

# CLASS ACTIONS IN CHILE

by  
Martín Gubbins<sup>1</sup> / Carla López<sup>2</sup>

## TABLE OF CONTENTS

<b>I. PRIOR CONSIDERATIONS .....</b>	<b>2</b>
<b>II. THE SOURCE OF CLASS ACTIONS IN CHILE .....</b>	<b>4</b>
<b>III. THE SPECIAL PROCEDURE FOR PROTECTING COLLECTIVE OR WIDESPREAD INTERESTS .....</b>	<b>6</b>
A. GENERAL CONSIDERATIONS .....	6
B. REQUIREMENTS AND EFFECTS OF THE SUIT .....	6
C. PURSUING THE PROCEEDINGS .....	7
1. <i>The admissibility or certification stage</i> .....	7
2. <i>The declaratory stage</i> .....	10
3. <i>The compensatory stage</i> .....	12
4. <i>Precautionary Measures</i> .....	12
5. <i>Reckless suits</i> .....	13
<b>IV. ACTIVE LEGITIMATION .....</b>	<b>14</b>
1. <i>SERNAC</i> .....	14
2. <i>Consumer Associations</i> .....	18
3. <i>Groups of 50 or more consumers</i> .....	21
4. <i>Law Enforcement agencies and lawyers</i> .....	23
<b>V. MAIN PROBLEMS ARISING WITH CLASS ACTIONS.....</b>	<b>24</b>
1. <i>Vouching for requirements</i> .....	24
2. <i>The principle of procedural economy</i> .....	26
3. <i>Retroactive application of the Consumer Act</i> .....	27
4. <i>Prescribing violatory responsibility</i> .....	28
5. <i>Special laws that exclude applying the Consumer Act</i> .....	29
<b>VI. PENALTIES LEVIES AS A RESULT OF A CLASS ACTION .....</b>	<b>30</b>
1. <i>Fines</i> .....	30
2. <i>Compensation</i> .....	31
3. <i>Non-monetary penalties</i> .....	31
<b>VII. ALTERNATIVE METHODS FOR RESOLVING CONFLICTS.....</b>	<b>33</b>
<b>VIII. THE COST OF CLASS ACTIONS .....</b>	<b>36</b>
<b>IX. FINAL CONSIDERATIONS .....</b>	<b>37</b>

---

<sup>1</sup> Martín Gubbins, LL.B., Universidad de Chile (1996), MA, University of London (2002). Invited Lecturer, "Civil Litigation Strategies", Universidad de Chile (2005 - ). Invited Lecturer, "Legal Action before the National Environment Commission", at the LL.M. Executive, Universidad del Desarrollo, Chile (2006). Teaching Assistant, Civil Law, Universidad de Chile (1995-2001). British Chevening Scholarship, UK (2001). Author: "Consumer Protection in Chile", included in "International Consumer Protection", Brill Academic Publishers, Leiden-Boston, 2005. Edited by Dennis Campbell, ISBN 0 79233 391 8. Member of the Advisory Board of the Latin American Arbitration Review of the Dickinson School of Law, Penn State University (Publisher: JurisNet LLC, Huntington, NY. USA) (2006 - ). Partner, Estudio Correa Gubbins, a law firm in Santiago, Chile (2005 - ).

<sup>2</sup> Carla López is a student at the Universidad de Chile Law School.

## PRIOR CONSIDERATIONS

The Chilean civil litigation system belongs to the tradition of *Continental Law*<sup>3</sup>, which means it is based on the law<sup>4</sup>, on decrees and on resolutions drafted by the executive powers rather than the jurisprudence of the courts, unlike Common Law systems.

With this system, legislation is born and invested with a democratic legitimacy stemming from its origin resting on two powers of the State: Congress and the Government. It will eventually be possible to resort to legal customs in those cases in which the law refers to them or in addition to the silence of the parties. Likewise, in accordance with our legal system, it is possible to resort to the general principles of law and natural equity in those cases where the rules of interpretation of the law enshrined in articles 19 and onwards of the Civil Code cannot be applied<sup>5</sup>.

Furthermore, it is worth considering that article 3 of the Civil Code establishes as a general rule the relative effect of sentences, by virtue of which they can only be enforced with regard to the cases that are currently being sentenced, which means that the consequences will only extend as far as the parties in that case and not to others.

Within this legal model, only the class actions found in Act N°19.496 of 1997 are envisaged<sup>6</sup>, and which establishes the rules regarding the protection of consumers' rights, amended by Act N°19.955 of 2004 (hereinafter the "Consumer Act"), which was the one precisely that incorporated a procedure for defending the widespread or collective interests<sup>7</sup> of consumers under the original Consumer Act<sup>8</sup>. So, the Consumer Act defines collective interests as the common rights or a determined or determinable series of

---

<sup>3</sup> A legal system of European origin rooted in our traditions as a result of the colonization of our country beginning in the 16<sup>th</sup> century.

<sup>4</sup> In the widest possible sense, as a generally observed legal rule in whose production one or more bodies belonging to the State intervenes, irrespective of whether it does so in an associated manner or not.

<sup>5</sup> Article 24, Civil Code.

<sup>6</sup> Class actions may also be: **(i)** those devoted to protecting widespread or collective interests related to the environment; **(ii)** public actions for securing roads and public works, or **(iii)** those envisaged in the limited companies law aimed at safeguarding the interests of minority shareholders; but an analysis therefore is beyond the realms of this work.

<sup>7</sup> Article 50, Consumer Act .

<sup>8</sup> These interests have been regulated "in view of three types of considerations ... a) in the first place, considerations of decisional symmetry (when faced with the same legal system, with the pretensions and a homogenous conglomerate of affected interests identified, the same procedure must be applied or the decision taken); b) Considerations of procedural economy, and c) Considerations around guaranteeing access to justice by individuals affected". DÍAZ SALVO, Grace, GÓMEZ OPORTO, Darío, *A Descriptive Analysis and Criticism of Class Actions in Consumer Law*, Universidad de Chile, a monograph submitted when opting for a Degree in Legal and Social Sciences, Santiago, 2005, p. 78.

consumers, tied to a supplier by a contractual link. On the other hand, it defines the widespread interests as the rights of an indeterminate series of consumers.

Class actions in force in Chile under the Consumer Act enable matters affecting a series of consumers “to be discussed in one sole proceeding before a civil judge in such a manner that the case in court reaches all of the persons whose rights have been affected, even though they were not party to the litigation<sup>9</sup>”.

We are dealing with a completely exceptional action in our legal system, because it alters the general rules in force inasmuch that all legal sentences only have relative effects; i.e. they only affect the litigating parties. On the other hand, with class actions under the Consumer Act, a sort of *erga omnes* is acknowledged affecting the sense. This means that the court's decision on the matter discussed could affect even those persons who did not file suit, so long as certain legal requirements regarding appearance are complied with.

---

<sup>9</sup> The web site of the National Consumer Service ([www.sernac.cl](http://www.sernac.cl)).

## I. THE SOURCE OF CLASS ACTIONS IN CHILE

The original Consumer Act enacted in 1997, did not meet its objective of granting complete and proper protection to consumers or users. "What really happened was that the system did not function properly in all sectors of the economy in which consumers were participating, and there were no relevant legal topics or figures recognized in compared legislation at the time, requiring a series of precisions in order to efficiently defend the interests of the persons involved<sup>10</sup>".

Conscious of the fact that at the time, the legislative mechanisms regarding legal safeguards envisaged in the legislation were not capable of protecting consumers' rights efficiently in certain situations, the Government suggested the need to create mechanisms so that market forces could function properly within the logic of the incentives usually provided in markets, strengthening the functioning of the economy, the transparency of information available and favouring a proper balance between the different parties involved.

With this in mind, a bill reforming the Consumer Act was sent to Congress aimed at putting these matters right, which was finally enshrined in Act N°19.995 published in the Official Gazette on July 14 2004.

Among the most important matters this legal amendment covered was that of creating a procedure that would enable consumers' collective and widespread interests to be defended. With that, it was aimed at discouraging massive violations and avoiding overloading the parties and the courts with hundreds of similar cases that could be dealt with under one sole process.

