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Welcome back for episode two.

Speaker 2: In terms of the activity going from the United States and Europe into Latin America, or Latin American corporates, family offices, [00:00:30] and this, I'll say, environment of flight to safety going into the US. Carol, can you speak to what are you seeing right now, which way the arrow is going at the moment?

Carol: So we do a lot of family office work, and I'm seeing a lot of it into the United States, not only from Chile for obvious reasons. I mean, I think Todd can correct me probably, but we're talking about a $50 billion hole [00:01:00] approximately that Chilean families and investors have left and because they've taken the investments out. Most of them are coming into the US. Florida, for example, has seen a huge uptick and real estate investment as we all know.

So I would say... And it's not just Chile. I see it all... In fact, I had breakfast this morning with someone from Central America, [00:01:30] big families, big wealthy families and family offices from throughout Central America, who continue... They have always had an eye to the north to invest here, but they continue, even though they're cautious, to more strategically look at, especially to Todd's earlier point, at strategics within their own fund family structure, and the appetite still continues [00:02:00] to be north.

I think three, four years ago, a lot of them were venturing within Latin America. So you would see some family offices, let's say, investing in projects in Columbia, even in Mexico. I think the trend, at least for now that I personally am seeing, is that it's coming up north. But I defer... I mean, Todd, I'm sure you've seen also a lot of otherwise.

Todd: Yeah, no, there's two types. We're in several projects right now with families [00:02:30] that are looking at expanding their platforms, either from Central America, Mexico down to Chile, Peru, Colombia. More Chile, Peru. But overall, you're right. There's been a huge amount of flight capital. It has driven by the uncertainty of the taxation of private wealth, basically. And so much that many [00:03:00] have changed been... I would say it'd be interesting to look at the number of how much money's left, but also how many people have changed their domicile. That has also been a big thing.

In terms of inbound invest, a big bank in Miami was bought by one of the biggest banks here. Supermarket chain was bought by the largest supermarket chain. [00:03:30] And these are investments of be 1B, almost [inaudible 00:03:36] each. And in addition to that, there's a lot of middle market type transactions occurring. Maybe 20 of them, different companies, they've just gone and bought things, everything from distribution of seafood so they could take the seafood and distribute it in the US, to different logistics [00:04:00] and shipping type of things.

But also, another thing that we haven't mentioned which is kind of a blend, is this trend of not going and investing in the US or Europe, but doing a stock swap for the HoldCo in a foreign jurisdiction, that is also a very interesting trend because there've been a big... Well, the biggest transactions recently, but [inaudible 00:04:31] [00:04:30] in UK or into Scotia Bank in Canada, or Hapag-Lloyd in Netherlands. There've been stock swaps where the Chilean owner has decided they want exposure globally, they don't want just the local exposure. And I think there's going to be more of that. We've been talking to different parties about deals like that, and I think that it's an attractive model because they feel like they don't [00:05:00] have to get out of the business, they just diversify a little bit better. So anyway, those are the trends we see.

Speaker 2: Going now to the specifics, Todd, you covered the Andean region for Hudson Bankers, and perhaps you're a little more experienced in Chile, Peru, and Colombia. Why don't you give us what's the current [00:05:30] state on those countries, on the opportunities, and what's happening in consideration to all a political and economical considerations that exist today?

Todd: Well first, I'm going to apologize that it's just going to be in soundbites because each one of those is a world of its own and it's very complicated. I'm going to try to simplify the way we see it from the outside within the context of M&A, but [00:06:00] very complicated situations are occurring because of the uncertainty from the political point of view. I think that these are waves, and if you had asked me five years ago, I would've said, "No problem at all. Everybody's on the right side of the situation and everybody's [00:06:30] pro market, and we're all going forward". Now, things have changed and they've changed dramatically in the region.

But despite that, I think business people in Latin America are accustomed to dealing with this, of waves. Because they can deal with those waves is why the return sometimes can be higher than just staying in a very stable pond.

[00:07:00] So having said that, let's start with Chile. I think that there's still a huge amount of deal flow coming out of Chile. There's going to be more deals, I think, this year motivated by the high levels of debt, the higher interest rates. And just the uncertainty that we talked about earlier that has broken their 30-year streak of everything's going to be fine. [00:07:30] And the generational change also. We're seeing when companies reach the cousins level, they're usually not as convinced they should stay in the company. They start looking at the boat in Miami. And I have specific examples of that exact example, but the first thing, they bought the boat before we even closed. [00:08:00] But it does happen. I mean, people are less passionate about it. They didn't put it together. It's understandable. But we're seeing that. We're seeing a lot of activity from the different funds and also strategics, and renewables is a huge topic. So kind of the trends we talked about earlier, but I think in Chile, you're going to see significant activity this year.

