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Two Examples of Legal Transplants in Chilean Consumer Law

Dos ejemplos de trasplantes legales en el derecho del consumo chileno

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Abstract

The objective of this article is to get a first glance at the conditions under which foreign law is being adopted in Chilean consumer law. Under the assumption that legal transplants are feasible in consumer law matters, this paper looks to diagnose the way in which legal transplants have taken place in Chilean consumer law, analyzing for such purpose two laws: Law No. 20,555 and Law No. 21,236. After a documentary analysis of said laws, their track record and the technical reports of the Library of the National Congress, it is concluded that the incorporation of foreign law occurs blindly.

Keywords: *Legal transplants, Consumer law, Comparative law, Functional method, Foreign law.*

Resumen

El objetivo de este artículo es realizar una primera aproximación a las condiciones bajo las cuales el derecho extranjero está siendo adoptado en el derecho del consumo chileno. Bajo el supuesto que los trasplantes legales son viables en el área del derecho en cuestión, el presente trabajo propone diagnosticar la forma en que se producen los trasplantes legales en dicho ámbito del derecho chileno tomando como muestra dos leyes: la Ley Nº 20.555 y la Ley N°21.236. Luego de un análisis documental de las mencionadas leyes, sus historias y los informes técnicos de la Biblioteca del Congreso Nacional, se concluye que la incorporación del derecho extranjero se produce a ciegas.

Palabras clave: *Trasplantes legales, Derecho del consumo, Derecho comparado, Método funcional, Derecho extranjero.*

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INTRODUCTION

One of the main objectives of comparative law is to learn of the solutions that different foreign legal systems offer to a given problem.[1] Hence, the study of comparative law is particularly useful in the context of reform processes when there is a need to reformulate local regulations or create legal responses in connection with new material challenges. In the law creation process, the recourse to comparative law provides distinctive tools, and also allows characterizing it as part of a legal science.[2] Thus, comparative law works as an instrument for legislative change and helps us connect with a key issue in this discipline, which is the discussion around the so-called legal "transplants".

In this regard, a typical case of legal transplantation consists of a situation in which the legislator of one country enacts a new rule that largely follows the rule of another country.[3] However, in these cases, the legal transplant may not involve a single event but rather an ongoing process and may involve not only the legislator but also other actors, such as academics and legal professionals. Recently, there have also been broad discussions on the citation of foreign judgments in court rulings, which can be conceptualized as a form of legal transplantation.[4]

If it is assumed that the incorporation of foreign elements into the national legal system should follow some structure that derives from legal science and, additionally, if it is accepted that the comparative method belongs to the legal science field, then it can be concluded that the absence of a method in a given legislation process prevents projecting the possible success of a legal transplantation.

Then, the question that arises in connection with legal transplants is which countries use the comparative method and to what extent this is an issue that represents a clear gap in specialized literature given that there are no statistics in this regard.[5] What this article seeks is to get a first glance at the conditions under which foreign law is being adopted in Chilean consumer law.[6]

Under the assumption that legal transplants are feasible in the field of consumer law, this paper looks to diagnose the way in which legal transplants have taken place in Chilean consumer law, analyzing for such purpose two laws: Law No. 20,555 that modifies Law No. 19,496 (on the protection of consumer rights and which provides attributions in financial

[1] ZWEIGERT & KÖTZ (1998), pp. 15-17.

[2] MOUSORAKIS (2019), p.6.

[3] SIEMS (2022), p. 232.

[4] SIEMS (2022), p. 232.

[5] KISCHEL (2019), p.57.

[6] Following Samuel, defining comparative law is easy and difficult at the same time; it is easy in the sense that it can be defined as the comparison of legal provisions, concepts, categories and (or) institutions in one system with those of another; but it is also difficult because said easy definition is riddled with ambiguities. See: SAMUEL (2014), pp. 10-13.

matters to the National Consumer Service, inter alia,);[7] and the Law that regulates financial portability, Law No. 21,236.[8] These laws have been chosen for the way in which foreign law has been incorporated into their provisions; their different use and because there are available statutory instruments that allow us to measure their application. This will help us conclude that one of the transplants has been successful, while the other has not. The usefulness of this evaluation lies in determining whether or not there is a methodological gap and the consequences of incorporating ideas from foreign legal systems into our system.

To achieve this objective, the work will be divided into three parts. In the first section, a theoretical synthesis of the problems raised by the idea of legal transplants will be presented. In the second section, under a critical approach, the discussion will analyze the scope of the two selected laws in order to identify the signs of foreign influence and the way in which foreign law has been incorporated. The third section will consist in formulating some conclusions around the objective sought by this paper.

The central idea of this paper is to determine that the Chilean consumer legislator incorporated elements of foreign law and that in doing so it did not follow any comparative method, not even the most widespread in private law: the functional method.[9] Although the purpose of this work is not to discuss or delve into the methodological debate, it is nonetheless argued in this work that up to now the functional method is the most widespread and accepted method. Accordingly, it is recognized as "the mantra" of comparative law and acknowledged as a traditional method and, for its defenders, it is the most successful method.[10] The functional method is the starting point for almost all studies of Comparative Law.[11]

Regarding the methodology used herein and in relation to the sources used, this work consists of a documentary investigation[12] that, in order to achieve the proposed objectives, will mainly analyze theoretical sources using a mixed argumentative[13] model. This will be performed by analyzing the history of the law and the reports and opinions on foreign law that have played some role in the discussion of the selected laws.

