

Dispute Resolution

Chile

I. INTRODUCTION TO CHILEAN LAW**I.1 LEGAL SYSTEM**

The Chilean legal system, which models the Napoleonic Code, is based on the civil law model common in Europe and throughout Latin America. It emphasizes the importance of codified, statutory law. As Chile belongs to a legal system governed by codes, court opinions don't have the same force that they have in a common law system. Chilean judges are not bound by the decisions of higher courts. A court decision does, however, have the force of law with respect to the particular case to which the decision applies.

I.2 SOURCES OF LAW**I.2.1 Law**

Chile is ruled by a hierarchy of norms. The overall norm is the Constitution. Under this text, Parliament passes the laws or statutes (*Ley*), with an internal hierarchy: institutional act (*Ley orgánica constitucional*), special act (*Ley de quorum calificado*), ordinary act (*Ley ordinaria*) due of quorum of approval and depending of matter. Within the ordinary act or ordinary law you have to consider Decree Law (*Decreto Ley*), Decree with force of law, a special delegated law (*Decreto con Fuerza de Ley* or "D.F.L.) and Ordinary Law, all of which are of equal hierarchy. The above-mentioned legislative initiatives, in the order they have been described, establish the hierarchical principle.

I.2.2 Custom and General Principles of Law

Custom and General Principles of Law are formal yet spontaneous sources, which are originated without the intervention of an explicit act of the congress. Custom is understood as a normative use: a constant and permanent repetition of a social practice, under the understanding of that act being a juridical norm. In civil law, it can only be considered as a source of law whenever the law itself refers to it as a source (*secundum legem*). In commercial law it is also a source as to fill the silence of the law (*praeter legem*). In public law, such as criminal law or administrative law, custom can never be considered as a source, in any way.

The General Principles of Law express the idea that the body of laws responds to certain normative ideas that make it coherent. Thus, principles work in two ways: they serve as law interpretation criteria for the judges, and serve as a way of fulfilling the body of laws, in relation to the Courts' Constitutional obligation to always resolve all and any issue subjected to their knowledge, even if there is no law that regulates it. These principles in the Chilean Law are Natural Equity and the General Spirit of the Legislation.

I.3 LIMITATION PERIOD

Limitation, or *Prescripción* in the Chilean law, is understood as a sanction to the party that has been negligent in defending its rights, that consists in the loss of the action.

That is why, if someone that is entitled to something does not file a claim in a certain period of time, which will vary according to the matter, the defendant will have *Prescripción* as an impregnable defence.

For claims arising in contract liability, there is a general rule of five years limitation, from the date of the act or contract, or its breach. For civil liability (torts), the time reduces to four years, which are counted since the damaging event. For pursuing criminal conducts, the action is subjected to *prescripción* between six months and fifteen years, depending on the penalty assigned to the crime.

2. ADMINISTRATION OF JUSTICE AND JUDICIAL FUNCTION

2.1 JURISDICTION

The Constitution states that the faculty of hearing, sentencing and executing sentences for civil and criminal causes belongs solely to the tribunals granted by law.

Chilean law is ruled by the principle of territoriality, according to which the courts granted by law have jurisdiction over all claims regarding any events taken place in the Chilean territory, no matter the person involved, with the exceptions stated by the Constitution and laws.

The limits and characters of the Court's jurisdiction is set forth on the Organic Code of Courts.

3. LEGAL PROCEEDINGS

3.1 COURT SYSTEM

The judiciary constitutes an autonomous and independent branch of government not subject to any other.

The principle of jurisdictional unity is the basis of the organization of the Tribunals.

The Chilean judicial system is historically divided into three levels: One Supreme Court, Courts of Appeal and First Instance Tribunals (or lower level).

Each Court or Tribunal can only exercise its jurisdiction on the matters and territory that the law has expressly assigned.

Ground Rules for the Exercise of Jurisdiction

Ground rules are as follows :

- legality. The creation, organization and faculties of the Courts can only be provided by law. Courts can only act within the limits given by law. Any infringement of this principle is null and void;
- independence, stability and responsibility;
- territoriality;
- hierarchy;
- publicity. All acts in Court are public, but the exceptions granted by law;
- sedentarism;
- passiveness; and

- common Jurisdiction as a general rule. Courts or Tribunals have jurisdiction over all matters, whether they are civil or criminal.

3.2 CIVIL PROCEDURE

Civil Litigation in the Chilean Law is governed by the Civil Procedure Code. The rules set forth by this Code cover all aspects of the litigation process, and will apply to any issue that is not subjected to a different special rule.

The process is, by general rule, written down. There must be a written statement of all the actions in the process.

It is also subject to a double revision. What has been sentenced by an inferior court can be revised, modified or amended by its hierarchical superior.

3.2.1 Ordinary Action

The Ordinary Trial of Higher Amount is the ordinary action, that will be applied on all processes that have no special proceeding.

It can be started either by a lawsuit (*demanda*) or by a prejudicial action (*medida prejudicial*).