Moreover, the powers of the National Consumer Service (hereinafter "SERNAC") were broadened, encouraging the functioning of bodies that would act as mediators as an alternative method for resolving conflicts, and the specific requirements were established so that Consumer Associations could come into being and be actively legitimized within collective proceedings.

This sought to tear down "three type of hurdles: **(i)** an economic hurdle, because many persons could not avail themselves of justice purely for financial reasons; **(ii)** a procedural hurdle, because certain types of traditional procedures are not sufficient for the aim of

---

<sup>10</sup> The message from the government which got the bill amending Act N° 19.496 regarding the protection of consumer rights under way. Bulletin N°2787-03 of the Lower House at Meeting N°35 on Tuesday, September 11 2001, p. 13.

protection, and **(iii)** an organizational hurdle, under which certain interests of a collective nature were neither efficient nor susceptible to being protected if no sweeping transformations could be introduced into certain procedural institutions”<sup>11</sup>.

---

<sup>11</sup> LARENAS GONZÁLEZ, Edison, *Actions for protecting consumers under Act N°19.496 and in compared law and its procedures*, Universidad de Chile, Monograph for opting for a Degree in Legal and Social Sciences, Santiago, 2006, pp. 77 y 78.

## **II. THE SPECIAL PROCEDURE FOR PROTECTING COLLECTIVE OR WIDESPREAD INTERESTS (COLLECTIVE LAWSUITS)**

### **A. General Considerations**

Just like in Chilean civil justice, these principles are dealt with in written proceedings, in two instances, and with the right to appeal to a Supreme Court by means of a motion to vacate.

Whether or not these proceedings can be heard depends on the Lower Courts of Law, and the general rules of competence of the Constitutional Court Code have to be applied when it comes to distributing the suits.

Furthermore, article 51 of the Consumer Act establishes that the rules of summary proceedings will apply, with the exception of: **(i)** the right to ask for a substitution of the proceedings with ordinary ones, and **(ii)** the provisional concession of the suit.

### **B. Requirements and effects of the suit**

Regardless of the general requirements established in the Civil Proceedings Code<sup>12</sup>, regarding damages, it is sufficient to mention the material damages sustained and request whatever compensation the judge determines, which shall be the same for all of the consumers found in the same situation.

This compensation may not extend to pain and suffering and neither is the litigating party entitled to ask that any discussion on the species and amount of the damages be reserved for when the sentence has to be complied with or for any other different lawsuit<sup>13</sup>.

Submission of the suit interrupts the prescription of any civil compensatory action the affected consumers may be entitled to under the general rules. For those who reserve

---

<sup>12</sup> Article 254 of the Civil Proceedings Code determines that a lawsuit must contain: i) the appointment of the court; ii) the name, address and profession or trade of the plaintiff, his/her representative and those of the defendant; iii) type of representation; iv) the facts and grounds in law upon which the suit rests, and v) an announcement of the requests submitted for the consideration of the court.

<sup>13</sup> Article 173, Civil Proceedings Code .

their rights to pursue civil liability, the total amount of the new deadline for prescription will run from when the final sentence has been handed down and enforced<sup>14</sup>.

Once the lawsuit has been filed, the defendant and SERNAC must be notified, and in this last case, if that service had not hitherto taken part in the process. This measure is aimed at facilitating the accumulation of similar cases whose admissibility is pending, regarding which SERNAC may be aware<sup>15</sup>.

### C. Pursuing the proceedings

The proceedings are split into three stages: **(i)** the stage of admissibility or certification; **(ii)** the declaratory stage, and **(iii)** the compensatory stage.

Furthermore, the granting of precautionary measures is regulated as well as the effect of filing a suit that could be considered as reckless.

Hereafter follows a description of those stages and matters:

#### 1. The admissibility or certification stage

A contentious and preliminary stage that seeks an avoidance of abusing class actions, granting the court the power to determine whether or not the suit filed complies with the requirements of article 52 of the Consumer Act; i.e.:

- That the suit has been filed by one of the legitimate plaintiffs.
- That the conduct pursued affects the collective or widespread interests of consumers.
- That the suit is in need of *de facto* and legal matters.
- That the potential number of affected parties justifies the collective proceedings used.

In the following cases. the last mentioned requirement will not concur and so the suit will be declared inadmissible:

- Whenever manufacturing processes, by their very nature, envisage a percentage of faults within industry standards.

---

<sup>14</sup> Article 51 N°6, Consumer Act .

<sup>15</sup> Article 51 N°9, Consumer Act .

- Whenever the supplier proves he has maintained a certain quality whilst dealing with claims.
- Whenever it is established that repairs have been made or money returned in the event of faulty products, at no cost to the consumer.
- Whenever the faults or the flaws do not represent a health hazard.

Once compliance with the aforementioned requirements has been vouched for, “the supplier may avoid damages by means of implementing more modern production processes. Furthermore, lawsuits may be ruled out in those cases where customer service is granted aimed at providing solutions to problems<sup>16</sup>”, as we shall see a little later on.

The defendant will have 10 days in which to explain whatever he deems necessary regarding the admissibility of the suit.

Moreover, as in the case of *Cavada Villarroel and others vs. Metro S.A.*, notwithstanding the fact that the class action enshrined in the Consumer Act does not specify a right or object to demurrers, it is understood that by the very nature of the procedural phase referring to the admissibility of the suit, the court must take care of those that are filed during this stage, otherwise it would be unbecoming leaving their resolution until the final sentence<sup>17</sup>.

On the other hand, if the judge deems that there are substantial, pertinent and controversial facts, he will admit the case for evidence. This period allowed for gathering will be governed by the rules of ordinary cases applicable to incidents, which means eight days. All of the evidence that has to be given will be perused in accordance with the rules of fair comment<sup>18</sup>.

This weighing of the evidence according to fair comment means that the judge must observe what is logical as well as the maxims of experience. Similar provisions are found in the new public criminal process in force in Chile and with any affairs brought before the new divorce courts, for example.

Whatever resolution is passed regarding the admissibility of the case can be appealed with suspensive or “both” effects.

If the proceedings are declared inadmissible, they may only be filed again individually, regardless of the fact that, should new information or circumstances come to light that

---

<sup>16</sup> DÍAZ SALVO, Grace; GÓMEZ OPORTO, Darío, Op. Cit., pp. 75 y 76.

<sup>17</sup> Sentence 13<sup>th</sup> Civil Court of Santiago, April 23 2007, drafted in Case N°15.817-2005.

<sup>18</sup> Article 51, Consumer Act .

justify reverting the inadmissibility declared, any legitimate party may file a new suit before the same court.

If the suit is declared admissible, article 53 of the Consumer Act establishes that the court will give the plaintiff a deadline of ten days in which to publish at least two notices in a national newspaper informing consumers who consider themselves affected to join the lawsuit. Only those who do join may receive whatever relief, reimbursements or compensation is granted in the case.

A deadline of ninety days since the first notice will begin to run during which consumers affected appear in person at the hearings and, once this deadline is up, another one of ten days is granted to the defendant to object to any member of the group appearing personally during the proceedings.

The contents of the notice will be fixed by the clerk of the court who shall consider at least the following points<sup>19</sup>:

- Identifying the court that, in the first instance, certified the admissibility.
- Date of the certification.
- Name, Sole Tax Number, profession or trade and address of the representative of the groups of plaintiffs.
- Name, Sole Tax Number, profession or trade and address of the defendant.
- A brief account of the facts and petitions submitted for the consideration of the court.
- A call to the parties by the same facts to join the suit, highlighting the fact that its results will even affect those who do not join it.

Since publication, no other persons may begin a lawsuit against the defendant based on the same facts, and it will have the effect of a *litis pendency*.

Moreover, a deadline of 30 days is given, since publication, for any consumer to come before the court to reserve his/her actions. This refers to the pursuit of the supplier's civil liability in a different lawsuit, in which case he will not be able to object to the results of a class action.

