CHILEAN LEGAL REPORT

2015 Edition

Cámara ChilenoBritánica

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COMITÉ LEGAL

Legal Committee of the British Chilean Chamber of Commerce

Mission Statement

The principal aim of the British Chilean Chamber of Commerce's Legal Committee is to serve as a communication channel for the analysis, development and circulation of all legal matters related to trade and business in general and, in particular, to the business and economic relations between Chile and the United Kingdom. The Committee aims to develop this objective in the following ways:

- By organising talks or events for the members of the Chamber and/or third parties
- By producing publications, such as articles in the mass media, newsletters, newspapers and others, on topics that the Chamber considers appropriate or that the Board requests
- By preparing annually a Chilean Legal Report, giving an overview of the current situation and legal news in Chile
- By collaborating with the updating of the compendium "Doing Business in Chile" which is published by the Chamber
- By issuing opinions about specific legal matters at the request of the Board
- By bringing attention to shared legal experiences, or legal matters between the United Kingdom and Chile
- By serving as a forum for meetings, discussion, debate and social events between the members of the Committee
- By developing any other related matters that are proposed by active participants of the Chamber and accepted by the Committee

For each project that the Committee agrees to undertake, the responsibility of its development, completion and end result will be that of the Committee or of the person(s) duly delegated. In turn, the delegate(s) will be able to form the specific working group that they may require. In relation to the development of the proposed tasks, the Legal Committee will always take into special consideration the interests of the members of the Chamber.

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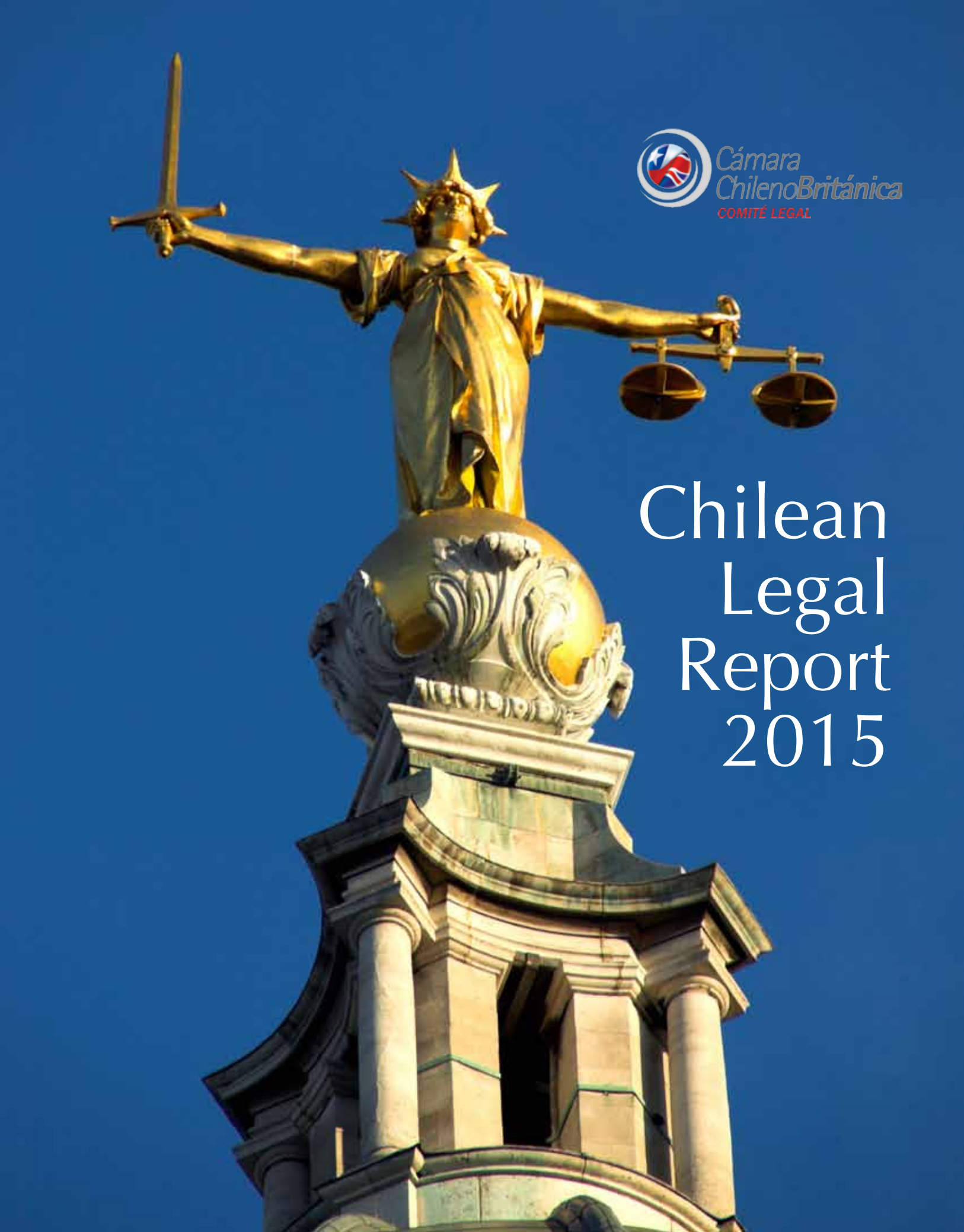

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Chilean Legal Report 2015

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Dear Readers:

Welcome to the fifth edition of the Chilean Legal Report for 2015. As many of you know, this publication has been designed to keep the Chamber´s Business community and senior executives up to speed on the most recent legal developments. Given the changing legal and business environment in which we all operate, I am confident that each article contained in this publication will help readers to be aware of recent developments and help them to understand the impact on their business.

As in previous years, each article is prepared by the most prestigious Chilean law firms, so I encourage readers to take advantage of this edition.

For the next coming year, BRITCHAM´s Legal Committee will face several challenges. Along with this yearly publication, we have scheduled an update to the "Doing Business in Chile", publication, which is a comprehensive guide that covers main aspects of business in Chile. We also expect to conclude a friendship agreement with the UK Law Society, intended to foster relationships between the UK and Chilean legal and business communities, so readers will be probably hearing more of us in the next coming year.

I would like to thank all contributing authors, member law firms and especially Isabel Juppet for her strong dedication to get this year's publication come to life.

If any of the information contained in this newsletter affects you or you have a general question, please do not hesitate to contact us by email to isabel.juppet@britcham.cl.

Ignacio Saavedra
President Legal Committee
British Chilean Chamber
of Commerce

SOCIAL RESPONSIBILITY AND SUSTAINABLE
DEVELOPMENT IN THE NEW "CODE" FOR CORPORATE GOVERNANCE PRACTICES FOR LISTED COMPANIES

On 8 June 2015 the Chilean securities regulator (hereinafter also SVS) issued General Rule N°385 (NCG 385 or "the new code") which sets out the rules for the disclosure of information on corporate governance practices adopted by listed corporations. NCG 385 replaces General Rule N° 341 (NCG 341), which had until then regulated such matters, and which is essentially a corporate governance code issued by the regulator on the basis of a comply or explain principle.

The regulator deemed it necessary to issue a new "code" to update the practices already recommended and contained in NCG 341, and to incorporate some practices related to social responsibility and sustainable development.

Prior to issuing the new code, the SVS initiated in March 2015 a novel public consultation process, which included the creation of several working groups with industry participants and practitioners who commented on the proposed rule. The initial draft published for comment by the SVS included two new practices related to social responsibility and sustainable development matters. One referred to diversity of membership of boards of directors, as well as within company organization in general, with an emphasis on gender diversity. The other matter was the need for a sustainability report, which would be required to meet certain international indices and parameters.

In relation to diversity, the regulator no doubt took guidance from certain foreign governance codes such as the Deutscher Corporate Governance Kodex (2014), which includes a practice on how to fill managerial positions of a company. The Kodex requires that the Management Board must take diversity into consideration and, in particular, aim for an appropriate consideration of women. Another example is the Corporate Governance Principles and Recommendations (Australian code, 2014). This recommends that a listed entity should have a diversity policy, which includes requirements for the board, or a relevant committee of the board, to set measurable objectives for achieving gender diversity.

Regarding social responsibility and sustainable development matters, the regulator may have taken into account the Dutch Corporate Governance Code (2009). This considered as a best practice the principle that the management board submit for

approval of the supervisory board the corporate social responsibility issues that are relevant to the company.

Comments on the rule, as well as the conclusions of the working groups, were included in a report that was issued by the SVS together with the new code on 8 June 2015.

