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Amendments to Consumer Rights Protection Law

Law No. 21.081, published in the Official Chilean Gazette on September 13th, 2018, amended various matters of Law No. 19,496 on Protection of Consumer Rights (hereinafter LPDC), in order to strengthen such rights. In general, the aforementioned reform will become effective on March 13th. However, some of its provisions will become effective deferred in different regions of the country.

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Chile:
Reforma Ley sobre Protección de los Derechos del Consumidor

A través de La Ley N°21.081, publicada en el Diario Oficial el 13 de septiembre de 2018, fueron introducidas diversas modificaciones a la ley sobre Protección de los Derechos de los Consumidores (en adelante LPDC) con el objeto de fortalecer tales derechos. En general, estas reformas entrarán en vigencia el 13 de marzo de 2019. Sin embargo, algunas de ellas lo harán de forma diferida en las diferentes regiones del país.

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Amendments to Consumer Rights Protection Law

Estudio Jurídico Otero

Chile

Law No. 21.081, published in the Official Chilean Gazette on September 13th, 2018, amended various matters of Law No. 19,496 on Protection of Consumer Rights (hereinafter LPDC), in order to strengthen such rights. In general, the aforementioned reform will become effective on March 13th. However, some of its provisions will become effective deferred in different regions of the country.

The main amendments introduced are:

I. New powers are granted to the National Consumer Service (SERNAC)

1) Supervise the proper enforcement of LPDC and all the regulations for the consumer rights protection. In order to do that, the service officials will be authorized, to enter properties in which activities are being monitored, take records, request documents, prepare minutes and, in general, proceed with the execution of any other measure tending to establish records of the status and circumstances of the audited activities. During the inspection procedures, the suppliers and their representatives must grant the necessary facilities to carry out the inspections and may not refuse to provide the required information within the scope of the audit. The unjustified refusal to comply with the requirements during the enforcement actions will be punished with a fine of up to 750 UTM and the SERNAC may request the assistance of the public force.

2) Administrative interpretation of the regulations of the consumer rights protection law. These interpretations will only be obligatory for Service officials.

3) Recommend to the President of the Republic, the enactment, amendment or repeal of legal or regulatory precepts insofar as this is necessary for the adequate protection of the consumers' rights.

4) Summon the legal representatives, administrators, advisors and dependents of the entities subject to its control in order to declare. In case of failure to appear without plausible justification, the competent local police court may order an arrest.

5) Ensure compliance with legal and regulatory provisions related to the protection of consumer rights and take part in cases that may involve the general interests of consumers, following the procedures established by the general rules or those indicated in special laws.

II. Substantial increase in fines

Depending on the area of business or on the conducted actions, the fines may be increased. Previous to the amendment of the law, the highest fines were set at 1,000 UTM (approximately 71.500,00 dollars). After the reform the fines could reach up to 2,250 UTM (approximately 161.500,00 dollars).

Also, mitigating and aggravating circumstances are established. This circumstances must be analyzed and indicated as the basis for the ruling or verdict that imposes a fine.

Mitigating circumstances are:

- ✓ The implementation of substantive mitigation measures.
- ✓ Self-report providing accurate, truthful and verifiable information that allows the initiation of a punitive procedure.
- ✓ Substantial collaboration provided by the offender before or during the punitive administrative procedure or provided in the judicial proceeding.
- ✓ If the offender has not been previously convicted for the same offense within the last 36 months, and in the case of micro or small business, within the last 18 months.

Aggravating circumstances are:

- ✓ If the offender has been previously convicted for the same infraction within the last 24 months and for micro or small business, within the last 12 months.
- ✓ Causing a serious patrimonial damage to consumers.
- ✓ Damaging the physical or psychological integrity of consumers or, in a serious way, their dignity.
- ✓ Putting the safety of consumers or the community at risk, even if no harm has been caused.

In the case of infractions that affect the collective or diffuse interest of the consumers, the court will graduate the fine according to mitigating and aggravating circumstances and the number of affected consumers. The court may, alternatively, apply a fine for each of the afflicted consumers, provided that they are infractions that, because of their nature may affect each of them, with an absolute limit of fines of 45.000 UTA (roughly 38.700.000,00 dollars).

