

# Chile

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## Developments in the financial markets

Felipe Moro  
Carey y Cia  
Santiago

Based on the need to provide comfort to foreign counterparties of local entities in connection with derivative transactions, the counsel of the Chilean Central Bank interpreted on January 23 2009 the various regulations issued up to that date in the context of the latest amendments of the June 2007 Chilean Bankruptcy Law and Banking Law, which related to the set-off of derivative transactions in bankruptcy or liquidation scenarios.

Article 69 of the Bankruptcy Law establishes, as a general rule, that bankruptcy declaration prevents any set-off (which has not taken place by the sole operation of law before the date of the bankruptcy declaration) between reciprocal obligations of the bankrupt party and its creditors, except in the case of *obligaciones conexas* (connected obligations) derived from the same agreement or negotiation, regardless of their different maturity dates.

Before the amendments, it was not clear whether Chilean law would accept set-off of derivative transactions undertaken between the same parties under a same master agreement, although it had been generally interpreted that such set-off should be recognised.

The amendments intended to terminate such uncertainty by providing in a new second paragraph of article 69 that "it will be deemed as *obligaciones conexas*" those obligations that, even being in different currencies, emanate from derivative transactions, such as futures, options, swaps, forwards or other instruments or derivative contracts entered into between the same parties, in one or more opportunities, under Chilean or foreign law, under the same master agreement duly recognised by the Central Bank of Chile, which includes netting provisions in case of bankruptcy or mandatory liquidation.

The Central Bank of Chile may determine the terms and general conditions of the above-mentioned master agreements, to which a bank or another institutional investor is a party, considering for these purposes that master agreements are generally accepted in international markets."

Based on the mandate granted by the law, the Central Bank accepted as agreements for close-out netting in case of insolvency of a Chilean counterparty the 1992 ISDA Master Agreement (in the Local Currency – Single Jurisdiction and Multicurrency – Cross Border forms), and the 2002 ISDA Master Agreement. Such recognition includes any amendment, substitution or supplement of any of the referred master agreements, agreed by the appropriate entities and in accordance with the legislation, regulation and the procedures that may correspond.

The Central Bank, however, interpreted the amendments as also granting it an authority to regulate what events of early termination would be permitted under the master agreements for netting regarding banks and institutional investors, prior to their mandatory liquidation or bankruptcy declaration.

According to current regulations issued by the Central Bank, parties may freely agree on any early termination events, but netting as a consequence of early termination events different from those specifically approved by the Central Bank will be suspended if certain actions have been applied to, or taken by the applicable administrative authorities in respect of, the corresponding bank or institutional investor.

On a separate matter, in order to boost investment in Chile, different laws have been recently enacted:

Law 20,326 (published in the Official Gazette on January 29 2009) reduced the stamp tax applicable to loans disbursed during year 2009 to zero, and for loans disbursed between January 1 2010 until June 30 2010 (both dates inclusive) to half of the applicable rate;

Law 20,343 (published in the Official Gazette on April 28 2009) introduced various amendments to the Chilean Income Tax Law, which in summary and among other matters: (i) sets a special treatment for capital gains obtained in the sale of certain publicly-offered debt instruments, allowing an exception to paying such tax if certain requirements are met; (ii) sets specific rules for determining the taxation applicable to securitisation of future cash flows; (iii) extends the application of a 4% withholding tax rate applicable to foreign banks and financial institutions to loans granted from abroad by foreign insurance companies and pension funds subject to a specific regulation of the Income Tax Law; and (iv) modifies the manner in which interest on certain publicly-offered debt instruments will be accrued and thus how such interest shall be recognised as income by the holders of those instruments.

In the corporate governance field, the latest reform promoted by the government with the intent of increasing access to relevant information of a company, avoiding insider trading among other practices and strengthening the rights of minority shareholders, was approved in general by the senate on April 21 2009 and is currently under consideration of specific commissions to be later submitted for further discussions by the senators.

All these regulations have been embraced by the different players involved at a time when project financings in the Americas have decreased during the first quarter of 2009 by 69.8% in comparison with the first quarter of 2008 (source: Thomson Reuters, Global Project Finance Review, Q1 2009) and thus investors need to regain confidence in the markets.

