The Guide to Mergers and Acquisitions

Editors
Paola Lozano and Daniel Hernández

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First Edition

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This article was first published in January 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.latinlawyer.com

ISBN 978-1-83862-430-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following law firms, advisory firms and corporations for their assistance throughout the preparation of this book:

Barros & Errázuriz

BMA Barbosa Müssnich Aragão

Brigard Urrutia

Bruchou, Fernández Madero & Lombardi

Credit Suisse

Debevoise & Plimpton LLP

Demarest Advogados

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FERRERE

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Mijares, Angoitia, Cortés y Fuentes

Pérez Bustamante & Ponce

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Philippi, Prietocarrizosa Ferrero DU & Uría

Posse Herrera Ruiz

Rebaza, Alcázar & De Las Casas

Shearman & Sterling LLP

Skadden, Arps, Slate, Meagher & Flom LLP

SoftBank Group International

Von Wobeser y Sierra

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Publisher's note

Latin Lawyer is delighted to publish *The Guide to Mergers and Acquisitions.*

Edited by Paola Lozano and Daniel Hernández of Skadden, Arps, Slate, Meagher & Flom LLP and containing the knowledge and experience of more than 40 leading practitioners, it provides guidance that will benefit all practitioners acting in Latin American mergers and acquisitions.

M&A activity in Latin America has grown significantly in recent decades and deals are increasingly complex. This guide draws on the expertise of highly sophisticated practitioners to provide an overview of the main elements of deal-making in a region shaped by its cyclical economies and often volatile political landscape. Its aim is to be a valuable resource for business-people, investors and their advisers as they embark on an M&A transaction.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide Mergers and Acquisitions*. If you find it useful, you may also like the other books in the Latin Lawyer series, including our *Guide to Corporate Compliance and Regulators*, our online tool that provides an overview of the major regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Rosie Cresswell, ***Deputy Publisher***

Part IV

Select Topics Critical to Deal-Making

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Due Diligence: A Practical Guide to Deals Involving Latin American Targets

Diego Pérez-Ordóñez[1]

In Latin American countries – particularly in Ecuador – due diligence processes usually have both legal and 'diplomatic' implications. Latin American targets are often family-owned or governed by a long-standing management team; therefore, due diligence usually poses practical challenges in addition to purely legal challenges.

When dealing with family-owned targets, the administration and management of companies is driven by personal relationships, trust and unwritten uses and customs. Buyers' counsel needs to navigate the art of trying to find and propose ways to understand and mitigate risks without involving, if possible, the implementation of unnecessarily invasive actions or policies that may irritate the controlling family or families. The latter tend to consider due diligence (often an invasive exercise) as questioning their good practices and interfering with their daily tasks, and the finding of risks as an accusation of incorrect conduct.

In family businesses, due diligence can feel like stepping on eggshells and requires 'people skills' in equal measure to legal tools. Transactions have often faced difficulties or fallen through just as much due to the finding of risks as due to a lack of tact or effective communication strategies by the buyers or their counsel. When working with sellers who are a family or family group, it is critical to explain that the suggested actions are consistent with or close to the best practices of international companies.

In companies governed by long-standing management teams, the due diligence process is often perceived by management as a threat or an unwarranted assessment of their work.

Conversely, transactions between similar and more sophisticated companies, in terms of the due diligence process, are usually more in depth and aggressive as the negotiation is

1 Diego Pérez-Ordóñez is a partner at Pérez Bustamante & Ponce.

mostly focused on discussing the significance, likelihood of materialisation and quantification of risks. Limitation on the information made available by a target for review is usually justified by commercial or antitrust concerns of the sellers.

Notwithstanding the political issues to be considered, as set forth above, due diligence processes – including those undertaken regarding Latin American targets – have certain common issues, regardless of the identity of the parties, which we will explore below.

Due diligence and representations and warranties

M&A practice in Ecuador distinguishes the fundamental representations and warranties from the run-of-the-mill, operational or general representations and warranties. The former, in SPAs, are confined to the ownership of the shares, the due organisation and legal operation of the target company (or companies) and the capacity and legal authority of the parties and signatories and, in recent years, often, the application of international compliance and anti-corruption rules. In the case of asset transfers, these concern the good title for, and absence of encumbrances on, such assets.

