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The Impact of Covid-19 in Chilean Contract Law
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I. Introduction

This report will briefly examine the impact that the epidemic of Covid-19 is having on Chilean contract law, both in commercial (B2B) and consumer contracts (B2C). Section II of the report will focus on new regulations enacted to deal with the crisis, particularly from some administrative agencies, and its possible impact on general contract law.¹ Section III will analyze whether the general provisions of Chilean contract law could be applied to deal with the problems arising from the crisis.

As a general remark, it is possible to claim that this health crisis is putting pressure on the general rules regarding contract law. For instance, given the absence of a general provision regarding the change of circumstances (*teoría de la imprevisión*) in the Chilean Civil Code of 1855, many Chilean jurists are currently debating whether a new provision should be added.² Meanwhile, some bills of legislation have been proposed, such as a general provision on change of circumstances³ and a provisional rule regarding tenant agreements,⁴ but none of these have yet seen the light. However, some regulatory agencies have enacted some interesting directives and guidelines that are worth examining.

II. Administrative regulations enacted to deal with the crisis

As explained above, with regard to contract law, at the moment there is no special legislation enacted in Chile to deal with the crisis, regardless of some proposals that may or may not be finally approved.⁵ This lack of legislation has been contrasted with other legal systems such as Spain, Germany or Portugal.⁶ However, some regulatory agencies have enacted special directives that will be examined here. Particularly, we will analyze some directives of the National Consumer Agency (Servicio Nacional del Consumidor [SERNAC]), two directives of the Financial Market Commission (Comisión para el Mercado Financiero

¹ The report is updated until May 31, 2020.

² For example, Jaime Alcalde Silva, “A vueltas con los riesgos del contrato: el Covid-19 y la teoría de la imprevisión”, *Estado Diario*, May 22, 2020 <<https://estadodiario.com/columnas/a-vueltas-con-los-riesgos-del-contrato-el-covid-19-y-la-teoria-de-la-imprevisión/>> accessed 28 May 2020, and Enrique Barros Bourie, “Cambios imprevisibles que afectan la economía del contrato”, *El Mercurio*, May 12, 2020 <<http://www.derecho.uchile.cl/comunicaciones/columnas-de-opinion/cambios-imprevisibles-que-afectan-la-economia-de-un-contrato.html>> accessed 28 May 2020.

³ Boletín No. 13474-07.

⁴ Boletín No. 13373.

⁵ The legislative activity has been concerned mainly with labour law (e.g. Ley 21.227), procedural law (e.g. Ley 21.226) and specific economic measures for SME's and the more vulnerable groups of the population.

⁶ Iñigo de la Maza & Alvaro Vidal, ‘El impacto del Covid 19 en los contratos. El caso chileno: Medidas excepcionales y derecho común’, *Revista de Derecho Civil*, Vol. VII, No. 2 (2020), 137.

[CMF]), a directive of the Ministry of Public Works (Ministerio de Obras Públicas [MOP]), a resolution of the General Accounting Office (Contraloría General de la República [CGR]), and a directive of the Public Contracts Agency (Dirección de Compras y Contratación Pública [Chile Compra]). Of these, only SERNAC's and CMF's directives can be applied generally to consumer contracts, whereas the other agencies have regulated some aspects of contracts between private individuals and the State.

1. Consumer contracts and SERNAC's directives

SERNAC is a specialized agency in charge of the enforcement of consumer law in Chile. Its main functions are to supervise compliance with the Consumer Protection Act (Ley 19.496 of 1997), the promotion of consumer rights and the development of actions for the information and education of the consumer.⁷

The agency is legally empowered to issue interpretative directives of legal rules regarding consumer protection. Even when these directives are not legally binding but for SERNAC itself, they can be considered as having relevant orientations for legal operators and courts in future disputes.⁸

SERNAC has issued four directives up to this date:

a. Resolución Exenta No. 0326, of April 6, 2020.⁹ Interpretative Directive regarding Contracting on Distance during the Pandemic caused by Covid-19.

This Directive stresses the importance of the information that the seller has to provide the consumer, taking into account that most of the commercial transactions are currently being made electronically. The Directive does not introduce new regulations. It only summarizes the sellers' duties established in the legislation, mainly the Consumer Protection Act (Ley 19.496).

b. Resolución Exenta No. 0340, of April 9, 2020.¹⁰ Interpretative Directive regarding the Suspension of the Statute of Limitations During the Health Crisis.

