts an array

of aspects of M&A transactions, including due diligence efforts and drafting of contractual provisions such as covenants and representations and warranties. The authors also provide commentary on significance of ESG matters for successful post-closing business integration.

Carolina Posada, Jaime Cubillos and Estefanía Ponce of Posse Herrera & Ruiz Abogados in Colombia discuss deal-related litigation in Latin America, which is worth observing as a potential trend, following in the tradition of the common law jurisdictions that handle larger deal volumes and sizes, and have developed a robust body of case law around frequently contested topics in M&A. The authors provide interesting insights on the driving factors in the choice of forum for dispute resolution in M&A agreements in the region, and provide commentary on the prevalence of arbitration in Latin American deals and relevant factors to select the seat of international arbitration proceedings. The chapter also draws interesting conclusions and notes potential trends to develop in the region on the basis of surveys involving some of the most reputable Latin American firms.

For the third edition, the editors and Ralph E Pérez, counsel at Skadden, discuss the increased availability and implementation of representations and warranties insurance (RWI) in Latin American M&A deals. The chapter addresses recent increased penetration of RWI as an important risk allocation tool in the region, often fostering deal activity in a turbulent environment, providing solutions and aligning parties' interests and risk appetite in a manner often not possible without an industry based on the assumption of transactional risk. The chapter provides an overview of the 'nuts and bolts' of RWI, including cost, risk allocation in deals with RWI, the underwriting process, the process for claims under a RWI policy, limitations on coverage and insurability of particularly complex and costly risks (including money-laundering, corruption and tax risk), factors driving the availability of RWI for a particular transaction, relative benefits of RWI for sellers and buyers, and the interaction between the RWI policy and the purchase agreement.

Part IV addresses selected topics critical to M&A dealmaking, outside the main transaction agreement, as well as a discussion on provisions within a transaction agreement that may impact certainty of closing.

Denise Grant, Augusto Ruiloba and Pedro de Elizalde of Shearman & Sterling LLP in New York address acquisition finance and debt structuring for M&A deals in the region. Naturally, the availability of an increased pool of sources of financing for M&A transactions has a positive impact on dealmaking appetite, especially as lenders with strong balance sheets continue to take an interest in the region and develop a tailored approach to the facts that differentiate it from the larger, less volatile markets.

Pablo Mijares and Patricio Trad of Mijares, Angoitia, Cortés y Fuentes in Mexico provide their views on the negotiation and execution of preliminary legal documents. This chapter addresses important issues such as the preliminary nature and non-binding effect of letters of intent, memorandums of understanding and term sheets with respect to a transaction, and the binding effect of certain provisions often included in such documents. The chapter also provides an insightful overview of the main issues revolving around confidentiality agreements, exclusivity agreements and cost-sharing agreements.

Diego Pérez-Ordóñez and Andres Brown-Pérez of Pérez Bustamante & Ponce in Ecuador provide an overview of the particularities of due diligence efforts and risk assessment with respect to Latin American targets. The authors combine remarks on some of the nuts and bolts of the interaction between due diligence efforts and the deal documents with a practical overview of common due diligence findings for Latin American targets. They also discuss statutes of limitations (with a focus on Ecuadorian law), and trending issues such as the use of legal tech in due diligence.

Last, Luis Burgueño, Alberto Córdoba and Elías Jalife of Von Wobeser y Sierra offer insights on escrow agreements, holdback provisions and other guarantees that may be used in the context of M&A transactions in Latin America. The chapter contains comprehensive remarks on some of the most critical issues typically related to escrow agreements, such as the selection of the escrow agent, the amount and term thereof, the use and beneficiary of interest accrued in the escrow account, and process and conditions for release of the escrowed funds. The authors also cover alternative mechanisms that may be relevant in Latin American M&A, such as parent guarantees, promissory notes and letters of credit.

We enjoyed the topic selection process and took great pride in editing each chapter of this guide. We thank each contributor for their time and appreciate the enriching exchange with each of the authors and collaborators. We hope the diverse experience and authoritative views captured in the guide will be very interesting and useful to attorneys, businesspeople and advisers in planning and preparing for their M&A transactions in Latin America

The opinions expressed in this guide are those of the authors and not necessarily of their respective firms. The views expressed in this guide do not constitute legal advice. Each transaction is unique and any analysis thereof is necessarily impacted by the specific facts, circumstances and deal terms, as well as applicable law, which, among many other variables, may result in issues and conclusions that may significantly depart from certain general statements contained in this guide.

Part III

New Transaction Dynamics and Evolving Trends in Latin America

CHAPTER 12

Representations and Warranties Insurance in Latin American M&A: A Long-awaited Alternative in the Face of Current Challenges

Paola Lozano, Ralph E Pérez and Daniel Hernández[1]

While representations and warranties insurance (RWI) is commonly used in many domestic private-target M&A deals in the US, the use of RWI in cross-border M&A transactions involving emerging markets has long been an up-and-coming trend yet to fully consolidate, especially in transactions involving Latin American targets. In recent years, RWI has gradually entered the cross-border transactional space and become an important risk allocation tool in cross-border M&A deals. Historically, RWI was often discussed but rarely used in Latin American M&A deals, mainly due to insufficient market penetration by insurance companies offering RWI in their portfolios. However, we have recently observed a significant increase in the frequency in which RWI is used, or at least available and seriously considered, in M&A deals in the region.

