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## **Choice of Court Agreements in International Consumer Contracts Their Efficacy Under Law No. 19.496**

### **Los acuerdos de elección de foro en los contratos internacionales de consumo Su eficacia en la Ley N° 19.496**

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#### **Abstract**

This study is divided into two parts. The first part analyzes the rationale for choice of court agreements, the roles they play in international contracts, and the difficulties arising when recognizing them in agreements between parties with unequal bargaining power, specifically in international consumer contracts. The second part analyses the national rules of international jurisdiction applicable to these contracts. Bearing this in mind, first, the current state of the discussion about their validity in Chile is explained; then the effect in this discussion of applying the provisions of Law No. 19,496 - on consumer rights protection (LPDC by its Spanish acronym), is studied. The international interpretation of the rules of jurisdiction set forth by this law, and the control it provides over abusive terms in consumer contracts are studied as possible solutions to establish the validity of these contracts. The foregoing, in order to seek a solution that harmonizes, both, the purposes of international consumer protection and to recognize the international nature of their consumer relationship, which allows to consider these contracts as valid if some specific requirements are met.

**Keywords:** *International jurisdiction; International consumer contracts; Choice of court; Abusive clauses; Access to justice*

#### **Resumen**

El presente estudio se divide en dos secciones. La primera examina los fundamentos de los acuerdos de elección de foro, las funciones que desarrollan en la contratación internacional y las dificultades que genera su reconocimiento en los contratos entre partes con desigual poder de negociación, específicamente, en los contratos de consumo internacional. La segunda analiza las reglas nacionales de competencia judicial internacional aplicables a estos acuerdos. Con ese propósito, se expone primero el estado actual de la discusión acerca de su validez en Chile; para luego analizar la incidencia de la aplicación de las disposiciones de la Ley N°19.496, sobre protección de los derechos de los consumidores (LPDC), en esta discusión. Aquí se estudian como posibles soluciones para determinar la validez de estos acuerdos la interpretación internacional de las reglas de competencia que contempla esta ley y el control que ella dispone sobre las cláusulas abusivas en los contratos de consumo. Lo anterior, para buscar una solución que armonice tanto los fines de protección del

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consumidor internacional, como el reconocimiento del carácter internacional de su relación de consumo, que permita reconocer la validez de estos acuerdos si se cumplen ciertos requisitos específicos.

**Palabras clave:** *Competencia judicial internacional; Contratos internacionales de consumo; Elección de foro; Cláusulas abusivas; Acceso a la justicia*

## INTRODUCTION

Exchanges between privates that cross national borders or involve the principles of international trade gives rise to a specific category of contract, the international contract.<sup>1</sup> This type of contract involves more than one legal system, whether or not the parties are aware of it during its negotiation or execution. Therefore, questions about the applicable law and the judicial or arbitral authority called upon to hear any dispute that may arise between the contracting parties arise in this type of contracts.

How to define the applicable law and court to these contracts varies in each national legal system, because both issues are resolved independently, and sometimes differently, by each legal system<sup>2</sup> according to its national rules of Private International Law.<sup>3</sup> Legal systems adopt specific legal measures such as allowing the parties to choose in advance the competent court and the law applicable to their contracts, in order to avoid these divergences, the legal uncertainty for the parties, and to harmonize the regulation of these aspects.<sup>4</sup> In this way, national systems consider the choices of law and court made by the parties in their international contracts as valid, as they are a useful tool to achieve internationally uniform solutions and to protect the legitimate expectations of the parties regarding the contracts they enter into.<sup>5</sup> Usually, these choices are included in the dispute resolution clause of a contract, reducing the uncertainty faced by the parties when concluding an international contract, and allowing them to reasonably anticipate the authority - judicial or arbitral - called upon to

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<sup>1</sup> The contract is international if the interests of international trade are at stake, or if the contract's connecting elements involve different States: PICAND & MAHÚ (2014), p. 398. However, this international nature shall be determined by each court: BRIGGS (2008), p. 7.

<sup>2</sup> VIRGÓS and GARCIMARTÍN (2007), p. 50; SCOTTI (2017), pp. 183 and 198; VILLARROEL & VILLARROEL (2015), p. 371.

<sup>3</sup> This leads to the fact that "there are several systems that are open for solving the conflicts of the individuals, who can go for legitimate or strategic reasons to different state courts looking for justice". VIRGÓS & GARCIMARTÍN (2007), pp. 45-46.

<sup>4</sup> BRIGGS (2008), p. 7; NYGH (1999), p. 47.

<sup>5</sup> Parties to international litigation face risks related to the court where a dispute will be heard and recognizing and enforcing foreign decisions. It may be difficult for a party to bring an action or defend itself in an unfavorable court, among other things, due to jurisdictional or procedural obstacles in the court, or because parallel proceedings take place. It may also be difficult to enforce a foreign judgment outside the court from which it was pronounced. In international contracts, the parties foresee these problems and try to minimize their risks, by clauses regulating the competent courts and the remedies against any breach of the counterparty. To minimize these risks depends on how effective are these choice of court agreements in each State connected with the international contract. FENTIMAN (2015), pp. 6, 42-44. NYGH (1999), pp. 2-3.

hear a dispute arising from that contract, and/or the substantive rules applied to his/her decision.

Choice of court agreements<sup>6</sup> are covenants or agreements entered into by the parties -either including a special clause in an international contract, or through a separate convention, contemporaneous or subsequent to the moment the controversy arises. By these agreements the parties define the court called upon to hear disputes relating to a specific legal relationship, excluding other potentially competent courts. Now, it is foreseeable that - as in the case of the arbitration clause<sup>7</sup> - these agreements are material covenants,<sup>8</sup> which have a dual procedural effect, since, on the one hand, they establish jurisdiction of the courts of a given court - *prorogatio fori*<sup>9</sup> - and, on the other, inhibit any act of the courts of the excluded court, by virtue of the *derogatio fori*.<sup>10</sup>

The widespread increase in the use of the choice of court agreements in international business practice also responds to other advantages they provide to the parties.<sup>11</sup> Among them,<sup>12</sup> the choice of court agreements often allow for: greater equity when choosing a court;<sup>13</sup> greater proximity to the conflict of the chosen court, designating a court with a lot of experience to hear the matter at stake;<sup>14</sup> providing prior certainty to the parties that their choice of law in the contract will be recognized,<sup>15</sup> that the clauses set forth in the contract by

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<sup>6</sup> In this article we prefer to use the expression “choice of court contracts” - in line with the Hague Convention of 2005 - in order to emphasize the agreement nature of attributing jurisdiction made by the parties to the authorities of a certain court, to deal with disputes that arise regarding a specific legal relationship. However, we should note that, in Chile, the expression most commonly used to name them is “*sumisión expresa*”, in accordance with Bustamante Code’s terminology. GUZMÁN (1997), pp. 547 et seq.; VILLARROEL & VILLARROEL (2015), p. 402; RAMÍREZ (2013), p. 262.

<sup>7</sup> Although both, the arbitration clause and the choice of court contract affect the authority called upon to hear a dispute, there is greater reluctance to accept foreign court choices made by the parties, because they are considered covenants challenging in a more direct manner the jurisdiction of the national state authority. NYGH (1999), p. 15.

<sup>8</sup> VIRGÓS & GARCIMARTÍN (2007), p. 279. FENTIMAN adds that the contract contractually obliges the parties to resort to the designated court and not to initiate proceedings in a different court, emphasis afterwards linked to the material remedies available to them in case of breach. FENTIMAN (2015), p. 44.

<sup>9</sup> VIRGÓS & GARCIMARTÍN (2007), p. 271; NYGH (1999), p. 15; ROMERO (2017), p. 165.

<sup>10</sup> The effect of the contract will depend on the will of the parties: “Nothing prevents the parties from seeking an effect that is only extendable or only derogatory”. VIRGÓS & GARCIMARTÍN (2007), p. 274; GARAU (2008), pp. 32-33; FENTIMAN (2015), p. 61; ROMERO (2017), p. 165; NYGH (1999), p. 15.

<sup>11</sup> This includes to recognize that the parties are in the best position to defining their own interests and determining the judicial authority that will hear the dispute; as well as practical reasons, such as reducing uncertainty, increasing predictability, and discouraging opportunistic behavior. VIRGÓS & GARCIMARTÍN (2007), p. 275; HOOK (2016), p. 59.

<sup>12</sup> To see a list of its advantages, v. VILLARROEL & VILLARROEL (2015), pp. 405-406.

<sup>13</sup> BOGGIANO (2001), p. 149.

<sup>14</sup> An example is the fact that London is perceived as an ideal center for resolving international commercial disputes and the role of its *Commercial Court* as a neutral, efficient, fair and commercially oriented international forum. FENTIMAN (2015), pp. 7-8.

<sup>15</sup> “When the parties decide on the jurisdiction of the courts that will hear a particular dispute, their agreement ultimately also affects the material rules that will be applicable to the litigious relationship. Choosing a country’s

virtue of their material autonomy will be enforceable; ensuring that the court called upon to hear the dispute will be neutral,<sup>16</sup> adapting the procedural rules of the court to the subject matter in dispute; or, preventing one of the parties from seeking to bring the dispute before a court that will provide unfair benefits to it, by means of *court shopping*.<sup>17</sup>

However, while practical reasons explain the spread of these agreements in international contracting, their ultimate foundation lies in the autonomy of the parties and in recognizing, legally, their private power of normative configuration; basis of the private justice model in international jurisdiction.<sup>18</sup> In this sense, we can affirm that in international contracting - as in private law - to accept the private autonomy of the parties in jurisdictional matters is a value in itself, worthy of recognition, and which shall be at the foundation of any legal system. This is not only because it meets an ethical requirement, but also because it allows to set individuals as free and independent actors on the international sphere;<sup>19</sup> in line with a truly international understanding of their legal relationships. For the same reason, when accepting these agreements, the jurisdiction is understood with a focus on providing effective *inter privatos* judicial protection, as opposed to those approaches that conceive jurisdiction in a reductive manner, understood as an exclusive and sovereign power of the State.

