

# Chile

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## Netting provisions after amendments to Chilean law

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On June 5 2007, Chilean Law 20,190 (the MKII Law) amended, amongst others, Article 69 of Bankruptcy Law 18,175 and Article 69 no 6 of the Banking Law.

Under article 1655 of the Civil Code, netting is effective by the sole operation of law, even without the knowledge of the parties, up to the lesser of both amounts if the parties are reciprocally debtors of similar obligations and such reciprocal obligations are due and payable.

### Changes to the Bankruptcy Law

Before the amendment, under Article 69 of the Bankruptcy Law, the declaration of bankruptcy impaired any netting that would have not been effective before this date by sole operation of law, except regarding connected transactions.

The amended Article 69 defines as “connected obligations” those that arise from derivative transactions under the same master agreement, including netting provisions in case of bankruptcy or mandatory liquidation. The definition covers futures, options, swaps, forwards and other instruments or derivative contracts, even if they are in different currencies or governed by different laws.

The master agreement must be recognized by the Central Bank of Chile, which has not done so as of yet. The Central Bank will be able to determine the terms and general conditions of the master agreements, considering the terms and conditions generally accepted in international markets.

This change does not amend the general provisions of Article 76 of the Bankruptcy Law, according to which certain payments made or securities created from the “date of cessation of payments” (which may not be

more than two years before the date of the resolution declaring the bankruptcy) may be annulled under certain circumstances – basically, when made or created to benefit one creditor versus the estate.

Nor does it amend the most specific provision of the second paragraph of Article 77 of the Bankruptcy Law. This paragraph allows any netting to be annulled if made in respect of credits acquired against the bankrupt party by assignment or endorsement, as long as the assignee was aware payments had been ceased at the time of the assignment or endorsement.

The criteria for the date of cessation of payments depend on whether the debtor conducts a commercial, industrial, mining or agricultural activity, or not. If not, the criteria followed by domestic doctrine and jurisprudence are strict: payments are ceased on the date of the first failure to comply with obligations evidenced in documents with executive force. If a debtor conducts one of the above activities, the criteria are wider: the date is not necessarily the date of the first failure, but is based on a broader analysis of the economic and financial situation of the debtor.

In any case, in our opinion, payments made before the bankruptcy declaration, and which are not ineffective *per se*, should not be rescinded by the bankruptcy court if made in good faith.

The fact that any payment is deemed ineffective, or is declared null and void, does not mean that the non-defaulting party will lose its right to obtain payment. It only means that the non-defaulting party will have to verify and obtain payment of its credit through bankruptcy proceedings.

### Changes to the Banking Law

Banks operating in Chile are not subject to bankruptcy proceedings but to a mandatory liquidation procedure in case of insolvency. Before June 5 2007, Article 136 of the Banking Law established that in case of liquidation, whenever a creditor was at the same time a debtor of the bank, netting should only

take place at the time of the corresponding distributions of funds made during the mandatory liquidation procedure, provided the other legal requirements were also met.

The MKII Law modified Article 69 no 6 of the Banking Law, authorizing banks to operate with derivative products, in accordance to the rules and limitations established by the Central Bank of Chile.

Article 136 of the Banking Law was also modified to establish that netting of connected obligations derived from derivative transactions entered into by banks in accordance to Article 69 no 6 of the Banking Law shall also take place during a mandatory liquidation procedure, pursuant to the provisions described above.

If a Chilean party (not necessarily a bank) fails to perform its obligations under the master agreement owing to default, bankruptcy, liquidation or any other similar circumstance, the non-defaulting party will be entitled to exercise its rights under the netting provisions. It will also have a claim to receive or an obligation to pay the net amounts of the mark-to-market values of individual transactions under the same master agreement on the bankruptcy declaration's date.

The netting provisions of the MKII Law have been in force since June 5 2007, but netting provisions for derivative transactions entered into by banks or institutional investors will be effective from October 3 2007.