I. THEORETICAL SUMMARY: LEGAL TRANSPLANTS AND CONSUMER LAW

There is consensus that the term "transplant" in law undoubtedly has a metaphorical root taken from medicine and is attributed to Otto Khan-Freund and Alan Watson. Both authors used organ transplantation as a metaphor to invoke the image of a legal system that

[7] Ley No. 20,555 of 2011.

[8] Ley No. 21,236 of 2020.

[9] An explanation of this method in: MICHAELS, pp. 245-389.

[10] MICHAELS (2006), 346.

[11] KISCHEL (2019), p.88.

[12] ECO (1993), p.69.

[13] DUNLEAVY (2003), pp. 63-74.

adopts rules or institutions from another legal system to implement them in the national system.[14]

Now, determining the precise meaning of the term "legal transplant" is not easy since the matter raises "more questions than answers" and more "proposals than fully agreed structures".[15] The underlying terminology is equally uncertain since the term "transplant" is associated with other concepts such as "circulation of legal models", "transfers", "receipts", "loans", *inter alia*.[16] According to Ferrante,[17] a term close to but undoubtedly different from that of transplantation is that of legal formate. Transplantation and "formate" are correlative, but different phenomena, where the latter describes different components that must be considered when analyzing a legal aspect, namely: legal rules, theoretical rules, examples provided by legal academia, rules issued by courts or the ratio decidendi of their rulings, etc. More precisely, "formate" refers to "every possible statutory variation that is made de facto, through a caselaw, theoretical or even legislative interpretation." [18]

Delving into the terminological precisions and discussions on the limits of legal transplantation with respect to other similar or related concepts exceed the purpose sought by this paper. As a starting point, a sufficiently widespread perspective has been considered, according to which a legal transplant occurs when the study of provisions or other sources of foreign law cause legislators to integrate specific provisions or legal institutions of foreign laws into national law.[19]

Notwithstanding the foregoing, it should be noted that the debates around the issue of legal transplants belong to the field of comparative law. It should be noted that comparative law should be understood as the comparison of legal provisions, concepts, categories and (or) institutions in one system with those of another.[20] Thus, following an idealistic perspective,[21] comparative law should not be confused with a simple knowledge or description of a foreign legal system or the characterization of a specific provision. Accordingly, it is characterized by the use of some comparative method.[22]

[14] CAIRNS (2013), p. 643.

[15] KISCHEL (2019), p.60.

[16] GRAZIADEL (2019), pp. 444-445.

[17] FERRANTE (2021), pp. 170 y 176.

[18] FERRANTE (2021), p. 142.

[19] KISCHEL (2019), pp. 57-59. p.15.

[20] SAMUEL (2014), p. 10.

[21] As Reimann points out, the idealistic perspective indicates that the study of foreign law is not comparative law since the latter is defined by comparison and, in the study of foreign law there is no comparison, but it is the first step of the comparative study. However, from a realistic perspective, the study of foreign law could be classified as comparative law because it involves a comparative exercise according to which comparative law researchers spend most of their time. Thus, it is easy to recognize conferences, publications, etc. under "the banner of comparative law", where no comparison is made, but rather describe, criticize, and learn from foreign systems. REIMANN (2012), p.15.

[22] FERREIRA and MORAIS (2018), p. 28.

In terms of the various possible methodological approaches to the study of comparative law, it is possible to observe the preponderance of studies in which various versions of the so-called "functional method" are used.[23] Although there is a diversity of currents and variations of this approach, its academic position finds multiple adherents, as well as detractors, where the latter direct their criticism to the fact that it would not be a "method" in the strict sense and question its deeper intellectual bases.[24] On the other hand, the idea of functionalism has different meanings in different areas of knowledge, for which reason the base concept has been subject to considerable uncertainty regarding its conceptual boundaries when analyzed from a law perspective. In this regard, law is often oriented at the achievement of pragmatic ends and thus distances itself from robust underlying theoretical foundations.

We perceive that in the process of creation of laws the use of comparative law is scarce, or non-existent. In this regard, we believe that the evaluation parameter used for resorting to comparative law has not been very demanding. To analyze this process, we will consider the functional method (the most basic and widespread of the methods) and will approach it in a simplified manner as stated by Dannemann,[25] i.e., through three scenarios: 1st a selection of the systems to be compared and the explicit reasons for said choice; 2nd the description of the relevant regulations and the context within which they operate; and 3rd a comparative analysis that highlights the relevant similarities and differences.

The comparison of the legal transplants hereby addressed places this paper under the dynamic approach of comparative law.[26] Hence, reference to legal transplants is a useful conceptual tool to study the movement of certain legal ideas from one given system to another.[27] Among other functions, comparative studies can be oriented to achieve an improvement of domestic law.[28] In this line, during the reform processes or drafting of laws they can serve as a true instrument of legislative policy.[29]

Beyond the theoretical importance of the issue of legal transplants, the study of these phenomena constitutes a contribution to knowledge, since the conditions under which a foreign legal provision is adopted in Chilean consumer law are not known, nor are the consequences of that adoption.

As can be seen, there are multiple factors that intervene in the process of adopting a foreign provision and, in turn, many factors of interest for comparative law researchers who study these processes.[30] However, the discussion revolves around the context from which the

[23] According to Siems, despite the criticism, even today many books and articles on comparative law appreciate the benefits of this approach, mainly the presumption of similarity. SIEMS, (2022), p. 31.