## I. THE CHOICE OF COURT AND THE LIMITS TO THE PRIVATE AUTONOMY

The limits on the autonomy of the will of the parties placed by legal systems - particularly, on conventionally choosing courts - is globally accepted in order to protect other higher legal interests. Indeed, this autonomy operates through the contract, and every contract requires a set of legal rules and principles defining its meaning and limits.<sup>20</sup> For this reason, it is accepted that the respect for private autonomy is compatible with its legal limitation when there is an overriding objective of public interest.<sup>21</sup>

Thus, in modern contract law, limits that seek to protect the proper exercise of private autonomy by the contracting parties have been established. This is the case of restrictions

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courts by the parties entails to apply its dispute system and to designate a specific legal system.” GARAU (2008), p. 34.

<sup>16</sup> BOGGIANO (2001), p. 151.

<sup>17</sup> BOGGIANO (2001), pp. 149-150.

<sup>18</sup> While the model of sovereignty focuses on jurisdiction as a power and sees justice as an expression of such sovereign power of the State; the model of private justice emphasizes jurisdiction as a function, when it comes to provide effective *inter privatos* judicial protection. For this reason, unlike the sovereignty model, the private justice model recognizes the autonomy of the will of individuals and to configure the *reasonable proximity* of the matter to the forum as a regulatory principle. All of the above, in turn, makes it possible to move towards a model of jurisdiction that is dispositive in nature. VIRGÓS & GARCIMARTÍN (2007), p. 71. In the Chilean case, the doctrine denying the validity of these agreements is based precisely on this sovereign vision of jurisdiction.

<sup>19</sup> HOOK (2016), p. 59.

<sup>20</sup> HOOK (2016), p. 16.

<sup>21</sup> BRIGGS (2008), p. 12.

seeking to ensure contractual freedom of the parties when there is a marked imbalance in their negotiating power. These limits can be applied to the choice of court agreements in international contracts when there was not a real negotiation between the parties, but was imposed by one of them.<sup>22</sup> In these cases, it may be questionable whether these agreements reflect an equitable choice of court, or whether there is a reasonable and fair proximity or connection between the chosen jurisdiction and the dispute. This is because there is always a risk that the stronger party in the relationship uses these agreements for imposing the jurisdiction of the courts of a particular State of its choice, to the detriment of the interests of the weaker party.<sup>23</sup> However, asymmetry in the negotiating power of the parties, or adhesion clauses that a party must accept, should not necessarily lead us to question the validity of choice of court clauses.<sup>24</sup> This would be incompatible with contractual *bona fide*, which requires not to disregard what was freely agreed upon in the contract,<sup>25</sup> and would introduce elements of uncertainty into the international contract that are incompatible with the current needs of international legal and commercial traffic as well.

The general and primary rule contract matters should be to recognize the validity of the agreements and commitments of the parties, even if they have unequal negotiating power, or do not have the same information. Therefore, questioning the validity of choice of court clauses will only be justified in those contracts where there is a structural asymmetry between the parties, leading one of them to be qualified as “weak” and therefore deserving special protection by the legal system.<sup>26</sup> This generally occurs in contractual relations between suppliers and consumers and has led to the development of an *ad hoc* law, the modern consumer law.

The development of these consumer protection regulations in national legislations is a typical phenomenon of the second half of the twentieth century.<sup>27</sup> This is a way to question the nineteenth-century model of contract<sup>28</sup> - which was conceived around the idea of a freely negotiated agreement - because it was not adapted to the modern conditions of mass contracting.<sup>29</sup> Thus, national laws began to adopt statutes protecting consumer rights,

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<sup>22</sup> Any system that recognizes the power of the parties to define the competent court must ensure that this choice is made in a situation of equity between them. If not, the legislator must set some limits to this power. GONZÁLEZ and MARTÍN (2011), p. 171.

<sup>23</sup> TOMÉ & GARCÍA-LUBEN (2011), p. 214; BRIGGS (2008), p. 12.

<sup>24</sup> Especially if we consider that the adhesion contracts may imply advantages for the consumer, by reducing the price of the contracted goods or services. DE LA MAZA (2012), p. 10. For this reason, we believe that what is problematic is not to include the clause in an adhesion contract, but the eventual impossibility for the weak party to previously know its effects, or the imbalance caused by including it in the contract to the detriment of itself.

<sup>25</sup> CORRAL (2006), p. 197.

<sup>26</sup> It is difficult to find a contractual relationship where the parties are in an equal position when negotiating. This is why it is discussed who should fall into the category of “weak party”, and whether small traders who lack economic power but are specialists within their field of action should be included. ÁLVAREZ (1992), p. 41.

<sup>27</sup> TAPIA (2017a), pp. 79-80; ISLER (2019a), pp. 61-63; GUARDANS (1992), pp. 319 et seq.

<sup>28</sup> TAPIA (2017a), p. 79.

<sup>29</sup> PIZARRO (2012), pp. 49-51.

considering them as the weakest part of the contractual relationship.<sup>30</sup> This protection established for national contracts, was extended to international consumer contracts as well,<sup>31</sup> which have increased as a result of the economic integration processes, the greater development of international trade and the massification of technical means that facilitate the exchange of goods and services at the international level.<sup>32</sup> The need to define and protect the consumer's interest in the context of international contracts with suppliers located in another country arose.

This development affected the recognition of choice of court agreements for international consumer contracts.<sup>33</sup> Indeed, the practical application of these agreements in international consumer disputes<sup>34</sup> may affect the consumer's right to effective judicial protection, because of the costs and difficulties involved in litigating in a foreign court. However, this objective of protecting the consumer must set some limits, since it does not justify - in itself - sacrificing the counterparty's interests by imposing a court that he/she didn't foresee when entering into the contract, or that has no connection with the contractual relationship.

The rules defining international jurisdiction must be reasonable and allow for an adequate distribution of disputes among the different jurisdictions, guaranteeing access to justice for all parties to the litigious relationship. Therefore, the solution to this possible asymmetry of the contracting parties requires maintaining a balance between the fundamental right of access to justice in its private international dimension for both parties to the consumer contract,<sup>35</sup> and the requirements of reasonable proximity between the court and the dispute, which guarantees them that they can demand their rights and assert their means of defense adequately.<sup>36</sup>

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<sup>30</sup> ISLER (2019a), p. 98.

<sup>31</sup> This forces us to study the effects of an increased intervention of the national authority in international consumer contracts and the limitations that this intervention imposes on them. NYGH (1999), pp. 28-30. On the other hand, the main international instruments on contracting deliberately exclude the consumer from their regulations, since there are no common protection standards in the various States. SCOTTI (2017), pp. 782-784.

<sup>32</sup> In particular, to adopt electronic contracting is highlighted, which confers a substantial increase in the traffic of products and services, without being linked to national borders. This is a major challenge to the classic conception of private international law, which, as a national and territorial law, forces to order legal relations, from a spatial perspective, which is not possible today. LEIBLE (2017), pp. 14-15. In addition, international elements in private consumer relations appear increasingly. KLEIN (2013), p. 1.

<sup>33</sup> Protecting consumers from the harmful effects of choice of court agreements that may be imposed on them is particularly important, since these agreements are common in international consumer contracts. On the contrary, in international contracts concluded between merchants, agreements of arbitration clauses negotiated by the parties are more frequent. Nevertheless, there are areas, such as finance, banking, shipping and reinsurance where choosing an ordinary court is relevant. See ÁLVAREZ (1992), p. 140 and FENTIMAN (2015), p. 8.

<sup>34</sup> This situation, problematic at the national level, may become critical at the international level, due to the difficulties involved in litigating in another foreign forum. SCOTTI (2017), p. 190. Besides, the scarce number of claims is not an incentive for consumers to bring actions in that jurisdiction. KLEIN (2013), p. 4.

<sup>35</sup> DREYZIN (2015), p. 158.

<sup>36</sup> "The principle of effective judicial protection means, therefore, that the international jurisdiction of a country's courts should not be extended to cases with no 'connection' or 'contact' with that country, but rather

Indeed, to predict the competent court is a principle that must inform every judicial system and that must be guaranteed to the parties, along with the principle of legality and effective judicial protection.<sup>37</sup> These principles make it necessary to think of any consumer's problem of access to justice, which may arise as a result of a court contractually "imposed" by the other party, and to seek the means to ensure that access is guaranteed. To this end, special rules of jurisdiction (the so-called *foros de protección*)<sup>38</sup> have been established in some legal systems. These *foros de protección* safeguard the interests of consumers considered as the "weak" party in the legal relationship. This, in two ways: first, they establish a special rule of residual jurisdiction to favor the consumer's access to justice, ensuring the right to litigate before a nearby court;<sup>39</sup> and second, they restrict the effects of the choice of court agreements when they are detrimental to the party's rights.<sup>40</sup> However, in order for the consumer to be covered by these *foros de protección*, certain conditions must be met. The first and most obvious condition is that the consumer must be, from a legal perspective, a consumer, in line with the

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that the parties must have access to justice in the same courts when the case has "sufficient connection" with that country. VILLARROEL & VILLARROEL (2015), pp. 374. For a discussion of the concept of effective judicial protection in Chilean law and its relationship to access to jurisdiction, see GARCÍA & CONTRERAS, (2005), pp. 244-250. In the Chilean case, this principle is a guarantee contained in Article 19 No. 3 of the Constitution, which recognizes equal protection of the law when exercising rights to everyone. This principle could be affected, because if the derogatory effect of a foreign choice of court agreement is recognized, this would mean that the national courts have no jurisdiction to hear and judge a given dispute, what would correlatively imply that the party would not be able to bring an action before a Chilean court. See COLOMBO (2004), pp. 584 et seq. See also, VIRGÓS & GARCIMARTÍN (2007), p. 67-68.