## Financial and corporate

Recommended firms
<b>Tier 1</b>
Carey y Cía Claro y Cía Philippi Yrarrázaval Pulido & Brunner
<b>Tier 2</b>
Barros & Errázuriz Cariola Díez Pérez-Cotapos & Cía Guerrero Olivos Novoa y Errázuriz Morales & Besa Prieto y Cía
<b>Tier 3</b>
Bofill Mir & Alvarez Hinzpeter Jana Larrain y Asociados Noguera Larrain & Dulanto
<b>Tier 4</b>
Alessandri & Compañía Baker & McKenzie Urenda Rencoret Orrego y Dörr

With neighbouring Argentina and Bolivia awash with economic and political turmoil, Chile has been an island of stability in South America's southern horn. Facing intense pressure over the past few years to spend the \$20 billion-plus surplus created by copper exports, the fiscally prudent policies of finance minister Andrés Velasco proved to be well founded when the global economic crisis hit. The accumulated funds would allow the government to stimulate the economy safely for several years if the need arises.

Fears were raised in the first quarter of 2009 regarding Chile's largest industry, when the value of copper exports plunged 66% in March over the previous year. The commodity market swiftly recovered in the ensuing weeks, spurred largely by increased demand from China. However it is apparent that Chile's overwhelming reliance on its copper trade makes it vulnerable to the Asian nation's appetite for the metal. The recent market swings underscore the need for Chile to develop other industries to support its economy through periods of weak global copper demand.

Despite Chile's relatively strong economy, the nation's workforce suffered a dramatic rise in the unemployment rate, which reached 10.2% in the second quarter of last year. The government hopes to counteract this with an ambitious \$4 billion stimulus package – one of the world's largest in relation to Chile's size. The plan includes tax breaks for businesses, a job-creating public works programme and added funding for energy and resource development projects. Given Chile's enterprise-

friendly nature, the stimulus package should create attractive opportunities for investors.

One problem sector in the economy is Chile's commercial fishing industry (second only to Norway's), which is suffering from an outbreak of infectious salmon anemia – a virus that has destroyed populations at salmon farms and hatcheries. Some operations saw their output plummet as much as 64% last April over the previous year. Since it takes two years for salmon to reach harvesting size, fishing operations will need financing to make it through the blight. Whether this comes in the form of a government bailout or private lending, Chile's southern fishing communities will be looking for loans in 2010.

### Carey y Cía

Carey y Cía remains in the top tier in 2010 not only because it's the largest firm in Chile but also owing to its ability to manage its size. As one competitor says: "Carey is a very efficient firm. It's a very large firm, but they manage to integrate the departments well." Last year Carey acquired the Harnecker IP practice from its fledgling partnership with Guerrero Olivos Novoa y Errázuriz, but plans to operate the well-regarded patent and trademark firm as a separate entity.

The firm has a long-established reputation in the international banking market. In late August of 2008 a team led by Diego Peralta advised the China Development Bank in a three-year, \$100 million loan to Banco de Chile under the recent free trade agreement signed by the two countries. The firm also counselled HSBC in financing the \$1.6 billion takeover of supermarket chain Distribución y Servicio (D&S) by Walmart.

With the global financial crisis constricting the banking community, Carey is able to draw on its well-balanced corporate practice to maintain its presence in the market. Claudio Lizana's team of lawyers counselled utility provider PSEG in the sale of electricity distributor Saesa to a consortium of investors formed by Morgan Stanley and the Ontario Teachers Pension Plan. The transaction closed late in 2008 for a base price of \$870 million, with the consortium assuming an additional \$400 million of Saesa's debt.

Recently, the firm has been kept busy by woodcraft company Masisa in several transactions, securing a \$103 million loan from a syndicate of banks led by Rabobank and conducting a \$101 million offering in the Chilean market.

#### Leading lawyers

Jaime Martínez  
Diego Peralta  
Salvador Valdéz

### Claro y Cía

While Claro y Cía is regarded as a traditional family-oriented firm, there is a consensus among Chile's lawyers that this format has not stifled the attorneys there. One competitor uses a simple formula to assess the success of a firm's second line. "I ask, 'What would happen if the top three partners of the firm were to die or depart?' I have a sense that Carey may be affected but Claro wouldn't change."

One such second-line attorney is the younger José María Eyzaguirre, active in the firm's corporate practice. One client praises Eyzaguirre not only for his reputation as a resolute yet results-driven negotiator: "He strongly supports his client's interests and, at the end of the day, you will reach an agreement with him but it will be tough."

Last February Eyzaguirre's team finalised one of the largest M&A transactions in Chile's history, acting as local counsel to Walmart in its takeover of Chilean supermarket chain Distribución y Servicio (D&S). The purchase, listed at \$2.2 billion, marks the US retailer's long-sought entry into the Chilean market. The transaction is notable not only for its size but also for its timing at the peak of the global financial crisis.

The firm has also been active in the energy sector, with Rodrigo Ochagavía's team advising energy developer AES Gener and its project company Empresa Eléctrica Angamos in garnering the \$988 million debt financing needed to build and operate a thermo-electric generation plant in northern Chile.

