

## Company redomiciliation and alternatives for changing the jurisdiction of companies in Colombia, Chile, Mexico and Peru

During the development and operation of multinational enterprises, in some cases and for a number of reasons (strategic, market, risk, among others), they are faced with the need to explore alternatives for changing or transferring their registered office to a different jurisdiction. This process, commonly known as “cross-border redomiciliation”, consists precisely of the act whereby a company decides to transfer its domicile abroad without first undergoing a liquidation process or a business reorganization such as an international spin-off or merger.

These decisions are accelerated and adopted due to multiple internal and external factors; in many cases, they are due to the need to seek jurisdictions that are more favorable and advantageous for the company’s organization and operations.

This article provides an analysis of the legal feasibility of cross-border redomiciliation in Colombia, Chile, Mexico and Peru from a corporate law perspective, considering alternatives and structures that permit a company to transfer its domicile and cease to be established in its jurisdiction of origin. We will focus on the corporate law aspects only, without delving into tax aspects or implications.

### Is cross-border redomiciliation of companies legal?

#### Colombia

This mechanism is not expressly stipulated in Colombian legislation. The Superintendencia de Sociedades (the Companies Supervisory Authority, a governmental authority in Colombia in charge of supervising commercial companies) has stated repeatedly that cross-border redomiciliation is not allowed.

## Chile

The redomiciliation of companies is not expressly contemplated in the legislation governing companies in Chile.

By application of the principle of freedom of contract governing commercial transactions, companies can carry out any acts which are not prohibited by law. Moreover, persons are free to perform any economic activity that is not prohibited by law and so, in principle, the owners, partners or shareholders of a company should have the power to decide to carry out their business and transactions in another jurisdiction if they so desire. However, given the regulations governing the domicile of a company in Chile, there could be legal and practical obstacles to transferring the domicile of a Chilean company abroad.

In Chile, a company's domicile has special relevance, as it determines the city where the company must be registered in order to legally exist; that is the case, for example, of capital companies (public limited companies and joint stock companies). In addition, the domicile is, in general terms, specified in the bylaws, meaning that the only way to modify it is by amending the bylaws, complying with the legal formalities established in Chilean legislation in order for the change to have effects (mainly, the resolution to amend the bylaws must be

registered at Companies Registry and published in the Official Gazette).

Therefore, to change the domicile to another country, the company must necessarily be registered at the Companies Registry and that registration must then be canceled so that the company can continue with its legal existence in the country of the new domicile. In this respect, it is not clear whether the Companies Registries will register a company's change of domicile abroad and cancel its registration in Chile, since that possibility is not expressly envisaged in Chilean law. Regard should also be had to the situation of shareholders, especially minority shareholders, creditors, employees and third parties if the redomiciliation affects their interests, and an analysis should be made of the requirements established by the legislation of the foreign country of the new domicile, particularly with respect to Chile's recognition of the redomiciliation.

Lastly, the tax implications that could arise from the redomiciliation of a Chilean company abroad should be taken into account. The Chilean tax authorities have stated that redomiciliation can be considered abuse of legal forms if its sole aim is to generate a tax benefit without having relevant legal or economic effects, and that there must be an actual and effective transfer of the company to the new country.

## Mexico

There are some provisions in the General Commercial Companies Law (*Ley General de Sociedades Mercantiles*, "LGSN") in Mexico that allude to the change of registered office and change of nationality, but there are no additional regulations of this process. Therefore, although it is not expressly regulated, the conclusion is that it is possible to carry out the redomiciliation of a public limited company abroad.

This conclusion is due to at least two reasons: on the one hand, according to article 182, section V of the LGSM, it is possible to change a company's nationality through a resolution approved by a special shareholders' meeting. A company's nationality is in turn determined by its domicile. Article 8 of the Nationality Law states that legal persons of Mexican nationality are those that are incorporated under Mexican law and have their domicile in Mexican territory.

By logical inference, that means that, as some Mexican authors have stated, a company whose registered

office is located abroad is foreign (Rendón, G. (1993). *Sociedades mercantiles*) [*Commercial companies*].

