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NEW INSOLVENCY - RELATED CRIMINAL OFFENCES IN CHILE

BY ROBERTO VILLASECA, DANIELA LOZANO, AND FRANCISCO OSSA

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INSOL International, 29-30 Ely Place, London, EC1N 6TD
Tel: +44 (0) 20 7248 3333

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ACKNOWLEDGEMENT

INSOL International is pleased to present a new technical paper, "New Insolvency-Related Criminal Offences in Chile", written by Roberto Villaseca, Daniela Lozano and Francisco Ossa, of Carey & Cia.

The paper provides an overview of the insolvency-related criminal offences introduced in Chile in 2023. Those offences provide for criminal penalties for a company that has, within certain time periods prior to its insolvency, conducted its management improperly, or has otherwise dissipated, concealed or divested assets, in a manner that causes prejudice to the collective body of creditors. The criminal penalties are novel, as most other jurisdictions typically provide only for civil penalties in these cases.

The paper discusses the background to the reforms, the key policy rationales and the practical significance of the new laws.

The authors also conducted a wide range of interviews with insolvency and criminal law experts, and the views of these experts are summarised in the paper to enhance the understanding and implications of the laws for practitioners.

INSOL International expresses its gratitude to the authors for their time and expertise in writing this paper in an important region of the world. The experience of the new laws in Chile could in time also benefit future insolvency law reform in other jurisdictions.

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1. Introduction

On 17 August 2023, Law No. 21,595, known as the Economic Crimes Law (hereafter referred to as the Law), was published in the Chilean Official Gazette.

Most significantly, the Law provides for new insolvency-related criminal offences, which are incorporated in article 463 of the Criminal Code (CP).[1]

This paper covers the doctrinal foundations and practical background of the Law, analyses the main criminal offences and the requirements for a conviction, and summarises expert opinions on the Law and its practical implications from practitioners and criminal law specialists.

The paper is divided into three sections:

- a brief overview of the legislation prior to the Law;
- an analysis of the doctrinal foundations and background which justify the criminal offences under the Law, as well as the main criminalised conduct under the Law and the requirements to establish an offence; and
- a summary of the insolvency practitioners' and criminal experts' opinions of the Law.

2. History of the insolvency-related criminal offences in Chile before the enactment of the Law

2.1 Before 2014

Under the legal regulations in Chile prior to 2014, insolvency was an issue of public law. The system aimed not only to protect the private interests of creditors but also the interests of the general public.[2]

Under the previous legislation, there were three types of bankruptcies. These could be "accidental", "culpable" or "fraudulent."[3] Both culpable and fraudulent bankruptcy were considered criminal offences. Furthermore, the previous law contained presumptions of culpable and fraudulent bankruptcy. For instance, a bankruptcy was presumed culpable if a commercial debtor did not file for its own bankruptcy within 15 days from the date on which it had ceased to pay a commercial obligation.[4] Therefore, bankruptcy law was heavily criminalised under the pre-2014 insolvency regime in Chile.

2.2 2014 to 2023

With entry into force of Law 20,720 on 9 October 2014, the Chilean legislator intended to de-stigmatise insolvency and restructuring. This led to a decriminalisation of many insolvency-related offences, with the offences that remained requiring proof of direct intent or malice (a more difficult standard of proof to make out).[5]

Under this new legislation, prior to the liquidation resolution (a declaration of bankruptcy), there were only two types of conduct that were considered crimes in an insolvency scenario. First, any type of concealment of assets. Second, acts or contracts that reduced assets or increase liabilities "without any economic or legal justification other than to harm creditors".[6] Given that malice was required, convictions were seldom declared. This framework lasted until 2023, when a stricter regulation made a comeback under the Law.

3. Economic Crimes Law and insolvency-related criminal offences

3.1 The purpose of the Law

By enacting the Law, the Chilean legislator intended to create a stricter regulation to sanction conduct that, under the former law, was frowned upon by the general public but did not constitute a crime. In the discussion of the Law, supporters stated that the incorporation of a catalogue of white-collar crimes had broad dogmatic support and followed a correct criminal policy criterion.[7]

In this context, among scholars there are two opposing views concerning the public policy aspect of insolvency crimes: (a) the "patrimonial" thesis; and (b) the "meta-patrimonial" thesis.

