

THE COLLISION BETWEEN SPECIALTY AND HIERARCHY IN CONSUMER LAW: APPROXIMATION TO A REAL ANTINOMY

ERIKA ISLER SOTO*

Abstract

The present article addresses the subject of the solution of the second degree antinomy, which arises when the criterion of specialty collides with the one of hierarchy, in the area of consumer law. In this respect, the article discusses the two doctrinal opinions which can be argued thereon: the abrogable and the non-abrogable nature of the Consumer Rights Protection Act by an administrative norm.

Keywords: *Consumer Law, Legal Antinomy, Specialty, Hierarchy.*

INTRODUCTION

It is known that the idea of the legal system as a hierarchically organised and systematized complex of norms, in which imperatives that perfectly adjust to one another in accordance with certain principles of precedence, come together, is a chimera. In actual fact, we know from practice that in each and every normative system –and their consequential subsystems- it is possible to find opposing provisions, as well as situations not envisaged in them, which are to be appropriately solved and integrated.

Chilean Consumer Law is no exception, for in fact our Act N° 19.496 on Protection of the Rights of Consumers (*Ley N° 19.496 sobre Protección de los Derechos de los Consumidores*) (LPDC) not only contradicts itself internally, but also contains provisions conflicting with other ones set out in different regulations of equal or diverse hierarchy. The importance of opting for one or the other of the conflicting provisions bears special significance, considering that the adopted decision will affect the layout of matters of transcendental importance for obtaining a proper protection for the victim, such as active or passive legitimation, limitation period, competent tribunal, etc. Furthermore, as explained by Pardow Lorenzo, there is the possibility that scenarios of interference or lack of command unity in public powers might arise.¹

* Universidad Bernardo O'Higgins; Researcher in the Cátedra Euroamericana de Protección Legal de los Consumidores (erikaisler@yahoo.es). This work was generously funded by the research project “La aplicación de la Ley 19.496 sobre Protección de los Derechos de los Consumidores a materias reguladas por leyes especiales”, UBO/VRIP 170105. Article received on November 10, 2017 and accepted for publication on March 1, 2018. Translated by Mauricio Reyes.

1 PARDOW LORENZO (2014), p. 12.

Legal antinomies are therefore to be urgently resolved, by resorting to the traditional mechanisms of temporality, hierarchy and specialty, to which the ones of primacy of the public interest and protection of the vulnerable person (pro consumer principle, pro employee principle, etc.) have been added more recently.² Nevertheless, since they follow diverse applicability criteria, it may be the case that according to one criterion a certain norm should prevail, but in case of applying a different criterion, the solution would be the exact opposite. In these situations, we find ourselves facing a real antinomy (also called second degree antinomy), which is distinctly harder to solve.

This is what frequently arise when dealing with consumer rights protection, particularly since the proliferation of norms regulating certain consumer relations, which although are special, possess infra-legal rank. So it is, that the present document is aimed at analysing one antinomy in particular, which is the one that arises when the specialty principle collides with the one of hierarchy in the context of consumer rights protection. Therefore, it will be left aside, for the purposes of the current work, the study of the situation that presents itself when only specialty comes into play, because two norms of the same rank are in conflict, as it would occur, for instance, if a rule regulating a specific market provides a solution for a certain case which is different from the one established by the LPDC. In this regard, existing specialized literature on this matter can be consulted.³

In order to achieve the goal formerly stated, specialized literature thereon will be consulted, as well as literature on general theory. This work will have an emphasis on judicial rulings, in order to examine what are the solutions that have been given in practice.

1. REAL OR UNSOLVABLE ANTINOMIES IN CONSUMER LAW

According to Bobbio, a legal antinomy presents itself when “two mutually incompatible norms, which belong to the same legal order, have the same scope of application”.⁴ Among them, the ones called real or unsolvable are characterized by the simultaneous validity of both norms involved,⁵ situation from which result the impossibility of preventively indicating which one is to prevail. As this same author observes, they appear in two cases: when none of the solution criteria can be applied or when more than one of them are applicable.⁶

2 For extension reasons, the specific treatment of every one of the mentioned criteria is not subject of the present work.

3 BARRIENTOS ZAMORANO (2013), pp. 345-359; JARA AMIGO (1999), pp. 47-74; JARA AMIGO (2006), pp. 21-58; MOMBERG URIBE (2013a), pp. 66-76; MOMBERG URIBE (2013b), pp. 3-16; MOMBERG URIBE, (2013c), pp. 77-83; PINOCHET OLAVE (2008), pp. 9-20; PINOCHET OLAVE (2011), pp. 343-367.