That means that the company must adopt the legislation of its new domicile and is no longer governed by the laws of its country of origin. The Spanish legal theorist, Francisco J. Garcimartín, stated that "if the registered office is the criterion which determines the *lex societatis*, a transfer of the registered office abroad entails a change of *lex societatis*."

Moreover, according to said article 182, section XI of the LGSM, any amendment of the bylaws must be discussed in a special shareholders' meeting. According to article 6, section VII of the LGSM, the domicile forms part of the elements which must be included in the bylaws. Therefore, by means of the special shareholders' meeting, it is possible to amend the company's bylaws, and through that amendment, the registered office can be changed.

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Nonetheless, the laws applicable in the jurisdiction where the company seeks to establish its new domicile must be taken into account, given that the internationally accepted view is that “it is a case of application of two laws. The law of the State of origin tells us whether its companies can transfer the domicile abroad and under what conditions they can do so (...), and the law of the State of destination tells us whether a foreign company can transfer its domicile to this second State (...)” (Garcimartín Alférez, F. J., & Bercovitz Rodríguez-Cano, A. (2021). *Derecho Internacional*

*Privado*) [Private International Law], as well as to any treaties existing between Mexico and the destination jurisdiction. For that purpose, it will be necessary to make a case-by-case analysis.

It is important to remember that in cases where a company seeks redomiciliation, it does so for operational and business reasons, so it must retain the same legal personality. It will also be necessary to first evaluate the Mexican tax consequences of the redomiciliation pursuant to applicable laws.

## Peru

Yes, Peru permits inbound redomiciliation, whereby a company domiciled abroad transfers its domicile to Peru. This process is regulated by article 394 of the Peruvian General Companies Law (*Ley General de Sociedades Peruana*, “LGS”) and articles 135 to 139 of the Peruvian Companies Registry Regulations under the heading “Reorganization of Companies Incorporated Abroad”.

Thus, the inbound redomiciliation enables any company incorporated and with domicile abroad (provided no other Peruvian law prohibits it) to become established in Peru, keeping its legal personality and adapting its bylaws to the corporate forms envisaged in the LGS, with the obligation to cancel its registration in the foreign country for such purposes.

As regards outbound redomiciliation, where a company domiciled in Peru transfers its domicile abroad, it is not expressly envisaged in the Peruvian legal system. However, it is not expressly prohibited, and recently the Tribunal Registral (Registration Court, which is the second and last administrative instance in relation to registry procedures) accepted the cancellation of the registration of a Peruvian company that was redomiciled to Panama. Although the court’s ruling does not constitute a binding precedent, it is its first judgment on the matter, applying legislative construction, by analogy, of the provisions on inbound redomiciliation, and arguing in favor of the reasonableness of a company having only one domicile for the purposes of its dealings with third parties, of the legislation that applies to it, and of its public disclosure at the registry.

## If it is permitted, how does it work and what requirements must be met?

### Colombia

N/A

### Chile

N/A

### Mexico

Taking into consideration the reasons set forth above, the position adopted by practicing lawyers in relation to this type of transaction, in view of the absence of specific rules, is to adopt and follow the same corporate measures to protect and inform creditors

and other third parties, as those adopted in similar corporate operations where the company maintains the same legal personality, such as the change of legal form. To this end, it will be necessary to complete at least the following corporate steps/stages:

## Corporate requirements

Stage	Description – requirements
Stage I – Calling and holding a special shareholders’ meeting	In this special shareholders’ meeting, the shareholders must resolve on the company’s change of domicile, change of name, as the case may be, and submission to the laws of the jurisdiction of the new domicile. Conditional on the fulfillment of the statutory requirements applied by the new jurisdiction, the company must approve its new bylaws in accordance with the laws of that jurisdiction
Stage II – Disclosure to third parties	In order to disclose the change to third parties, the aforementioned resolutions, and the company’s last balance sheet and, as the case may be, the system for canceling its liabilities, must be published in the electronic system of the Secretary of Economy.
Stage III – Notarization of the public deed	The minutes of the special shareholders’ meeting and the aforementioned publication must be recorded in a public deed.
Stage IV – Registration at the Public Registry of Commerce	The public deed mentioned in the preceding paragraph must be registered at the Public Registry of Commerce of the company’s domicile. The resolutions may take effect, as appropriate, once that registration is completed.

