Noviembre, 2018
Newsletter 24

International Legal Partners

Actualidad Legal / Legal News

Chile • Ecuador • Germany • Mexico • Peru • Spain

Chile:
SEIA Reform

On July 29 of this year, the government introduced a bill in the National Congress which modifies our Environmental Impact Assessment System (SEIA), an institution that is part of our existing environmental institutionalism since the enactment of the General Law of Bases of the Environment, Law Nº19.300, in 1994.

Read more | 4 minutes

Chile:
Reforma al SEIA

El 29 de julio del año en curso, el gobierno ingresó al Congreso Nacional el proyecto de ley que modifica nuestro Sistema de Evaluación de Impacto Ambiental (SEIA), institución que forma parte de nuestra institucionalidad ambiental existente desde la dictación de la Ley General de Bases del Medio Ambiente, Ley Nº19.300, en el año 1994.

Leer más | 4 minutos

Spain:
Employment relationship theories: Link Theory. When is a contract an ordinary job? When is it commercial? When is it senior management? Evolution in times of crisis

Read more | 5,5 minutes

España:
Teoría del Vínculo. ¿Cuándo un contrato es laboral ordinario? ¿Cuándo es mercantil? ¿Cuándo es de alta dirección? Evolución en tiempos de crisis

Leer más | 5,5 minutos

Germany:
European Court of Justice (ECJ): Compensatory claim of the commercial agent for the loss of clientele applicable as well for the probationary period

Read more | 1,5 minutes

Alemania:
Tribunal de Justicia de la UE (TJCE): Derecho compensatorio del representante comercial aplicable también con respecto al periodo de prueba

Leer más | 1,5 minutos

Ecuador:
Ecuador makes important advancements towards international fiscal transparency

Read more | 1,5 minutes

Ecuador:
Ecuador adopta importantes avances hacia la transparencia fiscal internacional

Leer más | 1,5 minutos

Peru:
Peru continues to be an interesting country for mining investments

Read more | 2,5 minutes

Perú:
Perú sigue siendo un País interesante para las inversiones mineras

Leer más | 2,5 minutos

Chile:
SEIA Reform

Estudio Jurídico Otero

Chile

On July 29 of this year, the government introduced a bill in the National Congress which modifies our Environmental Impact Assessment System (SEIA), an institution that is part of our existing environmental institutionalism since the enactment of the General Law of Bases of the Environment, Law Nº19.300, in 1994.

The SEIA consists of a procedure administered by the Environmental Assessment Service (SEA) which, on the basis of a Study or else on an Environmental Impact Statement, as the case may be, concludes with the issuance of an Environmental Qualification Resolution (RCA) through which the project or activity subject to evaluation is accepted or rejected, according to whether the impact directly or indirectly caused in a certain area, conforms to current environmental rules.

The purpose of this bill is to modernize, strengthen and improve the SEIA in order to guarantee sustainable development, promoting citizen participation and granting legal security to all actors in our society.

The main axes of the SEIA reform are:

- Reduction of the political component in the SEIA

  It seeks to limit the instances of political decisions, therefore modifying the formation of the Regional Assessment Commission, which will remain with only three Macrozonal Commissions that will be integrated by technical agents, experts in the environmental component involved in the different projects that enter the SEIA.

  Three Macrozonal Directions will be created: a northern zone with headquarters in Antofagasta; a central zone with headquarters in Santiago, and a southern zone with headquarters in Valdivia, and these three Macrozonal Directions will coincide with the current organization of the Environmental Courts.

  One of the main reasons that were taken into account to propose this division into three macrozones is that the current political-administrative division of our country does not adequately reflect the environmental reality or the specialization acquired in certain projects that are frequently subjected to environmental assessment.

  A third modification to reduce the political component in the SEIA is the elimination of claims filed to the committee of Ministers or the Executive Director of the Environmental Assessment Service (SEA), replacing it with a strictly judicial appeal that must be filed to the Environmental Courts, thus leaving the final decision in the hands of an impartial third party, endowed with the necessary knowledge to resolve the matters submitted to its jurisdiction.

  A special clarification resource is also established so that both the holders of projects and the citizens that participated in them may resort to the same administrative body that issued the bill or law in order to clarify any unclear passages it may have.

