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PAGBAM SCHWENCKE
ESTABLISHING A BUSINESS ENTITY IN CHILE



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ESTABLISHING A BUSINESS ENTITY IN CHILE



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I. Types of Business Entities

1. Description of the types of entities available

In Chile, there are different types of entities available to establish a business. The most common entities for foreign investment are: (i) Limited Liability Partnership or Company (*Sociedad de Responsabilidad Limitada*, “SRL”); (ii) Corporation (*Sociedad Anonima*, “SA”); and (iii) Stock Company (*Sociedad por Acciones*, “SpA”).

a) Sociedad de Responsabilidad Limitada

The SRL has a minimum of two partners and a maximum of fifty. There is no restriction on foreign partners. There cannot be less than two partners, as the partnership is

automatically dissolved if there is only one partner. Each partner’s liability is limited either to the amount they contributed to the capital, or an upper amount specified in the partnership deed. This company differs from the next two (SA’s and SpA’s) in its character as “persons corporation”, where the identity of the partners and the relation between them is essential to the validity of the company, in such length that the names of the partners are included in the bylaws.

The deed must contain certain minimum requirements established by law in order to be valid, such as the company’s name, domicile, corporate purpose, capital, etc. and any other relevant terms agreed to by the partners.

Capital and Partnership Rights. There are no minimum capital requirements for the incorporation or the operation of an SRL. The partners may pay the stock capital in cash, assets, or by their work or activity. There are no restrictions regarding the distribution of profits, so the partner may freely agree on any percentage in the bylaws. If the bylaws do not regulate the distribution of the profits, the law mandates to distribute them in the same proportion of their contribution to the stock capital.

Given that the transfer of partnership rights requires the amend of the SRL’s bylaws, the partner willing to sell its rights needs to obtain the prior consent of the others.

Management. The partners have the freedom to choose how to manage the SRL. Usually, the partners will manage the partnership by their own, or through one or more representatives, elected by unanimity, of which at least one must be domiciled in Chile. The partners may also entrust the



management to a board of directors or a single director, both to be chosen by unanimous agreement. An SRL is not subject to the control of a regulatory authority and there is no obligation to publish or file accounts.

b) Sociedad Anónima

An SA is a company formed by a common fund provided by two or more shareholders who are responsible only for their respective capital contributions. There cannot be less than two shareholders. In opposition to what was mentioned regarding SRL's being persons corporations, SA's (and SpA's) are "capital corporations", being the contribution of capital the main interest in this type of entities.

The deed must contain certain minimum requirements established by law in order to be valid, such as the company's name, domicile, corporate purpose, capital, etc. and any other relevant terms agreed to by the shareholders. It must also contain the bylaws of the company.

Capital and Shares. In general, there are no minimum capital requirements for the incorporation or operation of an SA. Nonetheless, there are some exceptions regarding determined types of businesses, where a special law requires a minimum capital for its constitution and ongoing operation, such as banks and insurance companies. The capital of an SA may be paid with cash or assets. According to the law, the initial capital must be fully subscribed and paid within three years counted as of the incorporation of the corporation. If the capital is not subscribed within this term, it will be automatically reduced to the amount effectively subscribed and paid.

An SA may be publicly traded or closely held. If it is publicly traded, the shares are publicly traded on the stock market, either as a legal requirement or voluntarily. In this case, the corporation is subject to the supervision by the Commission for the Financial Market (*Comisión para el Mercado Financiero*, "CMF") and, therefore, the shares must be registered in the Securities Register of this regulatory body. Shares of closely held SA's are privately traded.

Shareholders of a SA may freely transfer their shares without the consent of the other shareholders, and without amending the corporation's bylaws.

Distribution of profits in closed SA's is ruled by the bylaws. If there are no provisions on point, distribution is ruled by the general rules affecting open corporations, under which at least 30 percent of net profits must be distributed in cash, unless otherwise agreed by all shareholders. In case of accumulated losses, the profits of the period must be used first to cover said losses.

Management. SA's are managed by a board of directors of at least three members, who are essentially revocable. The chairman and CFO of the company are elected by the same directors. The board of directors is vested with ample managing powers and can represent the SA before third parties.

c) Sociedad por Acciones

An SpA is fairly similar to an SA but simpler. Besides certain minimum provisions set forth in the law, the shareholders are free to agree upon any rules in their bylaws. It seeks to combine the flexibility in management of a corporation, with the structure of rights and obligations of a SA.



Unlike the prior companies, SpA's may have one single shareholder for all the duration of the entity. They are therefore preferred by Venture Capital Companies and other companies with an intention to incorporate partners in the future.

