Chile

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION AND LEGAL LANDSCAPE

With more than forty years of market- and foreigner-friendly policies, Chile is seen as one of the most competitive markets in the Latin American region. With efficient governance, robust institutions and low corruption levels, Chile has positioned itself as a leader in the region in several international competitive and business rankings.

Chile is currently undergoing a historic process, debating a new constitution and facing central questions about governance and economic models. As in the rest of the world, Covid-19 has been a challenge to M&A transactions, due to the market downturn, uncertainty, and lockdowns and closing of borders. However, a positive consequence of the pandemic has been that it has sped up the digitalisation processes that had begun at the beginning of the 21st century, facilitating digital signature processes and avoiding excessive paperwork in M&A transactions.

As a general rule, private M&A is governed by the principles of autonomy and free will. Therefore, commercial transactions can be performed by private parties without the intervention of any authorities whatsoever.

However, corporate mergers and acquisitions of private stock corporations are governed in Chile by Law No. 18,046 (*Ley de Sociedades Anónimas* or the Chilean Corporations Act) and its regulation (*Reglamento de Sociedades Anónimas* or the Regulation), which contain the main rules and principles applicable to these transactions – particularly regarding the incorporation, governance and transfer of shares, and by the Chilean Commercial Code. The Chilean Corporations Act was enacted in 1981 and has been amended and complemented several times thereafter.

Common law jurisdictions and practice, particularly the United States, have a strong influence in Chilean commercial practice. As a result, certain processes and institutions, such as due diligence, shareholders agreement and letters of intent, among others, are very similar to those found in common law countries.

Finally, there are two mechanisms regulating foreign investment in Chile and the repatriation of the latter and its profits. These mechanisms are: (1) Chapter XIV of the Compendium of Foreign Exchange Regulations of the Chilean Central Bank of Chile, which offers a quick and relatively free-from-public-authority-intervention system for inflow of foreign currency into the country; and (2) Law No. 20,848, which establishes a framework for direct foreign investment in Chile and grants certain rights.

2. TYPE OF TRANSACTION STRUCTURES ADOPTED IN PRIVATE M&A TRANSACTIONS[1]

2.1 Merger

2.1.1 Framework

From a corporate point of view, mergers of corporations are regulated in articles 99 and 100 of the Chilean Corporations Act and in the ninth title of the Regulation. According to the Chilean Corporations Act, a merger is the joining of two or more companies into one company, which

[1] For the purposes of this document, we will mainly focus on regulations and procedures applicable to corporations in Chile, which is the most detailed regulated type of entity. However, we will also note thedifferences applicable to certain other type of entities, as required.

succeeds the predecessors in all rights and obligations, and in which all of the rights and liabilities along with the shareholders of the merged entities are incorporated.

2.1.2 Type of mergers

(a) Creation merger (*fusión por creación*): A merger by creation exists when the assets and liabilities of two or more corporations (that are dissolved) are contributed to a completely new company that is incorporated.
(b) Absorption merger (*fusión por incorporación*): A merger by incorporation exists when one or more of the companies being dissolved are absorbed by an existing company, which acquires all assets and debts thereof.

2.1.3 No liquidation

In these cases, there will be no liquidation of the merged or absorbed companies.

2.1.4 Successor

The absorbing company becomes the legal successor of the absorbed company by the mere operation of law, with respect to its assets as well as its liabilities. Accordingly, the absorbing company will become the owner of all the tangible and intangible assets and real estate, rights and obligations of the absorbed company.

2.1.5 Appraisal rights

Minority shareholders who expressly oppose the merger resolution adopted through a shareholders meeting are entitled to exercise appraisal rights. In this case, the dissenting shareholder's shares must be bought by the company at book value for closed corporations, and at market value for listed corporations.

2.1.6 No squeeze-out

As a general rule, unless expressly consenting thereto, no shareholder may lose its condition as a shareholder as a result of an exchange of shares of stock, a merger, an incorporation, or a transformation or split of a corporation. However, the bylaws of a publicly traded corporation may contain a provision to allow a squeeze-out if a shareholder reaches 95 per cent ownership within a tender offer process, in which at least 15 per cent of non-related parties have sold shares to the controlling shareholder. Price to be paid must be the same as in the tender offer.

2.1.7 Contractual effects

As a general rule, the absorbing company will be the new party to the contracts executed by the dissolving entity, with no need for any formality. In any case, the provisions of each contract will prevail: specific formalities may be stated in this regard, such as, for example, notifying the other party, or the change may be an event of termination of the contract, among others.
Finally, contracts that are *intuito personae*, which are those made by reason of the party who is contracting, would be terminated unless the consent of the other party is secured to continue in the contract with the absorbing company.

2.1.8 Labour contracts entered into by the absorbed entity

In connection with labour issues, there is a specific rule in this regard in Article four, second subparagraph, of the Labor Code, which provides:

> '(...) Total or partial changes in ownership, possession or mere holding of a company shall not alter the rights and obligations of the workers under their individual contracts or collective employment instruments, which shall remain in effect and continue with the new employer or employers.'

2.1.9 Advantages

Mergers may reduce the number of competitors in the market and give the surviving entity increased market share. Mergers also enable the target to restructure and strengthen its organisation as companies involved in the transaction share strategise to strengthen the organisation, thus eliminating weaknesses in the target.

From a legal perspective, the assets and liabilities are transferred by the mere operation of law as a consequence of one legal action (the merger approval by the shareholders and its further legalisation according to corporate regulation requirements).

2.1.10 Disadvantages

The surviving entity assumes all the liabilities, including tax liabilities (and all potential contingencies), of the absorbed entity. It is difficult to exclude assets or liabilities.

Obtaining the necessary votes of the shareholders of the involved companies may be time-consuming and difficult. The possibility of dissenting shareholders exercising withdrawal rights must be considered from a financial point of view. Furthermore, the cooperation of the target company's existing management is a necessity for a merger. This cooperation may not be easily or inexpensively obtained.

2.2 Share purchase

The share purchase alternative consists of the purchase of shares directly from the shareholders or as a consequence of a capital increase. This is generally used in the acquisition of private companies or wholly owned subsidiaries.

It is important to note that restrictions to share transfers are allowed under Chilean law if complying with certain requirements. These restrictions can be established in the corporation's bylaws or agreed to in a shareholders' agreement, which must be registered in the company's shareholders' registry. Liens and encumbrances constituted over the shares do not necessarily prohibit their transfer, but the buyer will acquire the shares with the corresponding encumbrances. Regarding the contractual effects and the labour contracts entered into by the target entity, Section A (vii) and Section (viii) above apply.

Share purchases can also be made through capital increases by subscription of new shares by the buyer. In this case, the existing shareholders need to approve the capital increase by a regular quorum of more than 50 per cent of the attending shares (in the case of publicly traded corporations) or more than 50 per cent of the outstanding shares (in the case of closely held corporations), unless otherwise provided in the bylaws. Since any capital increase will give existing shareholders pre-emptive rights, it will be necessary for existing shareholders to waive or assign their pre-emptive rights; the waiver must take place at the same shareholders' meeting approving the capital increase.