Regardless of the amount of diligence parties can do in connection with fundamental representations, from a negotiation perspective, the buyer will push hard to have any liability arising out of a breach of fundamental representations be covered by the sellers up to no less than the amount equal to the total price (under the argument that this is precisely the aspect that distinguishes the fundamental representations and warranties from the ordinary representations) and the seller will try to reduce the scope of its assumed risk by showing that the target has all its documentation in order and that there is no doubt as to the integrity of the shares or assets being purchased.

Disclosure plays a critical role in connection with one of the most important battles in a transaction process: non-fundamental or operational representations and warranties. The buyer will propose that these are as broad, generous and extended as possible, while the seller seeks to narrow them. A reasonably thorough and technical examination with the advice of experienced attorneys gives the buyer invaluable information to understand the strengths and weaknesses of the target, possible existing and expected issues and contingencies that may impact its value, its ability to continue to operate and the extent of assumed liabilities. All of which have to be reflected in the negotiation of price, contractual terms, conditions and guarantees. The seller's strategy will often revolve around the timing and level of detail of the disclosure of information over the course of the due diligence review, in putting together the disclosure schedules and seeking to reduce anxiety about the risks found from a legal and financial perspective, to seek to minimise any closing risks, pricing pressure from buyer or increased post-closing exposure.

Any experienced attorney or adviser knows that much of the energy in seeking to sign and close transactional documents is invested in negotiating the representations and warranties, the applicable law, the liability regime and certainty of closing.

The more comprehensive a due diligence review is, and the more information made available to the buyer and its advisers, the better the buyer will understand the risks the underlying business is facing, and the better the parties will be able to discuss risk allocation with greater context. As part of that risk allocation strategy, the seller may request

the inclusion of anti-sandbagging provisions in the agreement, where the buyer waives the right to be indemnified for risks or contingencies known to buyer prior to signing or closing. This provision forces buyer to discuss these issues as specified indemnities with the sellers prior to the execution of the agreement or to consider such issues in its assessment of the pricing of the deal. Critical to an anti-sandbagging provision is the definition of both the timing and the manner in which the buyer 'acquired' the knowledge.

Due diligence and disclosure schedules

Disclosure schedules are instrumental in the allocation of risk between the parties. Some sections to the disclosure schedules are exceptions to representations and warranties and other sections include information (usually in the form of lists) with respect to which certain representations and warranties are made. The seller will usually want the former to be broad and over-inclusive, to shift the risk to the buyer, and to limit the latter to what is strictly necessary, to keep the representations as narrow as possible.

The structuring and preparation of the disclosure schedules is often far from routine for the target representatives involved in the process, and in the case of family-owned targets, it may prove challenging to gather all information necessary for the disclosure schedules to be completed accurately.[2] On the one hand, the seller's counsel normally aims to be over-inclusive in the disclosure schedules (in which the seller discloses and acknowledges the existence of certain risks) to avoid liability for breach of representation, or worse, concealment or failure to disclose, but without affecting the price of the transaction and without assuming unnecessary commercial exposure. On the other hand, buyers will advocate for certain disclosure schedules (especially those that are exceptions to representations and warranties) to be limited in scope, specific in wording and contain only disclosures of known contingencies, as opposed to generic risks (it is common for the buyer to require the seller to disclose all issues required on each schedule, and not allow a disclosure in a single schedule *vis-à-vis* a specific representation and warranty, to be considered as a disclosure with regard to all other representations and warranties). In any case, the review of the disclosure schedules prepared by the sellers are an invaluable tool to confirm any findings of the due diligence review, and to point to possible liabilities or contingencies which may not have been detected.

Much of the M&A attorney's expertise and experience comes into play in this chess game of allocation of liabilities, which has contractual implications, and often has litigation implications. Additional contractual tension arises between, on the one hand, the seller's desire to argue that the buyer has been granted access to all relevant information and has independently assessed the risks of the business with the support of sophisticated advisers and is equipped to make an informed investment decision considering any contingencies and liabilities, and, on the other hand, the buyer's desire to argue that it has relied in good faith on the information the seller expressly disclosed in the schedules.

