Chile

Negotiated M&A Guide

Corporate and M&A Law Committee

Contact

Roberto Guerrero V.

Guerrero Olivos
Santiago, Chile

rguerrero@guerrero.cl

1. INTRODUCTION

Corporate mergers and acquisitions of private stock corporations are governed in Chile by Ley de Sociedades Anónimas Nr. 18.046 (the "Chilean Corporations Act") and its regulation (Reglamento de Sociedades Anónimas) which contains the main rules and principles applicable to these transactions, particularly regarding the incorporation, governance and transfer of shares, and also by the Chilean Commercial Code which regulates, among others, contracts for the purchase and sale of movables. The Chilean Corporations Act was enacted in 1981 and has been amended and complemented several times thereafter.

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

It is important to note that, as a general rule, private M&A is ruled by the autonomy and free will principles. Therefore, commercial transactions can be performed by private parties without the intervention of any authorities whatsoever. Also, according to Chilean law, both local and foreign investors will be treated the same and have identical rights and obligations.

Finally, the entry and exit of funds in and out of Chile are subject to foreign exchange regulations.

2. STRUCTURE OF THE TRANSACTION

As a consequence of the autonomy and free will principles, as a general rule acquisitions can be performed in a number of ways, subject to restrictions under applicable law which are mainly contemplated in the Chilean Corporations Act.

In most cases, the acquisition will begin with a due diligence process, however, there are cases where the due diligence takes place after the execution of the acquisition agreement. The most common types of acquisitions in Chilean practice are corporate mergers, share purchases and acquisitions of assets.

(A) Due diligence process

The due diligence stage is typically the first and most important process when acquiring or merging a company. Due diligence is conducted to (i) identify issues that can arise at the different phases of the acquisition or merger process, (ii) detect potential synergies, and (iii) 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 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 with one another 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 ("*carta de intención*") or a memorandum of understanding ("*memorandum de entendimiento*") 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 is not uncommon 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.

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) to which the buyer will have access during a certain timeframe to conduct due diligence.

It is important in the due diligence process to understand the due diligence "big picture" and try to answer the following questions:

- Should buyer buy?
- At which price?
- What should seller's representations and warranties and indemnities be?
- What should schedules that limit representations and warranties and indemnities contain?
- What do the schedules mean?
- Identify necessary third-party consents and waivers for the transaction
- Enable lawyers to deliver their legal opinion

The business and financial due diligence includes:

- Due diligence sessions with key members of management
- Facility visits
- Preparation and review of forecasts; "sensitivity" analysis
- Discussions with key customers, suppliers, creditors
- Review of industry information and disclosure regarding comparable companies
- Meetings with accountants
- Third party reports (sometimes expertised)

Usually lawyers participate in most of these activities and thereby gain an excellent and often interesting understanding of the target, the industry and the economic reasons for the transaction.

The legal due diligence review usually involves:

- Review of the target's main aspects, such as:

  - Corporate matters (by-laws, corporate books, representatives, liens on the stocks, shareholders agreements, voting agreements, organizational charts, internal regulations, etc.)

  - Business arrangements (partnership, joint ventures, consortium or other associations, purchase contracts, guarantees, undertakings, indemnities, loans, borrowings and other facilities, collaterals, material agreements, agreements with major suppliers, related-party agreements, etc.)

  - Financial information (financial statements, auditors reports, internal memoranda, correspondence with the auditors, business plan or budget, etc.)

  - 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.)

  - 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.)

  - Other assets (plant, machinery and material equipment, pledges, encumbrances or prohibitions, etc.)

- Labor and social security matters (employees agreements, collective bargaining agreements, employee benefit plans, deferred compensation and similar agreements, employment, consulting, severance, change of control, retention and termination agreements, arrangements or policies with current and former employees, strikes or labor dispute, etc.)

- 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)

- IT (computer systems, ownership of right, agreements to use and operate, etc.)

- Permits (governmental and other authorities licenses, consents, permits, approvals and permissions to carry out the business, etc.)

- Insurance matters (insurance policies, payments of premium certificates, claims, etc.)

- Litigation matters (pending or threatened disputes, litigation, regulatory disputes, investigations before administrative bodies, settled disputes, etc.)

- Environmental matters (environmental permits issued by any environmental agency, permits, notices of violation or noncompliance from any environmental agency, all material reports under environmental statutes or rules, etc.)