2.2.1 Advantages

Performing the acquisition through a share purchase is easy to close because the buyer does not need to retitle assets. A capital increase also allows the target to receive fresh funds and to apply them to new projects or expand/improve existing operations. Both the share purchase and the capital increase are relatively simple transactions in terms of documentation.

2.2.2 Disadvantages

In the case of companies owned by a large number of shareholders, there will be high transaction costs in order to negotiate the terms and conditions of the purchase with each shareholder. Sometimes it can be difficult to acquire 100 per cent of the stock capital. Another disadvantage is that the buyer acquires all debts and liabilities of the target.

2.3 Asset acquisition

The asset acquisition consists of a direct purchase of assets owned by the target. This option is used in Chile in the acquisition of private companies and in bankruptcy reorganisations. The buyer acquires specific assets and buyer's liability will be limited to those assets.

As part of due diligence, it is important to investigate each asset's corresponding liabilities, if any. Generally, there are no liabilities associated with the purchase of assets unless the assets are subject to encumbrances or special conditions. Incidentally, imported assets may be subject to deferred customs payments, which may affect their saleable condition.

2.3.1 Withdrawal rights

Minority shareholders who expressly opposed the company's resolution adopted through a shareholders' meeting (which is required (1) if more than 50 per cent of the company's assets are being disposed of, whether including liabilities or not; (2) if more than 50 per cent of a company's subsidiary's assets are disposed of, if such subsidiary represents at least 20 per cent of the assets of the company; or (3) if by means of a transaction the company loses its capacity as controller of its subsidiary) are entitled to exercise withdrawal rights. In this case, the dissenting shareholders' shares must be bought by the company at book value for closely held corporations and at market value for publicly traded corporations.

2.3.2 Advantage

The buyer may choose what assets to buy, and the buyer's liability will be limited to the assets it acquires (therefore, it can exclude liabilities other than those applicable to the acquired assets).

2.3.3 Disadvantage

Requires assets to be retitled and liabilities to be assumed.

3. PRE-AGREEMENT DOCUMENTATION

3.1 Letter of intent/memorandum of understanding

3.1.1 Content

Even though these agreements are not specifically regulated under Chilean law, it is very common to start the negotiation of an acquisition of a private company with the execution of a letter of intent (*carta de intención*) or a memorandum of understanding (*memorándum de entendimiento* or MOU). The letter of intent is a unilateral declaration from one party who expresses its intent to begin a negotiation and potentially conclude a transaction, and requests the other party to accept it. The MOU is a bilateral agreement drafted and executed by both parties.

Even though no specific content is required to be included in these agreements, customarily there are certain clauses and provisions that are generally included therein. The parties include a description of the purpose of the negotiation and of the intended transaction. Usually, due to the information exchanged among the parties and to prevent parallel negotiations, confidentiality and exclusivity clauses are included, as well as the timeframe for due diligence to be conducted and certain special conditions of the due diligence process. Non-binding clauses are included to expressly establish that none of the parties are obliged to enter into the final agreement.

3.1.2 Binding nature

These documents are not binding for the parties under Chilean law, in the sense that none of these pre-agreements can obligate the parties to enter into a definite agreement unless expressly provided on them. Notwithstanding, the party who, in an arbitrary and unjustified manner, refuses to enter into the final agreement may be obliged to indemnify the other party for damages caused by its refusal. The foregoing arises from the principle of good faith, which prevails in Chilean law, and which means that parties must exhibit honest and loyal conduct, even while negotiating a contract.

Although pre-contractual liability is not expressly regulated in Chile, the doctrine has established some principles that govern the breakdown of negotiations between parties and the damages caused by the refusal of one of them to enter into an agreement. Given that the general rule in Chile is that parties are free to enter into agreements and to freely negotiate their terms and conditions, pre-contractual liability is exceptional, and its application very limited. According to Chilean doctrine, the requirements for pre-contractual liability are the following:

(a) Mutual agreement among the parties to enter into negotiations with the aim to execute a contract.
(b) Arbitrary and unjustified refusal of one of the parties to enter into an agreement, acting with fraud or negligence.
(c) Damages caused to the other party as a direct consequence of such refusal.

The non-complying party which abandoned the negotiations cannot be compelled to enter into the agreement but can be obliged to indemnify the other party for costs incurred during the negotiation period. Loss of profits is not indemnified.

It is important to note that, although Chilean courts have accepted the application of pre-contractual liability, they have never required anyone to pay damages arising from this type of liability system. This is due to the difficulty of proving that the interruption of negotiations, or refusal to enter into an agreement, was unjustified, negligent or fraudulent.

In the context of an M&A transaction, the letter of intent or the MOU can serve as evidence in the event of abandonment of the negotiation by one of the parties, which may reveal the real intention of the parties to conclude the negotiations. In addition, the extent of the terms and conditions of the MOU may help to determine the effective damages caused by the interruption of the negotiation.

3.1.3 Advantages and disadvantages

There are several advantages in executing a letter of intent or an MOU at the beginning of a negotiation for an M&A transaction. First, these documents limit the risks associated with an open negotiation. In a sense, they bind the parties to a certain course of negotiation and limit the room for negotiation of the broad terms of the transaction.

Also, as stated above, they may serve for evidence purposes in case one of the parties unjustifiably abandons the negotiations causing damages to the party, which may have been acting under a reasonable expectation that the agreement would be executed.

In addition, these documents provide seriousness to the negotiation. For example, parties may obtain financing for the transaction if they have an executed document evidencing the said transaction.

It is important to be very careful in drafting these documents in order to reflect the real intention and purpose of the parties: to enter into a negotiation stage to potentially, if certain conditions are met, enter into a final transaction. In fact, if the parties fully determine the terms, conditions and details of the intended transaction and they express a certain intention to enter into a final agreement, the document will probably be construed as binding among the parties; the one who refuses to enter into the final agreement will probably be liable for damages. On the other hand, if the intention of the parties is not to be obligated, they should include a non-binding clause and describe the conditions of the transaction in general terms so as only to set up the rules for the negotiation and be free not to pursue the transaction if they wish.

3.2 Lock-up (or voting) agreements with major shareholders

The execution of lock-up or voting agreements depends on the circumstances of the transaction. Neither lock-up nor voting agreements are expressly regulated under Chilean law, but they are accepted and commonly executed among the shareholders of the target company. They are usually included as clauses in the letter of intent or the MOU. It is important to note that the breach of a lock-up or voting agreement by a shareholder does not make the transfer or the vote null or invalid. The breaching party will be liable for damages caused to the other parties. For these purposes it is highly recommended to establish a penalty in the case of breach of the agreement.

4. DILIGENCE STAGE

The due diligence stage is typically the first and most important process when acquiring or merging a company. Due diligence is conducted to:

(a) identify issues that can arise at the different phases of the acquisition or merger process;
(b) detect potential synergies; and
(c) obtain information to determine the value of the target.

This stage consists, among others, in uncovering all liabilities associated with the purchase, identifying possible contingencies, obtaining proof of the target's assets and looking, in detail, into the target's business.