<sup>37</sup> DREYZIN (2015), p. 158.

<sup>38</sup> On this matter, see Article 18 of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I *bis* Regulation); Article 16 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 2007 (Lugano Convention); Article 114 par. 1 of the Swiss Federal Law on Private International Law; and Article 2654 of the Argentine Civil and Commercial Code.

<sup>39</sup> SCOTTI (2017), p. 209. In short, the consumer's *court actoris* reduces his/her costs of accessing to jurisdiction. VIRGÓS & GARCIMARTÍN (2007), p. 167.

<sup>40</sup> In the case of the European Union, the consumer has the right to sue in the courts of the Member State where he is domiciled, or where the supplier is domiciled. The choice of court is possible only if made after the dispute has arisen and enables the consumer to sue in other courts, and when the jurisdiction of the forum where the consumer was domiciled at the time of entering into the contract is chosen. v. Articles 18 and 19 Brussels Ia Regulation and VIRGÓS & GARCIMARTÍN (2007), pp. 166-175; GONZÁLEZ & MARTÍN (2011), pp. 162-173. The Lugano Convention provides for a similar solution in articles 15 and 16. In the Swiss case, the Federal Law on Private International Law provides in its article 114, paragraph 2, that the consumer may not waive in advance the jurisdiction of his domicile or habitual residence. For a comparative analysis of the application of these rules, see FORNAGE (2011), pp. 242-259 and 290-321. In the same vein, Article 2654 of the Argentine Civil and Commercial Code of 2015 grants the consumer the power to bring his action before alternative courts, that of the judges of the place where the contract is celebrated, the services are provided, the goods are delivered, the guarantee obligation is fulfilled, the defendant is domiciled, or the place where the consumer performs acts that are necessary for entering into the contract, but it does not allow the choice of forum. As LÓPEZ points out, the basis of prohibiting the choice of forum is to prevent the abusive or predisposed clauses. For this reason, since the rule does not distinguish between the agreement concluded before or after the damage was caused, "the best interpretation is that even in the latter case it would not be possible because it is a protective statute and because the law does not distinguish". LÓPEZ (2015), p. 401.

concepts used by the laws about *foros de protección*.<sup>41</sup> And the second condition is that to use the *foro de protección* is somehow foreseen and known by the supplier when entering into the contract, since the latter undertakes the risk of applying this exception rule. It is relevant for the supplier to know about this, because to apply the *foro de protección* implies for the supplier to waive - in practice - to be sued in his natural forum, which would probably be that of his domicile or habitual residence.<sup>42</sup> Therefore, to sue the supplier before the *forum actoris* is justified; this means before the court where the supplier directed his offer, since it has been considered that by the fact of directing a commercial activity to the place where the plaintiff consumer is located, the supplier would be assuming, as part of the commercial activity, the risk of a lawsuit before that foreign forum.<sup>43</sup>

The *foros de protección* and the choice of court agreements regarding international consumption have not been regulated by our legislator,<sup>44</sup> and have not been object of analysis by the national doctrine in practice,<sup>45</sup> despite the growing openness to foreign trade of the Chilean economy and the consequent increase in international consumer contracts with parties domiciled or resident in Chile.<sup>46</sup> There is also little national case law regarding international consumer protection.<sup>47</sup> Thus, it is relevant to examine their legal validity and

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<sup>41</sup> In the case of Regulation 1215/2012, an autonomous concept of consumer is used, different from the one provided by each national regulation of the European Union member countries. See GONZÁLEZ & MARTÍN (2011), pp. 166-168; VIRGÓS and GARCIMARTÍN (2007), p. 168-169.

<sup>42</sup> See GONZÁLEZ & MARTÍN (2011), pp. 164-166.

<sup>43</sup> In this regard, article 17 No. 1 letter c) of the Brussels Ia Regulation requires the supplier to “pursue commercial or professional activities in the Member State of the consumer’s domicile or - by any means - to direct such activities to that Member State or to several Member States, including that Member State, and the contract to fall within the scope of such activities. See VIRGÓS & GARCIMARTÍN (2007), p. 170. However, the solution has not been free of criticism, especially by companies developing electronic commerce, who consider that it affects the development of their activity. GONZÁLEZ & MARTÍN (2011), p. 166. A similar solution is provided for in article 15 No. 1 letter c) of the del Lugano Convention.

<sup>44</sup> Exceptionally, as stated in the First Report of the Senate Economics Committee in the context of the discussion of Law No. 21,081, solutions aimed at protecting consumers at the international level were proposed, with respect to the choice of forum and applicable law. In particular, Senator Pérez suggested to incorporate to Article 16 of the LPDC a new literal, which declared abusive any clause that established “a foreign court as competent to hear and resolve all those controversies arising from the law”. However, the Commission requested its withdrawal, since it was considered that, according to the indications of the Executive Branch it was possible to declare the abusive nature of the clause in accordance with the provisions of Article 16(g) of the LPDC, or of the new rules on competition.

<sup>45</sup> As per the application of the rules of private international law to international consumer relations, see: SEVERÍN (2019), pp. 959-980.

<sup>46</sup> This situation has been described as anomalous, because while, on the one hand, an economy open to foreign trade is shown, on the other hand there has not been an effective amendment of domestic regulations on private international law that would provide solid foundations for this development. FERNÁNDEZ (2005), pp. 106-107. In a similar vein, see ESPLUGUES (2014), pp. 298-304.

<sup>47</sup> *Rivas Nielsen con Med El Elektro* (2013). In the case at stake, a claim for damages was brought against a company domiciled in Austria - in its capacity as manufacturer of defective cochlear implants - and a company domiciled in Argentina - in its capacity as distributor of said implants. The Supreme Court dismissed the exception of lack of jurisdiction, considering that the dispute arose within the territory of the Republic, in the terms of Article 5° of the *Código Orgánico de Tribunales* (COT), since the illegal act took place in Chile, when the defective devices were implanted in the patient. However, to apply the consumer standards was not discussed in the dispute.



effectiveness in Chile when incorporated into international consumer contracts and to analyze whether, despite the absence of a specific legal rule regulating these agreements, a harmonious and teleological interpretation of the provisions of Law No. 19.496 can determine whether they are valid and under which conditions. Furthermore, it should be studied whether this law allows for an adequate conciliation of the interests of the two parties involved in an international consumer relationship, regarding to their access to justice.

When this analysis is developed, three related hypotheses will be affirmed: that international consumer contracts do not exclude to apply the provisions of the LPDC in those cases where there are relevant links between the contract and the Chilean legal system; what is relevant in international consumer relations to ensure the consumer's access to justice; and that, therefore, to recognize private autonomy - expressed when accepting the choice of court agreements - should be harmonic with the tutelary or protective nature of consumer law.

Finally, we should note that this analysis will focus on the effectiveness of being submitted to a foreign ordinary court in light of the LPDC, and will not analyze international consumer arbitration, because it has a special treatment within the consumer law,<sup>48</sup> which imply special problems in defining the arbitrability of the dispute.<sup>49</sup> Neither will it study the protection of collective or diffuse interests in international consumer contracts, since regardless of the need for intervention of the Chilean court to protect the interests involved in this type of process, its characteristics prevent anyone from having sufficient authorities to submit their knowledge to a given forum contractually and in advance.

## II. THE SITUATION IN CHILE

In our legal system, the validity of clauses incorporated into consumer contracts is mainly regulated by the provisions of the LPDC, which governs both substantive and procedural issues of consumer relations. The adequate analysis and understanding of the provisions of this law when applied to international consumer relations requires, however, to previously analyze, briefly, the Chilean rules of international jurisdiction and the issues arising on the occasion of the validity of choice of court agreements. This is necessary because the basic problem addressed in this article - the effectiveness of express submission to a foreign court, in light of the LPDC - would be meaningless if our legal system were to declare these submission or choice of court agreements null and void. Furthermore, it is relevant because there are different positions in our national doctrine about the scope and limits of international jurisdiction, which affect the interpretation and application of the provisions of the LPDC.

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<sup>48</sup> See Art. 16 par. 2° and 3° LPDC.