[24] LEGRAND (2022).

[25] DANNEMANN (2006), pp. 406 y ss.

[26] GOLBACH (2019), p. 10.2.

[27] GOLBACH (2019), p. 10.2.

[28] DAVID and UFFERT-SPINOSI (2010), pp. 5-6.

[29] FERREIRA and MORAIS (2018), p. 32.

[30] KISCHEL (2019), p.60.

provisions or legal figure (subject of the transplant) and the recipient country derive, since this operation does not take place in a "cultural vacuum".[31]

The cultural factor in comparative studies has been summarized by Husa,[32] who emphasizes that these studies naturally involve interdisciplinary research aspects associated with the idea of "legal culture", which is a concept that addresses various ways in which law and culture interact. In other words, it is an attempt to approach the law as an integral part of a culture, which obviously implies going beyond the vision of law as a mere positive rule.

Based on the importance given to the cultural factor in the comparative process (that accompanies a legal transplant), one of the theoretical opinions suggests that it is not possible to separate a provision from its context (whereby law is understood as a phenomenon rooted in a specific culture). According to the latter theoretical opinion, said consideration would result in legal transplants being impossible.[33] However, this is an extreme position, there are more moderate positions,[34] according to which autonomous transplants can be found, as well as others that can be characterized as non-autonomous. In this regard, autonomous legal transplants deal with institutions less related to their place of origin, which would make a legal transplant mostly feasible. In this sense, it is assumed that the study of comparative law presents new challenges based on the transnational nature of countless commercial transactions.[35]

Thus, a consequence of the globalization of the economy[36] is that the provisions involving property matters, for example, those that make up consumer law, are more easily transplanted, while the provisions related to matters more linked to the culture from the source system are more resistant to its reception.[37] This idea serves as the basis for the feasibility of transplants in the area of consumer law where the structural differences are less perceived given that it is a more recent and globalized area of development. Therefore, the study of legal transplants is most successful in this area where the internationalization of commercial exchanges has naturally led to more similar provisions.

There are also positions that are less connected to the cultural element, as Graziadei has pointed out, who maintains that legal transplants tend to be founded on reasons of perceived prestige and economic globalization than on cultural factors.[38]

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[31] See: HUSA (2018), pp. 129-150.

[32] HUSA (2021), p. 3.

[33] LEGRAND (1997), p. 114.

[34] GRAZIADEL (2019), p. 471.

[35] MUIR WATT (2019), p. 599.

[36] *Questions about globalisation and comparative law are particularly problematic*'. SAMUEL (2021), pp. 464-486.

[37] Thus, for example, the debates around the incorporation of the concept of trusts originating from common law in systems of the Roman-canonical tradition face the difficulty of adapting to systems that do not have an equivalent figure to that of "equity". Although it is possible performing said incorporation, it requires a profound study of comparative law to adapt such institution. BRAUN (2017), p.133.

[38] GRAZIADEL (2019), pp. 458-459.

An example of the above comes from the OECD[39] – a body to which Chile has belonged since May 2010 – which issues recommendations that, although are not binding in nature, "seek that member countries gradually improve their public policies over time, as a result of a reflective process",[40] and in this sense they push the Member States to adapt their legal system so that such recommendations can be executed, and these can have an impact on consumer law.[41] It has been argued that, as a result of belonging to this body, economic and social accomplishments have been achieved, such as the legal modifications to Law 19,496 through Law No. 20,555 (which strengthens the rights of consumers in financial matters).[42]

At this point, it is worth asking how legal transplants and the comparative law method are combined. According to the theory on legal transplants and despite adopting a functionalist perspective and assuming that legal transplants are possible, at least in consumer law, it is not easy to predict their efficacy or success. This is regardless of the notion that is defended, i.e., the strict notion of legal transplants or the flexible one that can be identified with the mere influence of an idea derived from a foreign system. However, it should be noted that the legislative exercise through which foreign provisions or institutions are adopted is closely related to the most important function of comparative law, which is to conceive it as a tool for "the creation, application and interpretation of law".[43] It is argued that comparative law is a valuable method for drafting laws, in fact, this explains its relationship with the legal method and the sources of law. The relevance of this lies in the fact that the use of a method when incorporating foreign provisions into the national legal system must follow some structure of legal science. Following a certain methodology makes it possible to forecast a certain success or effectiveness of what is intended to be adopted. Accordingly, the general criterion for adopting a legal figure involves determining if according to the "prior conditions" "fits" the legal system where it will be used, and whether it is necessary to evaluate its "compatibility".[44]

[39] The Organization for Economic Co-operation and Development (OECD) is an international organization whose "objective is to promote policies that favor prosperity, equality, opportunity and well-being for all people." Member countries: Australia, Austria, Belgium, Canada, Chile, Colombia, Costa Rica, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Iceland, Israel, Italy, Japan, Slovenia, Spain, United States, Latvia, Lithuania, Luxembourg, Mexico, Norway, New Zealand, Netherlands, Poland, Portugal, United Kingdom, Czech Republic, Slovak Republic, Sweden, Switzerland, Turkey.

[40] Report of the Foreign Relations Commission issued in connection with the draft agreement during the second constitutional reading, which approved the Convention of the Organization for Economic Cooperation and Development and its supplementary protocols numbers 1 and 2. Bulletin No. 6,818-10..

