

Corporate Aspects of Trading and Investing Argentina

1. INTRODUCTION

This brief memo relates to different ways to enter the Argentine market and to set up a company in Argentina. It outlines the most commonly used profit-driven entities.

2. METHODS OF MARKET ENTRY IN ARGENTINA

There are two main types of vehicles that a foreign company may use in order to do business in Argentina: a) a local branch; or b) a subsidiary.

A branch is a permanent representation office of the foreign company in Argentina and is a part of the foreign entity. On the other hand, a subsidiary (SA or SRL) is a different company controlled by the foreign company through the holding of the majority of its equity.

The most significant difference between these two alternatives resides in the extent of the foreign company's liability. Since the branch is considered to be the same legal entity as the foreign company, the foreign company is liable for the debts of the branch. On the other hand, if the foreign company acts as shareholder/quotaholder of an Argentine subsidiary (SA or SRL) its liability will be limited as described in section 2.2.2.

2.1 BRANCH

Setting up

Pursuant to the Argentine Companies Act (Law No. 19,550, the "ACA"), in order to establish a branch in the City of Buenos Aires, foreign companies must register their By-laws and other corporate and accounting documentation and information with the Public Registry of Commerce of the City of Buenos Aires (*Inspección General de Justicia* or "IGJ").

The foreign company must file with the IGJ evidence that it has been duly organized, that it has no legal restrictions with regards to carrying out business in its country of incorporation and that it actually has activities in its country of incorporation. Among other documents, the foreign company must file with the IGJ: a) documentation disclosing personal information (passport number, address, number of shares) of each shareholder of the foreign company; b) documentation showing the assets that the company has outside Argentina and their value; and c) a Board resolution appointing a legal representative in Argentina. The registration process can take a month or two. In order to operate in Argentina, the branch must obtain its tax registration once the registration with the IGJ is completed.

Structure of and dynamics of branches of foreign companies in Argentina

Corporate capital: No minimum capital is required for the establishment of a branch of a foreign company in Argentina. However, depending on its corporate activity, a branch may be required to have a certain minimum capital (such is the case of Argentine branches of foreign companies registered as financial entities).

Legal representative: The legal representative of the branch must be an Argentine resident. The legal representative will have the same liability as directors of SAs as explained in section 2.2.2. There is no legal requirement of having employees or other officers.

Corporate Legal Domicile: The branch must establish a corporate domicile in the City of Buenos Aires.

Reporting requirements.

Local branches of foreign companies must file their annual financial statements with the IGJ.

In addition, the parent company must file, on an annual basis, certain information/documentation with the IGJ in order to evidence that it carries out activities or has assets outside Argentina and that Argentina is not its main place of business.

2.2 SUBSIDIARY

The most commonly used entities are Argentine corporations (*sociedad anónima* or SA) and Argentine limited liability companies (*sociedad de responsabilidad limitada* or SRL). Although the structure of these types of companies is similar there are certain differences.

Setting up.

The process of incorporating a local subsidiary involves two steps, namely, registering the foreign companies which will be the initial shareholders/quotaholders; and setting up and registering the Argentine company.

Registration of foreign shareholder/quotaholder: In order to become a stockholder of a local company, a foreign company must register its corporate documents with the IGJ. Each foreign company that intends to become a shareholder/quotaholder of a local company must file with the IGJ similar documentation referred to above as required for the registration of a branch.

Registration of the Argentine company: The first step is the execution of the deed of incorporation and the company's By-laws. Incorporation of SA's requires the execution of a public deed (prepared by a notary public). On the other hand, the incorporation of SRLs may be instrumented by means of a private document.

The execution of these documents must be done by the shareholders/quotaholders themselves, or by their legal representatives or attorneys - in - fact.

The shareholders must then subscribe the initial corporate capital and appoint the initial Board of Directors (if the company is a SA) or Managers (if the company is a SRL). The documents must then be filed with the IGJ which, after a notice has been published in the Official Gazette, will register the company. In order to operate in Argentina, the subsidiary must obtain its tax registration once the registration with the IGJ is completed.

Structure of and dynamics of local corporations (SA) and limited liability companies (SRL)

Corporate capital: While the capital of an SA is divided into shares, the capital of an SRL is divided into quotas.

The minimum capital for a SA is A\$12,000. The corporate capital must be 100% subscribed at the time of the incorporation, but only 25% of the amount subscribed needs to be paid-in at the time of incorporation. The remaining 75% must be paid within two years of subscription, unless a shorter time is required by the By-laws.

Although there is no regulation requiring a minimum capital for SRLs, the IGJ is unlikely to accept an SRL with capital lower than A\$12,000. In addition to the minimum capital requirements, it is important to bear in mind that applicable regulations establish that the amount of the corporate capital must be related to the company's corporate purpose. This rule applies both for SAs and SRLs.

Number of shareholders or quotaholders: According to the ACA, an Argentine company must have at least two owners. As a consequence of the IGJ's recent interpretation of this requirement, each owner must own substantial holdings. If the two shareholders/quotaholders are foreign entities, both of them must be registered in order to become owners of local companies, and must file all the documentation/ information described above.

Transfers of shares/quotas: In order to be effective vis-à-vis third parties, any transfer of quotas of an SRL must be registered with the IGJ. On the other hand, transfers of shares of an SA are only registered at the stock registry book kept by the company and registration with IGJ is not required.

