



## INTERNATIONAL MARITIME LAW SEMINAR 2012

### Recognition and Enforcement of Foreign Decisions in Chile

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#### 1. Enforcement of Foreign Judgments

In Chile foreign public court judgments are enforced through a process called *exequatur*. This process is contemplated in the Chilean Code of Civil Procedure under which judgments issued in a foreign country shall have in Chile the force granted to them in existing treaties; for their enforcement, the procedures set out by Chilean law shall be followed unless they have been modified by such treaties. If there are no treaties related to this matter, Chile shall grant to the judgment the same force granted to Chilean judgments by the jurisdiction originating the judgment. If the judgment comes from a jurisdiction that does not enforce Chilean judgments, it shall not be enforced in Chile. If none of the previous rules may be applied, foreign judgments shall be enforced in Chile provided that:

- (i) they contain nothing contrary to the laws of the Republic, except that procedural rules to which the case would have been subject to in Chile shall not be considered;
- (ii) they are not contrary to national jurisdiction;
- (iii) the party against whom enforcement is sought was duly served with process, except that such party may still be able to allege that for other reasons it was prevented from making a defense; and
- (iv) they are not subject to appeals or further review in the country of origin.

A duly legalized copy of the judgment –officially translated into Spanish, if necessary- must be presented to the Chilean Supreme Court in order to begin the *exequatur* process. In the case of arbitral awards, its authenticity must also be certified by attestation of a high court of the originating jurisdiction.

Notice of the enforcement request must be served on the party against whom it is sought. Such party shall have a period of 15 days –expanded depending on where it is domiciled- to respond. An opinion from an independent court official is also requested by the Supreme Court.

The Supreme Court entertains the matter in a hearing at which the parties may make oral statements.

The whole exequatur process can take anywhere from 2 to 12 months.

After enforcement is allowed, the judgment must be presented to the competent civil court to commence an executive proceeding (under which the defendant's assets can be foreclosed, if applicable).

In general, the whole enforcement process can take anywhere from 2 to 18 months.

## **2. Enforcement of Foreign Arbitral Awards**

It is well known that arbitration clauses are the general rule when dealing with bills of lading, time or voyage charters or contracts of affreightment. Unfortunately, the parties to such agreements are not always aware of the real scope of these clauses and the steps required to enforce an arbitral award, particularly when enforcement is requested in a different jurisdiction to that which resolved the dispute.

In Chile foreign arbitral awards are also enforced through the exequatur process. In this respect, a law on international commercial arbitration -based entirely in the UNCITRAL Model Law rules- was passed in 2004 (Law 19,971). According to UNCITRAL, the model law is designed to assist states in reforming and modernising their laws on arbitral procedure, so as to take into account the particular features and needs of international commercial arbitration. Its article 35 regulates the recognition and enforcement of foreign arbitral awards.<sup>1</sup> Its article 36 lists the defenses that can be asserted against enforcement and regulates orders of stay.

Chile is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to the Inter-American Convention about International Commercial Arbitration.

Chilean Courts have enforced all foreign and domestic arbitral awards that comply with the rules set out in the law for enforcement.

## **3. Formal requirements for obtaining an exequatur relating an Arbitral Award**

In Chile, when dealing with a foreign arbitration award the main formal requirements

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<sup>1</sup> According to article 35 of the Chilean adoption of the UNCITRAL Model Law “*an arbitral award, whatever is the country where is issued, shall be known as mandatory and after submitting a written petition before the competent tribunal, shall be enforced...*”.

of the exequatur are as follows:

- the authenticated original award or a duly certificated copy thereof;
- the original agreement referred to in Article II of the New York Convention (ie, the arbitration clause) or a duly certified copy thereof;
- if the two items above are not in Spanish, a translation of these documents into Spanish;
- a copy of the resolution or the "confirmation or other sign of approval" by the relevant superior ordinary court of the country where the arbitral award has been issued; and
- a certificate of enforcement or similar document.

Despite the fulfilment of all the requirements mentioned above, the Supreme Court may still refuse the exequatur application if:

- any of the circumstances established under Article V of the New York Convention is met;
- the award is contrary to Chilean law or jurisdiction; or
- the counterparty was not served with the arbitral complaint in the first place.

#### **4. Rules that govern service of foreign court proceedings**

A party who wants to sue or serve a resolution from a foreign court in Chile must do so by way of a letter rogatory (ie, a formal request from a foreign court to a Chilean court) and through the appropriate diplomatic channels. If so, in Chile the matter will be first reviewed by the Ministry of Foreign Relations. The Ministry will be guided by the specific bilateral treaties that may exist. Otherwise, the Ministry may work directly with the foreign ministry of the country where the petitioner is requesting service. Once this procedure is completed, the Ministry will forward the matter to the Chilean Supreme Court for its final approval.