III. Incorporation of the Voluntary Procedure for the Collective or Diffuse Interest of Consumers Protection

This procedure, which aims to reach an agreement with the Provider, is voluntary, administrative and will be managed by a specialized sub-direction of SERNAC. The procedure will be initiated by ex officio resolution of the SERNAC, by request of the supplier or by a complaint made by a consumer association. The maximum duration of the procedure will be 3 months, extendable for another 3 months. The SERNAC will dictate a resolution if an agreement is reached with the provider and will establish the obligations of each of the parties. For the agreement to have effect, it must be approved by the Civil Judge.

IV. Injury Compensation for suspension of basic services

In cases of suspension, paralysis or unjustified non-provision of basic services, the provider shall compensate directly and automatically to the affected consumers for each day without supply with an amount equivalent to 10 times the average daily value of the invoiced in the bill prior to the respective suspension. This amount must be deducted from the following statement.

Each time the service has been suspended, paralyzed or not rendered for 4 continuous hours or more within a period of 24 hours counted from the initiation of the suspension, it will be considered as a day without supply. This compensation will only take place in those cases in which the respective special laws have not set a minimum compensation.

V. Increase in statute of limitations

The statute of limitations for actions for damages caused by the LDPC is increased from 6 months to 2 years, and the term is calculated from the termination of the infringement.

The civil actions will prescribe according to the norms established in the Civil Code or special laws (5 years if there is a contract, and 4 years if there is none).

The fines imposed for such contraventions shall be prescribed within one year.

VI. Modifications to the procedures of the LPDC

1) In the case of procedures of individual interest, the previous rule was that the competent Local Courthouses will be the ones located in the place where the contract was concluded, after the amendment, the competent Courthouse will be, at the consumer's choice, the one corresponding to his domicile or to the provider's address.

2) In Class Actions:

✓ The compensations determined in class actions may be extended to moral damages whenever the physical or psychological integrity or the dignity of the consumers has been affected.

✓ In qualified cases, the judge may order as a precautionary measure that the provider temporarily cease to collect charges whose provenance is being challenged at trial.

✓ Consumers affected in any case may testify as witnesses without being affected by impartiality desqualifications.

✓ The accused suppliers will be forced to hand over to the court all the requested documents. If the supplier declines to provide the information and the judge considers such refusal as unjustified, the court is enabled to declare all the plaintiff's claims related to the content of such documents as "proven".

When is the distribution of dividends obliged?

ILP Abogados

Spain

Until now, the distribution of dividends depended on a general meeting without any limitation. Limitations apply to the reform of article 348 LSC. When is the obligation to distribute dividends? What happens if that obligation is breached?

The abstract right to distribute profits is specified in the right to the dividend. And it materializes because the board agrees. The distribution of dividends, in principle, is within the free business initiative and freedom of the enterprise.

But conceptually, the distribution of dividends does not operate in the same way in a listed (open) company, as it does in a non-listed (closed) company. In the listed company, there is a permanent divestment market. In the unlisted, the partner has been held hostage by the majority.

Why has the minority been held hostage by the majority?

1. As we will see, the minority are the last to be paid in case of liquidation. They occupy the last place in the liquidation process.
2. In addition, there are serious difficulties in disinvesting in unlisted companies.
3. And finally, dividends depend on the decision of the majority.

For these three factors, it is appropriate to protect the minority partner from the abuse of the majority. For this reason the legislative change has taken place.

What happens if the obligation to distribute dividends is not met?

That “the member who has voted in favour of the distribution of social benefits shall have the right of separation in the event that the general meeting does not agree on the distribution as a dividend of at least one third of the benefits of the exploitation of the object social benefits obtained during the previous fiscal year, which are legally distributable”.

Additionally, the modification is established with absolute character; no real or imminent solvency problems can be claimed.

Does this lead to abuses of the minority over the majority?

It is possible, although it will be time and jurisprudence that will determine the answer.

