

THE US: A PLATFORM FOR LATIN AMERICAN TRANSACTIONS

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Businesses operating across Latin America are increasingly utilising US legal entities or US law to structure their operations in the region

The flow of Iberian investment across the Atlantic is not merely between Iberia and Latin America, much increasingly goes through and via the US, says Xavier Ruiz, Partner with K&L Gates in New York.

The past year has seen a strong continuation of the trend of Spanish businesses looking well beyond Latin America for new opportunities, he says. "We have seen companies investing in the US, opening new plants, businesses or, as a result of mergers and acquisitions, acquiring local companies. Much of this activity is being undertaken not only with the goal of expanding across the US but also across the continent."

New York law is the default option governing finance transactions (especially project finance) in Latin America, and this is also true for projects developed or sponsored by Spanish companies in the region, says Ruiz. The main reasons to choose New York law are related to custom and practice, as the principal lenders for projects in Latin America are New York-based financial institutions, as well as multilateral organisations based in Washington DC, such as the Inter-American Development Bank and the International Finance Corporation.

They also relate, however, to the legal certainty brought by New York law, which allows an almost absolute freedom of contract and does not generally impose any legal requirement on the parties. Among the benefits is the fact that the contracts are almost always self-contained, says Ruiz, relative to those conducted under civil law, and agreements do not require a prior knowledge of existing Codes or additional regulation. "Under US law, the parties are able to set out everything of relevance in a single document."

Because certain countries in Latin America, including Chile, Colombia, Mexico, Peru and of course Brazil are nowadays stable both politically and economically (they have been spared from the international financial crisis), country risk is no longer a factor when determining whether a local project is financeable. Therefore, US and multilateral lenders are generally evaluating projects in those countries solely on the basis of their economics.

Joint ventures and corporate transactions

In addition to financing transactions, New York law (and to a lesser extent the laws of other US states, such as Florida, California or Delaware) is increasingly being chosen as the law governing joint ventures and even acquisition transactions in the region, for the same reasons of practice and legal certainty. Because US and Spanish companies are generally market leaders in multiple industries in Latin America, adds Ruiz, they often team up for projects in the region or engage in corporate transactions there. "However, Spanish law is hardly ever chosen as the law governing those transactions, but the parties tend to favour the choice of US law."

The joint investments being made encompass a broad scope of business sectors, says Ruiz, but the best opportunities currently being developed are in the energy, transportation and telecommunications industries (whether as contractors, sponsors or operators), as well as in the finance industry.

Recent examples he highlights include operations where one company co-ordinates the technology and the other the distribution and logistics, again utilising New York law. "When we discuss the benefits of such structures with potential international investors, we often point out the volume of US and Spanish investment already being made across the region – they remain number one and two in terms of investment value, and therefore have significant local knowledge and resources."

For cross-border Latin American transactions or project financing, the US also offers a neutral platform for the parties, says Ruiz. "We see many Latin American operations of Spanish companies being increasingly managed from Miami, which is a location that offers not only excellent transport links across the US and Latin America, but also a depth of legal and transactional expertise available." New York, Washington DC, Chicago, Houston and Dallas are strong alternatives to Miami. Miami is also the preferred site for the resolution of commercial disputes through arbitration involving Latin American companies, due to its location, practice expertise and Spanish language skills of a good number of local practitioners, adds Ruiz.

His own firm has an office in the city, which is a favoured location for Spanish and Latin American companies looking to establish a permanent presence to service the US market.