It is a general and common practice in Chile that the buyer conducts a due diligence review of the target. It involves mainly legal, business, tax and financial due diligence. For that purpose, it is a common practice in Chile that the parties execute a confidentiality agreement that outlines the confidential material, knowledge or information that the parties wish to share amongst themselves for the purpose of due diligence and the negotiation of the proposed transaction. Usually, the confidentiality agreement is executed together with the letter of intent or MOU in which, among others, the parties agree on the length of time they have to conduct due diligence, as well as other conditions of the due diligence process. The due diligence process usually starts upon the execution of the mentioned documents. At this stage, it is common to agree on a term sheet that describes the contents and basic agreements to be included in the different documents that will be executed at closing, if reaching to such stage.

For the purposes of due diligence, and usually based on a checklist provided by the buyer, the seller will establish a data room containing physical documentation, or a virtual data room (internet platform, which is the most common manner used nowadays) to which the buyer will have access during a certain timeframe to conduct due diligence. Exceptionally, certain highly confidential documents may be available only for physical review (upon the obtention of the required waivers from the parties therein) and no copies of such document would be allowed.

The business and financial due diligence includes:

(a) due diligence sessions with key members of management (management presentations);
(b) facility visits at the target entity;
(c) preparation and review of forecasts; 'sensitivity' analysis;
(d) discussions with key customers, suppliers, creditors;
(e) review of industry information and disclosure regarding comparable companies;
(f) meetings with accountants;
(g) third-party reports (sometimes expertise); and
(h) reputation, ESG and PR analysis.

Usually, lawyers participate in most of these activities and thereby gain an excellent and often interesting overall understanding of the target, the industry and the economic reasons for the transaction. The legal due diligence review usually involves:

(a) Review of the target's main aspects, such as:
    (i) corporate matters (bylaws, corporate books, representatives, liens on the shares, shareholders' agreements, voting agreements, organisational charts, internal regulations, etc);
    (ii) business arrangements (partnerships, joint ventures, consortia or other associations, purchase contracts, guarantees, undertakings, indemnities, loans, borrowings and other facilities, collaterals, material agreements, agreements with major suppliers, related-party agreements, etc);

(iii) financial information (financial statements, auditors' reports, internal memoranda and annual reports, correspondence with the auditors, business plan or budget, etc);

(iv) real estate (title to the properties, registration of ownership in the Property Registry, certificate of mortgages, encumbrances, interdiction and litigations, Treasury Service certification, certificate of use of soil or zoning, easements, leases, etc);

(v) other assets (plant, machinery and material equipment, pledges, encumbrances or prohibitions, etc);

(vi) labour and social security matters (employees' labour agreements, collective bargaining agreements, employee benefit plans, deferred compensation and similar agreements, employment, consulting and third-party providers, severance, change of control, transaction-related bonuses, retention and termination agreements, arrangements or policies with current and former employees, strikes or labour dispute, etc);

(vii) intellectual property (intellectual property rights, patent, trademarks, registered designs, utility models, industrial property's ownership certificates issued by the National Institute of Intellectual Property, claims, etc);

(viii) IT/data protection (computer systems and software, ownership of rights, agreements to use and operate, data use and protection, etc);

(ix) permits (governmental and other authorities' licences, consents, permits, approvals and permissions to carry out its business, etc);

(x) insurance matters (insurance policies, payments of premium certificates, claims, etc);

(xi) litigation matters (pending or threatened disputes, litigation, regulatory disputes, investigations before administrative bodies, settled disputes, etc);

(xii) environmental matters (environmental permits issued by any environmental agency, permits, notices of violation or non-compliance from any environmental agency, all material reports under environmental statutes or rules, etc);

(xiii) compliance (documents relating to the target's compliance programs or Crime Prevention Models, criminal or internal investigations related to the target or its shareholders, executives or employees, etc); and

(xiv) water rights (General Direction for Water Resources' resolutions, ownership registration, certificate of ownership, mortgages, encumbrances, prohibitions and interdictions and litigation, registration in the Public Water Cadastre, etc).

(b) Discussions with informed third parties and other sources about the legal affairs of the target.

In analysing the documentation it is important to look for:

(c) Potential impediments to the transaction – ie, aspects of the transaction which infringes or conflicts with a third party's rights or covenants, industry regulations or other limitations. For example:

(i) Financing documents may have covenants limiting debt incurrence/investments/mergers/asset sales etc, and change of control covenants or defaults.

(ii) Contracts and joint venture agreements may have change of control restrictions and limitations on assignability or transfer of interests.[2] Additionally, the

[2] Generally speaking, a sale of shares in a company implicates change of control provisions in its contracts (or those of its owners) while an asset acquisition implicates 'no assignment' provisions.

Chilean Corporations Act requires shareholder approval with a high quorum (at least two-thirds of issued shares) to approve the sale of assets representing more than 50 per cent of the total assets of the target.

(iii) Agreements with or among a target's shareholders (or holders of warrants/options to acquire the target's stock) who may have pre-emptive rights or rights of first refusal (or first offer) that apply when the target issues more shares or when shareholders transfer shares, or tag along/drag along rights that apply when key shareholders of the target wish to transfer shares.

(iv) Antitrust regulations or resolutions by official bodies.

(d) Contingent obligations – looking for pending and threatened legal proceedings, such as:

(i) financing arrangements that may have principal repayment requirements;

(ii) partnership and joint venture agreements that may have 'capital calls' (an obligation of the target to make further investments either at a date certain or upon the occurrence of a contingency) or 'puts' (the right of the target's partner to require the target to buy its interest); or

(iii) project finance arrangements that may have completion guarantees or other obligations, which are 'off balance sheet' (not recorded as a liability) but which could lead to substantial expenditures if things do not go as planned.

(e) Risks to future financial performance or competitive position, and limitations on operational or financial flexibility. For example, customer and supply contracts may expire or have early termination provisions.

The due diligence process ends with the draft of a due diligence report by the buyer, in which the main issues, contingencies, and risks of the target are explained and assessed, generally categorising the risks found and including potential mitigation alternatives. This is a key document on which usually the representation and warranties and the schedules of the purchase contract are based on.

The due diligence process may vary upon the type of transaction proposed. For instance, a merger or share purchase will require more in-depth and exhaustive due diligence than an asset acquisition which will be limited to the assets to be acquired.

5. ACQUISITION AGREEMENT

As a general rule, the acquisition agreement contains a series of common clauses that are intended to set the structure and principal rights and obligations of the parties regarding the acquisition or merger of a company. Clauses vary depending on the type of company and transaction agreed.

It is common to include an obligation to execute specific ancillary agreements. For example, in an asset purchase, certain assets will be subject to specific agreements according to Chilean law, such as vehicle transfer agreements and trademark transfer agreements.

If the target is to be acquired by a share purchase agreement, certain corporate authorisations will be required, such as shareholders' meetings, or share transfer forms to be filled, etc. Shareholders' agreements will be executed upon the execution of share purchase or merger agreements. The shareholders' agreements will evidence the mutual agreements agreed between new and old shareholders, if any, and generally will establish procedures for the sale of shares, rights of first refusal, put and call options, capital increases and other relevant corporate issues.