- Pre Judicial Actions are used to either prepare the trial, provide the plaintiff with evidence that could be lost when the proof period of the trial arrives, or ensure the results of the trial.
- Lawsuit. Four different periods can be identified:
 - Discussion Period: The Lawsuit itself must be notified to the defendant in the way that the law states for every case, usually in person. Defendant must answer to the lawsuit, also in a written form, within 15 working days, as a general rule. If there is no answering to the lawsuit, it is understood that the defendant denies every statement provided by the plaintiff.
 - Settlement Period: The judge will call the parties to a conciliation audience, where he will personally propose the basis for an eventual settlement.
 - Evidence Period: If the settlement fails, the judge studies the arguments of the parties and decides whether there are facts that are substantial, pertinent and controversial to the trial. If so, he will issue a resolution that enumerates these facts (*resolución que recibe la causa a prueba*). All the evidence in the trial will have to be limited and restricted to those facts.
 - Sentence Period: After the evidence period has finalised, the judge will study the discussion period, and compare the evidence presented by each party with the facts that he stated on the resolution that governs the evidence period (*resolución que recibe la causa a prueba*).

The law does not only state what evidence can be brought to trial, but also sets forth the rules to appreciate each and every proof, and the rules for “weighing” them, in order to come to a final decision. Between two or more contradictory facts, the law states that the judges will

prefer the one that they believe is closer to the truth. Nevertheless, judicial deliberation will always prevail among other proof.

3.2.2 Corporate Litigation Procedure

The corporate litigation procedure is similar to the civil procedure outlined above. The law applied, nevertheless, can be different when commercial issues are being discussed, and some procedure rules may be changed by the special law set forth on the Commercial Code.

3.2.3 Incidents

Incidents are any issue that is accessory to the trial, and that requires a special statement from the Court.

Incidents have a special shorter procedure and usually will not suspend the main trial.

Among the most common are:

- *Accumulation of trials;*
- *Jurisdiction challenging issues;*
- *An application for summary judgment; and*
- *Abandonment of the Process.*

3.2.4 Enforcement Proceedings

A judgment will usually be enforced by seizing the debtor's assets.

In order to do that, plaintiff must have an Executive Title (*Título Ejecutivo*), the most common being a sentence. If the Executive Title is liquid (perfectly determined in specie and quantity), the executive action is not yet subject to limitation (usually three years), and the obligation contained on the Executive Title is not subjected to a condition, date or mode; the Court can issue an impound order of the defendant's assets.

3.2.5 Enforcement of Foreign Decisions

A civil judgement obtained in a foreign country can only be enforced in Chile after the Supreme Court has issued a resolution called *exequatur*, regarding that sentence. This proceeding is regulated in the Civil Procedure Code.

The Supreme Court will issue the *exequatur* taking into consideration the existence of an International Treaty –in which case it will follow the rules set forth by it- and International reciprocity. If none of these two rules can be applied, foreign decisions will have the same effects as if they were issued by a Chilean Court, if they:

- are not against Chilean Law;
- don't challenge Chilean jurisdiction;
- the party that the sentence is invoked against has been properly notified; and

- there are no pending appeals or recourses, according to the laws of the country they were issued at.

These rules are also applicable to arbitrators' awards, in which case the lawyer will prove their authenticity and effectiveness by a sign of approval from an Ordinary Court hierarchically superior to the arbitrator.

4. ARBITRATION

4.1 ARBITRATION IN CHILE

4.1.1 Definitions

Arbitration in the Chilean Legal System is regulated in both the Civil Procedure Code and the Organic Code of Courts.

Arbitrators are Judges appointed by the parties, or by the judicial authority otherwise, to resolve a conflict subject to litigation. The arbitral procedure, therefore, is the one that takes place before an arbitrator.

4.1.2 Types of Arbitrators Granted by the Chilean Law

Chilean law grants three different kinds of arbitrators, depending on the powers set by the parties in both the trial procedure and the process of making his decision:

- *árbitro de derecho*, or arbitrator in law, must follow all the stages that are set forth in the law to ordinary judges, in terms of the litigation procedures. Regarding the method which he needs to follow in order to come to a final sentence, he must also strictly follow the law;
- *árbitro arbitrador*, or arbitrator *ex aequo et bono*, is not forced to follow a legal procedure during the trial, but only the rules agreed and granted by the parties, with very few limitations granted by the law, such as hearing both parties and admitting the evidence. Concerning the final sentence, he issues his decision according to the considerations of prudence and equity;
- *árbitro mixto*, or mixed arbitrator, shares the characters of the *arbitro arbitrador* in terms of the trial procedures, so they can be granted by the parties, but must always issue his decision following the law;

4.1.3 Requirements to be an Arbitrator.

All arbitrators must be of legal age, have free disposition of their assets, and be able to read and write. Arbitrators in law are also required to be attorneys.

Public Notaries and Prosecutors cannot act as arbitrators, likewise neither can any person that is a party in the dispute in issue.

4.1.4 Matters that can be subjected to Arbitration.

The law sets forth what can and what can not be subject to arbitration, by prohibiting some matters to be subjected to it, and setting some others for compulsory arbitration. Besides these two restraints, the parties can freely appear before an arbitrator in order to resolve their conflicts.