The disclosure schedules may be overlooked by some and considered as low value, routine and irritating work. In practice, their importance lies in the fact that they may

2 See Chapter 5, 'Mergers and Acquisitions Involving Family-Owned Targets'.

reverse terms included in the face of the transaction agreement, may shift the allocation of risks among the parties for known and unknown issues, and can alter the damages and degree of liability of the parties. The disclosure schedules' impact on the bring down of representations and warranties may also affect the certainty of closing (especially when the agreement allows for the disclosure schedules to be updated during the period between signing and closing), and may even affect various levels of pre-contractual liability or *venire contra factum proprium* theories (application of good faith or estoppel).

The use of legal technology in due diligence efforts

A key technological tool for the due diligence process has been the use of virtual data room platforms, which allow the buyer and its advisers to conduct a remote review of all relevant documents, and allows the seller to keep track of the documents reviewed, set up specific confidentiality and security restrictions for sensitive documents and promptly answer any questions though the Q&A features. The use of this tools is widespread in Latin America, and the physical review of documents has become the exception.

The use of digital platforms (including those with artificial intelligence) is increasingly common in Ecuador and the region. Particularly in matters in which recurring processes, repeated information or key conducts must be detected, as in compliance or competition. We have also seen the use of these tools to review serial documents and conduct the analysis of contracts, for example, in detecting key contractual clauses (such as exclusivity agreements or change of control clauses) that may have an impact on the viability of the transaction or on the mechanics for the closing of a deal.

Other areas still require manual analysis work to find strategic information, usually regarding labour law, litigation, intellectual property and regulatory analysis. Technology is also very useful in tax and financial matters for detecting numerical inconsistencies, recurring processes or trends.

Common due diligence findings for Latin American targets

Due diligence findings will vary by target, by country, by industry and by level of thoroughness of the due diligence process and access to information. However, certain areas tend to yield a higher number of issues upon a rigorous review, including the following:

Taxes

These include income tax assessments by the tax authority, and detailed administrative proceedings with high accounting content in which counsel analyses the target's accounts and practices in order to find inconsistencies that may lead to potential higher tax payments being due. Aggressive tax structuring and planning are frequent and tend to result in high-value potential contingencies given the long-term potential violations and the possible imposition of fines and interest by the tax authorities. In certain sectors, including beverage and telecommunications, these examinations also focus on analysing the management and calculation of Excise Tax (ICE), which is very frequently a source of litigation and discord between the state and the companies.

The key to a robust tax due diligence is a combination of an experienced legal team and a financial-accounting team who can exchange opinions and jointly assess the findings. Limiting the analysis to a purely formal study of compliance with laws and regulations is not normally enough.

Labour and employee benefits and compensation.

The most frequent issues tend to concern unfair dismissal – a very costly way to cut staff in Ecuador – in cases where there is an employment relationship with an officer who exercises legal representation (notably the general manager), sham labour relationships (and the resulting indemnification risks), meticulousness of supplementary and additional payments (extra hours or vacation pay), the existence of bonuses or golden parachutes for executives, allegations of harassment and, in recent years, policies and good practices for managing personal data of the target company's employees. Clients are increasingly requesting the quantification of labour risks that, in view of the constitutional rule for a profit-sharing regime,[3] often has tax and accounting implications. Good communication between the labour and tax teams is of the essence.

It is also common for the company to engage private contractors or temporary personnel agencies to perform certain duties. Such contractors, personnel or the labour regulator may claim that they should be considered as employees, and require they are paid all benefits to which employees are entitled. It is imperative to detect if these cases exist in a potential target company during the due diligence review, as they are a common source of liabilities after closing.

Competition regulation.