It is important to bear in mind that parties may wish to amend the target's bylaws to evidence the new stock structure or the agreements between the shareholders. Nevertheless, it is not recommended to amend the bylaws if the normal course of the business or the target's purpose is affected.

5.1 Holdback and escrows

Depending on the type of acquisition, the parties may agree to hold in escrow part of the purchase price. Usually, funds will be released upon fulfilment of certain conditions – ie, execution of ancillary agreements evidencing the share acquisition or merger, completion of financial milestones, or conditions on closing, etc. Also, parties will instruct the escrow bank to release the funds upon performance of conditions or the expiration of a certain term.

Also, regarding indemnification of damages, buyer may request that the seller hold in escrow, for a limited term, part of the purchase price to provide security in the event that the seller must hold the buyer harmless due to breach of certain obligations imposed in the agreement.

5.2 Representations and warranties

Representations and warranties included in acquisition or merger agreements in Chile do not differ from what is typically included in most other countries' agreements. Usually, acquisition agreements contain an extensive list of representations and warranties made by the seller and a shorter one by the buyer, typically regarding its corporate structure and duly and valid existence, power of authority and capacity. Parties are responsible for the truth and exactitude of the said representations and shall be liable in this respect.

Below is a list of the most common representations and warranties found in an acquisition agreement in Chile.

5.2.1 Target's organisation and capacity

The seller usually represents and warrants to the buyer that the target is, as the case may be and depending on the type of company: duly organised; validly existing and in good standing under the laws of Chile; and has all requisite, corporate power and authority to own, license, use, lease and operate its assets and properties and to carry on its business as it has been conducted in the past. Sometimes there is detailed information regarding the documents evidencing the target's incorporation, ie, date of public deed of incorporation (bylaws), registration with the Registry of Commerce and publication at the Official Gazette. Information is provided regarding amendments of bylaws of the target, if any.

5.2.2 Authority, non-contravention and approvals

The seller usually represents and warrants that it has all requisite corporate power and authority to execute and deliver the acquisition agreement and to perform the transactions contemplated thereto; that the transactions have been approved by the competent governing body and that no other proceeding or approval is necessary to authorise the execution and delivery of the acquisition agreement; and that the agreement has been duly executed and delivered by the seller, through representatives duly empowered to do so, and assuming that the due authorisation, execution and delivery of the agreement constitute a valid and binding obligation of the seller, enforceable against such seller in accordance with its respective terms.

In addition, the seller usually represents and warrants that the execution and delivery of the agreement and the performance of the transactions contemplated therein do not and will not (1) conflict with or result in a breach of any provision of the organisation documents of the seller or the target; (2) result in a violation or breach of, or constitute a default of any contract or other instrument of any kind to which the seller or the target is a party, or by which any of their respective assets may be bound or affected; or (3) violate any order, writ, injunction, decree, statute, treaty, rule or regulation applicable to the seller or the target or any of their respective assets.

Also, a representation and warranty regarding governmental authority is made in the sense that no declaration, filing or registration with, or notice to, or authorisation, consent, order or approval of, any governmental authority or other person is required to be obtained or made in connection with or as a result of the execution and delivery of this agreement by the seller or the performance by the seller of the transactions contemplated in the agreement.

5.2.3 Ownership of the shares

The seller usually represents and warrants to the buyer that it is the sole and lawful owner of the shares and that said shares are free and clear of all encumbrances whatsoever. The seller usually also represents and warrants that there are no outstanding options, warrants or other rights of any kind regarding the shares or securities convertible into, or exchangeable for, or which otherwise confer on the holder thereof any right to acquire any such shares.

5.2.4 Capital stock and shareholders agreement

The seller usually represents and warrants the stock capital structure of the target and its ownership. Usually, a chart with the target's corporate structure and ownership is included as an annex to the agreement. In this regard, the seller represents and warrants that all shares have been validly issued and paid and that there are no capital increases or decreases in course. Also, it will include the description of shareholders' agreements, if any.

5.2.5 Management

Usually, the seller describes the target's form of management. A list of managers, directors, attorneys-at-law and other persons involved in the target's management will be attached as an annex to the acquisition agreement.

5.2.6 Financial statements and auditing

The seller usually provides the financial statements of the target for the previous year or such other period as agreed, which are attached as an annex to the agreement.

The seller usually represents and warrants that the financial statements have been prepared in accordance with the corresponding auditing or acceptable standards – ie, Generally Accepted Accountig Principles (GAAP) or International Financial Reporting Standards (IFRS) – on a basis consistent with prior periods, and fairly present the financial position and results of operations of the target as of their respective dates and for the respective periods presented. The seller also warrants that it has provided true and complete copies of all management letters and other correspondence received from its independent auditors relating to the financial statements, accounting controls of the target and all related matters.

5.2.7 Undisclosed liabilities

The seller usually represents and warrants to the buyer that there are no undisclosed material liabilities or obligations relating to the target of any nature, whether accrued, contingent or otherwise, and there is no existing condition, situation or set of circumstances that reasonably could be expected to result in such a liability or obligation.

5.2.8 Absence of certain changes or events

The seller usually represents and warrants to the buyer that as of a certain date (normally related to due diligence), there has not been any event, circumstance, change or effect that has had or reasonably could be expected to have a business material adverse effect, and that the business of the target has been conducted only in the ordinary course.

5.2.9 Books and records

The seller usually represents and warrants that corporate books and other similar records of the target contain a true and complete record, in all material respects, of all actions taken at all meetings and by written consents in lieu of meetings of the stockholders, board of directors and committees of the board of directors or other governing body of the target.

5.2.10 Tax matters

In this regard, usually the seller declares that the target has timely complied with all tax provisions and rules. Also, the seller represents and warrants to the buyer that all tax returns required to be filed with any tax authority by the target have been timely filed in accordance with applicable law, and all such tax returns were correct and complete. All taxes shown as due and payable on such tax returns have been timely paid to the appropriate tax authority. No claim has been made by a tax authority in a jurisdiction where tax returns are not filed by or on behalf of the target or may be subject to taxation by that jurisdiction.

In addition, the seller usually represents and warrants that the target is not delinquent in the payment of any tax, has not requested an extension of time to file a tax return not yet filed, that no audit or other administrative proceeding is pending or threatened, and that no judicial proceeding is pending or threatened that involves any tax paid or tax return filed by the target.

5.2.11 Employment, social security matters, and employee benefits

In general, the seller makes representations and warranties regarding compliance with all labour and social security laws and regulations applicable to the operations of the target, and that all social security contributions, pension fund contributions, mandatory healthcare contributions and severance benefits for which the target is liable have been paid.

Regarding employee benefits, the seller will represent whether or not the target has an employees' union or collective bargaining agreements with employees, compensation or severance plans or other similar plans or arrangements, with or for the benefit of any of the target's officers, employees, representatives or directors. Also, the seller represents and warrants that the target is not currently in the process of collective bargaining with its employees nor has it any knowledge, based on written notice, creating the reasonable likelihood that activities or processes to organise workers are underway with the intent to create a union or commence a collective bargaining process.