## Capital markets

Recommended firms
<b>Tier 1</b> Carey y Cia Claro y Cia Philippi Yrarrázaval Pulido y Brunner
<b>Tier 2</b> Barros y Errázuriz Cariola Díez Pérez-Cotapos y Cia Guerrero Olivos Novoa y Errázuriz Morales Noguera Valdivieso & Besa Prieto y Cia
<b>Tier 3</b> Cruzat Ortúzar & Mackenna Larrain y Asociados Urenda Rencoret Orrego y Dörr

## Banking

Recommended firms
<b>Tier 1</b> Carey y Cia Claro y Cia Philippi Yrarrázaval Pulido y Brunner
<b>Tier 2</b> Barros y Errázuriz Cariola Díez Pérez-Cotapos y Cia Guerrero Olivos Novoa y Errázuriz Morales Noguera Valdivieso & Besa
<b>Tier 3</b> Cruzat Ortúzar & Mackenna Larrain y Asociados Prieto y Cia Urenda Rencoret Orrego y Dörr

## Mergers and acquisitions

Recommended firms
<b>Tier 1</b> Carey y Cia Cariola Díez Pérez-Cotapos y Cia Claro y Cia Philippi Yrarrázaval Pulido y Brunner
<b>Tier 2</b> Barros y Errázuriz Guerrero Olivos Novoa y Errázuriz Morales Noguera Valdivieso & Besa Prieto y Cia
<b>Tier 3</b> Albagli Zaliasnik & Cia Cruzat Ortúzar & Mackenna Larrain y Asociados Urenda Rencoret Orrego y Dörr

## Project finance

Recommended firms
<b>Tier 1</b> Carey y Cia Philippi Yrarrázaval Pulido y Brunner
<b>Tier 2</b> Barros y Errázuriz Cariola Díez Pérez-Cotapos y Cia Claro y Cia Guerrero Olivos Novoa y Errázuriz Morales Noguera Valdivieso & Besa Urenda Rencoret Orrego y Dörr
<b>Tier 3</b> Larrain y Asociados Prieto y Cia

By all measures, the Chilean economy is doing well and the Santiago exchange is flourishing. The government is pro-business, or at least not anti-business, which is sufficient in this emerging market. At the very least, the administration is doing its best to encourage investment, both foreign and domestic.

Capital markets continue to provide liquidity, and bank lending is booming. Market insiders have commented that there is so much activity in Chile that very little effort is required for firms to find transactions. This has become an aggressive and competitive financial environment, where deals are won on the basis of pricing. Low-bid transactional firms are competing for deals against firms that have maintained relationships with clients for nearly a century – and as often as not, pricing matters more.

An indication of how strong the markets have become is that bonds can easily be placed on the Santiago exchange without needing to be listed simultaneously in New York or London. This was a necessary step in years past because of insufficient liquidity within Chile. Today's local markets, however, are able to sustain corporate debt without infusions of foreign capital.

Bank lending has also changed over the past decade. Syndicated loans were once the province of the international banks and the law firms that advised them since those banks were the only ones with the capital to lend. There is more money in the market today, so now local banks are willing – and able – to do syndicate lending on their own. In fact, Chilean companies using international lenders are increasingly requesting that their local banker be involved as well.

M&A is as strong as ever, with plenty of consolidations in various industries. As in banking, it used to be that only the pedigreed law firms – with their international clients – could participate in the big acquisitions.

Today's market, however, is dominated by Chilean companies acquiring their domestic competitors. The improved economy has improved the balance sheets of stronger companies, allowing them to think about growth. Upstart firms, or smaller ones, with hungry clients have been able to take advantage of this new environment.

### Carey y Cia

Carey y Cia is the country's largest firm, and one of its most prestigious. A varied client list includes some of the largest industrial and financial companies in the world: Bank of America, ING Group, GlaxoSmithKline, JPMorgan, Grupo Televisa and Deutsche Bank, among many others. The firm was Chile's 2007 *IFLR* law firm of the year for its work with VTR and Liberty Media on a \$750 million loan, the largest in Chile last year.

The firm has been a leader in the capital markets on both the debt and equity sides, advising real-estate company Paz on its \$30 million initial public offering (IPO) in October 2006. Carey also represented Mitsubishi in its \$50.5 million purchase of a 12.5% stake in leading steel producer CAP; the Japanese company considers Chile to be its launching pad for other Latin American expansion.

Carey's biggest asset is its international connections, and was able to use these connections to help state copper company Codelco place a \$500 million bond in the US. The amount is at the higher end of debt obligations for a Chilean entity.

The firm is also a big player in banking, a practice area jointly led by Jaime Martínez, Diego Peralta and Juan Guillermo Levine. One long-time client said about the team: "They are very good, and maintain excellent levels of contact. They are able to deliver the most efficient transactions in banking and capital markets." Both Peralta and Martínez have been singled out by their competitors for the quality of their work.

The banking group represented VTR (Liberty Media's primary operation in the Americas) in that award-winning \$750 million lending deal. The firm represented Chile's largest supermarket chain Distribución y Servicios D&S in the September 2006 restructuring of a \$225 million loan. Exemplifying the firm's international clientele, the Canadian mining firm relied on Carey as their advisers in the Chilean segment of a \$150 million revolving credit facility arranged by the Canadian Imperial Bank of Commerce.