⁷ See generally Rodrigo Momberg, María Elisa Morales and Alberto Pino-Emhart, 'Enforcement and Effectiveness of Consumer Law in Chile: A General Overview', in Hans-W. Micklitz and Geneviève Saumier (eds.), *Enforcement and Effectiveness of Consumer Law* (Springer, 2018), 154-7.

⁸ See article 58 b) of Ley 19.496, 1997.

⁹ Available at <<https://www.sernac.cl/portal/604/w3-article-58438.html>> accessed 28 May 2020.

¹⁰ Available at <<https://www.sernac.cl/portal/604/w3-article-58446.html>> accessed 28 May 2020.

This is by far the most interesting directive enacted by SERNAC. The Directive interprets that the statute of limitations established in the Consumer Protection Act (articles 19, 20, 21, 40 and 41) are suspended as long as the constitutional state of catastrophe is in place for consumers.¹¹ The suspension of the statute of limitations includes the consumers' rights established by the law, known as *garantía legal*,¹² and also rights contractually agreed.

The Directive argues that under the present circumstances, it is not possible for consumers to enforce their rights, since consumers do not have access to the sellers' physical facilities, such as shopping centers and stores. Therefore, it is stated that the statute of limitations should be suspended because consumers are currently unable to enforce their rights. Accordingly, the suspension should be in place as long as the constitutional state of catastrophe is maintained.

The interpretation seems to be good news for consumers. However, two points must be made. First, SERNAC does not have powers to modify through interpretation the statute of limitations established by the legislation. In this sense, some sellers might argue that SERNAC here is legislating and not just interpreting the Consumer Protection Act, because the law does not establish these exceptions. And secondly, it is not obvious to claim that consumers are currently unable to enforce their rights during the health crisis. SERNAC reports that consumers are currently filing complaints against sellers,¹³ and these complaints seem to be increasing with the use of ecommerce.¹⁴ Moreover, some sellers could eventually argue that they have provided suitable procedures and mechanisms for consumers to enforce their rights. And finally, it could be argued that the constitutional state of catastrophe does not necessarily involve the closure of the commerce, especially if some regions of the country are affected by the crisis at a different level.

*c. Resolución Exenta No. 0360, of April 20, 2020.*¹⁵ *Interpretative Directive regarding Good Practices During the Health Crisis.*

The Directive establishes general recommendations to all sellers, suggesting the use and encouragement of digital platforms, the establishment of flexible hours of attention for consumers, and the adoption of hygiene measures in open spaces and in the physical contact with consumers.

¹¹ The constitutional state of catastrophe was declared in Chile on March 18, 2020. Decreto No. 104, Ministry of Internal Affairs and Public Order.

¹² See generally Francisca Barrientos, *La garantía legal* (Legal Publishing, 2016).

¹³ See for example <<https://www.sernac.cl/portal/604/w3-article-58536.html>> accessed 28 May 2020.

¹⁴ See <<https://www.t13.cl/noticia/negocios/ola-reclamos-tardanza-despachos-domicilio-pone-al-retail-mira-del-sernac>> accessed 01 June 2020.

¹⁵ Available at <<https://www.sernac.cl/portal/604/w3-article-58521.html>> accessed 28 May 2020.

*d. Resolución Exenta No. 0371, of April 20, 2020.*¹⁶ *Interpretative Directive regarding the Protection of Consumers' Health and Alternative Measures for Performance of Consumer Contracts during the Health Crisis.*

This Directive stresses that the consumers' safety and health must be especially protected. Accordingly, despite the fact that consumer contracts should be in principle performed within the same terms that they were agreed upon, during the crisis some goods or services exceptionally might be supplied after the date that was agreed, or even might be cancelled reimbursing the consumers. The Directive is interesting because it allows sellers to excuse from performing some contracts based on impossibility or *force majeure* caused by the health crisis.

2. Consumer credits and CMF's directives

The CMF is a decentralized public service. Its main objectives are to safeguard the proper functioning, development and stability of the financial market, facilitating the participation of market agents and promoting the care of public faith.