5.2.12 Litigation

Usually, the seller represents and warrants to the buyer that there are no material claims, suits, proceedings, actions, investigations, oppositions, challenges, cancellation proceedings or charges pending or, to the knowledge of the seller, threatened against or affecting the target or affecting its assets, and that there are no outstanding orders, writs, judgments, decrees, injunctions or settlements that restrict the target in any material respect.

5.2.13 No violation of law, governmental authorisation

The seller usually represents and warrants to the buyer that the target is not, and has not been, in default under or in violation of, and has not been charged with, any violation of any law, statute, order, rule, regulation, ordinance or judgment (including any applicable environmental, labour, export control or foreign corrupt practices law, ordinance, decree or regulation) of any governmental authority to which it is subject. Also, that the target has obtained all permits, licences, franchises, variances, exemptions, orders and other governmental authorisations, certificates, consents and approvals necessary to conduct the business and operate the assets as presently conducted and operated and to own its assets. In addition, it warrants that all business permits have been legally obtained and maintained and are in full force and effect.

5.2.14 Entire business, sufficiency of assets

The seller usually represents and warrants that the target's assets constitute all of the assets, properties and rights used in or necessary for the conduct of the target's business and that there are no material facilities, services, assets or properties shared with any other person in the conduct or operation of the business.

5.2.15 Insurance

Usually, the acquisition agreement includes a list of the outstanding insurance policies with a brief description of such policies, including the names and addresses of the insurers, the principal insured and each named insured, the policy number and period of coverage, the expiration dates, the annual premiums and payment terms, a brief description of the interests insured by such policies and the amount of any deductible. Likewise, the seller represents and warrants that all premiums due in connection with such insurance policies have been paid, that the target is not in violation or breach of, or in default, under such policies, and that it does not have knowledge of any fact that may prevent the target from collecting amounts from the insurer.

5.2.16 Contracts and other agreements

The acquisition agreement will include a list of the target's main or material agreements. Parties will define what is understood by 'main' or 'material' agreement – ie, contracts involving large payments. The seller represents and warrants that the target is not in violation or breach of, or in default under, nor has there occurred an event or condition that with the passage of time or giving of notice (or both) would constitute a default under, or permit the termination of, any such contract, except as would not reasonably be expected to result in a business material adverse effect.

5.2.17 Accounts receivable, disputed accounts payable

The seller usually represents and warrants that (1) all accounts, notes receivable and other receivables reflected on the most recent balance sheet included in the financial statements; and (2) all accounts, notes receivable and other receivables will be valid, genuine, and fully collectible in the aggregate amount thereof subject to normal and customary trade discounts, less any reserves for doubtful accounts recorded on the most recent balance sheet included in the financial statements. Also, it warrants that there are no unpaid invoices or bills representing amounts alleged to be owed by the target or other alleged obligations of the target, which the target has disputed or determined to dispute or refuse to pay.

5.2.18 Intellectual property

Usually, the acquisition agreement includes a list of all intellectual property (patents, trademarks, utility models, etc) owned by the target and the seller represents and warrants: that the target is the sole and exclusive owner of all right, title and interest in and to the intellectual property, free and clear of all encumbrances; that the target has paid all charges regarding the registration and maintenance of such intellectual property; that there are no restrictions on the direct or indirect transfer of any licence pursuant to which a right to use intellectual property has been granted; and that it has not infringed intellectual property rights owned by third parties.

5.2.19 Real estate property

Generally, the seller provides the buyer with a list of all real estate property owned by the target and a description of which buildings are owned, leased, subleased, etc, and the seller usually represents and warrants that the target has a valid title to own or use the real property where the business is conducted. Also, the seller declares if any of the property is subject to any encumbrance whatsoever.

5.2.20 Environmental matters

The seller usually represents and warrants that the target has complied at all times with any environmental laws to which the business or the assets are subject and that there are no claims by any governmental authority or other person relating to such environmental laws.

5.2.21 Disclosure

Usually, the last representation and warranty made by the seller is made with respect to the truthfulness of the representations and warranties in the acquisition agreement. The seller represents and warrants that: all material facts relating to the target have been disclosed in the acquisition agreement; no representation or warranty made contains any untrue statement of a material fact or omits a material fact necessary to make the statements contained therein; and, in the light of the circumstances under which they were made, are not misleading. A declaration by the seller is also generally included, acknowledging that the representations and warranties are essential for the buyer, and that if they are not true, it may lead to remedies such as nullity of the agreement.

Depending on what contingencies have arisen from the due diligence or what has been agreed between the parties, some representations and warranties survive a certain period of time. It will also depend on the nature of the business carried out by the target.

5.3 Covenants

Covenants are included in acquisition agreements to ensure that parties will perform or not undertake certain actions before, on and after the closing date. It is important to state that some covenants are customary, but others will depend on the contingencies arising, the special characteristics of the target's business or issues discovered in the due diligence process. In this regard, parties aim to ensure that said contingencies or issues are covered by the affirmative and negative covenants established for the seller and the target.

There are two main types of covenants: negative covenants, which are actions that parties must abstain from doing; and affirmative covenants, which are actions that must be taken by the parties.

5.3.1 Covenants of the buyer

Pre-closing

In general, the buyer shall be bound to cooperate in order to obtain the fulfilment of the seller's covenants and refrain from sharing information to third parties. Usually the parties execute a confidentiality agreement in the due diligence stage, in which the buyer agrees not to disclose or share the information delivered to it. Breach of this obligation is subject to high penalties. Sometimes, the buyer is obliged not to make public announcements regarding the transaction unless required by applicable law or mutually agreed with the seller.

Post-closing

Usually, post-closing covenants apply for the buyer when the purchase price has been agreed in instalments, and part of the price is to be paid after closing or when the release of the funds is requested for funds deposited in escrow.

5.3.2 Covenants of the seller

While buyer's covenants are customary, the seller's covenants may differ depending on the target's business, the timing of the transaction, and other issues such as permits, governmental authorisations, and others.

Pre-closing

In general, the seller and the target are restricted from taking any corporate or financial decision or action that may affect the purchase or acquisition, such as a capital decrease, dividend distributions, transactions of ongoing litigation proceedings, bylaw amendments, sale of assets and, in general, anything that may materially affect its business and financial situation. It is common to subject the seller to exclusivity in the negotiations to sell the target for a certain period of time.

Post-closing

Usually, post-closing covenants for the seller refer to non-competition or non-solicitation obligations and other specific performances. It is important to state that Chilean courts have admitted non-competition clauses, but limited to a reasonable period of time and subject to compensation.

5.4 Conditions of closing

The main purpose of the closing conditions is, from the seller's perspective, to guarantee payment, and from the buyer's side, to guarantee the transfer of the shares or ownership of the assets, as applicable. In this regard, there are certain documents that evidence the payment and proper transfer of the shares or the assets. Commonly, conditional obligations may be agreed in the acquisition agreement and shall be performed at closing, such as the resignation of board members of the target, revocation of existing powers of attorney, the delivery of the target's books or required passwords, etc.

In general, both parties will be requested to deliver certificates signed by their officers evidencing the fulfilment of all obligations included in the acquisition agreement, and that the representations and warranties included in the agreement are true, complete and correct at closing (bring-down certificates). Also, a certificate evidencing the fulfilment of the covenants may be requested.

