

Bolivia

Private equity 2008

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1. What are the most common types of private equity transactions in your jurisdiction?

Private equity transactions are mainly made by individuals and corporations through direct acquisitions of equities, joint ventures and minority investments.

The number of transactions made on the stock exchange market is relatively small, compared to the amount of transactions made by individuals and corporations.

2. What are the most common types of investors in the private equity market of your jurisdiction?

The most common investors in the Bolivian private equity market are either local or foreign individuals, corporations, or private equity funds.

The Pension Funds (AFPs) are also big investors in the private equity market, with long term investments.

The main regulatory limitations are in the financial sector.

3. What are the main target industries?

During the last couple of years one of the industries that has attracted large amounts of funds is mining, with big projects in different areas of the country.

Other main target industries or areas for private equity investors are lumber companies, agriculture, cattle-raising and general services.

The phase of legal uncertainty that the country is going through has caused a decrease in foreign private equity investments.

4. Please describe the main features of local private equity funds. Are there any regulatory or market restrictions or incentives to the development of such funds?

According to the Stock Exchange Market Law, private equity funds can be open or closed investment funds, open or closed non-financial investment funds, and open or closed international investment funds.

In order to operate equity funds, the Fund Manager must meet several requirements established by the Stock Exchange Market Law and the regulations from the Superintendence of Pensions, Securities and Insurance (SPVS). Most of these Fund Managers are banks.

5. Are there any private equity funds listed in your jurisdiction? Are there any special regulations or requirements applicable to the listing and public offering of securities by such funds?

Yes, there are private equity funds listed in Bolivia. The Superintendence of Pensions, Securities and Insurance (SPVS) has authorised 25 different private equity funds and about eight fund managers.

The public offering of securities must be approved and registered by the Superintendence of Pensions, Securities and Insurance (SPVS). Public offerings by the General Treasury of the Nation (TGN) or the Central Bank of Bolivia (BCB) do not require any authorisation from the SPVS.

6. What are the main issues in connection with the liability of fund managers?

The liabilities of fund managers mainly refer to terms such as prudent acts, provision of the necessary administrative services, presentation of regular reports and confidentiality. In general terms they are liable for administering the funds with due diligence and loyalty.

Fund managers are subject to civil, administrative and criminal liabilities in case of any violation of their legal duties.

The administrative liabilities for fund managers are dictated by the SPVS.

7. What are the main remuneration schemes for fund managers? Are there any limitations?

Previously fixed fees or profit-sharing arrangements at different percentages (or both), depending on the amount of the transactions, and different terms, are usually the main remuneration schemes for fund managers.

8. Please describe any special legal considerations in your jurisdiction in connection with leveraged buy-outs and similar strategies.

Leveraged buy-outs are not yet regulated in our legal system. A commonly used similar strategy is to obtain the funds for a buy-out through bank loans.

9. What are the main organisational forms used to channel private equity investments? What are the main formation requirements?

Limited liability companies (sociedades de responsabilidad limitada) and stock companies (sociedades anónimas) are the two main organisational forms used to channel private equity investments.

The main features and requirements of a limited liability company are:

- the number of partners must be at least two but cannot surpass 25, and the partners must be registered on a 'partners registry' book;
- the partners are liable up to the amount of their equity in the company;
- the partners company can issue debt securities, but not shares;
- a partner who wants to sell his equity must offer it to the rest of the partners before offering it to third parties, and this transaction must be public and registered in the Commerce Register;
- the sale of equity requires the modification of the company's constitutive document;
- the company must be registered in the Commerce Register; and
- the company's general manager must reside in Bolivia.

The main features and requirements of a stock company are:

- there must be at least three shareholders;
- the liability of the stockholders is limited to the value of their shares;
- there can be shares issued to the bearer;
- board meetings can be held abroad;
- directors can all be foreigners;
- shareholder meetings must be held in Bolivia, and if the shareholders are not in Bolivia, they may empower someone to attend it;
- the CEO and the corporate comptroller (syndic) must have a domicile in Bolivia;
- there are two ways to create the company: through a foundation minute or through the subscription of a public offering of shares; and
- stocks can be easily traded, without any other conditions than the ones established in the by-laws, and those conditions cannot be any kind of limitations to the trade.

10. What are the most important operating and governance issues arising in connection with local companies?

The Commercial Code establishes that companies must be registered in the Commerce Register. This code also establishes the structure, organisation and main administrative issues regarding shareholders' and partners' meetings.