4 BOBBIO (1992), p. 189.

5 HENRÍQUEZ VIÑAS (2013), p. 463.

6 BOBBIO (1992), p. 191.

This being so, one of the hypothesis whereby this situation may arise, presents itself when the criteria of specialty and of hierarchy oppose one another. In the consumer protection system, as previously stated, administrative-rank norms are abundant, so that it is by no means uncommon that we find ourselves facing situations in which the interpreter must weight an eventual conflict of administrative provisions contained in sectoral statutes that collide with some norm of the LPDC.⁷

As it happens, we can mention the recently dictated Regulation for the determination and payment of compensations for unavailability of power supply (*Reglamento para la determinación y pago de las compensaciones por indisponibilidad de suministro eléctrico*, Decreto N° 31 2017), which establishes rules referred to the assessment of the amount of the compensation, whose application could conflict with the requirement of integral reparation of all the damages caused, as regulated in the context of consumer rights protection law (Art. 3 letter e) LPDC). This is also relevant considering that, according to Art. 2 bis LPDC, cases where the special norm contains rules referred to redress of damages caused to consumers are exempted from the application of the specialty criterion. In this manner, it is necessary to determine whether the indicated regulation could be regarded as a compensation statute, which adequately and pertinently integrates the legislation on electrical services.

Furthermore, Art. 26 of the new Regulation of Insurance Agents and Claim Settlement Procedure (*Reglamento de los Auxiliares del Comercio de Seguros y Procedimiento de Liquidación de Siniestros*, Decreto N° 1055 2012), provides that once the settlement report has been received, the insured person and the insurance company –except in the case of direct settlement– have ten days to contest it, after which the former has another six days to respond to the challenge, rule that could conflict with the limitation and lapse periods laid down by the Act N° 19.496 with regard to legal actions and rights derived from the aforementioned act.⁸

A similar situation takes place regarding the supplementary lapse period contemplated by Art. 328 of the Implementing Regulation of the General Act of Electric Services (*Reglamento de la Ley General de Servicios Eléctricos*):

Every decision, resolution, measure or act which, according to this regulation, is to be carried out by concessionaires, CDEC or users, must be settled or fulfilled within the special period prescribed for that purpose

⁷ PARDOW LORENZO (2014), pp. 3 and 4, PARDOW LORENZO (2015), p. 110, explains that it is possible to differentiate between prudential regulation –the regulator concerns itself with the market under its supervision in terms of system- and behaviour regulation –the regulator ensures that transactions within the regulated market comply with certain substantial standards of equity and honesty-, corresponding both, in some cases, with the powers of the Chilean superintendencies.

⁸ In a similar way, the old Art. 25 of the Regulation of Insurance Agents (*Reglamento de los Auxiliares del Comercio de Seguros*), now abrogated (DS 863/1989), referred to conflict resolution, indicating that in case of differences between insurer and insured over the compensation amount or it is due, the insurance company should notify its resolution to the policy holder, indicating the right of the former to resort to the procedure contemplated in the insurance policy for that purpose.

se. In the absence of a specific time period, the maximum term shall be of 90 days, except if the requesting authority, on the basis of reasonable grounds, establishes a shorter period.

In these hypothesis, the difficulty concerning the resolution of the conflict of norms increases, since –as argued by Bobbio– two strong criteria collide.⁹ That author explains accordingly:

The seriousness of the conflict derives from the fact that two values, both of them paramount to every legal order, are at stake: the respect for the legal system, demanded by the regard for hierarchy and therefore for the criterion of superiority, and that of justice, which requires the gradual adaptation of the law to the social needs, as well as the respect for the criterion of specialty.¹⁰

Some foreign regulations have resorted to the *favor debilis* criterion in order to solve this situation, thus asserting the precedence of their own general laws governing consumer relations when the same subject matter is also regulated by a special provision, independently of its rank. In this manner, specialized or sectorial regulation leaves untouched the prerogatives conferred by the legal order to the individual whose rights have been violated. Therefore, those prerogatives take ample precedence.

Thus, for example, the Art. 3 of the Argentinian Act N° 24.240 prescribes that its provisions are integrated with “the general and special norms applicable to the legal consumer relations”, prioritizing always the interpretation that is most favourable to the consumer. As it can be noted, the legislator has used the word “norms” instead of the expression “special laws”, employed by our LPDC, so that the Argentinian formula turns out to be much broader, since it does not distinguish according to the hierarchy of the prescriptive rules.