Subjective scope of the application:

Excluded listed companies (different distribution policy). These are companies listed based on article 495 LSC, those corporations whose shares are admitted to trading on an official secondary securities market.

These include:

- Limited or limited companies (closed companies)
- MAB Companies (Alternative Stock Market). Due to the wording of the 495 LSC, they are not considered quoted, since the standard does not make a qualification. Therefore, in principle

they would be included. We emphasize that in this area the greatest attention should be given.

Imperativeness of the precept

Article 348 bis is considered imperative, since it does not refer to the statutory forecast at any time.
Therefore, the renunciation of this right of separation would not be statutorily available.
However, one would think that an express waiver of this right would be admissible with unanimous acceptance of the partners.

Requirements:

- Temporary requirement of five (5) years from the registration of the company in the commercial registry. These five years are undistributed results, with the decision being taken in the sixth year.
- A repeated denial is not required. It is enough that in a single exercise it is not distributed so that this separation right can be generated.
- No agreement of the general meeting of distribution of a third of the benefits as dividends. Here, we are facing a non-agreement, in which the general meeting does not support the distribution. We specify that it is a refusal to distribute the legally established third, not being applicable to other concepts, that are not dividends.
- Legally distributable benefits. These must be distributable benefits, excluding legal reserves, loss compensation and any other concept that is not a dividend.
- Voting in favour of the member of the dividend distribution (Judgment of the Provincial Court of Barcelona of March 26, 2015)

Basis of calculation of that percentage

Here, we are facing the benefits of the exploitation of the social object.
But to all the benefits? Or only to those of the social object? Or also the extraordinary or atypical ones?
In principle one would think that the atypical results would have to be eliminated. However, a non-peaceful issue will be outlined jurisprudentially.

Uncertainties associated with the right of separation

According to what is established in 348 bis, there is an obligation to distribute a third, which could lead to a decapitalization of the company. So could you choose a distribution method that is not in money (in kind)?

What happens if there is no agreement about the value of the shares?

You would have to go to an auditor and that would entail at least three harmful consequences for the society.

In the first place, there would be some costs (economic and human resources) associated with the audit.

Second, a contingency situation would affect financing, investment, disinvestment, merger, or any structural modifications.

The third option is a dangerous approach.

And what about the social creditors?

Let's analyse this question "a la gallega", that is, with four other questions.

- *First,* what happens in a situation of future insolvency?
- *Second,* has there been a prevalence of partners over creditors?
- *Third,* Can the insolvency have been generated by having to facilitate the exit to the minority partner?
- *Fourth,* to what extent is a treasury tension not imposed on the society to the detriment of creditors?

This modification is still very recent. It will be Jurisprudence that will help it mature.

Do German Companies comply with Data Protection Regulations?

ILP Global Mertens Thiele

Germany

On 27 September Bitkom (Association of the German Information and Telecommunications Industry) published a representative survey of 502 companies with more than 20 employees, representing different business areas.

After four months of implementation of the new European regulation on data protection, it is interesting to know the level of compliance of German companies with the European regulation.

The study shows that ...

Only a quarter of German companies have successfully completed their compliance with current legislation. And 40% have made major changes but have not completed their compliance.

The balance sheet is worrying,

> "Many companies have clearly misjudged the implementation of the DS-GVO. For others, full implementation is probably not a time problem, but an ideal that cannot be achieved at all," said Susanne Dehmel, general manager of law and security at Bitkom. "Apparently, many of them have only become aware in the course of reviewing and adapting their processes of the delay they have in data protection. ".

Most of the companies questioned talk about the difficulty of including the mandates of European law in a company that is also still operating, work activities continue and data protection involves not only a lot of documentation, but new processes that are difficult to reconcile with the daily routine of the company.

Almost all companies (96%) therefore demand that the new standards be improved. 83% demand that the information obligations of the basic data protection regulation be more practically oriented. The obligation to appoint a data protection officer is only a cause for complaint for one third of companies. 63% of the companies surveyed also state that the DSGVO complicates their business processes.

But the current situation may become even more complicated when the "ePrivacy Regulation" is published.