Capital and Shares. There are no minimum capital requirements for the incorporation or the operation of a SpA. The shareholders may pay the stock capital in cash, assets, or the contribution of personal work (which is not allowed under an SA structure). The initial capital and capital increases must be fully subscribed and paid within the term fixed by the shareholders, or a maximum of five years counted from the incorporation or the capital increase date, if such term is not set forth in the bylaws.

The bylaws can establish that the SpA may issue different kinds of shares, such as non-voting preferred shares, limited-voting shares, or with multiple votes.

In general, shareholders of a SpA may freely transfer their shares without the consent of the other shareholders and without amending the bylaws.

If an SpA reaches 500 (five hundred) or more shareholders or, at least, 10% of the nominal capital belonging to a minimum of 100 (one hundred) shareholders, during more than 90 (ninety) days, the entity will be transformed into a SA *ipso facto* and will be submitted to the SA regulations over their bylaws. The next shareholders' meeting held will have to make the corresponding adaptations and choose the members of the board.

Management. The SpA's obligations are basically two: appoint a general manager and hold ordinary shareholder meetings. Shareholders are free to decide on the

management structure, and they can designate a single manager or a board of directors.

2. Matters to be considered when choosing a business entity type

There are several advantages and disadvantages related to each type of entity. When choosing, it is vital to consider the following elements:

a) *Sociedad de Responsabilidad Limitada*

- It has a minimum of two partners and a maximum of fifty.
- All partners may be foreigners.
- The responsibility of the partners is limited to its capital contribution.
- Its management is simpler compared to an SA.
- The partners have the flexibility to agree on the terms of the bylaws. There are no limitations regarding the capital, its payment, and the distribution of profits.
- Partners need unanimity to adopt all types of decisions.
- Partners that want a relationship of trust, fewer formalities, and simplified management, prefer this entity.

b) *Sociedad Anónima*

- There is no limitation for the transfer of the shares.
- Foreign entities can hold 100% of an SA's shares.
- Generally, there are no minimum capital requirements.
- The creditors have rights over the assets of the corporation, not over the property of the shareholders.



- They have a complex management organization (board of directors + shareholders meetings).
- They can operate in the stock market.
- If they are publicly traded, they have reporting duties towards the CMF.
- Businesses requiring large amounts of capital prefer the S.A. corporate structure.

c) Sociedad por Acciones

- It may be constituted by one or more shareholders, without limitations.
- There is almost complete flexibility in agreeing upon the bylaws of the company.
- Foreign entities can hold 100% of an SpA's shares.
- It is flexible in its administration.
- Shares trading is simpler.
- The shareholders can determine the number and types of shares that constitute the capital.
- The shareholder's responsibility is limited.
- Enterprises seeking to attract venture capital prefer the SpA corporate structure.

II. Steps and Timing to Establish

1. Brief overview of steps to incorporate/constitute each entity

a) Sociedad de Responsabilidad Limitada

The constitution of an SRL requires a public deed granted before a notary public by at least two partners. Within the next sixty days, the partners must register an excerpt of the document in the Register of

Commerce corresponding to its domicile and publish it in the Official Gazette.

Any amendment to the bylaws requires the agreement of all the partners, recorded in a public deed. An excerpt of it must be recorded in the Register of Commerce and published in the Official Gazette within 60 days.

b) Sociedad Anonima

The establishment of a SA requires the same process as the one described for the SRL. In the case of an amendment to the bylaws, an extraordinary meeting of the shareholders is required. Besides certain particular matters which require the approval of two-thirds of the shareholders with voting rights (transformation into a different type of company, reductions of capital, sale of more than 50% of the assets, et al), ordinary amendments require majority of shareholders to be approved. The shareholders must record a brief of the meeting into a public deed, and, within the next sixty days, an excerpt containing the amendment must be filed at the Register of Commerce and published in the Official Gazette.

c) Sociedad por Acciones

The incorporation of an SpA requires a public deed, or a private document signed by all the shareholders, in which case a public notary must verify and legalize it. Within 60 days of the date of the incorporation document, its excerpt must be registered at the Register of Commerce and published in the Official Gazette.

Any amendment to the SpA's bylaws requires the approval of the shareholders in a meeting as described for SA's. Nevertheless, this is not necessary if all shareholders appear granting such



amendment in a public deed or a private instrument before a public notary. Within 60 days as of the date of the amendment document, its excerpt must be registered at the Register of Commerce and published in the Official Gazette.

