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PRECONTRACTUAL LIABILITY IN CHILEAN PRIVATE INTERNATIONAL LAW

La responsabilidad precontractual en el Derecho internacional privado chileno

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Abstract[**]

Chilean law has no specific conflict rules to determine the law governing precontractual liability in the negotiation of international contracts; this absence of rules generates legal uncertainty for the negotiating parties to these contracts, when linked to Chile. To ascertain this law, Chilean courts need to make an extensive and teleological interpretation of general conflict rules in force that points to different applicable laws. It is convenient that this interpretation is done harmoniously by courts following certain guidelines -as those given in this paper- to obtain congruent judgements between Chilean courts and foreign competing courts. These guidelines should be flexible and guarantee a governing law that is predictable, fair, and reasonably connected to the precontractual claim. *De lege ferenda*, it is advisable that Chilean Private International law includes specific conflict rules on precontractual liability. They could be modelled on those of Rome II Regulation and be flexible by using alternative connecting factors that help to ascertain the most appropriate national substantive law to govern cases on this liability.

Keywords

Conflict rules on precontractual liability, precontractual liability, Chilean Private International law on precontractual liability.

Resumen

El Derecho Internacional Privado chileno carece de normas de conflicto específicas para determinar la ley aplicable a la responsabilidad precontractual originada en la negociación de contratos internacionales. Este vacío legal genera incerteza jurídica para las partes que negocian contratos internacionales vinculados con Chile. Para determinar esta ley, los tribunales chilenos deben hacer una interpretación extensiva y teleológica de las normas generales de conflicto chilenas. Es conveniente que la realicen en forma armónica y conforme a ciertos lineamientos comunes – como los que aquí se sugieren- para obtener fallos congruentes con los de tribunales extranjeros con competencia para decidir del mismo asunto. Estos lineamientos deben ser flexibles para determinar una ley aplicable, predecible, justa y razonablemente conectada con los hechos reclamados. *De lege ferenda*, se propone la introducción en el derecho chileno de normas de conflicto específicas que regulen la responsabilidad precontractual. Estas normas podrían inspirarse en las del Reglamento Roma II, debieran ser flexibles y utilizar factores de conexión alternativos para determinar la ley sustantiva nacional más apropiada para regular los casos internacionales de responsabilidad precontractual.

Palabras clave

Normas de conflicto sobre responsabilidad precontractual, responsabilidad precontractual, Derecho Internacional Privado Chileno regulador de la responsabilidad precontractual.

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Introduction

The increasing number of judicial cases triggered by the precontractual misconduct of the parties in the negotiation of international contracts has moved lawmakers, legal scholars, and the judiciary in many jurisdictions to study the conflict of laws arising from these cases and to enact conflict rules to determine a suitable law to govern the precontractual liability resulting from them. This paper analyses Chilean conflict rules on this liability, hereinafter referred to as international precontractual liability, as opposed to national or domestic precontractual liability.

As will be seen, Chilean law has no specific conflict rules to determine the governing law of international precontractual liability, though penalizing precontractual liability in domestic cases. Neither there is case law or legal literature in Chile that could give guidelines to determine the applicable law to this liability[1]. Thus, there is now legal uncertainty on the law governing international precontractual liability for the parties negotiating international contracts linked to Chile and for the judges and arbitrators that adjudicate cases on this liability in Chile.

Since it is reasonable to foresee that the number of judicial disputes on international precontractual liability will grow progressively in Chile with the increase of international exchange between foreigners and parties domiciled, or who own assets in Chile; judges, lawyers and the parties will need to have recourse to reliable legal studies to guide their legal conduct and decisions. This paper aims to provide a guideline for them and, in so doing, to fill in the vacuum in Chilean legal doctrine on the law governing this liability so to increase legal certainty in respect of this law. Arbitrators might also benefit from this work when applying Chilean conflict rules to determine the substantive law to adjudicate a case on international precontractual liability[2].

This paper is structured in two sections. The first section shows how the doctrine of precontractual liability has evolved in the substantive and conflict laws of other jurisdictions; its aim is to provide doctrinal material for the analysis of the Chilean law that will follow. The second section identifies the Chilean conflict rules governing international precontractual liability and proposes guidelines for the proper construction and fair application of these conflict rules.

As studying precontractual liability is complex because precontractual problems are multifarious and triggered by a great variety of facts with different legal solutions amongst jurisdictions, this paper sets some research boundaries. It assumes that precontractual liability is a type of non-contractual obligation and limits its scope of study to common cases of precontractual liability. Consequently, this paper does not study other cases of precontractual liability as, for example, that arisen from the physical damage suffered by one party during the contractual negotiation inside the place of business of the counterparty. Besides, it does not deal with the problem of ascertaining the international jurisdiction of courts in cases on precontractual liability, because this problem is governed by other specific conflict rules.

1. Precontractual liability in domestic substantive law and Private International Law

1.1. The growing complexity of the negotiation of international contracts and the development of the doctrine of precontractual liability

It is well known that the world economic development and globalization process have led to a rise of international contracting, along with a more complex negotiation of international contracts. Hence, the traditional domestic rules governing the contract formation, as the offer and acceptance, the counteroffer and the withdrawal or rejection of the offer; do not accommodate well to the various and complex stages, steps and documents that are currently exchanged between the parties while negotiating international contracts. These contracts are many times contained in one or various lengthy documents, which the parties sign in several copies and

[1] Precontractual liability has not been analyzed in the Chilean Private International Law studies on non-contractual liability; see: DOMÍNGUEZ (1966), p. 313; RAMÍREZ (2013), p. 245, VILLARROEL AND VILLARROEL (2015), p. 364.