The view of industry participants was that the proposed rule was too narrowly focused on gender diversity in boards of directors. The original text did not make any reference to other aspects of diversity such as different experience, professions, careers, nationalities and knowledge.

There was also debate about: the real benefit that the adoption of such practices would bring; whether board diversity should in itself be a matter of good corporate governance; the fact that there was no international consensus on what would be considered a best practice in relation to board diversity; and whether board diversity was in the direct interest of the company and part of the fiduciary duties of directors.

While for many the need for diversity on the current boards of directors was a subject that needed to be addressed, they questioned whether the board of directors could implement board diversity policies given that it is the shareholders, not the directors, who elect board members. There was also doubt as to whether a more diverse board is necessarily synonymous with better corporate governance or greater efficiencies.

Regarding the sustainability report, even if the market considered that it was a subject of increasing relevance, it was deemed that the proposed text was too prescriptive. This is because it only permits the adoption of certain specific international standards, thus ruling out others, and it does not grant freedom to adopt equally well reputed standards.

The need to introduce guidance and explanations in the new rule was also proposed by the industry. Furthermore, given the novelty of these new practices, there were calls to allow for gradual implementation.

The SVS took into account some of the concerns that had been voiced, by incorporating, among other matters, wider concepts of diversity and inclusion, where the diversity of knowledge, experience and visions among board members was also valued. It also permitted other standards to be used to produce and assess the so-called sustainability reports.

The text of the draft code was adjusted, complemented and in parts rewritten with the purpose of facilitating comprehension and, by the same token, enhancing compliance.

Specifically on diversity, the regulator modified its approach by focusing on the need for the necessary tools to detect those factors that might be inhibiting the natural diversity of capacities, condition, experience and visions that would have existed in the organization if there were no such barriers. Likewise, the code incorporates practices relating to the detection of new talent within companies, valuing diversity, in planning succession of management teams. Moreover, the new code reflects the importance of shareholders taking into account diversity of talents when choosing board members.

THE IMPACT OF TAX TREATIES ON THE CHILEAN TAX REFORM

As to sustainability reporting, the final wording of the code provides a friendlier approach. Instead of imposing strict compliance with ISO 26000:2000 and the guidelines of the Global Reporting Initiative, the regulator has made room for other international standards (for example, those of the International Integrated Reporting Council) and accepts that such standards be followed more as guidelines.

One of the most relevant outcomes of the working groups that the regulator organized with industry participants is that most practices are now imbued with the idea of social responsibility and sustainable development. The regulator deemed that those matters were so relevant that it is now a requirement that such practices be, for example, part of the topics on which board members are to be trained and receive induction on when assuming office. Thus, board members must learn about the risks that come with sustainability, must know and understand the company's relevant interest groups, their expectations, and how to maintain a stable and lasting relationship with them; and must permanently update their knowledge about the main advances made, both nationally and internationally, on inclusion, diversity and sustainable reporting matters.

Another new practice contained in the code is to have a Social Responsibility and Sustainable Development unit, or person with an equivalent function, in addition to the internal auditing unit, in charge of analysing the effectiveness of the policies approved by the board of directors on diversity matters, sustainability reports and their relevant annual disclosure.

While some companies had already started to adopt some of the practices contained in the new code, in order to comply with international standards and, therefore, enhance their ability to compete globally, many market participants had not truly recognized the importance of these new topics. Thus, one of the merits of the new code has been to raise the profile of such issues. Likewise, the way in which the references to the sustainability report were finally incorporated, suggests that the regulator understands social responsibility and sustainable development as a broad concept that encompasses all the internationally accepted issues, such as relationships with communities, the environment, human rights, labour and consumer policies and governance of the company itself.

One may conclude that, once again, the regulator in Chile has had to step in with corporate governance regulation, given the failure of the market to self-regulate. This is despite the increasing awareness of listed companies of the importance of corporate social responsibility and of the challenges of sustainability. Having now published this new code, it may well be that a future initiative of the securities regulator will be to require that the sustainability reports actually be disclosed to the market.

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NEW REQUIREMENT FOR ADDITIONAL TAX

EXEMPTION TO BE MET BY REINSURERS DOMICILED IN COUNTRIES WITH AN EXISTING CONVENTION WITH CHILE FOR THE AVOIDANCE OF INTERNATIONAL DOUBLE TAXATION

To be considered exempt from the 2% Additional Tax on income from the payment of reinsurance premiums to reinsurance companies domiciled in a country with a Convention in force with Chile for the Avoidance of International Double Taxation, it used to suffice to send a certificate of residence of the respective country to the insurer, as an agent obliged to withhold the tax. Starting from May 29, 2015, in addition to this certificate, an affidavit stating that the reinsurer does not have a permanent establishment in Chile and that it is an actual beneficiary of the income is also required.

I. Introduction.

Chilean law provides that taxpayers who remit, pay or make available income to taxpayers not domiciled or resident in Chile, who are residents of countries with which there is a valid Convention to avoid International Double Taxation, and in the cases in which the income, according to the Convention can only be subject to taxation in the country of residence, may be exempt from withholding the Additional Tax, if the beneficiary of income complies with certain criteria. These are the following: a) the beneficiary accredits residency by providing a certificate issued by the Competent Authority of the other Contracting State; b) the beneficiary declares, in the form prescribed by the Chilean Internal Revenue Service (SII) through a resolution, that at the time of the statement it does not have a permanent establishment in Chile; and c) when the Convention so requires, the beneficiary also declares that it is the beneficial owner of such income ( ).

In the past, the SII had not issued the resolution establishing how to draft the affidavit referred to in point b) above. Therefore, for the withholding agent of the Additional Tax of the taxpayer non-resident or non-domiciled in Chile to be exempted from withholding this tax, it was enough to hold the certificate of residence referred to in point a) above.

However, on May 29, 2015 the SII's Resolution No. 48 came into effect. This specifies the content and conditions of the affidavit that must be requested by the payer of an income from

NEW REQUIREMENT FOR ADDITIONAL TAX EXEMPTION TO BE MET BY REINSURERS DOMICILED IN COUNTRIES WITH AN EXISTING CONVENTION WITH CHILE FOR THE AVOIDANCE OF INTERNATIONAL DOUBLE TAXATION

the beneficiary resident in a country in the cases when there is a valid Convention to avoid International Double Taxation. This allows the payers of an income to demonstrate before the SII the circumstances that exempt them from withholding the additional tax or that allow them to apply a rate lowered under the provisions of the Convention, as appropriate.

Conventions for the Avoidance of International Double Taxation signed by Chile mostly state that the Business Benefits of a Contracting State will be taxable only in that State, unless the company carries out its business in the other Contracting State through a permanent establishment.

In the case of income from reinsurance premiums contracted abroad, considered Business Profits for the reinsurers, the additional tax rate is 2%, as provided for in subsection 2 of No. 3, Article 59 of the Law on Income Tax.

As a result, reinsurance premiums paid to a reinsurer domiciled for tax purposes in a country with which Chile has a Convention to avoid International Double Taxation, are exempt from payment of the additional tax of 2%. The insurer is therefore exempt from withholding such tax in favour of the reinsurer, provided that it meets the above-mentioned requirements. ( )

Accordingly, starting from 29 May 2015, the insurance company, as a withholding agent, must prove to the SII that it has obtained from the reinsurers, not only the domicile certificate for the respective country with which there is an existing Convention to avoid International Double Taxation, but also an affidavit. This must state that the reinsurer does not have a permanent establishment in Chile and that it is the beneficial owner of the income paid, in accordance with the provisions of Resolution No. 48 of 2015.

We have focused this analysis on the consequences of the new requirements for the withholding of the Additional Tax for income corresponding to the payment of reinsurance contract premiums. These include the requirements established, and especially those corresponding to the validity of the affidavit. It will be difficult to comply with these for reinsurance and this could make the exemption established by the Conventions inapplicable.

II. Background.

In Circular Letter No. 54 of 2013, the SII set forth the conditions that must be met by the withholding agent, enabling him to be exempted from withholding the Additional Tax or to apply it with the lowered rate established in the respective Convention. These conditions are as follows:

1. That the income paid (by the insurer to the reinsurer in the case of reinsurances) must be covered by a Convention in force to avoid International Double Taxation between Chile and the country of residence of the beneficiary.

2. That the beneficiary (reinsurer) proves its residence before the withholding agent (insurance company) through a certificate issued by the competent authority of the respective country.