CMF has issued two directives about consumer credits up to this date:

*a. Directive of April 2, 2020.*¹⁷

This Directive eases the treatment of provisions required from banks when rescheduling loan installments in the commercial, consumer and mortgage portfolios. These transitional measures seek to mitigate the impact of the shock on the economy due to the spread of Covid-19. The Directive establishes a maximum grace or installment deferment period of six months in the case of mortgage loans, a period four months in the case of commercial loans, and a period of three months for consumer loans.

The Directive allows banks and financial institutions to grant periods of grace or deferment periods with consumers. However, they are not mandated to do so, and the terms of the new conditions must be negotiated individually with each debtor. Interestingly, CMF reports that 18% of mortgage credits have been renegotiated, and 261,386 customers have renegotiated their consumer credits.¹⁸

*b. Directive of April 27, 2020.*¹⁹

This Directive extends the period for financial institutions to reschedule loans to six months for commercial loans.

¹⁶ Available at <<https://www.sernac.cl/portal/604/w3-article-58529.html>> accessed 28 May 2020.

¹⁷ Available at <<http://www.cmfchile.cl/portal/principal/605/w3-article-28582.html>> accessed 28 May 2020.

¹⁸ Report available at <<http://www.cmfchile.cl/portal/principal/605/w3-article-28643.html>> accessed 28 May 2020.

¹⁹ Available at <<http://www.cmfchile.cl/portal/principal/605/w3-article-28682.html>> accessed 28 May 2020.

3. Construction contracts with the State

The Ministry of Public Works (MOP) is the cabinet-level administrative office in charge of planning, studying, designing and constructing as well as repairing, maintaining and operating public infrastructure in Chile.²⁰ The Ministry has issued a Directive regarding construction contracts with the State, Oficio Ordinario No. 239, of March 27, 2020.

This regulation distinguishes between contracts that are currently in progress and contracts that have not yet been performed. Regarding the latter type of contracts, MOP establishes that these contracts might be suspended, and the works rescheduled. It is established that these suspensions will not allow the builders to claim compensatory damages.

Whereas in the case of contracts that are currently in progress, MOP states that the works should not be suspended or paralyzed. If it is necessary to suspend the works, the builder will have to provide evidence that the suspension was necessary, and will not be entitled to get compensation based on the rescheduling of the works.

4. CGR and contracts with the State. Dictamen No. 6854-20

The Office of the Comptroller General of the Republic (CGR) is a supreme audit institution of the State Administration and autonomous with respect to the Executive Branch and other public bodies. It controls the legality of administrative acts and safeguards the correct use of public funds.²¹

CGR has issued the Resolution No. 6854-20, of March 25, 2020, regarding contracts between private individuals and the State, especially contracts of personal services that are not being performed, since most of the public offices have been closed.²² The Directive establishes that these services must be paid by the State, despite the fact that most of these services are not currently being performed. However, the CGR establishes that these payments will proceed only if the providers keep their workers employed, and pay them all their salaries and social security debts. According to the CGR, this condition is necessary because otherwise the contractors would be unjustly enriched.

²⁰ <<https://www.mop.cl/Paginas/ingles.aspx>> accessed 01 June 2020.

²¹ <<https://www.contraloria.cl/portalweb/web/cgr-ingles>> accessed 28 May 2020.

²² Available at <<https://www.contraloria.cl/pdfbuscador/dictamenes/006854N20/html>> accessed 28 May 2020.

5. Chile Compra and contracts with the State

The Public Contracts Agency (Chile Compra) is a decentralized public service. Its main objective is to administer the transactional platform Mercado Publico, a platform that allows public offices to purchase products and services from private suppliers. The agency has issued a directive with recommendations to public offices regarding public contracts and biddings, Resolución Exenta No. 237 B, of April 13, 2020.

The Directive establishes various suggestions regarding the bidding procedures, prioritizing communications through digital channels. It also suggests that biddings should have more flexible dates and deadlines. More importantly, the Directive states that warranties should only be demanded to providers and suppliers in very few exceptional cases, when it is strictly necessary. It also suggests that public offices should pay for the goods and services provided as soon as possible.

Finally, the Directive suggests public offices to be more flexible regarding the dates of performance. Moreover, the Directive holds that contractors should be allowed to justify their breaches, and public offices could eventually excuse these breaches given the current difficult circumstances.