Simultaneously to the previous stages, the company must fulfill the requirements established by the legislation of the jurisdiction where the company is redomiciled, in order to be registered in the public register thereof. For example, the adoption of the resolutions mentioned in the preceding section; notarization or legalization by the “apostille” method of the public deed containing the resolutions; and legal opinion by the company’s lawyers in the jurisdiction of origin, confirming that the corporate resolutions for the redomiciliation are valid and have been legally adopted.

## Peru

For the inbound redomiciliation, the following stages must be completed:

### Inbound redomiciliation:

Stage	Description – requirements
Stage I – Procedure abroad	<ul style="list-style-type: none"> <li>• Foreign company adopts the decision or resolution to redomicile to the Republic of Peru and to cancel the registration abroad, after obtaining the provisional noting of redomicile in the Peruvian companies registry.</li> <li>• The bylaws of the foreign company must be amended and adapted to the LGS and the corporate forms permitted by Peruvian law.</li> <li>• The foreign company must request a “validity certificate”.</li> </ul>

Stage	Description – requirements
Stage II – Provisional noting in Peru	<ul style="list-style-type: none"> <li>• Draft copy and public deed executed in the presence of a Peruvian notary or consul abroad, requesting the provisional noting of creation of an entry in the registry in Peru.</li> <li>• Registration of the provisional note.</li> <li>• Term of six months to prove cancellation of registration abroad. It is prohibited to obtain the cancellation abroad before requesting the provisional noting.</li> </ul>
Stage III – Final redomiciling	<ul style="list-style-type: none"> <li>• After filing the document proving cancellation of the registration abroad, the entry in the registry becomes final. The effects of the registry entry shall be retroactive to the date of cancellation of the registration abroad.</li> </ul>

In the case of outbound redomiciliation, as this is a process which is not envisaged under Peruvian laws (albeit not prohibited), there are no legal requirements for carrying it out.

**If it is not permitted, what alternatives are there under the legislation in force which permit transferring, in part or in whole, the company’s operations to another jurisdiction?**

## Colombia

As the aim of the redomiciliation is to change or transfer the registered office to another jurisdiction, resulting in the company’s being governed by the laws of the new country of reincorporation, a similar result may be achieved through corporate reorganization transactions (other than a business reorganization regulated by Law 1116 of 2006), for corporate law purposes, as that achieved with the partial or full transfer of the company’s operations to another jurisdiction.

Next, we present an analysis of the main alternatives available:

### Cross-border merger by absorption or creation:

- (i) **Absorption:** a foreign company absorbs a Colombian company, which is dissolved without liquidation, meaning that its assets and liabilities are transferred en bloc to the foreign company.
- (ii) **Creation:** a new company is incorporated abroad and receives the assets and liabilities of the merged companies, which are dissolved without liquidation..

Under these transactions, there is a universal transfer of assets and liabilities – sets of assets and liabilities – from the Colombian company to the existing or newly created foreign company.

In order to formalize the transaction, the companies involved must comply with the provisions regulating the merger under the laws of the two or more jurisdictions involved. Given that the foreign company absorbs the Colombian company’s assets and liabilities and commercial operations in the country, the Companies Supervisory Authority<sup>1</sup> has ruled that, as the merger entails an amendment of the bylaws of the Colombian company resulting in a business integration, the foreign absorbing company would be covered by article 471 of the Colombian Commercial Code and would undertake the obligation to set up a branch of a foreign company in Colombia when commencing permanent operations in Colombia.

**Cross-border spin-off:** (i) a Colombian company that is not dissolved (the Colombian company survives) transfers en bloc one or more sets of its assets and liabilities to one or more existing foreign companies, or allocates them to the creation of one or more foreign companies, or (ii) a Colombian company is dissolved without liquidation, dividing its assets and liabilities into two or more sets, which are transferred to several existing foreign companies, or allocates them to the creation of new foreign companies.