#### Leading lawyers

Cristóbal Eyzaguirre  
José María Eyzaguirre  
Rodrigo Ochagavía

### Philippi Yrarrázaval Pulido & Brunner

Philippi Yrarrázaval Pulido & Brunner fills in where Carey leaves off in terms of banking and finance, with strong ties to German and Spanish banks. Chilean lawyers point to the partners' close affiliation with Spanish law firm Uría Menéndez as partial explanation of their success. Clients single out Marcelo Armas as a focused attorney with the ability to manage a team of lawyers effectively. As one client states: "He will put the team together so we get appropriate coverage."

Armas's team represented French bank BNP Paribas in its strategic acquisition of a 49.9% stake in BancoEstado's asset management unit. The terms of the deal include a 20-year exclusive distribution agreement and an immediate payment of \$19.3 million. BancoEstado is Chile's third-largest bank.

Recently, the firm has been involved in financing within the mining and energy sectors, representing several syndicates in some of Chile's largest projects. Last May, the firm counselled the larger part of a consortium of lenders including French bank Calyon, ING and Santander in loan agreements totalling \$1.05 billion to finance the Esperanza copper mining project. Concurrently, the firm represented a similar consortium in the initial financing of Pacific Hydro's Chacayes hydro-power project on the Cachapoal river.

In capital markets, the firm took part in the first issuance of bonds on the Chilean market by a foreign company – advising Mexico's América Móvil in its \$145 million bond placement last April.

#### Leading lawyers

Marcelo Armas  
Jaime Irarrázabal  
Alberto Pulido

### Guerrero Olivos Novoa y Errázuriz

The short-lived partnership between Guerrero Olivos Novoa y Errázuriz and the IP firm Harnecker abruptly ended at the beginning of last year, with Harnecker going to Carey y Cía. While there is a sense that the meltdown is a symptom of trouble at the firm, most competitors feel this will have little effect on its financial practice.

Clients laud Guerrero's ability to handle complex financial transactions. As one said: "Not so many people in Chile handle these kinds of matters, but they have delivered." Jorge Delpiano and a team of lawyers counselled Telefónica in its acquisition of Compañía de Telecomunicaciones de Chile for \$942 million. The negotiation process involved an amendment of the bylaws and the approval of 75% of the acquired company's shareholders.

Most recently, Delpiano led the firm's representation of Compañía General de Electricidad in its acquisition of Iberdrola's Chilean assets. The sale, valued around \$300 million, includes the renewable energy producer's stake in two hydroelectric companies.

#### Leading lawyers

Jorge Delpiano Kraemer  
Roberto Guerrero Valenzuela

### Morales & Besa

Following the 2007 shake-up in the firm's financial department, there is a consensus among Chilean lawyers that Morales & Besa has landed on its feet and is a substantial presence in the market. Clients praise Pedro

García for being hard working and efficient. "If you need to renegotiate something complex in a short period of time," one client says, "you will find with Pedro you can get done whatever you need."

Competitors note Morales & Besa's presence in the banking markets and its particular emphasis on financing for mining and energy projects. In 2008, Pedro García's team advised a syndicate of lenders, led by European banks BNP Paribas and RBS, that provided \$988 million to the local arm of AES Gener to fund the construction of a thermal power plant in northern Chile. The firm represented the State Bank of India in a \$185 million secured loan facility to mining entities Sante Fe Mining Company and Inversiones Eroush for the development of iron mines in Chile.

Morales & Besa has advised several companies on the issuance of bonds in the Chilean market, including state-owned energy company ENAP's successful \$300 million offering of ten-year notes last year.

#### Leading lawyers

Pedro García  
Guillermo Morales

### Other ranked firms

While noted for its IP practice, **Alessandri & Compañía** boasts several notable corporate clients, including Samsonite, Johnson & Johnson and Louisiana-Pacific Corporation. In regard to the latter, Felipe Cousiño's team locally advised the building materials manufacturer's acquisition of a 75% share of a wood panelling factory in Brazil owned by Chilean company Masisa. The value placed on the assets acquired by Louisiana-Pacific is \$74 million. The firm is also active in the asset management industry, with a list of clients that includes Goldman Sachs and Oppenheimer.

*Leading lawyers:* Felipe Cousiño and Fernando Jamarne

In addition to carrying out the work of its US hub, the local arm of **Baker & McKenzie** has been active representing corporate clients in the placement of bonds in the Chilean market and assisting with Superintendency of Securities registration.

Last year Antonio Ortúzar Jr represented Viña Concha y Toro in several offerings, including a common stock issuance that netted the wine maker \$52 million, as well as several other lines of corporate notes that totalled \$180 million.

*Leading lawyers:* León Larrain and Antonio Ortúzar Jr