Dealmakers have been motivated to find alternatives to traditional post-closing risk allocation in Latin America because of the increased complexity of deals, the number of regulatory or court-mandated transactions and distressed divestments, the increased sophistication of passive investors that are unwilling to assume direct risk and the more competitive nature of global auction processes. Also, in the current environment of social unrest and political instability facing

1 Paola Lozano is a partner, Ralph E Pérez is a counsel and Daniel Hernández is an associate at Skadden, Arps, Slate, Meagher & Flom LLP.

the globe and the region, RWI can be a valuable tool to align parties' interests and expectations as to risk allocation, in a manner that may not otherwise be possible without transactional insurance.[2]

The increase in private equity-led Latin America M&A divestitures has also been a driving factor in the rising interest in RWI, because it may avoid potential misalignment between the fund life expectancy of the selling private equity fund, on the one hand, and the acquirer's expectation as to recourse, indemnification survival periods and holdback or escrow terms under the purchase agreement, on the other hand. As more region-specific funds reach maturity and the return of capital to their investors becomes imminent, the pressure increases to seek clean exits where a selling fund does not retain significant post-closing financial risk through indemnity covenants.[3]

Nonetheless, the use of RWI in Latin American M&A deals continues to be in the early stages. Therefore, aggregated data regarding the use of such tool in the region is not readily available and the specific terms and scope of a RWI policy are likely to be highly bespoke. While there is no shortage of RWI guides for the US, such resources are limited with respect to Latin America. Notwithstanding, as is the case with many M&A constructs, RWI has been transplanted from US M&A practice into Latin American M&A practice,[4] and the use of RWI should be expected to follow US practice and developments, with certain notable differences highlighted in this chapter.

As market penetration by insurance companies offering transactional insurance in Latin America is still developing, the relative cost of RWI in Latin American deals should generally be expected to be higher than that of RWI policies issued in US domestic transactions due to reduced competition among, and limited risk appetite from, insurers that currently offer this product in the region. Over the long term, we expect insurer competition to increase and RWI to be more broadly available and cost-efficient in the future, especially in transactions with less complex target operations for which due diligence efforts may provide a

2 See Chapter 1 of this guide, 'Roundtable: The Impact of Political Instability and Social Unrest on Dealmaking in Latin America', for a discussion on social unrest and political instability in the region, and the effects on M&A dealmaking.

3 See Chapter 3 of this guide, 'Private Equity Funds and Institutional Investors in M&A', for an overview of transactions involving private equity funds and other institutional investors in Latin America.

4 For an introduction to the term 'legal transplant,' see Watson, Alan, *Legal Transplants: An approach to Comparative Law*, 2nd ed, University Press of Virginia, 1993.

greater degree of assurance as to the likelihood of unexpected material contingencies. This is the case for assets in the power and energy space – one of the hottest industries in Latin American M&A in recent years.

Against this backdrop, this chapter is intended as an overview of the main aspects that dealmakers should take into account when considering RWI and its implementation in Latin American cross-border M&A. The first section includes an overview of the 'nuts and bolts' of RWI, including the types of RWI policies available; policy period, deductible, limits and exclusions; associated cost; typical underwriting process; and key aspects of the process to make claims under the RWI policy. The second section focuses on factors that may impact whether RWI is available for a particular transaction, and the related cost of the policy. The third section includes reflections on the relative benefits that RWI can offer for both sellers and buyers, and the transaction as a whole. Finally, in the fourth section, we discuss the intersection of RWI and the purchase agreement.

'Nuts and bolts' of RWI

Types of RWI policies

RWI protects the insured party against financial losses resulting from the breach of representations and warranties (R&Ws) made by the seller or the target under the purchase agreement. There are two types of RWI policies, depending on who will be the insured party:

- a buy-side RWI policy, which is issued to the buyer as the insured party, allowing it to seek payment from the insurer for losses incurred as a result of the breach or inaccuracy of R&Ws made by the seller or the target under the purchase agreement; and
- a sell-side RWI policy, which is issued to the seller as the insured party, allowing it to seek payment from the insurer for losses incurred as a result of claims brought by the buyer against the seller for breach or inaccuracy of R&Ws made by the seller or the target under the purchase agreement.

In broad terms, both buy-side and sell-side RWI achieve the same ultimate financial effect, which is to allocate to the insurer the risk of any breach or inaccuracy of the covered R&Ws, within policy coverage limitations and exclusions. Thus, the risk of any losses derived therefrom is shifted to the insurer and is not borne by either seller or buyer. The type of RWI policy may be indicative of:

- the extent to which there will be recourse available to the buyer under the purchase agreement in connection with any insured breach or inaccuracy of the R&Ws; and

- the allocation of the risk that a claim under the RWI policy against the insurance company be denied.

On the one hand, buy-side RWI eliminates or significantly narrows the seller's indemnity obligations under the purchase agreement, as the buyer looks mostly to the RWI carrier instead of the seller for recovery in the covered areas. A buy-side RWI policy may be issued regardless of whether the buyer has recourse against the seller under the purchase agreement for the covered matters, in addition to the RWI. Absent recourse against the seller, the buyer will exclusively bear the risk that a claim under a buy-side RWI policy be denied by the insurance company. If the buyer has recourse against the seller, the seller will likely bear such risk to the extent of its indemnification obligations under the purchase agreement, especially if the parties have agreed that the buyer must first seek recovery from the buy-side RWI and may only collect from the seller to the extent it is unable to recoup under the RWI.