The patrimonial view focuses on the impact insolvency has on creditors, as they are directly affected by the difficulty of pursuing payment of their claims in the debtor's estate.[8] In contrast, the meta-patrimonial view takes a broader perspective and considers that insolvency crimes negatively impact society in general, causing significant disruption of public faith and economic public order.[9]

1 This paper focuses on the new offences set forth in article 463 of the PC. These are the most relevant from a business perspective. Other new offences enacted in the Law are not covered by this paper.
2 See Goldenberg, Juan Luis, "Bases para la Privatización del Derecho Concursal" (2013), Chilean Journal of Private Law, page 1.
3 Ex. Article 218 of Law No 18,175.
4 Ex. Article 41 and 219 of the Law No 18,175.
5 Silva Silva, Hernán, "Derecho Penal Parte Especial" (2018), Editorial Metropolitana, 2nd Edition, Santiago, Chile, page 697.
6 Prior version of article 463 of the Chilean Criminal Code.
7 Library of the National Congress. History of the Law No. 21,595. Available at: https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/8195/
8 Mayer, Laura, "El Bien Jurídico protegido en los Delitos Concursales" (2017), Pontificia Universidad Católica de Valparaíso, Law Journal, page 258.
9 *Ibid*.

With the Law, the legislator intended to come closer to a meta-patrimonial view. The general purpose of the legislator was to sanction white-collar crimes perceived to be protected with impunity, and as a consequence the new Law aims to protect economic public order and public faith as a whole, rather than solely recovering assets for creditors.

3.2 Influence of other legal systems

According to certain scholarship, insolvency crimes related to the debtor can be divided into two sets of conduct: (a) concealment of assets prior to the commencement of the insolvency proceedings; and (b) wrongful acts related to the improper management of the debtor's assets.[10]

The first group of conduct was already considered to give rise to criminal offences before the enactment of the Law. However, following the German legal system,[11] legislative innovation was made by criminalising improper management of the debtor's assets amid imminent insolvency. The idea was to prevent abuses the debtor could incur in the administration of its assets.[12] Scholar Antonio Bascuñán noted during the legislative discussion that the purpose of these new criminal offences was akin to what the previous bankruptcy regime called "culpable bankruptcy."[13]

3.3 Debtor's main criminal offences and their requirements

The most relevant changes made by the Law were to enact article 463 and article 463(2) of the CP.

3.3.1 Article 463 of the CP

Any of the following actions by the debtor during the two years prior to the liquidation resolution, while the debtor is aware of its bad state of business (discussed below), are deemed to be criminal offences:

- the considerable reduction of the debtor's value because of the destruction, damage, disabling or dilapidation of assets or securities or unreasonable waiver of credits;
- disposing of relevant sums by applying them to games or bets or in unusually risky businesses in relation to its normal economic activity;
- granting loans without the usual guarantees in relation to the amount loaned, or disposing of guarantees without having satisfied the guaranteed loans; and
- carrying out any other act manifestly contrary to the requirements of a so-called "rational administration of the debtor's assets" (discussed below), provided the act significantly contributed to the debtor's insolvency.

The business debtor will also be sanctioned in the aforementioned cases if it has acted with inexcusable negligence.

3.3.2 Article 463(2) of the CP

The debtor will commit an offence if it engages in any of the following conduct:

- favouring one or more creditors to the detriment of other creditors, by paying debts that are not currently due or by providing guarantees for previously unsecured debts, within the two years prior to the reorganisation or liquidation resolution, or during the period between the notification of the forced liquidation petition and the issuance of the respective resolution;
- receiving, appropriating or diverting assets that should be subject to any type of liquidation proceeding, after the liquidation resolution has been issued;
- engaging in acts of disposition of assets from the debtor's estate, whether real or simulated, or creating a pledge, mortgage, or other encumbrance on them, after the liquidation resolution; or
- concealing, in whole or in part, the debtor's assets or property, within the two years prior to the liquidation or reorganisation resolution, or subsequent to that resolution.