[2] Law 19.971 of 2004; UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 28 N° 2.

exchange, almost simultaneously, at the time of their closing. The drafting of these contracts and documents is the result of a complex negotiation in which it is not easy to identify a single offer or counteroffer, which the parties can accept. The negotiation is a gradual and long process where the agreements are reached partially and progressively through successive drafts discussed by the managers, alongside the bankers, accountants, and lawyers of the parties. At the beginning, there might be an exchange of information to identify the goals and differences between the parties (letters of intent), followed by some partial agreements in some crucial matters (memorandum of understanding, preliminary agreements, heads of agreements), that lead to the final drafting of the contract. The managers might first want to negotiate without issuing any legally binding offer. Then, after some preliminary issues are agreed, they might want to receive the legal view and approval of their lawyers; but their lawyers' legal reports or corrected drafts are not yet a proper offer, since lawyers normally lack authority to make binding offers on behalf of their clients. Thus, after successive drafts and corrections, and, sometimes, after having introduced the amendments required by third parties related to the contract –as bankers or financing agents- the final text of the contract is agreed for the parties to sign and exchange at a closing[3].

During this lengthy negotiation, one party might have given the other confidential information, might have received incomplete, distorted, or false information[4], might have incurred in considerable expenses, might have refrained from negotiating with other clients or might have adopted measures in anticipation of the prospective contract[5]. Therefore, if the contract is finally not made, or is made with the breach of a precontractual duty by one party, the innocent counterparty might suffer a considerable loss or damage which, in fairness, should be compensated, notwithstanding, the absence of a contractual obligation between the parties.

Bearing this in mind, legal systems have introduced judicial and legal techniques to provide compensation for the damage produced by one party and suffered by its counterparty in the precontractual stage of the negotiation of a contract[6]. Hence, the principle or doctrine of the precontractual liability of the parties has been developed and regulated. The term "precontractual liability" has been though, somehow criticized, because this liability might arise even if the parties do not conclude a contract[7]. Nevertheless, this term is commonly used today to name the legal liability of a negotiating party for the damage caused to the innocent counterparty during the negotiation of a contract. This liability includes, in general, the legal obligation of a party to compensate the counter party for any damage caused by his action, omission, or negligence during the precontractual stage of a contract, if this damage is directly linked with the negotiation of the prospective contract or of the contract made by the parties. It includes, amongst other conducts, the liability derived from the violation of a duty of disclosure and that from a unilateral breakdown of contractual negotiations [8].

1.2. The legal grounds for precontractual liability in domestic substantive law

The legal grounds for the obligation of compensation of precontractual damage, varies greatly between legal systems. In most civil law jurisdictions this obligation derives from the general duty of the parties to negotiate in good faith, which is expressed in various ways, such as, the duties of respect and mutual trust, of loyalty and correct and fair conduct, of protection of the counterparty, of confidentiality and true disclosure, and of acting with coherency (*non venire contra factum*

[3] FARNSWORTH (1987), pp. 218-220; HILSENRAD (2005), pp. 7-12, KUCHER (2004), pp. 1-6.

[4] On precontractual duties of disclosure, see: BARRIENTOS (2015a); BARRIENTOS (2015b); CRASWELL (2006); DE LA MAZA (2010a), p. 413; DE LA MAZA (2010b) pp. 21-52; DE LA MAZA (2010c), pp.75-99; DE LA MAZA (2010d), pp. 115-135; RÍOS (2014), p. 208.

[5] ARYE AND BEN-SHAHAR (2001), pp. 423-424.

[6] DIETRICH (2001), pp. 154-156; FARNSWORTH (1987), pp. 218-223, SCHULZE (2016), pp. 13-16.

[7] TEGETHOFF (1998), pp. 342, 351.

[8] Regulation (EC) Nº 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), Recital 30 and art. 12; ARENAS (2007), p. 317; ELBERT (2012), p. 23; HAGE-CHAHINE (2012), p. 452; PALMIERI (1999), pp. 32-34. On non-contractual obligations in Chilean substantive law see: BARROS (2006), pp. 1000-1042; BARRIENTOS (2008), pp. 29-121; CELEDÓN AND SILBERMAN (2010), pp. 105-152; NOVOA (2005), pp. 601-606; RAMOS (2008); ROSENDE (1979), pp. 13-114; ZULOAGA (2006), pp. 7-321.

proprium), reasonableness and fairness, etc.[9]. In other cases, the duty of compensation derives from a negligence or willful misconduct -equivalent to a civil quasi-delict or delict- that should be punished as an infringement of the *neminen laedere* principle[10]*.* On the opposite, common law jurisdictions are reluctant to accept the duty of negotiating in good faith as a basis for precontractual liability. As a rule, these jurisdictions protect contractual freedom with the theory of the aleatory view of the negotiation, which permits the parties negotiate under their own risk and break negotiations at any moment and for any reason, with no liability for them[11]. Common law courts, however, accept liability in some specific cases, under the basis of other contractual or non-contractual principles; as the duty of restitution for unjust enrichment, the duty to repair the deception of one party in respect of the intention of contracting (misrepresentation*)*, or under the doctrine of promissory estoppel[12]*.* Thus, nowadays, the compensation of the precontractual damage is accepted with equivalent results in both, the civil law, and the common law jurisdictions though, in the latter, restricted to specific cases[13].

1.3. The variety of doctrines on precontractual liability in domestic substantive laws

The doctrines or legal remedies sanctioning precontractual liability vary between the civil law and the common law jurisdictions. In the civil law jurisdictions, the compensation of the precontractual damage is done through the doctrine of *culpa in contrahendo*[14] (which is characterized as having a contractual, or sui generis, or a *tertium quid* between contractual and non-contractual, or a purely non-contractual nature[15]); or entitling the injured party to claim compensation from the willful or negligent feasor of a civil delict or quasi-delict[16]. In the common law jurisdictions, the doctrine of *culpa in contrahendo* is, in general, not accepted; but the compensation of the precontractual damage can be obtained under other contractual and non-contractual doctrines as those of misrepresentation, specific promise or promissory estoppel (or equitable estoppel) or restitution for unjust enrichment[17] and through different torts of non- contractual nature[18]*.*

[9] BARRIENTOS (2008), pp. 53-109; BARROS (2006), pp. 1000-1002; CELEDÓN AND SILBERMAN (2010), pp 55-77; DIMATTEO (2009), pp. 148-151; HILSENRAD (2005), pp. 77-85; KESSLER AND FINE (1964), pp. 403-413; KUONEN (2005), pp. 271-273; NEDZEL (1997), pp. 97-116; NOVOA (2005), pp. 584-589; PASCUAL (1994), pp. 23-45; ROSENDE (1979), pp. 69-75; TEGETHOFF (1998), pp 348-349, 353-359; VALÉS (2012), pp. 92-153; ZULOAGA (2006), pp. 51-102. See also Italian Civil Code (CC), art. 1337 and Portuguese CC, art. 227.