[41] On the subject, for example: Council Decision-Recommendation on the OECD Notification System on Consumer Safety Measures [C(89)106]; Council Recommendation Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce [C(99)184]; Council Recommendation on Consumer Protection in the Field of Consumer Credit [C(77)39].

[42] See: https://www.subrei.gob.cl/sala-de-prensa/noticias/detalle-noticias/2020/05/06/chile-cumple-10-anos-de-ingreso-a-ocde.

[43] VOGENAUER (2017), p. 879.

[44] SIEMS (2022), p. 298.

Thus, comparative studies have the potential to provide knowledge about pre-existing conditions and test whether there is some degree of compatibility that would allow foreseeing a successful legal transplant. Therefore, the way of predicting the outcome of a transplant would be achieved using a method. However, as will be seen in the following section, there is a certain lack of rigor in the incorporation of foreign law in the process of creating the laws.

II. How Does Foreign Law Influence Chilean Consumer Law? A Response from Two Examples

2.1 Two Chilean consumer laws

Certain Chilean legal opinion has defined consumer law as "one that deals with consumption, i.e., it regulates the situation according to which an individual acquires goods or services to use them for its own needs and not to include them as an input in business, craft, industrial or professional activities.[45] According to this definition, the essence of consumer law would be found in the notion of final recipient consumer[46] in accordance with article 1, No. 1, of Law No. 19,496[47] on the protection of consumer rights (LPDC), i.e., that which acquires, uses, or enjoys a good or service delivered by a provider defined by article 1, No. 2, also of Law No. 19,496. Accordingly, the consumer relationship under the terms of said law comprises the core of said regulation and of Chilean consumer law. The foregoing is without prejudice to situations that are not exactly included in said provisions, but that from interpretative exercises[48] or as mandated by law[49] are subject to Law No. 19,496 (LPDC). Thus, the LPDC acknowledges in its article 3, letter h), that there are other "laws that refer to consumer rights" in our legal system. This obviously indicates that consumer law goes beyond the law in question. However, given that the Chilean consumer law does not indicate which set of laws or provisions[50] also refer to consumer rights, this must be first determined by verifying the existence of a consumer relationship according to the terms described above.[51]

[45] Baraona (2019), p.4.

[46] In spite of which, as is known, the Chilean legal system, as well as in some foreign systems, in exceptional cases it is possible to extend the right of consumption to relationships between businessmen, whereby the use of the good or service is not relevant. Momberg (2013), p.11. See also: Morales (2018b); Morales (2017b).

[47] Law No. 19,496, of 1997.

[48] See: Momberg (2013), p. 7, regarding legal consumers and materials.

[49] Article 2 of Law No. 20,416 in relation to Article 9 of the same legal body, which extends the LPDC to micro and small businesses.

[50] In our opinion it could perfectly be the subject of another proposal. In order not to compromise the feasibility of this proposal, the scope of the investigation has been reserved for Law No. 19,496.

[51] Without prejudice to dogmatic discussions that are beyond the objectives of this article, namely: those related to the scope of application of the LPDC: Morales (2021), pp. 177-192; Reveco (2020), pp. 277-287; Barrientos (2019), pp.3-50; Tapia (2017), pp. 73-116; Morales (2017b), pp.329-335; Rodríguez (2015), pp. 13-14; Momberg (2015), pp. 279-287; Isler (2010), pp. 97-126; Jara (2006), pp. 21-58; Momberg (2004),

Next, two laws have been selected (which form part of consumer law) because they constitute two particularly interesting cases due to the diverse way in which foreign law is approached and analyzed and because of the different effectiveness that these regulations have had. This is Law No. 20,555 that modifies Law No. 19,496 (on the protection of consumer rights, which provides attributions in financial matters to the National Consumer Service,[52] inter alia); and secondly, the Law that regulates financial portability, i.e., Law No. 21,236.[53]

Both laws have undoubtedly come to strengthen the corpus of Chilean consumer law in the financial field considering, as expressed in the grounds that supported the respective legislative initiatives,[54] the deep information asymmetries that exist in these markets and the need to ensure the right to freely choose which financial institution to contract with. In this sense, both laws have meant progress. However, as will be seen, it is possible to draw up some significant criticism on the way foreign legal figures have been incorporated in each case. Criticism can also be directed on the impact that this form of legal transplants has on regulatory effectiveness.

To determine foreign influence in these two laws, the first thing we have done is to review the history of the law in search of any reference to foreign law; then, an attempt has been made to determine the process that precedes or surrounds these references to try to definitively elucidate what their influence was on the published law. Said investigation has concluded that in most cases the reference to foreign law is preceded by reports provided by the "Parliamentary Technical Advisory Area" (AATP) of the Library of the National Congress of Chile.[55]

As Weidenslaufer[56] has stated, the AATP is focused on preferably supporting the work of the legislative committees of both chambers, with special attention to monitoring bills. Within this framework, foreign law reports are prepared. Reference to foreign law is

pp. 41-62; those referring to the notion of consumer: CARRASCO (2021), pp. 335-348; HERNÁNDEZ (2019), pp. 3-35; FERRANTE (2018), pp. 438-467; TAPIA (2017), pp. 25-56; BARRIENTOS (2015), pp. 333-350; MOMBERG (2013), pp. 3-16; PINOCHET (2011), pp. 343-367; as well as those debates concerning the coordination between the LPDC and other regulatory bodies: BARRIENTOS (2021), pp. 113-115; DE LA MAZA (2020), pp. 83-116; MOMBERG (2019), pp. 25-45; MOMBERG (2012), pp. 377-391.