Compulsory arbitration is provided in matters such as the division of an inheritance, liquidation of marital property between spouses, or liquidation of the social property in certain corporations; and prohibited arbitration has been set forth in certain matters that are of public interest, like criminal and alimony cases.

4.1.5 Sources of Arbitration. Contracts as a Source

An arbitration can find its source in the law, for mandatory arbitrations; in a will, whenever the testator appoints the arbitrator to divide the inheritance; in a court-ordered arbitration, as a subsidiary source; or in a contract.

Mutual consent to arbitrate is the most common form of arbitration. Parties can either subject themselves to arbitration by just setting forth the fact that they will solve their disputes before an arbitrator (“*compromiso*”), or they can designate the person of the arbitrator immediately (“*cláusula compromisoria*”).

4.1.6 Time Limit for the Arbitrator to issue his Sentence

The law sets forth that the arbitrator must issue his decision in two years at the most, if the parties had not set a different time, which can be longer. After that, the arbitrator loses jurisdiction over the matters that were appointed to his knowledge. This term starts usually at the date of his acceptance to be an arbitrator, but the parties can also agree to set a different date.

4.2 CHILEAN LAW ON INTERNATIONAL ARBITRATION

Chilean law did not refer to international arbitration before September 2004, when Law N° 19.971 was published.

Before that, since commercial arbitration was not specifically ruled, judges had to apply domestic laws, which were inadequate and incomplete, and did not truly fulfill the special needs of this subject.

Due to the latest and ever growing integration of Chile in the global economy, and the multiplication of international transactions with an arbitral clause, there was an increasing need of an alternative that would enable companies of any size to resolve commercial disputes within Chile.

The Chilean Law of International Commercial Arbitration’s text was drawn up very closely to the United Nations Commission on International Trade Law (UNCITRAL), a model published in 1985. It sets out how the parties can select an arbitrator, the process to be followed, and how to implement the arbitrator’s decision. This model has been used by several countries like

Germany, Canada, Hong Kong, Mexico, New Zealand, Scotland and Russia; and also by many U.S. States.

This similarity of legislation among different countries is useful and beneficial for the actual application of the law: the closest the local law is to the model widely applied, the more accurately it will reflect uniform and universal practices. This condition, of course, is an incentive for foreign parties to choose Chile as a venue for international commercial arbitration.

4.2.1 Benefits of the new Law on International Commercial Arbitration

This new law allows the parties to choose the procedure that will be more convenient to resolve their disputes, and to decide the language and the technology to be used.

It also improves the deficiencies of the previous legal structure, by drastically slimming down obstacles such as the chances of challenging the arbitral sentence, which speeds up all procedures and prevents the trials from becoming unduly protracted or postponed; or by lowering inner law requirements to the activity of the “arbitrator in law”. This scenario will bring juridical certainty for foreign investors and counterparts, and will promote international transactions by assuring solid grounds for these operations and the resources the parties can count on, when it comes to resolve their differences.

4.3 INTERNATIONAL CONVENTIONS REGARDING ARBITRATION SUBSCRIBED BY CHILE

Chile has subscribed and ratified the United Nations Convention on recognition and enforcement of foreign arbitral awards, New York 1958, and the Interamerican Convention on International Commercial Arbitration, Panama 1975, which helps the efficiency of the international arbitration system in Chile.

4.4 APPEAL

4.4.1 Civil Arbitration

Recourses of appeal and annulment (*casación*) can be filed against the arbitrator’s sentence, unless the parties have relinquished the rights by agreement.

4.4.2 International Commercial Arbitration

For international commercial arbitration, the only recourse set forth in the law against the arbitrator’s sentence is annulment, which will be pronounced by the Court of Appeals if some specific requirements have been infringed, such as the parties’ capacity; the ruling of aspects that were not covered by the arbitration clause; or infringement on the composition of the arbitration court.

5. ALTERNATIVE EXTRA-JUDICIAL DISPUTE RESOLUTION

5.1 ALTERNATIVE DISPUTE RESOLUTION

Mediation is the most common form of ADR in Chile. It has developed quickly in recent years to meet to demands of changes in criminal proceedings, family law and labour law.

5.2 MEDIATION

5.2.1 Family Mediation

The new law on Family Courts, published in 2004, has brought the opportunity to put a more frequent and efficient use to this mechanism. It states that a third impartial party, with no binding power over his decision, can help each party to reach, by themselves, a solution to their conflict. The objective of the law is to promote collaborative solutions, oriented to mitigate the confrontation.

There are still several obstacles to overcome, in order to raise the number of successful mediations in this field, such as the extremely litigious attitude of the people, the scarcity of well trained mediators, and of course, the costs associated with family mediation.

5.2.2 Health Mediation

Health Mediation is a useful tool to remove conflicts from the overcrowded judicial world, where litigation between doctors and patients can be very harmful to society, as it involves a number of emotional issues that can't always be manifested to or understood by a civil judge. Mediation, in this field, seeks to establish a more fluid communication between the doctor and the person affected by his actions.

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