



Acquisition of Shares and Assets in Argentina

What you should know

2014

Overview



- Argentine laws do not restrict foreign investments in any significant manner
 - Except for certain specific activities, foreign investors are neither required to obtain special permits or licenses nor requested to become associated with local companies to conduct business in Argentina
 - However, in addition to the analysis of the recurrent changes and fluctuations in the political, business and economic scenario, there are certain specific regulations that should be carefully considered when pursuing an investment in Argentina, including:
 - Alternatives for implementing the transaction and special proceedings
 - Matters regarding the structure of the investment vehicle
 - Antitrust matters
 - Forex regulations
 - Tax matters
 - Regulatory issues
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Alternatives to Implement an Acquisition in Argentina



- **There are 2 basic alternatives to acquire a business in Argentina:**
 - Purchase of equity interests
 - Purchase of all or part of the business' assets

 - **Share Acquisition**
 - Not subject to specific regulations (except for publicly traded companies and companies involved in regulated industries)
 - Usually conducted under Stock Purchase Agreements with terms freely negotiated and established by the parties, thus reducing the transaction costs
 - Main risk: hidden liabilities
 - ✓ May be reduced through due diligence and contractual provisions such as adequate reps & warranties and indemnities
 - Shareholders' Agreements (SHAs):
 - ✓ Valid and enforceable in Argentina, but only among its parties. The company, its directors or any third party are not subject to nor have any obligations or rights under a SHA (even if they are notified of or acknowledge its terms). The only provisions mandatory to the company and applicable to third parties are those included in the By-laws
 - ✓ Generally, no specific performance of obligations in Argentina, where breaches of contracts (including SHAs) are usually resolved through indemnification of damages. SHAs may be governed by foreign laws provided there are sufficient connection points to such jurisdiction
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Alternatives to Implement an Acquisition in Argentina



▪ **Assets Purchase**

- There is a statutory proceeding for the acquisition of all or part of an ongoing business (the Bulk Transfer Law)
 - The proceeding is not mandatory, though (assets may be purchased through a simple Assets Purchase Agreement, if the parties decide to do so)
 - The proceeding allows buyer to acquire the assets free of certain pre existing hidden liabilities (others, like labor and tax liabilities, remain)
 - When the proceeding is not used, both parties are jointly liable for those pre existing liabilities (and the agreement should establish appropriate indemnities, warranties and collateral, where necessary)
 - The statutory proceeding is not traditionally used for significant transactions, since it is more burdensome and complex, longer and more costly than a share acquisition (or a non-statutory purchase of assets)
 - The statutory proceeding provides for:
 - ✓ Publication of notices of the acquisition
 - ✓ A 10-day period for the creditors to oppose to the transaction
 - ✓ An additional 20-day period for opposing creditors to obtain seizures or other injunctive measures to protect their credits
 - ✓ The prohibition to close the sale for a price lower than the aggregate claimed liabilities
 - ✓ The registration of the purchase in the Public Registry of Commerce
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Alternatives to Implement an Acquisition in Argentina



■ Mergers

- Assets of a company may also be acquired through a merger, in which:
 - Two or more companies transfer their assets and liabilities to a new company
 - One company absorbs and incorporates the assets of liabilities of one or more other companies (“merger by absorption”)
- The same statutory proceeding is applied to both types of merger, including:
 - ✓ Execution of a Preliminary Merger Commitment (including special balance sheets of the merging companies as of the same date) which shall be approved by each companies’ shareholders (certain opposing shareholders may retire from the company with a reimbursement of its shares value, according to the balance sheet)
 - ✓ Publication of notices of the merger
 - ✓ A 15-day period for creditors to oppose to the merger
 - ✓ An additional 20-day period for opposing creditors to obtain seizures or other injunctive measures to protect their credits
 - ✓ Execution of the Final Merger Agreement, including special individual and consolidated merger balance sheets
 - ✓ Registration with the Public Registry of Commerce

■ Spin-Offs

- Separation of assets and liabilities of a company to create one or more new companies or merge the same into an existing company) pursuant to a proceeding similar to the merger proceeding
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Alternatives to Implement an Acquisition in Argentina



