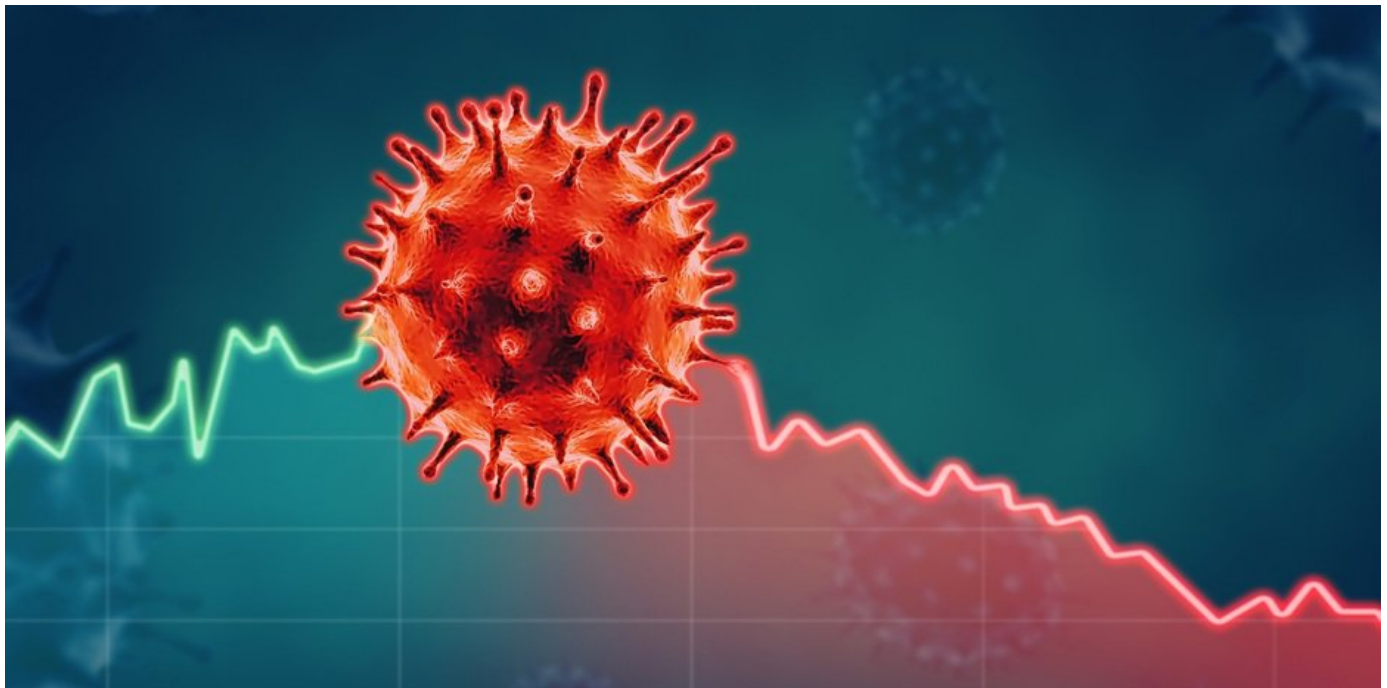


The dramatic changes to deal-making under covid-19

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26 March 2020

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The covid-19 crisis is unprecedented, spreading across the globe with unforeseeable consequences for people's lives and the global economy. As markets across the world adapt to operate under strain, Luís Bulcão Pinheiro talks to M&A partners to find out how deal-making is faring in the era of covid-19.

In Brazil, the situation has developed at a fast pace. It is the worst affected country in the region, with the number of covid-19 cases getting close to 2,000, including 34 deaths. Of the latter, 30 have been in the country's business hub, São Paulo.

On 18 March Brazil's competition watchdog CADE rejected an appeal from prosecutors challenging Boeing and Embraer's landmark tie-up, giving the final clearance for the deal to proceed. At the time, Brazil had only just registered its fourth covid-19 death. With that number rising, the country is bracing for the

impact of a crisis that is already hitting Europe hard. But amid the evolving situation, one of the most important deals in Latin America – with global consequences to the aviation industry – still went ahead.

Embraer's general counsel, Fabiana Leschziner, told Latin Lawyer her team "remained focused and determined to make the right decisions to face up to covid-19," adding that "nothing changed in relation to the deal." The main obstacle for the tie-up now is getting clearance from the European Commission, which opened an in-depth investigation in October. The authority has now put that process on hold due to the coronavirus.

Like many other high-stakes and complex transactions underway during the covid-19 pandemic, Boeing and Embraer's tie-up deal may well be facing its most critical phase. The reason is simple: covid-19 dramatically changes the circumstances under which the deal was initially hammered out. An article published by *Reuters* notes that, if the deal goes ahead, Boeing will be paying three times Embraer's value, which was calculated at US\$1.3 billion after its shares plunged by two-thirds following the covid-19 outbreak. The deal was signed in July.