On the other hand, sell-side RWI covers the financial risk of the seller resulting from its indemnity obligations contemplated in the purchase agreement, as it requires the carrier to pay the seller following a verified payment by the seller to the buyer with respect to an indemnity claim. Sell-side RWI policies are therefore premised on the fact that there is recourse against the seller under the purchase agreement, and are moot in 'no recourse deals'. Therefore, the seller generally bears the risk that a claim be denied by the carrier under a sell-side RWI policy.

Buy-side RWI policies are overwhelmingly used more than sell-side RWI policies, among other reasons, because contingencies known by the insured party are typically excluded from coverage under RWI policies (see 'Exclusions', below). Considering that the buyer is less likely to be aware of contingencies of the target business than the seller, buy-side RWI policies are expected to entail a more narrow range of excluded contingencies due to knowledge of the insured party. Also, as mentioned above, sell-side RWI policies are moot in no recourse deals. Not surprisingly, according to a recent market survey by the American Bar Association on private-target US M&A deals (the ABA 2021 Survey), 95 per cent of the transactions in which RWI was used from 2018 to the first quarter of 2021 included a buy-side RWI policy.[5]

5 American Bar Association, Business Law Section, 'Private Target Mergers & Acquisitions Deal Points Study', December 2021, p. 122.

Cost

The main cost components of RWI are the premium, the broker fee, the underwriting fee and taxes payable on the policy.

The premium is a one-time payment to the carrier, usually expressed as a percentage of the RWI policy coverage limit. Premiums in the US typically range between 2.5 per cent and 4 per cent of the policy limit.[6] However, as previously noted, costs associated with RWI issued in Latin American deals are higher than in the US due to reduced penetration and competition among insurers in the relevant markets. Although there is no aggregated data for RWI in the region, premiums in Latin American deals should be expected to be above 4 per cent of the coverage limit, going over 6 per cent in some cases, depending on the circumstances of each transaction and the terms of the policy.

The amount of the premium will be impacted by the terms of the RWI policy, the transaction terms and the specific circumstances of the target, including the jurisdiction and industry in which it operates, perceived legal certainty and macroeconomic risk (including currency risk). Insurance companies are willing to agree on enhancements to the policy to cover some of the excluded items (see 'Exclusions', below), for an increase in the premium. Thus, the amount of the premium in each case will ultimately depend on the facts and circumstances at hand.

RWI policies issued in Latin American deals should bear no difference in cost when it comes to RWI broker fees (typically ranging in the US in the low tens of thousands of dollars and often absorbed within the RWI premium if a policy is ultimately bound) and taxes on the policy (which typically are dependent on the registered address of the insured party). The insured party is usually required to pay an underwriting fee (sometimes referred to as a 'diligence fee') to the carrier to cover diligence and other costs incurred in the underwriting process, including outside counsel engaged by the insurer for diligence purposes, if any. The underwriting fee typically ranges in the US between US$25,000 and US$50,000.

Regardless of whether a RWI policy is buy-side or sell-side, the parties can negotiate the allocation of the premium and other RWI costs between buyer and seller. In a competitive sale process, it is not uncommon for the seller to ask the buyer to cover all RWI cost, including the full amount of the premium. However, if the buyer has more leverage, it is usually well-advised to request that the seller assume or share the costs of the RWI, under the argument that the RWI is

6 SRS Acquiom, *Tales from the M&A Trenches, Post-Closing Practices to Mitigate Post-Closing Risks*, 5th ed, March 2019, p. 149.

covering risks that would otherwise need to be covered by the seller under indemnity provisions in the purchase agreement. Pursuant to the ABA 2021 Survey, in deals in which RWI was used in 2020 through the first quarter of 2021, the seller assumed all or part of the RWI costs in at least 32 per cent of the deals (despite 95 per cent of the relevant policies in that period being buy-side RWI).[7]

Retention

RWI policies include a deductible, referred to as the 'retention'. In the US, the retention usually ranges between 0.5 per cent and 1 per cent of the deal value, although higher deductibles may apply for smaller transactions or in special circumstances. The retention in RWI policies issued in Latin American deals often ranges between 1 per cent and 2 per cent of deal value. However, the retention may be higher depending on the relevant jurisdiction and specific circumstances of the target business, and may go over 4 per cent of the deal value in some cases. Many RWI policies in the US provide for a drop of the retention after a specified period of time has passed since the policy is issued, but some carriers may not be willing to offer such drop of the retention in Latin American deals.

In a competitive environment, the seller may require that the buyer assume the risk below the retention, as would be the case in a no recourse deal. Conversely, when the buyer has more leverage, it may require that the seller provide indemnification for breaches of R&Ws below the retention, subject to customary limitations on indemnity, such as a de minimis amount, as applicable. Furthermore, if the seller is liable for all or some amount of the losses below the retention and arising from breaches of R&Ws, a buyer with negotiation leverage may require a holdback or escrow in connection therewith.[8]

Recourse against the seller for breach or inaccuracy of the R&Ws covered under the RWI (e.g., with respect to all or some amounts below the retention) has the potential of lowering the cost of the RWI, in the form of a reduction in the premium. Insurance companies will have more confidence in the quality of the R&Ws and in the seller's diligence and overall process in granting such R&Ws if buyer has recourse against the seller. Insurance companies assume that, if the seller has 'skin in the game', it will be more zealous in negotiating the specific wording and relevant qualifiers of R&Ws and in making appropriate disclosures

7 American Bar Association, Business Law Section, 'Private Target Mergers & Acquisitions Deal Points Study', December 2021, p. 124.