The same solution results from the Peruvian Code of Consumer Protection and Defence (*Código de Protección y Defensa del Consumidor*), whose Art. V.6 prescribes that its provisions contain the minimal protection which the legal system confers to consumers, although “sectorial norms” may grant them better rights.

Our LPDC does not foresee an explicit provision regulating this matter, even though through an interpretative effort it has been extracted from the unwaivable character of consumer rights, which is established in its Art. 4, flowing from its own denomination as well: Consumer Rights Protection Act.¹¹

Nonetheless, this lack of express determination has led to the formulation of two possible answers, which will be discussed in what follows.

9 BOBBIO (1992), p. 204.

10 BOBBIO (1992), p. 204.

11 BARRIENTOS ZAMORANO (2013), p. 355; JARA AMIGO (1999), p. 48; PINOCHET OLAVE (2008), p. 14.

2. THE ABROGATION OF THE LPDC BY AN ADMINISTRATIVE NORM

In accordance with a first view, it would be possible to abrogate the LPDC by a provision of infra-legal rank, as long as the latter is of special nature and regulates a consumer relation. In these cases, the solution would involve a partial suppression of effects, since the LPDC would remain in force with regard to everything that does not contravene the special provision.

Even though it has not been possible to find judicial decisions adopting this doctrine, it is possible to argue in its favour, based on grounds of specialty, convenience and efficiency.

2.1. The primacy of specialty

A first argument that can be made is the preference for the criterion of specialty over the one of hierarchy in case of a second degree antinomy, so that the special norm shall prevail over the general one, regardless of its rank. In support of this view, it can be argued that the special characteristics of certain legal relations would make them deserving of special rules, so that it is required that the legal system adapts itself to the peculiarities of those relations.

Among us, Jara Amigo argues that the unimpeded application of the hierarchy criterion could lead to inconvenient consequences, especially considering that the regulation of several matters has been passed by the legislator to the administrative authority, on the grounds of its peculiar needs. In this regard, the author explains as follows:

A ‘regulatory’ law is, in several cases, compatible with the normal evolution of every economic activity and with the legislative technique that is usually employed in such matters. An absolute and unrestricted application of the principle envisaged in the LPC, (...) would mean that every administrative authority that normatively intervenes in such activities should follow the provisions contained in the LPC when dictating all its administrative rules, in all cases that are not contemplated in their special legislations.¹²

To this it should be added the greater celerity with which it is possible to modify a provision derived from the administrative power, when compared to a statutory law approved by parliament. This is attested by the delay in processing the various amendments to the LPDC, even without considering those that have not been approved. With that in mind, adaptation efficiency would be better accomplished by applying the specialty criterion rather than the one of hierarchy.

Moreover, this principle could derive, in accordance with this doctrine, from the heading of Art 2 bis LPDC, which states: “Notwithstanding the rules set up in

¹² JARA AMIGO (1999), p. 67.

the previous article, the norms of the present act are not to be applied to the activities of production, fabrication, importation, construction, distribution and commercialization of goods or to activities consisting in the provision of services, which are regulated by special laws". Therefore, and based on the interpretation of the letter a) of the same provision, the LPDC would operate only in a supplementary capacity. Without limiting the foregoing, and as it will be indicated in what follows, the referred provision demands, in order to apply the specialty criterion, that the special norm shall be a statutory law (*ley*).

2.2 The legality of the normative power

Secondly, it might be stated that the authority by which administrative norms are dictated is based on a legislative decision, so the preference for the special rule would not infringe upon legal certainty.

In this regard, Escalona Vásquez, when commenting on the powers of superintendencies –specially referred to the SBIF, *Superintendencia de Bancos e Instituciones Financieras*, and the SVS, *Superintendencia de Valores y Seguros*–, argues that the exercise of their normative function derives from their own organic statutory laws, so there is neither pre-eminence of them over the LPDC nor vice versa, because they are competent for the regulation of provisions contained in a statutory law. The author adds that it should be taken into consideration whether the administrative authority exercises its function based on a legal mandate or not. In order to determine that, it is precise to examine if the regulation complements or develops a function or legal precept which is expressly referred to the subject of the regulated statutory law.¹³ This is due to the fact that the legislator would have preferred to provide the superintendencies with powers which it did not bestow on the President of the Republic.¹⁴