3. That the beneficiary declares before the withholding agent, in the manner and time determined by the SII through a resolution:

a) That at the time of the statement, the beneficiary does not have a permanent establishment in Chile.
b) That, if the Convention so requires, it is the beneficial owner of the income, or is a qualified resident of the other country party to the Convention.

4. The Convention must have a maximum taxation limit imposed for the type of income concerned. This must be lower than the limit referred to in local law, or otherwise, it must be exempt from taxation in the country where the income was generated, therefore taxed only in the beneficiary's country of residence.

III. Resolution No. 48 of 2015 issued by the SII.

Until the enactment of Resolution No. 48 of 2015 by the SII, the manner in which the beneficiary should present an affidavit before the withholding agent was unclear, and therefore this requirement did not apply. From 29 May 2015, the date the resolution came into effect, the affidavit has become enforceable. Below are the requirements that must be met.

1. Information that must be contained in the affidavit:

a) Complete identification information about the beneficiary of the income.

b) Complete identification information about their legal representatives.

c) Business name and identification number of the withholding agent or payer of the income.

d) Country, city, province and date on which the affidavit was presented.

e) Signature of the declarant or their legal representatives.

f) Identification information about the notary or minister of faith and his or her respective signature and stamp.

2. The affidavit must indicate clearly and expressly in its text that the beneficiary of income:

a) At the time of the statement does not have in Chile a permanent establishment or a fixed base to which the income paid will be attributed.

b) If the Convention so requires, it must indicate that it is the beneficial owner of the income, or that it fulfils the requirements to be considered a qualified resident of the other country party to the Convention.

3. The affidavit must be signed by the declarant or its legal representatives, and if signed abroad this must be done before officials having the status of ministers of public faith or its equivalent in the country of residence of the declarant.

4. The date of the declaration must correspond to the monthly period in which the income or amounts are meant to be paid, distributed, retired, remitted, credited into the account or made available to the interested party.

5. The statement must state that it is presented for purposes of applying the rules of a Convention to Avoid International Double Taxation, signed by Chile and the other contracting country.

6. The resolution in question attaches a sample of an affidavit. However, statements that do not follow this model but comply with the above requirements will be considered equally valid.

7. The withholding agent will retain the affidavits, and make them available to the SII if so required. If presented in a language other than Spanish, a translation may be required by the SII.

If the affidavits are not submitted when required by the SII, or if submitted but do not comply with the requirements listed above, the taxpayer will not be providing proof of the legal requirements that would allow exemption from withholding the additional tax. In this scenario, the SII may charge the withholding agent the tax difference due and apply appropriate sanctions in accordance with the general rules.

IV. Consequences.

The aforementioned legal and administrative regulations apply to all income of taxpayers domiciled in a country with which Chile has a current Convention to Avoid International Double Taxation. However, our analysis refers specifically to the consequences that the issuance of SII Resolution No. 48 of 2015 will have on the

exemption from the 2% Additional Tax to which foreign reinsurers are entitled under a Convention such as the aforementioned.

We believe that the implementation of the manner in which the affidavit should be presented, according to the SII, will affect the feasibility of the retaining agent being exempt from the obligation to withhold Additional Tax. This is because the SII did not consider the reality of those businesses that make constant and multiple payments abroad and to many reinsurers.

Indeed, in the case of reinsurance, particularly the facultative type, many reinsurers and several insurance companies may participate in a single business transaction. Sending the affidavit within the monthly period in which income is paid, remitted or made available to the reinsurer, will be difficult to achieve, It requires sending an affidavit for each withholding agent and the signature of the reinsurer's legal representative before a person who has the status of minister of faith in the respective country. This requirement will become a redundant and repetitive procedure, difficult for the reinsurers to meet within the monthly period prior to the payment process.

This situation could lead insurance companies to opt to retain the Additional Tax, to avoid the risk of not meeting the legal and regulatory requirements in the case of a review by the SII. This will affect the benefit of the exemption from the 2% Additional Tax, despite the existence of Conventions to Avoid International Double Taxation. The tax amount will ultimately be transferred to the cost of the local insurance.

To minimize the impact of the affidavit, we deem reasonable that the SII should require the sending of the affidavit on an annual and not on a monthly basis, as is currently the case with the certificate of residence, considering that both documents are required to prove compliance with the requirements to access the benefits of the Conventions to avoid international double taxation.

María Paz Chaigneau
Partner

CONVENTION BETWEEN CHILE AND ARGENTINA
FOR AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND CAPITAL AND FOR THE PREVENTION OF FISCAL EVASION AND TAX AVOIDANCE

On 15 May 2015, Argentina and Chile signed a new Convention for the avoidance of double taxation, composed of three instruments: (i) the Convention itself, which generally follows the classic OECD Model Tax Convention; (ii) a Protocol containing provisions that form an integral part of the Convention; and (iii) a Memorandum of Understanding on the implementation of the Convention.

This Convention applies in Chile to Income Tax (but also includes a possible wealth tax) and in the case of Argentina to Income Tax, Tax on personal assets and Tax on minimum deemed income. Its rules will take effect from the first of January of the calendar year following the year in which the Convention has been ratified by the parties and the diplomatic exchange of the ratification instruments has taken place.

Of particular relevance is **Art. 24 on Limitation of Benefits.** Paragraph 1 states that, unless otherwise specified, a resident of a Contracting State is not entitled to the benefits of the Convention, unless such resident is a "qualified person" in the terms of paragraph 2, at the time the benefits are applicable.

Paragraph 2 defines when a resident is considered a **"qualified person"**. It states that a resident is a qualified person when he, she or it satisfies the following requirements:

a) Is an individual; or

b) Is one of the Contracting States or a political subdivision or local authority thereof or an entity that is wholly owned by such State, political subdivision or local authority; or

c) Is a company or other entity, if throughout the fiscal period including the moment in which the benefits apply, the company has met certain requirements. These are as follows:

- The principal class of shares (and any other category of preferred shares) is regularly traded on one or more recognized

securities exchanges, and (i) such exchanges are located in the Contracting State of which the company is a resident; or (ii) the principal place of effective management and control of that company or entity is located in the Contracting State of which it is a resident; or

- At least 50% of the voting rights and of the value of the shares (and at least 50% of any class of preferred shares) in the company or entity are directly or indirectly owned by five or fewer companies or entities entitled to treaty benefits under the preceding paragraph (i.e. they trade on recognised stock exchanges of the appropriate jurisdiction), so that, in the case of indirect ownership, each intermediate owner is a resident of any Contracting State;

d) Is a non-profit legal entity, established and maintained in that State exclusively for religious, scientific, charitable or educational purposes; or it has been organised and is operated exclusively to manage or provide pensions and other similar benefits, provided that more than 50% of the beneficiaries of such entity are individuals resident in either Contracting State; or has been organized and is operated to invest funds for the benefit of the entities described in the preceding paragraph, as long as substantially all revenues from this company are derived from investments made on behalf of such persons;

e) Is a legal entity if, for at least half of the days of the relevant fiscal period, such entity which is a resident of that State entitled to treaty benefits (as provided above) that directly or indirectly hold shares representing at least 50% of the voting rights and value (and at least 50% of any class of preferred shares) of such legal entity, to the extent that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State; and less than 50% of the gross income of such legal entity, (as determined in the Contracting State of which such legal entity is a resident for the fiscal period that includes that relevant moment) is paid or payable, directly or indirectly, to persons other than residents of any of the Contracting States entitled to treaty benefits in the form of payments that are deductible for purposes of the taxes covered by the Convention in the Contracting State of residence of such person.

f) The activities performed by third parties connected to a person shall be considered performed by this latter person. A person is considered "connected" to another if one possesses at least 50% participation in the profits of the other person (or, in the case of a partnership, has at least 50% of the voting rights and value of the shares of the company or participation in profits), or if any other person owns at least 50% share in the profits (or in the case of a corporation, at least 50% of the voting power and value of the company shares or participation in the profits of the company) of either person.

In terms of **Business Profits** (Art. 7) and **Permanent Establishment** (Art. 5), there is a new idea included in the concept of Permanent Establishment. This is "the operation of **large or valuable equipment** in a Contracting State for a period or periods totalling more than 183 days within a period of 12 months."

The provision of **International Transport** (Art. 8) is given with retroactive effect for tax years or fiscal years beginning after 30 June 2012.

Regarding **Dividends** (Art. 10), the taxation limit imposed on the Contracting State where the company paying the dividends is a resident is 10% of the gross amount of the dividends if the beneficial owner is a company that directly holds at least a 25% stake in the company paying the dividends, or 15% in all other cases. According to the text of the Protocol, this rule does not limit the application in Chile of the Additional Tax (non-resident withholding tax) to the extent that the first category tax (corporate income tax) is deductible from the Additional Tax.

