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CREATION OF A NEW LAW THAT CREATES AN IN REM RIGHT OF CONSERVATION

A new law that creates an in rem right of conservation over real estate has been published in the Official Gazette on June 25, 2016 (the "Law of IRRC").

The Law of IRCC aims to create an instrument to facilitate and promote the participation of the private sector in the environmental conservation of Chile, supplementing thereby the conservation activities carried out by the State in this regard. The foregoing is based, principally, on article 19 No. 8 of the Political Constitution of Chile, which grants to the State the duty to safeguard the preservation of nature, allowing the State to establish specific limitations on the exercise of certain rights for such purpose.

Nevertheless, the creation of this new in rem right is based on Comparative Law. The United States of America has included in its legislation a type of easement called "conservation easement", as a voluntary mechanism that permits the owners of certain property to limit its use for conservation purposes, without losing their right of domain over it. Likewise, since 1992, Costa Rica has had a similar instrument in its body of laws, and more than 3,000 hectares of private land have been protected under such legal figure.

The in rem right of conservation is defined by the Law of IRRC in article No. 2 as, "an in rem right which grants the authority to preserve the environmental heritage of an estate or some of its attributes and purposes", underlining that the referred right must be created, "in a free and voluntary basis by the owner of the estate in benefit of a specific person or legal entity". In other words, these are not liens and encumbrances imposed by the authority, but rather, an in rem right that is voluntarily created through a constitutive agreement (the "Constitutive Agreement"), with the purpose of providing mechanisms for individuals or private entities to materialize their spirit of conservation, granting continuity over time to their initiatives.

It is necessary to point out that the Law of IRRC makes a clear

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distinction between the real right of conservation and the right of ownership. In this sense, the article No. 3 of the Law of IRRC provides that, “the in rem right of conservation is immovable and different from the domain of the encumbered property”. Moreover, according to the definition established in the law for the in rem right of conservation, it is granted by the owner of the encumbered property, for the benefit of a different person or legal entity.

In that sense, the Law of the IRRC gives broad flexibility to the parties to agree on the terms and conditions of the Constitutive Agreement. Thus, for example, the in rem right of conservation may be transferred under any title, and will last for an undetermined term, unless the parties to the Constitutive Agreement agree on something different. In the same vein, the Law of IRRC states that the beneficiary of the in rem right of conservation cannot collect the natural and civil products (frutos naturales y civiles) which may arise from the conservation of the real estate, unless the parties to the Constitutive Agreement explicitly agree on it. In addition, the parties to the Constitutive Agreement may freely set pecuniary obligations.

The beneficiary of the in rem right of conservation can be any individual or legal entity, public or private, and it shall be acquired by means of the Constitutive Agreement, which must be evidenced by public deed, and executed by the owner of the encumbered property and the beneficiary of the in rem right of conservation. The Constitutive Agreement will be used as title to request the registration of the in rem right of conservation in the corresponding Real Estate Registrar, and from the moment of its registration, the in rem right of conservation will produce its effects.

It is important to point out that, for the validity of the Constitutive Agreement, the parties shall establish specific liens, which cannot be a mere obligation to fulfill the current statutory rules. In this sense, the Law of IRRC requires the parties to the Constitutive Agreement to include at least one of the followings limitations or covenants:

1. A limitation or prohibition to use the encumbered property for one or more specific purposes (for example, construction purposes, commercial purposes, industrial purposes, etc.);
2. The obligation to take over the maintenance, cleaning, management, repair, etc., or to hire related services for the conservation of the encumbered property; and,
3. The obligation to execute or oversee a management plan, and to

rationally use and take advantage of the natural resources of the encumbered real estate.

Finally, the Law of IRRC regulates the events of termination of the in rem right of conservation, providing that, in addition to the applicable events that all in rem rights are subject to, according to our current regulation, the in rem conservation right can be terminated by:

1. The transfer of the encumbered property, when this transfer arises from the foreclosure of a preferential mortgage and under specific conditions described in the Law of IRRC;
2. The dissolution of the entity that benefits from the in rem right, unless the parties agree to something different; and,
3. The expropriation by the State of the encumbered property, without prejudice towards the option for the beneficiary of the in rem right of conservation to maintain such right over the part of the encumbered property that is not affected by such expropriation, to the extent it is possible.

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