[10] CARTWRIGHT AND HESSELINK (2008), p. 458, 487-488; LLUÍS (1994), pp. 43-49; DRAETTA AND LAKE (1993), pp. 848-850; MIRMINA (1993), pp. 86-89; NEDZEL (1997), pp. 113-116, 137-140; ZULOAGA (2006), pp. 51-59. Rome II seems to have rejected this criterion by purposely detaching the *Culpa in Contrahendo* rules (Chapter III) from those of civil delicts and quasi-delicts (Chapter II): see Rome II, arts. 4-13 and BOLDERS (2008), pp. 464-465.

[11] FARNSWORTH (1987), pp. 221-222 names this theory. See also: CARTWRIGHT AND HESSELINK (2008), pp. 451-452, 466-468, 487-488; DIETRICH (2001), pp. 156-158; DIMATTEO (2009), pp. 147-148; DRAETTA AND LAKE (1993), pp. 836-839; GODERRE (1997), pp. 269-270; KESSLER AND FINE (1964), pp. 412-413; KUCHER (2004), pp. 6-9; ZULOAGA (2019), pp. 183-231.

[12] BABUSIAUX (2018), pp. 352-354.

[13] CARTWRIGHT AND HESSELINK (2008), p. 452; DIETRICH (2001), pp. 182; DIMATTEO (2009), pp. 147-148; FARNSWORTH (1987), pp. 285-287; GODERRE (1997), pp. 267-272; KESSLER AND FINE (1964), pp. 448-449; NEDZEL (1997), pp. 154-158; KÜHNE (1990), pp. 292-293; SCOTT (2004), pp. 1930-1936.

[14] The author of this doctrine is Rudolf von Ihering: VON IHERING (1861), p. 239. See: BARRIENTOS (2008), pp. 8-19; BASS (2009), pp. 218-220; DRAETTA AND LAKE (1993), pp. 851-853; FARNSWORTH (1987), pp. 240-241; KESSLER AND FINE (1964), pp. 401-409; LLUÍS (1994), pp. 8-13; MENDIETA (2011), pp. 44-45; MIRMINA (1993), pp. 79-86; NEDZEL (1997), pp. 112-113; NOVOA (2005), pp. 583-584; SCHINKELS (2011), pp. 522-523; TEGETHOFF (1998), pp. 351-353; ZULOAGA (2006), pp. 15-37. See also: Rome II, art. 12; Italian CC arts. 1337-1338; Portuguese CC, art. 227; BGB, arts. 122, 241.2, 280.1, 311.2, 523, 524, 694.

[15] CARTWRIGHT AND HESSELINK (2008), pp. 458-460; HAGE-CHAHINE (2012), pp. 464-465; HILSENRAD (2005), pp. 58-77; KUONEN (2005), pp. 267-269; KESSLER AND FINE (1964), pp. 401-409; SCHINKELS (2011), p. 523; VALÉS (2012), pp. 158-168; VOLDERS (2007), pp. 130-132. Some authors consider that the inclusion of *culpa in contrahendo* in Rome II confirms that EU law characterizes it as non-contractual: see VOLDERS (2007), pp. 128-129; HAGE-CHAHINE (2012), pp. 466-469. Against: TOMÁS (2010), p. 210.

[16] CARTWRIGHT AND HESSELINK (2008), pp. 199-203, 238-239, 257-259, 343-344; DIMATTEO (2009), pp 148-151; DRAETTA AND LAKE (1993), pp. 848-851.; HILSENRAD (2005), pp. 71-77; KESSLER AND FINE (1964), pp. 406-407; MIRMINA (1993), pp. 86-89; NEDZEL (1997), pp. 149-150. This happens in France, see French CC, arts. 1240-1241.

[17] BASS (2009), pp. 225-229; CARTWRIGHT AND HESSELINK (2008), pp. 461-468; DIETRICH (2001), pp. 158-164; DIMATTEO (2009), pp. 147-148; DRAETTA AND LAKE (1993), pp. 837-838, 847; FARNSWORTH (1987), pp. 221-243; GODERRE (1997), pp. 269-272; KESSLER AND FINE (1964), pp. 448-449; KUCHER (2004), pp. 33-37; KÜHNE (1990), pp 282, 289-292; NEDZEL (1997), pp. 128-137.

[18] CARTWRIGHT AND HESSELINK (2008), pp. 461-468; KUCHER (2004), pp.15-16.

1.4. The progressive sanctioning of precontractual liability in domestic substantive laws

As exposed, precontractual liability has progressively been sanctioned in many jurisdictions throughout the world. The doctrine of *culpa in contrahendo,* formulated initially in Germany, was gradually accepted in other European domestic laws and case law, before it was sanctioned in the European Union's Rome II Regulation on the Law Applicable to Non-Contractual Obligations, of 2007 (Rome II)[19]. This Regulation harmonizes the EU legislation on *culpa in contrahendo*, characterizes it as non-contractual, and provides specific conflict rules to determine the law to govern it[20]. In the United States, precontractual liability has been sanctioned in some cases by calling upon the authority of the Restatement Second (Contracts), Section 90, which permits Courts to apply the doctrine of promissory estoppel to compensate the party who has been damaged by an unfulfilled promise[21]. Besides, the Restatement Second (Contracts), Section 205, Comment (c) acknowledges that bad faith in negotiations may be subject to sanctions. Also, the US Uniform Commercial Code (UCC) permits presenting precontractual evidence, in some cases, to prove misrepresentation (mistake, deceit or fraud) in the making of a contract[22]. In addition, certain precontractual conducts done in bad faith might be punished and compensated as a tort or restitution[23]. Furthermore, in the American mixed jurisdiction of Louisiana, precontractual liability is justified under the doctrine of detrimental reliance and in Puerto Rico, under that of *culpa in contrahendo*[24].