- Early Citizen Participation

  The General Law of Bases of the Environment

sets forth in its Article 4 that;

> "It is the duty of the State to facilitate citizen participation, allowing access to environmental information and promoting educational campaigns aimed at the protection of the environment."

In order to create occasions of early dialogue, i.e., before the projects enter the SEIA, the reform includes early citizen participation. It will have a maximum term of 18 months from the publication in the Official Gazette of the summons to the community to participate and ends with a minutes signed by the representatives of the participants, a minutes that must contain the agreements and disagreements of such participation and must be incorporated in a document called Terms of Environmental Reference. This document must be formally registered and sent in consultation to the respective Environmental Court for its authorization. The results of the early citizen participation will not be binding.

By virtue of the above, the projects that must be assessed through an Environmental Impact Study entering the SEIA, must obligatorily submit to the early citizen participation, which must be reported to the SEA. Once the project of early citizen participation has ended, the holder of the project will have a period of 2 years to enter the project for environmental processing.

Those projects or activities that only require an Environmental Impact Statement are not bound to submit voluntarily to the early citizen participation, but they may do it on a voluntary basis.

- **Single Window**

For the processing of large projects, the SEIA is designated as a single window that will channel the granting of sectoral environmental permits. These sectoral environmental permits will be granted by the Macrozonal Assessment Commission through a favorable Environmental Qualification Resolution (RCA) that so provides, being exempt from any subsequent sectoral environmental processing.

This reform seeks to give speed and agility to the processing of large projects, given the fact that there are currently about 200 sectoral environmental permits that must be granted by the different agencies of the public administration.

Spain:
Employment relationship theories: Link Theory. When is a contract an ordinary job? When is it Senior Management? When is it commercial? Evolution in times of crisis

ILP Abogados

Spain

It is very common in acquisitions to warn of contingencies arising from a defective legal relationship of the management team with the Company that is the object of the transaction.

Senior Management Contracts

Regarding the termination of senior management contracts, a relevant practical issue arises since they do not have the written form “ad solemnitaten” but “ad probationem” (since the relationship can be proven, whether or not there is a written contract) and it is often necessary to define when we are facing a common labour relationship or an employment relationship of senior management staff and when it is a member of the Board of Directors.

Contracts of Senior Management and Commercial Contracts

There are times when there is a concurrence of tasks in which a senior manager in turn plays a position of administration. The problem occurs in the different labour regime they have; an administrator has a business relationship and a senior manager has a regime of special labour. The consequences of this is that having a different labour regime should be included in the self-employed regime.

Employment relationship theories: Functional Theory and Link Theory

This problem has been solved in different ways throughout history. The Fourth Chamber of the Supreme Court in its judgment of September 29, 1988, the so-called Huarte ruling, had established the so-called “functional theory”: it was necessary to analyze, on a case-by-case basis, the most relevant function performed, when several functions concurred, or as was said in the sentence: “it is necessary to insist, therefore, that the foundation of the exclusion of the labour scope is not in the class of functions performed by the subject, but in the nature of the link under which he or she performs them. Or said in this way, for the concurrence of the employment relationship of a special nature mentioned, it is not enough that the activity performed happens from the senior office, as defined by the regulatory precept, but to make them a worker, as the same precept mentions, and not a counsellor in the performance of their position.”

Link Theory, one of the most common employment relationship theories

At present, the thesis followed is the so-called “link theory” in such a way that it is completely incompatible, holding at the same time the condition of senior management and being a company administrator, so the commercial link held by the administrator absorbs the labor link that the senior manager could have (who is also an administrator.) STS (4th Room) December 9, 2009.

There are statutes that foresee this situation by differentiating both scopes and even sentences that

admit this double bond (STSJ Catalonia of July 7, 2005, STSJ Madrid of June 17, 2005, STSJ of Asturias of December 23, 2004, STSJ Castilla y León (Valladolid) of April 29, 2003, the STSJ País Vasco of July 18, 2006 and the STSJ Madrid of June 6, 2006 …)

STJ Madrid December 19, 2012

According to the judgment of the Superior Court of Justice of Madrid of December 19, 2012 which reads as follows:

"The decision of this Chamber of December 9, 2009 (RJ 2010, 1182), recourse 1156/2009, has examined the situation that occurs when a worker, joined to the company by a special senior management relationship, happens to play a corporate position, as a member of the Board of Directors.

