The Corporate Governance Review

Seventh Edition

Editor
Willem J L Calkoen

The Law Reviews

THE CORPORATE GOVERNANCE REVIEW

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this seventh edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, more and more shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on 'norms' by codes and influential investor groups.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust.

What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better 'tone from the top'? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national versions along the lines of the Cadbury 'comply or explain' model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs gradually amassed too much power or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well.

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders' regulations and the press?

Each country has its own measures; however, the chapters of this book also show a convergence. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick 'first look' at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2017

Chapter 7

CHILE

Jorge Ugarte, Luciano Aguilera and Héctor Hernández[1]

I OVERVIEW OF GOVERNANCE REGIME

i Sources of law and regulations

The primary sources of corporate governance rules applicable to listed corporations in Chile are contained in the Corporations Act (Law No. 18,046), the Corporations Regulation (Supreme Decree 702/2011 of the Ministry of Finance), the Securities Market Act (Law No. 18,045) and the rules issued by the Securities and Insurance Superintendency (SVS). Moreover, there are three active stock exchanges – Santiago Stock Exchange, Valparaíso Stock Exchange and the Chilean Electronic Stock Exchange – that have implemented a series of rule books for issuers and other market participants.

For the past 20 years, the corporate governance model in Chile has increasingly become a central concern among academics and lawmakers, and has been subject to various new laws and regulations. With a view to strengthening minority shareholder rights, in 2000, Congress passed Law No. 19,705, which introduced new corporate governance rules and measures (e.g., independent directors, internal committees and the regulation of related-party transactions) and provided for the first time a legal framework for tender offers. In the following years, in an effort to build a more robust corporate governance regime, Congress enacted a series of legal reforms, introduced by Law No. 19,768 and No. 19,769 of 2001 (also known as the MK I Law), Law No. 20,190 of 2007 (the MK II Law) and Law No. 20,382 of 2009 (the Corporate Governance Law).

ii Enforcement

The listed company regime is generally enforced by the SVS and, when disputes arise, by competent courts. The SVS is a regulatory agency that has primary responsibility for enforcing securities laws and regulations by monitoring and sanctioning listed companies and management team members who fail to discharge certain duties and responsibilities. The SVS sanctions may consist of fines, censorship, suspension or delisting. Local courts, on the other hand, generally settle disputes between the SVS and supervised individuals or entities, among shareholders, and between shareholders and the company's management.

iii Recent developments and future trends

Chile has certainly improved and strengthened corporate governance standards, becoming an investor-friendly jurisdiction within the Latin American region, according to international

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1 Jorge Ugarte is a partner, Luciano Aguilera is a senior associate, and Héctor Hernández is an associate at Carey. The authors would like to thank Joaquín Plaza, a legal intern, for his contribution to this chapter.

surveys.[2] Nevertheless, the most recent major reform of corporate governance was the Corporate Governance Law, enacted almost eight years ago. The Corporate Governance Law strengthened minority shareholder rights in listed companies by tightening rules for insider trading, enhancing the roles of independent directors and further regulating related-party transactions in listed corporations.

Although legal reforms of corporate governance have become stagnant, the SVS has been active in providing rules with a view to bolstering the corporate governance regime in Chile. In 2015, the SVS issued General Rule Nos 385 and 386 to enhance transparency standards and introduce corporate social responsibility practices by promoting, among other things, management diversity (e.g., in relation to gender, nationality, age and length of tenure for board members and high-level executives).

In a recent development, a bill currently under discussion proposes replacing the SVS and other market regulators with a centralised governmental body called the Financial Market Commission (FMC). Key aspects of this bill include the creation of an investigative unit for securities violations, an increase in corporate fines and penalties (including, as the most severe punishment, the dissolution of the company) and a leniency policy for whistle-blowers.

II CORPORATE LEADERSHIP

i Board structure and practices

Corporate boards in Chile are one-tier boards, and two-tier structures are not contemplated under Chilean law. The business of a listed company is managed by the board of directors, whose members are elected by the shareholders in shareholders' meetings.

The number of board seats, the term of appointments, and the existence of alternate directors are detailed in the company by-laws. Listed companies must have at least five members, whose term of office may not exceed three years. However, under certain circumstances, as explained below, listed companies are required to have at least a seven-member board, which must include one independent director and a board committee.

