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State interventionism may spur policy advice work for law firms

Fredrik Karlsson

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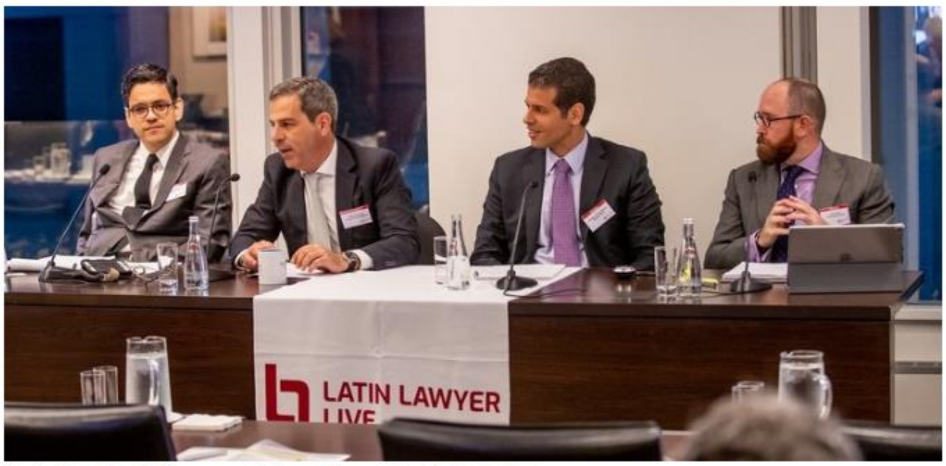
As regulatory environments become increasingly complex and state intervention increases, private equity investors may need non-legal policy affairs advice from Latin American and US law firms, heard delegates at Latin Lawyer Live 9th Annual Private Equity conference in New York.



Sergio Urias, Hernán Slemenson, Guilherme Bueno Malouf & Andrés Nieto

The laws and regulations governing private equity deals across the Americas are becoming stricter and more complicated. In August, US President Donald Trump signed the Foreign Investment Risk Review Modernization Act (FIRRMA), which allows US agencies to scrutinise more deals for national security concerns. "This results in the most complex investment trade and transactional environment in many years and it won't go away," said Sergio Urias, a partner at Covington & Burling in New York. Although Urias thought FIRRMA will affect Chinese investors more than their Latin American counterparts, practitioners must adapt to a more complex regulatory environment and have a more strategic perspective in deal-making.

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Some Latin American countries may take similar measures to guard against real or perceived threats against economic and civil security. "There is a huge question mark as to how Jair Bolsonaro will actually behave in terms of protectionism," said Guilherme Bueno Malouf, a partner at Machado Meyer Advogados in Brazil. The president-elect's economic adviser, Paulo Guedes, strongly supports more privatisation, but Bolsonaro has spoken against foreign governments buying up companies in Brazil. "He means that he does not want Brazil to be sold to China," clarified Malouf. The military, which Bolsonaro frequently praises, has also been hostile to the sale of state assets. It traditionally considers large swathes of the economy to be of strategic national importance.

Still, a global shift away from free trade and towards government intervention may create new opportunities for law firms. Lawyers must now be close to government and serve as "governmental affairs consultants", said Urias. "Clients will expect us to help them navigate those murky waters," he noted, adding that it will become increasingly common to see law firms have non-legal policy advisers on their teams. "You are seeing it in the US," he added.

Economic security acts and tariff barriers are not the only forms of growing government assertiveness. "We have to be careful as well with FCPA [the US Foreign Corrupt Practices Act] problems and other anti-corruption laws enacted in several Latin American countries," noted Andrés Nieto, partner at Mexican firm Von Wobeser y Sierra SC. Various Latin American countries, including Argentina, Brazil and Mexico, have implemented corporate liability laws over the last few years to address corruption concerns.

Despite the regulatory environment becoming stricter, the panel agreed that private equity is still a "sellers' market". "I see buyers continuing to agree to hell or high water provisions and doing whatever it takes to obtain regulatory approval," said Urias.

Both Nieto and Hernán Slemenson, a partner at Marval, O'Farrell & Mairal in Buenos Aires, agreed. "As Urias mentioned, it is basically the buyer's risk that has been assessed in the process prior to signing or closing," said Slemenson, who moderated the panel.

And private equity investors have much to lose in today's business environment without good advice. Slemenson said companies involved in corruption scandals and with debt issued in the US will find it hard to obtain refinancing, prompting many to sell.

The prospect of private equity investors being more exposed to assets that are tainted by corruption raised questions from the audience. Karin Alvo, a partner at KLA - Koury Lopes Advogados in Brazil, asked how a potential buyer can separate corruption-tainted assets from something that happened in the past. Urias said it was important to have a good public relations strategy in place when buying "murky targets". The importance is to show that the buyer will change the target company, including the implementation of compliance controls. "Bring in a strong PR team to rebrand your portfolio and you will be able to buy the business and move it forward," he added.

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The Latin Lawyer Live 9th Annual Private Equity conference was hosted by Simpson Thacher & Bartlett LLP and held in September. It was co-chaired by Simpson Thacher's Todd Crider and Jean Michel Enríquez from Mexican firm Creel, García-Cuéllar, Aiza y Enríquez SC. Previous panels reported on by Latin Lawyer discussed the business environment in Latin America from investors' perspective.

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