Shareholders/ Quotaholders meetings: In SAs, a shareholders' meeting must be held at least once per year in order to consider the annual financial statements. These meetings customarily will determine the distribution of profits and appoint directors and statutory auditors. Such shareholders' meetings are called Ordinary Meetings. In addition, Extraordinary Shareholders' Meetings must be held when decisions on certain specific issues are necessary (such as the increase of the corporate capital over a certain limit, redemption of shares, mergers, spin-offs and dissolution of companies, limits to the exercise of preemptive rights, issues of debentures or bonds and amendment to the By-laws). These regulations also apply to SRLs and quotaholders meetings.

Shareholders and quotaholders liability: Shareholders and quotaholders who have fully paid in their equity participation shares are, in general, not liable for the company's obligations beyond their capital contributions.

Any shareholder with interests in conflict with those of the company has a duty to abstain from voting on any matter which relates to such conflict; if that shareholder does not comply with this provision, it will be responsible for any damages resulting from a final resolution of the matter in conflict, if, without such shareholder's vote, the majority vote necessary to adopt such resolution could never have been reached.

Furthermore, all shareholders who vote in favor of a resolution which is subsequently declared null, will be jointly and severally liable for any consequences resulting therefrom.

Directors/ Managers:

- The directors of SAs are elected by the shareholders at regular meetings. The majority of the members of the Board of Directors must be Argentine residents. The members of the Board of Directors may hold office for a maximum term of three fiscal years, but may be re-elected at a shareholder meeting. The president, elected from amongst the members of the Board, has full powers to act on behalf of the company, and his authority in relation to third parties cannot be limited. The Board must meet at least once every three months and a majority of its members must be present in order to reach a valid quorum for deliberations.

Directors (even if they are non-residents) are required to make monthly social security contributions. In addition, directors must obtain an insurance policy, the price of which is in the region of US\$ 70.

- In SRLs, the managing functions of manager are taken care of by a body called *Gerencia*. The members of the *Gerencia*, the Managers or *Gerentes* are appointed by the quotaholders. Most of the regulations applicable to the Board of Directors also apply to the *Gerencia*, with the exception that the *Gerentes* may hold office either for a fixed or an open period, as established in the by-laws. Please also bear in mind the above considerations as to the requisite insurance policy.

Liability of Directors and Managers: All directors and managers of local companies are subject to a standard of loyalty and diligence (fiduciary duties); violation of this standard will result in liability for damages arising therefrom. Directors and managers are jointly and severally liable for the negligent performance of their duties, or for violations of the law or of the by-laws or regulations of the company. Directors and managers may be exonerated from liability with respect to the company by a subsequent approval of their tenure in a shareholders' meeting, provided that they have not violated the law or the By-laws, and that shareholders representing 5% or more of the company's capital do not object to the decision.

Statutory auditors: A statutory auditor or supervisory committee is required only if the company: (a) makes a public offer of its securities, (b) has a nominal capital higher than A\$ 10,000,000, (c) requests money or assets from the general public under a promise of future benefits, (d) is engaged in the provision of public services as its main activity or (e) controls or is controlled by other corporation as to which (c) or (d) is applicable.

Corporate Legal Domicile: The owners of the company, in the company's deed of incorporation, must establish a corporate domicile in the City of Buenos Aires.

Reporting requirements

Local SAs (and SRLs with a corporate capital exceeding A\$10,000,000) must file their annual financial statements with the IGJ.

All foreign shareholders of local companies must file, on an annual basis certain information/documentation with the IGJ in order to evidence that they carry out activities or have assets outside Argentina and that Argentina is not their main place of business.

3. TAXATION

In general terms, the taxation system is very similar for all kind of companies. Argentine resident companies -incorporated in Argentina- are taxed on the worldwide income basis at a 35% flat

rate on all taxable income. The tax period for resident companies is the fiscal year - commercial period - established in the by-laws. In cases of companies which are not required by law to keep accounting records, the tax year is the calendar year. Foreign income tax paid by a resident companies on foreign source income may be credited against its argentine income tax liability. The income tax may be credited against the presumptive minimum income tax.

Indeed, in order to determine the income tax taxable base, the Income Tax Law ("ITL") allows to deduct from the incomes all the expenses needed to produce it. In principle, all ordinary and necessary expenses incurred in earning taxable income are deductible for IT assessment purposes (such as interest, salaries, etc.).

When resident companies distribute dividends or deliver profits to their shareholders/quotaholders, such dividends and profits are not subject to the income tax. However, the equalization tax rules apply. The equalization tax is triggered when the dividends or profits that are payable exceed the tax profits accumulated at the end of the tax period preceding the distribution. For this computation, the tax profits are determined (i) by subtracting from the taxable income -as determined by the general rules in the income tax law- the income tax paid in the relevant tax periods in which the profits being distributed were generated, and (ii) adding to such result, the dividends or other profits which are not subject to tax, received by the company during those years. The ITL provides for a 35% withholding tax to be applicable upon distributions of dividends that exceed taxable profits. (53,85% grossing up).

Author

Alejandro Guardone

Cabanellas Etchebarne Kelly &
Dell'Oro Maini
Buenos Aires, Argentina

E-mail a.guardone@cekd.com

Tel. +54 11 4114 5500

To contact PLG

Julienne Laveaux
PLG Secretariat
PANNONE LAW GROUP E.E.I.G.
avenue de Sumatra 41
1180 Brussels
Belgium

Tel. +32 2 374 88 46

Fax: +32 2 374 90 61

E-mail plg@plg.be

www.plg.eu.com

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