III. General contract law

1. The Chilean Civil Code. A strong recognition of *pacta sunt servanda*

The Chilean Civil Code was adopted in 1855 and entered into force on January 1, 1857. Regardless of the enactment of an important amount of special legislation, e.g. consumer law, labour law, loans, leases, etc., the Code still contains the main core of Chilean private law. Besides, although relevant reforms to the law of persons, family law and inheritance law were introduced in the second half of the twentieth century, the books on property law and obligations have remained without significant modifications.

The Code was inspired and reflects the nineteenth century's prevailing liberal doctrine and individualism. Consequently, of the principles of freedom and sanctity of contract (*pacta sunt servanda*) are strongly recognized and protected. Article 1545 of the Code, which is based on the old article 1134 of the *Code Civil* states that '*Contracts lawfully entered into*

*are a law for the contracting parties and cannot be invalidated except by mutual consent or for causes authorized by law.*²³

Accordingly, in the Code's system, the parties are free to enter into a contract and to pursue their own interests. Profits derived from a contract are neither restricted nor limited, with the exception of *lesión* in the sale of immovable goods and some restrictions on the amount of interest on loans.

2. Force majeure

Force majeure is defined in article 45 of the Civil Code as the unforeseen event which is not possible to avoid.²⁴ Based on this definition, Chilean doctrine and case law has traditionally required for an event to be considered as force majeure to be unforeseeable, external to the affected party and unavoidable. This last condition has been interpreted in the sense that the event must render the performance of the obligation impossible.²⁵

Under this interpretation, a party only is allowed to claim force majeure if the performance of its obligation has become absolutely and definitively impossible. Therefore, the effect of force majeure is the extinction of that obligation.

However, modern contract law doctrine has contended that the main effect of force majeure is the extinction of the affected party's obligation. It is claimed that the main effect of force majeure is to release the debtor of its liability to pay damages for non-performance, but still the creditor may exercise any other remedy, if available. More importantly, since the debtor is not released from its obligation, she still has to apply her best efforts in order to overcome the force majeure event, and even may be compelled to perform if the impediment is only temporal.²⁶

The strict measures imposed in order to control the spread of the disease can be easily considered as unforeseeable and external circumstances. More problematic can be to determine whether it is unavoidable, because not all contracts and not all obligations have been affected to the same extent.

If the performance of the contract by the affected party has become impossible or the purpose of the contract has been totally frustrated, that party is definitively released from

²³ 'Todo contrato legalmente celebrado es una ley para los contratantes, y no puede ser invalidado sino por su consentimiento mutuo o por causas legales'. Author's own translation.

²⁴ "Se llama fuerza mayor o caso fortuito el imprevisto a que no es posible resistir, como un naufragio, un terremoto, el apresamiento de enemigos, los actos de autoridad ejercidos por un funcionario público, etc." Author's own translation.

²⁵ For a comprehensive study of force majeure in Chilean private law see María G. Brantt, *El caso fortuito y su incidencia en el derecho de la responsabilidad civil contractual* (Abeledo Perrot 2010).

²⁶ See Brantt (2010).

her obligations. However, considering the temporal nature of the emergency measures, suspension of performance is a more plausible outcome, with no liability for the affected party. Finally, if performance is still possible, that party should take the necessary actions in order to overcome the impediment and perform her obligations, even when the costs of performance were higher than those anticipated at the time of conclusion of the contract. This situation leads to the analysis of the doctrine of a change of circumstances or *teoría de la imprevisión*.

3. Change of circumstances (*teoría de la imprevisión*)

3.1. Legal doctrine

Based on the already cited article 1545, traditional Chilean legal doctrine rejects the possibility of a revision of contracts in cases of change of circumstances and in any other case that is not expressly regulated. The principle of sanctity of contracts is arguably absolute, and therefore any attempt to find other underlying principles may be regarded as artificial. In sum, the provisions of the Civil Code leave no room for the general application of *imprevisión* in Chilean private law, and therefore the introduction of an express legal provision is required for its recognition by the courts.²⁷