[52] Law No. 20,555 of 2011.

[53] Law No. 21,236 of 2020.

[54] See: History of Law No. 20,555. First constitutional reading. Presidential message. Date: July 30th, 2010. History of Law No. 21,236. First constitutional reading. Presidential message dated August 5th, 2019.

[55] "ATP is a multidisciplinary team of specialized analysts and reference experts, which technically and opportunely supports, and in an interdisciplinary and impartial manner, the legislative, representation and oversight functions of the National Congress. The services are provided at the request of the parliamentary community and in a proactive manner." Available online: https://www.bcn.cl/concurso_publico_historico/que-es-atp. Specific parliamentary advisory services can be found at the following link: https://www.bcn.cl/asesoriasparlamentarias/

[56] WEIDENSLAUFER, C. (2021) "El Derecho Comparado en el proceso legislativo chileno". Lecture delivered within the framework of the Permanent Seminar on Comparative Law of Pontificia Universidad Católica de Chile, on July 20th, 2021. Christine Weidenslaufer is an advisory lawyer and researcher at the Library of the National Congress.

determined in turn by the requests of members of parliament. The AATP's response is limited to the framework given by the specific requirement. The advice provided by the AATP in the field of Comparative Law is included in the legislative process or in the internal regulations of the chambers. In this regard, the lack of statutory continuity has resulted in the lack of uniformity in the process – in addition to other problems that will be analyzed later – , which is a situation that prevents an adequate evaluation of the impact of the reports issued by the AATP.

2.1.1 Law No. 21,236 (financial portability)[57]

Early in the processing of the Law that regulates financial portability, reference was made to French, Spanish, Italian and Mexican legislation[58] as experiences that demonstrate "a recent trend" in foreign law.[59] In terms of sanctions for non-compliance with the regulations, US legislation was cited, where the sanction provided for in the Sherman Act[60] was proposed. Said antitrust law of the United States of America of 1890 sanctions with a fine that is calculated based on the benefits, as well as the losses or damages caused by the infringement."[61] This proposal was not accepted; in turn, the existing fine applicable to infringements was maintained and thus the general rule provided for by Chilean consumer law. The case of England has also been cited specifically regarding financial portability as a good example of healthy competition between banks.[62] However, only the case is named, and no details can be found in connection with the regulation to which reference is made, nor is it explicitly stated whether it was considered as a reference point or not.

A more detailed reference was made to the Spanish and Mexican legislation during a full parliamentary discussion. Indeed, the Economic Commission of the Chamber of Deputies asked the AATP to review foreign laws that especially regulate financial portability.[63] Based on said request, the respective regulations of the Mexican and Spanish systems were informed, since these systems have recently modified their regulatory frameworks on the matter to make it more flexible and facilitate portability.[64] In the cited report, the selected systems were briefly described and analyzed. Some valuable observations

[57] This advice can be reviewed online: https://www.bcn.cl/asesoriasparlamentarias/detalle_documento.html?id=75280 (Consultation date: 01/11/2022).

[58] Another reference to Mexico: Alejandro García Huidobro. History of Law No. 21.236. Second Constitutional Reading. Parliamentary discussion. November 26th, 2019.

[59] History of Law No. 21,236. First Constitutional Reading. Economic Commission Report. October 23rd, 2019, p.36.

[60] Sherman Act of 1890.

[61] History of Law No. 21,236. Second Constitutional Reading. Second Report of the Economic Commission. May 5th, 2020, p. 116.

[62] History of Law No. 21.236. Third Constitutional Reading. Parliamentary discussion. May 26th, 2020, p. 15 and 16.

[63] See History of Law No. 21,236, online: https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/7757/.

[64] Parliamentary Technical Advisory. Report for the Economic Commission of the Chamber of Deputies. October 2018. Cabrera, Fabiola and Wilkins, James. Bank Portability in Spain and Mexico.

can be made from what is provided in said report and which are valuable for the work described herein.

In the first place, the factor that – apparently – led to selecting the systems in question was the novelty elements that characterized said systems. The report on financial portability selected the Mexican and Spanish systems because they had "recently" modified their regulatory frameworks on the matter. Secondly, neither the AATP report nor the parliamentary discussion carried out a comparative exercise that was left on record. What exists is a description of the portability regulation in each system. Then, in an ex post comparative analysis that compared the selected foreign experiences with the law published in our legal system, imported elements of both foreign experiences can be clearly recognized. Such is the case of the scope of application of financial portability or the subrogation effect. It should be noted that both financial portability and the subrogation effect have modifications that, according to a certain typology of legal transplants,[65] have allowed them to adapt to our legal system.

Indeed, in the case of Spanish law,[66] banks, official credit institutions, savings banks, credit cooperatives, and financial credit establishments are subject to portability. Accordingly, Spanish law regulates mortgage loans in a different manner when compared to payment accounts. Meanwhile, Chilean law indicates that providers, i.e., "any bank, insurance company, mortgage loan administrator, family allowance compensation fund, savings and credit cooperative or institution that places funds through massive money credit operations (...)" [67] is subject to portability. In other words, financial portability involves a broad subjective scope of application and similar to what is currently in force in Chile, however, Spanish law distinguishes between mortgage loans and payment accounts, a distinction which cannot be found in national regulations given that it regards a distinction that makes sense at the community level.