8 See Chapter 16 of this guide, 'Indemnity Escrows and Other Payment Guarantees', for an overview of escrow agreements, holdback provisions and other guarantees that may be used in the context of M&A transactions in Latin America.

of exceptions thereto. The seller's indemnity obligations usually do not need to be substantial relative to the deal value or even the RWI policy limit for the insurance company to be able to offer a discount in the premium, as long as the RWI carrier deems such obligations to be enough for the seller's interests to be aligned with those of the insurer when negotiating the relevant terms of the purchase agreement. According to SRS Acquiom's 2020 buy-side RWI deal terms study, indemnity baskets in deals with an identified buy-side RWI are more frequently structured as deductibles and not as tipping baskets (69 per cent deductible versus 12 per cent tipping) compared to indemnity baskets in deals in which no RWI is identified (40 per cent deductible versus 53 per cent tipping).[9] The notable shift towards deductible baskets in the presence of RWI evidences a willingness to split the risk below the retention.

The RWI policy usually does not include a de minimis amount. However, significant materiality thresholds in the scope of the buyer's due diligence review may prompt certain carriers to increase the retention or, less market standard, attempt to include a de minimis amount in the policy.

Policy period

In sell-side RWI policies, subject to a specified maximum term, the policy period tends to match the survival period of the seller's indemnification obligations under the purchase agreement, because the insured risk stems from such obligations. In buy-side RWI policies, however, it is more common in the US to see a three-year policy term for operational and non-fundamental R&Ws and a six-year policy term for tax and fundamental R&Ws.[10] No aggregate comparable data is available specifically for RWI policies issued with respect to Latin American deals. The rationale for policy periods may be impacted by the underlying applicable statute of limitations and other considerations that are specific to each underlying jurisdiction. Nonetheless, we would not expect the aggregate trend on policy period to be substantially different in Latin American deals from what is observed in policies issued for US deals, especially considering that most insurers offering RWI in Latin America are based in the US.

9 SRS Acquiom, '2020 Buy-Side Representations and Warranties Insurance (RWI) Deal Terms Update', September 2020.

10 SRS Acquiom, *Tales from the M&A Trenches, Post-Closing Practices to Mitigate Post-Closing Risks*, 5th ed, March 2019, p. 150.

Coverage limit

The total coverage limit of RWI policies issued with respect to M&A transactions in the US usually ranges between 10 and 25 per cent of the deal value. Most carriers are open to a policy enhancement to cover breaches of true fundamental representations (i.e., title, organisation, good standing, authorisation and capacity) beyond the general limit of the policy, often up to 100 per cent of the deal value, in exchange for an increase in the premium amount.

As with other aspects of RWI policies issued in respect of M&A deals in Latin America, there are no statistics readily available in connection with typical coverage limits under such policies. Some RWI brokers say that RWI policies issued with respect to Latin American deals have lower limits, as a percentage of the deal value, than RWI policies issued in respect of US deals, due to limited RWI carrier competition and appetite. Others maintain that RWI policy limits in Latin America tend to be higher, as a percentage of the deal value, because of smaller deal sizes. Still, others believe that the policy limits in Latin America are comparable to those in the US.

Exclusions

RWI generally covers unexpected financial risk derived from breaches of R&Ws. Therefore, RWI is not designed or intended to cover, and does not cover, breaches of covenants or price adjustment payments. However, coverage through R&Ws on the underlying subject matter of some covenants may be obtained under RWI. For instance, the risk of breach of seller's interim operating covenants often can be covered indirectly, through an 'absence of certain changes' R&W.

Insurers only protect against unknown risk. As is the case in the US and other jurisdictions, RWI policies typically do not cover breaches of R&Ws derived from known or expected issues, including those revealed in the diligence process or identified in the disclosure schedule.[11]

There also are various subject areas that RWI carriers will generally exclude from RWI policies, including data protection and cyberattack matters, compliance with certain labour and employee benefits laws (including on wages and pension matters), certain tax matters (such as open audits, transaction-related taxes or the ability of the target or buyer to, or time frame in which the target or

11 As of the publication date of this chapter, there are reports of insurers broadening coverage in the US for certain interim breaches (i.e., breaches of R&Ws first arising between signing and closing, of which the insured party has actual knowledge as of the closing). Time will tell whether such coverage enhancements will be available with respect to M&A deals in Latin America.

buyer may, utilise net operating losses), product liability, certain environmental matters (such as pollution and handling and release of hazardous materials), and fraud by the insured party (in the case of buy-side RWI policies, breaches of covered R&Ws that occur due to fraud or fraudulent misrepresentation by the seller are usually covered, subject to the insurer's subrogation right with respect to any claims involving fraud by the seller). Additional subject areas that RWI carriers almost always seek to exclude for Latin America RWI policies include bribery and corruption, money laundering, and expropriation risk. Separate insurance policies and products may be available to cover some, but not all, of these exclusions.

Among other issues, quantifying the underlying risks of such excluded matters is extremely difficult for RWI carriers on the basis of transaction diligence, and although some of the excluded items may be perceived as having a low likelihood of occurring, most of the risks (e.g., anticorruption) have been more pervasive in Latin America than in other jurisdictions in recent times. Furthermore, when the risk materialises, it tends to have a severe and long-lasting negative impact not only on the target but also on the buyer.

Further, insurers may seek to have additional exclusions on a jurisdiction-specific, industry-specific or deal-specific basis. Such exclusions may include specified matters that in the opinion of the insurer were not sufficiently reviewed during diligence, or items relating to diligence findings.

Depending on how competitive the M&A process is, the buyer may require that the seller provides indemnification for excluded items under the RWI policy, and may even require an escrow or holdback to guarantee liquidity for such risks.