The compensation of precontractual damages is as well ordered in certain international instruments of soft and hard law as the UNIDROIT Principles of International Commercial Contracts, 2016 (PICC)[25], the Principles of European Contract Law (PECL)[26] and, according to some authors, the UN Convention on Contracts for the International Sale of Goods, Vienna 1980[27].

1.5. The law applicable to precontractual liability in Private International Law

Determining the law applicable to international precontractual liability poses two problems which are strictly linked. First, that of characterizing international precontractual liability, which consists in determining which relevant legal system should be used for defining its legal meaning or category; this because the characterization of what precontractual liability is and which precontractual conduct triggers it, might vary between different legal systems[28]. And second, that of using this legal category to identify the conflict rule that will determine the applicable law to govern this liability.

[19] GODERRE (1997), pp. 267-269; DIETRICH (2001), pp. 174-183; DRAETTA AND LAKE (1993), pp. 848-853; KESSLER AND FINE (1964), pp. 401-408; KUCHER (2004), pp. 20-24; MENDIETA (2011), pp. 44-53; MIRMINA (1993), pp. 79-89; MONSALVE (2011), pp. 61-78; TEGETHOFF (1998), pp. 342, 345-350, 351-353; VON HEIN (2012), pp. 430-433.

[20] Rome II, Recital N° 30, art. 12. See: ARENAS (2007), pp. 315-320; DICEY et al. (2012), p. 2249; DICKINSON (2008), pp. 523-536; SCHINKELS (2011), pp. 522-524; VOLDERS (2008), pp. 464-466.

[21] AMERICAN LAW INSTITUTE (1981), § 90. See: DIMATTEO (2009), pp. 147-148; DRAETTA AND LAKE (1993), p. 847; GODERRE (1997), pp. 270-271; KÜHNE (1990), p. 282; NEDZEL (1997), pp. 99-109. On the development and requisites of *promissory estoppel* in USA, see: NEDZEL (1997), pp. 128-137.

[22] UCC § 2-302. See: DIMATTEO (2009), pp. 146-148; DRAETTA AND LAKE (1993), pp. 839-846; GODERRE (1997), p. 270; KESSLER AND FINE (1964), pp. 444-448; NEDZEL (1997), pp. 103-104.

[23] AMERICAN LAW INSTITUTE (1981), § 205, commentary c). See: FARNSWORTH (1987), pp. 223-239; GODERRE (1997), p. 270.

[24] Louisiana CC, arts. 1878, 1967; Puerto Rico CC, arts. 1271-1272. See: GODERRE (1997), pp. 268-269; MIRMINA (1993), pp. 90-92; NEDZEL (1997), pp. 140-146.

[25] PICC, arts. 1.7, 2.1.4 N° 2b), 2.1.15 N° 2-3, 2.1.16. See: GODERRE (1997), pp. 272-274; NEDZEL (1997), pp. 151-154.

[26] PECL, Art. 2:301.

[27] GODERRE (1997), pp. 275-282; KLEIN AND BACHECCHI (1994), pp. 1-25; NOVOA (2005), pp. 606-612; SPAGNOLO (2007), pp. 261-310.

[28] BARIATTI (2017), p. 357; LIPSTEIN (2011), pp. 4-8.

1.5.1. Characterizing an act as triggering precontractual liability in Private International Law

Characterizing or classifying precontractual liability is not an easy task, even in a purely domestic case. Hence, the scope of precontractual liability is wide and difficult to delimitate because of the great variety of precontractual acts or misconducts that could cause damage, and because, sometimes, there are no clear boundaries between precontractual and contractual liability[29]. For instance, a precontractual exchange of documents between the negotiating parties – such as a letter of intent or memorandum of understanding- might, at times, change the type of liability from precontractual to contractual[30]. Something similar might happen in certain cases of breach of a precontractual duty of disclosure[31].

In an international case, the judge must characterize the precontractual act or damage using the legal system that the conflict rule of his forum orders him to apply. This legal system determines the juridical nature of the act or damage and establishes if it refers or not to a claim on precontractual liability[32]. If the answer is positive, the judge then determines its applicable law, using the forum´s conflict rules on precontractual liability[33].

The problem arises because most legal systems have no conflict rules on characterization; thus, they have no rule to determine which legal system should be used to classify the legal nature of an act or damage. Scholars have proposed different solutions to this problem; amongst which the most common ones are to classify it according to the legal meaning or characterization given by the law of the forum, or that given by the *lex causae* (the law applicable to the case, as determined by the choice of law rules of the forum) if this law is more linked to the case, or that given autonomously by a particular law, regulation or Treaty applicable to the case[34]. Hence, in those jurisdictions where there are no conflict rules on characterization, national Courts might apply any of the above laws to determine if the facts of the case give rise or not to precontractual liability.

Because of the absence of conflict rules on characterization and the different conflict rules in force amongst jurisdictions, the same act or damage could be characterized as precontractual in one forum and as contractual or non-contractual in another. This might happen when there are several national fora with jurisdiction to adjudicate a particular international precontractual liability claim; in which case, the same precontractual damage might be characterized and compensated under different doctrines and submitted to different substantive laws, depending on the forum where it is adjudicated. This diversity of solutions might hinder legal certainty and, sometimes, lead to unfair decisions or forum shopping.

Ideally this diversity of solutions should be corrected with the harmonization or unification of national conflict laws[35]. This has been done in the EU conflict law. Thus, Rome II gives an autonomous characterization for *culpa in contrahendo* in the negotiation of international contracts connected to the EU States, which differs from the characterization provided by their national laws. This autonomous characterization unifies the legal meaning of *culpa in contrahendo* within the EU to secure uniformity of judicial decisions amongst its national courts[36].

1.5.2. Determining the applicable law to precontractual liability in Private International Law

As said, after characterizing the case as a claim on precontractual liability, courts should apply their own forum conflict rules to determine the law governing this liability. National jurisdictions have used different criteria and connecting factors to determine this law. These connecting factors have

[29] BARRIENTOS (2012), p. 839; BARROS (2006), pp. 976-1000; DIETRICH (2001), pp. 153-191; GIL-NIEVAS (2007), pp. 115-116; LÓPEZ (2017b), pp. 9-98; LÓPEZ (2018b), pp. 51-91; PALMIERI (1999), pp. 106-112. On a breach of a precontractual duty of disclosure see: DE LA MAZA (2010a), pp. 269-271.