The sentence reasons: "As you remember the sentence of 22-12-94 (RJ 1994, 10221) (rec 2889/1993), when interpreting art. 1.3.c) of the Workers' Statute (RCL 1995, 997), "It must be borne in mind that the activities of management, management, administration and representation of the company are the typical and specific activities of the administrative bodies of the companies. merchants, whatever the form they may be, whether it is a Board of Directors or a sole Administrator, or in any other manner permitted by law.

For this reason it is wrong and contrary to the true essence of the administrative bodies of society to understand that they must be limited to carrying out purely consultative functions or simple advice or guidance, because, on the contrary, they are responsible for the performance direct and executive, the exercise of management, direction and representation of the company. Therefore, all these actions involve "carrying out inherent tasks" to the status of administrators of the company, and fully fit in the "performance of the position of director or member of the administrative bodies in companies that have the legal form of society ", which is why they are included in the aforementioned article 1.3, c) of the Workers' Statute."

Ordinary Labour or Senior Management

Regarding the distinction between a manager (common labour relationship) and personnel of senior management, Additional Provision 27 of the LGSS that uses as a parameter the effective control of the company and understands that a person holds it, when it holds half of the share capital without that fits proof to the contrary (iuris et de iure).

On the contrary, there will be presumption – iuris tantum – when a group holds 50% or holds 33%, or 25% and also holds management functions.

Judgment of the Superior Court of Justice of Catalonia of December 18, 2012

"The decision of this Chamber of July 5, 2012 (JUR 2012, 297073), which makes a brilliant review of jurisprudential doctrine in the face of analogous assumptions to which we are concerned that:

"A constant jurisprudential doctrine has been sanctioning the lack of work in the relationship of the partners of a company that perform other tasks di-

fferent from those of their own as a partner due to the lack of the note of alienation and when said partner holds the ownership of a determining societary fee so that the work that can be performed is carried out as a contribution to society. This case is understood to be concurrent when the participation quota exceeds 50% of the share capital (STS 12/26/07).”

Germany:
European Court of Justice (ECJ): Compensatory claim of the commercial agent for the loss of clientele applicable as well for the probationary period

ILP Global Mertens Thiele
Germany

The compensatory claim of the commercial agent at the end of the agency contract is one of the agents most important and basic rights. Its economic dimension tends to be extremely relevant, since the underlying European Directive – as well as the corresponding national laws of the EU member states - stipulates a compensation up to an amount correlating with an anual comission of the agent, calculated as an average commission on the ground of the last 5 years of the commercial relation. Depending on the circunstances of the contractual relation, the corresponding amount may easily skyrocket, being therefore frequently a source of dispute.

Given the european roots of the national regulations of the EU member states, this item ultimately requires an european projection. It therefore goes without saying, that the corresponding jurisprudence at the end of the day is up to the European Court of Justice (ECJ), ensuring thereby an uniform treatment throughout all member states.

Art. 89 b HGB (German Commercial Code) provides, that the commercial agent at the end of its contractual relationship with the principal has got an “adequate” compensatory claim against the latter, in case he has generated new clients for him and the principal will most probably benefit from the obtained commercial relationship with the new client even after the contractual relation with the agent has been terminated.This right and claim cannot be excluded prior to the termination of the agency contract.

To that background, a common source of conflict has been for quite some time the question if those regulations are applicable as well in case the agency contract is terminated already during the probationary period of the agent.

The European Court of Justice (ECJ) recently has unequivocally judged with its verdict number C-645/16, dated 19.04.2018, that this is the case. Hence the commercial agent is entitled to a compensatory claim for the loss of clientele even if the agency contract is terminated already in the probationary period. This obviously applies for all court of EU member states.

Ecuador makes important advancements towards international fiscal transparency

Estudio Gallegos Valerezo & Neira
Ecuador

On October 29th, 2018 at the OECD Headquarters in Paris, the General Director of the Internal Revenue Service of Ecuador, signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention) in the presence of the OECD Deputy Secretary-General Ludger Schuknecht.
Ecuador is the 126th jurisdiction to join the Convention.