---

<sup>19</sup> The cost of publishing these notices depends exclusively on what means are being dealt with and there is no average cost. Generally speaking, the parameters for determining the cost of the notice depend on its size, the number of words used and the section of the newspaper where it is published.

Any other lawsuit against the same supplier based on the same facts and which is pending when the notices are published, will accumulate in accordance with the general rules of accumulation of cases envisaged in the Civil Proceedings Code.

## 2. The declaratory stage.

Once the deadline of 30 days granted to reserve actions is up, the court may summon the parties to a hearing to contest and reconcile. In addition, article 53 B) of the Consumer Act establishes that the judge may call a reconciliation as many times as he deems necessary during the proceedings.

Likewise, the defendant may make public offers to come to an arrangement. Any arrangement, transaction or reconciliation must be submitted for the judge's approval, who may reject it if he deems it is against the law or arbitrarily discriminatory. These will be described a little later on.

In the event of a dismissal of action<sup>20</sup>, the court will serve notice on SERNAC, which may join the suit within a deadline of 5 days.

The court may decree, during the case and until the final sentence is passed, the formation of groups or sub-groups of consumers affected, as and when he deems fit, aimed at applying the corresponding compensation or relief.

The final sentence that is handed down, besides complying with the general requirements of all sentences envisaged in article 170 of the Civil Proceedings Code, must resolve the following aspects:

- Declare how the facts have affected the collective or widespread interests of the consumers.
- Declare the supplier's liability and levy whatever penalty is due.
- Declare who is responsible for the corresponding compensation and relief and their amounts for each group or sub-group.
- Make sure that what has been paid in excess is returned and how it is to be returned, in the case of dealing with proceedings begun as a result of an incorrect payment of certain sums of money. In the case of faulty products, their value will be ordered to be returned the moment payment is made.

---

<sup>20</sup> A unilateral act consisting of the plaintiffs waiving their rights, which must be accepted by the defendant or, if necessary, by the judge.

The sentence will be made known so that everyone who was affected by the same facts making up the lawsuit receive the benefits of the corresponding compensation. This is the sort of *erga omnes* effect previously described, which admits as demurrers a reservation of rights and the processes that have not been able to accumulate.

Appeals may be filed against this sentence with suspensive or “both” effects.

The sentence will be published in a notice on at least 2 different occasions in whatever local, regional or national newspapers the judge determines, with at least 3 and no more than 5 days between each of them.

The contents of the notices will be determined by the clerk of the court who, when drafting it, shall bear in mind the following aspects:

- The case number, an identification of the court that handed down the sentence and the name, profession or trade and address of the violators and their representatives.
- The facts that gave rise to the violators’ liability and the way in which such facts affected the consumers’ rights.
- An identification of the group of plaintiffs, the existence or otherwise of any sub-groups and the way in which the interested parties may wield their rights and the deadlines they have for doing so.
- The institutions where the affected parties may obtain information and orientation, such as SERNAC, municipal consumer information offices or Consumer Associations.

Notwithstanding the foregoing, the judge may order a different way in which to notify in those cases where, because of the number of affected parties, it becomes necessary to make sure that each one of them is made aware of the sentence by some other means<sup>21</sup>.

If the suit is rejected, any legitimate party may file a new suit, within the deadline for prescription of the suit, before the same court but only making use of new circumstances, and the prescription will be understood as having been suspended in his favour for the whole period that the class action lasted. In this case, when the court decides, it shall make a declaration that it finds itself facing new circumstances together with a declaration

---

<sup>21</sup> Other types of notifications could be, for example, a personal notification or a summons. A personal notification is done by delivering a complete copy of the resolution to the person as well as the request on which it is based. Notification by summons is a copy of the resolution and the request on which it is based left at the address of the person notified.

of the admissibility of the suit as set forth in article 52 of the Consumer Act<sup>22</sup>. Therefore, if a class action is dismissed, it does not automatically mean that the right to act extinguishes if new circumstances come to light.

### 3. The compensatory stage.

Article 54 F) of the Consumer Act sets forth that the defendant has a deadline of 30 days in which to pay the corresponding relief or deposit into the court's current account the amount of the compensation.

All interested parties shall appear to exercise their rights established in the sentence within a deadline of 90 consecutive days as from the last notification. Within this same deadline, the interested parties may reserve their rights to pursue the civil liability of the defendant in a different suit and in which the existence of the violation will not be discussed, because it has already been declared in the class action.

This process is carried out in the same court which heard the class action, regardless of each consumer being able to resort individually to the competent court according to the general rules.

If the overall amount of the compensation could cause the defendant a significant dent in his assets, the judge may establish a monthly payment program of compensation or some sort of alternative means of payment. Whatever resolutions determine these matters will not be subject to any appeal whatsoever.

Lastly, article 54 G) of the Consumer Act estimates that if the sentence is not complied with by the defendant, enforcement will be undertaken by a common solicitor for one whole amount or for the total unpaid balance owing, as established in article 54 E) of the Consumer Act.

Payments due to each consumer will be in proportion to their respective rights declared in the final sentence.

### 4. Precautionary Measures.

Are envisaged in article 50 F) of the Consumer Act. If during a class action, the judge learns of the existence of assets that could cause damage, he will order them to be taken

---

<sup>22</sup> Article 54, Consumer Act .

into custody by the court if he deems necessary. If this is not possible due to their nature and characteristics, the judge will order any expert opinion that vouches for the state, quality and aptitude of causing damage or any other relevant element regarding the goods or products and he will order whatever measures are necessary for the safety of persons and goods.

## 5. Reckless suits.

So as to avoid any abuse of the litigation proceedings in class actions, the Consumer Act contains a mechanism that penalizes reckless suits.

Regarding this, article 50 E) of the Consumer Act establishes that when a lawsuit, process or action filed does not have any plausible grounds, the judge, in the sentence and at the behest of the party, may declare it reckless.

Once such a declaration has been made, those responsible will be penalized with a fine that may be as much as 200 Monthly Tax Units<sup>23</sup> (hereinafter, UTM), and the judge may also penalize the lawyer in accordance with the disciplinarian powers found in articles 530 and onwards of the Constitutional Court Code<sup>24</sup>, regardless of whatever joint and several criminal and civil liabilities the perpetrators of the damages have caused.

Moreover, article 7 of the Consumer Act considers that if within a deadline of 3 years, two or more class actions filed by the one same Consumer Association have been declared reckless, he may decree, at the behest of the party, the dissolution of the association in serious cases as a result of the sentence.

For that reason, also, the directors of any Consumer Associations dissolved under a court order, will be barred from taking part in any other Consumer Associations for a period of two years.

---

<sup>23</sup> The Monthly Tax Unit, UTM, is an official indexation unit used when paying taxes and other operations<sup>23</sup>. For referential sakes, in September 2007, one UTM equaled 33.382 pesos; i.e. US\$ 63.56 approximately (according to the exchange rate of the US\$ today).

<sup>24</sup> This rule includes a verbal warning, a written disapproval or detention for no more than four days.

### III. ACTIVE LEGITIMATION

In order to determine what *legitimate* means for the purpose of class actions, whilst an amendment was being drafted to the Consumer Act, it was left on record that “when sentencing the lawsuit of *Horvath Kiss vs. CONAMA* in the Supreme Court, the concept of legitimacy was widened to cover all persons who found themselves in the same situation and whose rights had been impaired, in spite of being the bearers of a huge social damage, and who did not sustain a significant damage or at least one clearly apparent on an individual level<sup>25</sup>”.

For that, the Consumer Act specified that a class action in view of acts or conduct affecting the exercising of any of the rights of the consumers may only be filed by the following bodies: **(i)** The National Consumer Service (SERNAC); **(ii)** A Consumer Association formed in the manner prescribed by law, and **(iii)** A group of 50 or more consumers duly identified who have been affected as regards the one same interest.

Any action taken in this matter is marked by not acknowledging any type of active legitimacy regarding the consumer individually taken into account, but regardless of that though, article 51 of the Consumer Act establishes that once proceedings have been put in motion by one of these parties, any active legitimate or consumer who considers himself affected, may take part in the suit.