#### **5. Measures to be adopted in case of malicious transfer of assets before the enforcement of a foreign judgement or arbitral award**

##### **5.1 Mechanisms established by Chilean law against the malicious transfer of assets**

Under Chilean law exists the so-called "*acción pauliana*" which is the legal action that our law grants to the creditors to annul the acts and contracts celebrated by the debtor in bad faith and with the intention to prejudice such creditors.

In order to be admissible, the so-called "*acción pauliana*" must fulfill the following the requirements:

- a) The act or contract must be susceptible to be annulled (i.e. sale contract);
- b) That the debtor has no other assets to comply with his/her debts;

- c) The debtor must perform these acts or contracts with a fraudulent purpose (intention), that is to say, aimed to prejudice creditors by getting rid of his/her assets. As bad faith is not presumed, the petitioner must prove the bad faith of the debtor.
- d) Regarding third parties that obtain benefit from the act or contract, Chilean law makes a distinction depending on whether the act or contract is gratuitous or onerous. If the act is gratuitous, the sole fraudulent purpose of the debtor is enough to make pertinent the so-called “*acción pauliana*”. On the contrary, in the case of onerous acts or contracts, the creditor must prove that both the debtor and the third party had a fraudulent purpose.
- e) The so-called “*acción pauliana*” must be filed and served within one year as of the date of the act or contract that is pretended to be annulled or revoked.

The proceedings can take say up to 4 years. Within the context of the proceedings initiated by filing the so-called “*acción pauliana*”, the claimant could request as precautionary measures the prohibition to celebrate acts or contracts over the specific asset or real estate that the claimant is alleging that was transferred in bad faith. For such purposes, it must follow the requirements already mentioned in I. 2.b) above.

## 5.2 Bankruptcy

Bankruptcy is defined as a judicial process that involves the liquidation or sale, in a single proceeding, of all the assets of an individual or entity in order to pay off debts in the manner provided by law.

In bankruptcy, a trustee must be appointed. The role of the trustee is to represent the creditor’s interest in the bankruptcy proceedings, and also interest of the debtor as long as the said debtor’s interests are of interest to the bankruptcy estate. The trustee is responsible for the management of the assets of the bankruptcy estate.

The bankruptcy proceedings can last up to four years. Payment to creditors can be made by the trustee within that period with the approval of the meeting of creditors and following the order of payment stated by law.

The bankruptcy law establishes a process for a fast and efficient sale of the debtor’s assets in order to repay credits and to prevent the closure of an economically viable business that has ceased its payments or is facing insolvency. Courts have jurisdiction with respect to management and sale of debtor’s assets. The law permits an informal reorganization plan between debtor and all the creditors, avoiding the involvement of the courts, although most companies are liquidated through the courts.

The bankruptcy law allows for creditors’ meetings, through which they express their opinion on the proceedings and control the acts of the trustee. Agreements made, discussions held and/or votes taken during the meeting are recorded in the minutes. The courts settle disputes among creditors and between creditors and the trustee.

The bankruptcy law allows the debtor to file for bankruptcy if the debtor complies

with all legal requirements on this matter. The bankruptcy law requires the debtor to file the bankruptcy petition before the competent court within 15 days of defaulting on a commercial obligation; otherwise the law considers the debtor to have incurred a “fraudulent bankruptcy”.

The bankruptcy law also permits any creditor to file a petition for bankruptcy against the debtor, even if the debtor does not default on a payment, when there is clear evidence of cessation of payments or insolvency. This fact needs to be proven in court to formally institute bankruptcy proceedings.

The effects of the declaration of bankruptcy are as follows:

- a) The debtor is prevented from managing his own assets.  
The management of the assets passes directly to the trustee. Having said the above, it is important to consider that the fact that the management of the assets is transferred to the trustee does not mean that the property is also transferred. The debtor is prevented from disposing of the assets until creditor’s have been paid.
- b) The suspension of the creditor’s rights to bring individual claims for payment against the debtor.  
The general rule is that all creditors must file their claims in the bankruptcy proceedings.
- c) The declaration of bankruptcy has retroactive effects.  
Certain acts or contracts celebrated in the “suspected period” are unenforceable against the bankruptcy estate. This period is a certain length of time prior to the declaration of cessation of payments when the law presumes that commercial acts or contracts celebrated during that period were intentionally made to prejudice creditors. Indeed, gratuitous acts or contracts celebrated by the debtor from 10 days prior to the cessation of payments and up to the bankruptcy declaration are unenforceable against the bankruptcy estate.
- d) Right to revoke contracts of valuable consideration.  
As previously explained other acts or contracts celebrated by the debtor prior to the declaration of bankruptcy are subject to the so-called “*acción pauliana*”. In this regard, it is important to point out that the law presumes that the debtor knew the bad condition of the business from 10 days prior to the cessation of payments.

## 6. Case study 1: Enforcing a foreign arbitral award under Chilean law: arrest of a vessel

Enforcing a foreign arbitral award has always presented difficulties - even more so when the enforcement of the award is coupled with the arrest of a vessel as a measure to force the counterparty into complying with the award.