Underwriting process

Typically, the insured party (likely the buyer) will engage a RWI policy broker. The broker will then reach out to potential insurers and provide them with limited key information regarding the deal, which is generally only disclosed after the insurers sign a customary non-disclosure agreement or joinder to the buyer's non-disclosure agreement with the target or the seller. The information typically shared with the insurers includes the management presentation or confidential information memorandum, recent target financial statements, the draft purchase agreement, the proposed purchase price and the requested coverage. Insurers that are interested in issuing a policy for the relevant deal will then provide the broker with quotes and the broker will prepare a summary comparison chart of proposed key policy terms, including coverage limit, retention, premium, exclusions,

enhancements and areas of required heightened diligence (which may ultimately result in additional exclusions). The quotes will typically be subject to confirmatory due diligence by the insurer.

Once the prospective insured party has selected a preferred insurer, the insurer may require the execution of a 'non-binding indication letter', setting forth the key terms of the policy, in addition to payment of the underwriting fee. In competitive auctions and other circumstances in which the buyer has not entered into an exclusivity agreement with the seller or target with respect to the transaction, a buyer seeking a RWI policy may be required to pay an exclusivity fee to the insurer to proceed with the underwriting. Pre-exclusivity underwriting is not very common and therefore the exclusivity fee charged by carriers can be material (e.g., low to mid hundreds of thousands of dollars), depending on market capacity and how much competition and appetite there is for the target business. However, the exclusivity fee is likely to be credited against the premium if a policy is issued thereafter.

The insurer will require access to the data room and a copy of all due diligence reports (including from outside counsel, accounting firms and other advisers) and a copy of the disclosure schedules, all of which are usually expressly provided on a 'non-reliance basis.' Thereafter, the prospective insured party and the insurer will (1) hold an 'underwriting call' to discuss the status, scope and findings of the diligence review and other items relevant to the negotiation of the purchase agreement and the scope of the R&Ws (the insurer may follow up with specific questions after the call), and (2) negotiate and agree on the terms of the RWI policy, based on a form provided by the insurer.

The RWI policy can be bound prior to signing of the purchase agreement or between signing and closing, in each case, effective as of the closing. Buyers seeking a buy-side RWI are well-advised to secure the terms of the RWI prior to signing. The purchase agreement does not typically include a condition to closing for the benefit of the buyer on a RWI policy being actually obtained, because it is in buyer's control to secure the policy prior to signing, assuming RWI is available to begin with.[12] Further, as discussed, deals involving RWI often have no recourse or limited recourse against the seller. Therefore, the buyer should be the party

12 Pursuant to the ABA 2021 Survey, only 12 per cent of deals referencing RWI in 2020 through the first quarter of 2021 included a stand-alone condition for the benefit of the buyer on obtaining RWI. Twenty-three per cent of such deals included such condition for the benefit of the seller and 66 per cent of such deals did not include any stand-alone condition on RWI. See American Bar Association, Business Law Section, 'Private Target Mergers & Acquisitions Deal Points Study' December 2021, p. 125.

most interested in confirming the availability and terms of the RWI (its only expected source of recovery), prior to executing the definitive agreements. When the terms of the RWI policy are agreed prior to the execution of the purchase agreement, the buyer and the insurer will typically enter into a binder of insurance, which will include a draft of the policy as an exhibit thereto and provide for the issuance of the policy upon satisfaction of certain customary conditions, including, among other things:

- payment of the premium in full;
- payment of the underwriting fee in full;
- consummation of the closing under the purchase agreement;
- absence of any amendments to the purchase agreement that adversely impact the insurer;
- a certificate from the insured party on the absence of knowledge of any breach of R&W (referred to as a 'No Claims Declaration'); and
- delivery to the insurer of an electronic copy of the data room and copies of final due diligence reports.

Prior to issuing the policy at closing, the insurer will require a 'bring-down call' with the insured party's deal team and third-party advisers on outstanding diligence questions and to inquire whether there have been any additional diligence findings since the date of the diligence reports provided to the carrier. Absent materially adverse issues, the terms of the policy are not typically revised after that call or the finalisation of the insurer's diligence.

The duration of the underwriting process will depend on whether the RWI carrier is willing and able to rely on the parties' diligence reports, rather than require full-blown diligence by its independent US and local counsel. In the US, the entire process from engagement of the RWI broker to a final negotiated RWI policy can sometimes be done in as little as two weeks, assuming no full-blown independent diligence by the insurer. Some brokers indicate that the RWI process in Latin America is only a couple of days longer than that for a US policy, while others suggest it may take an additional three weeks. Other than possibly taking longer to complete, the process for a Latin America RWI policy is no different than that for a US policy.

In a highly competitive auction, the seller may indicate to the bidders that it will be providing no indemnity or very limited indemnity, and encourage them to use RWI as the sole source of recovery. Moreover, in that type of auction (especially in jurisdictions where availability of RWI is not clear or where there is uncertainty that it would be available at reasonable cost), the seller is generally well-advised to engage a broker early in the process to confirm availability of

RWI for the transaction, and pre-package a buy-side RWI policy that would be presented to bidders along with other transaction materials (typically during Phase II of the auction). Bidders should bear in mind that they are not required to engage the broker that has worked with the seller in pre-packaging the RWI policy or to purchase the RWI policy from any of the seller's proposed carriers. Bidders can, of course, engage a different broker to survey the market and confirm whether better terms (including better coverage or more efficient costs) can be independently obtained. The merits of going down this route should be carefully assessed, considering, among other things, (1) time constraints; (2) RWI market depth and likelihood that other brokers and carriers may offer better terms for the particular transaction; and (3) the competitiveness of the auction, including whether the bidder may put itself at a disadvantage compared to other bidders that may go with the pre-packaged broker, carrier and policy, especially if recourse against the seller in lieu of RWI coverage is on the table, because the seller will need to educate itself on the terms and reliability of the bidder's proposed policy and carrier.