Carey's banking group also advised clients including HSBC Securities, JPMorgan, ING, Barclays Credit Suisse and other international

financiers on banking and financial markets regulatory matters ranging from the issuance of perpetual bonds to changes in Chilean derivatives law.

International clients have allowed Carey to participate in several global M&A deals. The largest was the February 2007 purchase of Bank of America's operations in Chile and Uruguay by Brazilian bank, Banco Itaú. Representing Bank of America, Carey helped its client shed unwanted assets in \$633 million sale; Bank of America then acquired a stake in Banco Itaú. The former now owns a piece of Brazil's largest private bank while the latter expanded its operations into Chile and Uruguay.

Another worldwide deal was the sale of Grupo Nueva-owned Amanco to Mexican PVC maker Mexichem in March 2007. Carey was Chilean counsel to the sellers in the \$600 million deal.

#### Leading lawyers

Jaime Carey  
Jorge Carey  
Juan Guillermo Levine  
Jaime Martínez  
Diego Peralta  
Salvador Valdés

### Cariola Díez Pérez-Cotapos y Cia

A solid firm in other transactional areas, it is in the M&A markets that Cariola Díez Pérez-Cotapos y Cia is able to show its expertise. One client who used the firm in a takeover said: "I chose them because of solid references I obtained. The work they provided was excellent and very professional."

A team led by Sergio Díez advised Norwegian bank DnB Nor for the Chilean part of Pan Fish's multi-jurisdictional acquisition of Fjord Seafood and Marine Harvest. The total value of the deal was €1.33 billion.

In a complicated acquisition, Cariola Díez represented Intercontinental Hotels in the sale of its holdings in SC Andina for \$30 million. Spanish conglomerate Nueva Rumasa was the buyer in a deal that included the takeover of the Crown Plaza Hotel in Santiago.

Partner Oscar Ferrari advised Saxoline Traveller in the travel goods company's acquisition by Samsonite Group. The \$50 million deal helped Samsonite expand its presence in Latin America.

Sergio Díez and managing partner José Luis Letelier have been singled out by clients for their M&A work. The firm is also respected for its intellectual property practice.

#### Leading lawyers

Sergio Díez  
Luis Oscar Herrera  
Francisco Illanes  
José Luis Letelier  
Sebastián Obach

### Claro y Cia

"The standard of their international work places Claro as one of the best firms in Chile; we have used them for a long time and find them to be highly trustworthy, and [they] offer an excellent referral network." So said a Claro y Cia client, who also praised the "professional work" of partner Cristóbal Eyzaguirre.

No surprise, then, that Claro represented the underwriting syndicate led by Merrill Lynch in a recently completed offering of 19.9 million shares by LAN Airlines. The June 2007 offering raised \$320 million for the Chilean based airline. Originally, 11.2 million shares were set to be offered but better-than-expected traffic figures required an increase to the offering. The proceeds are intended mainly for regional expansion.

The firm advised client Canadian Imperial Bank of Commerce (CIBC) on a \$150 million syndicated loan offered to mining company Aur Resources. Proceeds from the loan were meant to be used for general corporate purposes. CIBC was lead arranger for the syndicate.

Considering Claro's reputation in the M&A market, it figures that the 127-year-old firm would participate in one of the largest deals in Chile. Claro client Restco Iberoamericana announced in May 2007 that it would acquire 1600 restaurants owned by McDonald's, in 18 Latin American countries. The \$700 million deal included the participation of other leading law firms in Latin America which, like Claro, are top-tier firms in their markets.

Another international client, Brazil's largest privately owned bank Banco Itaú, purchased the Chilean (and Uruguayan) operations of Bank of America in a \$633 million acquisition. This was part of Itaú's acquisition of Bank of America's Brazilian subsidiary, BankBoston, in 2006. The deal included the rights to purchase BankBoston operations in Chile, which the bank did in this rights exercise which was completed in February 2007.

A rival partner agreed with Claro's status when he said: "They are an excellent firm for banking and M&A. They have Rodrigo Ochagavía, the best lawyer of his generation: very thoughtful and intelligent, but also easy to deal with."

#### Leading lawyers

Cristóbal Eyzaguirre  
José María Eyzaguirre  
Nicolás Eyzaguirre  
Sebastián Eyzaguirre  
Matías de Marchena  
Rodrigo Ochagavía

### Morales Noguera Valdivieso & Besa

The new Chilean legal environment is one where lean transactional law firms are competing against traditional, relationship-oriented ones. Morales Noguera Valdivieso & Besa has raised its profile above the rest of the pack. The firm has managed to work in some of the biggest deals in Chile's financial markets, despite its small size – the firm has less than 40 partners and associates.