The board has managerial and representative responsibilities and must always act collectively at board meetings. Directors may participate in a meeting by physically attending the meeting or participating by technological means (e.g., telephone or similar device) that allows all persons participating in the meeting at least to hear each other at the same time. The board represents the company judicially and extrajudicially and is invested with all the managerial powers that the law or the by-laws do not otherwise reserve to the shareholders' meeting. The board has the duty to set short and long-term business objectives and make all the necessary decisions to reach those objectives, which may be made directly through board resolutions, or indirectly by delegating authority to managers and other company officers. The board of directors must appoint one or more managers whose attributions, duties, rights and obligations will be set by the board, and may delegate part of its authority to managers, assistant managers or lawyers, or a member of the board or a directors' committee and, for specific purposes, other individuals. However, the board's managerial functions

2 Chile has been praised for many years by international surveys for its solid institutions and low perceived corruption. See https://lavca.org/wp-content/uploads/2015/11/UPDATED-FINAL-Scorecard-15-16.pdf; and www.transparency.org/cpi2016.

may not be delegated; thus, although the board may delegate part of its authority to one or more individuals, the board members will remain ultimately liable for the management of the company.

Unless otherwise provided in the company's by-laws, all board resolutions must be passed with the approval of the absolute majority of the directors present with voting rights. The board meetings must be chaired by the chairman of the board, who has a casting vote, unless otherwise provided in the by-laws. The Corporations Act forbids the CEO or managers from being the chairman of the company. Board compensation is determined in the company by-laws and is annually approved at the regular shareholders' meeting. The annual report that listed corporations provide to the regular shareholders' meeting must detail payments made to the board members during the relevant fiscal year, including payments that do not relate to their functions as members of the board of directors.

When listed companies reach a market capitalisation of 1.5 million Unidades de Fomento[3] and at least 12.5 per cent of the company's voting shares are held by shareholders that control or possess less than 10 per cent of all of the company's shares, an independent director must be appointed and a board committee must be established.[4] The members of the board committee must be compensated, the majority of them must qualify as independent directors and all of them are simultaneously liable for their duties as directors and members of the board committee. Listed companies are free to have other committees as well (e.g., executive, internal-audit, risk, ethics, investment and human resources committees).[5]

ii Directors

The Corporations Act provides certain fiduciary duties for board members to discharge to adequately fulfil their managerial duties. These fiduciary duties are commonly classified as duties of care, loyalty, confidentiality, information and account rendering. The directors must always act with ordinary diligence and they are jointly and severally liable for any damage caused to the company, the shareholders or third parties. The managers have the same liability as the directors.

The director's liability can be civil, criminal or administrative. If a director does not wish to assume any responsibility for an act or agreement of the board of directors, he or she must record his or her dissent in the minutes of the meeting and it must be duly reported by the chairman in the following regular shareholders' meeting. Any provision in the corporate by-laws and any agreement adopted by the shareholders that tends to release or limit the directors' liability is void.

The board members are elected by the shareholders in a regular shareholders' meeting and their term of appointment, which is provided in the by-laws, cannot exceed a three-year term. Directors may also be re-elected indefinitely. However, if the by-laws are silent as to the directors' term of office, the board must be renewed annually. The board members must be elected and revoked as a whole and, therefore, partial replacements are forbidden. Vacancies on the board require a complete revocation and re-election of the board members; however, the board may fill the vacancy by appointing an interim director until the next regular

3 As of 29 January 2017 approximately US$59,720,249.

4 Currently, all listed companies whose shares are traded in the Santiago Stock Exchange have a board committee. See Amrop MV Consulting, 'Directors in Chile' (2016 edition), p. 37.

5 Only a 23 per cent of all the companies listed with the Santiago Stock Exchange have one of these additional committees. Id., p. 39.

shareholders' meeting takes place. The Corporations Act does not contemplate diversity requirements for boards' composition; however, it stipulates incompatible roles for directors, including senators, representatives, mayors, state secretaries and other senior government officers, employees of public entities (e.g., the SVS) that oversee the relevant company, and broker dealers, among others. The same individual is able to hold the position of director simultaneously in more than one listed company, and in fact this is a quite common practice.

