Chile
Financial Assistance
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Contents

INTRODUCTION

This guide sets out an overview of the regulations dealing with the concept of financial assistance in Chile. Currently, there are no specific regulations on the subject, except for banks. Nevertheless, we can apply other provisions which we believe could have some bearing on this institution. Law No. 18,046 of 1981, (the Corporations Law) and Law No. 18,045 of 1981 (the Securities Market Law) provide some provisions that may be applicable to the concept of financial assistance.

GENERAL OVERVIEW

What are the origins of financial assistance in Chilean law?

Chilean law does not regulate the institution of financial assistance in a specific manner, except for Decree Law No. 3 of 1997 (the General Banking Law). Article 84, No.3 of this law provides that banks shall not, directly or indirectly, grant any kind of loan whatsoever for the purpose of enabling an individual or company to pay shares of the same bank. The General Banking Law provides for a fine equal to the amount of the loan if a bank infringes this provision.

What should be understood as financial assistance under Chilean law?

Chilean law does not address financial assistance in a specific way; therefore, there is no concept for this institution in the law. Nevertheless, Article 84, No. 3 (without referring to it as ‘financial assistance’) specifically prohibits banks from lending money to a third party, so that such third party might purchase the securities that the bank itself might have issued.

Is financial assistance accepted under Chilean law?

Due to the fact that Chilean law does not provide a general prohibition for financial assistance, we may state that it is accepted as long as it does not violate any other law.

What are the consequences of providing financial assistance?

As mentioned above, the General Banking Law states that a bank that breaches the prohibition on ‘financial assistance’ will be subjected to a fine for the same amount of the loan that was granted.

LIMITED LIABILITY COMPANIES

In Chile, limited liability companies are regulated by Law No. 3,918 of 1923 (the Limited Liability Companies Law or LLC Law). This law states that any matter not treated on it will be ruled by the Chilean Code of Commerce. Neither the LLC Law nor the Code of Commerce treat financial assistance, therefore there is no specific regulation on the matter.

Even so, if a manager of a company decides to provide financial assistance, the other partners may request the appointment of a new co-manager or the dissolution of the company if actual damages are incurred.

LISTED CORPORATIONS

Listed corporations are regulated by the Corporations Law. While there are no specific regulations on financial assistance, there are some rules applicable to this institution.

Transactions with related parties
If the financial assistance is provided by a listed corporation to a related party, Chapter XVI of the Corporations Law (Chapter XVI) should apply. Chapter XVI provides a broad definition of who is considered a related party to a listed corporation; it also lays out the procedure to execute such transactions. As a general reference, all companies under joint control of the entity that controls the listed corporation are related parties for the purposes of Chapter XVI.

Listed corporations will only be able to perform financial assistance with related parties whenever such operations have the purpose of furthering the company's business, with price terms and conditions that are consistent with those prevailing in the market at the time of their approval. In addition, in obtaining such approval, the transaction will have to follow a process which is regulated by the Corporations Law, such as having the transaction approved by the absolute majority of the directors, with the exclusion of those directors that may have an interest (as defined by the Corporations Law).

The resolution by which the board approves the execution of the transaction must be raised at the following shareholders' meeting. Notwithstanding the applicable sanctions, the breach of the aforementioned provisions will not affect the validity of the transaction. However, it will entitle the corporation or the shareholders to request from the breaching party the reimbursement to the listed corporation of an amount equivalent to the benefits obtained from the transaction by the related party. Such reimbursement is in addition to any payment of damages which might be due.

Chapter XVI of the Corporations Law is applicable to listed corporations and all their affiliates, regardless of their legal nature.

Insider information
Pursuant to Article 164 of the Securities Market Law, insider information means any information in connection with one or more securities issuers, their business, or one or more securities issued thereby, that is not disclosed to the market and the knowledge of which, by its nature, can affect the price of the issued securities. It also qualifies material *reserved* information as insider information, if any.[1] It also considers information about purchasing decisions, and transfers and acceptance or rejection of specific offers of an institutional investor in the stock market, as insider information.

Article 165 of the Securities Market Law sets forth that any person who, because of their office, position, activity or relationship, has access to insider information is required to keep it strictly reserved. Specifically, they may not use it for their own benefit or for the benefit of other persons. They also may not directly or indirectly acquire, for themselves or for third parties, the securities with respect to which such person holds insider information. This is directly related to the duty of

[1] Material information that a company decides to keep *reserved*.

abstention, which means that such individuals cannot acquire or dispose of, for themselves or for third parties, directly or through other persons, securities on which they possess insider information. Recently, regulators and courts have ruled that the breach of such duty of abstention is a matter of strict liability.[2]

With financial assistance, there is a risk of a breach of this provision. The company, by making a third party to buy securities of its own issuance, may be providing privileged information when recommending or assisting in the purchase of its own securities. Anyone who violates the rules regarding insider information can be subject to civil, administrative and criminal sanctions.

