Company status — Argentina

A tough choice for foreigners

By Laurence P Wiener *
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One of the first questions I get asked when a representative of a foreign company comes to do business in Argentina is "What type of business association is best?".

For reasons discussed below, my answer is often less than absolute. Most of the time, for a foreign business seeking to expand to Argentina, determining the entity type depends primarily on what the tax advisers say. The reference to tax "advisers" in plural is not unintentional. Most of the time, tax consequences of a business form, particularly the treatment of income, need to be harmonized between the home country and the country of operations. But enough on taxes (which is not the subject of this article) and on to legal criteria.

The principle ways a foreign corporation may carry out business in Argentina are either as an Argentine branch or as a limited liability company. (There are other limited liability forms but they are unlikely, for various reasons, to appeal to a foreign business.) The limited liability company takes the form of either a stock corporation (*sociedad anónima*) or as a limited partnership (*sociedad de responsabilidad limitada*).

Foreign Company Branch

The Argentine Corporations Code recognizes the branch as a means to conduct business. Though required to maintain commercial bank accounts in its own name and to hire personnel on its own authority, the branch is considered under Argentine law as indistinct from its parent. As a result, the parent remains responsible for all of the branch's obligations.

Foreign companies establishing a branch are required to register with the Inspección General de Justicia (the Public Registry of Commerce or "IGJ") or, if domiciled in a province of Argentina, with the respective Registro Público de Comercio.

In either case, the filing requirements are substantially the same.

In the interest of brevity, references to the IGJ include the provincial registry.

The documents filed with the IGJ consist mainly of the charter documents, certificate of good standing, and the financial statements of the parent, as well as evidence (e.g. a board resolution) of the decision to establish the branch. Each of these documents needs to be legalized by the appropriate Argentine consulate located in the home country, which may be time consuming. Fortunately, an alternative and generally more expedient procedure is to have an "apostille" affixed to the document. (An "apostille" is a certification of authenticity issued by the governmental authority of the home country pursuant to the Hague Convention of 1961).

The Limited Liability Company

To form a *sociedad anónima* or "*SA*", Argentine law requires a minimum of two shareholders and minimum capital of 12,000 pesos, 25 percent of which must be paid-in upon incorporation of the *SA* and the remainder of which must be paid-in within two years of such date.

Like the *SA*, a *sociedad de responsabilidad limitada* or "*SRL*" must have a minimum of two interest holders. But while an *SA* may have an unlimited number of shareholders, the number of interest holders of an *SRL* cannot exceed 50. This limitation may discourage shareholders desiring to take their company public.

Choosing Between a Branch and a Limited Liability Company

The decision to form a limited liability company, instead of the branch, generally reflects the desire of the foreign shareholder to limit its exposure to liability for the acts of the Argentine company. As with a US corporation, an *SA*, absent abuse by its shareholders, limits liability to the extent of the shareholders' investment. Similarly, the *SRL* limits the liability of each interest holder to the holder's investment, plus joint and several liability to third parties to the extent of any unpaid interests subscribed for by other interest holders. Because the branch is not legally separate from its parent, the foreign parent remains liable to the branch's creditors.

Nonetheless, the foreign parent may be organized as a limited liability company, thus shielding any superior shareholders from liability.

Despite the absence of limited liability, the branch's indistinctness from its foreign parent may be beneficial commercially. Banks may be more likely to lend to a branch knowing that the parent is the underlying credit risk. For similar reasons, the public may be more inclined to do business with the branch, rather than the insulated limited liability company. As a result, despite its unlimited liability for the foreign investor, the branch remains a popular business form.

Other considerations governing the choice of a business form usually center on the ability to transfer funds out of Argentina to the home country, the ease of governance, and regulatory oversight. Let us look at each of these issues.

As to the transfer of funds abroad or, as it's frequently referred to, "repatriation of profits," Argentina imposes no restrictions, regardless of the business form. Still, restrictions of the foreign parent's or shareholder's country of origin, if any, may apply.

When it comes to governance, the branch offers a particularly attractive means of operation. A single representative officer chosen by the foreign parent and appointed pursuant to a power of attorney may manage the branch. Branches are not required to maintain a board of directors (required for the *SA*) or a manager (required for the *SRL*). The parent determines the level of autonomy for the branch. When a foreign company is making a tentative foray into the Argentine market and does not wish to commit a large administrative structure, the branch representative is often an attractive alternative.

To resolve one foreign company's concern of delegating too much power too soon to the local operation a member of my firm served as branch representative acting on the written instructions of the parent's authorized officer.

The administration of an *SA* is substantially similar to that of a US corporation. The board of directors makes strategic decisions, while the executive officers operate the company on a daily basis. Principal corporate matters are voted on at shareholders' meetings. A notable difference from US law, however, is that Argentine law requires shareholders of an Argentine corporation to appoint one or more statutory auditors to represent the shareholders' interests. These auditors or "syndics" are responsible for overseeing the company's compliance with applicable law and the financial reporting requirements. Small-capital and non-public corporations are exempt from appointing a syndic.

Under Argentine law, an *SA*'s shareholders must nominate and elect at least one director. While Argentine law freely allows foreign persons to participate in an *SA*, a majority of its directors must have their actual domicile in Argentina and all directors must have a "legal" domicile in Argentina (i.e., an address maintained for service of process). This requirement has frequently discouraged foreign investors from forming an *SA*.

In lieu of a board of directors, one or more managers, each of whom are appointed by the interest holders, control the policies of the SRL. The interest holders may appoint more than one manager and alternate managers to serve in the event of vacancies. If more than one manager, each manager may act as officers, discharging specific functions, including binding the SRL, unless the company's charter documents specify to the contrary. The manager may, but need not, be an interest holder. The *SRL* is required to have a syndic only if its paid-in capital exceeds 2.1 million pesos.

If all other considerations are neutral, often the degree of regulatory oversight may control a foreign investor's decision on business form. The foreign branch has few reporting requirements, generally limited to providing the IGJ on an annual basis with the financial statements of the parent. The *SA*, however, is subject to periodic review and inspection if, for example, it has publicly offered its stocks or bonds or exceeds the small-capitalization threshold of 2.1 million pesos. Corporations not subject to periodic review, nonetheless, must submit their articles of incorporation, bylaws and any capital increases to the review of the IGJ.

Conclusion

While other considerations (e.g., transferability of interests, funding) may also bear on the decision of how to operate in Argentina, the factors discussed above provide the most common basis for decision. But remember, whatever your legal considerations, talk to your tax advisers!

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