Another statutory example that shows adaptation features is the Mexican system. In this regard, mortgage portability (with subrogation effects) eliminates the requirement of having to need a public deed to formalize this legal figure. To the contrary, Chilean law requires that credits guaranteed by one or more guarantees in rem be recorded in the registrar system. In this same line, Chilean law requires that the new credit must also comply with the legal formalities that are required for the granting of guarantees in rem and are mandatory for recording the respective special credit subrogation.

[65] Margit Cohn speaks of the result of a transplant according to its degree of conformity with the original provisions. Hence, the success of a transplant can be evaluated according to the degree of reception in the importing country; Cohn classifies transplants between those that achieve "full convergence", i.e., "if legal transplants operate by adopting the provisions or institution identical to its origin"; she also classifies them with decreasing degrees; the typology goes from "fine tuning" to different transformations methods and adaptations up to those cases in which there is distortion and mutation, or a total rejection. COHN (2010), p. 592.

[66] Law 2/1994, Spain.

[67] Article 3, No. 9, of Law No. 21,236.

The foregoing suggests that the aforementioned AATP report has been taken into account, despite the few references made to it and to the comparative experience in the parliamentary discussion of the bill. However, it is noted that the report was formally incorporated into the legislative discussion; it was thus included in the records of the parliamentary discussion, and there is proof that its content was considered. According to these backgrounds, it can be concluded that financial portability is in vogue, which is evidenced by the allusions to the Italian, French, Spanish, and Mexican experience.[68]

Regarding the effectiveness of this regulation, it can be classified as successful. As reported by the Commission for the Financial Market (CMF) in terms of the use that has been made of it, it is possible to note that between September 2020 and October 2021, more than 300,000 requests for financial portability have been submitted in accordance with Law No. 21,236.[69] However, the solution taken from foreign legal experience and later adapted to our legal systems has given rise to a legal figure of a confusing legal nature, which has been called "special subrogation".[70] Its confusing legal nature arises due to its proximity to the personal subrogation figure, which is a legal figure regulated in our Civil Code.[71]

2.1.2 Law No. 20,555 that modifies Law No. 19,496 (Law of the Financial SERNAC)

During the processing of this law, several references to foreign law were made. Indeed, the history of the law indicated that reference was made to the United States and the United

[68] This is a bill that arises from a presidential message and that does not make any reference to foreign law.

[69] See Statistical Report on Portability as of October 2021 from the Financial Market Commission. Available at: https://www.cmfchile.cl/portal/estadisticas/617/w3-propertyvalue-44004.html (Date of consultation: 01/11/2022).

[70] "It is the process by which the customer takes a new credit with a new provider in order to pay a credit that the customer maintains with an initial provider, thereby producing a special credit subrogation (article 4, paragraph 1)." GONZÁLEZ (2021), p. 181.

[71] This has been highlighted by Goldenberg: "However, from the previously transcribed regulations of the Financial Portability Law, it does not seem to configure a personal subrogation, but rather an enigmatic subrogation in rem. This situation was even presented in the Presidential Message of the bill as well as in the indication presented by the Executive before the Economic Commission of the Senate. (…). In this way, and as clearly expressed in article 3 of the law, the new credit occupies the legal position of a previous one, which, as a result of the payment, is extinguished. Thus, unlike the cases of civil law subrogation, in which the credit is "transmitted" to the third party (article 1608 CC), here the original credit is definitively extinguished as a result of the payment, however, the position that it has left empty is occupied with the new credit. To the contrary, "subrogation in rem" takes place when an asset happens to occupy the position of another, but always in the same estate." GOLDENBERG (2020).

Kingdom;[72] Spain;[73] France and Mexico,[74] and to "Nordic Countries".[75] It is also possible to note that in the context of the processing of Law No. 20,555, the AATP unit at the request of the Economic Commission of the Chamber of Deputies[76] was asked to prepare a report on Financial Consumer Protection.

The report presented by AATP described the US reform on the matter (Dodd-Frank Wall Street Reform and Consumer Protection Act),[77] whose purpose was aimed at strengthening and consolidating legislation and consumer protection functions for financial products and services. One of the important aspects of this regulation involved a reform of the current institutional framework, creating a specialized body known as the Consumer Financial Protection Bureau (CFPB); while a second pillar was aimed at strengthening the catalog of consumer rights for financial products and services. In Chile, for its part, as of the date of preparation of the report, the bill known as financial SERNAC was under legislative discussion.

In summary, what this report does is describe the reform process of this law in the United States, providing insights on its legislative background and relevant opinions during the legislative discussion and compares it with the Chilean bill. From this comparison, the main differences between the US law and the Chilean bill were highlighted. For example, the fact that in Chile, unlike the US, a new institutional framework would not be created, but special powers in that area would be given to the competent body (SERNAC). In the field of rights, in principle the bill did not grant new rights to the consumer, although the published law did end up expanding the catalog of rights, strengthening especially those of the financial consumer.

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[72] History of Law No. 20,555. First Constitutional Reading. Economy Commission Report. Chamber of Deputies. Date: November 8th, 2010; History of Law No. 20,555. First Constitutional Reading. Chamber of Deputies. Date: January 17th, 2011. Report of the Finance Commission in Session 127. pp. 69 and 70; History of Law No. 20,555, First constitutional reading. Chamber of Deputies dated May 4th, 2011. Session Diary, Session 15. Legislature 359. General Discussion, p.42.