In recent years, directors' fiduciary duties have become increasingly important. Directors and managers must discharge their duties with the degree of diligence, care and skill that an ordinary person would exercise in his or her own business (i.e., an ordinary standard of care). This fiduciary duty implies that a director must take all appropriate and timely measures to keep her or himself informed of the company's affairs, actively participate in board and board committee meetings, require the inclusion in board-meeting agendas of certain matters that may benefit the 'corporate interest', and oppose illegal resolutions or resolutions that diverge from benefiting the corporate interest.

The Corporations Act provides that directors have the right to be duly informed on the company's business affairs, and the Corporations Regulation and Chilean courts have made clear that they also have a duty to keep themselves reasonably informed to adequately comply with their administrative role.

Directors must also act loyally, which implies that they must abstain from acting in the event of a conflict of interest, and must not usurp corporate business opportunities for their own benefit or for any shareholder or group of shareholders, including those who elected them. In this context, the Corporations Act provides that directors elected by a shareholder or group of shareholders have the same duties towards the company and the other remaining shareholders as they do to the shareholder or group of shareholders that elected them, and they cannot approve by-law amendments, issue securities, approve policies or make decisions that move away from benefiting the company in its entirety. Also, the directors cannot borrow money or other assets from the company or use the company's assets for their own benefit or for the benefit of persons related to them, unless previously authorised by the board of directors. In general, the duty of loyalty entails that directors must always pursue the corporate interest.

If a director violates the aforementioned duty of loyalty rules, he or she will be forced to disgorge to the company any profits received thereby, and will remain liable for any other damage caused to the company, in addition to any other sanction that may be imposed by the SVS.

In the year 2009, the Corporate Governance Law introduced a new chapter to the Corporation Act on listed company related-party transactions. Related-party transactions are defined as transactions between the company and one or more individuals or entities related to the company (e.g., directors, managers or senior executives of the company or their relatives, legal entities in which any of the foregoing individuals own, directly or indirectly, at least 10 per cent of the shares or equity rights of the legal entity, among others). Listed companies, however, may enter into related-party transactions provided that they are intended to contribute to the corporate interest, the transaction is at arms' length as to the market price, terms and conditions, and the transaction complies with the related-party transaction procedure detailed in the Corporations Act.

Pursuant to the related-party transaction procedure, individuals who have a personal interest in the transaction must immediately report the situation to the board of directors. Before the company enters into the corresponding transaction, it must be approved by the absolute majority of the board of directors, without counting the votes of the interested directors; and if the majority of the board members must be excluded from voting, the transaction must be either approved by unanimous vote of the disinterested directors or approved by the shareholders, in a special shareholders' meeting, by two-thirds of the issued voting shares. If the transaction is deferred for the shareholders' approval, the board must appoint at least one independent appraiser to prepare and provide the shareholders with a report on the terms and conditions of the proposed transaction and its potential impact on the company. The board committee or, if there is no such committee, the disinterested directors may appoint an additional independent appraiser. Once the final appraisal report is received, the directors must explain their interest in the transaction and provide the shareholders with their opinion on the same, taking into account the corporate interest. In any case, a violation of the related-party transaction procedure does not void the transaction, but gives the company and the shareholders the right to procure a court judgment in their favour and make the breaching individual or entity disgorge any profits obtained from the transaction, and indemnify the company for any applicable damages, regardless of any further sanctions imposed by any authority.

The approval of merger and capital contributions in kind are subject to specific procedures provided under the Corporations Act; however, Chilean courts and the SVS have recently held that when these transactions involve related parties, their approval must be subject to the related-party transaction procedure, which may be considered a stricter standard than the aforementioned specific procedures. Notably, the court and SVS resolutions were issued in relation to a dispute between a controlling shareholder and certain institutional investors, whereby the institutional investors sought better terms and conditions for themselves and other minority shareholders.