On the contrary, most of the contemporary Chilean legal doctrine argues for the application of *imprevisión* in Chilean private law, based on article 1546 of the Civil Code, which provides the principle of good faith in the performance of contracts.: ‘*Contracts must be performed in good faith and are consequently binding not only as to what is expressed therein, but also with regard to all consequences which are derived from the nature of the obligation, or belong to it by statute or usage.*’²⁸

Good faith in performance is considered to be a limit on the power to claim the execution of the contract by the creditor, when the performance of the contract as agreed implies an unjustified and serious detriment to the debtor derived from external events, which is unforeseen by both parties at the time of the conclusion of the contract.²⁹ Some additional

²⁷ Lorenzo de la Maza, *La teoría de la imprevisión. (En relación con el Derecho Civil Chileno)* (Universidad de Chile 1933) and René Abeliuk, *Las obligaciones* (Editorial Jurídica de Chile 2001).

²⁸ ‘Los contratos deben ejecutarse de buena fe, y por consiguiente obligan no sólo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que por la ley o la costumbre pertenecen a ella.’ Author’s own translation.

²⁹ Juan C. Dörr, ‘Notas acerca de la teoría de la imprevisión’ (1985) *Revista Chilena de Derecho* 12, 253-270; and Daniel Peñailillo, ‘La revisión judicial de obligaciones y contratos en la reforma del Código Civil: la lesión y la imprevisión’ (2000) *Revista de derecho (Concepción)* N°208 año LXVIII, 209-237.

arguments are usually added: a serious alteration in the performance of the obligation by supervening events will lead to the disappearance of its *causa*, leading to the nullity of the contract; and in the case of commutative contracts (*contratos conmutativos*); i.e. those with reciprocal obligations which are considered to be equivalent by the parties (article 1441), the equivalence between the counter-performances would be an inherent element of the agreement.³⁰ If after the conclusion of the contract, such equivalence is severely disturbed by unforeseen and extraordinary circumstances, the purposes of the parties may be deemed to have been frustrated and the contract (with regard to its original nature) has been transformed into another completely different.

Finally, it has to be noted that some particular rules of the Civil Code do allow the modification of specific contracts in cases of change of circumstances: articles 2003 rule 2 (construction contracts – *contrato de construcción*), 2180 (loan for use – *comodato*) and 2227 (bailment – *depósito*). On the contrary, articles 1983 (lease of rural property – *arrendamiento de predios rústicos*) and 2003 rule 1 (construction contracts – *contrato de construcción*) expressly reject the modification of such contracts on that basis.

3.2. Case law

To this date, the Supreme Court has not applied *imprevisión* to terminate or revise a valid contract. Thus, in the landmark case of *Galtier v. Fisco*,³¹ the Supreme Court held that the courts had no power to ignore or revise the terms of the contract, either by reasons of equity, custom or administrative rules.

More recently, in *South Andes Capital S.A. c/ Empresa Portuaria Valparaíso*³² the Supreme Court expressly declared that article 1545 of the Civil Code excludes the possibility of accepting the *imprevisión* theory in Chilean private law because under that provision the contract cannot be terminated or adjusted by the courts, but only by the mutual consent of the parties. The Court added that neither article 1546 nor article 1560 (interpretation of the contract on the basis of the parties' intention) are legal grounds to invoke *imprevisión*, because neither the duty of good faith nor the intention of the parties are contravened if the creditor claims the performance of the contract as agreed. In a later decision, the Court

³⁰ Dörr (1985).

³¹ *Gaceta de los Tribunales* of 1925, I.er Sem., p. 23. *RDJ*, T. 23, sec. 1, p. 423 (10 January 1925) 'Los tribunales carecen de facultad para derogar o dejar sin cumplimiento la ley del contrato, ya sea por razón de equidad, o bien de costumbre o reglamentos administrativos'. In the same sense, the Supreme Court stated that article 1545 gives the force of law to the terms of a contract, and therefore such terms should be observed by the contractual parties and the courts (*RDJ*, T. 37, sec 1, p. 520, 1940). The *Repertorio de Legislación y Jurisprudencia Chilenas* reports eight decisions on *Casación* by the Supreme Court, which state that the decision of a lower court is null and void if such a decision ignores the binding force of a contract through the omission or alteration of the terms agreed by the parties.