The Protocol contains a most-favoured-nation clause for Art. 11 in order to reduce the rates in the event that Chile were to agree with a third State a more preferential treatment for interest payments.

In terms of **Royalties** (Art. 12), these may be taxed in the Contracting State in which they arise. However, if the beneficial owner is a resident of the other Contracting State the tax so charged may not exceed 3% of the gross amount paid for the use of (or the right to use) news coverage; or 10% of the gross amount paid for the use of (or right to use) a copyright in any literary, artistic or scientific work, for the use of (or right) to use any patent, trademark, trade name, design or model, plan, secret formula or, for the use of (or the right to use) industrial, commercial or scientific equipment and for information concerning industrial, commercial or scientific experiences and payments for technical assistance; or 15% of the gross amount of the royalties in all other cases.

This rule reducing the tax to 10% applies only to the extent that the respective technology transfer contracts are properly registered in accordance with the provisions of the legislation in Argentina. It is further understood that payments for the use of (or right to use) computer programs are within the scope of the limit of 10%, including the partial acquisition of the copyright of a computer program. However, if the acquired rights in relation to a standardized computer program (so-called shrink-wrapped software) are limited to those necessary to enable the user to operate the program, payments received in connection with the transfer of these rights will be treated as business profits under the rule described in Art. 7.

Conclusion

Even though the Convention between Argentina and Chile for the avoidance of double taxation follows the OECD Model, it has specific provisions that include the most advanced considerations developed in the international tax arena within the framework of BEPS ("Base Erosion and Profit Shifting").

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NEW STATUTE FOR DIRECT FOREIGN INVESTMENT IN CHILE

Chilean Congress recently approved a bill that establishes a new statute for direct foreign investments (hereinafter the "New Statute for Foreign Investment") to replace Decree Law 600 of 1974, which had been in place for almost forty years. The New Statute for Foreign Investment will be promulgated soon and will come into effect as of 1 January 2016.

Below is description of the main aspects of the New Statute for Foreign Investment.

I. Creation of new entities for the promotion of foreign investment

The New Statute for Foreign Investment seeks to establish in Chile an explicit strategy for the promotion of foreign investment, through the creation of state entities tasked with advising the President of the Republic and assuming the administrative aspects related to foreign investments.

A) Committee of Ministers for the Promotion of Foreign Investment

The New Statute for Foreign Investment creates the Committee of Ministers for the Promotion of Foreign Investment (the "Committee of Ministers"), which is chaired by the Minister of the Economy, Promotion and Tourism and formed by the Minister of Finance and other Ministers to be determined by the President of the Republic.

The Committee of Ministers will seek to advise the President of the Republic in matters associated with the promotion of foreign investment, and, to that end, it will be entrusted with various functions and judicial powers in order to accomplish these objectives.

B) Foreign Investment Promotion Agency

The New Statute for Foreign Investment also creates the "Foreign Investment Promotion Agency" (the "Agency"), as a decentralised service, with its own legal personality and resources.

The Agency will be the legal successor of the Foreign Investment Committee created by DL 600.

In order to fulfil its objective of promoting foreign investment in Chile, the Agency will act as an administrative body of the Committee of Ministers. It will receive and analyse the submissions that are filed, produce the background information and studies that may be required, and perform all other administrative functions that may be determined by the committee.

Senior management and the technical and administrative affairs of the Agency will be the responsibility of the "Director", who will be appointed by the President of the Republic.

II. New concept of direct foreign investment and its requirements

A) Concept of direct foreign investment

The New Statue for Foreign Investment defines direct foreign investment as "the transfer into the country of foreign capital or assets owned or controlled by a foreign investor". An investment will be deemed to be 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 made 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.

B) Who is considered a foreign investor

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

C) Contents of direct foreign investment

For the purposes of New Statute for Foreign Investment, the investment must be made for an amount equal to or greater than USD 5 million or its equivalent in other currencies The investment may take one of the following forms:

a) Freely convertible foreign currency

b) Physical assets of any type

c) Reinvestment of profits

d) Capitalisation of loans

e) Technology in diverse forms that may be capitalised

f) Loans associated with foreign investment granted by related companies.

III. Regime applicable to direct foreign investment

The New 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 this regime. The rights epitomised in the regime are the following:

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

a) That the investment be foreign.

b) 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.

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

d) That the capital assets be related 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.

e) That a request be filed before the Treasury Ministry attaching the certificate issued by the Foreign Investment Promotion Agency evidencing approval as a direct foreign investor.

B) The right to remit abroad the transferred capital and the net profits that the investments generated in Chile, once all of the tax obligations established under Chilean law have been met.

C) The right to access the formal foreign exchange market in order to liquidate the currency that constitutes the investment, so as to obtain the currency necessary to remit the capital and profits abroad.

D) The right to treatment that is equal to that grant ed to Chilean investors, whereby investors are subject to the common legal system, without any direct or indirect arbitrary discrimination whatsoever against them.

Thus, the current rights granted to investors governed by the rules of DL 600 through the execution of an agreement with the Chilean State, which makes them eligible for a tax invariability regime, cease to exist. However, a transitory 4- year system is established, under which foreign investors may request foreign investment authorisations via the execution of agreements with the Chilean State, albeit subject to a total income tax rate of 44.5%.

IV. Procedure to be eligible for the new foreign investment system

Any individual or legal entity incorporated abroad not residing or domiciled in Chile, which transfers capital to Chile under the aforementioned terms, will be entitled to request a certificate issued by the Foreign Investment Promotion Agency, whose sole purpose will be to enable access to the new foreign investment system.

Finally, foreign investors and the companies receiving their investments that maintain a valid foreign investment agreement executed with the State of Chile pursuant to the regulations of DL 600, will fully retain the rights and obligations set forth in these agreements. This is provided that the agreements have been executed prior to 1 January 2016, or to the date on which the New Statute for Foreign Investment comes into effect, if this were to occur on a later date.

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CONSUMER RIGHTS UNDER THE NEW TELECOMMUNICATIONS SERVICES REGULATIONS (DECREE N° 18/2014, MINISTRY OF TRANSPORT AND TELECOMMUNICATIONS)

On 13 February 2014, new Telecommunications Services Regulations, applicable to all telecommunication services provided under the General Telecommunications Law, were published (Decree No. 18 of the Ministry of Transport and Telecommunications, hereinafter the "Regulations"). The main purpose is to regulate the rights and obligations between the service providers and their customers. As noted in its prologue, regulating these rights and obligations is of great relevance in an industry of such an immense economic and social impact, with increasing penetration and under constant technological change. As a consequence, the platforms and methods through which telecommunications services are provided and paid for change on a periodic basis, causing some regulations to become obsolete.

By means of these Regulations, different requirements, restrictions and obligations are imposed on telecommunications providers of all types. Furthermore, some additional specific obligations are imposed exclusively on providers of voice services, Internet services and paid TV services. These requirements are intended mainly to protect the consumers from the moment of contracting the relevant service until this is terminated. Below you will find a brief description of the provisions that seem to be the most relevant from a consumer standpoint.

I. Contracting provisions and other general obligations

Many of the Regulations' provisions refer to the contracts to be entered into between providers and users of telecommunications services, most of which comprise reinforcements of obligations already contained in the Consumer's Rights Protection Law (Law No. 19.496). Through their different communication channels, including websites, providers are instructed to present a clear and transparent contracting procedure. This involves making available at all times updated information regarding their services, their conditions, technical and commercial characteristics, prices and fees, geographic coverage, and also a copy of the relevant contract,

in order to guarantee a transparent and non-discriminatory offer to their users. Additional obligations are required for the offer of bundled products, such as including an updated quotation comparison mechanism.

Further information and transparency are also expected in the contracts themselves. There is a list of minimum provisions that must be contained in every contract and some other additional ones for voice services, ISP services and paid TV service contracts. Among such obligations, contracts for the supply of internet access must include information related to blocking of contents according to the Net Neutrality Regulation (Supreme Decree. N° 368/2010). Likewise, paid TV contracts must include provisions regarding content blocking and parental control, and they must list all channels and services available to the user and detail a procedure for their modification. Regarding this last matter, the Regulation also sets forth that providers cannot change or eliminate the TV channels of a service without 20 days' prior notice, and these channels must be replaced with others of similar quality and content, or otherwise the user has to be compensated.

