

New York: The 'go to' State for M&A



As Iberian law firms continue their expansion drives beyond the Peninsula, New York remains the legal capital for governing transactions, litigation, and a hub for investment.

With its geographical location and practitioner expertise, New York is the place to be when it comes to advising on trans-Atlantic transactions, either for law firms seeking to strike M&A deals in the Americas or brokering deals with US firms entering the Iberian market.

With investment from Spain into the US having tripled since 2006 to \$50bn and foreign direct investment in Spain having doubled in the first three quarters of the year to €19.4bn, law firms and companies alike are no doubt feeling the benefits of being a part of it.

The 'go to' law

Michael J Willisich, a Partner at Davis Polk & Wardwell and Head of the Firm's Madrid office, points to New York's importance as a strategic capital, not only due to companies' preference for the New York body of law, but also for the expertise of its lawyers. "In my experience, the use of New York law firms in transactions is not just because of the city's standing as a complete, enforceable body of law, but also due to a common understanding of that law, plus a further element of confidence in both the legal system and the skill of practitioners working on complicated cross-border deals."

This creates a virtuous circle because, as more New York law deals are done, familiarity and confidence grow further, say lawyers, citing the growing interest in investment in Latin America on behalf of Spanish firms. "On the M&A side, a number of Ibx companies are entering into transactions in the US and Latin America in order to diversify their markets and open new frontiers,"

says Patricia Menéndez-Cambó, Vice President and Chair of Greenberg Traurig's Global Practice Group.

Spain is active now in capital markets and there's strong investor interest, adds Willisich, while there's a lot of inbound investment from the US into the Spanish banking sector.

Given the prestige of New York law and its jurisdiction, it is the 'go-to' law for large M&A transactions involving Asia, the Caribbean and Latin America according to Mariano Batalla of Batalla Abogados in Costa Rica.

New York also has the largest concentration of private equity firms and hedge funds, and New York law governs M&A deals negotiated with firms with a presence in the region. The importance of this role of New York law is highlighted by María Luisa Canovas, a Partner at Jones Day in New York. "For M&A financing transactions, US clients generally drive a hard bargain for documents to be governed under New York law," she explains. "We are seeing several New York-based hedge funds that do not have offices in London using our New York office as a hub for their investments in Europe, particularly in Spain, while US bankruptcy law is used to restructure Spanish companies laden with debt."

Lawyers say that many of the investments by Spanish companies have been in complex infrastructure transactions that required substantial cross-border and cross-disciplinary legal services. The consistent application of New York law throughout the transaction process also helps law firms anticipate potential enforcement or interpretation issues prior to closing a deal.

Fernando Rodríguez-Marín, Of Counsel to DLA Piper in New York, also highlights large and medium-sized Iberian law firms' need to tap into the New York capital markets to increase their funding sources, as well as to have a presence in the city. Investors in capital markets transactions will almost surely use New York law in their investment agreements with Spanish targets, say lawyers, and would likely use New York-based firms to advise them.

Therefore it is crucial for the finance

Por su ubicación geográfica y experiencia profesional, Nueva York es el lugar idóneo para llevar a cabo transacciones transatlánticas, ya sea para los despachos de abogados que tratan de llegar a acuerdos sobre Fusiones y Adquisiciones en las Américas o para realizar ofertas de intermediación con las firmas estadounidenses a fin de introducirse en el mercado ibérico. Con un sistema jurídico que ofrece numerosas garantías, Nueva York sigue siendo el principal destino para desarrollar negocios en los EE.UU. y en Latinoamérica.

and infrastructure sectors to use New York as a base because most of their main sources of funding, both debt and equity, are based there or its vicinity.

Legal guarantees

As the finance, investment management, media, legal and advertising capital of the world, New York attracts companies operating in those industries from around the world. Being close to their potential clients is a driving factor for Iberian companies choosing it for their US base, say lawyers, as well as the fact that the majority of international transaction agreements are governed by New York law.

And New York law is particularly attractive to foreign investors, say lawyers. Among others, at the heart of its contract law is the importance that that law sticks to the written terms of agreements that the parties have negotiated and to which they have subscribed, and the duty of the contracting parties to fulfil their obligations to each other, even when compliance becomes difficult or costly.

Parties in a transaction may adopt New York law to govern a deal or a commercial contract when the agreement considers or relates to an obligation arising from a value of at least \$250,000, and regardless of whether either party or the agreement itself bear any relation to the City.

New York law is also routinely used in Latin American transactions according to Rodríguez-Marín, particularly joint venture agreements, engineering and construction projects and operation and management contracts. "New York courts have a long history of reliability in resolving disputes where only one or neither of the parties is US-based," he says. "One of the reasons for this is the New York Bar's deep bench of talent with many members who are dual qualified in New York and another jurisdiction, such as dual qualified with Portugal and/or Spain."