<sup>49</sup> Particularly, according to Article V, 2, letter a) of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

## 2.1 ¿Are the choice of foreign court agreements valid in Chile?

If we set aside to accept the international submission agreements regulated in Bustamante Code's Article 318 - which, as a treaty in force, only applies between ratifying States and inasmuch as they are opposite to Chilean domestic law, considering the specific reservation to which it was subject - Chilean legislation does not contain general rules governing the validity of choice of court agreements in the international sphere. Although a minority doctrine - applying Article 1462 of the Civil Code (CC)<sup>50</sup> - asserts that these choice of court agreements are unlawful in their purpose because they deal with a public law matter, such as determining a court's jurisdiction to hear a dispute,<sup>51</sup> most Chilean authors currently accept their validity under Chilean law.<sup>52</sup> This is despite the fact that accepting the will of the parties as a general rule for defining international jurisdiction in matters of contracts is still an issue.<sup>53</sup>

Particularly, the forum choices made by the parties are recognized based on the dominant role of private autonomy in international contracting in Chile. We reach this conclusion when interpreting systematically several current regulations: Paragraphs 1 and 2 of Decree Law No. 2,349, which declares choice of foreign court agreements in international contracts as legal stipulations, in accordance with national law, and recognizes their frequent application in international contracts between privates as well;<sup>54</sup> the provisions of Article 318 of the Bustamante Code, which sets forth as a general rule in civil and commercial disputes that the courts to which the litigants expressly or tacitly submit have jurisdiction; Law No. 19,971, which allows the parties to submit to arbitration to be held abroad;<sup>55</sup> and finally,

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<sup>50</sup> As AGUIRREZÁBAL *et al.*, correctly point out, the fact that the agreements to extend jurisdiction are precisely an example of a covenant against Chilean public law, shows certain distrust towards the figure, what has been overcome by the doctrine, mainly by the requirements of modern commerce. However, the position whether the agreements on choice of forum are considered valid or null and void will depend, mainly, on whether jurisdiction is conceived as a public power that cannot be waived, or as an element that can be disposed of by private autonomy. AGUIRREZÁBAL *et al.* (2011), pp. 440-443. See also ROMERO (2017), pp. 165-169.

<sup>51</sup> This line of argument has been taken up by some old case law (see CORTE SUPREMA [1905]) and by authors such as HAMILTON (1966), pp. 364-365. However, the one who has most recently insisted on this interpretation is Juan Colombo. He asserts that the exercise of jurisdiction belongs exclusively to the courts established by law, whose force derives from sovereignty itself. COLOMBO (1991), pp. 43 et seq. On this same basis, he states in a later work that "In domestic law, from the moment that every court has a part of the jurisdiction, it is neither possible to extend it not in international law, since jurisdiction attributed to the State - inspired by the supreme national interests - cannot be subject matter of disposition by the litigants." COLOMBO (2004), p. 63.

<sup>52</sup> VILLARROEL & VILLARROEL (2015), pp. 403-406; CANELO (2014), pp. 43-52; RAMÍREZ (2013), pp. 262-266; MONSÁLVEZ (2010), pp. 144-148; GUZMÁN (2008), pp. 219-224; MONSÁLVEZ (2008), pp. 225-239; GUZMÁN (1997), pp. 547-550. This interpretation has begun to instill civil doctrine, as shown in the latest versions of Domínguez's work of in the legal conventions, see DOMÍNGUEZ (2012), p. 135.

<sup>53</sup> In this regard, mainly VILLARROEL and VILLARROEL (2015), pp. 394-396 and 398 et seq.

<sup>54</sup> D.L. No. 2,349 of 1978, sets out rules on international contracts for the public sector, see also art. 1 of the same legal body.

<sup>55</sup> In particular, this results from the provisions of articles 35 and 36 of Law No. 19,971 on international commercial arbitration, which recognize the binding nature of foreign arbitration awards that seek to be recognized or enforced in Chile, regardless of their country of origin. AGUIRREZÁBAL *et al.* (2011), p. 462. In the case of arbitration, the notion delimiting faculties between the judicial authorities of a country and the

Articles 242 to 245 of the Code of Civil Procedure (CPC by its Spanish acronym), which establish the requirements for recognizing the validity in Chile of foreign court decisions. All of these rules reinforce the idea that the subject matter of Article 1462 CC would only be unlawful in those cases where the parties actually choose jurisdiction that is not authorized by national law, as per the wording of this article, and to choose a foreign court choose – what is accepted by Chilean law - would not apply.

In short, the general rule in the Chilean legislation - and according to the doctrine - is to accept choice of court agreements, since our laws recognize foreign jurisdictions as competent, except for exceptional matters where Chilean law sets the exclusive jurisdiction of Chilean courts, establishing national imperative rules that must be applied.<sup>56</sup> Grounds for this statement would be the provisions of Article 245 No. 2 of the CPC, which allows to ignore foreign judgments in Chile when they are opposed to national jurisdiction. This is the case when Chilean courts must rule a dispute,<sup>57</sup> as per the Supreme Court case law considers in recent years;<sup>58</sup> and in line with the Constitutional Court's interpretation of the rules on jurisdiction.<sup>59</sup>

In conclusion, despite the fact that our law contains no general rule validating choice of court agreements in international contracts, there is a line of thoughts based on the importance of private autonomy in international contracting, which recognizes that these

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arbitrators is the objective arbitrability (Article 36.1(b)(ii) of Law No. 19.971 and Article V.2(a) of the New York Convention of 1958), since stating that a matter can't be subjected to arbitration implies to reserve jurisdiction for the benefit of the State's jurisdiction. See CAIVANO (2011), pp. 368 et seq.

<sup>56</sup> At paragraph 4<sup>th</sup> of *A.J. Broom con Exportadora Frutícola* (1999), the Supreme Court indicates that “Indeed, Article 929 of the Commercial Code provides that the legal rules on maritime transport agreements are mandatory for the parties, except where the law expressly provides otherwise, a provision from which it follows that, in general, those rules contain essential elements of the contract and cannot therefore be excluded or modified by the contracting parties; Thus, it must be understood that the rules of jurisdiction of Articles 1032 to 1035 of the Code are not left to the will or discretion of the parties. Thus, it is an error of law to attribute validity to the second clause of the bill of lading, inasmuch as it declares that they are subject to Spanish laws and courts; In fact, such clause is against the provisions of Article 1034, which prohibits to initiate legal proceedings in places other than those specified in the two preceding articles, and therefore, pursuant to Article 824 of the Law on the Trade, it should be considered null and void; by not declaring it so, the decision has violated the aforementioned legal rules, with substantial influence on the decision, since such error is the sole basis of the decision.” For its part, Concha emphasizes that Article 1462 of the CC does not limit its application to prohibitive norms but includes imperative ones - as in the case under analysis- so that it affects all those institutional outcomes contravening public regulations. CONCHA (2010), pp. 79-90. See also, ROMERO (2017), pp. 163-164; VILLARROEL & VILLARROEL (2015), pp. 403.

<sup>57</sup> See MONSÁLVEZ (2008), pp. 67-69; GUZMÁN (1997), pp. 582-586; VILLARROEL & VILLARROEL (2015), pp. 444-448. For a critical analysis of national case law showing the confusion between this cause and the contravention of public order, see ESPLUGUES (2014), pp. 340-345.

<sup>58</sup> In *exequatur* seat, see *State Street Bank con Inversiones Errázuriz* (2007); *Steelcase Inc.* (2008). In *casación* seat, see *Hochschild con Ferrostaal* (2008); *M. Limitada con European Industrial* (2008); *Medtronic Usa con Med Implant* (2017). See PICAND & MAHÚ (2014), pp. 401-409; ROMERO (2017), pp. 166-169; AGUIRREZÁBAL *et. al.* (2011), p. 460-461.

<sup>59</sup> TRIBUNAL CONSTITUCIONAL (2002). In the majority vote (C. 50°), the Court considers that any conflict involving a compromised public interest must be under the jurisdiction of the courts established by Chilean law. *Contrario sensu*, it may be interpreted that only as long as there are private rights that may be disposed of jurisdiction may be extended to international or foreign courts.

agreements are valid as long as they refer not only to domestic businesses,<sup>60</sup> or is a case where the jurisdiction of Chilean courts excludes another one.<sup>61</sup> As a consequence, it is necessary to analyze whether or not the LPDC establishes an exclusive jurisdiction of the Chilean courts in consumer matters. If this is the case, choice of foreign court agreements in international consumer contracts would be null and void. To do so, it is necessary to determine whether or not the LPDC has rules of international jurisdiction first, and if so, to indicate how these rules should be interpreted.

## 2.2 ¿Does the LPDC establish rules on international jurisdiction?

Title IV of the LPDC contains the rules determining the courts called upon to hear disputes arising from acts, omissions or conducts affecting the exercise of consumer rights (Article 50 LPDC) and also establishes the relative jurisdiction of these courts. Thus, in order to hear actions of individual interest, the LPDC grants *competencia absoluta*\* to the local police courts, which must hear complaints filed in defense of the consumer's individual interest (art. 50 A LPDC)<sup>62</sup> and actions brought by the consumer as an individual, to obtain compensation for damages suffered as a result of the violation of this law (art. 50 H LPDC). Since the reform by Law No. 21.081, the relative competence of local police judges is defined by the choice of court made by the consumer when filing his complaint or lawsuit.<sup>63</sup> The LPDC allows the consumer to choose between the local police court with territorial jurisdiction where he has his domicile, or the one in the place of the supplier's domicile.<sup>64</sup> In both cases, it is expressly forbidden to extend the jurisdiction by contract<sup>65</sup> in order to protect the consumer's interest and facilitate his access to justice.<sup>66</sup>

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<sup>60</sup> PICAND & MAHÚ (2014), pp. 439-440; VIAL (2013), pp. 913-914.

<sup>61</sup> As VILLARROEL & VILLARROEL point out, the exclusive forum implies that the State, in this matter, will not admit more competence than that of its own courts. VILLARROEL & VILLARROEL (2015), pp. 390.

\* Refers to the requirements of a court to have jurisdiction in a certain matter: *forum*, issue and amount.

<sup>62</sup> For its part, according to Article 50I of the LPDC, this same court shall have jurisdiction to hear actions by which consumers pursue contraventional liability of the supplier.