– Discussions with various people about the legal affairs of the target.

In analyzing the documentation is important to look for:

– Potential impediments to the transaction. Looking for where the transaction "trips" a third party's rights or covenants, industry regulations or other limitations, for example:

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

  - Contracts and joint venture agreements may have change of control restrictions and limitations on assignability or transfer of interests[1]. The 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% of the total assets of the target.

  - Agreements with or among a target's shareholders (or holders of warrants/options to acquire the target's stock) may have preemptive 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.

  - Antitrust regulations or resolutions by official bodies.

– Contingent obligations. Looking for pending and threatened legal proceedings, for example:

  - Financing arrangements may have principal repayment requirements

[1] 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.

- Partnership and joint venture agreements 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)

- Project finance arrangements 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

– 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. 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 a more in-depth and exhaustive due diligence than an asset acquisition which will be limited to the assets to be acquired.

(B) Merger

(i) Framework

From a corporate point of view, mergers are regulated in articles 99 and 100 of the Chilean Corporations Act and in paragraph ninth of its regulation body. According to the Chilean Corporations Act, a merger is the joining of two or more companies into one company which succeeds the predecessors in all rights and obligations and in which all of the patrimony and shareholders of the merged entities are incorporated.

(ii) Types 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.

(iii) No Liquidation

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

(iv) Successor

The absorbing company becomes the legal successor of the absorbed company by the mere operation of law, both with respect to its assets as well as its liabilities. Accordingly, the absorbing company will become the owner of all the corporeal and incorporeal chattels and real estate, rights and obligations of the absorbed company. A notation of the merger will be made in the margin of applicable certificates with respect to assets recorded in any type of registry. For example, in the case of real estate, the corresponding marginal annotation of the merger will be made in the relevant registration of ownership.

(v) Procedure

(a) On a date not later than the publication of the announcement calling the shareholders to an extraordinary meeting to decide about merging the company, the board of directors must make available to all the shareholders the following documentation: (i) A merger term sheet containing the name of the companies included in the merger, a draft of the new by-laws, the share exchange ratio and the facts that were analyzed to determine the share exchange ratio, (ii) Audited balance sheets, and, (iii) A report issued by an independent expert, addressing the conditions of the merger[2].

(b) The merger must be approved by the shareholders of both companies in extraordinary shareholders meetings summoned to that effect. The quorum for approval must be of at least two thirds of the outstanding shares.

(c) At such shareholders meetings (with the same quorum) the audited balance sheets and expert reports prepared for the companies contemplated in the merger must be approved.

(d) At such shareholders meetings, the by-laws of the absorbing or new company must be approved.

(e) The minutes of the shareholders meetings must be transcribed in a public deed.

(f) Within 60 days from the date of the public deed, an abstract of such public deed (including the changes introduced to the by-laws of the absorbing or the new company) must be published in the Official Gazette and registered with the Commercial Registrar.

(g) Within 2 month from the end of operation of the dissolved company, the dissolving entity must file with the Chilean Internal Revenue Service ("*Servicio de Impuestos Internos*") an out of business balance and pay the outstanding taxes.

(vi) 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.

(vii) 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 corporation may contain a provision to allow a squeeze-out if a shareholder reaches 95% ownership within a tender offer process in which at least 15% of non-related parties have sold shares to the controlling shareholder. Price to be paid must be the same as in the tender offer.

(viii) 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 tenor of each contract will rule since 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.

[2] A company need not present this documentation if the merger is agreed unanimously by the shareholders.

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.

(ix) Labor Contracts Entered Into by the Absorbed Entity

In connection with labor issues, there is a specific rule in this regard in article four, subparagraph second 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."

(x) Advantages and Disadvantages

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 organization as companies involved in the transaction share strategies to strengthen the organization, thus eliminating weaknesses in the target.

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

Disadvantages

The surviving entity assumes all the liabilities, including tax (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. Also, the possibility of dissenting shareholders exercising appraisal 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 cheaply obtained.

(C) 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 used generally in the acquisition of private companies or wholly-owned subsidiaries

According to Chilean Law, share purchases are executed among the seller (shareholder or shareholders of the target) and the buyer by private instrument granted before two adult witnesses, a stockbroker, a notary public or by public deed executed by both parties. Also, the seller must deliver to the buyer the share certificates corresponding to the sold shares. In this document the parties must establish the number of transferred shares and the price for them. For tax reasons, it is advisable to express the price per share.