[73] History of Law No. 20,555. First Constitutional Reading. Parliamentary discussion. Date: January 19th, 2011, p. 81; History of Law No. 20,555. Second Constitutional Reading. Second Report of Joint Commissions. Senate. Date: October 19th, 2011, p. 145; History of Law No. 20,555. Third Constitutional Reading. Parliamentary discussion. Date: November 9th, 2011, p. 16-18; History of Law No. 20,555. Date November 9th, 2011. Session Diary, Session 106. Legislature 359. Single discussion. Pending, p. 30.

[74] History of Law No. 20,555. Second Constitutional Reading. Second Report of the Economic Commission. Senate. Date: August 31st, 2011. Report of the Economic Commission in Session 64. Legislature 359, page 86.

[75] History of Law No. 20,555. Second Constitutional Reading. Second Report of United Commissions. Senate. Date: October 19th, 2011. Report of United Commissions in Session 64. Legislature 359, page 173.

[76] It should be noted that this was a bill presented by the executive where no reference to foreign law is made in the presidential message and no reference to this report is found in the parliamentary discussion, although its influence seems evident.

[77] Available at: https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf.

It should be noted that this was a bill presented by the executive where the presidential message does not refer to foreign law. Then, if the parliamentary discussion is reviewed, there is no reference to this report either, although, as will be seen, its influence seems evident.[78]

Indeed, Law No. 20,555, through which the reform was carried out, incorporated a series of special consumer rights in financial matters. Upon comparing the published legal text, it can be inferred it followed the US experience. However, it differs from US legislation given it incorporated the so-called "Sernac Seal". The effectiveness of this modification can be divided into two parts. The first refers to the special rights of the financial consumer, and the other is related to the "Sernac Seal".

The legal effectiveness of having incorporated into our legal system special rights of the financial consumer has been relative. The published statistics show that claims in financial matters have decreased since the publication of Law No. 20,555,[79] and consequently there are few collective proceedings[80] that have ended successfully (which sought the protection of consumer rights in this matter). From both data one could infer that the reform had relative success in terms of strengthening the rights of consumers in financial matters when compared with the previous situation.[81]

Regarding the "Sernac Seal", described as "a voluntary mechanism established for the certification of adhesion contracts for financial products and services",[82] it has been criticized for presenting a deficient design for the interests of providers. This, since the strict submission to said procedure is not a guarantee of legality and, therefore, does not prevent the judge from reviewing the contracts that have the seal.[83]

[78] History of Law No. 21,236. First Constitutional Reading. Presidential message dated August 5th, 2019.

[79] To consult the evolution of complaints from the financial market and financial sub-markets during the first half of 2010 to the first half of 2018, see National Consumer Service, *Ranking de Mercado Financiero y sub-mercado bancario: primer semestre 2017 a primer semestre 2018*, pp. 6-7, available at https://www.sernac.cl/portal/619/articles-54825_archivo_01.pdf.

[80] As proof of this, of a total of 17 collective proceedings initiated by Sernac since 2012, only 2 of them deal with financial consumer rights and only one of them has a favorable ruling. See on online: https://www.sernac.cl/portal/609/w3propertyvalue59115.html#recuadros_articulo_1395_group_pvid_66422. Judgments on financial consumer rights: Sernac v. Hites (2013); Sernac v. Financiera La Elegante (2019).

[81] Thus, the presidential message of the law states the following: "during 2009 the National Consumer Service received approximately 328,000 consultations and 170,000 complaints. Of the latter, 27% corresponded to the financial and insurance services sector, and 26% to the telecommunications sector. In other words, more than half of the claims handled by said Service are concentrated in markets regulated by special laws.". First Constitutional Reading. Chamber of Deputies. Message. Date: July 30th, 2010. Session 58. Legislature 358, p. 4.

[82] ARANCIBIA and MORALES (2022).

[83] In this sense: MORALES (2018a), p. 203; ARANCIBIA and MORALES (2022).

This has meant that, in practice, the SERNAC Seal has resulted in a complete failure.[84] It is a mechanism that, from its entry into force to date, has been totally ineffective.[85]

It is worth mentioning that this part of the reform was not taken from foreign legislation as provided by the report of the AATP unit. Apparently, it was an adaptation that totally distanced itself from foreign models[86] or, simply, an original creation, since there is no record in the history of the law that provides that it involved a legal transplant.

III. CRITIQUES AND CONCLUSIONS

The first conclusion that flows from the previous section is that a brief sample can reveal that foreign law was indeed an input that the legislator used to create and modify financial consumer law.

Similarly, what can also be pointed out is that legal transplants in Chilean consumer law do occur.

Yet these transplants occur through scattered and succinct references to foreign law in various stages of the law-making process. As was noted, this occurred either during the parliamentary discussions or through reports requested from the Parliamentary Technical Advisory Area. These latter reports are more complete, are prepared by experts and have been incorporated into the legislative process as relevant documents. Nonetheless, it should be noted that these documents are not always incorporated in the history of the law. However, to date these texts can be consulted on the website of the National Library of Congress.[87]

Given that the other references to foreign law in the legislative process consist only of mere references, for the purposes of this work it has been interesting to review the AATP reports to determine if the Chilean consumer legislator has incorporated elements of foreign law and which method it used when doing so.