Hereafter follows a description of the bodies which may begin a class action, their general characteristics, problems concerning their legitimacy and the main financial aspects and, at the end, some considerations will be made regarding the use of law enforcement officers and the role played by the lawyers in this process.

#### 1. SERNAC.

##### a. *A general description and attributions.*

SERNAC is a public service functionally decentralized and with a presence in all of the regions of the country<sup>26</sup>, with its own legal identity and assets, subject to supervision by the President of the Republic through the Ministry for Economy, Development and Reconstruction.

---

<sup>25</sup> An Economic and Development Commission Report based on the bill amending Act N°19.496 concerning the protection of consumer rights. Bulletin N°2787-03, Meeting N°76 on Tuesday, May 13 2003, p. 74.

<sup>26</sup> Chile is administratively split into 15 regions.

SERNAC is entitled to: **(i)** safeguard compliance with the Consumer Act and any other rules related to it; **(ii)** divulge all rights and duties enshrined in the same law, and **(iii)** take any action regarding information and the education of consumers.

The power to safeguard compliance with legal rules includes the attribution to report any noncompliances to the corresponding bodies and jurisdictional entities and to take part in cases where the general interests of consumers are affected.

Furthermore, SERNAC is authorized to mediate between consumers and suppliers, but not to require suppliers to pay any reparatory compensation, as that lies exclusively with the courts at the behest of the same parties.

**b.** *Objections to active legitimation.*

Initially, it was suggested that in a market system governed by the principle of the subsidiarity of the State, the latter may only intervene when private persons are not capable of taken certain actions, so the active legitimation of SERNAC was viewed as unnecessary and even as a nuisance, if active legitimation were to be granted, at the same time, to groups of consumers.

Moreover, it was sustained that neither would it be recommendable for a state body to litigate, as that would only reflect an additional procedural advantage for the State, thus compromising the principal of legal equality and generating an undesirable imbalance for the job of supervision to function well.

However, in practice, the main conflict generated as a result of strengthening SERNAC's powers has led to "functions overlapping with regard to other bodies that could intervene when rendering services, such as those regulated by concessions and supervised by a regulatory body<sup>27</sup>".

An example of this is the case of natural monopolies that arise and which provide basic services<sup>28</sup>. In these cases, the law does not permit that the cost of rendering the services be freely determined by the parties because, given their characteristics as a monopoly, users lack the possibility of opting for a different alternative as regards price and quality.

Bearing this in mind, an important effort was made to pin down the attributes of the different State bodies having powers in these matters, in two main ways.

---

<sup>27</sup> An Economy and Development Commission Report, Op. Cit., p. 29.

<sup>28</sup> Services such as roads, electricity, drinking water, drainage and fixed phones.

On the one hand, it was established that the best way would be to allow a solution to the problems to arise regarding consumption legally, leaving the possibility of market self-regulation in place.

In this sense then, the reform of the Consumer Act which incorporated class action, was concerned with “abiding by areas for regulation over certain institutions bearing in mind that an approach toward them could take place by means of self-regulation. Therefore, invading areas where the same market actors provide the best solution for the problem damages consumers. At the same time, providing self-regulation for areas and issues in which there are no long-lasting incentives for that to function, is senseless<sup>29</sup>”.

On the other hand, provisions were included in the text of the Consumer Act that reflect the pre-eminence of specific regulation systems, such as the case of its article 2 bis, which determines that the rules of the Consumer Act will not apply to such activities as production, manufacturing, imports, construction, distribution and the sale of services regulated by special laws<sup>30</sup>.

However, the problem still remains as to attributes overlapping regarding SERNAC in class actions, because the aforementioned article 2 bis of the Consumer Act admits two important exceptions.

On the one hand it allows the Consumer Act to apply in those cases not covered by special laws and, on the other, it could be thought that the breadth of application of the Consumer Act extends to the development of procedures for defending individual interests as well as to collective and widespread interests.

In view of these two exceptions, safeguarding competences is very fragile as taken into account when the reform was dealt with.

This issue has remained uppermost in most cases such as that of the *Chilean Organization of Consumers and Users (Odecu) vs. Banco Estado*<sup>31</sup>, when the party being sued argued that defending a bank’s customers and their rights was up to the Regulatory Body for Banks and Financial Institutions and not an Association of Consumers or SERNAC, in circumstances that the plaintiffs estimated that a judge was the person in charge of safeguarding consumers’ rights, not the Regulatory Body for Banks.

---

<sup>29</sup> An Economy and Development Commission Report, Op. Cit., p. 76.

<sup>30</sup> For example, when dealing with relations between real estate companies and purchasers, Act N°19.472 regulates liability regarding faults as a result of the poor quality of the construction of homes.

<sup>31</sup> Sentence handed down by the 6<sup>th</sup> Civil Court of Santiago on April 14 2005, drafted in case N°19.891-2006.

In addition this problem has been at the centre of numerous public and political debates that forecast future court and administrative conflicts, and even new legal reforms, such as the following case reflects:

“When Regulatory Bodies do not respond to claims and, even often before resorting to them, users and consumers tend to approach SERNAC, but as this body only acts within the framework of the Consumer Act which, when faced with these services, happens to be supplementary .... its actions tend to be inhibited in these cases. In this sense then, it could be said that neither any special laws governing the functioning of Regulatory Bodies now the Consumer Act offer any certainties regarding this matter, so there is then an important legal vacuum with regard to who is responsible for defending the rights of consumers when facing private regulated services<sup>32</sup>”.

In view of this, SERNAC decided to create one sole desk for attending to claims<sup>33</sup> and sign agreements with the majority of the Regulatory Bodies so as to derive those cases that could cause some or other conflict to the information and mediation offices in each area.

**c. *Financing.***

Because it is a body administered by the State, financing SERNAC is specifically envisaged in the Annual Budget as a part of what is allotted to the Ministry for Economy, Development and Reconstruction, upon which this service depends.

Over the years, its budget has increased by 40%, so that by this year, it was allotted 4,210,169,000 pesos equal, as September 2007, to US\$ 8,193,381.68. Of this amount, 155,250,000 equal, as of September 2007 to US\$ 302,130.98, was money devoted specifically to financing Competitive Funds for the establishment of Consumer Associations in compliance with what is set forth in the Consumer Act<sup>34</sup>.

Lastly, “it is worth stressing that this fund does not have a pre-established budgetary item, rather approval of its resources depends on the annual provisions of the Ministry of the Treasury and the Budget Board<sup>35</sup>”.

---

<sup>32</sup> MANZANO, Liliana, Op. Cit., P. 24.

<sup>33</sup> “This project enables information to be handed out and the disagreements of the public to be made known with regard to private companies, linking the different public institutions whose duty it is to admit and deal with such requirements.” MANZANO, Liliana, Op. Cit, p. 11.

<sup>34</sup> Web Site of the Budget Board ([www.dipres.cl](http://www.dipres.cl)).

<sup>35</sup> MANZANO, Liliana, Op. Cit., P. 18.

## 2. Consumer Associations.

### a. *A general description and their attributions.*

Consumer Associations are organizations created for re-establishing the balance between suppliers and consumers and they consist of natural persons or legal bodies<sup>36</sup>.

They must be independent from all types of economic, commercial or political interests and their aims must be that of protecting, informing and educating consumers, as well as assuming the representation and defence of their members and whatever consumers ask them for help, irrespective of any lucrative interest or non-informative publicity.

To form one, the partners hold a meeting in the presence of a Notary Public or they sign a memorandum before a Notary Public that has to be approved by the members.

Members shall consist of at least 25 natural persons or legal bodies or 4 legal bodies (such as Neighbourhood Associations or Parents' Centres or Associations).

3 copies of the establishment deed must be deposited with the Ministry for Economy, Development and Reconstruction together with a copy of the by-laws of association and, subsequently, an extract of the memorandum must be published in the Official Gazette.

The whole of this process must be completed within no more than 60 days.