Companies that are required to have a special board committee must also appoint at least one independent director. Independent directors are subject to the same rights and obligations as regular directors. However, being part of the board committee allows them to be closely involved in the company's internal activities (e.g., examination of the company's financial matters, review of related-party transactions, reporting on related-party transactions to the shareholders, review of the company's executive compensation plans, and review of the annual reports, among other things). Independent directors, like regular directors, may arrange individual meetings with one or more shareholders, as well as with lower management officers, and they can also attend the board meetings of the company's subsidiaries; nonetheless, they are subject to the same confidentiality duties as regular directors and may not disclose information that the company has not officially disclosed to the market.

III DISCLOSURE

i Financial reporting and accountability

Listed companies must comply with reporting obligations provided in the Securities Market Act and rules issued by the SVS and the individual stock exchanges. These reporting obligations may be classified into reporting material events and periodic information.

A listed company has the legal obligation to truthfully, sufficiently and promptly report any material information about itself and its business. 'Material information' is defined as information that a prudent person would consider important in his or her investment decision-making, and includes events that are capable of having a significant impact on the company's assets and liabilities, business or financial condition. The company must report to the SVS any material information as soon as it becomes aware of it; however, the board of directors, with a three-quarters majority vote, may report certain information on a reserved basis when it refers to pending negotiations whose knowledge may harm the corporate interest of the company.

Also, listed companies must periodically report to the market certain information that is generally determined by the SVS and the stock exchanges where their shares are traded. The SVS requires listed companies to report their financial statements annually and quarterly (consolidated or otherwise). The annual reports must be disclosed within 60 days after the close of the fiscal year and in any event at least 20 days before the shareholders' meeting that will approve the annual financial statements.

ii Auditors' role and authority, and independence

In recent years, lawmakers have strengthened reporting standards for listed companies and reinforced the role of external auditors.

External auditors review and audit the listed company's accounting and financial statements, and determine whether the accounting principles used by the company comply with applicable accounting standards. External auditors are monitored by the SVS and may provide audit services as long as the external audit company and its members are deemed to be independent from the audited company. The law has provided a standard of independence required for the external audit company and its members, pursuant to which it lacks independence if it, directly or indirectly, either: (1) maintains a significant contractual or credit relationship with the audited company (or any of the companies of its business group), (2) owns securities issued by the audited company (or any of the companies of its business group) or (3) simultaneously provides services that are banned by the Securities Market Act (e.g., internal audit services, record-keeping or representation services). The external auditor's members are presumed to lack independence when they: (1) qualify as a person related to the audited company, (2) are or have been within the past 12 months an employee of the audited company (or any of the companies of its business group), (3) own securities issued by the audited company or its business group, or (4) audit the company for more than five years, among other cases.

iii The 'comply or explain' model and mandatory disclosure

Recent SVS rules have adopted the European comply or explain model. In 2015, SVS enacted General Rule No. 385 on disclosure of information regarding corporate governance standards.[6] This Rule's primary goal is to provide the market with better and more reliable information as to whether the listed companies are complying with certain corporate governance practices. All listed companies are required to provide the SVS, on an annual basis, with answers to a survey that relate to the board's functions and composition; relationships between the company, shareholders and public in general; third-party assessments; and internal control and risk management.

6 This rule repealed General Rule No. 341, which was the first comply or explain rule issued by the SVS, in 2012.

IV CORPORATE RESPONSIBILITY

i Compliance policies and whistle-blowing

There are no comprehensive laws on whistle-blower procedures or protection programmes in Chile. However, Chile has taken important steps to improve corporate internal control policies. To adopt the Organisation for Economic Co-operation and Development's anti-bribery guidelines, Chile enacted on 2 December 2009 the Corporate Criminal Liability Law (Law No. 20,393). The Corporate Criminal Liability Law encourages companies to create internal compliance programmes to prevent money laundering, terrorism financing, bribery of public officials and receipt of stolen property. These compliance programmes must offer whistle-blower reporting channels; however, they usually lack adequate measures to prevent retaliation against whistle-blowers.

ii Corporate social responsibility

There is no legal definition of 'corporate interest'. The Supreme Court, however, has held that corporate interest is the common interest between stockholders, as opposed to their individual interest. Also, the Court stated that corporate interest must always relate to the purpose of the company, the primary goal of which is obtaining and distributing profit among the shareholders.[7]