▪ Joint Ventures

- Pursuant to the freedom of contracts principle, JVs may be structured in any manner parties thereto elect. However, Argentine laws offer the alternative of regulated statutory structures:
 - ✓ *Uniones Transitorias de Empresas (UTES)*
 - ✓ *Acuerdos de Colaboración Empresaria*
 - ✓ *Consortios de Colaboración*
- The structure most commonly used (in particular, for public biddings) is the UTE
 - ✓ It is a contractual JV, not an independent legal entity (except for labor, social security and tax matters). It shall be registered with the Public Registry of Commerce
 - ✓ Foreign companies may participate in UTEs provided they comply with requisites similar to those required to establish a branch in Argentina
 - ✓ UTEs shall be entered into to perform a certain task or provide a certain service and shall last until completion thereof
 - ✓ Unless otherwise agreed to by its members, all UTE decisions are to be taken unanimously and members of an UTE are not jointly liable for the UTE's operations

▪ Trusts

- Investments in Argentina may be made by means of a participation in a trust (very common in real estate and agribusiness) or in a financial trust, thus isolating assets from the insolvency risk of all intervening parties
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Investment Vehicle: Corporate Structure



- In case of an asset acquisition, the foreign purchaser shall incorporate a local vehicle to own the assets.
 - Foreign companies intending to conduct business in Argentina on a “regular” basis (e.g., the operation or holding of the acquired assets), are required to form a branch or establish a local subsidiary
 - Branch
 - ✓ It is not considered as an entity independent from its parent (which is liable for all operations of the branch)
 - ✓ Must prepare and file annual financial statements, not consolidated with those of the parent
 - ✓ Parent may elect whether to allocate capital to the branch (which may be advisable given existing restrictions to financings under forex regulations)
 - Subsidiaries (more common structures):
 - ✓ S.A. (corporations or *sociedades anónimas*)
 - ✓ S.R.L. (limited liability companies or *sociedades de responsabilidad limitada*)
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Investment Vehicle: Regulatory Issues



- Foreign companies must register in Argentina (Public Registry of Commerce) to become shareholders of an Argentine company (either due to a purchase of shares or by establishing a subsidiary for an asset acquisition)
 - Both SAs and SRLs must have at least 2 shareholders/quotaholders
 - ✓ In certain jurisdictions (e.g., the City of Buenos Aires) an initial minimum capital dispersion is required (approximately, 95/5%), though it can be altered by subsequent capital increases
 - In many jurisdictions (and specially, in the City of Buenos Aires) registration requirements are stricter and more burdensome (e.g., branches or shareholders of companies domiciled in “tax havens” or of foreign companies having an Argentine company or individual as ultimate shareholder are not allowed)
 - Members of the Board of Argentine SAs may be foreign, provided that a majority of the Board actually resides in Argentine (same principle applies to SRLs, but there is more flexibility in case each Manager/Director has individual powers to bind the SRL). The legal representative of a branch, on the other hand, may reside abroad (but shall establish a legal domicile in Argentina, where any official notices will be directed)
 - Foreign companies having their principal headquarters in Argentina or having a corporate main purpose which is intended to be performed in Argentina, shall be deemed to be Argentine companies as to compliance with all local regulations
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Antitrust



- Mandatory notice of any transaction implying an economic concentration
 - Whenever the aggregate “business volume” in Argentina of the “acquiring group” and of the target company (and its subsidiaries) exceeds Pesos 200 MM

 - Main exceptions:
 - First acquisition in Argentina of the “acquiring group”
 - Transactions in which the amount of the transaction and the value of the assets in Argentina to be transferred or controlled do not exceed Pesos 20 MM, in each case
 - Acquisition of companies already controlled by the purchaser

 - The transaction may be closed before obtaining the Antitrust Authority’s authorization, but it remains subject to such authorization, which may mandate the reversion of the whole transaction or impose certain obligations to the parties, including divestitures

 - Consequently, the risk of non-approval (which includes a political factor) shall be carefully considered when resolving whether to close without said approval or establish the same as a condition precedent to closing
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Foreign Exchange Market



- Inflow and outflow of funds must go through the “Single Free Exchange Market”, which is regulated by the Central Bank
 - Forex regulations, which are frequently modified, establish maximum terms to liquidate proceeds from exports and payment of imports, restrictions for the acquisition of foreign currency and minimum terms for all external financings and a registry of foreign investments, among other issues
 - Access to the “Single Free Exchange Market “ for the payment and remittance of profits and dividends abroad is technically permitted, provided such profits are reflected in audited financial statements, but as a practical matter authorization of the remittance is subject to political discretion (and generally not granted)