In addition to the basic data protection rules, companies will soon have to adapt to another set of data protection rules, the so-called ePrivacy Regulation. This regulation is intended to complement the data protection regulation in the electronic communications sector and is currently being negotiated at EU level. The Regulation aims to create a level playing field for different communications providers.

Four out of ten of the companies questioned think that this could lead to the collapse of the online advertising market in Europe. And 8% already say that the ePrivacy Regulation prevents innovation. Endangering the new business models in the area of Internet and Artificial Intelligence.

But to find this out we will have to wait until the regulation is in force.

New obligation to publish on the Electronic System of Publications of the Ministry of Economy notices and registries related to assignments, subscriptions or cancellation of shares or social interests, of corporations or limited liability companies

Bitar Abogados

Mexico

On June 14 of the current year, a decree was published on the Federal Official Gazette in which a second paragraph to article 73, as wells as a second and third paragraph to article 129, of the General Law of Business Corporations (Ley General de Sociedades Mercantiles **"LGSM"**) were added. This reform will become effective six months after the day after its publication, in accordance with its only transitory article, meaning the next December 15 of 2018.

In that regard, from the day the decree becomes effective, in accordance with article 73 of the **LGSM**, Limited Liability Companies will also have the obligation to maintain a special corporate book in order to keep a record of information of the partners including their names and addresses, contributions, and assignments of social interests made by them. Also, they shall publish a notice on the Electronic System of the Ministry of Economy, as this registry will not be effective with third parties until its publication.

Corporations, in terms of article 129 of the **LGSM** consider as owner of the shares whoever appears with that character on the Shares' Registry. In that regard, the corporation must register on said Registry, as requested by anyone entitled, any assignments.

It is important to point out that the registry referred in the previous paragraph shall be published on the Electronic System of the Ministry of Economy, which will make sure that the general information of the shareholder is kept confidential, unless there is an request from the judiciary or administrative authorities to disclose said information if deemed necessary for the adequate exercise of their attribution in terms of the law.

Said change to the **LGSM** aims to establish the obligation of Corporations and Limited Liability Companies to publish a notice on the Electronic System of Publications of the Ministry of Economy of all the registries made by them in their corporate books, as well as the assignments, subscriptions or cancellations of shares or social interest made on such corporations.

In that regard, is important to note that the legislator did not took into account in said decree, specifically on the addition of the second paragraph of article 73 of the **LGSM** that applies to Limited Liability companies, the obligation to keep the personal data of the partners confidential, which could generate uncertainty about the publication of the general information and the actions performed by the partners during their daily operation on the company. Therefore, a comprehensive interpretation with article of 129 of the **GLBC** shall be made, in the way that it is understood that the Ministry of Economy shall keep the information of all registries made on the Corporate Books undisclosed.

By: Juan Antonio Lainé Güereña

Mutual agreement for recognition of foreign professional degrees

Estudio Jurídico Otero

Chile

On July 23th, 2018, National Decree 113 was published in Chile's Official Gazette, about a Mutual Agreement between Chile and Spain for recognition of a foreign academic degree. In addition, on August 29th, 2018, The Resolution 3.866 from National Ministry of Education was published, which regulates the procedure that has to be done for those titles to be recognized and valid in Chile.

With this agreement, the old procedure for the recognition of academic degrees that previously operated for both nations was replaced, finishing with a strenuous process that was an important barrier to practice a profession legally in the other country. Actually, in Chile there are two ways to obtain a recognition of a professional degree gained abroad. The first alternative is applied when the degree has been granted by a country that already has a treaty on that kind of subject. Otherwise, the procedures for revalidation and recognition of a professional degree must take place at the University of Chile.

It is worth mention that Chile has this kind of treaties of professional degree recognition with Brazil, Colombia, Ecuador, Peru, Uruguay, Argentina and now, joining Spain. In addition, there is a multilateral treaty that applies for recognition of a professional degree obtained in Bolivia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Peru.