In order to produce its effects before the target and third parties, the share purchase must be registered in the target's stock registry by the general manager. For these purposes, the share purchase agreement and the share certificates must be presented to the target, and the target must make the registration within the following 24 hours. The target can not refuse to register a share purchase agreement when it fulfills the abovementioned formal requirements.

It is important to note that restrictions to share transfers are allowed under Chilean Law. These restrictions can be established in the target's by-laws or agreed to in a shareholders agreement, which, to be opposable to third parties, must be registered in the target's shareholders registry. Liens and encumbrances constituted over the shares do not necessarily prohibit their transfer, the buyer will acquire the shares with the corresponding encumbrances.

Regarding the contractual effects and the labor contracts entered into by the target entity, Section B (viii) and Section (ix) above apply.

Share purchases can also be made through capital increase by a new shareholder subscription. In this case, the existing shareholders need to approve the capital increase by a regular quorum of more than 50% of the outstanding shares. Since any capital increase will give existing shareholders preemptive rights, it will be necessary for existing shareholders to waive their preemptive rights, and the waiver must take place after the publication of the preemptive rights notice in a national newspaper.

Advantages

Doing 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.

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 and sometimes it can be difficult to acquire 100% of the stock. Another disadvantage is that the buyer acquires all debts and liabilities of the target.

(D) Asset Acquisition

The asset acquisition consists of a direct purchase of assets owned by the target. This alternative is used in Chile in the acquisition of private companies and in bankruptcy reorganizations. 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 liability or 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 payment, which may affect their salable condition.

The structure of the transaction will depend upon the asset to be acquired. The first step is to analyze how the ownership of the different assets shall be acquired. For example, in the case of real estate assets, the transfer is made by public deed and the acquisition 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.

Disposition of 50% or more of the corporation's assets

The Chilean Corporations Act states that the disposition of 50% or more of the assets of a company (whether including liabilities or not) or the modification of a company's business plan such that the disposition of assets over the percentage stated above is contemplated, must be approved by the shareholders in extraordinary shareholders meeting summoned to that effect. The quorum for approval must be of at least two thirds of the outstanding shares.

Appraisal Rights

Minority shareholders who expressly opposed the company's 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.

Advantages and Disadvantages

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).

Disadvantage: requires assets to be retitled and liabilities to be assumed.

3. PRE-AGREEMENTS

(A) Letter of Intent / MOU

(i) 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 an MOU (*memorandum de entendimiento*).

The letter of intent is a unilateral declaration from one party who expresses its intent to begin a negotiation and conclude a transaction and requests the other party to accept it. The MOU is a bilateral agreement drafted and executed by both parties.

There is no typical or customary content in these agreements. In these documents, 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 when due diligence will be conducted and certain special conditions of the due diligence process. Also, non-binding clauses are included in order to expressly establish that none of the parties is obliged to enter into the final agreement.

(ii) 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. 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 rule the unjustified rupture 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 is 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 the said 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 our courts have accepted the application of pre-contractual liability, they have never required anyone to pay damages arising from this type of liability system 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, in that it 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 in the interruption of the negotiation.

(iii) 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, which is not advisable to leave to the free will of the parties.

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, who honestly believed 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, which is, to enter into a negotiation stage. 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, probably the document will be construed as binding among the parties and 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.

(B) 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. 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 very common to include an obligation to execute specific ancillary agreements. For example, if 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 will be acquired by a share purchase agreement, certain corporate authorizations will be required, as detailed above, such as shareholders meetings, or share transfer forms to be filled, etc. Also, 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 by-laws to evidence the new stock structure or the agreements between the shareholders. Nevertheless, it is not recommended to amend the by-laws if the normal course of the business or the target's purpose is affected.

(A) 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 fulfillment of certain conditions, i.e. 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 for breaching certain obligations imposed in the agreement.

(B) Representations and Warranties

Representations and warranties included in acquisition or merger agreements in Chile do not differ from what typically is included in most other countries. 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, 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 we have included a list of the most common representations and warranties found in an acquisition agreement in Chile:

(i) Target's organization and capacity

The seller represents and warrants to the buyer that the target is, as the case may be and depending on the type of company, duly organized, 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. Also, sometimes there is detailed information regarding the documents evidencing the target's incorporation, i.e. date of public deed of incorporation (by-laws), registration with the Commerce Registrar and publication at the Official Gazette. Also, this information is provided regarding by-law amendments, if any.