The Regulations also set forth obligations regarding the provision of the services. These include, for example, allowing users access to updated information about the use of the services up to the very day before the relevant request (except for certain specific cases such as international roaming and long distance calls). They also include allowing multiple companies to provide services within the same building or facilities. Again, some specific obligations are imposed on voice service providers and ISPs. For example, users of voice services must be able to communicate with all subscribers and users of voice services within Chile and abroad, and must be allowed to request or eliminate at any time, access to additional services, such as long distance calls, complementary services, and international roaming.

II. Payments and indemnities

The Regulations set forth minimum standards for monthly invoicing by the providers. Invoices must be delivered on paper or in electronic form, at the user's choice, and must not include charges for services rendered before three months prior to the invoice date (except for international roaming and long distance calls, which may be incorporated up to six months afterwards). Likewise, the invoices must not give a payment date less than 20 days from the invoice date and must specify all the contracted services and payment mechanisms.

Public voice services and ISPs must deduct from the monthly invoice the time during which the relevant services were suspended, interrupted or altered for any cause not attributable to the user. In the case of suspension, interruption or alteration of any telecommunications service that exceeds 48 continuous or discontinuous hours during a month, not due to force majeure or an act of God, the relevant provider must indemnify its users with an amount equal to three times the value of the daily rate for each day of suspension, interruption or alteration of the service (and this amount must be included in the next monthly invoice).

III. Suspension of the services

The Regulations allow providers to suspend the provision of relevant services if users have not paid their invoices within a term of five days following the payment date. However, no suspension is permitted if part of the fees contained in the relevant invoice has been subject to a complaint filed in accordance to the Telecommunications Complaints Regulation (Decree N° 194/2012), which has not been definitively settled in favour of the provider and as long as the uncontested balance of the referenced invoice has been duly paid by the user. The criteria used by the provider for the suspension of the service must be expressly mentioned in the contract and must be non-discriminatory. Once the pending fees are duly paid, the deadline for restoring the relevant service shall be the business day following the effective payment date.

IV. Termination of the services

The Regulations grant users the right to terminate contracts at any time and at their own discretion, by simply notifying their decision to the relevant provider, which must terminate the provision of the services within one business day. The provider must stop charging the relevant fees for the terminated services as from the notification date and any fees paid in advance shall be returned to the user. It is set forth that any actions required for the termination or modification of a contract may not be more burdensome than the ones required for contracting the services in the first place.

In the case of termination of voice services, the relevant providers have an obligation to maintain the relevant user's number in order to allow the user to request another service with that number within a certain period of time, after which providers may reassign the relevant number to another user. If the termination is due to the lack payment of an invoice by the customer within 90 days, the providers must keep available the number of the relevant user for 180 days from the date of termination of the service (or from the date of the last charge in the case of prepaid services). If the termination has any other cause, the relevant number must be kept for two years.

V. Sanctions for non-compliance

Sanctions for non-compliance of the Regulations are to be imposed by the Ministry of Transport and Telecommunications, through the Undersecretary of Telecommunications, according to the sanctions chapter of the General Telecommunications Law (law 18.168/1982). These sanctions differ depending of the severity of the relevant infraction. In the case of fines, they may vary from approximately US$400 to approximately US$70,000, which may be trebled in the case of repeated offences (recidivism). If a fine is not paid within 30 days, that circumstance may even lead to the cancelation of the respective telecommunication licence (depending on the case).

Provisions of the Telecommunications Complaints Regulations (Decree N° 194/2012) remain fully applicable regarding the service invoice.

V. Final comments

Since the Regulations have a customer oriented focus, it is important to note that all the rules set forth in the Regulations are without prejudice to the rights and remedies contained in Law No. 19.496 (which regulates the protection of consumer rights, as mentioned above) and all other applicable regulations.

Finally, from a telecommunications regulations standpoint, it should be noted that as from the date the Regulations came into effect, the former Telephone Public Services Regulations (Supreme Decree N° 425/1996), the regulations regarding the offers and prices of such services (Decree N° 742/2003) and Title III of the VoIP Services Regulations (Supreme Decree N° 484/2007) were derogated.

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COMPETITION LAW:
A MANDATORY MERGER CONTROL SYSTEM LOOMS ON THE HORIZON

On 19 March 2015, the Chilean Government submitted a bill ("Bill") to Congress, aimed at bringing in a comprehensive reform of Chilean Antitrust legislation. Among the Bill's main amendments, we can list the following:

• **Fines:** The current version of the Chilean Competition Act (Decree Law No. 211, hereinafter "DL 211") contemplates a system of fixed maximum fines amounting to approximately US$15.5 MM (for general violations) and approximately US$ 23.3MM (for cartels). The Bill aims to eliminate this system, imposing fines with a maximum threshold equivalent to double the economic benefit obtained as a result of the violation, or 30% of the sales made by the offender for the specific line of products or services involved in the violation for the period of the infringement.

• **Collusion:** The Bill proposes to transform collusion, which currently requires the causing of an effect (or at least the potential to cause an effect) in competition, into anticompetitive conduct per se. Additionally, having decriminalised hard core cartels in 2004, the Bill now re-criminalises these, with possible punishments of 5 to 10 years of imprisonment. We must point out, however, that the definition of collusion, as it currently stands in the Bill, is ominously broad. The criminalized conduct punishes whomever subscribes to, implements, executes or organises agreements, conventions, contracts or covenants that involve two or more competitors seeking any of the following purposes: (i) to set the price at which goods or services are offered or demanded in one or more markets; (ii) to limit the production or supply of goods or services; (iii) to divide, assign or distribute areas or market shares of a market of goods or services, or (iv) to affect the result of public or private tenders conducted by the Chilean State or its enterprises.

• **Merger control:** Perhaps the most noteworthy amendment contained in the Bill is the introduction of a mandatory pre-merger control notification system for concentration transactions that exceed certain thresholds. Considering the novelty of this particular amendment and its relevance to

foreign companies and individuals evaluating an investment in Chile, we have chosen to focus this article in its distinctive features and peculiarities.

The current merger control system

Strictly speaking, Chile does not currently have a merger control system as such, thus the legal statute applicable to mergers and acquisitions is the general provision set forth in article 3 of DL 211. This renders unlawful any act or agreement that prevents, restricts or hinders competition, or that tends to produce any of the aforementioned effects.

Consequently, there is currently no obligation to request prior clearance for mergers and acquisitions (although there are some exceptions in specific markets such as the media industry). Nevertheless, mergers and acquisitions have been subject to an ex ante or an ex post scrutiny by the competition authorities in the following scenarios:

• **When the merging parties voluntarily submit the proposed transaction to the prior review of the Chilean Antitrust Court** ("TDLC"). This procedure suspends the execution of the transaction until it is approved by the TDLC, which can take approximately 8 months. The decision may then be appealed before the Supreme Court. This procedure is public and any interested party may submit information in favour or against the transaction. Additionally, the TDLC has broad powers to impose behavioural or structural conditions and remedies for the approval of the transaction.

• **When the Chilean Competition Agency ("FNE") or third parties submit the proposed transaction to the scrutiny of the TDLC.**

• **In the case of an investigation by the FNE.** The FNE's internal "Guidelines for the Analysis of Horizontal Concentration Operations" (not binding to the TDLC) set out the procedure and criteria for the assessment of a transaction with horizontal concentration implications. When the parties file before the FNE, it may: (a) issue a decision to take no further action; (b) ask the parties to submit a consultation before the TDLC, or submit it directly if the parties fail to do so; or (c) reach an out-of-court settlement with the parties, usually agreeing upon some mitigation measures, which must subsequently be approved by the TDLC.

• **If a previous decision by the TDLC ordered that any of the parties must file for prior approval.**

• **When the FNE or third parties file a lawsuit against the merging parties.** If a transaction has been executed without any consultation, the FNE or third parties may file a lawsuit. In such case the TDLC will exercise an ex post control of the executed transaction, with broad powers to impose penalties and corrective measures to mitigate any anticompetitive effects (e.g. the modification or termination of contracts, the modification or dissolution of partnerships and corporations, and the imposition of fines).

Most of the abovementioned scenarios have been harshly criticised for many reasons, including their excessive duration, the sometimes capricious intervention of third parties and the uncertainty regarding the vast range of mitigation measures that may be imposed by the TDLC.

The Bill and the introduction of a mandatory pre-merger control system

The Bill proposes the enactment of a mandatory pre-merger control notification system, pursuant to which the merging parties must notify the FNE of concentration transactions exceeding certain sales thresholds to be established by a regulation issued by the Ministry of Economy.