³² Corte Suprema, 09.09.2009, Rol 2651-08.

also disregarded the claim for additional costs due to unexpected circumstances, incurred by a contractor on a lump sum contract.³³

However, there are a small number of decisions at the level of Court of Appeals that have accepted, to a different extent, the application of *imprevisión*. Most of these cases are concerned with construction contracts, in order to compensate the constructor the higher costs incurred due to the occurrence of unexpected circumstances during the performance of the contract.³⁴ Other decisions of Court of Appeals, recognizing the possibility to apply the doctrine of *imprevisión* in Chilean contract law, have rejected the claim because the strict conditions for its application were not met to the case in dispute.³⁵

On the other hand, arbitral courts have accepted the application of *imprevisión* in some cases.³⁶ Most of these cases are again related to construction contracts concerning additional costs borne by the building contractor deriving from unexpected difficulties in the construction process, which were unknown at the time of contracting, e.g., relating to the soil composition or an increase in the price of materials or labour. However, the limited number of cases makes it difficult to come to any general conclusions as to the willingness of arbitral judges to broadly apply the *imprevisión* theory. On the contrary, some authors have argued that the cited cases are extraordinary and the general rule still is that the Chilean courts refuse to revise contracts based on these grounds.³⁷ In this sense, a close examination of the cases shows that even arbitral courts apply *imprevisión* only in very exceptional situations and after a strict assessment of its requisites.

³³ Corte Suprema, 03.07.2012, Rol 9110-2009. More recently, the Supreme Court rejected again the application of *imprevisión*, not on the grounds of its lack of recognition in the Civil Code, but because on the merits of the case, it was clear that the affected party had assumed the risks of the change of circumstances. See Corte Suprema, 20.03.2020, Rol 28.122-2018.

³⁴ The most well known and reported is *Guillermo Larraín Vial con Servicio de Vivienda y Urbanización de la Región Metropolitana*, Corte de Apelaciones de Santiago, 14.11.2006, Rol 6812-2001. For comments on the case, see Enrique Alcalde, 'Corte de Apelaciones de Santiago y teoría de la imprevisión. Un hito fundamental en la evolución de nuestra justicia ordinaria' (2007) *Revista Chilena de Derecho* 34, 361-372; and Rodrigo Momberg 'Análisis crítico desde el derecho alemán y nacional de la sentencia de la Corte de Apelaciones de Santiago que acoge la teoría de la imprevisión' in Alejandro Guzmán (ed), *Estudios De Derecho Civil III* (Legal Publishing 2008). See also Corte de Apelaciones de Santiago, Rol 2187-2010; and Corte de Apelaciones de San Miguel, 17.01.2011, reported in Alejandra Aguad and Carlos Pizarro, 'Comentarios de Jurisprudencia. Responsabilidad Civil' (2011) *Revista Chilena de Derecho Privado* N°16, 338-344.

³⁵ Corte de Apelaciones de Concepción, Rol 2060-2008; Corte de Apelaciones de Valparaíso, Rol 2141-2008; Corte de Apelaciones de Santiago Rol 5442-2011.

³⁶ The decisions reported are *Pavez y Cia. Ltda. c/ Alemparte* (1983), *Sociedad de Inversiones Mónaco Ltda. c/ ENAP* (1986), *Sociedad Constructora La Aguada c/ Emos S.A.* (1994), *Chilesat S.A. c/ Smartcom PCS S.A.* (2005). See Claudio Illanes (2000) 'Teoría de la Imprevisión' in Fundación Fernando Fueyo (ed), *Estudios Sobre Reformas al Código Civil y al Código de Comercio* (Editorial Jurídica de Chile 2000); and Ramón Domínguez *et al.*, 'La révision du contrat. Rapport Chilien' in Société de Législation comparée (ed), *Le Contrat: Journées Brésiliennes* (Société de Législation comparée 2008).

³⁷ Domínguez *et al.*, (2008).

3.3. Perspectives

It seems that even in the context of the emergency measures adopted in the context of epidemic of Covid-19, the judicial scenario for the application of the doctrine of a change of circumstances is uncertain. As stated above, the approach to *imprevisión* by Chilean Courts has been very restrictive, and there is no reported case on a Court allowing the adaptation of a contract because of unexpected circumstances. On the other hand, even when arbitral courts have accepted its application to long-term contracts affected by a change of circumstances, they have done that only in exceptional cases following a rigorous examination of its requisites.