(ii) Authority, non-contravention and approvals

The seller 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 is necessary to authorize the execution and delivery of the acquisition agreement; and that the agreement has been duly executed and delivered by the seller and assuming the due authorization, execution and delivery of the agreement, constitutes a valid and binding obligation of the seller, enforceable against such seller in accordance with its respective terms.

In addition, usually the seller represents and warrants that the execution and delivery of the agreement and the performance of the transactions contemplated thereto do not and will not (i) conflict with or result in a breach of any provision of the organization documents of the seller or the target; (ii) 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 (iii) 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 authorization, 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.

(iii) Ownership of the shares

The seller 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. Also, 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.

(iv) Capital stock and shareholders agreement

The seller represents and warrants the stock 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.

(v) Management

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

(vi) Financial statements and auditing

The seller usually provides the last financial statements of the target, which are attached as an annex to the agreement.

The seller represents and warrants that financial statements have been prepared in accordance with the corresponding auditing or acceptable standards, i.e. GAAP or 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. Also, that the seller have 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.

(vii) Undisclosed liabilities

The seller represents and warrants to the buyer that there are no 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.

(viii) Absence of certain changes or events

The seller 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.

(ix) Books and records

The seller 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.

(x) 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 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.

(xi) Employment and social security matters. Employee benefits

In general, the seller makes representations and warranties regarding compliance with all labor and social security laws and regulations applicable to the operations of the target and that all social security contributions, pension fund contributions, mandatory health care contributions and severance benefits for which the target is liable have been paid. Also, regarding employee benefits, the seller will represent whether or not the target has union or collective bargaining agreements, 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 organize workers are underway with the intent to create a union or commence a collective bargaining process.

(xii) 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.

(xiii) No violation of law. Governmental authorization

The seller 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, labor, export control or foreign corrupt practices law, ordinance, decree or regulation) of any governmental authority to which it is subject. Also, that target has obtained all permits, licenses, franchises, variances, exemptions, orders and other governmental authorizations, 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, that all business permits have been legally obtained and maintained and are in full force and effect.

(xiv) Entire business. Sufficiency of assets

The seller 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.

(xv) 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 and 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.

(xvi) Contracts and other agreements

Also, 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, i.e. 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.

(xvii) Accounts Receivable. Disputed Accounts Payable

The seller represents and warrants that all accounts, notes receivable and other receivables reflected on the most recent balance sheet included in the financial statements are, and 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, 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.

(xviii) 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 target has paid all charges regarding the registration of such intellectual property, that there are no restrictions on the direct or indirect transfer of any license 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.

(xix) Real property

Generally, the seller provides the buyer with a list of all real 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.

(xx) Environmental matters

The seller 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.

(xxi) 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 and that no representation or warranty made contains any untrue statement of a material fact or omits a material fact necessary to make the statements contained herein or therein, in the light of the circumstances under which they were made, not misleading. A declaration by the seller acknowledging that the representations and warranties are essential for the buyer may lead to remedies such as nullity of the agreement should they not be true.

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.

(C) 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 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.

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.

(i) Covenants of the buyer

Pre-closing. In general, the buyer shall be bound to cooperate in order to obtain the fulfillment of the seller's covenants and refrain from sharing information to third parties. In this regard, usually the parties execute in the due diligence stage a confidentiality agreement, in which the buyer agrees not to disclose or share the information delivered. Breach of this obligation is subject to high penalties. Also, sometimes the buyer is obliged not to make public announcements regarding the transaction unless required by applicable law.

Post-closing. Usually, post closing covenants apply for the buyer when the purchase price has been agreed in installments 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.

(ii) Covenants of the seller

While the buyer's covenants are very customary, the seller's covenants will be different depending on the target's business, the timing of the transaction and other issues such as permits, governmental authorizations, 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, by-law amendments, sale of assets and, in general, anything that may materially affect its business. Also, it is not uncommon to subject the seller to exclusivity in the negotiations to sell the target during a certain period of time.

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

(D) 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 or make certain payment and the 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, the delivery of target's books, etc.

In general, both parties will be requested to deliver certificates signed by their officers evidencing the fulfillment of all obligations included in the acquisition agreement and that the representations and guarantees included in the agreement are true, complete and correct at closing. Also, a certificate evidencing the fulfillment 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.

