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NEW REQUIREMENTS APPLICABLE TO ARGENTINE BRANCHES OF FOREIGN COMPANIES AND FOREIGN SHAREHOLDERS/PARTNERS OF ARGENTINE ENTITIES

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I. INTRODUCTION: STARTING UP A BUSINESS IN ARGENTINA—PRINCIPAL LEGAL STRUCTURES

IN general terms, an investor company may choose between two different business structures when starting up a new business in Argentina: 1) To register a branch of a foreign company (*Sucursal de Sociedad Extranjera*) with the Commercial Companies Registry (*Insepección General de Justicia* [IGJ]), according to article 118, third paragraph of the Commercial Companies Law (CCL) No. 19.550;¹ or 2) To incorporate a local subsidiary or acquire shares/quotas of a local company already in operation.² In this regard, it is important to state that every foreign shareholder/partner of a local company shall be registered with the IGJ according to article 123 of the CCL.³

This article will briefly discuss the new additional requirements imposed by General Resolution 7/2005 for foreign companies registered or to be registered either as a branch according to article 118 third paragraph of the CCL, or as a foreign shareholder/partner of a local company

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1. Ley de Sociedades Comerciales No. 19.550 art. 118 (Arg.) [hereinafter CCL].

2. The most common types of local subsidiaries are the *Sociedad Anónima* (SA) and the *Sociedad de Responsabilidad Limitada* (SRL).

3. CCL at art. 123.

according to article 123 of the CCL.⁴

Additionally, this article will briefly discuss the rules established by the resolution for those foreign companies that have not been registered under Argentine laws jurisdiction, which may exceptionally perform “isolated acts” according to article 118 second paragraph of the CCL.⁵

II. RESOLUTION 7/2005 OF THE IGJ: NEW REQUIREMENTS FOR ARGENTINE BRANCHES OF FOREIGN COMPANIES (ARTICLE 118 THIRD PARAGRAPH OF THE CCL) AND FOREIGN SHAREHOLDERS/PARTNERS OF LOCAL ENTITIES (ARTICLE 123 OF THE CCL)

Generally speaking, it can be asserted that the new requirements established by General Resolution 7/2005 for foreign companies registered or to be registered as an Argentine branch according to article 118 third paragraph of the CCL, or as a foreign shareholder/partner of local entities according to article 123 of the CCL, are based on what the IGJ understands as an abuse in the use and registration of foreign entities that should have been registered as local entities. In this regard, the purpose of these new requirements is to distinguish companies that operate abroad and are determined to legally invest/operate within the Republic of Argentina, from companies or investors that, covered behind the structure of a foreign entity, attempt to avoid the application of the Argentine Law.

According to the aforementioned, the new requirements stated by Resolution 7/2005 for foreign companies may be summarized as follows.

A. ACTIVITIES, BRANCHES, AND/OR NON-CURRENT ASSETS LOCATED OUTSIDE THE REPUBLIC OF ARGENTINA

In general terms, according to article 188, subsection 3, foreign companies registered or to be registered with the IGJ as a branch according to article 118 third paragraph of the CCL or as a foreign shareholder/partner or a local company according to article 123 of the CCL, need to provide evidence with the IGJ through certain documents (i.e. financial statements), that such companies basically own non-current assets of substantial value and/or develop activities and/or count with branches, all

4. General Resolution 7/2005 has been enacted by the IGJ and is in force since February 21, 2006 through General Resolution 1/2006. Before the enactment of Resolution 7/2005, and although the IGJ had started to require stricter requirements for the registration of foreign companies since the year 2003, the following were basically the only existing requirements in order to apply for the registration of a foreign company according to articles 118 third paragraph or 123 of the CCL: 1) Articles of Incorporation of the company; 2) Bylaws of the company and its modifications; 3) Certificate of good standing; 4) Board of Directors' Resolution in which the company decides to register its bylaws according to article 118 third paragraph or 123 of the CCL, appoints at least one legal representative residing in Argentina, and establishes a legal domicile in the city of Buenos Aires, Argentina; and 5) Financial statements (applicable only to branches).

5. CCL at art. 118.

located/established outside the Republic of Argentina.⁶ Considering the aforementioned, the purpose of this requirement is to show the IGJ that the company is not a company with activities only in Argentina, but a foreign company with activities/fixed assets located in both Argentina and overseas.

B. IDENTIFICATION OF THE SHAREHOLDERS/PARTNERS OF THE FOREIGN COMPANY

This requirement regulated by article 188, subsection 3(c) of Resolution 7/2005 pursues through certain information required by the IGJ, the disclosure of the shareholders/partners of the foreign company registered or to be registered with the IGJ and their percentage of ownership in such foreign company.⁷ It is important to state that this requirement does not apply to such foreign companies that have publicly traded shares.⁸

C. NON-REGISTRATIONS OF OFFSHORE COMPANIES

The IGJ establishes that foreign companies registered or to be registered with the IGJ should not have any legal or statutory restrictions to operate in its place of incorporation. If such is the case, the company will not be able to obtain or maintain the registration as a foreign company, but only as a local Argentine entity.

