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Litigation

Second Edition

Chile
Carey

chambers.com

2019

Trends and Developments

Contributed by Carey

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Chilean litigation has experienced multiple trends in the last couple of years. Remarkable it has been the case of constitutional litigation based on the special constitutional action called "recurso de protección". On the other hand, under private law, insolvency and reorganization proceedings have also thrived. At the same time, consumer's rights conflicts have raised attention. Another interesting trend has been the development of specialized Courts that tend to explore singular topics that have gained a huge relevance on the past few years such as antitrust or environmental issues. Additionally, it is worth mentioning the development on arbitration and ADR methods which were rare thirty years ago, but now they stand as a trending option when a difficult conflict arises. For instance, expert panels to solve special conflicts have gained more and more interest. Finally, we mention some aspects of the general reform to civil procedures that is currently in progress.

Constitutional litigation

"Recurso de protección" is a special action enshrined in the Constitution of Chile, n Article 20, intended to protect from acts or omissions illegal or arbitraries, that can disturb or threat a constitutional right of those established on Article 19, of the same Fundamental Bill. Aspects of formalities and its quick process before Appeal Courts has made this action a useful instrument to litigate, specially when the right to property can be endangered. In general, this action can be used to restore the empire of the law and to protect the constitutional rights from illegal or arbitrary acts or omissions, so the extent of its use is broad, for instance, on environmental issues this broadness can be perceive and we will detail more about it on the respective section.

Other constitutional aspects to note out, is the relevance that inapplicability claims have had on the Constitutional Court.

Since the party that uses this measure can obtain the inapplicability of a certain rule if that rule results unconstitutional for the resolution of the case. This recourse is available while there is a judicial matter pending the resolution, and the Constitutional Court is the competent tribunal to solve if that rule is decisive to the resolution. The original judicial proceeding can be suspended if the party that requests it has reasonable foundations.

Insolvency proceedings

Regarding insolvency, since the enactment of Law 20,720, on insolvency and re-entrepreneurship, the practice in the legal market has flourished because of multiple reorganization and liquidation proceedings that have been submitted. In the same way, after the full validity of UNCITRAL cross-border insolvency regulations in Chile, several processes of recognition of foreign insolvency proceedings have also been known, where our courts have given a good reception-received. Without a doubt, this new insolvency law will allow Chile to be at the forefront in the insolvency proceedings, where, as an example, there has been approved reorganization plan in record times (3 months).

Strengthening of class actions in consumer's rights conflict.

Class actions tending to the protection of the rights of a group of consumers have ad a significant increase in the last years. In this context, on March 2019 the Law N° 21.081 entered into force and introduced several changes to the Law N° 19.496 related to the Consumers Right's Protection (commonly known in Chile as "LDPC"). Specifically, in connection with class actions, it shows a consolidation of consumer's protection by means of certain procedural advantages for them, such as:

(i) A reduction of the admissibility requirements of complaints: Before the Law N°21.081 the LDPC established a reasonability standard for the admissibility of complaints, however, currently on the admissibility requirement, the court must only verify if plaintiffs are entitled to submit the complaints and if complaints fulfill with the formal requirements set forth in the Chilean Civil Procedure Code; and

(ii) An introduction of certain evidentiary advantages for consumers, e.g. (a) A presumption that establishes if suppliers do not provide documents requested by the court -provided that such documents are or *have to be* in their possession-, the court may declare all the plaintiff's allegations related to the content of such documents as proven; and (b) the admission of consumers as witnesses in the proceeding without being affected by impartiality disqualifications.

(iii) The possibility to request the payment of moral damages in collective procedures, which was previously prohibited by the LDPC.

On 22 November 2019, a case was solved by the 11th Civil Court of Santiago, granting the class action in favor of the National Consumer Service (SERNAC) which was representing the collective interest of consumers, stating that the Company sued, violated the LPDC as it didn't informed correctly the consumers about the commissions charged as interests when a cash advance was made.

Additionally, and following the modern trend in order to contribute the out-of-court solutions, the Law N° 21.081 introduced a voluntary procedure for the protection of collective interest that is in charge of an independent and specialized sub-direction of SERNAC and is the legal recognition of what is currently known as "*collective mediations*". According to the same Law, the purpose of this voluntary proceeding is to obtain a fast, complete and transparent solution in case of acts that may affect collective interest. This proceeding can be initiated by SERNAC or through a complaint from a consumer association and can only begin if no class actions have been filed related to the same facts. Once the proceeding has begun, no class actions can be filed concerning the same facts until the voluntary proceeding ends.

The length of this voluntary proceeding cannot exceed three months renewable once for another three months. If, within this term, no agreement is reached, the voluntary proceeding will be understood as "failed". Additionally, both parties, at any moment of the proceeding, can manifest their intention to no longer continue participating in it.

Specialized areas of interest:

Antitrust claims

On 2003 the Court of Free Competition ("TDLC") was created by the Law N°19.911, as a specialized tribunal, so it does not belong to the judicial system and it is located in Santiago. Among its primary functions we found: (i) To sanction the infractions to the D.L. 211 and (ii) to solve consultations about no judicial matters that could infringe the free competition act.

There is a prosecutorial enforcement model where the National Economic Prosecutor ("FNE") acts as an administrative and highly technical agency that conducts the investigations and then prosecutes in an adversarial setting before the TDLC, an independent and specialized adjudicatory body. So far, both the FNE and the TDLC have focused only on competition aspects. Even before extremely difficult cases from a political standpoint, they have stayed observant essentially on technical aspects.