[30] SCHWARTZ AND SCOTT (2007), pp. 674-676; VOLDERS (2008), p. 465.

[31] DE LA MAZA (2010b), pp. 46-47.

[32] CARTWRIGHT AND HESSELINK (2008), p. 460; HAGE-CHAHINE (2012), pp. 464-496.

[33] FARNSWORTH (1987), p. 220.

[34] BARIATTI (2017), pp. 357-365; BASEDOW (2017), pp. 311-320; LIPSTEIN (2011), pp. 1-21; LORENZEN (1940-1941), pp. 743-761.

[35] This justified enacting Rome II: see Rome II, Recitals N° 1, 2, 6, 11, 15, 16, 31.

[36] Rome II, Recital 30 and art. 12 N°.

also become more flexible and diverse throughout the years to secure the application of laws that lead to fair judgements and guarantee a reasonable degree of predictability of results[37]. Hence, the traditional main connecting factor of the place of making of the damaging act (*lex loci delicti commissi)*, used for delicts and quasi-delicts in civil law jurisdictions, and for torts, unjust enrichment, and restitution in the common law jurisdictions[38]; has been progressively replaced by other multiple or subsidiary connecting factors. These new connecting factors point to other laws to govern precontractual liability and, sometimes, include an escape clause to secure that each case is adjudicated under a law closely connected to it. They order the application of the law of the place where the direct damage occurred (*lex loci damni)*[39], or of the law of the common habitual residence of the parties[40], or of the law of the State most closely connected to the obligation[41], or of the law of the State that has the most significant relationship to the transaction and the parties, or of the law of the more interested State[42], or of the law chosen by the parties to govern this liability or the contract linked to it[43].

The rules on *culpa in contrahendo* of Rome II set an example of the use of multiple or subsidiary connecting factors to govern precontractual liability. Hence, Rome II firstly submits *culpa in contrahendo* to the law freely chosen by the parties to govern it after de damage occurred or, in the case of merchants, before its occurrence[44]. Failing such choice, Rome II, secondly points to the law applicable to the contract (*lex contractus in negotio*) or to the law that would have been applicable to it, if the contract had been made, as determined by the choice of the parties, or by the conflict rules of the forum[45].

Rome II opts for the *lex contractus in negotio* because of its functionality. Hence, the submission to this law, instead of the *lex loci damni,* omits the problem of identifying the place where the damage occurred, which is difficult to localize in some types of damages, as economic damages, or multistate damages. Besides, applying the law governing the contract to govern precontractual liability permits governing it by the same law that determines the existence or non-existence of the contract, and many times, the existence or non-existence of the precontractual liability linked to it[46]. In addition, when there are parallel claims in contract and in tort, it might be beneficial for the parties to submit both claims – the contractual and precontractual one- to the same law[47]. And finally, because it is becoming increasingly common for the parties to choose, at the time of contracting, the same law to govern the contract and the non-contractual duties related to it[48].

When it is not possible to determine the *lex contractus in negotio*, Rome II, thirdly submits precontractual liability to other laws: as the law of the place where the direct damaged occurred, or the law of the common habitual residence of the parties, if they had their residence in the same country when the event giving rise to the damage occurred. However, while rendering applicable these laws, the Regulation includes an escape clause, providing that when the precontractual

[37] Rome II, Recital 14 and KESSLER AND FINE (1964), p. 449; LOOKOFSKY AND HERTZ (2009), pp. 110-111; NORTH AND FAWCETT (1999), pp. 681-685.

[38] LOOKOFSKY AND HERTZ (2009), pp. 112-116; NORTH AND FAWCETT (1999), pp. 606-608; 676-689; SCOLES et al. (2004), pp. 713-726, 1042-1043.

[39] Rome II, art. 12 N° 2 (a); Argentinian Civil and Commercial Code, art. 2657; Cuban CC, art. 16; Dominican Republic Private International Law Act, art. 69; Panamanian Code of Private International Law, art. 140.

[40] Rome II, art. 12 N° 2 (b); Argentinian Civil and Commercial Code, art. 2657; Dominican Republic Private International Law Act, art. 69.

[41] Rome II,,arts. 4 N° 3, 12 N° 2 (c); Private International Law (Miscellaneous Provisions) Act 1995, UK, arts. 9-12; Argentinian Civil and Commercial Code, art. 2597. See: GARCIMARTÍN (2012), pp. 363-389; LOOKOFSKY AND HERTZ (2009), pp. 122-127, NORTH AND FAWCETT (1999), pp. 606-616, 676-689.

[42] AMERICAN LAW INSTITUTE (1971), § 145 (2), § 221 (2).

[43] Rome II, arts. 12, 14; art. 69 Dominican Republic Private International Law Act.

[44] Art. 14 Rome II. See: DE BOER (2007), pp. 19-29; GARCIMARTÍN (2012), pp. 366-368; KADNER (2008), pp. 445-456; LEIBLE (2007), pp. 219-239; LOOKOFSKY AND HERTZ (2009), pp.119-120.

[45] Rome II, art. 12 N° 1. This law is to be determined in the EU by the Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), arts. 4 and ff. See: SCHINKELS (2011), pp. 529-532.

[46] BOLDERS (2007), pp. 132-134; GARCIMARTÍN (2012), p. 382; HAGE-CHAHINE (2012), pp. 520-524.

[47] FRÖHLICH (2008), p. 36.

[48] Rome II, art. 14 n° 1 b). See: GARCIMARTÍN (2012), pp. 367.

obligation is manifestly more closely connected to the law of another State, the law of that State applies[49].