2. Other Formalities

Tax Number. After the legal constitution is completed, all entities must obtain a Tax Number (RUT) before the Internal Revenue Service (*Servicio de Impuestos Internos, "SII"*). Foreign investors that wish to hold a share in a local entity must obtain also a Tax Number and appoint a legal representative on their behalf with domicile or residence in Chile. For these effects, the SII will require (i) the appointment of a local representative, with domicile in Chile with sufficient authorities to represent the foreign investor; and, (ii) evidence of existence of the foreign investor (in case of an individual, a legalized copy of its passport; and, in the case of a legal entity, a copy of its bylaws and a certificate of good standing, duly legalized and translated into Spanish).

There are two alternatives to obtain the Tax Number. The standard procedure and the simplified procedure. The standard procedure may be undertaken by the foreign investor or through a legal representative domiciled or with residence in Chile. If the foreign investor undertakes the procedure, he/she will have to fill out the Form F-4415 (Registration of RUT and Sworn Declaration of Start of Activities). If the legal representative undertakes it, he/she will have to be given a power of attorney granted before a public notary in Chile, or in a foreign country, and legalize it per the Apostille Convention of The Hague or by the Chilean Consulate of the corresponding jurisdiction. The simplified procedure is carried out directly by authorized banks and stockbrokers who can

obtain the Tax Number for customers who invest in Chile.

Starting Activities. If the investment implies the exercise of an economic activity in Chile, the investor will have to "initiate activities" before the SII. This procedure requires a sworn statement in which the taxpayer informs them of the intention to initiate economic activities in the country, and that they may be taxable. It can be filed electronically on the web page of the SII.

Municipal Licenses and Permits. According to the nature of the economic activity involved, certain permits and municipal licenses may be required. Municipal licenses authorize the entity to undertake a specific economic activity within the municipal territory.

Simplified Regime for Incorporation. Law No. 20,659 created a Simplified Regime to incorporate legal entities. This Regime allows individuals to incorporate a company "in one day," without the formalities and higher costs of the General Regime.

The procedure shall be carried out by completing an electronic form with the information of the new entity and of its partners or shareholders.

The partners or shareholders shall incorporate the entity appearing in two ways:

- a) Advanced Electronic Signature ("AES"): each partner or shareholder can sign from their computer or electronic device, the relevant form.
- b) Signature before a Notary Public: Each partner or shareholder shall appear before a Notary Public, that signs with AES.

Incorporation of the company will instantly create a RUT for the entity.



Interested individuals shall modify, transform, merge, divide, dissolve and rectify the entity through the Simplified Regime's website. However, they shall extend a public deed in order to terminate each of these acts.

III. Governance, Regulation and Ongoing Maintenance

1. Summary of regulation of each type and ongoing maintenance, reporting requirements

The partners of an SRL may mandate the administration to one or more partners or a third party, or parties, appointed in the company's bylaws. If the partners do not delegate a decision to the administrator, it must be taken unanimously by the partners.

Administration of an SA is entrusted to a Board of Directors. The shareholders' meeting elects the members of the Board by the majority of the shareholders. The bylaws of the SA will determine an invariable number of directors that will integrate the Board and the term of their mandate, that may not exceed three years. The shareholders will meet in ordinary meetings once a year following the bylaws, and extraordinarily if the social necessities require it.

In the case of a SpA, the shareholders may agree to administrate the company through one or more administrators (like in the case of an SRL), or a board (like in the case of a SA). The bylaws must consider this agreement.

2. Requirements for local shareholding/directors

In Chile, there are no requirements for companies to have a local shareholder.

Though the directors of SA's and SpA's may be fully integrated by foreigners, these companies, together with SRL's must have at least one local representative, authorized to respond before and be notified by local authorities.

It should be noted that directors of SA's and SpA's hold a fiduciary duty toward the company, which contemplates certain attributions such as full access to all business of the company, but also duties of care and confidentiality. Directors are joint and severally responsible before the company and its shareholders for any damages caused to them due to the infringement of said duties.

3. Minority shareholders' rights and protection

Chilean corporate law establishes a withdrawal right in favor of the minority shareholders when the controller acquires more than 95% of the shares of a publicly traded SA. The minority shareholder must exercise this right within 30 days counted from the date in which the shareholder reached more than 95% of the shares.