Corporate social responsibility is a developing concept in Chile. Although there are multinational firms that have voluntarily adopted and comply with international standards,[8] there are no laws regarding corporate social responsibility towards society and stakeholders in general. However, General Rule No. 385 encourages listed companies to take into account corporate social responsibility. This rule compels listed companies to provide information on the existence of internal audit committees, corporate social responsibility programmes and whistle-blower reporting channels. This information is subsequently uploaded and published on the SVS website.[9]

7 See *Cuneo Solari et al. v. Superintendencia de Valores y Seguros*, Supreme Court, Case No. 3,389 (2015).

8 See 'Corporate Social Responsibility in Latin America: A collection of research papers from the Virtual Institute Network', United Nations (2010), p. 16 available at http://unctad.org/en/docs/dtlktcd20102_en.pdf.

9 A recent study has shown that as of 7 April 2016, of 206 listed companies, 37 per cent responded as having a risk management unit, 50 per cent responded as having an internal audit committee, 69 per cent responded as having anonymous whistle-blower reporting systems in place, and 37 per cent responded that they maintain internal policies that consider economic, social and environmental risks. See 'Gobiernos Corporativos en Chile: Una mirada a la implementación de la Norma de Carácter General No. 385', PwC, April 2016, available at www.pwc.com/cl/es/publicaciones/assets/2016/Estudio-NCG-385-2-VF.pdf.

V SHAREHOLDERS

i Shareholders rights and powers

Listed companies in Chile have high ownership concentration levels[10] and are generally controlled by a controlling shareholder or a group of shareholders.[11] The Chilean corporate structure does not separate ownership and control, creating different minority shareholder concerns; these typically include concerns that conflicts between controlling shareholders and minority shareholders will, in practice, be settled favouring controlling shareholders' interests, and that controlling shareholders will benefit from asymmetry of information, among other things.

Recent legal reforms have strengthened minority shareholder rights, and the power of institutional investors in listed companies has become more significant than in previous decades. These investors are usually institutions that manage large pools of assets and invest their clients' money in listed company shares (e.g., pension fund managers, private equity firms and banks). Institutional investors have played a huge role in improving and promoting good corporate governance, becoming an influential counterweight to the controlling shareholders of Chile's concentrated capital market.

The Corporations Act contains the one-share-one-vote rule, recognising the proportionality principle for voting rights. The equal voting right, however, is subject to certain exceptions, as the by-laws may contemplate one or more preferred series of shares, without or with limited voting rights. Preferred shares must have fixed-term duration and may not grant dividend rights over distributions that do not derive from net income, retained earnings and their individual appreciation in value.

Because of the high ownership concentration of Chilean listed companies, shareholders (and specially controlling shareholders) usually have a strong influence on the board. Many business groups that control Chilean listed companies are family-owned, and in some cases family members are involved in top management positions.[12] Nevertheless, the Corporations Act clearly provides that directors elected by a group or class of shareholders may not represent their own interest to the detriment of the company and other shareholders.

The Corporations Act expressly provides for certain matters that are reserved to shareholders, which are to be decided in either regular or special shareholders' meetings. Regular meetings are held once a year, as provided in the by-laws of the company, and decide on matters that expressly relate to approving the company's financial statements, dividend distributions, election or revocation of the board members and appointment of auditors, among other things. In turn, special shareholders' meetings are held at any point where it is necessary to decide on material matters, including by-law amendments, corporate conversions, mergers and spin-offs, bond issuances, the transfer of all or substantially all of

10 A recent study concluded that although there has been a reduction of the frequency of increases in ownership concentration since 2000, it has not led to a quick ownership dilution. See M Donelli et al., 'Ownership Dynamics with Large Shareholders: An Empirical Analysis', *Journal of Financial and Quantitative Analysis*, 48(2) (2013), 582.

11 A study made in the year 2000 showed 70 per cent of non-financial listed companies in Chile belonged to a business group. See Fernando Lefort and Eduardo Walker, 'Ownership and Capital Structure of Chilean Conglomerates: Facts and Hypotheses for Governance', *Abante* 3(1) (2000), at 15–16.

12 See Fernando Lefort, 'Ownership Structure and Market Valuation of Family Groups in Chile', Pontifical Catholic University of Chile (2005).

the company assets, the furnishing of collateral or personal guarantees to secure third-party obligations (except in the case of subsidiaries, in which case the board's approval will suffice), the dissolution of the company and other similarly relevant matters.