It is customary for the seller to deliver to the buyer a legal opinion regarding legal and accounting status of the target.

5.5 Indemnification provisions

5.5.1 Typical indemnification provisions

Regarding indemnification provisions, it is typical to state that the seller shall indemnify and save the buyer harmless if the seller does not fulfil the covenants established in the agreement or if the representations and warranties in the agreement given by the seller are not true, complete and correct. Also, indemnification provisions in the event of third-party claims arising from issues prior to the date of the agreement that were not disclosed by the seller are common.

5.5.2 Mechanism

To make indemnification effective, it is commonly established that buyer must notify the seller of any third-party claim or issue that may cause a loss to the buyer within a certain time of its occurrence or when the buyer becomes aware of the claim/loss. When notified, the seller may or may not (depending on negotiations) assume the defence, and pay or reimburse all sums in connection with the claim.

5.5.3 Limitations

Usually, the parties set limits to the indemnification obligations of the seller based on time, quantity and financial limits. Regarding time limits, it is usually established that losses caused to the buyer arising from certain issues (ie, tax and labour matters, or regarding fundamental representations) will have a term for the indemnification by the seller similar to the applicable statute of limitations.

On the other hand, regarding financial limits, acquisition agreements often establish a cap to the amount of seller's liability or a basket structure (ie, by means of which claims for indemnification may only be filed if the sum total of all the claims reaches a minimum amount, in which case, the claim may be for the total amount). This cap is usually established in reference to the price paid in the transaction and its amount/percentage may vary from deal to deal.

It is also important to note that, in order to guarantee payment of the indemnification, it is common that the seller will deposit part of the purchase price in an escrow account.

5.6 Dispute resolution

There are two methods for dispute resolutions that parties may include in acquisition agreements, namely ordinary courts and arbitration. It is more common in acquisition agreements to state that disputes will be resolved by arbitrators rather than by the courts, because in this way the dispute will be solved in a shorter term and by specialised adjudicators (however, this method is commonly more expensive). Chile has a long-standing tradition of, and reputation for, arbitration (domestic and international); judgments are recognised by Chilean courts.

It is common to provide for a negotiation period or a mediation stage before beginning the judicial process to resolve conflicts in good faith and in an amicable way. In the negotiation period, the parties directly try to resolve the dispute, involving senior executives of each party; in mediation, the parties will use an independent and specialised third party to help them find the best and fairest solution to the problem. If either of these mechanisms fails to solve the dispute, then the judicial process (ordinary court or arbitration) agreed by the parties will be available for the parties.

The parties may agree to appoint one or more arbitrators to solve the dispute and can freely establish whether the disputes shall be solved by courts or by arbitrators and, in this last case, the type and number of arbitrators. There is no general rule, and the choice will depend on the circumstances of the transaction and the parties' will. International arbitration governed by rules of procedure of established international arbitration centres (such as the American Arbitration Association, the London Court of Arbitration or the International Chamber of Commerce) is common in large transactions and in those transactions where there is a multiplicity of parties from different jurisdictions.

There are two well regarded arbitration centres in Chile: the Santiago Chamber of Commerce Arbitration and Mediation Center (*CAM Santiago*) and the National Arbitration Center (*CNA*). It is very common for parties to grant a power of attorney to either centre to appoint the arbitrator from among its members (however, in certain cases the parties will have veto rights on certain numbers of potential appointees).

There are three types of domestic arbitrators in Chile:

(a) *Arbitrator at law:* this type of arbitrator must solve the dispute according to Chilean law and follow the procedure established for ordinary courts.
(b) *Arbitrator ex aequo et bono:* this type of arbitrator must solve the dispute according to prudence and equity principles, and follow the procedure agreed by the parties.
(c) *Mixed arbitrator:* this type of arbitrator must solve the dispute according to Chilean law while also following the procedure agreed by the parties.

6. RELEVANT REGULATORY REGIME

The main jurisdiction restrictions relate to regulatory approvals of either the antitrust authority or the local regulator of capital markets, pensions, insurance, or banking activity as applicable. The advantages refer to the relatively simple/restricted legal requirements to bring foreign investment into the country and the limited formalities required by law to implement such transactions (unless regulatory requirements are applicable).

6.1 Antitrust

Decree Law No. 211 (DL 211), its implementing regulations and the guidelines set forth by the Chilean antitrust prosecution agency *Fiscalía Nacional Económica* (FNE) state that the merger review or merger control procedure is applicable to acts and agreements that: (1) are considered a concentration operation according to DL 211; and (2) meet the sales revenues thresholds set by the FNE.

Chilean law provides for mandatory filing – if complying with the abovementioned requirements – in the case of a merger transaction or concentration operation with effects in Chile. The filing or notification initiates a review by the FNE with suspensive effects over the transaction. Transactions cannot be closed before approval by the FNE, although certain commitments (including divestiture of assets or property) may be implemented after closing is authorised.

6.1.1 Concentration operations according to DL 211

The first requisite to assess in order for a transaction to be subject to merger control is if the acts or contracts to be performed comply with the definition of concentration operation according to article 47 of DL 211.[3] This determines the jurisdiction of the FNE to review those acts or agreements that are notified according to the procedure established in Chapter IV of DL 211. Those acts or agreements that cannot be assessed as concentration operations will not be reviewed through this special procedure (Chapter IV) and will be governed by the general rules of DL 211.

6.1.2 Sales revenues thresholds set by the FNE

If the act or agreement is regarded as a concentration operation, the second step is to determine if the sales revenues of the economic agents involved meet or exceed the thresholds established in Resolution 157 of the FNE, which is a condition which determines if those agents are required to mandatorily notify the concentration operation to the FNE. Article 48 of DL 211 and the FNE implementing regulations state that concentration operations producing effects in Chile are to be notified if the following thresholds are met jointly by the intervening parties:

(a) When the total sales of the economic agents that are merging, collectively considered, are equal to or exceed US$98.1m (UF 2,500,000) during the year prior to the year of the notification.

(b) When at least two of the economic agents that are merging, individually considered, have sales equal to or exceed US$17.7m (UF 450,000) during the year prior to the year of the notification.

[3] Article 47, Decree Law 211. A concentration shall be deemed to be any event, agreement or contract, or a combination thereof, the effect of which is that two or more economic agents not forming part of a same corporate group and previously independent from each other, cease to be independent in any respect by following any of the ways detailed below:
(a) Merging, regardless of the type of corporate organisation of the merging entities or the entity resulting from the merger;
(b) Acquiring, one or more of them, directly or indirectly, an interest that allows them, individually or jointly, to exert a material influence on the other's administration;
(c) Entering into agreements, under any modality, to form an independent economic agent, different than them, that may carry out activities in a continuous way; and
(d) Acquiring, one or more of them, control over the other's assets under any title.

The FNE guidelines state that sales volume must be calculated as follows. For mergers, and associations or joint ventures, it shall be considered the sales in Chile of:

(a) the economic agents merging or becoming associated; and
(b) those of their respective corporate group entities.