[00:08:30] Because also, the political aspect of this and the potential taxation changes have had very little teeth because the Congress is controlled by the right side, or at least center-right, and so you're not going to go anywhere too venturous because they're going to block it every time, and that's happened. And so I think [00:09:00] people were realizing that the discourse in the presidential election was much more dramatic than the reality. And so people were continuing to invest and people are living their lives. I mean, they're continuing here.

I think that in Peru, that's not the case exactly, because they've had just too many changes politically. But the Peruvian business [00:09:30] community has always had this view that business goes one way and the politics goes the other way. They really don't have to mix. You can still make good money. You can go forward. You can do all your deals without the political side being fully calm. I agree to a certain extent, but it still makes a difference. And particularly when you're dealing with international players, they're looking at a agro-industry deals [00:10:00] or mining deals or whatever. It is a factor. It'll bring the prices down, it'll postpone strategics from going in. They're not going to be as fast. It's going to take longer. But deals are happening once in a while, but they do happen.

Where it's become more difficult is in Columbia given the changes that are very dramatic on the taxation [00:10:30] front for individuals and companies, and also just the entire ecosystem is not stable. And so you have a FX rate that is double what it was not too long ago. And so people look at the company they have, and since Columbia looks much more to Miami, I mean they kind of face Miami, they're always thinking in dollars. So [00:11:00] they're saying, "Oh, I could have sold my company for $50 million. Well now I can sell my company for $25 million, same amount in pesos." But that is something that is kind of seeping in, and I think that it takes a while for owners to react, but I think we're going to start seeing people that are just willing to take the loss. It takes a while. Once [00:11:30] you're told your house is worth half what it was worth, you don't go out the next day and sell it, but a year from then you might actually sell it. And that's happening there.

So that's kind of roughly where... I mean, I apologize for the simplicity because it's oversimplifying very complicated situations.

Speaker 2: So Carol, in your experience as a boat owner in Miami, can [00:12:00] you speak about some of the other countries that you're seeing they're active and you expect that there will be significant activity over the next year or so?

Carol: Going back to what Todd said, I agree completely, especially in Colombia, we have some clients who are Colombian who were tepid as to make a full divestiture of their investment. And all of a sudden they have decided they've seen the light [00:12:30] and they are selling and they're all moving to Miami, and they already have a boat.

Anyhow, either way, other opportunities, other countries. I think slightly different is the case for Brazil. I think Brazil is preparing itself for a big uptick and a big boom. We just need to be there. We all need to be there and prepared, because [00:13:00] I think we will go back and see a boom there both in financial sector and with strategics, as we said.

I agree with Todd. Chile will continue to generate a significant amount of deals in both inbound and outbound, given the nature of where they are and where the financial institutions and private wealth and family offices are.

[00:13:30] I think Mexico/Central America, as I put it together, will continue to generate opportunities, both inbound and outbound. And the US in terms of regulations, and I personally have clients in the logistics world, and the US is making it easier every day through changes in legislation, especially with customs and border patrol and taxation, to import [00:14:00] things into the US after having been refurbished or reconstructed or repackaged at the border. So that will, I think as people, as American companies and European companies see the value of doing that, it'll generate additional deals, if you will, or fusions or mergers or even investments and swaps of corporate shares, whether it's in the US or Europe, and continue to foster [00:14:30] additional activity in that region.

I think those are the areas that are to look out. Chile, Brazil, Mexico/Central America are the areas I think that will probably be most active in this year.

Todd: I agree.

Speaker 2: One more point. It occurs to me that in this environment, as I said, with the war and the collapse of some banks, [00:15:00] one thing that happened during Covid where you have all this MAC clauses and terminations based on people started adding into the transaction documents that make specific [inaudible 00:15:13]. So are there any things that you've seen, Carol and Todd, both on the legal side, on the commercial side, where people are adding additional termination events, for example? Where people are a little more [00:15:30] sensitive to certain reps and warranties, or adding no caps on indemnities in breach of certain covenants or reps? Are there things that are new that you're seeing, Carol and Todd, that have been arising over the last year?