Although other aggravating and extenuating circumstances must be taken into consideration, in principle, if an offence is proved the penalty associated with this crime ranges from 61 days to five years' imprisonment. In case of a legal entity, the judge may apply fines or name a supervisor of the business.

Furthermore, pursuant to article 463(4) of the CP whoever in the management or administration of the debtor's business has taken part in the relevant acts or omissions specified, or has expressly authorised such acts or omissions, shall be punished as a principal of the crimes contemplated. Thus, the representatives of a company can also be condemned to imprisonment.

10 Navas, Iván, "La política criminal en el nuevo derecho penal de la insolvencia chileno a la luz del derecho penal de los EE.UU., alemán y español" (2023), Polít. Crim, Vol. 17 N°35, Art 11, page 342.

11 Library of the National Congress. History of the Law No. 20,720. Available at: https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/4343/

12 Navas, Iván (see above), page 334.

13 Library of the National Congress. History of the Law No. 21,595. Available at: https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/8195/

Moreover, article 464(2) of the CP provides that the debtor, overseer, liquidator or member of management referred to in the preceding paragraph, who avails themselves of someone else to perpetrate any of the crimes provided for shall be punished as a principal of the respective crime. There are also penalties for those who act as inducers or accomplices.

Although the Chilean legislator intended to follow the German legal system to create a stricter regulation regarding insolvency crimes, some of the concepts remain unclear.

To date, we are not aware of any convictions under this new regulation. However, we can offer some general observations regarding the requirements for the relevant conduct to result in a conviction under these new regulations:

- **Liquidation resolution**

  For these crimes to exist, the civil court must have issued a judgment for the liquidation of the debtor or a liquidation resolution (*resolución de liquidación*). It is unclear whether the liquidation resolution must be final and enforceable or if its mere issuance is sufficient even if subject to appeal. Ruling in a similar matter under the pre-2014 framework, the Santiago Court of Appeals held that the liquidation resolution must be final and enforceable.[14]

- **Knowledge of the bad state of business**

  Although the Law does not define what "bad state of business" means, the concept is inspired in the requirement of the revocatory action and refers to a state of insolvency. This civil action only proceeds if the debtor has performed acts with knowledge that it is insolvent or that the act it performs will cause or aggravate its insolvency. In this manner, the Santiago Court of Appeal understands the "bad state of business" as a situation where the debtor regularly fails to meet its obligations on time or is in financial distress.[15]

  The debtor must be aware of its bad state of business and be able to know that its actions could harm creditors. This will be part of the investigation and evidence provided to the court by the Public Prosecutor.

  Both doctrine[16] and court decisions[17] have stated that knowledge of the bad state of business requires that the plaintiff must have objective indicators that the company could face a situation of insolvency that would result in the initiation of a bankruptcy proceeding. Proof mainly relies on judicial presumptions (i.e. self-contract, family relationship, cohabitation, or hiring of a financial advisor).

- **Rational asset management (administration)**

  For the offence listed in article 463(4), there may be issues in determining what are the "requirements of a rational administration" and how to determine them. As stated during the legislative discussion, the reference should be understood to amount to grossly negligent administration of the debtor prior to the liquidation resolution.[18-19]

  Therefore, for the defendant-debtor to be convicted, it is necessary that a regular business and commercial standard criterion is constructed by the Public Prosecutor to prove that the debtor's conduct grossly deviates from such standard, making it an irrational o illogical administration of business.

- **The debtor's actions must have significantly contributed to the state of insolvency**

  For the offence listed in article 463(4), if there are other causes that have significantly generated the state of insolvency, such as changes in circumstances or markets, honest mistakes in business decisions, or bona fide errors, the debtor should not be sanctioned.