Moreover, the same author specially comments two provisions of the LPDC which regulate financial markets, in view of Art. 2 bis LPDC: Art 39 B Subpar. 3 LPDC would exclude the application of Arts. 38 and 39 to the money lending operations carried out by entities monitored by the SBIF, pointing out that in case of contradiction between a rule emanated from the SBIF and one prescribed by the LPDC, the latter takes precedence because of its superior rank, except if the former refers to matters regarding its functions and powers or in case regulating powers have been given to the monitoring body by legal mandate; secondly, the author considers that, according to Art. 39 C LPDC, only those activities which are regulated by a "special law" are excluded, so if the special norm has a different rank, the LPDC remains applicable.¹⁵

13 ESCALONA VÁSQUEZ (2013b), p. 846.

14 ESCALONA VÁSQUEZ (2013b), p. 846.

15 ESCALONA VÁSQUEZ (2013b), pp. 842 and 843; ESCALONA VÁSQUEZ (2013c), pp. 845 and 850.

2.3 The avoidance of a conflict of competence

Thirdly, it is possible to mention the validity of the public powers of administrative bodies endowed with normative and controlling attributions. As a matter of fact, our system envisages, together with the tutelary powers conferred to the National Consumer Service (*Servicio Nacional del Consumidor*) and the judiciary powers bestowed on local district courts (*Juzgados de Policía Local*), those referred to bodies of state administration, according to which these can dictate legal norms and impose sanctions on suppliers who take part in certain regulated markets. Among them, the following can be mentioned by way of example: The Superintendence of Electricity and Fuels (SEC, *Superintendencia de Electricidad y Combustibles*); the Superintendence of Securities and Insurance (SVS); the Superintendence of Banks and Financial Institutions (SBIF); the Superintendence of Sanitary Services (SISS, *Superintendencia de Servicios Sanitarios*), among others.

In these cases, it could be argued that an adequate distribution of competences, by which the spheres of action corresponding to each and every one of the public bodies that intervene in the Chilean consumer rights protection system, are established, would demand the absence of areas of overlap among them. This being so, the legal rules involved should be interpreted in accordance with the principle of efficient division of state powers.

Escalona Vásquez explains thereon that,

[in] the case of norms of infra-legal rank, issued by a sectoral regulator, whose object is the exercise of its functions in matters within its competence, but whose content nonetheless also refers to matters regulated by the Act N° 19.496 and therefore collides with the latter, we think that each body shall exercise, within their own areas of competence, the powers corresponding to them, so that, regarding the power of monitoring which falls within the exclusive competence of the SBIF or of the SVS, the instructions issued by them are to be applied and monitored by those same authorities.¹⁶

According to this author, the above stated contentions would be based on the wording of the final subparagraph of Art. 39 B LPDC, which refers to the applicability of certain rules for financial products and services to money lending operations in which entities monitored by the SBIF take part, “notwithstanding the powers of this monitoring body”. In this case, he argues that both the Superintendence and the Sernac are endowed with different competencies: while the former is in charge of monitoring the activities of the entities subjected to its supervision, the latter is to ensure the protection of consumer rights, so that the infraction to those legally established rights is sanctioned, not only with the imposition of a fine, but also with the reparation of the damages caused by it.¹⁷

16 ESCALONA VÁSQUEZ (2013b), p. 847.

17 ESCALONA VÁSQUEZ (2013b), p. 847.

On this issue, we must formulate two qualifications. The first one refers to the old conception of the civil action as ancillary to the action for non-compliance with regulations, which, even though rightly abandoned by legal scholarship,¹⁸ continues to be upheld by the predominant court opinions.¹⁹ That is the case because if this erroneous thesis were to be accepted, it would mean that no civil claim could be granted without a previous ruling for non-compliance, so that the establishment of liability for non-compliance in the context of consumer rights protection regrettably still plays a decisive role when trying to obtain redress. Secondly, it must be considered that according to Art. 58 LPDC, the Sernac does not have the power of pursuing legal claims for compensation of damages before a local district court, which means that, in order to obtain effective compensation, consumers must take part in the corresponding proceedings.

3. THE NON-ABROGATION OF THE LPDC BY THE ADMINISTRATIVE NORM

According to a second opinion, which I believe to be right, the LPDC is not abrogated by a provision of inferior rank, not even under the specialty principle. Consequently, consumers can invoke the LPDC and claim the rights derived from it, regardless of any particular infra-legal rule that regulates a consumer relation. In what follows, I will explain the arguments sustaining this interpretation.