Process to make claims under the RWI policy

RWI carriers usually have standardised and relatively expeditious processes to review claims. Insurers typically approach the claim process with a much more commercial perspective than sellers may approach indemnity claims, because at the end of the day handling such claims is inherent to the insurers' business model. The last thing an insurer wants is to build a reputation for being unreasonable in the handling of claims, as insurers are continuously competing for business in future deals, potentially involving the insured parties making such claims under existing policies. Insured parties who are repeat players in the M&A space should also be wary of earning a reputation of being difficult to deal with, as insurers may factor in that reputation when assessing the availability and cost of future RWI policies issued to those parties.

The claim process is typically kicked off by the delivery of an initial claim notice by the insured party, followed by the insured party's assessment of the breach and incurred loss. Thereafter, the insurer and the insured party will discuss an investigation plan, often including a preliminary investigation by the insurer, followed by information and document requests. Finally, the insurer will issue a coverage position and negotiations will take place, as needed.[13] The majority of claims are resolved within one year, with approximately a quarter of the claims

13 M&A Insurance presentation by AON to Skadden, April 2022.

being resolved within six months.[14] Claims issued with respect to assets in Latin America may take longer, due to expected reduced familiarity of the carriers with the underlying jurisdictions compared to the US. The insured party is often encouraged to be forthcoming with relevant information required to assess the breach of R&W and the loss incurred, relative to the level of information that it would otherwise share with the seller in connection with an indemnity claim. The amount of time it will take to resolve the claim will depend to a great extent on information flow, in addition to the complexity of the claim.

Pursuant to recent data from AON on RWI policies issued to AON clients, between 18 and 25 per cent of RWI policies issued in the years 2013–2017 resulted in at least one claim by the insured party under the policy. However, between 2013 and 2019, only 13 per cent of the claims made with respect to deals with a value under US$100 million resulted in payment of a loss above the retention, with lower percentages for larger deals within such period. Nonetheless, over 54 per cent of the claims made under RWI policies issued to AON clients are currently active.[15]

Insurability factors

There are several factors that may impact the RWI carriers' appetite to issue a RWI policy and the cost thereof. Considering the limited offerings of RWI alternatives in the Latin American M&A space, sellers and buyers should seek to structure the deal around such factors to increase the likelihood that RWI may be obtained and reduce the cost at which it may become available. Such factors include, among other things:

- a well-regarded ultimate beneficial owner of the insured party;
- a sophisticated insured party with an established track record in M&A, such as private equity funds, preferably based in the US or another jurisdiction with high historical deal flow;
- a simple target business model that is not heavily regulated;
- sophisticated counsel and accountants involved in the transaction, performing a customary due diligence process, and availability of a data room and US-style detailed due diligence reports from such advisers;
- an English-language acquisition agreement governed by US law, UK law or the law of another jurisdiction with a robust body of case law on M&A matters;

14 See AON, 'Representations and Warranties Insurance Claims Study; an analysis of claim trends, data and recoveries', 2020, p. 23.

15 id., at 4.

- high-quality terms and conditions under the purchase agreement; and
- arm's length negotiation of the R&Ws, preferably including some recourse against the seller for any breach thereof (e.g., with respect to losses below the retention).

The above list is non-exhaustive. In essence, insurers welcome any deal trait that enhances the predictability of contingencies, legal certainty or the likelihood that any material contingencies have been identified during due diligence.

Sellers expecting bidders to obtain RWI should make sure that the factors that they can control are structured in a manner that favours the availability of RWI at a reasonable cost (e.g., engaging top-notch advisers, selecting an applicable law with an established body of M&A case law that is familiar to the RWI carriers, preparing transaction documents in the English language, conducting vendor's due diligence and documenting a robust process for disclosure of contingencies). As it is, RWI carriers are already cautious on the basis of factors that tend to be out of the control of the parties. Each market is different, and the common perception of higher political and economic volatility – including widespread corruption scandals, which tend to increase fears of fraud – may cause RWI carriers to be more conservative and increase prices in emerging markets. Similarly, less deal flow and higher perceived uncertainty on the underlying applicable law of the R&Ws' subject matter also makes it more challenging to put a price tag on unknown risks. While RWI policies have been implemented in a broad range of industries across Latin America, not all countries are regarded as equal by RWI carriers. For example, it appears that Brazil, Chile and Mexico have had higher levels of RWI carrier interest than other significant jurisdictions, such as Argentina, Colombia and Peru.

Relative benefits of RWI

Outlined below are some of the main benefits that RWI brings to the table for each of the parties and the transaction as a whole.

Benefits to the transaction and both parties

RWI offers an important risk allocation solution and can render significant benefits to both buyer and seller and to the transaction as a whole, regardless of the type of policy in place (i.e., sell-side or buy-side) or the allocation of cost thereof. The main and most obvious benefit is that it aligns otherwise incompatible interests and expectations, allowing for a clean (or cleaner) exit of the seller from

the target business, while at the same time affording buyer protection against unknown contingencies that could otherwise take a premature significant toll on the valuation of the target, in the absence of recourse.