It is advisable to conduct a series of interviews with key executives to detect or analyse competition practices during the due diligence process. Experience shows that even when contracts are impeccable and policies are wonderfully drafted and communicated, commercial pressure tends to cause both intended and unintended violations to competition rules. In almost all cases, findings in this area arise more from the interviews with the executives than from reviewing documents provided directly or via a data room. Also, though it can be a delicate task and the sellers may even find it invasive, it is necessary to understand the competition practices of the target, as well as potential antitrust concerns with the combined market share of the buyer and the target. The latter can be the biggest issue to obtaining required regulatory approvals without which a deal cannot close. This is particularly important in jurisdictions in which awareness of competition matters is still forming, such as in Ecuador, and is much more important when the competition authority may also be in the process of being formed, is in charge of, and applies very severe and punitive laws.

Anti-bribery and corruption compliance.

Corruption, money laundering, conflicts of interest and violations of transparency best practices have become a very significant issue for acquirers. Due diligence and corporate

3 Ecuadorian law requires companies to share 15 per cent of their profits with their employees.

best practices are critical to limit exposure with regard to these issues. Conducting a thorough compliance and anti-corruption analysis is even more essential in times of political, social or healthcare crises, such as the covid-19 crisis.[4] The use of digital tools and through the identification of red flags are key to detect recurring suspicious practices or purposeless contracts which require a closer look by compliance experts; therefore, it is important to ensure a fluid exchange of information between the compliance, competition and tax teams to identify these risks promptly.

Environmental

Environmental matters are more important than ever in Ecuador given the constitutional mandate whereby there is no statute of limitations for lawsuits or claims for environmental damages. For both the purchase of shares and acquisition of assets, the analysis must not be limited to compliance with regulatory formalities or the existence of permits. Instead, technical examinations are recommended to determine potential impacts and compliance with policies and guidelines. It is also necessary to note that the different districts of Ecuador usually have different regulatory norms that have a bearing on environmental issues.

Risk mitigation

The due diligence process should be used as a tool for the parties, especially buyers to ensure the purchase price factors in any features, contingencies or risks of the target. Seasoned counsel will reflect the allocation of such risk as well as covenants to seek to reduce or mitigate the materialisation of risks in the period between signing and closing, and post-closing. The terms of indemnity that are established in the agreement are another tool to mitigate and allocate risk; in that sense, the parties may choose to limit the maximum exposure of the indemnifying party as well as a minimum amount of losses required for a party to be indemnified (through the establishment of a de minimis amount, under which the losses are not indemnifiable – or a basket, which establishes a threshold for aggregate losses that must be met before such losses are indemnifiable, and may be structured as a deductible or a tipping basket).

Statutes of limitations overview

The statutes of limitations in place in the jurisdiction where a target operates will be instrumental to determine the scope of review during the due diligence (there is no need to review issues when the statute of limitation has already expired) and will also drive the contractual discussion for the survival of the representations and warranties of the sellers (where buyers push to be covered and indemnified until any contingency expires, and sellers push to reduce as much as possible the period in which they remain liable after closing).

The statute of limitation that applies in each case may vary significantly depending on the jurisdiction within Latin America where the target operates, and thus the scope of the review during the due diligence and the contractual discussion for the survival of the

4 See Chapter 1 of this guide for further analysis on the impact of the covid-19 pandemic on M&A in Latin America, including with respect to due diligence.

representations and warranties of the sellers will also vary significantly between different jurisdictions. In that sense, for illustrative purposes, we have included the different statute of limitations for tax issues, as described on the Inter-American Center for Tax Administrations (CIAT) Tax Administration Magazine:[5]