(E) Indemnification provisions

(i) 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 fulfill 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.

(ii) Mechanism

In order 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 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 defense and pay or reimburse all sums in connection with the claim.

(iii) Limitations

Usually, the parties set limits to the indemnification obligations of the seller based on time and financial limits. Regarding time limits, it is usually established that losses caused to the buyer arising from certain issues (i.e. tax and labor matters) 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. This cap is usually established in reference to the price paid in the transaction.

As stated in (A) above, 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.

(F) Dispute resolution

There are two methods for dispute resolutions that parties may include in acquisition agreements: 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 specialized adjudicators. Chile has a long-standing tradition of arbitration (domestic and international) and judgments are recognized by Chilean courts.

It is very common to provide for a negotiation period or a mediation stage before beginning the judicial process in order to resolve conflicts in good faith and in an amicable way. In the negotiation period, the parties directly try to resolve the dispute; while in mediation the parties will use an independent and specialized 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 apply.

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 centers (such as American Arbitration Association, 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 centers 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 center to appoint the arbitrator from among its members.

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 follows the procedure agreed by the parties.

(c) Mixed Arbitrator: this type of arbitrator must solve the dispute according to Chilean law and follow the procedure agreed by the parties.

5. OTHER MATERIAL LEGAL FACTORS

(A) Antitrust

Decree Law No. 211 ("DL 211"), its implementing regulations[3] and guidelines recently set forth by the *Fiscalía Nacional Económica* ("FNE")[4], state that the new merger review or merger control procedure is applicable to acts and agreements that: (i) are considered a *concentration operation* according to DL 211; and (ii) meet the sales revenues thresholds set by the FNE.

Chilean law provides for mandatory filing in 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.

Merger transactions cannot be closed before approval by the FNE although certain commitments (including divestiture of assets or property) may be implemented after closing is authorized.

(i) 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[5]. 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. On the contrary, those acts or agreements that cannot be regarded according to the law as concentration operation will not be reviewed through this special procedure (Chapter IV) and will be governed by the general rules of DL 211[6].

(ii) Sales revenues thresholds set by the FNE.

If the act or agreement is regarded 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 667 of the FNE, condition which determines if those agents are required to mandatorily notify the concentration operation to the FNE.

(a) Article 48 of DL 211 and 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:

(1) Joint Threshold: The sales in Chile of the economic agents that intend to merge, during the fiscal year prior to that in which the notification is made, reach or exceed the threshold set by the FNE of US$77 million approximately[7]; and,

---

[3] Jurisdictional Notice of the FNE for merger control, Regulations for the Notification of Concentration Operations of the Ministry of Economy and FNE Resolution establishing Thresholds, as of November 2016.
[4] FNE 2012 Guidelines for the assessment of a concentration operation, a Guideline for the Calculation of Thresholds and FNE Remedies Guidelines.
[5] 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 organization 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;
d) Acquiring, one or more of them, control over the other's assets under any title.
[6] FNE's Competition Guideline, June 2017, page 5. Voluntary filing is considered in DL 211 and the FNE may initiate *ex officio* reviews of transactions not subject to mandatory filing.
[7] Unit used to measure the change in price levels according to inflation, determined by the Central Bank.

(2) Individual or Minimum Threshold: In Chile, separately, at least two of the economic agents that intend to merge have had, during the fiscal year prior to that in which the notification is made, sales that reach or exceed US$12.5 million approximately.

(b) The FNE guidelines state that sales volume must be calculated as follows:

(1) For *mergers*, and *associations* or *joint ventures*[8], shall be considered the sales in Chile of:

- the economic agents merging or becoming associated; and,
- those of their respective corporate groups.

(2) For *acquisitions of control* (decisive influence)[9], shall be considered the sales in Chile of:

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

(3) For *acquisition of assets*[10], shall be considered the sales in Chile of:

- the sales in Chile of the acquiring economic agents;
- those of its corporate group; and,
- those arising from the acquired assets (without considering, once more, its corporate group).

(c) 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. The sales revenues to be considered are those referred to those generated during the previous fiscal period (year) to the year when the Notification is to be filed.

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.

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

(1) Taxes directly related to the volume of sales shall be discounted from the sales revenues such as the Value Added Tax, duties and other customs taxes, alcohol and tobacco taxes, etc.