Preferable jurisdictions

While New York law is favoured by international firms doing business in the Americas, it often depends on the jurisdiction of the region in which one of the firms has its headquarters, says Marco E Schnabl, Litigation, Arbitration and Latin American Corporate Matters Partner at Skadden, Arps, Slate, Meagher and Flom in New York. "You can use New York law to govern transactions, but by going through New York you're often electing New York

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Fernando C Alonso, Hunton & Williams



counsel. There is a great tendency to use Delaware law in M&A, as it's the most developed in that area. In corporate finance, it could equally be New York or English law governing the contractual aspects of a transaction."

Identifying New York law as that still favoured by Iberian companies, as well as their preference for its courts for dispute resolution, Fernando C Alonso, a Partner at Hunton & Williams in Miami, identifies a recent shift away from New York law, with many significant transactions more likely to be governed either by the law of the state in which one or both of the parties is based, or a neutral jurisdiction such as the East Coast State of Delaware. And with regard to an Iberian firm's choice of location, that would be dictated by the geographical location of their operations. Florida, for example, is a hotbed of activity and investment, where more than 350 Spanish firms operate, investing \$6.5bn.

"It is not typical for many Spanish or Portuguese companies to choose New York for their base of operations," explains Alonso. "Iberian companies appreciate the vastness of the US and have generally chosen to establish their centres of operations in places close to where their particular business is undertaken."

But in terms of outbound US investment to the Portuguese and Spanish markets, he points out that New York continues to be the preferred jurisdiction on which such transactions are based, with US firms continuing to prefer New York law for sophisticated cross-border transactions.

Being a part of it

New York and the New Jersey area are where the headquarters of many multinational companies with interests in the Iberian Peninsula lie, according to Xavier Ruiz, a Partner at K&L Gates in New York. But such firms' choice of the area's law firms is more driven by the location of the relevant industry than by the relative geographical proximity to the Iberian Peninsula.

While it continues to be a two-way gateway for the financial sector, New York is also an increasingly important centre for early-stage tech start-ups and



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for media-savvy firms in design and advertising, according to Philip M. Berkowitz, Co-Chair of Littler Mendelson's International Employment Law Practice Group.

With a body of law that provides numerous

guarantees, most notably an adherence to written contractual terms, New York continues to be a strategic capital for business in both the US and Latin America. With the majority of Spanish investment being made in complex infrastructure transactions that required substantial cross-border and cross-disciplinary legal services, New York is still the 'go to' jurisdiction and law for M&A deals. This keeps the jurisdiction, the city's lawyers and Iberian interests right at the very heart of things.

Opening new frontiers



Patricia Menéndez-Cambó

Given the country's recovery cycle, Spanish firms continue to look beyond the Iberian Peninsula towards new markets, and there is renewed confidence in Spain thanks to economic recovery and new bankruptcy laws. At the same time, US investors are turning their eyes to Europe as an attractive opportunity, says Patricia Menéndez-Cambó, Vice President and Chair of Greenberg Traurig's Global Practice Group.

“On the M&A side, a number of Ibox companies are entering into transactions in the US and Latin America in order to diversify their markets and open new frontiers,” says Menéndez-Cambó. She points to renewed interest in Mexico on behalf of Spanish firms in the wake of the recent reforms to the telecommunications and energy sectors, allowing for greater private sector participation, and where firms such as Renovalia and Abengoa are likely to increase their market share.

With deal flow within the US having been very slow since the 2008 financial crisis, US and London-based private equity funds and investors are now looking to Europe as a workplace for their money, says Bruce R Zirinsky, Global Co-Chair of the Firm's Global

Business Reorganisation & Financial Restructuring Practice.

But a large deterrent has been a lack of confidence in the legal system. “Investors want to be sure that if they are committing capital then the courts will protect them, and that they won't get caught up in protracted legal proceedings that would affect their rate of return,” Zirinsky says. He highlights the progress made by Spain's recently reformed bankruptcy and insolvency laws, modified to adapt to the country's economic reality.

“Capital-strapped companies are now looking for fresh funds, while new capital is looking for a good home, which makes for a perfect match,” he says. Manufacturing and specialised commodities are the Spanish sectors most attractive to investors, where exports will be the initial engine of growth for an economy in early-stage recovery.

“In terms of investment opportunities in Europe, Spain and Italy are the countries that have been most overlooked, but that is starting to change,” says Menéndez-Cambó. And while the crisis has kept investors cautious, Spain is now being seen as 'a safe harbour'.



Bruce R Zirinsky