3.1. The primacy of the hierarchy criterion

As previously stated, we find ourselves in front of a second degree legal antinomy, whereby strong legal principles are confronted with one another, namely that of legal certainty, from which follows the respect for hierarchy, and the one of protection of justice, by reason of which the adequacy for the concrete case should be preferred.

18 BARAONA GONZÁLEZ (2014) p. 394; BARCIA LEHMANN (2012) p. 124; BARRIENTOS CAMUS & CONTARDO GONZÁLEZ (2013) p. 582; CÁRDENAS BUSTAMANTE, (1999) pp. 69-71; CELEDÓN BAEZA, (2015): pp. 5-6; CONTARDO GONZÁLEZ, (2011) p. 97; CORTEZ MATCOVICH, (2004) p. 26; ISLER SOTO, (2017): pp. 129-133.

19 Only by way of example: *Valdés Rodríguez con Delgado Figueroa* (2010): 1 JPL Santiago, Rol 38.363-2009, 26.07.2010; *Gutiérrez con Homecenter* (2008): 1 JPL Viña del Mar, Rol 8306-2007, 25.02.2008; *Canahuate con Sociedad Szerecz y Molina Ltda.* (2008): 1 JPL Talcahuano, Rol 5834-2007, 26.09.2008; *Cid con Isapre Consalud* (2006): 1 JPL Osorno, Rol 259-2005, confirmed by the C. Ap. Valdivia, Ing. 125-2006, 05.05.2006; *Pérez Vera con Calzados El Tigre* (2004): 1 JPL Puerto Montt, Rol 2.078-2004, 26.07.2004; *Vera Pincol con Electrónica del Sur* (2009): JPL Coyhaique, Rol 29.863-2009, 18.08.2009; *Martínez con Hites S.A.* (2010): 1 JPL Santiago, Rol 14.905-2010, 29.11.2010; *Meléndez Arteaga con Óptica Ver Bien Limitada* (2011): 1 JPL Santiago, Rol 5.760-2010, 18.01.2011; *Bravo Cáceres con Ind Ingresa Chile S.A.* (2011): 1 JPL Santiago, Rol 2.806-2010, 10.01.2011; *Vilches Cruz con Comercial Electro South Ltda.* (2010): 4 JPL Santiago, Rol 732-3-2010, 21.10.2010; *González Olivares con Inmobiliaria PY S.A.* (2009); C. Ap. La Serena Ing. 223-2009, 28.12.2009, Id. Microjuris: MJCH_MJJ22626; *Sernac con Compañía de Telecomunicaciones de Chile* (2007): 1 JPL Pudahuel, Rol 5278-2006, 28.12.07, confirmed in this point by C. Ap. Santiago, Ing. 904-2008, 19.03.08.

This subject matter has already been examined in the context of civil law and Jurisprudence, opportunity in which the Spanish author Diez Picazo argued in favour of the prevalence of hierarchy.²⁰ Among us, this also seems to be the opinion of Guzmán Brito, since he notes that specialty comes into question if the conflict is between rules of equal rank.²¹

The rationale for this also lies in the idea that a statutory law is a more direct reflection of the sovereign will than an administrative norm, since the former has been enacted by democratically elected legislators, without intermediaries. Likewise, the opposite solution could lead to the derogation or undue restriction of rights granted by the legislator –which in this case are of public policy nature– by a state administration which changes more rapidly than the drafting and implementation of a statutory law. Such a solution could subject the regulation of consumer law to the vagaries of the governments in office and the principles on which their government programmes are based.

In the context of consumer rights protection, this has been the argument indisputably invoked by courts when deciding these cases.

An example of this is to be found in the case *Conadecus v. BancoEstado*²² (“*Conadecus con BancoEstado*”), originated in a collective legal action taken by a consumer association, which was based on the illegality of charging quarterly commissions that were not authorized in the contract signed between the parties. Moreover, the supplier had unilaterally closed the accounts that had a zero balance.

In this occasion, the defendant alleged the inapplicability of the LPDC to the pleaded case, arguing that banking activity was governed by special statutes and administrative norms, and its conduct conformed to the regulation issued by the Chilean Central Bank (*Banco Central de Chile*).