Consumer organizations in Chile have increased over the last 5 years. Judging by data issued by SERNAC, there are 27 consumer organizations throughout the country and of these 27, only two have been legally acknowledged: the National Corporation of Consumers and Users (CONADECUS) and the Organization of Consumers and Users (ODECU).

Another type of organization is the one born out of one aim or common campaign, such as the League of Conscious Consumers, that was able to eliminate the use of asbestos. The same situation occurs with the National Association of Health Users (ANADEUS), who protest against leaving a cheque in custody when services are needed in hospitals. Another emblematic case is the Group for Action against Financial Fraud, formed by the debtors of a finance company that went bankrupt.

---

<sup>36</sup> They were hitherto governed by the rules of Title XXXIII of Book I of the Civil Code, and their legal identity had to be decided by a Supreme Decree of the Ministry of Justice, which meant more time and expense. With the reform of the Consumer Act, creating these organizations was regulated by the special rules under Decree Law N°2.757 concerning associations of companies and other associations.

**b.** *Objections to active legitimation.*

Prior to the reform of the Consumer Act which incorporated class actions, the provisions regulating consumer associations were criticized because they curbed “active legitimation restricting it to the defence of their members’ interests, which was totally at odds with the attributions granted to these organizations under compared law. However, the provisions incorporated ... granted them the power to represent ... consumers’ collective and widespread interests ... In this way, active legitimation was extended ...<sup>37</sup>”.

Nonetheless, a part of the discussion that preceded the incorporation of such provisions left clear that legitimation given to Consumer Associations could inconveniently confuse what is public with what is private, inasmuch that it could be understood as being possible to sue without a mandate on behalf of any consumer.

In practice, however, the main problem has been the deviation of specific interests represented by Consumer Associations, in that they eventually act outside the field of their original aim.

In the case of *Anadeus vs. VTR*<sup>38</sup>, Anadeus had been established to defend the right to health services and the individual and collective rights of the users of health services, which arose in the midst of a trial, a controversy over the relationship that such an aim might have with the object of an illegal charge existing for the cable TV services rendered by the company VTR.

Be this as it may, the action was declared inadmissible given the lack of the association’s active legitimation. This decision was based on the fact that the specificity of its objective and the consumers represented suffered from a lack of connection to the business of the company being sued, which stemmed directly from non-existence of damages with which to underpin the action filed.

However, the same case was subsequently appealed, generating considerable contradictory jurisprudence, because the court of appeals determined that *Anadeus’* active legitimation was based solely on article 51 of the Consumer Act, so that its due establishment was the only aspect to be examined, and an accreditation of the consumers on behalf of whose interests it was acting should be dispensed with as well as an analysis of the specific aims of the association. The case was filed away in May 2007.

---

<sup>37</sup> DÍAZ SALVO, Grace; GÓMEZ OPORTO, Darío, Op. Cit., p. 98.

<sup>38</sup> Sentence handed down by the Court of Appeals of Santiago on July 18 2006, drafted in case N°973-2006.

Concluding, the problem of legitimation in this sense is, to a large degree, subject to the opinion of each court and the circumstances of the case, and by virtue thereof, there is a lot of murkiness around whether or not a suit can be declared admissible or inadmissible.

**c.**     *Financing.*

Consumer Associations are financed by means of action permitted under the same Consumer Act or with Competitive Funds whose creation are envisaged in the same legal body<sup>39</sup>.

These funds consist of money that is included in SERNAC's budget and by donations made by non-profit making organizations, both national as well as foreign<sup>40</sup>.

To gain access to this financing, Consumer Associations only have to do whatever is expressly determined under the Consumer Act<sup>41</sup>. By virtue thereof, it is necessary that they are established according to the law and that their intentions comply with the following objectives:

- Divulge the Consumer Rights Protection Act and its complementary regulations.
- Inform, orient and educate consumers and provide advice when required to do so.
- Study and propose measures for protecting consumers' rights and do or support research into the area of consumption.
- Take part in processes aimed at fixing tariffs for basic household services in accordance with the regulatory laws regulating them<sup>42</sup>.

So, Consumer Associations are barred from accessing these funds with the object of financing the representation of consumers' collective or widespread interests before any jurisdictional or administrative authorities<sup>43</sup>.

Furthermore, they are banned from submitting projects that Consumer Associations which, when applying for them, have certain projects pending with SERNAC, their accounts or

---

<sup>39</sup> This year, available funds amount to 150,000,000 pesos, equal as of September 2007 to US\$ 291,913.99.

<sup>40</sup> These donations are exempt from the insinuation referred to in article 1,404 of the Civil Code. Article 2 letter b) of the Regulations for Competitive Funds devoted to financing the initiatives of Consumer Associations.

<sup>41</sup> N°3 of the Regulations for Competitive Funds devoted to financing the initiatives of consumer Associations.

<sup>42</sup> SERNAC's web site ([www.sernac.cl](http://www.sernac.cl)).

<sup>43</sup> Article 3, Regulations for Competitive Funds devoted to financing the initiatives of Consumer Associations.

reports or which have, among their directors, any natural persons who are members of Consumer Associations found in such a situation<sup>44</sup>.

Nonetheless, this mechanism of financing, albeit modest if the truth be told, is essential for the proper functioning of the institutionality regarding the protection of consumers because, for reasons of honesty and openness, Consumer Associations may not accept donations from companies.

However, it is well worth remembering that this financing does not extend to the field of beginning and taking part in class actions.

In addition, there exist other government means of financing for the specific projects of individual associations, established by links at a national level or in certain specific areas. However, this also refers to undertaking activities that enable the contents of the Consumer Act to be divulged or improve situations of a regulatory nature, and not to finance class actions.

Nevertheless, there are organizations such as ODECU which function with volunteers and which recently subsisted with financing from the National Training and Employment Service, because they functioned as technical training bodies providing courses on consumer rights and the indebtedness of workers employed by private companies.

Furthermore, consumer associations receive income from the dues paid in by their members and the subscription and sale of their publications.

### **3. Groups of 50 or more consumers.**

#### **a. *A general description and attributions.***

Here we are dealing with private interest groups whose establishment does not require any formalities, as is the case of Consumer Associations.

#### **b. *Objections to active legitimation.***

Doctrine has reached the conclusion that these groups do have a legitimacy to sue, but they do not have the capacity to act as a group, because they lack a legal identity as such.

---

<sup>44</sup> Conditions of the Public Tender for projects from the fund for financing the initiatives of Consumer Associations, 2006 call, p. 2.

In the end, they are similar to one of the cases of the active litisconsortium referred to in article 18 of the Civil Proceedings Code<sup>45</sup>, and by virtue of that, the group does not have procedural capacity.

So, "this accumulation is none other than a coming together of several persons in one same procedure, from which three consequences transpire: a) the need to vouch for the entitlement of the law ...; b) the necessary identification of the components of the group, and c) the requirement to vouch for the representation of the consumers in whose interests they are acting"<sup>46</sup>.

This is reflected in a *contrario sensu* in the Consumer Act, inasmuch that in the case of SERNAC, the plaintiff will not require to vouch for the representation of certain consumers in the association in whose interest it is acting, plus the fact that such an exception is not envisaged as far as these groups are concerned.

In this manner, the main problem arises when the time comes to vouch for the entitlement to the law affected regarding each one of the consumers. Generally speaking, the objections that have arisen refer to casting doubt on the damages of those taking part in the case.

For example, in the case of *Cavada Villarroel and others vs. Metro S.A.*, regarding a discussion on the benefits given as a result of using the company's card, the group of consumers vouched for their identities simply by means of photocopies of their identifications and an interest with the corresponding card.

In view of this then, court estimated that with such information, it was not sure whether the cards had been used so as to have a right to the benefits whose elimination had given rise to the suit filed.

At the bottom of it all, the problem lies in when the case is heard with the pleadings, which can easily be put right in some cases, for example, with the due appearance of the parties in order to ratify their identity and right affected; a situation that, in the case previously mentioned, did not occur and so the suit was declared inadmissible.