- **Initiation of the criminal proceedings**

  An investigation into these offences can only be initiated if certain people or institutions report the crime. These offences are considered crimes of public action upon request of a private party (delitos de acción pública previa instancia particular), meaning that the Public Prosecutor (Fiscal) may not initiate investigations ex officio but requires that the punishable act be reported by certain persons or institutions, which in the case of a criminal action against the debtor are:

  (a) the Superintendency of Insolvency and Reinsurance;

  (b) the overseer;

  (c) the liquidator; or

  (d) any creditor that has filed a proof of claim in the liquidation proceeding.

14 Santiago's Court of Appeal, ruling of November 18th2003, *"Unitrade c. Gonzalez Fernandez Rodrigo"*, locket number: Criminal-75647-1999.
15 Santiago's Court of Appeal, ruling of Abril 19th 2021, *"Salomón Sack y otro con Metalúrgica Pelizzola y otro"*, locket number: Civil-13.262-2019.
16 Contador, Nelson y Palacios, Cristián, "Procedimientos Concursales" (2023), page 429 and 430.
17 26° Civil Court of Santiago, ruling of November 22nd 2016, *"Vera/Albo"*, docket number: Civil-9.919-2016.
18 Library of the National Congress. History of the Law No. 21,595. Available at: https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/8195/
19 A somewhat similarly wide offence can be found in the German Criminal Code. See section 283 (1) N°8 and (2) of the Strafgesetzbuch (StGB): "(1) Whoever, in the case of overindebtedness or existing or imminent insolvency, N°8 in another manner which grossly contravenes regular business standards diminishes their net assets or hides or conceals their actual business circumstances; (2) Whoever causes their overindebtedness or insolvency by one of the acts referred to in subsection (1) incurs the same penalty."

4. Expert opinions on the new Law

We have requested insolvency and criminal scholars and practitioners to provide their initial thoughts on the Law.

Insolvency law experts (Juan Esteban Puga,[20] Eduardo Godoy[21] and Francisco González[22]) and criminal law experts (Davor Harasic,[23] Rodrigo Aldoney[24] and Eduardo Alcaíno[25]) seem to have different opinions.

Although the criminal experts consider that there are elements of the Law that could be better defined, they consider that overall, it is an improvement of the existing framework. In contrast, the insolvency practitioners are more critical of the Law. They fear that creditors might make instrumental use of the new legislation as a mechanism to maximise recovery, that penalties are now too high, and that certain conduct might seem reasonable at the time it is undertaken, but later turn out to give rise to an offence with the benefit of hindsight.

4.1 General overview of the Law

According to criminal law expert Davor Harasic, the Law introduces precision and modernisation in regulating insolvency-related conduct, aligning with international standards. It aims to protect transparency and good faith in insolvency proceedings, limiting fraudulent or malicious behaviour. The Law is not a return to the pre-2013 regulation, which distinguished between "culpable bankruptcy" and "fraudulent bankruptcy" (inspired by the French model). While parallels can be drawn, the Law does not use these categories but distinguishes between intentional and negligent actions. It modernises the previous approach by incorporating more detailed standards on what constitutes illegal acts in insolvency, such as disloyal administration or actions affecting creditors.

Similarly, both Rodrigo Aldoney and Eduardo Alcaíno are of the opinion that despite initial criticism of the Law and that it clearly has room for improvement in the precision of some concepts, an analysis of the Law reveals that it does contain counterbalances and additional requirements that make it a relatively reasonable law.

In contrast, Juan Esteban Puga considers that the Chilean legislator has clearly gone back to the pre-2014 "culpable bankruptcy" framework, but with a series of defects regarding the governing terms that characterise the new offences of the Law. He adds that some new crimes have unjustified high penalties.

For Eduardo Godoy, given that under the previous Law offences required direct intent, convictions were seldom declared. A modification was in order. However, the Law is not clear on why some conduct is considered to give rise to a crime. It remains to be seen how courts will establish criteria for determining the existence of a crime in practice.

In a similar manner, Francisco González is of the opinion that, from the perspective of defending major creditors, criminal action should be seen as a last resort to maximise recovery possibilities.