The Convention provides all forms of administrative assistance in tax matters:

- Exchange of information on request
- Spontaneous exchange
- Automatic exchange
- Tax examinations abroad
- Simultaneous tax examinations and
- Assistance in tax collection

It guarantees extensive safeguards for the protection of taxpayers' rights.

The Convention is the key instrument for swift implementation of the Standard for Automatic Exchange of Financial Account Information in Tax Matters (CRS). The Standard – developed by the OECD and G20 countries – enables more than 100 jurisdictions to automatically exchange offshore financial account information since September. It is also a powerful tool in the fight against illicit financial flows.

Ecuador has also signed just recently, the CRS Multilateral Competent Authority Agreement (CRS MCAA), which is the prime international agreement for implementing the automatic exchange of financial account information under the Convention. The signing of the CRS MCAA will allow Ecuador to activate bilateral exchange relationships with the other 103 jurisdictions that have so far joined the CRS MCAA.

Peru continues to be an interesting country for mining investments

Estudio Laos, Aguilar, Limas & Asociados

Peru

Despite the price swings of recent months, Peru remains to be a country that meets the expectations of mining investors. The mining investments will exceed $ 4 thousand 600 million in 2018, while for the next year it is estimated that will reach $ 6 million, says Jaime Gálvez Delgado, General Director of Promotion and Sustainability of the Ministry of Energy and Mines (MEM) of Peru, during his recent participation in the second edition of "Peru Mining Business 2018".

Gálvez Delgado revealed that Japan and India investors are very interested in mining projects classified in this Andean country. In the case of investors from Japan, their interest it is to find partners to invest, on the other hand, the most prominent companies from India are looking at copper with direct investments because they will need them for their industries.

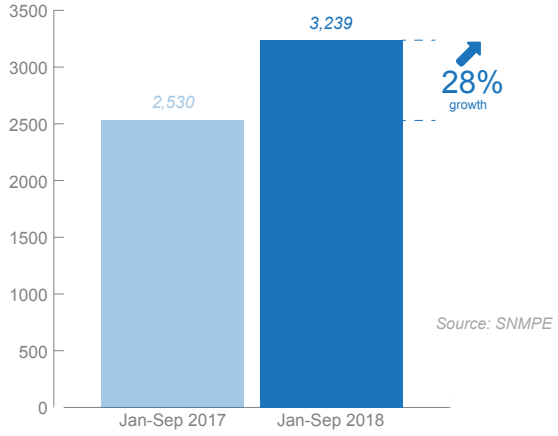
If the numbers are analyzed, every citizen of India consumes a tenth of the Chinese copper. In that sense, they see in their economic growth that there is a need for copper; therefore, they are interested in getting copper supplies. Consequently, it concluded that India could become an important actor in the term for mining investments in Peru.

The official informed that the portfolio was updated of mining projects representing a total investment of $59,134 million, being Cajamarca, Apurímac, Moquegua, and Arequipa those that are close to two-thirds of the total. "These are the projects that already have advanced exploration, with identified reserves," he said.

Data nowadays

Mining investments in Peru reached US$ 3,239 million between January and September 2018, a figure that represents a growth of 28% over the same period of the previous year, when US$ 2,530 million were reported, according to data from the National Mining, Petroleum and Energy (SNMPE). In September, investments in the Peruvian mining sector amounted to US$ 489 million, an amount higher by 46.2% compared to the same month of 2017 (US$ 334 million).

Mining investments in Peru
in US$ millions



The guild indicated that in the period from January to September, four southern regions concentrated approximately 50% of the mining investment. These are the regions of:

- Ica (US$ 527 million),
- Moquegua (US$ 421 million),

- Tacna (US$ 337 million) and
- Arequipa (US$ 329 million).

SNMPE also commented that the most significant investments in the national mining industry went to the:

- benefit plant items with US$ 949.5 million;
- infrastructure, with US$ 736.9 million and
- mining equipment, with US$ 405.6 million.

So far this year, the mining sector generated

205 thousand direct jobs.