As pointed out above in 2 above, Chile is a signatory state to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and as

such this convention is a law of the republic. Further to the New York Convention, enforcement of foreign arbitral awards is also regulated by Articles 242 to 251 of the Code of Civil Procedure. In turn, Articles 1231 and following of the Code of Commerce regulate arrests of vessels calling at Chilean ports.

In the case at stake, the claimants tried to enforce in Chile an arbitral award that had been obtained before an arbitration tribunal in Paris, France. The foreign owners had been awarded approximately \$400,000 in damages arising from the breach of a charterparty by Chilean charterers. It was decided that the most convenient way of achieving enforcement of the award was to request the arrest of a vessel calling at a Chilean port which was operated by the defendants. By doing so, it was possible to benefit from the special proceeding set out by the Code of Commerce to request the arrest based on a privileged credit.

Privileged credits are contained in Articles 844, 845 and 846 of the Code of Commerce. In this case the arrest plea was based on Article 846(3), which provides that there is a privilege over the vessel when the credit is originated by, among others, a charterparty. The credit was established by the arbitration tribunal in Paris and the arrest was conceded on these grounds.

Furthermore, the rules for arresting a vessel prescribe that any issues not resolved by the Code of Commerce will be regulated by the Code of Civil Procedure, which in turn prescribes that a formal complaint must be filed before the relevant tribunal within 10 days of the date of arrest being granted. Otherwise, the arrest will be lifted and the claimant may be held responsible for damages arising from wrongful arrest. This period of 10 days may be extended up to 30 days.

To comply with the general procedural requirement explained above, the first instance court that granted the arrest was informed that the formal complaint was going to be an *exequatur* plea before the Supreme Court. Under Chilean law, '*exequatur*' is the name given to the proceeding through which allowance for the local enforcement of a foreign judgment or arbitral award can be obtained. The *exequatur* plea was filed, but the defendant contested that it was not a formal complaint under the terms of the Code of Civil Procedure, and that it did not satisfy legal requirements for maintaining the vessel's arrest. Nonetheless, the Supreme Court upheld that the *exequatur* was sufficient for the purposes of complying with the obligation to file a complaint within the timeframe allowed by the first instance court.

The biggest challenge encountered when initiating an *exequatur* proceeding is fulfilment of all the formal requirements established by Chilean law before submitting the plea to the Supreme Court. In this particular case the situation was even more complex because all the necessary steps were to be completed before expiration of the term allowed by the first instance court that granted the arrest in order to present the formal complaint (ie, 30 days from the date of arrest). In this case all the formal requirements were fulfilled to proceed with the *exequatur* plea. The Supreme Court accepted that the *exequatur* was a complaint under the terms of the Code of Civil Procedure and the arrest was maintained until the defendant agreed

to settle and pay the amount awarded by the French arbitration tribunal.

**7. Case study 2: Interim measures of protection for shipping disputes arbitrated abroad**

A first instance civil court of Santiago City issued a resolution confirming the court's jurisdiction to grant interim protection measures in connection with ongoing shipping arbitral proceedings conducted in New York. The proceedings were commenced by a company based in the British Virgin Islands that had entered into an agreement with a Chilean shipyard for the construction of a yacht.

Regarding interim measures by a court, Article 9 of the Chilean adoption of the UNCITRAL Model Law rules for international commercial arbitration law states that: *"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."*

Theoretically, in Chile this article makes it possible to request from a local court any of the interim measures set forth under Chilean procedural regulations, such as attachments or goods retention, in order to protect the outcome of a foreign arbitration award. However, this criterion had not been tested in the context of international arbitration proceedings relating to a shipping dispute until this recent case.

The case referred to an agreement for the construction of a yacht at a Chilean shipyard. The yacht was still under construction and the owner (based in the British Virgin Islands) had made a substantive performance of his instalment duties. However, the Chilean shipyard issued a formal termination notice based on alleged failure to pay one particular instalment. The owner argued that such notice was improper because the instalment was not yet due.

The construction agreement was subject to the laws of the United States and the state of New York, and claims or disputes of a non-technical nature were referred to an arbitration panel in New York governed by the rules of the Society of Maritime Arbitrators.

The dispute went ahead and the owner commenced arbitration proceedings at the agreed venue. Notwithstanding these developments, the shipyard threatened to sell the yacht to a third party and the owner requested interim measures in Chile before a first instance civil court of Santiago City to prohibit and avoid such a sale. The petition was based fundamentally on the terms of Article 9 of the Chilean adoption of the model law and granted by the Chilean court.

The Chilean shipyard filed a defence challenging the jurisdiction of the Chilean court, but the case was settled in the international arbitration proceedings. In light of this decision, and subject to compliance with local procedural requirements, a party to international arbitration involving a shipping dispute is allowed to request interim measures from a Chilean court, if applicable, to secure the outcome of the trial.

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