---

<sup>45</sup> Article 18 of the Civil Proceedings Code determines that in one same process, several persons may take part as plaintiffs or defendants, always provided it is the same suit or suits stemming directly and immediately from one same event, or which altogether are filed by many or against many in whatever cases are authorized by law. The difference between this procedural institution and groups of consumers lies in that in the litisconsortium there could be one or more plaintiffs, whilst in class actions there can only be one plaintiff acting on behalf of a group.

<sup>46</sup> DÍAZ SALVO, Grace; GÓMEZ OPORTO, Darío, Op. Cit., p. 101.

c. *Financing.*

They are financed exclusively by the persons affected and who come together to file a class action, thus becoming a litigation option difficult to resolve.

4. Law Enforcement agencies and lawyers.

The role of law enforcement agencies is secondary and they act as advisers. The Consumer Act does not envisage penalties by virtue of which the need for law enforcement agencies arises, but rather measures aimed at repairing, returning or changing, besides fines. So, their role is limited to keeping order inside the courts.

In the case of lawyers, the same Consumer Act determines that there is indeed a need for authorized lawyers when it comes to filing class actions, and only if the judge deems that their acts only interfere with the normal course of the case, may the active legitimates be asked to appoint, within 10 days, one common solicitor from among their corresponding lawyers.

In order to exercise whatever rights are due once the corresponding sentence has been passed, no lawyer is required. In the event that a common solicitor has been appointed, these rights will be exercised through him/her.

The common solicitor's powers and acts, as well as the rights of the parties represented by him/her and those corresponding to the court, are governed by the general rules regarding appearances during court cases established in the Civil Proceedings Code<sup>47</sup>.

The appointment of the solicitor must be informed in notices drafted by the secretary, or in whatever other manner the court determines when, because of the number of persons affected, it is necessary that everybody concerned is made aware of it by other means.

---

<sup>47</sup> Article s 4 and onwards, Civil Proceedings Code and Act N°18.120 regarding appearances in court.

#### IV. MAIN PROBLEMS ARISING WITH CLASS ACTIONS

##### 1. Vouching for requirements.

##### a. *Vouching for the contractual link.*

One of the legal requirements most invoked when discussing the admissibility of class actions is the one established in the final paragraph of article 50 of the Consumer Act, which stipulates that for the purpose of determining the corresponding compensation or relief, there has to be a contractual link between the violator and the consumers affected. If it does not exist, there is no obligation to compensate and the plaintiff would thus lack active legitimation in the proceedings.

With this matter, what is relevant is the scope of the concept “contractual link”. This now generates questions as to what types of “contractual links” are considered and whether they should only be direct links between the parties litigating or whether the link could travel through a third party.

Regarding this, jurisprudence has given priority to a grammatical interpretation of the Consumer Act which, in some paradigmatic cases, carries with it an extensive interpretation of the concept referred to.

Thus, in the case of *Jaime Mulet and others vs. Telefónica Móviles de Chile S.A.*<sup>48</sup>, the court in the first instance declared that the definition of article 1 of the Consumer Act does not distinguish between direct and indirect contractual links, because it establishes that consumers or users will be considered as those acquiring, using or enjoying a goods or a service through *any onerous legal act* and not necessarily one legal onerous act entered into between the supplier and the consumer.

This suit was declared admissible in April 2007, albeit subsequently appealed by *Telefónica Móviles de Chile S.A.* At present, the appeal is being heard in the Court of Appeals of Santiago.

By virtue of this extensive interpretation, that is highly arguable, in that case it was declared that for the Consumer Act, it would be the consumer or user and, therefore,

---

<sup>48</sup> Sentence handed down by the 18<sup>th</sup> Civil Court of Santiago on April 17 2007, drafted in case N°12.001-2006.

anybody would be actively legitimate who, albeit not having acquired ownership of the goods, uses or enjoys it.

The foregoing is highly relevant when one observes the class actions currently being dealt with in this country, in some of which there is no direct link whatsoever.

Such is the case, for example, of the suit *Cavada Villarroel and others vs. Metro S.A.*, currently being appealed, where the benefits of the users' card of the Metro service and its withdrawal by the company were being debated.

Prominent also at this stage are such cases as *Hasbún vs. Concesionaria Vespucio Norte Express, Concesionaria Autopista Vespucio Sur and Concesionaria Costanera Norte*, and *Villarroel vs. Concesionaria Costanera Norte and Concesionaria Autopista Vespucio Sur*, both currently being dealt with concerning abusive charges of tolls for using highways under concession.

**b.** *Vouching for damages sustained.*

Another procedural problem that arose in class actions is that of vouching for the damage caused by the violator's conduct, a requirement that is also enshrined in the final paragraph of article 50 of the Consumer Act.

Although class actions imply a decrease in the number of suits, they also encourage many persons to join processes of this type without having actually sustained any damage as a result of the violation claimed.

However, in practice it has been estimated that vouching for damages is a question of substance that does not have to be argued at the time the action is discussed as regards its admissibility or not.

**c.** *Vouching for the consumer's capacity.*

In the specific case in which the plaintiff happens to be a group of 50 or more consumers, the main procedural problem is proving that the plaintiffs are really the consumers of the goods or the service in question and that they have been affected by the one same interest.

This is directly related to the problem of vouching for the damage and the contractual link between supplier and consumer in the case of class actions (as opposed to widespread

interests that do not require that link), so for the time being we shall just refer to the previously mentioned comments.

## 2. The principle of procedural economy.

The principle of procedural economy consists of obtaining the maximum results using the least possible resources.

With regard to this, article 52 letter d) of the Consumer Act sets forth that the potential number of affected parties must justify, in terms of costs and benefits, the procedural or economic needs of resorting to class action so that their rights can be effectively taken care of.

In addition, the law establishes that irrespective of the number of affected parties, it will be understood that this circumstance does not arise if: **(i)** the manufacturing process, by its very nature, envisage a percentage of faults within industry standards<sup>49</sup>; **(ii)** the supplier can prove having maintained quality procedures in the light of claims, relief and the return of money in the event of faulty products, at no cost to the consumer, or **(iii)** the faults or the defects do not pose a health hazard.

Thus, in practice, the non-existence of a procedural need that justifies the suit filed has been suggested in defence of inadmissibility, either because the party being sued has maintained the proper procedures for attending to claims that have to be exhausted prior to filing the suit or because we are dealing with a conflict whose damages do not justify a class action, but rather an individual one, in relation to the number of affected and potential parties.

Notwithstanding the general terms of the aforementioned legal provision, some jurisdiction has afforded it a restrictive scope.

So, for example, in the case of *Cavada Villarroel and others vs. Metro S.A.*, it was declared that the demurrer established in this article 52 of the Consumer Act will only apply to the manufacture of products that can be returned to the supplier, so if return or relief is not feasible, the existence of a claims system will not exonerate the supplier from his obligation to compensate.

---

<sup>49</sup> This argument was taken to its extreme in the case of *Odecu vs. Banco de Chile*, in which the defendant considered that the excessive charges made to its customers holding mortgages, be considered as a natural fault within industry standards.

A similar opinion was held in the case of *Odecu vs. Banco Estado* where, among others, the court deemed that although the banking law sets forth a series of supervisory, interventionist and penalizing activities devoted to safeguarding depositories, creditors and public interests, no monetary redemption is necessary for the victims of the banking activity so the penalties envisaged in the Consumer Act may be applied.

### 3. Retroactive application of the Consumer Act

Cases have arisen where actions were objected to as inadmissible by the defendants when based on events prior to the reforms of 2004 which inaugurated the class action procedures, because they were actions that attempted a retrospective application of the Consumer Act.

The reform of the Consumer Act did not envisage any rules regarding its own term, so in this case it is necessary to refer to the legal rules of common law on this matter<sup>50</sup>.

Article 7 of the Civil Code establishes that a law is understood as being in force from the moment it is published, unless anything otherwise is indicated, whilst article 9 of the Civil Code establishes that laws refer to future events and that they may never be retroactive.

On the basis of these rules then, any retroactive application of the reform should be rejected.