Both in the merger and in the cross-border spin-off, the shareholders of the Colombian companies involved resolve to submit to and be governed by the corporate law provisions of the domicile of the company receiving the assets and liabilities (foreign law).

<sup>1</sup> Official Notice 220-047727 of February 28, 2023

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**Asset disposals:** A foreign company purchases some or all of the assets of a Colombian company which, as a consequence of the transaction, are transferred and become part of the assets of the foreign company. After the disposal of the assets, in the event it involves all of them, the Colombian company – seller – can choose to be liquidated.

In this case, the foreign company purchaser, when beginning to carry out ongoing business transactions in Colombia, undertakes the obligation to set up a branch of a foreign company. It is important to note that Colombian law does not confer the effect of asset transfer en bloc to the disposal of assets, which is an effect of a merger and spin-off.

## Chile

As we have noted, the element that characterizes a company redomiciliation is that there is a change of the company's domicile abroad without undergoing a process of dissolution or liquidation in the country of origin, such that the legislation of the foreign country where the company is redomiciled will recognize that said company existed in the country of origin and, therefore, the company is governed by the laws of the new country of reincorporation. In Chile, through corporate or commercial transactions, a similar result can be achieved in which, for corporate law purposes, the operation or business is partially or fully transferred to another jurisdiction.

Next we analyze the main alternatives available:

**Cross-border merger:** In Chile, the merger of companies is only regulated for public limited companies and joint stock companies, by application by default of the laws applicable to closely held public limited companies. In local regulations, there is no law regulating this type of merger, but corporate law practice has applied it extensively to all kinds of companies, including foreign companies, and it has been accepted by the entities that participate in the merger registration process (e.g., Companies Registry and Internal Revenue Service). Through a merger, the absorbed company would be dissolved, but the absorbing company would acquire all the net worth of the absorbed company, which includes all its property, rights, assets, liabilities and obligations, such that the

entire business would be located in the absorbing company.

If the absorbing company is the foreign company, its effects will depend on the legislation existing in the country of the new domicile, but they would be similar to those existing in Chile, meaning that the foreign company must acquire all the assets, property and rights of the Chilean company, which would be dissolved and cease to exist as a result of the merger.

**Establishment of agencies abroad:** The domestic legislation of Chile expressly permits the establishment of agencies abroad, which can perform the activities permitted for domestic companies and those defined by their instruments of incorporation. On this basis, a Chilean company can set up an agency in a foreign country to carry out transactions and business in that foreign country, which would enable partially transferring the company's operations abroad.

**Incorporation or creation of a subsidiary abroad:** The Chilean company could create or incorporate a subsidiary abroad, through the contribution of its assets and rights – in whole or in part – in order to carry out its transactions and business abroad.

It is important to note that both in the case of establishment of an agency, and in the case of creation or incorporation of a subsidiary in another jurisdiction, the Chilean company would continue to exist.

## Mexico

As the aim of the redomiciliation is to change or transfer the registered office to another jurisdiction, resulting in the company's being governed by the laws of the new country of reincorporation, the result may be similar in Mexico, for corporate law purposes, to that obtained with the partial or full transfer of the company's operations to another jurisdiction under the following alternatives:

**Cross-border merger:** In Mexico, another way to achieve an effect similar to that of redomiciliation would be to carry out a cross-border merger. That concept is not regulated in the General Companies Law or other legislation, but it is not prohibited. Therefore, pursuant to the principle of freedom of contract, we consider it feasible to perform the merger and, from the Mexican viewpoint, the procedure to be followed

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would be very similar to that of redomiciliation. It may be noted that according to the General Companies Law, the formalities to be fulfilled and the disclosure requirements for a change of legal form and for a merger are the same.

**Branches abroad:** Opening a branch of a Mexican

company in another jurisdiction, provided it is permitted by the laws of that jurisdiction, would partially achieve the same effects, given that as we know, the branch has the same legal personality as the company of origin, and the latter must allocate some of its assets to the opening and operation of the branch.

## Peru

N/A

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