When a recognition of a professional degree takes place, these grades have the same validity as in the educational system where they were obtained, in accordance with the legal system of that country, provided the requirements of the respective treaty. Nevertheless, in case that an agreement could not be applied for a special reason, the recognition and revalidation procedure must be carried out at the University of Chile.

Among the requirements that must be fulfilled for the recognition of an academic degree with Spain, which recently came into force, we can highlight the following:

a) In Chile, the academic degree must be granted by a University that has an accreditation of the National Accreditation Commission (CNA in Spanish) or accrediting agencies authorized by it. In Spain, with a publication in the Official State Gazette, after verification by the Universities Council and a report from the National Agency for the Evaluation of Quality and Accreditation (ANECA in Spanish), or from the evaluation agencies that depend on the Autonomous Communities authorized by the Spain's regulations.

b) The title, diploma or academic degree granted by a National Education Ministry from Spain or by a Spanish University must be submitted to the Education Ministry, duly Apostilled and certified copies issued by a Public Notary or a Chilean Consul must be delivered.

c) The authorization certificate of the Spanish University must be displayed with the authorization to teach and issue diplomas and academic degrees, with their Apostille certification and certi-

fied copies issued by a Public Notary or a Chilean Consul must be delivered.

As mentioned above, in the event that the country does not have a valid international treaty of the matter, the revalidation and recognition procedure must be initiated at the University of Chile. The reason is that the University of Chile has the exclusive attribution to recognize, revalidate and validate professional degrees obtained abroad, without prejudice to the provisions of international treaties.

For the purposes of revalidating an academic degree, several documents must be accompanied to the University of Chile's Pro-Rector, including the diploma, all grades transcript and a resume with a descriptive program for all subjects' areas. Once all the required documents have been received, a curricular background study is carried out, requiring a report to the faculty or institute in that Country. Subsequently, the Pro-Rector must be informed of the candidate's situation according to the background studied. If the study establishes that the academic training was equivalent to the one taught in Chile, the University will grant the revalidation of the respective degree. In the event that the study establishes the equivalence is partial, the revalidation is not granted, but it does not mean that it is rejected, but requirements must be met, like taking a general test of the contents of the career or extracurricular activities.

Additional Requirements

Notwithstanding the above, to exercise some professions in Chile, in a formal way, there are other requirements, depending on the profession. Now, as an example, we will detail the attorneys and doctor's situation for their titles, besides being just validated, can be exercised in a valid way.

A foreign attorney, like any other professional, can provide professional advice and legal services for their skills, experience and legal knowledge. In this case, the degree validation in the way indicated above and compliance of the Chilean labor law for working in the country are enough. It is different if the attorney pretends to represent someone in a trial on a legal Court. In that case, there are additional requirements for the formal exercise of the profession.

The above is explained because the institution in charge of granting the title of Attorney in the Chile is the Supreme Court and not an academic institution. Once the revalidation or validation of the professional title has been obtained, the authorization of the lawyer degree must be requested to the Supreme Court. This request must be accepted by the full Supreme Court, verifying compliance with the requirements expressed in the Organic Code, which includes a six months professional practice in the Judicial Assistance Corporation. Complying with these additional requirements, the Supreme Court grants the qualification of the respective professional degree, as it grants this title to graduates in law schools of the country.

Furthermore, for healthcare professionals, like surgeons that want to practice the profession in Chile, just like as in the previous cases, they must apply for recognition of their degree or its revalidation at the University of Chile, depending if there are international treaties of the matter. Regardless of the existence of these treaties, the healthcare professionals may choose to revalidate their degree to grant greater academic and professional certainty. For this, as in the other cases, all the background information must be presented to the University of Chile's Pro-Rector. These documents are reviewed and studied by the Dean of the Medical School. Eventually, the Dean may propose to the Pro-Rector, additional requirements to revalidate the professional degree. Within these requirements, the presentation of special knowledge exams is contemplated.

It seems that these treaties between Chile and other nations to validate professional degrees are positive, because they increase job opportunities for professional foreigners in the country, making the recognition of their degrees less obstructed, favoring in this way a cultural, academic and scientific integration with the countries subject to this kind of agreements.