Nevertheless, the court rejected the previously stated arguments and declared the admissibility of the submitted claim, considering that the norms called upon by the defence –“Compendium of Financial Norms of the Central Bank” (“*Compendio de Normas Financieras del Banco Central*”)-, were regulations, and as such, they are superseded by the Consumer Rights Protection Act for reasons of hierarchy. Besides, the sentencing court added, based on the Civil Code, that the contract also had legal rank and should therefore have primacy over administrative regulations and instructions.²³

20 DIEZ-PICAZO (1990) p. 349.

21 GUZMÁN BRITO (2007), p. 155. In the same vein: ALESSANDRI RODRÍGUEZ *et al.* (1998), p. 57.

22 *Conadecus con Banco Estado* (2005): Rol 11.679-2004, 14° J.L. Civil Santiago, 14.04.05, confirmed by the C. Ap. Santiago, Ing. 5104-2005, 01.07.2005.

23 A similar conflict arose regarding the opposition to Circular 17 of the SBIF and the catalogue of unfair terms of the LPDC. According to PARDOW LORENZO (2014), p. 12, PARDOW LORENZO (2015), p. 118, the incapacity of such superintendence and of the Sernac to act co-ordinately led to a progressive deterioration of their institutional relations, which brought about the non-processing of claims presented by the former and the presentation of a legal claim against credit card issuers by

Even though the first consideration of the court was right, it draws attention that substantive questions were discussed at the admissibility stage, whose aim is to review the fulfilment of the requirements contemplated in the old Art. 52 LPDC.²⁴ Moreover, the reference to the normative superiority of the convention must be understood under consideration of the regulation of adhesion contracts, since an unfair term, even though it could form an integral part of the contract, can be declared void if the legal requirements for such declaration concur (Art. 16 et seq. LPDC).

Furthermore, the same criterion has been asserted by the local district court of Pudahuel –confirmed by the Court of Appeals of Santiago- in *Sernac v. Empresas Cecinas San Jorge S.A* (*Sernac con Empresas Cecinas San Jorge S.A.*). In this occasion, the Sernac reported the sale of a product called “poultry pâté”, even though pork and other meats were included among its ingredients. Although the defence was based on the compliance of the defendant with the requirements regarding the percentage of poultry meat (15%) established by the existing health regulation (DS N° 298 of the Agriculture Ministry, *DS N° 298 del Ministerio de Agricultura*), that allegation was rejected by the court, thus sentencing the company to pay a fine of thirty monthly taxation units, for infraction of the rules on information and advertising contained in the LPDC (Arts. 28, 29 and 33 LPDC), that prevailed over the regulation invoked by the defence.²⁵

The same criterion has been asserted by a local district court when ruling on a claim for damages: in the case *Sernac v. Post Office State Corporation of Chile* (*Sernac con Empresa de Correos de Chile*),²⁶ a claim against the state corporation on the grounds of infraction to Arts. 12 and 23 LPDC was filled, because of the loss of an envelope sent from Coyhaique to Santiago, which contained the necessary documents for the sender to apply to university and to several scholarships. The consumer also asked for the payment of \$1.002.920 for pecuniary and non-pecuniary losses.

With regard to the civil complaint, the defendant alleged that the regulation specific to the Post Office State Corporation should be applied, which established maximum limits and minimum amounts for patrimonial damage compensation and did not regulate extra-patrimonial damages. Notwithstanding the foregoing, the local district court of Coyhaique preferred the application of Art. 3 letter e) LPDC, according to which all damages suffered by the consumer, both patrimonial and moral, are to be redressed, over the special regulations asserted by the defence. Although the Court of Appeals revoked the condemnatory ruling, that did not translate into support for the opposite thesis, because the acquittal was based on a different discussion concerning national consumer law, that is, the one on the subjective or objective character of liability, since, in this case, negligence by the defendant was not proved.

the latter. This situation, explained by the author, is also serious because it implies the emergence of uncertainties regarding the guidelines that private parties are to follow, especially if the case receives ample press coverage.

24 Prior to the date on which the Act 20.543 came into force, the collective procedure contemplated two phases: the admissibility stage and the trial as such.

25 *Sernac con Empresas Cecinas San Jorge S.A.* (2003).

26 *Sernac y Pizarro con Empresa de Correos de Chile* (2013).

3.2 The requirement of legal rank, established in Art. 2 bis LPDC

Secondly, we must consider the wording of Art. 2 bis LPDC, according to which: “Notwithstanding the requirements of the previous article, the norms of this act shall not apply to the activities of production, manufacture, importation, construction, distribution and commercialisation of goods or service delivery, regulated by special laws”.