A similar shift towards flexibility, has taken place in the US, where State courts, rather than applying general rules, have begun to apply flexible and case by case solutions to characterize precontractual conducts that might be compensated in tort or in contract and to determine the applicable law to these conducts. Hence, courts have abandoned the general rules of the First Restatement, that rendered applicable to torts, contract formation and unjust enrichment the *lex loci delicti commissi*, or the law of the place of contracting, or the law where the benefit was conferred, because they sometimes produced unjust results[50]. Following the Second Restatement of Conflict of Laws, courts have introduced a judicial test that uses multiple, non-exclusive, non-prioritized and flexible connecting factors to identify the governing law with the most significant relationship to the case and the parties[51]. Besides, in accordance with this same Restatement, they have applied the law chosen by the parties to govern the contract formation and unjust enrichment, when it had some substantial relationship with the parties or the contract. Thus, following this Second Restatement and other American theories, the courts of most American States adopt now flexible criteria to characterize precontractual liability and to determine its governing law to secure that this law is significantly connected to the claim and/or the parties[52].

2. The Chilean Private International Law on precontractual liability

There are good scholarly studies on Chilean substantive domestic rules on precontractual liability. These studies commonly agree that this liability is non-contractual[53]. Besides, domestic case law and doctrine compensate the precontractual damage under the doctrine of *culpa in contrahendo* justified on an infringement of the legal duty of good faith and fair dealing by the parties[54]. Following European doctrine, Chilean scholars accept other grounds for sanctioning precontractual liability, as the infringement of mutual trust or reliance, or the abuse of rights, or the *actos propios* doctrine (estoppel), or the breach of a duty of care or disclosure by the parties during the precontractual stage of the negotiation[55].

There is, however, a legal vacuum in Chilean Private International law as regards international precontractual liability. Chilean law has no specific conflict rules to determine the applicable law to characterize a conduct as one that triggers precontractual liability, neither to determine the law to govern it. Thus, to solve both problems, Chilean courts need to make an extensive interpretation of general conflict rules in force. But there is no Chilean reported case law or legal literature, on how to construe and apply these rules to cases on international precontractual liability[56]. Hence, it seems useful to draw up guidelines on how to construe and apply Chilean general conflict rules in force to claims on international precontractual liability.

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[49] Rome II, art. 12. Rome II, art 4 n° 3 states that this closest connection might be based on a pre-existing relationship or contract between the parties, closely linked to the precontractual misconduct.

[50] AMERICAN LAW INSTITUTE (1934a), § 377; AMERICAN LAW INSTITUTE (1933), § 311-347; AMERICAN LAW INSTITUTE (1934b), § 453. See: HAY (2018) pp. 67-74.

[51] AMERICAN LAW INSTITUTE (1971), § 145, § 188, § 221.

[52] GEORGE AND GORDON (2017), pp. 140-156; HAY (2018), pp. 73-74; MILLS (2018), pp. 410-413, 416-419, 422-423; SCOLES et al. (2004), pp. 58-105, 709-866, 867-868, 1040-1052; SYMEONIDES (2009), pp. 337-411.

[53] Chilean CC, arts. 2284, 2314, 2329. The provisions on contracts of arts. 1546 Chilean CC and 98-100 Chilean Commercial Code are also quoted as basis of this liability in certain cases. See: Barros (2006), pp. 1003-1004; BOETSCH (2015), pp. 113-119; CELEDÓN AND SILBERMAN (2010), pp. 132-137; RAMOS (2008), pp. 6-13; LÓPEZ (2017a), pp. 87-127 and LÓPEZ (2017b), pp. 14-34. Some authors consider this liability as contractual and others as a third genre: ZULOAGA (2006), pp. 109-110, 123-127 and ZULOAGA (2019), pp. 101-106.

[54] BARRIENTOS (2008), pp. 29-59; BARRIENTOS (2012), pp. 838-842; NOVOA (2005), pp. 601-606; ROSENDE (1979), pp. 59-75, 82-88; SAN MARTÍN (2013), pp. 318-319; ZULOAGA (2006), pp. 94-100 and ZULOAGA (2019), pp. 106-112.

[55] BARROS (2012), pp. 1000-1002; CELEDÓN AND SILBERMAN (2010), pp. 118-132; LÓPEZ (2018a), pp. 57-69; ZULOAGA (2006), pp. 51-100 and ZULOAGA (2019), pp. 112-130.

[56] It seems that the inexistence of case law on international precontractual liability is not due to the absence of cases that could be adjudicated by Chilean courts, but to practical and economic reasons: parties tend to settle their disputes out of courts and to avoid costly and lengthy international proceedings leading to unpredictable results; they also tend to submit their international disputes on contracts to arbitration, rather than to judicial adjudication; besides Chilean lawyers lack training on litigating international precontractual liability cases and this might restrain them from beginning judicial proceedings, etc.

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2.1. The law applicable to the characterization of precontractual liability under Chilean Private International law

Under Chilean conflict law, the characterization of a conduct as one that triggers precontractual liability, might be, firstly and commonly done, applying the law of the forum; that is, classifying this conduct in accordance with the legal meaning or category allocated to it in Chilean substantive law[57]. This solution can be inferred from art. 14 of the Civil Code (CC) that generally and peremptorily orders the application of Chilean law in Chile, and by construing extensively art. 6 of the Bustamante Code, that resorts to the law of the forum for characterizing issues not specifically classified in it[58].

It might not be appropriate, however, to use solely the *lex fori* characterization, when Chile is only the place of trial of the case and the applicable law to govern the precontractual liability under Chilean conflict rules, is a foreign substantive law. In such case, after firstly characterizing the conduct according to Chilean substantive law (*lex fori*) in order to identify the applicable Chilean conflict rule to determine its foreign governing law; Chilean courts might conveniently make a second characterization of the conduct under that foreign substantive law (*lex causae)*, to secure coherency and fairness of results. This might be needed when under the *lex fori* characterization -Chilean substantive law- the precontractual conduct is unlawful and punishable but, under the *lex causae* characterization, which is the foreign substantive law that shall govern the conduct, it is not unlawful or it is punishable under another legal remedy. This second characterization seems possible, though there is no conflict rule to permit it, because it is not prohibited by Chilean conflict law. Besides, it might be permitted by broadly construing art. 24 CC, which allows interpreting contradictory sections of the law in accordance with the general principles inspiring Chilean law and natural equity. This same provision might also allow for a third solution, that is for the Chilean judge to apply to a case a characterization of his own, when he deems it necessary to secure a fair decision of that case.