For acquisitions of control (decisive influence), it shall be considered the sales in Chile of:

(a) the economic agent obtaining a decisive influence;
(b) those of its corporate group entities; and,
(c) the acquired economic agents (without considering its other corporate group entities).

For acquisition of assets, it shall be considered the sales in Chile of:

(a) the acquiring economic agent;
(b) those of its corporate group entities; and,
(c) those arising from the acquired assets (without considering its corporate group entities).

Sales revenues are earnings from the sale of products and/or the provision of services. These are the earnings from the first line of the income statement. Notwithstanding the above, in case any of the economic agents (or an entity belonging to its business groups) that are parties to the transaction, has acquired or sold (disposed of) another entity with sales revenues in Chile in the previous fiscal year to the prospective filing, then the sales revenues of the acquired or disposed entity must be, accordingly, either included or excluded completely.

Certain deductions may proceed according to DL 211 and FNE guidelines:

(a) Taxes directly related to the volume of sales shall be discounted from the sales revenues such as VAT, duties and other customs taxes, alcohol and tobacco taxes, etc.
(b) Sales between economic agents belonging to the same corporate or business group also have to be excluded. Only earnings from dealings between the economic agents involved in the transaction and third parties must be included. Nonetheless, business dealings between the parties to the transaction must always be included.
(c) Earnings arising outside the ordinary course of business of the relevant economic agents shall not be included.
(d) The FNE Guidelines also exclude discounts made to sale prices that proceed from promotions and volume discounts (rebates).

6.1.3 Procedure

After the filing, the FNE will conduct an assessment to determine if the concentration operation is able to substantially lessen competition. This assessment applies to all concentrations – horizontal, vertical or conglomerate.

A two-stage procedure is considered, with a 30-day first stage. A 90-day-long second stage may be opened if concerns are brought forward by the FNE, and the commitments offered by notifying parties do not comply as remedies to the risks the transaction may pose (a substantial lessening of competition standard is applied in the review.)

Mandatory filing must take place before the closing of the concentration operation, although there is no specific legal period in which the filing must otherwise take place. Nonetheless, DL 211 states that the economic agents that have taken part in the concentration operation are obliged to notify jointly (third parties that have not taken part cannot notify the transaction). Once notified, the economic agents involved cannot close the concentration operation, and the operation is deemed suspended from the filing until the final resolution or ruling that ends the review procedure.

6.2 Special authorisations

Other companies in specific industries are subject to additional regulations and requirements, such as:

(a) *Banks:* Prior authorisation by the Chilean banking regulator, the Commission for the Financial Market, will be necessary when: more than 10 per cent of the capital shares of a bank is acquired; a bank acquires shares in another bank; and a bank or group of banks achieve a significant market share as a result of a merger, acquisition of assets, takeover or increase in ownership at another bank.
(b) *Pension fund administrators (AFPs):* Acquisition of shares of an AFP may require prior authorisation from the Superintendency of AFPs.
(c) *Mass media:* Any relevant event or act in connection with the transformation or change of ownership or control in a media company must be reported to the FNE within 30 days of its completion. However, in the case of media companies subject to the state-sponsored licensing system, relevant events or acts must be the subject to a previous report prepared by the FNE assessing their impact on the media market. This report must be issued within 30 days of the filing of the application; if not, the application will be deemed as not meriting any objection.
(d) Casinos: Transfer of shares of a corporation operating casinos in Chile requires the prior authorisation by the Superintendencia de Casinos de Juego (the Chilean casino regulator).

6.3 Tax considerations

Tax considerations are one of the most important aspects for any transaction. Parties must be familiar with the Chilean tax regime to make an informed decision regarding how to structure the acquisition of another company (share purchase, asset purchase or merger), capital gains and other future implications, etc.

Under the Chilean Income Tax Law (CITL), shares and rights held in a Chilean entity are considered assets located in Chile. Consequently, any capital gains obtained from their transfer will be Chilean source income and subject to income tax in Chile. The capital gain will be determined by the difference between the price of disposal of the shares and their tax cost (ie, contribution or acquisition value increased or decreased, as the case may be, by subsequent increases or reductions of capital, duly adjusted by inflation).

As a general rule, the CITL provides that capital gains arising for Chilean residents from the disposal of shares in Chilean companies are subject to a corporate income tax at the rate of 27 per cent (or 10 per cent for entities that qualify for the special regime for small and medium enterprises – a rate that will increase to 25 per cent from commercial year 2023 onwards) and/or to a personal progressive tax (applicable to Chilean resident individuals and payable at the rate of 0–40 per cent).

In the case of non-Chilean residents, capital gains arising from the disposal of shares in Chilean companies are subject to a withholding tax (WHT) at a rate of 35 per cent (applicable to non-Chilean investors).

The rate of the WHT can be reduced if a double taxation treaty applies. Also, capital gains arising from the sale of Chilean shares that are regularly and substantially traded on a stock exchange may constitute not taxable income, provided certain requirements are met.[4]

Sales of assets have some differences with sales of shares, namely in the application of VAT (sales of shares are not subject to VAT, while sales of assets are generally VAT-taxable) and the inheritance of tax obligations (a purchaser of shares inherits all of the company's tax obligations, while a purchaser of assets only inherits the company's tax obligations when the seller does not continue in its business for insolvency or other reasons).

In relation to the taxation of an indirect transfer of Chilean entities, in general terms, CITL states that any income obtained by a non-Chilean resident or non-domiciled person derived from (1) the sale of interests, shares, quotas, bonds or other financial instruments convertible into shares or interests, (2) from the sale of other instruments which represent the capital of a foreign company incorporated or domiciled abroad, or (3) the sale of any kind of titles or property rights of an entity or equity incorporated or resident abroad is subject to WHT at a 35 per cent rate, if and when such entity or equity has material Chilean underlying assets, provided that certain requirements are also met.

6.4 Foreign investments regulations

There are two mechanisms regulating foreign investment in Chile and the repatriation of the latter and its profits. These mechanisms are:

(a) Chapter XIV of the Compendium of Foreign Exchange Regulations of the Chilean Central Bank of Chile (Chapter XIV); and
(b) Law No. 20,848.

Chapter XIV offers a quick and relatively free-from-public-authority-intervention system for bringing foreign currency into the country. Investments performed under Chapter XIV must exceed US$10,000. It should be noted that an investor under Chapter XIV may, at any time, repatriate the executed investment and the profits resulting therefrom, without any monetary limit, under the then valid regulations. The foregoing decision must be reported to the Chilean Central Bank.

Law No. 20,848 establishes a general framework for direct foreign investment in Chile, the latter being understood as the transference into the country of foreign capitals or assets owned by a foreign investor or controlled by the latter, in an amount equal to or greater than US$5m or its equivalent in other foreign currencies. It is available to any individual or legal entity established overseas, neither residing nor having domicile in Chile, who, in order to access this new system, shall require a certificate issued by the Foreign Investment Fostering Agency, evidencing the materialisation of the investment in the country. The main rights granted by Law No. 20,848 are:

[4] By virtue of Law No. 21,420, enacted in February 2022, as of September 2022, the capital gains arising from the sale of the referred shares shall be subject to a single tax of 10 per cent rate.