 - External financing shall:
 - Be registered with the Central Bank and have minimum term of 1 year
 - Be subject to a non-remunerated 365 days mandatory deposit equal to 30% of the amount of the financing

 - Main exceptions to the mandatory 30% deposit:
 - Direct investments in Argentine companies and investments in non-financial assets with a minimum duration of 2 years
 - Purchase of newly issued publicly traded securities in the primary markets
 - Cancellation of existing debts
 - Formation of external portfolios (within certain limits)
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Tax Matters



- It is key to take into account the tax impact of any acquisition structure, of the manner in which the operation of the business is structured and of the exit strategy, such as:
 - Argentina is party to several conventions to avoid double taxation and prevent tax evasion, mostly with neighboring countries and members of the EU, which may be important when deciding the jurisdiction from which to make an investment
 - Argentina's taxation system contemplates 3 levels of taxation: Federal, Provincial and Municipal, including: Income Tax (35%), VAT, Minimum Presumed Income Tax, Provincial Turnover Tax, Tax on Credits and Debits in Checking Accounts. The entering into documented agreements implementing transactions "for value" is levied by each jurisdiction where it produces "effects" (Stamp Tax)
 - According to recent legislation (not yet regulated in detail), capital gains obtained from the sale of unlisted shares or other membership interests is taxed at a rate of: (i) 15% of the gross gain, in case the seller is an Argentine resident; (ii) 13.5% of the price or 15% of the gross gain (at the option of the seller), in case the seller is a non-resident legal entity; and (iii) 31.5% of the price, in case the seller is a non-resident individual
 - Payments of dividends (and similar distributions) are subject to taxation at a rate of 10% (except for dividends paid in shares or other membership interests)
 - Passive income of residents of "tax havens" has a different (aggravated) treatment
 - Transfer pricing provisions apply to transactions among affiliates
 - Business reorganizations (mergers, spin-offs, transfers of going concerns within an economic group) have tax benefits, subject to certain conditions
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Other Relevant Issues



- **Special Regulated Activities:** Certain industries are subject to special regulations, including financial entities and insurance companies, and certain restrictions apply to foreign investment in key sectors of the economy, such as radio and TV, airlines and the purchase of land in border areas
 - **Public Companies:** Special regulations apply to listed companies and their shareholders, including reporting requirements on acquisitions and other relevant developments, specific governance provisions (such as requisite independent directors, among others) and special regulations applicable to certain acquisitions (e.g., mandatory public acquisition offerings are triggered in certain circumstances)
 - **Customs:** Imports and exports of goods must comply with customs applicable regulations, which, among other matters, periodically establish restrictions and/or different customs duties applicable to certain types of products. In recent years, Argentina imposed an increasing number of specific “micro” measures to restrict import transactions, such as antidumping duties, non-automatic licenses and reference prices
 - **“De Facto” Restrictions:** In recent years, Argentina imposed an increasing number of “*de facto*” unwritten restrictions, affecting both international commerce and internal prices, including imposing maximum prices for internal goods and services, quotas and/or prior registration of export operations and delays in or restrictions to the approval of import transactions (e.g., the authorization of imports in many sectors has been subjected to the requirement of exporting a similar amount of other products, even when the relevant company or industry has no exportable production)
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Other Relevant Regulations



- **Investment Incentives:** There are specific investment incentives for certain activities, including tax benefits for investments in new capital assets destined to certain industrial activities or public works, a reduction of the VAT (from 21% to 10,5%) levied on imports and sale of capital assets applicable and goods and components related to telecommunications and IT, among others. Other incentives apply to exports, to productive activities in certain jurisdictions and duty-free zones and promotional regimes for certain activities, such as hydrocarbons, software production and modern biotechnology
 - **Insolvency Proceedings:** Investments in distressed assets must carefully consider specific regulations governing the “*concurso preventivo*” (a Chapter 11-like reorganization proceeding) and bankruptcy, as well as the “*Acuerdos Preventivos Extrajudiciales (APEs)*” (out-of-court reorganizations approved by the court)
 - **Data Protection:** Creation and maintenance of databases are regulated by the Personal Data Protection Law, including annual mandatory registration obligations for holders of databases
 - **Residence Permits:** Foreigners intending to work in Argentina shall obtain a special permanent or temporary residence permit (valid for 3 years, with possible renewals) and duly register with Tax Authorities (AFIP), among other requisites
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