4.2 The Law impacts debt renegotiation outside a reorganisation procedure

Insolvency experts Juan Esteban Puga and Eduardo Godoy are especially critical of the limitations for granting guarantees for pre-existing debts under the Law. For Puga, this new offence may inhibit debtors from renegotiating their liabilities directly out of court with banks. In such renegotiations, a bank would normally demand new guarantees. However, with the entry into force of the Law, the granting of those guarantees may constitute a crime.

Godoy also adds that the Law requires precision on this matter. Granting guarantees may initially seem harmless but end up constituting a crime if the debtor starts a reorganisation proceeding. This situation, both Puga and Godoy agree, inhibits the debtor from renegotiating its liabilities with its creditors outside judicial reorganisation procedures.

4.3 Instrumental use of the Law by creditors

Insolvency experts González, Godoy and Puga fear that creditors may use the new legislation as a mechanism to maximise recovery. González considers that although criminal actions should be seen as a last resort, the new criminal offences could give rise to a more frequent use of this mechanism with the sole objective of obtaining better conditions of payment that creditors would otherwise not obtain if they did not initiate a criminal action.

4.4 What does "requirements of a rational administration" actually mean?

Concerning the definition of what is a rational administration, which is a key concept of the more open-ended crime of the new legislation, criminal law experts Harasic, Aldoney and Alcaíno emphasise that this general insolvency crime is inspired by the German criminal law model.

Given that a similar crime has already been proven effective and reasonable under that legal system, the application of the Law in Chile should, in theory at least, not be that different. Determining what constitutes

20 Professor of Commercial Law at Universidad de Chile and insolvency practitioner.
21 Professor of Procedural Law at Universidad de los Andes de Chile and liquidator.
22 Professor of Insolvency Law at Universidad del Desarrollo and insolvency practitioner.
23 Former Dean of Facultad de Derecho de la Universidad de Chile, Former President of Consejo de Defensa del Estado de Chile, Former Professor of Civil and Criminal Procedural Law at Facultad Derecho de la Universidad de Chile and Universidad Diego Portales, and Former board member of Colegio de Abogados de Chile.
24 Professor of Criminal Law at Pontificia Universidad Católica de Chile.
25 Professor of Procedural Criminal Law at Universidad Diego Portales.

rational administration is a matter that must be analysed on a case-by-case basis. Criminal law experts also consider that the analysis of this crime should not be reduced to the term of "rational administration". There are also many other requirements that should be met in order for conviction. These additional requirements can be considered a counterbalance to the broadness of what can constitute rational administration. Therefore, they consider that, although it will be up to the courts to establish a clear criterion, the application of the Law should be reasonable.

Insolvency experts agree that determining what constitutes the requirements of rational administration will be established on a case-to-case basis. The debtor's context, the business reasons upon which the debtor has acted, the industry risk and the debtor's fiduciary duties should always be considered.

4.5 How can the Law be improved?

Both the criminal and insolvency experts agree that there is room for improvement in the Law, mainly by defining, characterising and exemplifying the conduct that will give rise to criminal offences.

Insolvency experts also add that although it is important that the Law punish those practices that society repudiates, it is essential for the legislator to bear in mind that the criminalisation of this conduct should not harm debtors who in good faith seek lawful alternatives to get out of complex financial situations.

5. Conclusion

The Law introduces stricter regulations for insolvency-related conduct in Chile, aiming to protect public economic order and public faith. While intended to modernise and clarify insolvency regulations, the Law has faced criticism for its broad and vague definitions, which may create legal uncertainties and risks for debtors.

In practice, we expect to see increased scrutiny of business practices and potential challenges in debt renegotiations outside judicial procedures, particularly for small businesses. The Law's effectiveness will depend on how courts interpret and apply its provisions, balancing the need for justice with the protection of economic activities. Careful judicial interpretation will be crucial to avoid unintended consequences and ensure the law meets its objectives.

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INSOL International, 29-30 Ely Place, London, EC1N 6TD
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