Having said that though, from an analysis of the aforementioned provisions, neither does it transpire whether what is being rejected is a strict retroactivity or a material retroactivity.

Strict retroactivity refers to applying the law to acts that occurred prior to its publication. Material retroactivity means that the law governs present and future acts and also for the present consequences of acts perpetrated prior to its publication.

That being so, an interpretation will be necessary bearing in mind that article 22 of the Retroactive Effects of Laws Act establishes material irretroactivity whilst the same law does not envisage and specific rules for its temporary application. This means that the law would not even apply to the current consequences of an event prior to its publication.

However, in some cases, a material retroactivity has been adopted bearing in mind that events prior to the reform of 2004 would also be governed by the Consumer Act as

---

<sup>50</sup> Articles 7 and 9, Civil Code and the Retroactive Effects of Laws Act dated October 7 1861.

regards their substantial regulations, so I believe that the reform is of an eminently procedural nature, something which is not at all clear.

Nevertheless, what is set forth in articles 22, 23 and 24 of the Retroactive Effects of Laws Act stands in opposition to this jurisprudential opinion, inasmuch that "as regards a substantiation and rituality of court cases (article 24), proof (article 23) and the way of claiming rights stemming from contracts in court (article 22) the new law acts *in actum*<sup>51</sup>".

Although a certain sector of doctrine confirms the possibility of retroactivity when dealing with reforms merely procedural, there are those who consider that the reform to the Consumer Act which incorporates class actions "cannot be solely considered procedural or merely ritual, because it introduces substantial rights to whoever did not take part in the process and who could never ever have even heard of the case whilst it was being litigated<sup>52</sup>".

However, the point is arguable and it will depend on whether the court considers that the reform introduces procedural changes or that it establishes substantial rights in favour of consumers.

#### 4. Prescribing violatory responsibility

The Consumer Act sets forth that the deadline for pursuing a declaration of violatory responsibility; i.e. conduct that is subject to fines, is 6 months from when the violation occurred<sup>53</sup>.

The Consumer Act does not mention whether that same deadline extends to actions pursuing compensation for damages that occurred as a result of the legal violation that took place.

Class actions distinguish between a declaratory and a compensatory stage. Thus it transpires that a declaration of violatory responsibility is a *conditio sine qua non* for pursuing the corresponding compensation.

So, one possible interpretation would be that if the action aimed at pursuing a declaration of violatory responsibility happens to be prescribed, any action for asserting compensatory pretensions would also be prescribed, within the context of the special procedures of the

---

<sup>51</sup> Law Report in Act N°19.955, Professor Carlos Peña González, p 15.

<sup>52</sup> Law Report in Act N°19.955, Professor Carlos Peña González, p.16.

<sup>53</sup> Article 26, Consumer Act.

Consumer Act, and the right to exercise any ordinary non-contractual liability action according to ordinary procedures always remains safe.

5. Special laws that exclude applying the Consumer Act

Article 2 bis of the Consumer Act excludes from its field of application any activities regulated by special laws, unless the latter do not envisage the matter being dealt with.

In the case of *Odecu vs. Banco Estado*, the defendants asked for a declaration of inadmissibility of the class action based on the fact that banking concerns are regulated by Act N°18.840, the Constitutional Law of the Central Bank, by whose virtue, the Central Bank has drafted protection provisions for savers, creditors and public interests.

All in all, during the case, it was decided to reject that argument because the rules of the Central Bank are regulations drafted in the light of a framework law, so there does exist a difference between the special rules consisting of regulations and the consumer protection one which is a law and, therefore, hierarchically higher. For that reason, this argument of inadmissibility was rejected and the Consumer Act took priority.

## V. PENALTIES LEVIES AS A RESULT OF A CLASS ACTION

### 1. Fines.

The fines referred to in this law are to be paid into the Treasury and the penalties that are not otherwise mentioned receive a fine of up to 50 UTM (equal, as of September 2007 to US\$\_\_\_\_\_).

In the case of any noncompliances with the obligations established for rendering risky services, the suppliers could be fined up to 750 UTM (equal, as of September 2007 to US\$ 48,723.36).

The same fine applies in the case of violations as a result of deceitful publicity, but if the violation puts at risk the health or the security of the population or the environment, the fine could increase to 1,000 UTM (equal, as of September 2007 to US\$ 64,964.48).

On the other hand, the owners of public functions, including artistic and sports ones, that put up for sale an amount of entrance tickets that exceed the capacity of the corresponding premises, could be fined with between 100 and 300 UTM (equal, as of September 2007 to US\$ 6,496.44 and US\$ 19,489.34, respectively). The same penalty applies to the overbooking of passenger transport services, with the exception of air transport.

Moreover, whoever suspends, brings to a halt or does not render, without good grounds, a service previously contracted and which a connection, installation, incorporation or maintenance charge had to be made, could be fined with up to 150 UTM (equal, as of September 2007 to US\$ 9,744.67).

When the service is a basic one (drinking water, gas, drainage, electricity, phone or the recollection of toxic elements), those responsible could be fined with as much as 300 UTM (equal, as of September 2007 to US\$\_\_\_\_\_).

Lastly, whoever whilst obliged to label goods or services produced, dispensed or rendered, were not to do so, does not tell the truth on the labels, conceals or alters them, will be subject to a fine of 5 to 50 UTM (equal, as of September 2007 to US\$ 324.82 and US\$ 3,248.22, respectively).

In the event of a repeat offence of the fines previously mentioned, they could be increased to double their amounts. A repeat offender is a supplier who is fined twice in the one same calendar year for violations of this law.

When levying the fines, the court must bear in mind: **(i)** the amount of the dispute; **(ii)** the degree of negligence in which the violator has incurred; **(iii)** the seriousness of the damage caused; **(iv)** the risks to which the victim or the community was exposed, and **(v)** the violator's financial situation.

## 2. Compensation.

There is no information available regarding the usual amounts of compensation because none of the class actions have reached a final decision. However, the Consumer Act does enshrine certain specified rules that have to be taken into consideration.

First of all, the judge could order that compensation be made by the defendant without the need for the interested parties to appear, when the judge deems that the supplier has the information necessary for identifying them and proceed accordingly.

The court may decree, also during the proceedings and until final sentence is passed, the formation of groups or sub-groups of consumers affected as he deems necessary for applying compensation or the corresponding relief.

Whatever payment has to be made to each consumer will be in proportion to their respective rights declared in the final sentence.

The exclusion of pain and suffering as a compensable damage in these cases, enshrined in article 51 N°2 of the Consumer Act, discourages the contingency of manipulating the process with money in mind rather than real relief, so only material damages are compensable and those which have been demonstrated during the process.

## 3. Non-monetary penalties.

This process could also give rise to non-monetary penalties, such as the cancellation of the abusive clauses in joining contracts, forced compliance with rendering services, a stop to the acts that gave rise to the damage or certain relief<sup>54</sup>.

---

<sup>54</sup> Article 50, Consumer Act .

The consumer will be entitled to a product being replaced or, lacking that, to opt for receiving its value with the purchase of another, or a reimbursement of the price paid in excess, when the amount or the net content of a product is less than the one indicated on the container or package.

Furthermore, the consumer may decide between a relief at no cost for the goods or, prior to being replaced, their replacement or restitution or a reimbursement of the money paid, in the following cases:

- When products subject to obligatory security or quality compliance rules do not meet the corresponding specifications.
- When the materials, parts, pieces, elements, substances or ingredients of products do not correspond to the specifications they declare or those mentioned on their labels.
- When any product, due to faulty manufacturing, preparation, materials, parts, pieces, elements, substances, ingredients, structure, quality or health conditions, whichever the case may be, is not fit for the use or consumption to which it was to be devoted or which the supplier had mentioned in his publicity.
- When the supplier and consumer had agreed that the products object of the contract should meet certain specifications and this has not occurred.
- When after the first time of having fulfilled the guarantee and rendered the corresponding technical service, there were still deficiencies that cause the product unfit for use or consumption.
- When whatever is object of a contract has faults or defects that make it impossible to use according to what it was originally devoted.
- When the grade of the metals in any works or articles of jewellery, craftsmanship in precious metals or the like is inferior to what is mentioned regarding them.