Even though the scope and application of this provision is not clear and therefore does not allow the unimpeded assertion of the specialty principle, even if the colliding norms are of equal rank,²⁷ and even if that were the case, it must be taken into account, that the analyzed provision refers to “special laws” (“leyes especiales”), so the article does not provide for the case of a particular regulation contained in norms of inferior rank. From this point of view, Art. 2 bis cannot be invoked as a reason for preferring specialty, contrary to what the suppliers argued in the aforementioned cases. Moreover, it shall be called into attention, that legal inclusions –in this case, Art. 2 bis Subpar. 1º LPDC-, since they are exceptions, are to be interpreted restrictively, so that in case of doubt, the application of the LPDC must be preferred.

In turn, it has to be considered that when the legislator has authorised the dictation of administrative norms by legal provisions contained in the LPDC itself, it has prescribed so expressly, as it is the case –by way of example- of financial products and services, as stated in Arts. 11 bis, 17 D, 17 G, 30, etc., of the above mentioned LPDC.

A particular case is to be found in Art. 44 LPDC, precept that contains rules on product and service safety, according to which the provisions included in that paragraph (Arts. 44 a 49 bis LPDC) “shall only be applied to situations not foreseen in special rules regulating the provision of certain goods or services”.

Indeed, from that wording, Professor Corral Talciani concludes that the special norm is to be preferred to the LPDC, regardless of rank, without prejudice to the cases mentioned in Art. 2 bis letters b and c –compensation claim for damages via the Procedure for the Protection of Collective or Diffuse Consumer Interest, as well as the case of absence of a compensation statute, respectively- to which the LPDC becomes applicable again.²⁸

However, it seems to me that even in these cases, the LPDC remains in force when applying a special provision, also considering that the subject matter regulated herein refers to consumer safety, which means that unalienable legal interests, such as the health and physical integrity of consumers, are involved. In cases such as these, the requirements prescribed by the LPDC –for instance: recalls of dangerous products; report to the authorities; compensation of damages; etc.– should be complied with in any case, notwithstanding the prescriptions contained in special regulations. If that is

27 The appropriate application of the specialty principle to cases of special laws, is not subject of the present work, and its treatment is therefore excluded. It will only be mentioned that Art. 2 bis has given way to two possible lines of interpretation: the supplementary application of the LPDC and the onset of a concourse of legal actions.

28 CORRAL TALCIANI (2013), p. 920.

the case when patrimonial interest is affected, then the same should apply with all the more reason to cases where the infringed right is of extra-patrimonial nature.

In this sense, the mention of the provision of goods or delivery of services in compliance with “the preventive measures established by legal or regulatory provision”, contained in Art. 47 Final Subpar. LPDC, does not imply an exemption from liability in all events, since that same provision prescribes hereafter, that the compliance of the supplier also requires “all other precautions and protective measures that the provision of the respective goods or services demand according to their nature”, which also means that the harming conduct can be judged in accordance with the standards of due diligence.

3.3 The unwaivable character of consumer rights

One of the peculiarities of regulations for the protection of consumer rights is their public policy nature or *ius cogens* quality. This means that their provisions are imperative and unwaivable, which signifies that the rights derived from the former can only be waived after the generation of the latter, for every premature renunciation not only will be null and void because of illegal object (Arts. 10, 12, 1466, 1682 Civil Code), but also the pact containing it could be declared unfair (Art. 16 LPDC). In Chile, although this feature is not expressly included in the LPDC, it is possible to extract it from its Art. 4, which establishes the impossibility of waiving consumer rights in advance.

Furthermore, this imperative character of the norms contained in the LPDC, as well as the protective nature of their provisions, imply that this statute grants prerogatives that remain intact before the provisions of the state administration. For it would not be logical that a right constituting *ius cogens* could be left at the disposal of the administrative authority. Therefore, norms of infra-legal rank have to comply with them, not only because of the hierarchy principle, but also due to the principle of prevalence of public policy provisions, in respect of the legal interest involved.

4. CONCOURSE OF INFRACTIONS AND THE EVENTUAL INFRINGEMENT OF THE NON BIS IN IDEM PRINCIPLE

The fact that the LPDC remains in force even in the presence of an administrative norm regulating a certain subject matter, could lead us to sanction a supplier simultaneously, because of the same facts, but on different legal grounds. In these cases, the question naturally arises as to whether this would constitute or not an infraction of the *non bis in idem* principle, considering that the judgement by a superintendence as well as the ruling pronounced by a local district court are expressions of a single *ius puniendi* of the state which underlies the entire legal system of sanctions.

Although this is not directly part of this work,²⁹ it is important to mention that the courts with competence over matters concerning the LPDC have dealt with

29 This is discussed further in: ISLER SOTO (2015), pp. 91-103.

this issue, adopting both possible solutions, so that it can be asserted that there is no uniform criteria with regard to this question.