(2) Sales between economic agents belonging to the same corporate or business group also have to be excluded[11]. Only earnings from dealings between the economic

[8] Cases contemplated in article 47 letters a) and c) of DL 211.
[9] Cases contemplated in article 47 literal b).
[10] According to article 47 literal d), DL 211.
[11] Article 47 DL 211.

agents involved in the transaction and third parties must be included. Nonetheless, business dealings between the parties to the transaction must always be included.

(3) Earnings arising outside the ordinary course of business of the relevant economic agents shall not be included.

(4) The FNE Guidelines also exclude discounts made to sale prices that proceed from promotions and volume discounts (rebates).

(iii) 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: a 30 days phase I and, eventually, a 90 days 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 that the transaction may pose. (A substantial lessening of competition standard is applicable in the review.)

Mandatory filing must be previous to the closing of the concentration operation. There is no legal term or period for the filing to be complied with. 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[12] that ends the review procedure.

(B) Tax Considerations

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

Under Chilean Income Tax Law, 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 the difference between the acquisition value of the shares or rights issued by the Chilean company, duly indexed by inflation, and the respective price.

As a general rule, capital gains are subject to First Category Income Tax (hereinafter “Corporate Tax”) and to a 35% Withholding Income Tax (hereinafter “WHT”), against which the Corporate Tax can be used as a credit. Corporate Tax rate will increase gradually, from the current 25% to 27%, depending on the chosen tax system, as explained below.

The general rule is that capital gains realized by a non-resident are subject to the Category Tax with a 25% tax rate this year and the WHT with a 35% tax rate. As mentioned above, the former can be credited against the latter.

A capital gain is deemed realized in Chile if the capital asset is located in the country. The location of tangible assets is easily determined by its presence in the country. However, the location of intangible

[12] The notifying parties can request review in case the concentration operation is prohibited by the FNE before the *Tribunal de Defensa de la Libre Competencia* (“TDLC”). The TDLC is a special and independent jurisdictional body which hears exclusively competition cases. The Chilean Supreme Court can also hear a merger control case in exceptional circumstances.

capital assets such as shares in a corporation or interests in partnerships, may be harder to determine, considering special rules that try to extend the Chilean jurisdiction on capital gain. In these cases, the following rules apply:

(a) Shares in a corporation and interests in partnerships established under the laws of Chile are deemed to be located in Chile.

(b) If some circumstances are met, the capital gain from the sale of shares or interests of a foreign entity can be considered as a Chilean source income, if such acquisition permits the buyer to, directly or indirectly, participate in the equity or profit of a corporation or partnership established under Chilean Law. However, unless the purchased shares or interests are domiciled in a tax haven, this source rule will not apply if this transaction does not permit the acquisition of more than 10 percent of the equity or profits of the acquired Chilean entity[13].

(c) Income derived from American Depositary Receipts (ADRs) is not sourced in Chile if the certificates are issued by entities incorporated abroad or by international institutions.

(d) Investments in Chilean private investment funds are not sourced in Chile if they meet certain requirements.

(e) In addition to the aforementioned rules related to source of capital gain, Chile's Income Tax Law grants the following exemptions related to the sale of stocks and other capital assets:

(1) The first is related to capital gain realized on sales of stocks that are actively, publicly traded and other instruments representative of debts by a non-resident institutional investor such as mutual funds or pension funds. In order to access to this benefit the non-resident institutional foreign investor must meet a series of requirements.

(2) The second benefit is granted to both residents and non-residents with respect to the gain on the sale of issued shares of publicly traded corporations that are actively traded and sold on the Chilean stock market. To apply this tax exemption, the following requirements must be met:

The sold shares must be shares of open corporations with a "stock exchange presence".

The sale must be made in a Chilean stock exchange approved by the *Superintendencia de Valores y Seguros* or in a public offer to buy shares under the procedure regulated by the Chilean Securities Law.

The shares must have been acquired in a stock exchange, or in an Initial Public Offering upon the incorporation of a corporation or an increase in its capital, or in an exchange of convertible bonds or in a rescue of underlying assets of an exchange traded fund.

For this purpose, "stock exchange presence" refers to those shares which, on the date they were acquired, complied with all necessary conditions for being the object of investment by local mutual funds.

---

[13] This rule also accepts some exceptions.

(3) The capital gain realized in the sale of shares of corporations and rights in partnerships, if the seller has held the stocks for more than a year is subject to the First Category Tax as a sole tax. However, if the seller is engaged in selling shares on a customary basis, or if he sells the stocks to a related party, the Additional Tax is applied in addition to the Corporate Tax.