<sup>63</sup> For an analysis of the new rules of procedure, see GARCÍA (2019), pp. 199-240. Regarding the old proceeding rules, see CORTEZ (2013), pp. 951-966; BARAHONA (2006), pp. 299-338; VILLALOBOS (2006), pp. 129-141; and CORTEZ (2004), p.145.

<sup>64</sup> However, we understand that the rule of the supplier's domicile must be interpreted consistently with the provisions of Article 142 COT, which establishes that the domicile of the defendant legal entity is where the corporation or foundation has its seat, and that, in case that there are establishments or offices in different places, it will be considered the one where the contract was entered into, or the one intervening in the events giving rise to the lawsuit.

<sup>65</sup> Art 50 A par. 1° LPDC. The doctrine has supported that jurisdiction shall not be extended between local police courts, considering that Article 182 COT admits it only between ordinary courts of the same hierarchy. See CORTEZ (2013), pp. 978-979; CORTEZ (2004), pp. 39-40; COLOMBO (2004), p. 505.

<sup>66</sup> See Informe de la Comisión de Constitución, Legislación, Justicia y Reglamento de la Cámara de Diputados, where the indication made by Deputy Marisol Torres, who sought to recognize the consumer's right to sue in the court of his or her domicile or the supplier's domicile, not allowing the supplier to alter such jurisdiction by contractual means. Later, in the Second Report of the Commission of Economics of the Senate, the restrictions

Although at some point in the parliamentary discussion it was suggested that these rules would define the international jurisdiction of Chilean courts in consumer matters,<sup>67</sup> it seems that this approach was later set aside, because the text of the law does not mention it, nor is there any doctrine or case law declaring these rules applicable to international consumer contracts.

We believe that, if Articles 50 A and 50 H of the LPDC are understood as rules of international jurisdiction this would introduce a systematically alien element into the LPDC since this law does not address international consumer relations.<sup>68</sup> Furthermore, this would mean ignoring the well-established difference in our legal system between *jurisdicción y competencia*,\*\* which defines the latter as that part of the jurisdiction that corresponds to each court.<sup>69</sup> Articles 50 A and 50 H of the LPDC seek to define which of the various Chilean local police courts potentially competent will be able to hear and decide on a dispute,<sup>70</sup> which is previously subject to Chilean jurisdiction.

However, this situation does not preclude that – since there is not an express rule of international jurisdiction in the CPLP allowing the issue to be defined - these rules of national jurisdiction are interpreted teleologically and extensively, considering a reasonable connection – according to a principle of protection – in order to determine international jurisdiction of the court, and thus inferring a rule of jurisdiction applicable to international consumer relations.<sup>71</sup> In any case, this deduction shall not disregard the limitations stated by the LPDC regarding its specific scope of application; nor should it affect other values relevant to defining the international jurisdiction of a court, such as the proscription of exorbitant jurisdiction.<sup>72</sup>

In this sense, even resorting to the extensive interpretation of these rules of the LPDC, it seems wrong to understand without further ado that its articles 50 A and 50 H define the international jurisdiction of Chilean courts in accordance with the rule of the *forum actoris* allowing any consumer to always sue before the local police courts of his domicile. This is so

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in force were incorporated, through indications made by the executive. During the discussion, it was pointed out that this rule prevents the supplier from imposing on the consumer the jurisdiction of a court other than the one corresponding to its domicile.

<sup>67</sup> See footnote 44.

<sup>68</sup> SEVERÍN (2019), pp. 972.

\*\* In English, both concepts refer to jurisdiction, nevertheless in Spanish, *jurisdicción* refers to the court's power to mete out justice which corresponds to every court; and *competencia* which refers to the specific court that is called to hear of a certain matter in a specific case

<sup>69</sup> See COLOMBO (2004), pp. 66-67 and 120-123; ROMERO (2017), pp. 22-27; HOYOS (2001), pp. 79-82.

<sup>70</sup> GARCÍA (2019), pp. 206-207.

<sup>71</sup> Indeed, if there is not a rule of international jurisdiction, an extension procedure is used, which seeks to internationalize the criteria underlying the internal rules of jurisdiction. However, as VILLARROEL & VILLARROEL rightly point out, this process cannot be automatic, but rather requires to adapt the rules to the specific international circumstances of the case. VILLARROEL & VILLARROEL (2015), p. 401. In the same vein, GUZMÁN (1997), pp. 549-550.

<sup>72</sup> According to SCOTTI, exorbitant jurisdiction or *forum impropri* lack of reasonability since there is minimal or inexistant connection with the legal issue. SCOTTI (2017), pp. 203-204. BOGGIANO (2001), pp. 135-136; VILLARROEL & VILLARROEL (2015), pp. 389-390.

because the provisions of the LPDC require that the person acting be a consumer (Articles 50 A and 50 H) and that he or she do so against a supplier - normative categories defined by the LPDC itself<sup>73</sup> - a matter that presupposes that the consumer contractual relationship is governed by it. In the same sense, the fact that it is not possible to apply immediately the provisions of articles 50 A and 50 H of the LPDC, also arises from article 50 of the LPDC, which determines the general framework of application of proceeding rules for complaints and actions protecting individual interests, referring to the infringement of the provisions of the LPDC. Thus, it is only possible to apply its rules of jurisdiction to claims relating to an international consumer contractual relationship, if it was first established that such international consumer contract falls within the scope of application of the CPLP.

As a consequence of the above, jurisdiction of Chilean local police judges is conditioned on the international consumer contract being subject to the Chilean LPDC. However, the LPDC sets forth no rules regarding its application *en el espacio*,<sup>\*\*\*</sup> nor does it specifically refer to international consumer contracts.<sup>74</sup> For this reason, the delimitation of its scope must be made in accordance with the general rules applicable to international contracts. Following the traditional view held by the national doctrine, the effects of the contract, or rights and obligations arising therefrom, shall be subject to Chilean law when the contract is to be performed in Chile, in accordance with the general criteria set forth in Articles 16 subsection 3 of the Civil Code and 113 subsection 1 of the Code of Commerce.<sup>75</sup> Thus, international consumer contracts, entered into or performed in the country, are imperatively subject to Chilean law, without the parties being able to choose to govern them by a different law, which contemplates less favorable rules for the consumer.<sup>76</sup>

Thus, in our opinion, the element that internationally defines the jurisdiction of the Chilean courts regarding to actions brought by the consumer against the supplier,<sup>77</sup> is the objective connection between the consumer contract entered into and the national legal system. As a consequence of the above, in international consumer cases we would be in a situation where Chilean jurisdiction would not be determined by the *forum actoris* of the consumer, or by the general rule *actor sequitur forum rei*, but by the *forum causae* or *forum legis*,

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<sup>73</sup> See articles 1 No. 1 and 1 No. 2 LPDC. These provisions are extended in their application by virtue of Law No. 20,146. However, since these are categories provided for in Chilean law, they must be resolved in accordance with their own standards. On the concept of *consumer* and its extension to micro and small enterprises, by virtue of Law No. 20,416, see FERNÁNDEZ (2019), pp. 50-52; BARRIENTOS (2019), pp. 13-15; TAPIA (2017b), pp. 26-34.

<sup>\*\*\*</sup> The law can be applied in a certain territory and from a certain moment (specifically, since it is enacted). *Aplicación en el espacio* refers to certain territory.

<sup>74</sup> SEVERÍN (2019), p. 972.

<sup>75</sup> “The natural and proper effect of the provision of the third paragraph is that contracts entered into in a foreign country with the intention of being enforced in Chile are equal or governed by the same rules as contracts entered into in Chile; but this equality or similarity is only as to the effects, that is, the rights and obligations they produce.” FABRES (1892), p. 144; GROB (2014), pp. 234 et seq. However, the author expressly excludes the analysis of consumer contracts; SEVERÍN (2019), p. 972.

<sup>76</sup> VIAL (2013), p. 919.

<sup>77</sup> In the case of actions brought by the provider against the consumer, the general rule applies: *actor sequitur court rei*.

that is, by the court determined by the substantive law governing the contractual relationship.<sup>78</sup> This solution adequately harmonizes the various interests involved in determining this international jurisdiction. On the one hand, because it is consistent with Chilean case law, which requires a sufficient connection between the conflict and the national forum to understand that a case, for the purposes of Article 5 of the *Código Orgánico de Tribunales*, is brought “within the territory of the Republic” and is subject to national jurisdiction.<sup>79</sup> And, on the other hand, because it seems to us to be a solution in accordance with the protection of international due process, which avoids exorbitant forums<sup>80</sup> and favors access to justice and effective judicial protection of the consumer.<sup>81</sup>

In fact, an interpretation favoring the *court legis* that we propose succeeds eliminating the possibility that Chilean courts are considered an exorbitant forum abroad. Specifically, because it avoids the foreign supplier being subject to national jurisdiction when it was impossible for him to foresee the connection between his contract and the Chilean forum, given an objective condition such as celebrating or executing the contract within the territory of the republic<sup>82</sup>. At the same time, it guarantees access to justice for the consumer, because the consumer with domicile in Chile is entitled to bring actions in national courts, inasmuch as the effects of that contract are under the rules of the LPDC. Finally, this solution avoids mobile connections, because the consumer can’t alter unilaterally the competent jurisdiction - preferring a national court - modifying his or her domicile after entering into the contract.<sup>83</sup>

However, it is worth asking whether the LPDC sets an *exclusive* jurisdiction of the Chilean courts for international consumer contracts governed by its provisions. If so, the choice of foreign court agreement would be void, due to the illegality of its object, in accordance with the provisions of Article 1462 CC. The question is relevant, since it could

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<sup>78</sup> As Scotti points out, in this case the logical order will be reversed - according to which the competent court is first determined, and then the judge establishes the applicable law - since the international jurisdiction of the court will depend on the application of its material or substantive law. SCOTTI (2017), pp. 210. BOGGIANO (2001), pp. 125-126.