That having been said, the low amount of cases in which this subject has been debated stands out, considering that a broad spectrum of legally regulated consumer relations can be framed within the scope of action of the different superintendencies currently operating in our country. The cause of this may be found in the fact that consumers would normally prefer to bring their case before the National Consumer Service instead of resorting to one of the other competent administrative bodies, what means that judges are not always confronted with the quandary of imposing double punishment. This reality already suggests that the common citizen perceives the Sernac to be a more familiar and approachable institution than the superintendencies, or regards the proceedings before the Sernac as more expeditious.

Nevertheless, a first group of sentences have decided in the affirmative, considering that it would not be possible to punish a conduct for which the supplier has been previously sanctioned. The basis for this contention lies on the invocation of the previously stated principle of criminal law, which would lead us to assert that the criminal law could function as a regime supplementary to the liability for regulatory infraction.

In this group, we find every judicial ruling absolving suppliers who have already been sanctioned as a result of an administrative inquiry, such as *Sernac v. Chilectra S.A.*³⁰—sudden voltage increase—*Canahuate v. Szerecz and Molina Limited Company*³¹—sale of a hamburger that had a hair inside it—, *Sernac v. Coppelia S.A.*³²—lack of product labelling—and *Sernac v. Hypermarket Huérfanos Limited Company*.³³ The same can be argued about the rulings awarding compensation of damages, while simultaneously rejecting the claim for regulatory infraction, with basis on the previously stated grounds.³⁴

On the contrary, according to a second opinion, the legal system would allow the imposition of a sanction for infraction of the LPDC even if the supplier has been previously subjected to administrative penalties for the same facts. This thesis denies therefore the existence of a violation of the *non bis in idem* principle, considering that one of its three requirements would not concur. In effect, even though there is identity of subject as well as identity of facts, the cause would be different, because the norms on which the sentences in question are based are diverse, as are the violated legal interests to whose protection the rules serve. On the other hand, Art. 58 bis LPDC establishes the obligation of the public bodies endowed with monitoring

30 *Sernac con Chilectra S.A.* (2006).

31 *Canahuate con Sociedad Szerecz y Molina Limitada* (2009), the appeal was declared deserted; C. Ap. Concepción, Ing. 1.000-2008, 14.01.2009.

32 *Sernac con Coppelia S.A.* (2013), confirmed by the C. Ap. Santiago, Ing. 846-2012, 13.03.2013.

33 *Sernac con Hipermercado Huérfanos Ltda* (2010), confirmed by the C. Ap. Santiago, Ing. 2570-2010, 06.10.2010.

34 *Sernac y otro con Cafè Astoria Fuchs y Compañía Limitada* (2007); *Sotopassek con Hipermercado Punta Arenas Ltda.* (2009); *Ibacache con Supermercado Cofrima III* (2006); *Soto Sánchez con Carnicería La Ocho* (2007).

powers, to report to the Sernac a copy of the sanction resolutions which they have dictated, what is directed to facilitate that the latter institution takes appropriate legal action. This duty would naturally be of inconsiderable practical importance if it were not possible to impose an additional sanction.

This second opinion was adopted nonetheless by the Local Police Tribunal of San Bernardo, and confirmed by the Court of Appeals of San Miguel in the case “Sernac v. Braun Medical S.A.”³⁵(“*Sernac con Braun Medical S.A.*”), generally known as the “ADN case”, which arose great media interest, where this issue was explicitly discussed. To the same conclusion arrived the Second Local Police Tribunal of Las Condes in the case “Sernac v. Falabella SACI” (“*Sernac con Falabella SACI*”)³⁶, from 2008.

5. CONCLUSIONS

Taking into account the above noted, we can conclude that the LPDC cannot be abrogated by a provision of infra-legal rank, not even if the latter constitutes a special norm.

This arises from the principle of normative hierarchy, according to which one norm shall be preferred over one occupying a lower echelon of the hierarchical order of legal norms. That also accords with the wording of Art. 2, which warrants a collision of norms of legal rank, as requirement for the application of the specialty principle.

We arrive to the same solution under consideration, that the LPDC grants rights of public policy nature, and therefore unwaivable, so that they cannot be affected by the state administration.

35 *Sernac con Braun Medical S.A.* (2010), confirmed by the C. Ap. San Miguel, Ing. 187-2010, 17.05.2010.

36 *Sernac con Falabella SACI* (2008).

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