The Bill defines a "concentration transaction" as every fact, act or agreement, or a combination thereof, which have the effect of terminating the previous independence between two or more economic agents in any of their activities. In view of the remarkable breadth of this definition, the Bill tries to clarify it by stating that the following acts between independent agents (i.e. which are not part of the same corporate group) will constitute concentration transactions: (a) merger between them; (b) the acquisition by one of them of a decisive influence over the management of the other; (c) any kind of association between them aimed at creating a new independent agent which will conduct its activity permanently; and (d) the acquisition, by one of them, of control over the assets of the other.

Pursuant to the Bill, if the aforementioned transactions exceed certain sales thresholds they must be notified, before their execution, to the FNE. Specifically, the Bill establishes that the obligation to notify is triggered if the sum of the parties' sales in Chile, and the independent sales of at least two of the parties of the transaction in Chile, exceed the thresholds to be established by the Ministry of Economy. There is currently no certainty about the specific amount of such thresholds, although certain officials have suggested that they would range between approximately USD 14,000,000 (individually) and USD 83,000,000 (combined).

Conversely, if the transaction does not surpass these thresholds, the parties do not have the obligation to notify its execution, but they may still submit it voluntarily to the FNE's scrutiny. On the other hand, if the parties choose to execute the transaction without notifying the FNE, the latter will have a period of one year from the execution of the transaction to open an investigation and challenge it before the TDLC.

In a similar manner to European legislations, the Bill contemplates a two-phase analysis by the FNE, during which the transaction will be suspended. Once the FNE receives a notification, it has a brief period to determine whether the notification fulfils all legal requirements. If the notification is complete, the FNE starts its assessment of the transaction, otherwise it indicates to the notifying parties the errors or omissions that must be rectified.

Subsequently, within a period of 30 days from the beginning of its assessment, the FNE must either: (a) unconditionally approve the transaction, should it conclude that it lacks the potential to substantially lessen competition; (b) approve the transaction, conditioning it to the fulfilment of mitigation measures previously proposed by the notifying parties; or (c) extend its assessment for a maximum of 90 days if it preliminarily concludes that the operation has the potential to substantially lessen competition. In such case, the FNE must communicate its decision to the competent authorities and any economic agents that may have a legitimate interest in the transaction (including suppliers, competitors, clients or consumers of the merging parties), who may submit information for the FNE's assessment.

Within the extended term, the FNE must either: (a) unconditionally approve the transaction; (b) approve the operation, conditioning it to the fulfilment of mitigation measures previously proposed by the notifying parties; or (c) block the transaction if it concludes it has the potential to substantially lessen competition.

Finally, the Bill establishes the parties' right to appeal the FNE's decision to block the transaction before the TDLC; the TDLC may uphold or overturn the FNE's decision, either unconditionally approving the transaction or conditioning it to mitigation measures. In the latter case, if the mitigation measures are different from the last measures offered by the parties to the FNE, both will have the right to file for a judicial review before the Supreme Court.

Concluding remarks

In summary, the Bill completely overhauls the current voluntary notification system in favour of a mandatory control one, which clearly has its own trade-offs. Whereas the proposed system includes improvements in terms of a shorter, simpler procedure and an increased level of legal certainty, the Bill may ultimately bring about inefficiencies if the concept of "concentration transaction" is defined too broadly (as it stands today) and the thresholds triggering the notification are too low. This is because many transactions with no potential to lessen competition would have to be revised – incurring in the corresponding unnecessary costs.

In any case, the Bill still has a long way to go in the Congress, but a new regime of merger control is imminent, and once enacted it will surely affect the way local and international deals are done in Chile.

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THE IMPOSITION OF UK BRIBERY ACT (UKBA) AND US FOREIGN CORRUPT PRACTICES ACT (FCPA) OBLIGATIONS ON CHILEAN COMPANIES

Bribery and corruption are stark injustices in the business world. As for Chile, it luckily remains one of the least corrupt countries in South America, and even the world.

However, business crime is on the rise here. Recently, there have been several notable cases involving Chilean companies such as "Ceresita", "La Polar" and those involved in the "Cascadas" case.

Even more recently, cases such as "Soquimich" and "Penta" have brought widespread attention to electoral fraud and illicit financing operations. In both cases, the electoral campaigns were supported by using trusted individuals and organisations that submitted false invoices to these companies. These political campaigns therefore received capital regardless of any deadlines and legal requirements. In the case of "Penta", its owners and executives, as well as members of Chile's Internal Revenue service, and even a former government official, are currently being charged with bribery, tax fraud and money laundering.

Straightforward bribery cases are also on the rise. For example, in the Ceresita case (April 2013), a USD 2.5 million settlement was made for alleged bribes to public officials in connection with construction permits for industrial premises. This was one of the most significant settlements since the Chilean Corporate Criminal Liability Law came into force.

Chile´s basic laws regarding bribery and corruption

Chile itself does not have a specific corporate law that combats financial corruption. Instead, personal criminal responsibility must be established, whereby an individual obtains profit illegitimately.

Interestingly, in the case of bribery, Chilean law does not attribute criminal liability to legal entities based on the company acting through its legal representatives, having wilfully performed the criminal act. Instead, it makes the company liable when it has failed to implement and fulfil its duty to take appropriate measures to prevent the specific crime, and therefore a crime has taken place, benefitting the business. However, even with prevention measures,

a company can be checked and liable if a crime has been committed to its advantage, if these measures were not appropriate or were not effectively implemented.

The main principles of Chile's jurisdiction regarding bribery and corruption are as follows:

- Criminal liability regulations in relation to both natural persons and corporate entities follow the principle of territoriality. (i.e. Chilean law applies, and Chilean courts have jurisdiction, only when offences are committed in Chile, and in Chile the only regulation applied is the Chilean law).

- Chilean courts also have jurisdiction in cases of Bribery of Foreign Public Officials even when committed abroad, when carried out by a Chilean or foreigner with residency in Chile.

Regarding corruption laws, the implementation of acts such as the FCPA and UKBA raises several pertinent questions: (1) Does a long-arm anti-corruption law constitute a valid exception to the principles of territoriality? (2) Therefore, should regulations such as the FCPA and UK Bribery Act be applied in Chile, and if so, how? (3) Are Chilean companies prepared to deal with such foreign regulations if they come to change the national regulation?

The Foreign Corrupt Practices Act (FCPA)

The FCPA contains both anti-bribery prohibitions and accounting requirements. The latter are designed to prevent accounting practices hiding corrupt payments and ensure that shareholders and the SEC have an accurate picture of a company's finances. The FCPA applies to two broad categories of persons: those with formal ties to the United States and those who take action in furtherance of a violation carried out while in the United States.

The FCPA consists of five "elements." A person or organization can be considerate guilty of violating the law if it can be proven that the following conditions occurred:

- A payment, offer, authorisation, or promise to pay money or anything of value was made.

- It was made to a foreign government official (including a party official or manager of a state-owned concern), or to any other person, in the knowledge that the payment or promise would be passed on to a foreign official.

- A corrupt motive was involved.

- It was done for the purpose of (a) influencing any act or decision of that person, (b) inducing such person to take or omit any action in violation of his lawful duty, (c) securing an improper advantage, or (d) inducing such person to use his influence to affect an official act or decision.

- It was done in order to assist in obtaining or retaining business for, with, or directing any business to, any person.

The UK Bribery Act (UKBA)

The UK Bribery Act consolidates bribery related legislation into two general offences:

- Bribing: It is an offence to offer, promise or give a financial, or other, advantage for the purpose of bringing about an improper performance of a function or activity (active bribery).
- Being bribed: It is an offence to request, agree to or receive a financial, or other, advantage for the purpose of bringing about an improper performance of a function or activity or to request, agree to or receive a reward for having done so (passive bribery).

Moreover, it sets out two further offences that specifically address commercial bribery. Section 6 of the Act creates an offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business, and section 7 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation.

Enforcement of the UKBA and FCPA

In the case of the FCPA, the US Government has conducted global industry-focused 'sweeps' for several years, such as when the US Department of Justice and the Securities and Exchange Commission investigated corruption in the medical device industry. Their investigations targeted medical device companies who bribed health-care providers and administrators employed by foreign government agencies. Several of these investigations revealed, at least in part, corrupt activity in Latin America.

On the other hand, since its enforcement in July 2011, the UK Bribery act has had less influence than the FCPA has had in Chile in terms of prevention or convictions of bribery and corruption.