RWI also reduces transaction costs by expediting and simplifying the negotiation of the purchase agreement between the parties, particularly with respect to the R&Ws, and by potentially eliminating or considerably narrowing discussions on indemnity and escrow.

RWI can also benefit both sellers and buyers in an M&A transaction with multiple sellers, where sellers – whether as a matter of policy or simple financial wherewithal – do not offer joint and several liability for indemnities. RWI obviates the need to pursue multiple parties for varying percentages of losses and allows for a single process with the RWI carrier. This is particularly handy if some of the selling entities are unaffiliated minority and passive investors who may be reluctant to grant indemnification on the basis of operational R&Ws negotiated by the controlling shareholder, with respect to underlying matters of which such minority or passive investors have limited or no knowledge or ability to control.

Benefits to the seller

RWI eliminates or reduces the seller's financial risk for losses arising out of breaches of R&Ws under the purchase agreement. The seller's rate of return on investment at closing is maximised because:

- in the absence of recourse, the buyer is not required to discount the purchase price on the basis of contingencies that have not materialised and would be covered under the RWI policy;
- the seller's post-closing exposure is eliminated or significantly reduced; and
- the need for a holdback or escrow dissipates, maximising the amount of consideration actually received by the seller at closing. For instance, according to SRS Acquiom's 2020 Buy-side RWI deal terms study, the average indemnity escrow amount drops from 12.3 per cent of the purchase price in deals with no identified RWI, to 2.3 per cent of the purchase price in deals with an identified buy-side RWI.[16]

16 SRS Acquiom, '2020 Buy-Side Representations and Warranties Insurance (RWI) Deal Terms Update', September 2020.

As previously mentioned, RWI allows selling private equity funds, and other institutional investors reaching maturity and relevant milestones for return of capital to their investors, to liquidate their investment in the target and distribute proceeds, without pending indemnity obligations that would delay an otherwise clean fund wind-up and dissolution.

Finally, RWI can be a powerful tool to facilitate deals with financially distressed sellers. Distressed sellers' creditworthiness does not provide sufficient assurances for effective recourse. Also, such sellers likely need to receive the proceeds of the transaction at closing to disburse them shortly thereafter to creditors or use them to cover critical operational needs. RWI provides a solution for both of these issues by eliminating or reducing reliance on recourse against the seller and providing buyer with the ability to look at the insurer for creditworthiness and liquidity risks, instead of the seller.

Benefits to the buyer

Since the buyer looks to the RWI carrier instead of to the seller for recovery in the covered areas, as noted above, RWI significantly reduces a buyer's creditworthiness risk, which would otherwise be largely dependent on the identity and financial wherewithal of the seller.

RWI can be a useful tool for a buyer entering a Latin American market for the first time. Such a buyer often keeps much of the target business' existing management in place after the closing and may structure the transaction so that the seller keeps an ownership stake, even if temporarily, in the target business post-closing. Under those circumstances, the buyer's assertion of an indemnity claim could sour its relationship with its new employees and partner. A buy-side RWI policy might enable the buyer to avoid this awkward situation, since the buyer would make the claim to the RWI carrier.

In a hotly contested auction, a prospective buyer can make its bid stand out by easing the seller's indemnity obligations in reliance on a buy-side RWI policy. This is especially true in Latin American M&A because not all bidders are likely to consider RWI, as RWI is not yet as common and many bidders are unfamiliar with, and even skeptical of, the benefits of RWI.

If completed prior to signing, the RWI underwriting process may enhance the buyer's diligence efforts, as it may put the focus on and uncover certain risks that may have not been otherwise identified in diligence.

As previously mentioned, RWI also simplifies the process that the buyer is required to undergo to recoup losses incurred due to a breach of R&W, especially in transactions that would otherwise have involved recourse against multiple sellers. In Latin American cross-border M&A transactions, the seller or its

assets are often located in jurisdictions (or multiple jurisdictions, including in the event of multiple sellers) that have complex foreign judgment enforcement rules, involving lengthy and costly recognition proceedings. In the absence of RWI, the buyer would be required to invest significant time and effort in obtaining recognition and enforcement of any judgment before being able to recoup.

The intersection of RWI and the purchase agreement

In some transactions, the purchase agreement does not include any references to the RWI, despite one of the parties using RWI. In such cases, it is likely that the insured party will independently obtain the policy and assume all costs thereof. However, although not strictly necessary, there are certain provisions that the parties should seek to include in the purchase agreement in connection with the RWI.

If the insured party has not obtained a binder of insurance prior to signing, it should seek to include covenants in the purchase agreement requiring the other party to reasonably cooperate and provide assistance in the process to obtain the RWI. As mentioned above, if the buyer has substantial leverage in the negotiations, it may attempt to include a stand-alone condition to closing on actually obtaining a RWI policy, but such condition is not customary and may significantly diminish the standing of a prospective buyer's bid in a competitive auction.

If the seller has agreed to indemnification obligations in the absence of RWI coverage and a binder of insurance has not been entered as of the execution of the purchase agreement, the seller should seek to include covenants requiring the buyer to use some level of efforts to obtain the RWI.

In any event, the seller is well-advised to include provisions relating to the confidentiality of the information to be provided to the insurer, and the handling thereof, including the requirement that the carrier enters into a customary non-disclosure agreement or a joinder to the non-disclosure agreement executed by the buyer in connection with the transaction.

If the parties will share some or all of the costs of the RWI policy (e.g., the premium or the broker or underwriting fees), provisions and covenants should be included to that effect. For example, if the buyer will obtain a buy-side RWI policy but the seller will share some of the costs thereof, the buyer may seek to include such costs as transaction expenses to be deducted from the purchase price to be paid to the seller at closing.