Despite its unique complexities, Embraer's case illustrates well the level of uncertainty covid-19 is bringing to the market. Doubts over past, future and ongoing deals are making lawyers all over the region roll up their sleeves to look for creative solutions (from the safety of their homes; all the firms Latin Lawyer spoke with are remote working, as are company legal departments). "We are working full-steam, but in home-office," Leschziner told Latin Lawyer.

Lawyers in several countries report difficulties closing deals. Thiago Giantomassi, a partner at Brazilian firm Demarest Advogados, commented on the M&A market in general in Brazil, saying that uncertainty is forcing deals to go on hold. "The true fact is that, at this time, everybody is still assessing the impacts of this crisis. No one will make a critical decision at this point without having a clearer view of how things will develop," he says.

The effect on share value caused by the crisis is leading companies involved in deal negotiations to evaluate which party is liable for the risks of such price slumps. It is still too early to measure the impact of this, but Giantomassi has no doubt some cases will end up in dispute. "The parties of a contract tend to look for a consensual resolution, but many discussions evolve into more energetic arguments, so many cases will require the mediation of an arbitration or judicial court."

Some are confident of the capacity of businesses to follow through with transactions even in the face of tough measures to curb the spread of the disease. This is the view put forward by Michel Diban, a partner at Chilean firm Morales & Besa, but he also admits that general uncertainty about the economy and global markets has been an obstacle in the way of deals closing. “We will have to be creative and flexible to be able to close deals when this situation gets worse, but I am sure that it can be done,” he says.

Although Argentina was one of the last countries to be hit by the crisis, Marval O'Farrell Mairal's Bárbara Ramperti says the covid-19 pandemic will prompt all companies to revisit decisions on strategic investments that were based on expectations for the global economy in the short and medium-term. Some deals are continuing to occur, but Ramperti says fear of the pandemic has been the main obstacle. “Our clients are very concerned about the future and deals have been affected and slowed down.”

She says that consultation on the activation of *force majeure* clauses, which address unforeseeable circumstances that prevent a contract from being fulfilled, has been one of the main demands from clients. Other companies are asking lawyers for help reviewing financial covenants in contracts, says Demarest's Giantomassi. He says clients are asking them to check deadlines to see how interactions with creditors and investors will proceed in the event of operational commitments not being delivered as a result of the crisis.

In some cases, deals that are delayed may find themselves having to follow new legislation that they would not have been bound by had the deals closed earlier. In Peru, companies are concerned that their transactions will end up being liable to new merger control law that comes into force in August, notes Susan Castillo, a partner at Peruvian firm Payet, Rey, Cauvi, Pérez Abogados. Deals in that country have also been slowed by the closure of regulators and authorities' offices, she points out.

A common refrain among the lawyers Latin Lawyer spoke to is that technology holds the answers. For example, Ramperti says the Argentine government – which implemented a “total quarantine” last Friday – is recommending the conversion of the few remaining data rooms used to physically store due diligence documents into virtual ones.

Despite Chile having declared a “state of catastrophe,” Morales & Besa's Diban believes the tools for deal-making that are currently available, which include online conferences and documentation kept on the cloud, continue to facilitate

deals. Workers in countries across the world are using online meeting platforms to replace physical meetings.

The majority of companies in Latin America already had practice carrying out virtual board meetings and general assemblies. But some countries have issued new regulations to facilitate such proceedings. In Colombia, for instance, the government passed a decree establishing that all company assemblies should be held online. Ecopetrol, the country's largest oil company, quickly reorganised its assembly – which otherwise would have been open to 340 shareholders – to take place online on 27 March.

Other regulatory changes are being implemented elsewhere. In Brazil, the stock and exchange commission extended the period during which companies can cancel offerings that have been registered for analysis by the regulator. As the crisis evolves, it is likely that governments will implement new measures to prevent the spread of covid-19 and to protect their economies.

Lawyers are trying to address buyers' and sellers' doubts by including terms that cater for the effect of covid-19 in contracts. Diban says these include the possibility for a party to opt out of a deal in the event the pandemic prevents the buying party from obtaining finance. Another example is the addition of clauses addressing the effect of the crisis on the target's price.

But it is debatable how much such clauses can relieve all the concerns buyers and sellers face. Among these are changes in the terms and conditions for acquisitions, face-to-face meetings being cancelled, banks operating more slowly than usual and certain industries finding it hard to access finance. Independently of all the possible solutions on the table, the crisis has undoubtedly changed the deal-making landscape from day to night. The pandemic has had a "dramatic effect on our M&A work," says Payet Rey's partner José Antonio Payet.

Deal-making is just one of the areas affected by the covid-19 pandemic. Many lawyers are confident that economies will recover rapidly once the crisis is sorted, but at the moment there are heavy clouds on the horizon. The silver-lining? (Because there is always one or two). Demarest's Giantomassi says online meetings tend to be more efficient than face-to-face ones. "Some meetings that used to be quite long are now taking just a few minutes; we have a call and a video-conference and everybody is straight to the point and we wrap it up much more quickly."

Country: Argentina, Brazil, Chile, Mexico, Colombia, Peru