<sup>79</sup> *Rivas Nielsen con Med El Elektro* (2013); see ROMERO (2017), pp. 155 et seq.

<sup>80</sup> With the consequent risk of jurisdictional abuse, “whose most important sanction is the foreigner’s ignorance of the decision issued by a court assuming an exorbitant jurisdiction.” BOGGIANO (2001), p. 114; SCOTTI (2017), p. 186.

<sup>81</sup> See footnote 36.

<sup>82</sup> As pointed out by Fabres, the art. 16 par. 3° of the CC provides “that if the contract was not entered into for performance in Chile, its effects (rights and obligations) are not governed by Chilean law. Consequently, even if the material object of the contract exists in Chile, for example, one thousand bushels of wheat, if it is agreed that they be delivered in the foreign country where the contract was entered executed or in any other foreign country, and in general, when the contract was not entered into in Chile, its effects are not governed by Chilean law.” FABRES (1892), pp. 144-145.

<sup>83</sup> Particularly, this problem would result from applying the provisions of Articles 50 A and 50 H of the LPDC to an international relationship directly, since the definition of the national rule of *competencia relativa* does not establish a specific moment to define the consumer’s domicile for the purposes of determining the court’s jurisdiction (for example, his or her domicile when entering into the contract). If this interpretation were followed, the consumer could confer jurisdiction on the Chilean court by the mere fact of being domiciled in the country after the contract was entered into, affecting the interests of the supplier, who would be subject to a forum unrelated to the contract entered into.

be understood that the LPDC imperatively requires that the dispute be known by the Chilean forum if its rules are qualified as integral principles of Chilean international public order. This qualification would directly imply to set a limit to private autonomy and to recognize national jurisdiction as an imperative and exclusive court for consumer actions and claims. However, although we agree that the LPDC rules are part of the national public order, we believe neither correct, nor convenient, to conclude from this single fact a rule of exclusive jurisdiction of the Chilean forum that is applicable to claims arising from the breach of international contracts subject to the LPDC. A suitable answer to this question requires to analyze the nature of the individual claims (infringement claim and civil action) arising from the breach of the LPDC provisions,<sup>84</sup> in order to determine how important is to protect the Chilean public interest for are each of them.

We consider that the sanctioning nature of the infringement complaint prevents it from being heard by a foreign court, since its purpose is to establish the infringement of consumer regulations and to stablish a fine for tax purposes. Even though the person filing this type of action in the court is the consumer, the aim of this complaint is strictly punitive and, as such, is part of the Chilean State's *ius puniendi*, but allayed.<sup>85</sup> Thus, in this case we face a matter of exclusive jurisdiction of national courts and choice of foreign forum agreements made by the parties cannot be valid, and the provider cannot argue submission to the foreign forum to avoid the local Chilean police court to hear the infraction complaint.

On the contrary, when it comes to the civil action arising as from any breach of consumer law, there is not such a strong public interest that would justify the exclusive jurisdiction of the Chilean courts. Thus, in the actions of nullity, compliance, *cesación*, or indemnification of damages,<sup>86</sup> the dispute involves the private interests of the consumer and the supplier. This is despite the fact that they deal with nullity actions regarding abusive terms, since they focus on protecting the particular interest of the consumer as a weak party in the contractual relationship, rather than on protecting the general interest of society.<sup>87</sup> On the other hand, it may also be argued that it is not consistent to recognize the consumer's broad

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<sup>84</sup> The amendment by Law No. 21,081 allows a civil lawsuit to be filed without the need for prior infringement procedures. GARCÍA (2019), pp. 201-202. Even before the amendment the separation between the two claims was asserted. See CORTEZ (2004), pp. 25-28; CORTEZ (2013), pp. 955-959; PINOCHET (2012), p. 429.

<sup>85</sup> In particular, this is what happens with the tax benefit fines established in articles 23 par. 2°, 24 and 25 of the LPDC which apply in the context of individual contracts executed with the consumer. As PINOCHET points out, the requirement of bringing together the infractional complaint and the civil action was due to reasons of procedural economy, in circumstances where the former was heard by the local police courts, because of their function of imposing sanctions for violations of certain regulations. PINOCHET (2012) pp. 431-432 and 437. This matter is part of a "punitive consumer law" which functions through non-criminal law sanctions and which the case law has understood as part of the *ius puniendi*, albeit with nuances or allays. SOTO & DURÁN (2019), p. 245. In a similar vein, ISLER points out that the infractional action is a manifestation of the state *ius puniendi*, which normally gives rise to fines as established in Articles 24 and 28 of the LPDC. In this context, the function of the responsibility is eminently punitive and preventive, and it is a responsibility of public order and general interest, which is why SERNAC ensures compliance with the provisions whose violation generates it. ISLER (2019b), pp. 197-199.

<sup>86</sup> See art. 50 par. 2° of the LPDC. For an overview on civil actions, see ISLER (2019b), pp. 199-205.

<sup>87</sup> MORALES & VELOSO (2019), p. 157.



power to decide on his claim - which includes the possibility of submitting it to an arbitrator,<sup>88</sup> to compromise or reconcile,<sup>89</sup> and even to waive it<sup>90</sup> – on the one hand, and to affirm that the intervention of the Chilean forum is imperative and necessary for resolving correctly the dispute in accordance with Chilean law. Moreover, in these cases there seems to be no primary interest of the State in the outcome of the dispute. From an international perspective, the State could only be interested in ensuring that the legislative policies, objectives, and fundamental values of its legislation - which create its international public order - are not adversely affected.<sup>91</sup> In the case of choice of court agreements included in international consumer contracts, these policies, objectives and values could not be affected, nor the public order transgressed, when such choice of foreign court agreements expand the rights of the consumer.

Indeed, it seems to us that the idea of public order underlying consumer law should be interpreted teleologically,<sup>92</sup> in accordance with the aims of the LPDC, whose solutions do not seek to exclude certain matters from the scope of contractual negotiations, but to correct the inequalities between the contracting parties, by developing a statute of protection for the weaker party. It is precisely why we can affirm that the CPLP takes up a particular notion of *protection* public order, which differs from that of classical public order, which seeks to protect the essential principles of the legal order of the forum. The aim of this protection public order is more limited, since it seeks to protect the interests of the weaker party,<sup>93</sup> what is set forth in the protection afforded by Article 4 LPDC, which declares the rights it establishes for the benefit of consumers to be inalienable *in advance*.

For this reason, we believe that the correct interpretation of the LPDC should focus on protecting and developing the interests of the protected party, rather than protecting public interest or national sovereignty applying law theoretically. This is relevant for at least two reasons. First, because it is consistent with recognizing the autonomy of the parties in international contracts and with protecting the consumer as an actor in international trade.<sup>94</sup> And the second, because the LPDC is focused on the interests of the consumer as a weak contracting party, which means accepting all those solutions that do not affect the interest of this consumer, moreover, accepting those that favor him, increasing his freedom and protection.<sup>95</sup>

All of this seems consistent with the role that international public order should play in modern systems of private international law. Indeed, public order is an institution that

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<sup>88</sup> See art. 16 par. 2° and 3° of the LPDC. See JEQUIER (2020), pp. 57-92.

<sup>89</sup> See art. 50 H par. 4° of the LPDC.

<sup>90</sup> See ESPADA (2013), pp. 196-197.

<sup>91</sup> SYMEONIDES (2006), p. XLIII.

<sup>92</sup> BARRIENTOS (2019), pp. 92-93.

<sup>93</sup> ISLER (2019a), p. 96. TAPIA & VALDIVIA (1999), pp. 38-44.

<sup>94</sup> What would be an extension of what was asserted about the person, see footnote 19.

<sup>95</sup> See SEVERÍN (2019), p. 972; VIAL (2013), p. 919. For this same reason, we consider that restricting to extend jurisdiction set forth in Articles 50 A and 50 H LPDC cannot be interpreted in terms that directly implies that the choice of court agreements are void and null. This is particularly relevant when the consumer decides to sue abroad and then the Chilean system must recognize that decision.

guarantees the protection of the basic norms or principles of the forum,<sup>96</sup> which lacks of a precise delimitation of its specific content. This is why who interprets the law shall define its scope and identify the essential principles that this public order must protect; providing for a specific content and applying it to a specific case. This intrinsic indetermination of public order entails a risk of interpreting it expansively<sup>97</sup> at both, national and international level, so for some limits must be set for a fair application. We believe that, in a system based on access to justice and which recognizes the parties' control over their claims, the concept of public order applicable to choice of court agreements should be consistent with that considered by our case law in other areas where the recognition of autonomy is involved, such as in international arbitration. Thus, violations of public order must be interpreted restrictively,<sup>98</sup> declaring null and void only the acts and agreements infringing basic and fundamental rules of the Chilean State,<sup>99</sup> or if national law is clearly breached.<sup>100</sup>

Going deeper into this problem, we consider that an interpretation that sustains an exclusive jurisdiction of the Chilean courts in international consumer matters - as an integral principle of Chilean international public order - may end up, in practice, affecting the consumer's access to justice. In fact, a characteristic note of imperative and exclusive forums is that is not allowed to extend jurisdiction because there is any public interest that the forum keeps hearing about that matter. Therefore, in matters where there are exclusive forums, even express *post litem natam* agreements that may be entered into by the parties for declaring a foreign forum competent are rejected, as well as the tacit extension of jurisdiction by means of suing before a certain foreign forum. Considering that the rules of the LPDC grant exclusive jurisdiction to Chilean courts would deprive the consumer of the power to sue in a foreign jurisdiction - where he may have substantive or procedural advantages, in comparison to Chilean courts - and, in the case of having done so, he or she would be deprived of the possibility of enforcing in Chile rights recognized in a decision issued in a foreign jurisdiction, because this decision would collide with national jurisdiction.<sup>101</sup> In short, this interpretation of the Chilean consumer protection law would end up, paradoxically, by depriving the consumer of the rights the law claims to protect.<sup>102</sup>

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<sup>96</sup> VIAL (2013), p. 916.