Jurisdiction	Statute of limitation for tax issues
Argentina	Five years (registered taxpayers) or 10 years (non-registered taxpayers)
Bolivia	Four years (registered taxpayers) or seven years (non-registered taxpayers)
Brazil	Five years
Chile	Three years (after a complete return is filed) or six years (if no return is filed or after an incomplete return is filed)
Colombia	Five years
Costa Rica	Three years (registered taxpayers) or five years (non-registered taxpayers)
Cuba	Five years
Dominican Republic	Three years
Ecuador	Three years (after a complete return is filed) or six years (if no return is filed or after an incomplete return is filed)
El Salvador	Three years (after a return is filed) or five years (if no return is filed)
Guatemala	Four years (registered taxpayers) or eight years (non-registered taxpayers)
Honduras	Five years
Mexico	Five years (after a return is filed) or 10 years (if no return is filed, if the return is filed late, or if the taxpayer has no formal accounting)
Nicaragua	Four years (after a complete return is filed) or six years (if no return is filed or after an incomplete return is filed)
Paraguay	Five years
Peru	Four years (after a return is filed) or six years (if no return is filed)
Uruguay	Five years (after a return is filed) or 10 years (if no return is filed, if the return is filed late, or if the taxpayer is not registered)
Venezuela	Four years (after a return is filed) or six years (if no return is filed, if the taxpayer is not duly registered, if the tax authority is unaware of taxable activities undertaken by the tax payer, if the tax payer has undertaken taxable activities abroad, or if the taxpayer has no formal accounting)

In that sense, Federico Scheffler and Andrea Trejo of Galicia Abogados, in an article in the *International Tax Review*, state - in relation to Mexico, but applicable to all of Latin America:

> *As fundamental representations imply a greater liability for the seller upon breach, often their survival period is matched to the applicable statute of limitations of the underlying claim (e.g.*

5 Mendes, Sérgio Rodrigues, Los plazos para determinar la obligación y para exigir el pago de las deudas tributarias, en los países miembros del CIAT, Revista de Administración Tributaria CIAT/AEAT/IEF No. 34, December 2012 (https://www.ciat.org/Biblioteca/Revista/Revista_34/Espanol/7-los_plazos_para_determinar_rodriguez.pdf).

typically around five years with respect to tax claims), whereas non-fundamental RWs survival periods may last for varying periods of time, more commonly between 12 and 24 months.[6]

The topic of statutes of limitations, therefore, is instrumental, for the strategy of the buyer in any transaction (especially on the due diligence review and the contractual negotiation). The statute of limitation regime under Ecuadorian law has several nuances and local M&A practice is thus complex with multiple contractual considerations.

It is complex because the different variations of statutes of limitations, which in Ecuador are divided by subject, are regulated by different bodies of law (e.g., the Employment Code, the Civil Code, Law for the Control of Market Power and the Constitution), which, over the years, have been tackled and ruled on by different judges depending on the subject matter in different eras and circumstances. It is a significant issue since the legal norms that regulate the statutes of limitations were issued decades or even centuries apart, meaning there is no uniform case law on the application of such limitations. So, for example, the statute of limitations for contractual matters is normally governed by the Civil Code (which dates from the mid-19th century), labour is governed by the Employment Code (the first version is around 80 years old and is considered anachronistic and inflexible), competition rules date back to 2011 and the regulation of no statute of limitations for environmental damage was added in the 2008 Constitution.

This variety in relation to the statute of limitations has multiple effects and considerations for the due diligence process on the one hand, and the negotiation of contractual terms and conditions on the other hand.

The multiplicity of limitations scenarios generally requires the use of several dedicated and specialised teams in the due diligence process. From the perspective of commercial contracts and contracts governed by the Civil Code, if there is no express agreement to the contrary, the common obligations will expire in 10 years and executive or enforceable obligations will expire in five years. The distinction made by the Civil Code is very important: common obligations are considered those that do not include a duty to pay an enforceable and due fixed amount, that is, for the most part, the ordinary contractual obligations and benefits. Whereas executive or enforceable obligations are those in which, given the nature of the benefit, the debtor has assumed an obligation that is no longer contested precisely because it is for a fixed amount and has been declared due and payable by the creditor. In the first case, when a dispute exists, the judge is asked to acknowledge the existence of a right in the ruling; in the second case (summary collection proceeding), the judge is asked to enforce the payment or performance of an obligation.