In the event that the seller is granting recourse to the buyer in the absence of coverage under the RWI policy, whether for matters below the retention or exceeding the coverage limit, upon coverage being denied by the insurer or with respect to exclusions under the RWI policy, the indemnification provisions

should be revised accordingly to reflect any agreed-upon recourse hierarchy[17] and the scope of any indemnification obligations of the seller for matters not within the scope of the RWI policy. Areas of frequent debate between the parties in the presence of RWI include whether the seller should be liable to the buyer for breaches of fundamental representations or certain key areas excluded from the RWI policy (e.g., bribery and corruption), because the underlying subject matters tend to be within the seller's control and the financial consequences for the buyer upon a breach thereof tend to be dire.

The negotiation of the scope of the R&Ws should not be heavily impacted by the presence of RWI, other than the fact that the seller may be more amenable to broader R&Ws where there is no or limited post-closing recourse against the seller in connection therewith. Nonetheless, the scope and quality of the R&Ws in the presence of RWI tends to follow market practice because insurers will likely exclude coverage for atypical R&Ws or offer to cover broader R&Ws at an additional cost. Also, the seller should be expected to continue to be careful not to compromise closing certainty by agreeing to an overly broad set of R&Ws and increasing the risk that the agreed-upon standard for the 'bring-down' of the R&Ws at closing is not satisfied.

Other provisions that may be present in the purchase agreement in connection with the RWI include clarifying language to the effect that survival provisions under the purchase agreement do not impact the RWI policy period; and in the presence of a buy-side RWI policy, covenants requiring the buyer not to obtain a RWI policy providing for subrogation rights against the seller other than in the case of fraud, and requiring that the buyer does not agree to amendments to the RWI policy that adversely affect the seller, including with respect to subrogation rights.

The RWI policy is often self-contained as to the defined terms and other provisions that trigger coverage thereunder (other than the covered R&Ws, which are contained in the purchase agreement and included by reference), including with respect to the definition of covered losses, events constituting a breach of R&W, knowledge and other exclusions. However, in deals in which a buy-side RWI policy is put in place in addition to indemnification obligations granted by the seller, the RWI policy may be informed by the relevant provisions and defined

17 Pursuant to the ABA 2021 Survey, in 2020 through the first quarter of 2021, 38 per cent of deals in which RWI was used but was not the buyer's sole source of recovery required that the buyer first pursue a claim under the RWI prior to being able to recover from the seller. See American Bar Association, Business Law Section, 'Private Target Mergers & Acquisitions Deal Points Study', December 2021, p. 128.

terms in the purchase agreement (e.g., the definition of 'losses'). In those cases, the buyer should be careful not to accept limitations to the relevant defined terms and provisions that it is not willing to accept with regard to the RWI carrier. The RWI policy usually follows the materiality scrape provisions in the purchase agreement, for the purpose of determining whether there has been a breach of a R&W and the extent of the losses incurred.

Conclusion

With its expected increased prominence, it is timely for dealmakers with roles in the premier Latin American M&A transactions to brush up on RWI. As long as carriers continue to be willing to offer RWI at an accessible cost, the current environment of social unrest and political instability facing the globe and the region can incentivise the use of RWI, because:

- sellers will be looking for a clean exit (in particular private equity funds reaching maturity) and will be increasingly reluctant to offer substantial recourse in the face of current uncertainty;
- the volume of distressed M&A transactions could increase, forcing buyers to seek alternative sources of recovery; and
- US-based insurers provide a solution to creditworthiness and country risk, particularly in transactions involving local sellers.

However, Latin American dealmakers should proceed with caution and work with their RWI brokers as early as possible to confirm if RWI is available to them at an acceptable cost under the specific circumstances. As the region continues to warm up to the concept of fronting some costs for unknown risks that may never materialise, RWI carriers also are being cautious due to underlying legal uncertainty, market volatility, political and economic volatility and reduced deal-flow, which may continue to drive up the cost of RWI in the region in the short term.

APPENDIX 1

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Paola Lozano is a New York-based M&A partner at Skadden, Arps, Slate, Meagher & Flom LLP. She is the co-chair of Skadden's Latin America Group and the head of the firm's Spanish language corporate practice. She has also served as a member of Skadden's Policy Committee.

Paola has been repeatedly recognised by her clients and colleagues. Among others, she was Latin Lawyer's 2019 International Lawyer of the Year; a *New York Law Journal* 2019 Distinguished Leader and Crain's New York Business Notable Women in Law 2019. She has also been ranked by Chambers in Band 1 for Corporate M&A in Latin America (the first and only woman to achieve that ranking); and is also included as a top attorney in Lawdragon 500 Leading Lawyers in America (2014–2020); Latinvex Latin America's Top 100 Lawyers (2014–2020) and Latinvex Latin America Top 50 and Top 100 Female Lawyers (2013–2020).

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Published by Latin Lawyer and LACCA, edited by Paola Lozano and Daniel Hernández of Skadden, Arps, Slate, Meagher & Flom LLP, this third edition of *The Guide to Mergers and Acquisitions* provides guidance that will benefit all practitioners acting in Latin American mergers and acquisitions.

M&A activity in Latin America has grown significantly in recent decades, and deals are increasingly complex. This guide draws on the expertise of highly sophisticated practitioners to provide an overview of the main elements of dealmaking in a region shaped by its cyclical economies and an often volatile political landscape. Its aim is to be a valuable resource for business people, investors and their advisers as they embark on M&A transactions.

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