<sup>97</sup> MARÍN & GARCÍA (2011), p. 125.

<sup>98</sup> The interpretation must be exceptional, restrictive and reserved for obvious cases, see MARÍN & GARCÍA (2011), pp. 127-130.

<sup>99</sup> Report of Fiscalía Judicial de la I. Corte de Apelaciones de Santiago, contained in *Holdings B.V. y Publicis Groupe Investments con árbitro Don Manuel José Vial Vial* (2009).

<sup>100</sup> COURT OF APPEALS OF SANTIAGO, decision of September 9<sup>th</sup>, 2013, *Rol* No. 1971-2012.

<sup>101</sup> Art. 245 No. 2 of the CPC.

<sup>102</sup> We must bear in mind that the protection of the rights of individuals is at stake here, particularly the procedural implementation of these rights in international trade. Therefore, "when denying recognition to a foreign decision [...], the immediate consequences of that decision are not borne by the foreign State but by specific individuals (the parties who are benefited or harmed by that decision). See VIRGÓS & GARCIMARTÍN (2007), p. 41.

### 2.3 Substantive control of choice of court agreements in the LPDC

The link between the contract and Chilean consumer law will not only be relevant to define the jurisdiction of the Chilean court. Additionally, it will cause a second effect, since the substantive mechanisms of consumer protection provided by the LPDC shall be applied to consumer contracts under the LPDC;<sup>103</sup> in particular, those provisions related to the control of abusive clauses in adhesion contracts.<sup>104</sup>

According to Article 16(g) LPDC, abusive clauses “are contrary to the requirements of *bona fide*, considering objective parameters, and cause a significant imbalance in the rights and obligations of the parties under the contract to the detriment of the consumer”. Although Article 16(g) LPDC does not strictly provide a legal definition of an abusive clause,<sup>105</sup> it does provide two main criteria, which, applied jointly makes it possible to consider a clause as abusive: a) to include the clause runs counter to the parties’ special duties of consideration between parties, which as a result of the principle of *bona fide* must rule their actions;<sup>106</sup> and b) the clause causes a serious imbalance in the contractual relationship, to the detriment of the consumer’s rights.<sup>107</sup> The abusive nature of a clause entails a substantive *ex post* judicial control of the clause in question, which looks at the clause’s effect when including it in the contract, regardless of the consumer’s knowledge about the clauses effects, and of the reasons why the consumer has consented to it.

Regarding to the first requirement for the clause to be abusive, we consider that - in general - the objective application of the principle of good faith leads to affirm that there is abuse on the part of the supplier when he imposes a choice of foreign court clause on the

<sup>103</sup> In consumer contracts there is always the suspicion that the consumer does not know the terms and consents “blindly”. Thus, to avoid *surprise* clauses, the LPDC provides for formal rules seeking to safeguard the informed consent of the consumer and requires the provider that the clauses be written in a legible manner and in Spanish see TAPIA (2017a), p. 85. DE LA MAZA (2012b), p. 132. Finally, the sanction for breaching the *carga de escrituración* would be that the clause is not enforceable, only regarding the supplier. CONTARDO (2014), p. 127. See also TAPIA and VALDIVIA (1999), pp. 66-78.

<sup>104</sup> In the terms of article 1 No. 6 LPDC, an adhesion contract is “that whose clauses have been unilaterally imposed by the supplier, and the consumer is not entitled to alter its content.”

<sup>105</sup> MORALES (2018), pp. 34-35.

<sup>106</sup> This good faith requires that the supplier’s behavior does not go in detriment of the reasonable expectations that the consumer could have of entering into the contract, what matters is to exclude all those clauses that “normal contractors, properly informed and in conditions of negotiated parity, would have not agreed”. DE LA MAZA (2012b), p. 140.

<sup>107</sup> DE LA MAZA (2012b), p. 139. However, although the aforementioned provision seems to include two control parameters - the first during the negotiation and execution of the agreement and the second when reviewing the effects of the clause – to which extent both controls are required has been questioned. In this regard, Momberg and Morales point out that a clause giving an unjustified advantage for the supplier is *per se* incompatible with *bona fide* in contracts. For both, the main element when applying the rule is how disproportionate the compensations between the parties are. MOMBERG (2013), p. 18; MORALES & VELOSO, (2019), p. 154; MORALES (2018), pp. 38-40. In the same vein, Campos points out that “the requirements of *bona fide* entail the performance of the contract to have a balanced content, which does not hinder, in any way, to satisfy the reasonable expectations of the adherent when executing the contract. Therefore, the mere existence of a significant imbalance reveals, without the need for any other consideration, the contravention of the requirements of *bona fide*” CAMPOS (2019), p. 241.

consumer. This is so even though there may be exceptions where the consumer gives specific and informed consent to the choice of foreign court agreement, or where there is a real connection between the chosen forum and the consumer contract. In fact, both at the international level<sup>108</sup> and in domestic law,<sup>109</sup> consumer law seeks to protect the consumer's access to justice, so a clause which in advance imposes on the consumer the burden of litigation in a foreign jurisdiction may be considered contrary to his reasonable expectations, as well as excessively unbalanced and abusive. This is also concluded, if we consider that the choice of a foreign court may imply to tacitly waive the protection granted by the Chilean LPDC to the consumer<sup>110</sup>. The latter because the designated foreign court will decide on the dispute applying the law that its own rules of Private International Law indicate as applicable, which may be a foreign law. Regarding to the second requirement, to include a clause depriving the national consumer of the access to the national judge provided by the LPDC imports a significant imbalance in the contractual relationship: in practice the consumer will be prevented or seriously hindered from accessing the judicial system. This will be the case, whether the consumer is considered to have a right of access to the Chilean judge provided for in articles 50 A and 50 H of the LPDC,<sup>111</sup> or whether he or she is considered to have only an interest in accessing it in accordance with the provisions of the law.<sup>112</sup>

As mentioned above, the control in terms of abusive clauses is always *ex post*, i.e. after entering into the contract whose nullity is sought.<sup>113</sup> This generally excludes a possible “preventive” legality control of the choice of court agreements included by the foreign supplier in a consumer contract and proposed to the consumer within an adhesion contract.<sup>114</sup> Notwithstanding the foregoing, the choice of foreign court agreements

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<sup>108</sup> About the application of the control in abusive clauses in agreements see ÁLVAREZ (1992), pp. 137-138.

<sup>109</sup> In this sense the amendment to Law No. 21,081, already analyzed is relevant.

<sup>110</sup> However, the choice of a foreign court does not necessarily entail detriment to the consumer, since to apply a foreign law – as a consequence of the choice of court – may end up being beneficial to the consumer. In this regard, Guardans points out that the election of certain law if there was a special consent of the consumer, as long as there is a real connection to the contract and it is not detrimental to the weak party. GUARDANS (1992), p. 325. See VIAL (2013), p. 919; SEVERÍN (2019), p. 972. This solution must be in line with what we explained about international public order.

<sup>111</sup> The right of access to a Chilean judge could not be waived in advance, in accordance with the provisions of Article 4° LPDC. Although problematic, this interpretation would favor the consumer, since he would be released from the burden of proving the elements in the case, what affects his interests. On the relationship between the non-waivable nature of Article 4 of the LPDC and the control of unfair terms, see MOMBERG (2013), p. 193.

<sup>112</sup> An interpretation of the restrictions that considers the consumer's interest in access to justice, rather than a right to appeal specifically to the courts established in the LPDC may be relevant, especially in terms of the extension to claims not covered by Articles 50 A and 50 H LPDC. In particular, if we define a breach to the residual rule *actor sequitur forum rei*, when the claimant is the supplier, what could affect the consumer's defense options.

<sup>113</sup> MORALES and VELOSO (2019), pp. 155-156. In the same vein, Barrientos highlights that the autonomy of the will is the rule when dealing with consumer matters; nevertheless not negotiated clauses could be subject to a judicial *a posteriori* revision. BARRIENTOS (2019), p. 92.