Carol: Absolutely. Absolutely. And not only the MAC, and the formal has changed to include the pandemic world post- Covid, but [00:16:00] MAC clauses in all sorts of, not just purchase agreements, but commercial agreements, supply chain agreements, manufacturing agreements, all sorts of... Just the operational world has changed as to what... Material adverse effect, the ability suspension and what the remedies are of each of the parties during the [inaudible 00:16:24] of a economic crisis or a global pandemic and what the remedies are, especially when it comes to increase of prices, [00:16:30] suspension of prices. So that was traditionally a section at the end of the either purchase agreement or the underlying operating agreement, and now it's front and center and it's highly and heavily negotiated, not only what triggers it, but for how long. Termination rights are heavily negotiated. And again, pricing, pricing, pricing. A lot of people got caught with the pandemic not being able to move on prices.

And especially in the PPE world, we have a lot of healthcare, [00:17:00] the Cardinals of the world and Beckman Colemans of the world, all those people were caught in the middle of the pandemic unable to either take prices or pass on prices because there was an event of... There was a forced [inaudible 00:17:18] declared, and so nothing could happen, and so those clauses and agreements are now heavily negotiated. In addition to that in purchase agreements, you have a lot that all buyers and sellers are now ultrasensitive on termination [00:17:30] penalty and termination provisions and the ability to terminate and pay a penalty to get out of a deal if it no longer works given whatever economic condition. That used to be there always, but now buyers and sellers are really focused on the ability to exit a deal between signing and closing to levels that I had not seen earlier.

And then another area that, actually, I've seen a huge bump [00:18:00] is dispute over breaches of reps and warranties. Buyers and sellers, they let the lawyers negotiate reps and warranties, but they're like, "Really, what's the probability of this happening?" And a lot of times, and what I've seen is an uptick on people saying, "No, this is actually a breach. You told me this." And I think people, buyers and sellers both, are being much more cautious in the negotiated purchase agreement as to what they're repping and what they are actually claiming once post-closing... What happens. [00:18:30] And I know because I speak to my colleagues in litigation, I've had to refer some matters, and that has actually... I've seen the uptick in referrals to litigation because people are saying, "You've breached such and such a rep", whereas before people were much more relaxed before they would try to claim a breach of a rep. And so the advent of baskets and tipping baskets in purchase agreements has increased significantly [00:19:00] to provide for that change with times.

And I think that is all a result of people being more cautious, people having been burned, and the pandemic having affected how closings occur between signing and closing.

Todd: I would agree with all that. I would just add a couple things. One is what we're seeing is it also affects [00:19:30] price on deals and how you value companies, because since you have this parenthesis, kind of Covid parenthesis, and some businesses were affected in a material way. We've come up with all kinds of creative ways of either go back pre-Covid and see what they were making, or look forward and see your run rate, or even better, go with [00:20:00] some kind of earn out that allows you to capture value in the future as you pick it back up.

And so you're having to be a lot more creative in those areas. But I do agree that... And because of all the things Carol's saying, deals are taking much longer to close. We're seeing... It's just amazing to me to think that I remember when deals, I don't know, in a couple of weeks, we'd knock out a document. [00:20:30] It's now a couple of months and you're still in there.

Carol: You know what I'm also... I know you didn't ask the question, but I'll tell you anyway. You know what I've seen since COVID, I would say the last six months, all my deals, no one wants rep and warranty insurance anymore. Two years ago, everyone wanted rep and warranty insurance in their deals. Everyone. And now, I don't know whether it's the cost, the added timing. [00:21:00] I venture to say it's a combination of both, how much longer a deal is with rep and warranty insurance and the cost of it, given having an imbalance, how much they're going to go and try to recover, and the exclusions, because rep and warranty insurance over the last couple years has become, "Okay, here it is, and here's the list of exclusions", all of which made it almost irrelevant. So a lot of deals in the last, I would say, [00:21:30] six to nine months, no rep warranty insurance, which is odd given the last two years.

Todd: Very interesting.

Carol: Yeah, it is.

Speaker 2: So finally, if we were to describe the 2023 M&A activity and environment in a word, Todd, what would that word be?

Todd: I think it would be opportunistic.

Speaker 2: Okay. I like the optimism. [00:22:00] Carol?

Carol: I would say cautiously optimistic.

Speaker 2: Okay.

Todd: I'm coming at it from the deal.

Carol: I know.

Todd: Coming at it from the legal point of view of making sure everybody's protected as they go into the deal. But it's a combination of both.

Speaker 2: Well, I'm glad to hear that and we hope to have a successful 2023. [00:22:30] And with that, we conclude this episode of Greenberg Traurig's miniseries, Big Law Redefined Podcast. Thanks to Todd Huckabee and Carol Barnhardt. We hope you can join us again. And until then, stay in touch. Thank you all.

Todd: Thank you.