Perhaps this is due to the lack of regimes for corporate voluntary disclosure of corruption or other compliance-related issues. For

instance, it is worth noting the implementation of cooperation agreements between Chile and US regulatory authorities, such as the "Agreement on Antitrust Cooperation, March 2011", and the lack of a similar instrument with the UK. However, a U.K. voluntary disclosure regime, introduced in conjunction with the Bribery Act, does exist, but it remains to be fully tested.

In the bigger picture, the UKBA has seen significant convictions in India, Bahrain and Indonesia, and there seem to be no reason to expect a different outcome in Latin America in the medium or long term.

The practical effects of the UKBA and FCPA in Chile

In the case of transactional proceedings, the UKBA and FCPA are becoming increasingly relevant. For instance, in cross-border mergers it is now common to see businesses that may be subjected to long-arm jurisdiction of these laws being thoroughly reviewed for adequate compliance during the due diligence processes involved in such transactions.

Even in simple international commercial transactions, it is increasingly common to encounter non-negotiable provisions imposed by UK and US companies, or by their respective Chilean subsidiaries, on their Chilean counterparties. In such provisions, the Chilean counterparties are forced to declare that they are aware of the FCPA or UKBA provisions and obligations. They are also usually forced to undertake matters such as the following: to comply with such laws, and not to commit any of the conducts punished by such laws; that their employees, or subcontractors will do the same; that any irregularity or suspicion is duly and timely informed; that they will collaborate with investigations they have initiated; or that they will immediately implement an adequate compliance model that prevents UKBA or FCPA punishable conducts. Finally, it is commonly established that these declarations and obligations are of the essence, and that breaches of any of the declarations or obligations will constitute a serious breach of contract.

With regard to compliance, it is now commonplace now for local subsidiaries of multinational entities to implement locally the relevant FCPA and UKBA risk mitigation systems and rules in their codes of conducts, as well as their compliance arrangements. This is done in addition to the implementation of compliance systems that allow them to benefit from the liability limitations and exclusions established by the Chilean Corporate Criminal Liability Law.

Conclusion

In summary, evidence points towards the increasing need to consider and implement UKBA and FCPA regulations in Chile. Even though it might be seen as an excessive extraterritorial application of local US and UK law, in the long term these regulations will not only assist in eliminating bribery and corruption internationally, but at the same time they will promote legitimate business between entities and therefore increase fair trade.

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THE GENERAL ANTI-AVOIDANCE RULE AND ITS IMPLEMENTATION:

HOW IT WILL BE APPLIED BY THE TAX AUTHORITY

Introduction

A general anti-avoidance rule or "GAAR" can be defined simply as a technique used to counteract illegitimate tax planning. GAARs have been progressively adopted internationally by most of the OCDE countries[1] and also by the BRIC world[2]. In Chile, a new GAAR is coming into force for the first time at the end of September as part of a major tax reform bill enacted in 2014.

Certainly, the GAAR will allow the counteracting of aggressive tax planning in a more effective way. Two main improvements will result from the introduction of a GAAR. First, the line between criminal offences and unpermitted tax advantages will become more obvious and, as a consequence, the tax collecting role of the tax authority will be reinforced. Second, the introduction of the GAAR will allow a combination of anti-avoidance measures to be taken. In fact, it will be possible to complement the existing specific anti-avoidance rules, used to tackle specific tax planning techniques, with a general rule that potentially applies to all avoidance cases not covered by a specific rule.

However, the extension of this new statute and its boundaries are still unclear. In these circumstances, the expected benefits of the introduction of this legal technique become dispersed. Initially, an effective GAAR could reduce the utilisation of irresponsible tax planning and, therefore, it could be a helpful tool in achieving equality among taxpayers in similar situations. Nevertheless, the uncertainty about its application may erode this principle: can equality be guaranteed if the GAAR is applied administratively?

[1] Australia was the first country to enact a GAAR (1915). Germany, France, Canada, Belgium, Italy, Ireland, United Kingdom, Sweden, among other OCDE countries, have a GAAR as part of their tax legislations.
[2] China, India and Brazil.

THE GENERAL ANTI-AVOIDANCE RULE AND ITS IMPLEMENTATION: HOW IT WILL BE APPLIED BY THE TAX AUTHORITY

The United Kingdom's experience

This type of legal technique has acquired popularity and has been introduced into several legal systems over the last century. In the United Kingdom, a long debate took place about the pertinence of GAAR and a bill was finally enacted in 2013. In particular, the discussion was focused on the definition of the appropriate formula to attack illegitimate tax planning without affecting the certainty required by the tax system.

As a result, the GAAR was drafted with the following characteristics: i) it was designed to counteract "tax arrangements", that is, legal and economic acts executed to obtain tax advantages as their main purpose or as one of their main purposes; ii) in order to apply the GAAR, HMRC[3] requires the non-binding opinion of an Advisory Panel; iii) the HMRC decision can potentially be contested in Court; iv) the burden of the proof is on HMRC.

The formation of an Advisory Panel, made up of recognised tax practitioners and established as a consulting entity, was the formula used by the UK to counteract the powers of HMRC in the implementation of the GAAR. Even though it is unclear if the Panel will be able to neutralize HMRC instincts to apply the GAAR discretionally, the existence of a consultative stage will force the discussion, which includes a non-governmental entity, to define what can be considered reasonable in a tax planning context[4]. Afterwards, even if the Panel is only a consultative body, the HMRC decision may be reviewed by the Court and therefore, a two-step screening test must be passed before the application of the GAAR is obtained.

How will the Chilean GAAR operate?

It is not easy to articulate a comprehensive interpretation of the GAAR, especially if there is not a concrete case under revision. This complication is the weakest point of the new rule: if the extension is unclear, the powers of the tax authority seem disproportionate. As a result, more than a positive improvement to the tax system, the GAAR may be opening up the doors to responsive interpretation, alarming practitioners and taxpayers.

In any case, some principles may be extracted from the regulations to establish the overall contents of the GAAR (established in Articles 4.2 to 4.5 of Tax Act). These are as follows: i) the tax consequences of the acts must be governed by their legal effects according to the legal system[5], unless there is simulation or abuse[6]; ii) good faith is understood to be the fundamental principle underlying the acts of the taxpayers and, as a consequence, the legal and economic effects of the acts must be recognised unless they prove to constitute tax avoidance; iii) if there is a specific rule to counteract tax planning, only the specific rule applies (and not the GAAR); iv) the burden of the proof is on the tax authority and the application of the GAAR requires judicial authorisation; v) the GAAR may not be applied retrospectively; vi) finally, a minimum amount of tax has to be involved to require its application (USD $ 16,000 approximately).

The concepts mentioned in the previous paragraph seem to be guarantees to the taxpayer. Nonetheless, they raise concerns about several issues: What are the legal consequences of an act? Where is the line between a relevant and a non relevant effect? How can an act not produce any legal or economic effect? To what extent should a tax advantage be allowed? Unfortunately, the instructions issued by the tax authority interpreting the GAAR have not solved these queries[7].

Application procedure and voluntary consultation process

In contrast to the lack of clarity of the substantial rules of the GAAR, the application procedure is much more detailed and simple to understand. As for many tax administration acts, the application of the GAAR requires a previous administrative stage[8] and afterwards, a judicial authorisation.

At the judicial stage, the Court must value the evidence according to the principle of sound judgement. If the ruling declares the existence of abuse or simulation for tax purposes, it must assess the amount of the taxes, plus interest and penalties.

Additionally, the GAAR contemplates a previous qualification procedure for providing a grade of certainty on its application. The procedure may be initiated by any taxpayer interested in qualifying a specific tax planning scheme. The tax administration response will have binding effects if the same circumstances described by the taxpayer in the requirement are finally met. This formal declaration may avoid a potential conflict with the tax administration and assures that the acts will not be revised by the tax authority.

However, this procedure is restricted to specific operations and it does not guarantee a similar interpretation for all taxpayers. Nevertheless, if the declaration is obtained, it provides a guarantee to the taxpayer involved in the process, minimizing to zero the risk of a tax assessment.

Conclusions

It is difficult to be clear about how the GAAR will be applied and its correct interpretation. It is doubtful that enquiries to the tax authority will resolve the application and interpretation problems of these regulations if the decisions are not disclosed and if the tax authority takes a long time to issue the rulings. All in all, the limits for applying this rule will be defined by the tax authority, at a previous administrative stage with the judicial approval of the Tax Court. This generates legal uncertainty and insecurity.