2.2. The law applicable to govern precontractual liability under Chilean Private International Law

The substantive law governing precontractual liability might vary under Chilean conflict system depending on various facts: the place where the act that caused the damage was performed, the place where the damage occurred, the existence of an agreement by the parties on a choice of law to govern this liability, and the stage of the negotiation of the contract when the damaged occurred.

2.2.1. Applicability of the substantive law of the place where the act that caused the damage was performed or of the place where the damage was suffered to international precontractual liability

When the willful or negligent precontractual act is performed in Chile and/or the precontractual damaged is suffered in Chile, the resulting international precontractual liability shall be governed by Chilean substantive law, unless other Chilean conflict rule points to another governing law. This, by applying the main conflict rule in Chilean law -art. 14 CC- which enshrines the territoriality principle by, peremptorily, submitting all Chilean inhabitants -national or foreigners- and all acts performed or to have effect in Chile to Chilean substantive law. Besides, authors argue that this

[57] GUZMÁN (1997), pp. 289-305; VILLARROEL AND VILLARROEL (2015), pp. 60-69.

[58] The Bustamante Code is a Treaty in force in 15 Latin American countries, which can also be applied by Chilean Courts as a source of common international principles of Conflict of Laws, to a dispute linked to a non-party State. See GUZMÁN (1997), pp. 93-94.

law governs the non-contractual liability arising from a civil delict or quasi-delict performed in Chile[59].

Identifying the governing law of an international precontractual liability claim might become, more difficult when the precontractual act triggering this liability is performed abroad and the damage is also suffered abroad, but judicial proceedings are brought in Chile. This could happen when the author of the damage –a natural or juridical person- is domiciled or owns property in Chile or should perform an obligation of the contract in Chile, or the negotiating parties agree to submit the case to Chilean courts[60].

In this scenario, under a grammatical interpretation of art. 14 CC, Chilean substantive law is not applicable to the precontractual claim and courts need to determine which foreign law should govern it. There are, however, no specific Chilean conflict rules on the matter; hence, Chilean courts need to make a less grammatical, more extensive, and flexible interpretation of general conflict rules in force to identify this governing law.

Thus, if courts make a bilateral interpretation of art. 14 CC, or interpret extensively art. 168 of the Bustamante Code[61], they could adjudicate the claim under the substantive law of the place where the willful or negligent precontractual misconduct was performed, or under the law of the place where the damage was suffered, if it differs from the former place. Chilean conflict rules give no precedence to any of both laws; choosing which to apply would be left to the sole discretion of Chilean courts and thus, could produce legal uncertainty and unpredictability of results for the parties. Besides, both options could prove unworkable or too complex to apply when the place where the precontractual misconduct was performed, or where the damage was suffered, is difficult to localize (as in contracts *inter absentes,* or economic damages), or when the precontractual misconducts or damages have been performed or produced in various States. If this happens, courts might need to determine the applicable law using other criteria or connecting factors that could lead to more predictable and easily identifiable laws.

2.2.2. Applicability of the substantive law chosen by the parties to international precontractual liability

Another possible option for courts, if the parties were negotiating a commercial contract and had agreed to conduct negotiations under a chosen law, or to submit their precontractual duties to a certain law; is to enforce their agreement under art. 113 of the Commercial Code and apply the chosen law to that liability claim. Enforcing, however, the parties' agreement in the negotiation of a civil contract might turn dubious, if the parties chose a foreign law and Chilean courts construe grammatically art. 16 par. 3 CC as a peremptory rule that orders the application of Chilean substantive law to all the effects performed in Chile of contracts made abroad, including the judicial claims arising from them. In such case, resorting to art. 1545 CC -that ascertains the binding value of contracts- might be necessary to justify the enforcement of that agreement[62].

Under Chilean conflict law, the chosen law supersedes other possible applicable laws to the contract, even though this law has no other connection to the contract than the fact of having been chosen by the parties to govern it. Besides, the parties'choice of law might be express or tacit, but needs to be freely agreed by them to be valid and enforceable[63].

[59] DOMÍNGUEZ (1966), p. 313; GUZMÁN AND MILLÁN (1973), p. 852; RAMÍREZ (2013), p. 245, VILLARROEL AND VILLARROEL (2015), p. 364.

[60] Bustamante Code, arts. 318-323. Chile has no conflict rules on international jurisdiction. The Supreme Court has rendered applicable the rules of Treaties in force, amongst which, those of the Bustamante Code: see GUZMÁN (1997), pp. 545-546.

[61] The Bustamante Code submits civil quasi-delicts to the law of the place where the damaging act was performed (art. 168). This Code does not refer to wilful misconducts unless they are typified as delicts or faults (art. 167), in which case they are governed by the law that typifies them.

[62] VIAL (2013), pp. 898-899.

[63] VIAL (2013), pp. 900-902.

2.2.3. Applicability of the substantive law governing the prospective or made contract to international precontractual liability

In the absence of a specific choice of law to govern precontractual liability, or when courts disregard this choice, it seems that Chilean courts might opt to apply the *lex contractus in negotio* to the claim. That is, the law that governs the contract or would have governed it, if it had been made; either determined by the choice of the parties, or failing such choice, by the conflict rules of the forum. This might be possible and workable when a contract was made by the parties or the negotiation of the contract was in an advanced stage because the parties had signed some preliminary documents related to the prospective contract, or had reached some partial agreements on some of the future contractual obligations, or on the law applicable to the prospective contract, or on its place of performance, etc. Then, courts could extend the scope of application of the *lex contractus in negotio* to govern the precontractual acts performed by the parties while negotiating the contract.