NON-LISTED CORPORATIONS

Non-listed corporations are regulated by the Corporations Law.

If financial assistance is provided by a non-listed corporation to a related party, Article 44 of the Corporations Law applies. A non-listed corporation will only be allowed to execute contracts involving 'relevant amounts' – in which one or more directors have an interest for themselves or for related parties – when such transactions are disclosed and previously approved by the board. Furthermore, the transactions in question should meet the characteristics of business fairness that are similar to those that usually prevail in the market, except when the by-laws of the company authorise the performance of such transactions without being subject to the referred conditions.

If financial assistance is to be provided by a non-listed corporation to a related party, the matter should be previously decided by the board. Furthermore, it should be taken into account that the financial assistance is to be provided to a related party at the time the matter is raised to the board for its deliberation. All agreements executed by the company with related parties on any particular year must be raised at the next annual shareholders' meeting.

Regarding the meaning of 'having an interest', the Corporations Law provides a presumption referred in general to:

- the directors themselves and their families;
- those corporations or entities in which the directors, or specific individuals of their families, have the position of manager or own (either directly or through third parties) 10 per cent or more of its capital; and
- the controller of the corporation or its related persons, provided that the director would not have been elected without the votes of the former or the latter.

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A 'relevant amount' means an amount that exceeds 1 per cent of the corporate net worth, provided such contract exceeds at least the equivalent of UF 2,000 (US$78,000), and whenever it exceeds UF 20,000 (US$780,000).[3]

All breaches to Article 44 shall not affect the validity of the transaction and, regardless of the possible applicable sanctions, will entitle the corporations, their shareholders and third parties with a legitimate interest the right to demand indemnity for the damages caused.

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[2] Such interpretation has been invariably upheld by the Financial Market Commission (Exempt Resolutions N°306 and N°307, both of July 6, 2007; N° 662 of December 27, 2007 and; N° 7603 of November 8, 2019, among others), and ratified by the Chilean Supreme Court Chile (Rulings of November 28, 2012 and April 14, 2014, issued in cases Roles N°3,054-2010 and N°1,625-2013, respectively).

[3] The reference US dollar values are approximate amounts, based on the exchange rate as of February 2022.

Finally, there would be no breach of the rules on related party transactions if the financial assistance was previously approved by two-thirds of all voting rights in an extraordinary shareholders' meeting.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

Since Chilean law does not recognise the institution of financial assistance *per se*, there are no consequences for lending money to a third unrelated party so that the later might purchase securities issued by the creditor, other than in the case of the General Banking Law.

As mentioned previously, the breach of Article 84, No.3 of the General Banking Law will subject the breaching bank to a fine for a value equal to the amount loaned. All sanctions or consequences to which a provider of financial assistance might be subject to are:

- those concerning related party transactions, if such financial assistance was to be provided to a related party of the issuer of the securities; or
- if the financial assistance involves a disclosure of insider information.

Assuming that the financial assistance has been provided to a related party of the issuer of the securities or that it involves a disclosure of insider information, the provider of financial assistance might be subject to the following consequences:

Listed corporations

1. Transactions with related parties:
    (i). A fine by the regulator of listed corporations, the Financial Market Commission (*Comisión para el Mercado Financiero)* for an amount that may go up to approximately US$3.9m. If the person or entity has been previously sanctioned for an infraction of the same nature, a fine of up to five times the amount stated above could be applied.
    (ii). A fine by the Financial Market Commission of 30 per cent of the amount of the sanctioned operations.
    (iii). A fine by the Financial Market Commission equivalent to twice the profit obtained from the sanctioned transactions.
    (iv). Revocation by the Financial Market Commission of the company's authorisation to exist, when applicable.
    (v). The obligation for the individuals who incurred the breach to reimburse the listed corporation (typically the board members) any benefit they might have obtained.
    (vi). Payment of damages to the shareholders.

2. Insider information:
    (i). Imprisonment for up to 2,738 days.
    (ii). Any of the fines previously listed from (i) to (iii) in section 1 above.

Non-listed corporations:

1. Any of the fines previously listed from (i) to (iii) in section 1 above.
2. Payment of damages to the company, shareholders or related third parties.