Furthermore, this area has developed profusely over the past few years, including the last reform to the D.L. 211 which was made on 2016 by Law N°20.945, and included a system of mandatory control on concentration operations, leaded by FNE. In general terms this is an administrative process until the operation of concentration is rejected, then the

parties are allowed to ask a special revision before TDLC. In principle, the judgement of the TDLC is final, with no remedies available unless the same tribunal approves that the operation can be done under the compliance of certain measures, in that case, the parties or the FNE can file a remedy of reclamation before the Supreme Court.

On collusion matters, the TDLC has made several significant judgements since 2016, however, the Supreme Court will have to review them after the reclamation remedy was filed by the parties, and its judgement is still pending.

Environmental litigation

On January 2019, a legislative proposal was encouraged to persecute environmental crimes. This draft is still in progress but the rise of attention that it has brought, to environmental issues, makes it a trend to speak about the tendencies around our courts and the strategies to follow.

Litigations in environmental claims, are solve by the three special environmental courts ("Tribunal Ambiental") which are located in Antofagasta, Santiago and Valdivia. Also, it is important to note that Courts of Appeal have a minimal intervention now that Law N°20.600 (that created the environmental courts) almost erase the appeal remedy before them. But there is a cassation remedy leftstill exists, that of course is known and revised by the Supreme Court.

However, the Supreme Court does not only establishes the jurisprudence of environmental issues by the cassation remedy promoted by one of the parties under the environmental courts, rather it's knowledge can also be founded on the commonly known "recurso de protección" that is a constitutional action that safeguards the constitutional rights granted by the Constitution such as "*the right to live in an environment free of contamination*" stablished by the Article 19 N°8.

Particularly, on 28 May 2019 the Supreme Court dictated a judgement, granting favor to the claimants of a constitutional action "recurso de protección". It was a difficult judgement that entail events of contamination situated on an industrial complex near Quintero, supposedly attributed to the pollution made by several companies. Among some of the measures taken to reestablish the empire of the law, and guaranteed the protection of the breached rights, the Court stated the relevance of the preventive and precautionary principles. The preventive principle, however, sometimes should be enforce by the administrative headquarters, exceeding this kind of judgement, the frames of a constitutional action. But, as the environmental experts have said, "sometimes the Supreme Court has to correct the course of the deficiencies found on the structural environmental protection".

Anyhow, sometimes the recourse to principles that can guide to a right direction, is also problematic and threatens the rationality and predictability of judgements, so it is correct to be careful around them. Specially if there is an expert jurisdiction now, correctly functioning on the three environmental courts that we stated before.

Arbitration and mediation

During the last 15 years the ADR methods have had an exponential increasing. Regarding the arbitration, according to the information provided by the Santiago Arbitration and Mediation Center ("CAM"), in year 2006 the number of arbitrations raised to one hundred and in 2018 an estimated study stated that more than 390 arbitrations were solved that year.

Likewise, the mediation has become a relevant method for resolution of conflicts. Even though the voluntary mediations are less frequent than the arbitration, the mediation is established as mandatory in certain matters such as health claims, family and labor.

An example of the trending arbitration choices can be seen on M&A transactions where every time is more common to find arbitration clauses or other ADR methods to resolve the conflicts arising of the agreements. The advantages of such ADR methods have been largely developed by literature, however in our experience we have noted that the importance that parties assign to ADR methods are mainly related to the confidentiality of the procedure and the possibility to achieve faster and specialized solutions to the case. We believe that such goal finally could explain the trend of an incrementing of ex aquo et bono arbitration ("*arbitraje mixto*") in Chile (55% out of the total arbitrations from 2018), where parties are able to set forth the proceeding rules and the decision shall be finally adopted under a legal base.

Finally, in terms of remedies available on arbitrations, the general rule is that arbitral judgements can be final, because the parties voluntarily resign to the rest of remedies, with some exceptions, for instance the remedy called ("Recurso de queja") which is intended to correct faults or abuse made by the judges on the proceedings, was the most frequently used by parties according to the official data at CAM from 2018. But that doesn't mean that those were successful, in fact on 2017, 97% of "Queja" remedies were rejected, and only the 2% was granted.

Reform on the civil procedures.

In order to follow the Criminal Procedure Code and its complete reform on 2005, a new reform has been studied for civil procedures since 2009. Today, the reform in not ready yet but thanks to the work of the main schools of law in the country (Universidad de Chile and Pontificia Universidad Católica) the initiative has had a huge development on the past few years. Including the urge of expediting the long proceedings that have discouraged people to claim in general, or to strengthen an open access for those who have seen a

distance to the judicial system so the right to action can be guaranteed.

Among these changes, it has caught our attention, the inclusion of mediation as an ADR method, inside the judicial system, to solve conflicts based on harmony between the parties which represents a better contribution to the social peace. As well as the creation of an Administrative Unite that will ensure a quick enforcement of executive titles, unless the debtor contradicts it, because only in that occasion the civil courts will intervene. Furthermore, the creation of digital auctions among the country is moving forward on this reform, to promote the dynamism and speed on civil proceedings. Finally, regarding remedies, one of the primary changes concerns on giving a preponderate role to the Plenary judgment from the Supreme Court, which should be the final stage to unify the jurisprudence in the country

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Conclusions

Even if the civil and commercial proceedings are still strong and effective under the civil courts, conflicts that involve transnational interests, tend to prefer arbitration or expert panels to solve their controversies. The parallel development of both areas is interesting for forward research. Also, it is will be useful to use the findings from specialized areas to pursue the best litigation in our system as a hole, respecting its own boundaries and the complexity of each matter.