As mentioned, the most widespread method was taken as a reference, i.e., the functional method. This method follows the following structure: 1st the comparative study starts from a presumption of similarity, based on which legal systems respond to legal problems in a similar way, and that is what allows the comparison; 2nd then, all research in the field of comparative law must ask a question; 3rd immediately, to develop the comparative analysis[88] the reasons for the selection of the systems to be compared must be explained, after which 4th a description of the relevant provisions and the context within which they operate

[84] As of August 18th, 2022, only 4 applications for the Sernac Seal were submitted since the entry into force of the Law. Of those 4, 3 were rejected by Sernac for not meeting the requirements of numbers 1 and 2 of article 55 of the LPDC, and the fourth was withdrawn by the supplier requesting the seal. Ordinance No. 6169 of the National Consumer Service, response to the Request for Access to Public Information, dated August 18th, 2022.

[85] In this regard, *inter alia*: GASPAR (2013); ARANCIBIA and MORALES (2022).

[86] In Margit Cohn's typology it would be a great distortion that results in a total rejection. COHN (2010), p. 592.

[87] See: https://www.bcn.cl/asesoriasparlamentarias.

[88] DANNEMANN (2006), pp. 406 *et seq*.

in each of the selected legal systems must be made to finally, 5th comparatively analyze the solutions of the legal systems that are subject of the comparison. This exercise should conclude with the elaboration of conclusions to adopt an adequate policy for domestic law, which may imply a reinterpretation for the system itself.[89]

It is easy to notice that the reports briefly reviewed in section II did not follow the functional method. In both cases a brief presentation of foreign law regulations is made, however, in only in one of the two (Law No. 20,555) reports one can see a possible comparison. However, this comparison is an isolated exercise that does not comply with the other steps of the so-called functional method explained above.

When speaking about legal transplants, what is relevant addressing are the reasons that led to selecting the legal systems and that served as inspiration for the aforementioned laws. From the review of the two reports, it is concluded that there is no predominant or common factor that has determined the selection of the systems. Indeed, one of the two cases (Law No. 21,236) was considered a novelty within foreign law. Indeed, the report on financial portability selected the Mexican and Spanish systems because these systems have "recently" modified their regulatory frameworks on the matter, however, without evaluating the effectiveness or success of the revised solutions. In summary, none of the reports makes explicit reference to the prestige of the foreign system, the impact of the foreign law under analysis, or its effectiveness in its country of origin, which is an important drawback for this purpose. This is an important factor that has been considered by comparative law researchers when referring to legal transplants.[90] In this sense, for example, Zweigert and KÖTZ,[91] suggest that when a proposal is made to adopt the solution of another system that is considered better, it is convenient to ask two things first, "has it been satisfactory in its country of origin?" and, second, "will it work in the country that proposes its implementation?". In this sense, the selection of a successful experience answers at least that first question.

It is noteworthy mentioning that no copy or record of provisions or institutions was found in none of the cases reviewed. In this sense, it seems appropriate to reject a legal transplant that has copied a foreign provision or institution without further analysis. Experience has shown that if a provision or institution is transplanted by means of a copy, without the respective adequacy of the same to the national system, it is likely that said legislative change will fail or will have some pernicious consequence for the system.[92] In this line, the Chilean Civil Code has been given as a good example of legal transplantation. It has been argued that it is not a copy, but an adaptation, where Bello studied and adopted foreign law, using French law as a source of inspiration. Thus, it is said that comparative law was one

[89] ZWEIGERT and KÖTZ (1998), p. 6.

[90] GRAZIADEL (2006), pp. 458-459.

[91] ZWEIGERT and KÖTZ(1998), p. 17.

[92] Examples of this there are numerous. As noted previously, there is a case involving a reform in English Law related to abusive clauses, where Directive 93/13 was fully copied. This produced a problem of regulatory overlap with the existing regulations. See: MORALES (2017a), pp. 281-304.

of Bello's tools to find the best reformulation of the rules of Roman law contained in foreign law.[93]

Therefore, according to Tallon[94] and comparative law, a legal transplant does not involve a foreign legal figure that can be easily copied. Instead, it involves nurturing ideas from a careful study of similar foreign legal figures and making a reasonable transposition of those that can be retained in accordance with local conditions.

In summary, the findings obtained from the analysis carried out in this article are the following:

- From the sample analyzed, it is possible to presume that there is no method that governs the incorporation of foreign law into national law within the framework of the law creation procedure;
- The influence of foreign law in the creation of the law is usually channeled through reports issued by the Parliamentary Technical Advisory Area, without this being regulated;
- These foreign law reports are governed by the framework given by parliamentary requests and do not select the systems analyzed above based on any predominant criteria but rather ad-hoc;
- Given that the incorporation of foreign law is not based on any accepted method, its incorporation is uncertain;
- There is a legal vacuum in the law creation procedure, which could well be supported by Comparative Law.

Based on the foregoing, it is inevitable to think that the examples analyzed are simply brief studies of foreign law, but not legal transplants that use some comparative method (not even the most widespread and traditional of all). Said in a more categorical way, the findings lead to presume that in Chile the incorporation of foreign law occurs blindly.

[93] KLEINHEISTERKAMP(2019), pp. 275-276.

[94] TALLON (1969), p.266.

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