On the other hand, additional and stricter requirements are imposed by article 192 of Resolution 7/2005 if the company is set up in a low tax jurisdiction as defined by our income tax law or in a non-fighter country against money laundering as defined by the Argentine Central Bank.⁹

D. MINIMUM CAPITAL DISTRIBUTION (ONLY APPLICABLE TO SUBSIDIARIES)

The CCL requires that local corporations (Sociedad Anónima [SA]) or Limited Liability Companies (Sociedad de Responsabilidad Limitada [SRL]) be owned by at least two shareholders.¹⁰ Such shareholders can be either local or foreign entities or individuals, or one local and the other one foreign. Although the CCL does not establish a limit for the capital distribution between the two shareholders/partners, articles 55 and 227 of Resolution 7/2005 now requires that the ownership interest of the minimum shareholder/partner in the capital of the local company be substantial and not merely formal.¹¹ Furthermore, the resolution does not define the meaning of substantial or not merely formal participation, but the IGJ has recently approved many registrations of foreign shareholders (article 123 of the CCL) of local subsidiaries where the capital

6. General Resolution No. 7/2005 art. 188 subsec. 3 (Arg.).

7. *Id.* at art. 188 subsec. 3(c).

8. *Id.* at art. 188.

9. *Id.* at art. 192.

10. CCL at art. 1.

11. General Resolution No. 7/2005 arts. 55 & 227.

distribution between the two shareholders were 95 percent and 5 percent, respectively.¹²

E. EXEMPTIONS—VEHICLE COMPANIES—RECOGNIZED AND NOTORIOUS COMPANIES

According to article 190 of Resolution 7/2005, foreign companies that are able to prove to the IGJ that they are directly or indirectly controlled by another company that meets the requirements described in (a), (b), and (c) of this article, are exempted from complying with such requirements.¹³ This exemption is provided for the so-called vehicles companies, or in other words, those companies that were created with the sole purpose of being an investment vehicle of another company. In order to obtain the exemption, the so-called vehicle companies shall file to the IGJ an affidavit stating that it was established with the sole purpose of being an investment vehicle. Additionally, the vehicle company shall effectively prove the indirect or direct relationship with its parent company describing the corporate organization chart, and showing that the controlling entity does meet the requirements exempted to the vehicle company.

Finally, the IGJ may exceptionally exempt the compliance of the requirements described in (a), (b), and (c) of this article when it is notoriously known that the company to be registered, or the corporate group it belongs to, develops effective and substantial business activities abroad and that its principal place of business is located overseas.

F. NON-REGISTERED FOREIGN COMPANIES—ISOLATED ACTS

According to article 118 second paragraph of the CCL, foreign companies may perform what are called “isolated acts.”¹⁴ In this regard, those foreign companies that do not perform permanent business in Argentina are allowed to incidentally participate in some specific and exceptional business without the need of being registered in the country.

Accordingly, taking into account that this approach has brought many abuses from companies that permanently disguise business acts as isolated acts, the IGJ has established specific rules in order to determine whether a company is truly executing an isolated act or is simply doing permanent business in the country covered under this legal frame.

Therefore, according to article 229 of Resolution 7/2005, the IGJ keeps a record of isolated acts that it gathers information from Public Records such as the Registry of Real Property or the National Registry of Motor Vehicles, among others registers of property rights—related to the celebration of one or more acts where foreign companies have participated in creating, acquiring, transmitting, or canceling property rights and have been unilaterally or conventionally classified, by themselves, as isolated

12. CCL at art. 123.

13. General Resolution No. 7/2005 art. 190.

14. CCL at art. 118.

acts.¹⁵

The IGJ has the authority to request any information related to the act, particularly if applicable, to the person who acted as the legal representative of the company, to the public notary involved in the act, to the sellers of the assets, to the debtors of a mortgage, to the Tax Bureau, to the occupants of the real estate, to the assignor of rights, etc. It may also, by itself or in coordination with other state agencies, organize inspections on the assets involved in order to investigate their destination and conditions under which they are economically exploited.¹⁶

After analyzing and comparing such information with previous records, the IGJ determines whether or not such act may be considered as an isolated act. The IGJ considers all the information involved, but especially the information related to: 1) the economic importance of the act; 2) the destination and use of the assets involved; 3) the period of time passed since the acquisition or creation of the rights on the pertaining assets; 4) the domicile of the company (whether it is located off shore, in a low tax jurisdiction, or in a jurisdiction not cooperating against money laundering); 5) the reiteration of several acts, even when they were celebrated in a unique opportunity and have the same nature; and 6) the current and past circumstances related to the relationship between the legal representative who took part in the act and the company, its partners, or other persons related to them.¹⁷

If the IGJ decides that the company should be registered under the legal framework established by article 118 paragraph third of the CCL or article 124 of the CCL, it may demand that the company register. In case the company does not fulfill the registration requirement, the IGJ may judicially request the ineffectiveness of the company's legal personality related to the acts performed by such company.

15. General Resolution No. 7/2005 art. 229.

16. *Id.* at art. 230.

17. *Id.* at art. 231.