## VI. ALTERNATIVE METHODS FOR RESOLVING CONFLICTS

The Consumer Act grants the courts the power to summon the parties to a reconciliation and it is also legal in these matters to enter into arrangements or do deals which are considered as a normal way in which to resolve cases such as these.

A **reconciliation** is a legal and bilateral means of settlement, by virtue of which the parties bring their litigation to an end by means of a procedural contract proposed by the judge. A memorandum of a reconciliation agreement is then drafted that has the same effect as an enforced sentence.

A **transaction** is an agreement out-of-court also considered as a direct means of settlement and which acts as a contract by means of which two parties forestall possible litigation or bring one pending to an end, making reciprocal concessions. As this is a contract expressly regulated by common law<sup>55</sup>, the following restraints are in force:

- The act does not mean waiving any right that is not the object of the conflict.
- Only those persons who are capable of availing themselves of whatever is mentioned in it, may take part in the transaction.
- No transactions can be made over others' rights or any rights that do not exist.
- Any transaction is void if, when entered into, litigation as a result of an enforced sentence had ended and which the parties were not aware of when they entered into the transaction.

On the other hand, an **arrangement** is an agreement<sup>56</sup> reached directly by the parties, within the court proceedings, by virtue of which they bring the conflict to an end, notifying this to the court hearing the case so that it has the same value as an enforced sentence.

This is one of the tools most used in class actions as an alternative way in which to bring them to an end. Since the amendment to the Consumer Act of 2004 came into force, 32 class actions have been set in motion. Of them, around 40% have been declared admissible, and of that percentage, 53% have ended as a result of a court-approved arrangement.

---

<sup>55</sup> Article s 2,446 and onwards of the Civil Code.

<sup>56</sup> Procedural doctrine usually considers it as a legal procedural contract, "because generally speaking the parties enter into it outside the process, but they must notify its existence to the court so that the process can come to an end". MATURANA MIQUEL, Cristián, *Notes on an Introduction to Procedural Law, Jurisdiction and Competence*, Santiago, 2006, p. 25.

However, **mediation** is also the alternative most used for resolving conflicts stemming from the Consumer Act. This is a means of settlement out of court of a bilateral and assisted nature aimed at forestalling possible litigation or bring one pending to an end.

The fact that it is of an *assisted* nature implies the existence of a mediator between the parties, who does not actually take a decision regarding the conflict, but only cooperates to help the parties reach an agreement.

The Consumer Act grants the powers of mediator to SERNAC.

Until now, mediators have achieved success. In accordance with SERNAC's statistics, compensation worth 45 million US dollars has been obtained in favour of consumers<sup>57</sup> and, as a result of out-of-court mediation, "two out of every three cases reaching the service have been resolved<sup>58</sup>".

The solutions achieved by means of this mechanism not only involve monetary relief, but they also circumvent litigation.

In the case of *Sewage Treatment Plant of La Farfana*, "a class action was avoided against it by 1.2 million persons, deducting services not rendered from customers' receipts and getting rid of the bad smells around the plant. This solution was achieved thanks to the mediation of SERNAC and to the widespread reports on the problem in the press<sup>59</sup>".

On the other hand, the Municipal Consumer Information Offices (hereinafter OCIC) is bent on educating, informing and protecting consumers in their municipalities and they also have the power to mediate in any conflicts between suppliers and consumers, creating a speedy means of communication between SERNAC and the Municipalities.

However, mediation procedures have also led to certain doubts.

By way of example, it was suggested that this type of adviser is not impartial because, above all, he has to safeguard consumers' rights. The impersonality of the process has also been questioned, as the parties do not actually personally contact the adviser because affairs are normally conducted over the phone.

For that reason, doctrine has deemed it necessary to introduce certain basic principles that govern mediation and which are devoted to making sure there is fairness and

---

<sup>57</sup> The web site of the National Consumer Service ([www.sernac.cl](http://www.sernac.cl)).

<sup>58</sup> MANZANO, Liliana, Op. Cit., p. 17.

<sup>59</sup> MANZANO, Liliana, Op. Cit., p. 17.

transparency in agreements, that they have been given voluntarily, there is flexibility, questions of a criminal nature are excluded and there is a respect for and abidance by basic law and order so as to ensure the efficiency of the agreement that could be reached.

## VII. THE COST OF CLASS ACTIONS

Article 51 of the Consumer Act discourages the view of class actions being a business for lawyers, because it sets forth that lacking an agreement with the plaintiff, the fees of the common solicitor will be regulated depending on the financial means of the plaintiffs. They could also be estimated according to the amount of the cost courts, which is known as a *Cuota Litis* Agreement or Litigious Allocation, and which is also applied to the fees of the lawyers concerned.

The sole experiences regarding these agreements as a way in which to remunerate lawyers, stem from the code of ethics of the Bar Association which requires that a deed be entered into prior to beginning the process and that the following rules be observed<sup>60</sup>:

- The lawyer's participation must never be greater than that of the client.
- If the matter is resolved adversely, the lawyer must never charge any fees or expenses whatsoever, unless this was expressly stipulated in his favour.
- The lawyer will reserve the right to revoke the agreement and no longer act as the client's representative at any time and for any justified reason surviving<sup>61</sup>.

When litigious pretensions have been annulled because the customer him/herself has abandoned, or entered into a transaction, the lawyer may also be entitled to require payment of the fees corresponding to the services rendered.

---

<sup>60</sup> Article 35 of the Professional Ethics of the Bar Association.

<sup>61</sup> A justified reason surviving is considered to be one that affects the lawyer's honor, dignity or conscience, or which means a noncompliance with the client's moral or material obligations toward the lawyer or makes it necessary for a specialized professional to intervene.

## VIII. FINAL CONSIDERATIONS

Since the amendment to the Consumer Act of 2004 came into force, which introduced the system of class actions into our country, a total of 32 cases have dealt with the defence of collective or widespread rights. 43.75% of these processes were filed in 2006 alone.

Of all of these processes, around 40% have been declared admissible and of that percentage, 53% have ended in a court-approved arrangement, whilst the remaining approximate 47% continue their progress in the first or second instance.

So, the reform of the Consumer Act that introduced class action has filled the procedural vacuum left by the original law.

Generally speaking, the greatest impact of this new procedure refers to the explosive increase in claims. Figures provided by a CERC survey show that today 79% of consumers are willing to claim against a supplier or a service when they perceive that their rights have been trampled on, and 57% stop purchasing a particular product for this same reason<sup>62</sup>.

The rights that consumers have consciously achieved is also revealed in an increase in the amount of reports received through the different channels of SERNAC.

In 2005, for example, a total of 207,457 consumers were attended to in these channels, dealing with queries and claims. Those that were dealt with through the Regional Boards increased 28% in relation to the previous year and 79% at a municipal level provided by the services of the Municipalities themselves<sup>63</sup>.

Consequently, it has become necessary for SERNAC to incorporate "the different persons involved, companies and consumers, when it comes to resolving their conflicts. This mechanism will enable consumers' problems to be speedily resolved and for those companies joining the system, it will act as an element of competitiveness, as this experience has demonstrated in other countries.

Lastly, regarding the duration of a class action, in some cases the admissibility phase has lasted a little over one year. In fact, of the processes that are already enforcing rulings regarding admissibility (40%), the average delay in dealing with that procedural phase was 9 months, the longest case being *ODECU vs. CTC Comunicaciones Móviles S.A.*, that

---

<sup>62</sup> The web site of the National Consumer Service ([www.sernac.cl](http://www.sernac.cl)).

<sup>63</sup> The web site of the National Consumer Service ([www.sernac.cl](http://www.sernac.cl)).

lasted a little more than one year. This was due to the nature of written legal proceedings in Chile and because of the inefficiency of courts to adequately absorb the large amount of civil cases that are submitted every day to the lower civil courts in our country.

*Martín Gubbins / Carla López*  
*Santiago, 13.09.07.*