<sup>114</sup> However, as long as there are several contracts where this clause is included, its validity could be revised in a class action initiated by SERNAC. On the exercise of the action of nullity by SERNAC, see CARRASCO and CONTARDO (2019), pp. 81-83. In the latter case, notwithstanding the contracts whose invalidity is sought was

incorporated into the international consumer contract may not be declared void by application of Article 16(g) of the LPDC if it was a matter of particular and specific negotiation between the consumer and the supplier. In this case, even if the term is “abusive” regarding the content, this will lack of an indispensable requirement for the protection of the CPLP to operate, such as its incorporation into an adhesion contract. However, in the case of a freely agreed upon agreement the choice of court could still be considered ineffective, if articles 50A and 50H of the LPDC are interpreted recognizing the consumer’s *right* to appeal before the national judge, since in that case article 4° of the LPDC will be applied, which prohibits the waiver *in advance* of the rights that the law establishes for the benefit of consumers. However, we consider that this interpretation is not adequate because there are solid reasons to consider that the access to a judge with jurisdiction is not an inalienable right in the LPDC. This, despite the fact that some doctrine considers that this prohibition includes not only the prohibition to waive subjective rights, but also the legal powers granted by the LPDC.<sup>115</sup> This is clear particularly in the fact that the legislator should have expressly included a prohibition on extending jurisdiction in adhesion contracts.<sup>116</sup>

Similarly, we believe that choice of court agreements executed *post litem natam* are not covered by the restrictions of the LPDC and can be considered valid. This is because, according to Article 4 of the LPDC, what is prohibited is the waiver *in advance* of the rights it establishes, which does not prevent the consumer from entering into any other agreement that he or she considers favorable to his or her interest, after entering into the contract. Moreover, if the consumer is entitled to dispose of his claim and waive it, there is no reason to prevent him from submitting it to a foreign court. Besides, in the *post litem natam* agreements there is also no reason justifying the protection of the consumer; they are not part of an adhesion contract and are agreed in autonomous instruments, when the negotiating situation of the parties is not assimilable to that they were in when celebrating the original international consumer contract.<sup>117</sup>

Finally, we consider choice of court agreements entered into before the contract was executed or included as a clause within it, as valid, as long as the supplier is bounded - and not the consumer. To resort to a certain forum, especially if this is court of the consumer’s domicile or habitual residence; or agreements providing for alternative forums (non-exclusive) to which the consumer may resort are fully valid, as long as they include the forum of his or her domicile or habitual residence. In this last case, we are in view of a clause that affects no consumer’s inalienable rights *ex ante*, and that, in the end, will be validated, in its

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executed, the judge’s examination of the abusive nature of the clause will be general and abstract, not considering the particular conditions under which each contract was concluded. CAMPOS (2019), p. 270.

<sup>115</sup> ESPADA (2013), pp. 195-196.

<sup>116</sup> Art. 50A and art. 50 H of the LPDC.

<sup>117</sup> Once the conflict arises, the parties are in a position to assess their rights in relation to the court intervening; in addition, the consumer’s decision will not be influenced by distorting elements, related to the execution of the contract. This is why the validity of the *post litem natam* agreements and the tacit submission are justified. GONZÁLEZ & MARTÍN (2011), pp. 172-173. In the same vein there is no risk for the “strong” party to impose the consumer a court to appear at, once the conflict arose. See TOMÉ and GARCÍA-LUBEN (2011), p. 240. The Brussels I bis Regulation, the Lugano Convention and the Swiss Private International Law Act of 1987 follow this solution.

practical effects, by a subsequent act, such as the consumer's free decision to resort to a court other than the national one.

As a consequence, we consider that the choice of foreign court agreement will be abusive provided that it integrates an adhesion contract subject to Chilean law, and which deprives the consumer in advance of the power to act before the local police judge provided for in articles 50 A and 50 H of the LPDC. Also, in those cases where the rule of *actor sequitur forum rei* is affected, and the supplier is empowered to bring an action against the consumer in a forum other than that of the domicile of the latter. In both cases, the abusive nature of the agreement is clear because the consumer's interests are affected - expressed in the access to justice - in a manner that is contrary to the *bona fide* and the parties' reasonable expectations at the moment of entering into the contract. This choice of court agreement may be declared null and void, without affecting the rest of the contract,<sup>118</sup> and additionally, it may be invoked by the consumer despite having concluded the contract knowing or having been aware of the defect that invalidated it,<sup>119</sup> because it is a nullity based on the provisions of the LPDC,<sup>120</sup> whose purpose is to protect the weaker party to the contract.<sup>121</sup> Furthermore, it may not be remedied by the passage of time.<sup>122</sup> Finally, in any of these cases, in addition to the nullity action, the consumer's interest is protected at the *exequatur's* seat, since the decision issued by a foreign court basing its jurisdiction on the choice of court agreement may not be recognized in Chile, since if the national law considers such agreement null and void, the Supreme Court will declare that such decision is against the national jurisdiction (Article 245 No. 2 of the CPC).

## CONCLUSIONS

Chilean law does not systematically address the regulation of choice of court agreements in international contracts. For this same reason, it is not surprising that there is also no reflection on the consequences of their incorporation into international consumer

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<sup>118</sup> See art. 16 A LPDC. From the national consumer law perspective, this is a point "about which there seems to be no further discussion." MORALES & VELOSO (2019), p. 160. On the other hand, we understand on this same basis that a discussion on the validity of the contract does not necessarily affect the validity of the agreement, by virtue of their separability. As Briggs points out, separability is a technique protecting the choice of forum agreement when the validity of the contract to which it belongs is challenged, and which - in principle - shall be defined by the same law governing the contract. BRIGGS (2008), pp. 12 y 66-70. See also VIRGÓS & GARCIMARTÍN (2007), pp. 278-279; NYGH (1999), pp. 79-80.

<sup>119</sup> This implies that the *nemo auditur propriam turpitudinem allegans* rule of article 1683 of the CC is not applied. See BARAONA (2014), p. 239; MORALES & VELOSO (2019), pp. 159; CAMPOS (2019), pp. 263.

<sup>120</sup> BARAONA (2014), p. 233-241; MORALES & VELOSO (2019), pp. 157-160.

<sup>121</sup> MORALES & VELOSO (2019), pp. 157-160. For its part, to qualify the protected interests in the declaration of invalidity allows to ask if it can be declared *ex officio* by the judge. In this sense, it is argued that the judge could declare it, based on the imperative nature of consumer rules and the existence of a public interest. See CAMPOS (2019), pp. 265-276; see CAMPOS (2018), pp. 19-28. We consider that the protection of public order in practice is incompatible with recognizing this power. In particular, as Baraona points out, the abstract protection of the consumer could be dysfunctional to his interests, so a specific claim for nullity by the interested parties is justified. BARAONA (2014), p. 239-240.

<sup>122</sup> BARAONA (2014), p. 238.

contracts, and that our law does not contemplate special institutions with a view to safeguarding the access to justice of the international consumer. The question about the limits to the autonomy of the parties' will in matters of international jurisdiction assumes that it has previously been recognized as a founding principle of the jurisdictional system. However, there is a growing consensus in our law about the importance of this autonomy as a defining element of international jurisdiction in matters of contractual obligations, which has given rise to case law that has progressively moved away from the notion of jurisdiction as a sovereign and absolute power of the State, to a broader recognition of private autonomy.

For this reason, despite the fact that there is no specific regulation resolving the validity of the forum choices made by the parties in international consumer contracts, we believe that a harmonious interpretation of the rules of private international law and Chilean consumer law allows to build a solution, favoring their recognition. In particular, because the LPDC protects the access to justice of national consumers, in the context of international relations they are involved in. However, articles 50 A and 50 H of the LPDC do not directly establish rules of international jurisdiction. Thus, jurisdiction of Chilean local police judges will be conditioned on the international consumer contract being subject to the Chilean LPDC, in accordance with the general criteria set forth in Articles 16 of the Civil Code and 113 of the Code of Commerce, which mandate to apply national law for the purposes of international contracts in Chile.

However, if a conflict is submitted to the Chilean forum it does not mean that the intervention of the Chilean judge is necessary and exclusive. If the Chilean jurisdiction is not exclusive, the parties may submit the dispute to a foreign court. In matters of international consumer contracts there are good reasons to consider that the jurisdiction is not exclusive, at least when it comes to civil actions arising as a result of the breach of its provisions. In fact, to qualify the jurisdiction of the Chilean courts as exclusive or necessary would contradict the differences between the classic public order and the notion of public order of protection, proper of the LPDC, which allows those solutions favorable to the interest of the consumer; to which it is added that to qualify Chilean jurisdiction as exclusive creates the risk that the Chilean forum intervention in the matter may be considered exorbitant abroad and violate the supplier's right to the natural judge, the judge of the domicile.

For these reasons, we believe that the solution that best reconciles the protective purposes of consumer law and the importance of party autonomy in international contracts is to control the validity of the choice of court clauses included in adhesion contracts; according to the standards of abusive clauses provided for in Article 16(g) of the LPDC. This control allows declaring null those clauses affecting seriously the consumer's interest and forcing him to file a civil action before a foreign court, other than the one provided for in Articles 50 A and 50 H of the LPDC. This, in cases where the international consumer contract is subject to Chilean law and as far as it is an adhesion contract. Similarly, it will also allow to consider abusive the clause forcing the consumer to waive his natural forum, in benefit of the forum of the supplier, when it is the latter who sues.

On the contrary, this control will allow validating those choices of court favoring the consumer's interest. This happens -even in the case of adhesion contracts- in those elections enabling him to appeal, before different alternative forums, provided that among them is his

domicile; or those forum elections that were particularly negotiated between the consumer and the supplier; or those agreed by the parties *ex post*, once the conflict has arisen. Finally, these abusive clauses control will allow to consider as valid all the choice of court agreements integrated in a contract of international consumption, and to limit the access of the supplier to a certain forum, if this limitation does not harm the consumer.

We believe that this solution and interpretation of the jurisdictional scope of the LPDC - which validates some cases of choice of foreign court agreements in international consumer contracts - is fairer and in line with the protection of access to justice by the consumer, and with a vision of Private International Law and international jurisdiction based on protecting people's freedom, rather than on the defense of the jurisdictional prerogatives of the State.



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