This civil distinction, which may apply to commercial contractual relationships, is very important in connection with the due diligence process, as the results of this examination will necessarily affect contractual documents. In the case of share purchase agreements, this civil law distinction is more important because the buyer will take on the target company. The most typical scenario in a negotiation will be the sellers advocating for the

6 https://www.internationaltaxreview.com/article/b1mky5jd3wcp61/tracing-the-growth-of-representations-and-warranties-insurance-in-mexico.

contractual reduction of statute of limitation rules, while the buyers will push to be covered until the statute of limitation has expired or even add more time to the period established under legal norms and to reduce or defer the price using fiduciary mechanisms or, in case of greater risks, using withholding mechanisms such as holdbacks.

For labour matters, the statute of limitations is three years after the termination of the employment relationship. This seemingly simply rule also creates contractual complications, notably for employer obligations that are not necessarily tied to the severance, such as the employer-paid pension or the employer's obligation to create a reserve fund. For these two aspects, the contractual negotiations resulting from the due diligence process tend to focus on the creation of fiduciary guarantee mechanisms or the withholding of a portion of the price. Evidently, this aspect is vital in companies with long-standing labour forces.

In the tax field, the statute of limitations also has relatively complex due diligence and contractual implications. Here it is more to do with the expiration of the taxman's powers of assessment. In other words, the tax authority losses its power to assess tax payments due to the passage of time, without the taxpayer needing to make a claim (this is a fundamental difference with the statute of limitations). In tax matters, this expiration applies in two scenarios: three years after a complete tax return is filed (taxes, fees or special contributions) or after six years if the filing was incomplete. The due diligence challenges and contractual implications occur in the second scenario: the tax authority tries to argue that the taxpayer has filed an incomplete tax return, so that three years can be added. This is why it is advisable in M&A examination processes to conduct an analysis for the six prior fiscal years. Now, particularly from the seller's side, this analysis can create resistance and arduous contractual discussions. If the six years are not applied, the parties usually agree a period of four to five years to release funds held in escrow or holdback, without prejudice to the agreed upon specified indemnities.

A separate matter is the statute of limitations in competition matters (in reality, also the expiration of the regulator's powers). The relevant legislation states that the power of the Competition Authority (SCPM) to begin an administrative proceeding at its own initiative or at the request of a party expires four years after (1) it is made aware a violation has been committed or (2) for recurring violations, after the date these ceased. When due diligence processes are concerned, the detection of potential competition violations is much more complex that in other areas. Some reasons for this are that, usually, harmful conduct is not recorded in contracts or written documents; it is common for sales forces, sellers and distributors to act outside of the companies' policies, and the whistle-blowing regime in Ecuador is imperfect and questionable as regards its guarantees. Given the above, it is advisable for competition-related due diligence processes to be coordinated with those for compliance, so that risks can be detected from both fronts and using digital tools. The second complex issue is the absence of case law or guides by the authority regarding recurring violations that are mentioned in competition law, notwithstanding hardcore conduct.

Lastly, the Ecuadorian Constitution states that legal actions to prosecute environmental damage are not subject to any statute of limitations. In practical terms, this means that a third party (including the state itself) could bring actions or claims for environmental damage at any time, regardless of how much time has elapsed. Two further constitutional

mandates must be added to this: the *in dubio pro naturae* principle and the establishment of strict liability of the accused. So, in due diligence processes it is very important to have environmental technical experts, whether buying shares or assets.

Sellers' due diligence

Sellers and targets may choose to invest in internal processes to identify their own operational risks and weaknesses in order to address them prior to a due diligence review by a potential buyer (known as a vendor's due diligence), and they may also choose to conduct a due diligence of the buyer to analyse the buyer's creditworthiness and reputation, the risk of not obtaining required regulatory approvals, Anti Bribery and Corruption and Anti Money Laundering compliance by buyer, etc., all of which will ensure that there are no surprises at the moment of closing or post-closing, and thus avoid costly litigation.

Appendix 1

About the Authors

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Diego focuses on mergers and acquisitions and competition matters. In the field of M&A, he represents strategic buyers, sellers, investment banks and investment funds in international transactions, acquisitions, joint ventures, asset acquisition, share purchase agreements (SPAs), shareholder's agreements (SHAs), due diligence processes, closing of transactions and other complex corporate matters.

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ISBN 978-1-83862-430-9