While in the UK there is a double control test for applying the GAAR and the regulations are coherent in the text, in Chile, only the Tax Court could limit the powers of the tax authority if they exceed the letter of the law. Consequently, if the tax administration invokes the GAAR in an extreme manner, the Tax Court will play a key role in neutralising the application of these rules.

However, and at least in the short term, the GAAR will probably be applied as a matter of last resort where no other tax provisions are applicable. This is a logical consequence if the purpose of the GAAR was to provide tools to the tax authority for controlling the application of the tax reform.

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Lawyer

[3]HMRC: Her Majesty's Revenue and Customs is the tax authority in the United Kingdom.
[4]The GAAR has not been applied in the UK yet.
[5]This point is particularly confusing. Some interpreters have identified in this paragraph the principle "substance over form". However, the text is apparently a little distant from that principle.
[6]The presence of legal or economic effects was introduced as a way to determine if there was tax abuse. In addition, the rule expressly states that if the tax system provides a beneficial treatment, the tax advantage obtained is permissible.
[7]Circular N° 65, issued on 23 July 2015.
[8]The rule includes two limits for application of the GAAR: only the Head of the Chilean Tax Service has the authority to require the declaration of abuse or simulation, and no more than nine months must pass between the administrative requirement issued to the taxpayer (or the answer to the requirement) and the requirement of the Court.

LABOUR REFORM IN CHILE:
THE RIGHT TO STRIKE AND UNIONISATION

The labour reform that "Modernises the system of labour relations" is based on several myths that exist in our country and which circulate and are disseminated in seminars, lectures and various conversations. These myths are related to factors such as low unionisation, corporate persecution, absence of the right to strike and the existence of outdated collective negotiation legislation.

In fact, the Supreme Court noted that fundamental labour rights are lost when these are subordinated to economic systems.

We disagree with the above statement made by the Supreme Court, and we note that, indeed, fundamental rights are immersed in economic systems. In fact, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in Paris in December 1948, whose articles establish basic human rights, states in its preamble that "the peoples of the United Nations have reaffirmed their faith in fundamental human rights ... and have determined to promote social progress and better standards of life in accordance with a wider concept of freedom".

Social progress is essentially a contemporary concept associated with the living conditions of human beings in modern society. It was introduced in the social theories of the early nineteenth century, especially those of Auguste Comte and Herbert Spencer.

The term "standards of life" refers to the level of material comfort that an individual or group of individuals can achieve or aims to obtain. This includes not only goods and services purchased individually, but also the products and services consumed collectively, such as the ones provided by public services and/or governments. So, there is no doubt that fundamental rights are, to some extent, subordinated to economic systems.

I. THE MODERNISATION OF RULES ON COLLECTIVE NEGOTIATION

The reform does not modernise labour legislation, but it implies a regression of 85 years, going back to the Labour Code of 1931 that was in force until the 1970s.

With the reform, only union members may engage in collective negotiations with the employer; this situation involves removing any other negotiating groups. The employer may not unilaterally extend the benefits of a collective contract to workers that are not affiliated to the union. Therefore, if giving more to a non-union worker, the employer would be accused of anti-union practices. Only the worker's affiliation to the union will allow him/her to access to the benefits of collective agreements.

Although the project explicitly states that affiliation and disaffiliation are not mandatory, ultimately workers are forced to affiliate, as this is the only way to obtain the benefits of a collective contract, rather than less. Compulsory affiliation already existed in the Code of 1931, with a single union for blue collar workers and the obligation to join it. White collar workers had access to the benefits of collective agreements by merely affiliating to their union.

The project excludes the replacement of striking workers. The tasks of a striker may not be carried out by external or internal workers who may be available. Individual reinstatement of the strikers is not permitted. This is another feature of the Code of 1931.

The prevention of the replacement of workers on strike does not produce a better balance for the parties, as stated in the project. From the 1930s to the 1970s, when legislation was similar to the proposed project, Chile's average annual growth was only 2.5%. The country's growth, with the current labour legislation, has been the highest in its history, reaching an average of 7% between 1985 and 1997 and 5% in the 2000s (Public Studies 2005, José de Gregorio, Chile's Economic Growth: Evidence, Sources and Prospects). Of course, the country's growth is due not only to labour legislation, but certainly this is one aspect that has influenced it.

Moreover, the internal replacement of workers and the possibility of workers withdrawing from the strike once it has started are options that exist in most developed countries. This is because the fundamental human right to work of those who do not participate in the strike is guaranteed, and the right to strike is considered an individual right - which is collectively exercised. For example, in Germany every employee is free to choose when and for how long he or she wants to join a strike.

II. UNIONS AS EXCLUSIVE NEGOTIATORS

Negotiations conducted only by the union in a company do not generate any problems, as long as this union represents an important percentage of workers.

Of course, one must distinguish between the different areas within the company and/or functions of the workers, as circumstances differ. The collective negotiation in an area within the company or for a specific group of workers should not affect, or extend the benefits to, those who work in a different area within the company or belong to a different group.

The situation of negotiations being conducted only by a union in a company causes problems regarding the Freedom of Association that the project referred to as "expressly protected". These problems are caused because this Freedom of Association is not fulfilled for three reasons. These are related to the following aspects of the reform:

1. The obligation to negotiate only with the unions when they exist;

2. The prohibition of extending the benefits of the collective agreement without the consent of the union; and
3. The automatic extension of benefits by mere affiliation to the union. The problem is generated by the existence of collective agreements established for various areas within the company and workers who have benefits associated with their differing circumstances.
The prohibition of negotiating or extending similar benefits to those who are not obliged to unionise threatens the freedom of association and the right to employment.

Low Unionisation Rates

Low unionization rates are not due to anti-union attitudes from employers, but to various reasons that have been declared by the workers themselves. In the latest ENCLA survey, 89% of those surveyed said that the reasons for not joining a union correspond to a lack of interest among the workers and the small number of workers that makes unionisation difficult. A percentage of those surveyed also believe that it is not necessary. Only 5.3% said that the low percentages of unionisation were caused by a negative attitude of the company.

LABOUR REFORM IN CHILE: THE RIGHT TO STRIKE AND UNIONISATION

III. THE RIGHT TO STRIKE

The intention of the government in the reform is to adapt the actual right to strike to the Conventions N° 87 and 98 of the ILO (International Labour Organisation of the United Nations) and other international treaties. It seeks to guarantee balance between the parties and also to bring together the experience of countries where collective negotiation is more developed.

There is no international definition, nor is there one in the ILO Conventions, which does not mention strikes as a right.

There is also no definition in regional treaties, which relate only to the right to exercise it, but without conceptualising it. Thus, the International Covenant on Economic, Social and Cultural Rights of the United Nations guarantees "the right to strike exercised in conformity with the laws of each country".

That is why Professor Bernd Waas from Goethe University, Frankfurt, in his book "The Right to Strike, A Comparative View", points out that there is no national legislation like another.

The right to strike exists in our country. What happens is that it takes a different form to that of countries that do not support external replacement during strikes. However, in any case it is more similar to that of the more developed countries, where the replacement of workers is allowed, with an apparent impact on unemployment rates and the right to work of other workers.

Finally, in our view, the labour reform generates a clash of fundamental rights.

The right to work is a fundamental human right by which everyone has the right to work and the right to receive protection from unemployment (art. 23 N° 1 Universal Declaration of Human Rights).

The clash of fundamental rights occurs mainly due to the following factors:

1. The right to strike without replacement of workers conflicts with the right to work in a broad sense: referring to the fundamental right to work enshrined in the Universal Declaration of Human Rights.

Labour law must ensure, as a fundamental and basic right, the access to employment and therefore employment should be protected.

There is empirical evidence that the prohibition of replacement of workers during strikes produces a higher unemployment rate in the countries where this exists.

This emerges from the latest unemployment statistics from 2015 of the following countries, which do not include external replacement of workers during strikes: Spain 23.37%, Portugal 13.5%, France 10.3% and Belgium 8.6 %.

In contrast, in countries with replacement of workers during strikes, unemployment is significantly lower: 4.7% Germany, USA 5.3%, Russia 5.4%, and UK 5.6%.

2. The right to strike without replacement of workers also collides with the right to work in a restricted sense, referring to the right to work of specific workers:

i) All other employees of the company should be able to work performing their duties or others equivalent to those of the strikers, so that they are not affected by a movement in which they are not involved;

ii) Workers involved in the strike should be able to individually break away from the strike, as the case of the US, Britain or Germany (Bernd Waas, The Right to Strike, pg. 253).

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Cámara ChilenoBritánica

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