(4) Capital gain obtained in certain debts instruments that are publicly traded or Central Bank's bond or Treasury bonds are exempt of taxes if several requirements are met.

In relation to the taxation of an indirect transfer of Chilean entities, in general terms Chilean Income Tax Law states that any income obtained by a non-Chilean resident or non-domiciled person derived from the sale of interests, shares, quotas, bonds or other financial instruments convertible into shares or interests, or from the sale of other instruments which represents the capital of a foreign company incorporated or domiciled abroad, or 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% rate, if and when such entity or equity has material Chilean underlying assets. In this case, capital gains are subject to WHT in Chile, regardless of the domicile or residence of the seller or the buyer (it is an extraterritorial rule).

Chilean law includes three scenarios that define materiality of Chilean underlying assets: (i) when at least 20% of the fair market value of the assets is represented by certain Chilean underlying assets; (ii) when the value of the Chilean underlying assets is or was during the previous 12-month period, equal or greater than 210,000 Annual Tax Units (US$ 207 million approximately), taking into account only the pro rata participation that corresponds to the seller in such Chilean assets; and (iii) when the foreign assets have been issued by a company or entity domiciled in a country considered as a tax heaven.

New Tax Systems: As from the year 2017, companies incorporated under Chilean law may choose between two taxation systems: a) Attributed Income System; and b) Partially Integrated System.

(a) **Attributed Income System**: Owners of the companies will have to pay taxes according to their participation in the overall profits obtained by the company every year, regardless the amount that is effectively distributed to them.

Foreign partners or shareholders are subject to the WHT on income attributed to them by Chilean companies in the same year in which they are generated, and that are determined in the net taxable income ("*Renta Líquida Imponible*"), which shall be deemed withdrawn by the corresponding owner in the same year.

Under this regime, taxpayers are subject to a Corporate Tax at a rate of 25% for the year 2017[14], which may be fully used as credit against the WHT (35%).

(b) **Partially Integrated System**: Pursuant to this system, taxpayers are subject to taxation on income effectively withdrawn from the company.

It is a mandatory system for public or closed corporations, or any other company owned by another company. Also is the default system for stock companies (*sociedades por* acciones).

Under this regime, the rate of the Corporate Tax would be 25.5% for 2017 and 27% for 2018[15]. Furthermore, when income is effectively withdrawn from the company, the taxpayer only may use as credit for the payment of Corporate Tax, an amount equal to 65% of the average of the rates of all available credits.

[14] This tax rate will gradually increase to 27% for year 2018.

[15] This tax rate will gradually increase to 27% for the year 2018.

If the investor is resident of a country that has entered into a treaty to avoid double taxation with Chile, 100% of the credit maybe used; therefore the actual tax rate payable on income generated in Chile is 35%.

With respect to dividends distributions, a WHT is applicable over the total income from both categories of non-resident individuals or non-resident legal entities when they are withdrawn, distributed as dividends, or remitted abroad. The general rate of WHT is 35% and this applies to dividends and the withdrawal and/or remittance of the profits of corporations, among others. Lower rates, however, apply for some types of income. Fees paid for engineering or technical work and for those professional or technical services that an individual or entity specializing in a science or technique provides through advice or reports can be subject to a 15% WHT. Also, some double taxation treaties include lower rates than the above.

Regarding the acquisition of assets, VAT is levied at a rate of 19% on the sale of goods and services, with a few exemptions for some services and goods. VAT must be declared and paid on a monthly basis and the amount to be paid is determined as the difference between the tax debit and tax credit. If the tax credit is greater than the tax debit, the excess can be carried over to the following month and used as a VAT credit.

(C) Foreign Investment

Funds can be brought into Chile to buy assets or shares by means of two different investment regimes:

(i) The Foreign Investment Statute

The Foreign Investment Statute is very simple legislation based on three principles: non discriminatory treatment of foreign investors, free access to various markets and economic sectors, and minimal government intervention in the activities of the investors. The traditional Foreign Investment Statute (contained in Decree Law Nr. 600 of 1974) was replaced by a new law in 2016.The new statue defines direct foreign investment as "the transfer into the country of foreign capitals or assets owned or controlled by a foreign investor". An investment is deemed as direct foreign investment if it meets the following requirements:

(a) The amount of the transfer is equal or higher than USD 5 million or its equivalent in other currencies.