The firm's biggest M&A transaction was its involvement in the sale of Costanera Norte toll road by Morales client Impregilo International Infrastructures. An Italian consortium, Autostrade Sud America, paid \$277 million, with provisions to pay another \$33 million within the next four years, depending on toll revenues. In the deal, Morales Noguera negotiated with two of Chile's largest firms, Philippi Yrarrázaval and Claro y Cia.

Another highlight transaction involved the recently completed acquisition of Salcobrand, the second-largest Chilean drug store chain. The firm represented the joint owners – the Colodro, Selman and Weinstein families – in the \$178 million sale to the investment group Empresas Juan Yarur, which was represented by Carey y Cia.

In project finance, Morales Noguera has been able to really distinguish itself. The firm participated in bonds placements for several highway authorities, representing the issuer in the Chilean placement of the offerings. The firm represented Talca Chillán Sociedad Concesionaria in an October 2006 bond offering worth \$40 million. The following month, a \$60 million bond was placed for Morales client Sociedad Concesionaria Autopista del Bosque. Both bonds were in the mid-range for Chilean bond offerings, and the bonds were insured by MBIA and XL Capital, respectively. A third highway financing was the December 2006 for concessionaire Rutas del Pacífico for its Santiago-Viña del Mar toll road.

The firm's biggest deal, however, was the refinancing of a \$212 million bond – also insured by MBIA – issued for Autopista del Maipo Sociedad Concesionaria, in December 2006. A secured credit facility from ABN Amro was incorporated into the deal.

On the threshold of receiving a top-tier ranking, Morales Noguera is without a doubt

a firm to keep an eye on. Some market insiders feel that the firm will be moving up sooner rather than later. A partner at a rival firm said: "They are a young and efficient law firm, but even still, I find there is very little difference between dealing with them and with Carey or Claro."

#### Leading lawyers

Eugenio Besa  
Pedro García  
Guillermo Morales  
Diego Noguera  
Carlos Silva

### Philippi Yrarrázaval Pulido y Brunner

One of three firms to be ranked in the top tier for every practice area, Philippi Yrarrázaval Pulido y Brunner has participated in some of Chile's largest banking, capital markets and M&A deals.

In the capital markets, Transelec made a \$480 million bond placement as part of a financing plan for parent company Brookfield Consortium in a December 2006 offering which was the largest bond offering in Chile. This was followed in March 2007 with a second placement, for \$213 million. The proceeds from this offering were used to pay off the remainder of the bridge loan used to finance the 2006 Transelec takeover.

Philippi represented the Chilean interests of the lending syndicate led by Citibank, BNP Paribas, Banco Santander and Toronto-Dominion Bank in the largest loan of the year. The syndicate offered a \$725 million secured loan financing with a \$25 million local revolving tranche to VTR GlobalCom in a September 2006 deal. The loans were subsequently refinanced in May 2007.

2007 has already been a busy year for Philippi. In March, the firm represented its wireless client Claro Chile in a \$400 million syndicated deal.

When it comes to M&A activity, Philippi is considered one of the best in the business. One client said: "Philippi Yrarrázaval is my firm of choice, particularly in M&A deals. My relationship with this firm has been going for a long time, and the feedback has always been very positive."

Like other leading Chilean firms, M&A has been the most active areas for Philippi. The firm could claim a place at the top when Brookfield Consortium became an important client for Philippi. The asset manager's June 2006 takeover of Transelec for \$1.7 billion was the biggest M&A deal in recent Chilean history, and was financed by a \$600 million bridge loan from Scotiabank. After the deal was finished, Brookfield placed a

\$450 million bond offering to pay off the bridge loan.

Local companies also use Philippi for M&A deals. The Cencosud supermarket chain bought out Supermarket Infante in an August 2006 deal worth \$34.2 million. Philippi represented the buyers in a deal that left Cencosud with about 20% of sales in the Antofagasta region.

In October 2006, Philippi again represented Cencosud; this time it was a \$60 million acquisition of Economax Supermarkets, located in Santiago. A relatively simple transaction was complicated by regulatory issues about market share which had to be addressed before the deal.

Among Philippi partners, the one who gets singled out is Alberto Pulido. Clients refer to him as an "excellent professional" and "one of the best banking lawyers in the country".

#### Leading lawyers

Marcelo Armas  
Alberto Pulido  
Andres Sanfuentes