Depending on the area, companies may have special regulations applicable, such as in the case of banks, insurance companies and others.

11. Are there any issues to be considered in connection with the limitation of liability under the laws of your jurisdiction?

Shareholders are liable only to the extent in which they directly participate in a violation of the law.

The liability of the shareholders is limited to the amount of their shares.

12. What are the most common minority protection rights? Are there any special issues to be considered under the laws of your jurisdiction?

Rights of first offer and first refusal are available by law; the other rights are normally set forth in the shareholder or partner agreements.

The shareholders of at least 20 per cent of the shares have the right to designate a member of the board or a syndic (or both), who is a 'shareholder representative'.

The commerce code protects minority rights, declaring null any clause of the by-laws or partners' agreement that violates those rights.

13. What are the main exit strategies used by private equity investors in your jurisdiction? Are there any limitations to the enforceability of exit arrangements?

The most common exit strategy is to sell the shares to other investors. Depending upon the company statutes, there might be some restrictions or conditions other than those stipulated by the Commercial Code.

14. What are the key legal issues to be considered when appointing directors and officers?

Depending on the company's field, different laws establish regulations and limitations when appointing directors and officers. The main points to be considered are: (i) there must be no conflict of interests with the company; (ii) there are limitations on relatives being on the same board; (iii) shareholder representatives cannot be members of the board; (iv) the by-laws will establish the guarantees to be provided by the directors and officers; and (v) the directors are liable for any mismanagement of the company, breaking laws, or company statutes, lack of duty and diligence.

15. Please describe any special issues to be considered under the laws of your jurisdiction in connection with purchase and shareholders' agreements.

According to the Constitution (article 24), corporations and individuals are bound by Bolivian law and there is no statute of limitations

Shareholder agreements are not specifically regulated. Therefore, by-laws prevail in case of contradictory rulings. Bolivia has not signed the apostille treaty (Hague Convention).

16. Please describe the main issues related to dispute resolutions under purchase and shareholders' agreements. What are the most common dispute resolution mechanisms selected in private equity agreements?

Arbitration and conciliation is a dispute resolution method that has become common in Bolivia because of the advantages it has compared to the ordinary justice system, especially time-wise. Nevertheless, there are many disputes that are taken to the ordinary justice system to be resolved.

Foreign judgments are enforceable in Bolivia when they fulfil the procedures established by law.

The Conciliation and Arbitration Law recognises the following international instruments:

- Interamerican Convention on International Commercial Arbitration, adopted in Panama on 30 January 1975
- Convention on Recognition and Enforcement of Foreign Arbitral Judgments adopted in New York on 10 June 1958
- Interamerican Convention on Extraterritorial Effect of Foreign Judgments and Judgments, after ratification, adopted in Montevideo on 8 May 1979
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted in Washington on 18 March 1965.

17. What are the most common funding structures? Are there any special issues affecting such structures?

A very common option for companies to get funds is increases in capital: the shareholders have the first option to buy new shares in proportion to their percentage of shares. Capital increases must be registered in the Commerce Register.

Bank loans are also very common; as with capital increases, shareholders must approve any loan transactions.

The use of bonds as sources of funding is also an option, but it is not very common.

18. What are primary advantages and disadvantages of using debt or equity as sources of funding? Are there any hybrid options used by the market?

Equity has the advantage of not having a cost for the company, as opposed to bank lending. Hybrid options are also common.

19. What are the principal accounting considerations that arise in private equity transactions?

International accounting standards are used in Bolivia. There are specific provisions that regulate company accounting and reporting.

Depending on the area of the company, the fiscal year will close on different months.

20. Please describe any special regulations applicable to private equity funds and private equity investments.

The main regulation is the Stock Exchange Market Law created in 1998.

Private equity funds are regulated by the Stock Exchange Law, and Supreme Decrees and regulations issued by the SPVS.

21. Are there any disclosure requirements affecting private equity investments?

Any stockholder who owns 10 per cent or more of the shares issued by one company on the stock exchange market must inform the SPVS.

Directors and officers of issuing companies must inform the SPVS and stock exchange markets of any acquisition or sale of shares made by them.

22. Are there any licensing or registration requirements applicable to private equity funds or investments?

Private equity funds in Bolivia must be registered at the Stock Exchange Market Registry, which is a dependant of the SPVS.

Any other investments, like the direct acquisition of shares, must be registered in the Commerce Registry.

23. Please describe any restrictions or requirements applicable to foreign investors in connection with private equity investments.

The Constitution, which forbids any foreign person or company to directly or indirectly own land within 50km of the border.