(b) The transfer is consummated through the acquisition or ownership of interest in the company receiving the investment, whether directly or indirectly.

(c) The company receiving the investment is incorporated in Chile under Chilean law.

(d) The acquisition or ownership of interest confers the control of at least 10% of the shares with voting rights in the company, or an equivalent percentage of equity interest if the relevant company is not a corporation.

Who is considered a foreign investor

A foreign investor is defined as "any individual or legal person incorporated abroad that transfers capital into Chile and that is not residing or domiciled in Chile". In order to have access to the regime of rights established by the New Statute for Foreign Investment, the investor must request a certificate issued by the Foreign Investment Promotion Agency.

Contents of direct foreign investment

For the purposes of New Statute for Foreign Investment, the investment must be made for an amount equal or greater than USD 5 million or its equivalent in other currencies and may be performed in the following ways:

(a) Freely convertible foreign currency.

(b) Physical assets in all shapes and condition.

(c) Reinvestment of profits.

(d) Capitalization of credits.

(e) Technology in diverse forms, susceptible of being capitalized.

(f) Loans associated to foreign investment granted by related companies.

Regime applicable to direct foreign investment

The Statute for Foreign Investment establishes a general regime that regulates direct foreign investments and grants rights and legal protection to foreign investors that are subject to it. Said epitomized rights are the following:

(a) VAT exemption for the import of capital assets provided that that it complies with the new requirements established in the VAT Law as of January 1st, 2016, which are namely the following:

  (1) That the investment be foreign.

  (2) That the imported capital assets be used for the development, exploration and exploitation in Chile of mining, industrial, forestry, energy, infrastructure, telecommunications or technological, medical or scientific development projects, among others.

  (3) That the investments be made for a sum equal or greater than USD 5 million or an amount equal to that in other currencies.

  (4) That the capital assets be directed to investment projects that generate income within a period of twelve months, as of their date of entry into the country or their acquisition in Chile.

  (5) That a request is filed before the Ministry of the Treasury attaching a certificate issued by the Foreign Investment Promotion Agency evidencing such capacity.

(b) Right to remit abroad the transferred capital and the net profits that their investments generated in Chile, once all of the tax obligations established under Chilean laws have been fulfilled.

(c) Right to access the formal foreign exchange market in order to liquidate the currency that constitutes its investment, so as to obtain the currency necessary to remit the capital and profits abroad.

(d) Right to a treatment that is equal to that granted to national investors, being subject to the common legal system, and with no direct or indirect arbitrary discrimination against them whatsoever.

Thus, the current rights granted to investors governed by the rules of DL 600 consisting in the execution of an agreement with the State of Chile and to be eligible to a tax invariability regime, cease to exist. However, a transitory 4-year system (i.e., until 2020) is established, under which foreign investors may request foreign investment authorizations via the execution of agreements with the State of Chile, albeit subject to a total income tax rate of 44.5%.

Procedure to be eligible to the new foreign investment system

Any individual or legal entity incorporated abroad, which does not reside or is not domiciled in Chile, which transfers capitals to Chile under the aforementioned terms, is be entitled to request a certificate issued by the Foreign Investment Promotion Agency, the sole purpose of which is to enable access to the foreign investment system.

Existing Foreign Investment under DL 600

Foreign investors and the companies that receive their investments which maintain a valid foreign investment agreement executed with the State of Chile pursuant to the regulations of DL 600, fully retain the rights and obligations set forth in said agreements, provided that the same had been executed prior to 2016.

(ii) Chapter XIV of Foreign Exchange Regulations of the Chilean Central Bank

Chapter XIV offers an alternative in-flow foreign investment vehicle by providing for a simple and fast approval and registration process, and regulates all foreign loan, deposits, investments and capital contributions in an aggregate amount equal to or greater than US$10,000 transferred to Chile from abroad.

Pursuant to Chapter XIV, prospective investors must file a registration form with the Chilean Central Bank through a Chilean commercial bank, describing in very broad terms the amount of the investment, the identity of the investor and the description of the intended investment. Upon the filing, the investor is authorized to use the transferred funds and either retain the foreign currency or have it converted into Chilean pesos. Such conversion, which is also informed to the Chilean Central Bank, gives the foreign investor the right to remit, in the same currency originally transferred to Chile, capital and net profits at any time.

* * * * *