(a) the right to remit the foreign investment and net profits overseas once tax obligations have been fulfilled;
(b) access to the formal currency exchange market to convert foreign currency constituting the investment, or to obtain the necessary foreign currency for remittance of profits or capital;
(c) tax exemptions; and
(d) the right to be protected against arbitrary discrimination vis a vis local investors.

7. CLOSING AND POST-CLOSING

7.1 Corporate authorisations

The corporate documents and authorisations required at the time of closing will depend on the type of company being acquired or whose assets are being acquired.

For closely held corporations (*sociedad anónima cerrada*), publicly traded corporations (*sociedad anónima abierta*) and companies by shares (*sociedad por acciones*), or if more than 50 per cent of the company's assets are being disposed of (including liabilities or not), a shareholders' meeting approving the merger with another company will be generally required in advance.

For limited liability companies (*sociedad di responsabilidad limitada*), the public deed of the company will reflect the equity interests (the form in which the capital is divided in such companies) which are sold and transferred, or the approval of the merger, and the post-transaction holders of the equity interests.

7.2 Signing/closing documents

7.2.1 Documentation execution formalities/procedures

The general rule is that a duly signed private instrument (not notarised) is sufficient. Nonetheless, the parties may agree on executing the documents with additional voluntary formalities since these may have a positive impact for one or more of the parties. Some transactions require special formalities.

7.2.2 Mergers

In case of corporations or companies by shares (unless otherwise provided on their bylaws), the necessary general documents and steps required for executing mergers are as follows:

(a) On a date not later than the publication of the announcement calling the shareholders to an extraordinary shareholders' meeting to decide whether to merge the company, the board of directors must make available to all the shareholders the following documentation: (1) a merger term sheet containing the name of the companies included in the merger, a draft of the new bylaws, the share exchange ratio and the facts that were analysed to determine the share exchange ratio; (2) audited balance sheets; and (3) a report issued by an independent expert addressing the conditions of the merger. A company does not need to present this documentation if the merger is agreed unanimously by the shareholders.
(b) The merger must be approved by the shareholders of both companies in extraordinary shareholders' meetings summoned to that effect, in the presence of a notary public. The quorum for approval must be at least two-thirds of the outstanding shares.

(c) At these shareholders' meetings (with the same quorum), the audited balance sheets, expert reports prepared for the companies contemplated in the merger, and the bylaws of the absorbing or new company must be approved.

(d) The minutes of the shareholders' meetings must be recorded into a public deed.

(e) Within a period of one month or 60 days from the date of the public deed, depending on the type of company, an abstract of the public deed (including the changes introduced to the bylaws of the absorbing or the new company) must be published in the Official Gazette and registered with the Commercial Registrar.

(f) With respect to assets recorded in certain public registries, a merger materialisation public deed is commonly executed to record that a merger was performed and that the ownership of certain assets (listed) has changed. This way, it is possible to request the update of the registered ownership of such assets in the corresponding registries.

(g) In case of publicly traded corporations or certain special corporations (such as AFPs or insurance companies), it may also be necessary to communicate these transactions to the Commission for the Financial Market or other sectorial regulators.

In case of limited liability companies, all the partners must agree on the merger through a public deed, and an abstract of this public deed (including the changes introduced to the bylaws of the absorbing or the new company) must be registered with the Registry of Commerce and published in the Official Gazette within 60 days from the date of the public deed.

7.2.3 Share purchase

The transfer of shares of a corporation or a company by shares can be executed through a private instrument before a public notary or before two witnesses of legal age. This does not require the approval of any shareholders, unless the shareholders have executed a shareholders' agreement that requires it (in which case, the transfer would be valid but may trigger liability for the party breaching the agreement under the terms contained therein). In this document, the parties must establish the number of transferred shares and the price (for tax reasons, it is advisable to express the price per share). The seller must deliver to the buyer the share certificates corresponding to the sold shares. To produce its effects before the target and third parties, the share transfer instrument must be registered in the target's shareholders' registry by the general manager; the general manager must make the registration within 24 hours from its presentation. The target cannot refuse to register a share transfer agreement when it fulfils the applicable formal requirements.

The assignment/transfer of a limited liability company's equity rights should follow the same process than for a merger.

7.2.4 Asset acquisition

The general rule is that the acquisition of assets is consensual and is not subject to any formal procedural requirements. Nevertheless, the structure of the transaction will depend upon the asset to be acquired. The first step is to analyse how the ownership of the different assets shall be acquired. For example, in case of real estate assets, the transfer must be made by public deed and the ownership is obtained upon the registration of the property with the corresponding real estate registrar. In the case of personal property, the general rule is that a private agreement and the delivery of the asset is sufficient to transfer title to the property.

7.2.5 Proof of identity and authority to sign

The evidence of identity (through a national identity document, passport or similar) and sufficient powers of attorney is usually requested a couple of days prior to the execution of the relevant documents. This is analysed by each party unless the documents are to be notarised, in which case such verification should be made by the local public notary.

It is customarily required to have the powers of attorney evidenced in a public deed and, if such powers of attorney were granted a long time prior to the signing/closing date, a certificate evidencing its good standing is also customarily required.

Representative of the signing parties shall be in Chile if the documents are to be executed before a notary public.

7.2.6 Formalities for execution for foreign companies

Foreign companies are not usually required to comply with additional formalities to execute local documentation. If a foreign entity is acquiring shares/equity rights in Chile, it must file a request to obtain a taxpayer ID number before the local tax authority which, in any case, is a relatively simple and fast procedure.

7.2.7 Notary public role

The role of a public notary in a local transaction is mainly to act as a ministry of faith/certifying officer. The notary public is not entitled to review or potentially object to any substantial terms or conditions of the agreements filed for its certification. Nonetheless, the notary public must verify that the powers of attorney presented by the parties to execute the documents are sufficient in each case. The notary is also exceptionally required by law to also confirm if certain requisites have been fulfilled (eg, the payment of taxes or requirement of authorisation by the local tax authority for some particular processes).

8. POST-CLOSING ACTIONS

8.1 Appointment process for changing representatives, officers, and directors

In the event that a company takes control of another company, either through the acquisition of its shares or through a merger, it is common to revoke all the powers of attorney that the former representatives had and to grant new ones.

The procedures to change officers and directors will also vary depending on the type of entity. Corporations and companies by shares (if managed by a board) must appoint their directors by shareholders' meetings and their officers through a board of directors' meeting.

Limited liability companies and companies by shares (if managed by an administrator) must appoint their managers (they do not have directors) and officers in line with the processes established in their bylaws, which usually consist in the granting of a public deed.

8.2 Notification to the Chilean IRS

The Chilean Internal Revenue Service (IRS) must be informed of mergers and the change of shareholders or partners of a Chilean company within 60 days, accompanied by all relevant documents.

Additionally, in mergers, the dissolving entity must file with the IRS an 'out of business balance' and pay any outstanding taxes to terminate all its obligations.

8.3 Assets subject to registration

All assets subject to mandatory registration whose ownership has changed, must be updated in its relevant registry. The ownership of some assets is not acquired until they are registered in the name of the new owner (eg, real estate).