4. ESG

General Rule No. 461, year 2021 of the Chilean Financial Market Commission ("FMC"), establishes requirements for the information included in the annual reports of the entities supervised by the FMC, in line with environmental, social and governance criteria ("ESG"). ESG requirements include:

- a) The mission, vision, and purpose of the entity, and specially, if it adheres to the Guiding Principles of Human Rights and Companies of the United Nations or other equivalent standard.
- b) Certain matters regarding corporate governance, such as: i) how the entity assess the operation of their corporate governance; ii) how the entity incorporates a sustainability approach in its businesses, like in environmental matters, social aspects and regarding human rights, in assessment processes and strategic definitions; iii) how the



entity identifies and manages conflicts of interest, conducts affecting antitrust and unfair competition, and how it prevents corruption, money laundering and terrorist funding; iv) how it manages the interests of its main stakeholders; v) how it promotes innovation and Research and Development; and vi) how diversity topics are dealt; among other matters.

- c) Information of the entities workers, the existence of gender equity policies regarding wages, and the existence of policies to prevent and manage employment and sexual harassment.

IV. Entities Subject to FMC supervision

1. FMC supervision.

The FMC is the Chilean governmental entity responsible for overseeing the Chilean financial market, ensuring that supervised entities comply with applicable regulations. In that sense, the following activities and entities are subject to FMC supervision:

- Individuals who issue or intermediate publicly offered securities.
- Product exchanges, securities exchanges, and stock market operations.
- Securities Agents Associations and their operations on securities.
- Funds subject to supervision and their management.
- Companies by shares and limited liability partnerships subject to supervision.
- Companies engaged in insurance and reinsurance, as well as insurance intermediaries.
- Financial self-regulation committees.

- Banking entities and companies engaged in the issuance and operation of electronic currency.
- Savings and credit cooperatives subject to cooperative law supervision.
- Any other entity or individual as mandated by the law.

2. Fintech Law (Law No. 21,521):

Fintech Law establishes a general framework to promote the provision of financial services through innovative technologies, subjecting such services to the supervision of the CMF. This framework aims to enhance transparency and stability in financial innovation and competition, while also protecting clients by safeguarding their data and preventing money laundering. The Services regulated by this law, which must be registered in the Registry of the CMF include:

1. Crowdfunding platforms.
2. Alternative transaction systems.
3. Credit and investment advisory services.
4. Custody of financial instruments.
5. Order routing and intermediation of financial instruments.

V. Foreign Investment

1. Any significant barriers to entry for an offshore party

In general, there are no restrictions for the development of economic activities. More specifically, as the economic activity is not limited to the State or a Chilean natural person or legal entity, there are no limitations for offshore parties. Save as mentioned below, all the economic activities are open to the private sector, and foreign parties may develop most of them.



There are some activities that are subject to certain restrictions. For example:

- **Border areas:** Some territories located in border regions of the country cannot be acquired by natural persons from a neighboring country or by legal entities with their headquarters in a neighboring country unless they count with the authorization of the President of the Republic.
- **Aquaculture and fishing:** There are several activities regarding aquaculture and fishing that are restricted only for national natural persons or entities.
- **Hydrocarbons, lithium, and deposits in Chilean waters:** Mining concessions located in areas classified as vital for national security cannot be awarded to foreigners.
- **Domestic shipping:** Only Chilean boats are permitted to transport passengers and freight along the coast, rivers, or lakes. However, foreign merchant vessels may undertake these activities in the case of cargo volumes exceeding 900 tons.
- **Insurances and Reinsurances:** These businesses can only be developed in Chile by national corporations.

2. Foreign investment

Chapter XIV of the Central Bank's Compendium of Foreign Exchange Regulations regulates the entry of foreign capital into Chile. All operations involving loans, deposits, investments, or capital contributions for over US\$10,000.-, or its equivalent in other currencies, are subject to this mechanism. Any of these operations must be done through a formal foreign exchange market, such as banks and currency exchange offices authorized by the Central Bank. This

administrative system operates through commercial banks or entities, which reports the entry of the capital directly to the Central Bank. Any other operation which involves the entry of foreign currency must be reported directly to the Central Bank by the investor or by the recipient of the investment.

3. Any restrictions on remitting funds out of the jurisdictions (withholdings, etc.)

Remittances of profits abroad are subject to a 35% tax, whether in countries with or without an Agreement to Avoid Double Taxation with Chile. If the remittance is subject to Withholding Tax, the company paying the tax may charge, as a credit, the Corporate Tax paid, against the Withholding Tax. The amount of the credit will be equivalent to 100% or 65%, depending on its nature, and the country of residence of the receptor. Chilean tax regime has been subject to successive reforms and numerous administrative regulations over the law are still pending to be issued. Therefore, tax advice must be sought on a case-to-case basis.