Dissenting shareholders enjoy appraisal rights to demand from the company a buyout for their shares at market value if they vote against certain fundamental matters, including conversion or merger of the company, the transfer of all or substantially all of the company's assets, the furnishing of collateral or personal guarantees to secure third-party obligations, defects in the company's organisational documents making it subject to actions of annulment, and the creation of preferred shares, among other things. Appraisal rights must be exercised within 30 days after the shareholders' meeting that gave rise to the dissenting shareholders' appraisal right. The market value for shares that are traded on stock exchanges will be the weighted average of the stock market transactions of the shares during a period of 60 trading days between the ninetieth and thirtieth day prior to the shareholders' meeting that gave rise to the dissenting shareholders' appraisal right.

ii Shareholders' duties and responsibilities

Chilean law does not expressly contemplate fiduciary duties and liabilities applicable to controlling shareholders; therefore, they are subject to the general liability rules applicable under Chilean civil law. In any case, the Corporations Act provides that all shareholders must always act respecting the rights of the company and of the other shareholders, which may be construed as an express prohibition for all shareholders against exercising their rights abusively.

iii Shareholder activism

Given the concentration of corporate control in Chile, the only kinds of investors that conduct a certain kind of activism are institutional investors.

Institutional investors (such as pension fund managers, private equity firms and financial entities acting for their clients) usually play an important role in negotiating with controlling shareholders the structure, terms and conditions of certain transactions in which listed companies participate. Pension fund managers are subject to their own rules and regulations, and may only invest up to 7 per cent of an issuer's equity. In many cases, this ownership percentage allows them, acting either individually or jointly, to secure a board seat and, therefore, to closely monitor the management's performance.

The Chilean legislator has to some extent promoted shareholder activism by including in the Corporations Act, in the year 2000, a derivative action that any shareholder or group of shareholders representing at least 5 per cent of the voting shares, or any board member, may bring on behalf of the company against anyone who may prove to be liable for damages arising from, or losses incurred by the company as a result of, a breach of applicable laws and regulations, or of the company's by-laws. The shareholder or board member must be pursuing a corporate right (as opposed to an individual right) to procure a court judgment in the company's favour. However, this option to bring an action is rarely exercised in practice.[13]

13 See David Núñez And Diego Pardow, '¿Por qué no demandan los accionistas? El problema de las costas en la acción derivativa', *Estudios Públicos* No. 118 (2010).

VI OUTLOOK

A bill to reform the Chilean capital market institutions has been just approved by Congress and is expected to be enacted shortly. Although this bill could still undergo amendments before its definitive enactment, it will have a significant impact on the corporate governance regime in Chile. This legal reform includes the creation of the FMC, a new supervisory body that will replace the SVS. The FMC will be led by a commission rather than a single individual (as is the case with the SVS), which will probably guarantee a more technical approach in line with that of the Central Bank of Chile, which is also led by a commission. In addition, the FMC's responsibilities will be apportioned to different internal divisions, a new legal procedure for the investigation and sanctioning of legal infractions will be implemented, and a whistle-blower mechanism will be established.

We foresee that corporate governance will continue evolving in Chile in the coming years. We expect institutional investors to continue being the most relevant counterbalance to controlling shareholders in our highly concentrated market, as only they have the required negotiation power and sophistication for that purpose. Authorities such as the National Consumer Service and private consumer associations, helped by mass media, are gaining influence by claiming and recovering damages arising from corporate misconduct such as board liability and anticompetitive practices, and their influence and power will probably strengthen in the near future. Finally, the recent successful launch of an IPO by a retail corporation confirms that capital markets activity will probably be strengthened in the next few years, as other companies have also expressed their intention to list themselves on one or more Chilean stock exchanges.

Appendix 1

ABOUT THE AUTHORS

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Jorge Ugarte is a partner at Carey and co-head of the firm's corporate, mergers and acquisitions and capital markets group. His practice focuses mainly on mergers, acquisition and transfer of companies, public takeovers, joint ventures, shareholder agreements and capital markets and bank transactions in general. He is the author of several publications on civil and corporate law, and of the book *Share Transfer Agreements*, published in 2016.

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