In some other cases there are other restrictions like the one established by the telecommunications law, whereby concessions for TV channels will only be granted to Bolivian companies owned by Bolivian citizens.

The aeronautic law establishes that in order to register the ownership rights of an airplane, the investor must reside in Bolivia. The internal air transportation services are reserved for Bolivian individuals and Bolivian companies.

24. Are there any government approvals required in connection with private equity investments in certain industries? What are the main requirements to obtain such approvals?

International banks, insurance companies and financial services companies must get permission from the respective authority in order to start operating and offering services in the country.

The SIRESE is the sectorial regulatory system, which regulates areas such as telecommunications, electricity, hydrocarbons, transportation, water and other areas.

25. Are there any industry-specific regulatory schemes that can affect private equity investments?

There are limitations in certain industries, such as banks, pension funds, insurance companies and telecommunications.

These regulations are mainly intended to avoid possible frauds and to prevent trusts in certain areas.

26. Please describe any antitrust approvals or other competition law requirements that may apply in connection with private equity investments.

The Bolivian Constitution forbids any kind of private trust (article 134). This prohibition is ruled through many other specific laws. These regulations also include the banning unfair commercial competition.

Some sectors or industries have more detailed regulations. For example, mergers in the financial sector must be approved by the regulatory authority. Special laws regulating different sectors such as hydrocarbons, communications, public services and others, regulate antitrust and fair competition practices.

The Penal Code establishes sanctions for those who create trusts with the sole intention of increasing the prices of goods.

27. Are there any anti-money laundering regulations that should be considered when structuring a private equity transaction or setting up a vehicle?

Several laws and regulations are directly and indirectly intended to prevent money laundering. The Commerce Register registers the name of the shareholders and the percentage of shares each person has.

The Financial Investigations Unit is a government office within the structure of the Superintendence of Banks and Financial Entities that has broad attributions to access public databases (banking accounts) and different registries (such as the Commerce Register) to investigate any possible money laundering.

The Penal Code sanctions money laundering, even if the funds come from a foreign country; it establishes exemptions on the penalties for directors or administrative personnel who denounce money laundering according to procedures.

In order to avoid money laundering, fund managers must keep a record of the transactions made; if the transactions amount to over US\$10,000 they must fill out a form, giving the details of the transaction.

The financial institutions abide by the Basel principles in this area.

28. Are there any exchange controls affecting foreign private equity investments?

There is no exchange control and there are no restrictions on the repatriation of capital, which is levied with a 25 per cent tax.

29. What are the basic tax issues affecting private equity investments in your jurisdiction?

Some of the most relevant taxes are:

- Tax Transactions (IT), which taxes the total revenue earned by exercising any gainful or not gainful activity. Share purchases or sales are not included in this tax
- Company Profits Tax (IUE), which taxes the companies' net profits, and also taxes income that is sent abroad to beneficiaries
- Tax on Financial Transactions (ITF), which taxes local and foreign currency operations such as: payments or transfers of funds; money transfers outside or inside the country; and participation in Investment Funds. The rate is 0.15 per cent. Some of the exemptions from this tax are investments and income collection from private equity funds.

Equity investments made in Bolivia are not reached by any tax.

The distribution of dividends to local partners or shareholders is not taxed; when the partners or shareholders are abroad, they are taxed with the Companies Profits Tax - Foreign Beneficiaries (IUE-BE) with a 12.5 per cent rate of the amount paid.

Regarding thin capitalisation, the Companies Profits Tax regulations establish that the interest of loans is considered deductible for this tax under the following conditions: when the partner is local, it is considered deductible up to the bank interest rate, published by the Central Bank of Bolivia, in operation at the pay day; when the partner is foreign, up to one LIBOR rate plus 3 per cent. Besides these deductibles, another requirement must be fulfilled: they cannot exceed 30 per cent of the total interest paid by the company to third parties in the same tax year.

The sale of equity stakes is not affected by VAT or the transaction tax (IT). If the partner is local the income will be considered when determining the Company Profits Tax, and in the case of a foreign partner, the difference between the nominal value and the value paid will be reached by the IUE-BE with an effective rate of 12.5 per cent.

The expenses incurred in organising a company, in determining the IUE, are considered deductible expenses and must be amortised in the first year or in the first four years.

Shares or equities in foreign companies are considered incomes that are not taxed because in Bolivia taxes are based on the principle of source.

30. Please describe any other relevant legal considerations related to private equity investments in your jurisdiction.

N/A