If so, courts could enforce the parties' choice of substantive law and apply it to adjudicate the precontractual liability claim. This seems possible under an extensive and flexible construction of art. 16 par. 2 and 1545 CC and art. 113 par. 2 of the Commercial Code on the law governing contracts made abroad. In the absence of choice of law by the parties, courts could apply to the claim the substantive law of the prospective or agreed place of performance of the contract. This solution seems feasible under a bilateral construction of art. 16 par. 3 CC and art. 113 par. 1 of the Chilean Commercial Code that submit to Chilean law the performance in Chile of contractual duties agreed abroad. The submission to the law of the place of performance though, might be unworkable or difficult to apply when the prospective or made contract was to be performed in several jurisdictions, as happens in a multistate distribution or franchising contract; in which case, it seems that courts would have to choose to apply a single law from the several national applicable substantive laws, or to apply all of them in a distributive manner to adjudicate the claim.

2.2.4. Applicability of other substantive laws to a claim on international precontractual liability

It appears that Chilean law in force precludes having recourse to other laws - used in foreign jurisdictions- to govern international precontractual liability claims, as the law of the common habitual residence of the parties, or the law manifestly more closely connected to the obligation, or the law of the State more interested in it, or the law having a substantial relationship with the facts or the parties. This conclusion stems from the fact that Chilean conflict rules do not point to these laws to govern conflict issues, nor they use the connecting factors contained in them and lack tests or criteria to apply them.

However, it is reasonable to sustain that amongst the possible governing laws endorsed by Chilean conflict rules, as construed in 2.2.1 and 2.2.3 above, the judge should choose to apply the substantive law most closely connected to the precontractual claim to adjudicate it and set aside other laws less connected to it to secure legal certainty and fairness of results.

For instance, if both parties have their habitual residence or domicile in the place of performance of the precontractual misconduct, the Chilean judge might opt to apply the law of that place, instead of the law of the place where the damage was suffered and vice versa. Likewise, in a case where the precontractual misconducts were performed, or the damages were suffered in several jurisdictions; the Chilean judge might adjudicate the case applying the substantive law of the place where the principal damage was suffered or the principal misconduct was performed, displacing other laws, as the law where a collateral damage was suffered, or a secondary misconduct was performed. Hence, applying laws with stronger connection to the liability claim might increase predictability of results and do justice to the parties in that claim. This might justify that the Chilean judge departs from applying Chilean substantive law to a claim with a too frail connection with Chile, to adjudicate it instead under a foreign substantive law. This could happen when the place

of the damage or of performance of the misconduct or the chosen law to govern the contract, have no links to Chile.

3. The need of practical guidelines for a harmonious construction and application of Chilean conflict rules on precontractual liability

It seems convenient to draw up some guidelines for the proper application of the above conflict rules and set up an order of precedence to determine which should supersede the others in ascertaining the governing law to international precontractual liability claims adjudicated in Chile. These guidelines intend to increase legal certainty and promote harmonious decisions for these claims within Chilean courts. They also aim to provide harmonious decisions with cases litigated in other jurisdictions and to minimize "forum shopping", as much as possible.

These guidelines could help courts to fill in legal gaps in current Chilean conflict law and, specifically, in cases where achieving a workable and fair judicial decision demands departing from a grammatical interpretation of the conflict rules in force, towards a teleological and flexible interpretation of them. For instance, when Chilean law might be applicable under a grammatical interpretation of art. 14 CC because a collateral damage was suffered in Chile or some secondary action that triggered it was performed in Chile; but the case has a closer connection to the foreign law of the place where the direct damage was suffered or the principal act that caused it was performed. Or when a contract or another precontractual document has been agreed by the parties and both, the contract and/or the document, are governed by a certain law – as the law chosen by the parties - which could be more easily identified or more conveniently applied to govern the liability claim, than the laws of the place of damage or of performance of the act that caused it.

The guidelines might also help to ascertain a more adequate governing law in those cases where Chilean conflict rules lead to apply a law that has little connection to the precontractual claim. Or when Chilean conflict rules point to several laws as applicable to the case and courts need to choose between them, or to apply them in a distributive manner.

It needs to be mentioned that these guidelines adopt the solutions provided by Rome II to determine the applicable law to *culpa in contrahendo*, to the extent that they seem compatible with Chilean conflict rules in force[64].

4. Guidelines for ascertaining the applicable law to an international precontractual liability claim adjudicated in a Chilean court

First, to characterize or classify a precontractual misconduct as one that triggers international precontractual liability, the Chilean court should initially, classify it in accordance with Chilean substantive law to then identify the Chilean conflict rule that shall determine its governing substantive law. When the Chilean conflict rule ascertains that the law governing the case is a foreign law, the court could depart from the initial *lex fori* characterization and classify the misconduct in accordance with this foreign governing substantive law (*lex causae*), with the purpose of achieving a coherent and fair judgement[65].

Second, when the parties have freely and validly chosen a substantive law to conduct negotiations or to govern their precontractual duties, the court should apply this chosen law to solve the international precontractual liability claim, unless the choice is declared null. The choice of law by the parties might be express or tacit, but never presumed by the court[66].

Third, in the absence of the above choice of law, and in the case where contractual negotiations were in an advanced stage or a contract was made by the parties, the court should apply the law governing the contract to the precontractual claim (*lex contractus in negotio)*, either chosen by the

[64] Rome II, arts. 12, 14.

[65] See above Section 2.1.

[66] See above Section 2.2.2. and Rome II, art. 14.

parties or determined by Chilean conflict rules in the absence of that choice; provided this law has a real connection or link with the precontractual claim[67].

Fourth, if the law governing the contract has no, or little connection with the international precontractual claim, the Chilean court, should decide the claim applying the law of the place where the precontractual damage was suffered, or where the principal or direct precontractual damage was suffered if it was suffered in several States[68].

Fifth, if it is difficult to localize the place where the damage occurred, the court should adjudicate it under the law of the place of performance of the act that caused the damage, or of the principal act that gave rise to it, if the acts that caused the international precontractual damage were performed in various States[69].

Sixth, if the law asserted under guidelines 3rd, 4th or 5th has little connection to the international precontractual claim, the Chilean court could depart from that specific guideline, to apply the law most closely connected to the claim, choosing it amongst the laws mentioned in the other guidelines and justifying its choice[70].

4.1. Putting these guidelines to the test in two paradigm cases

It seems appropriate to put these guidelines to the test in two paradigm cases that could give rise to precontractual liability. Case A refers to a unilateral and belated breakdown of contractual negotiations of an international sales contract that damaged the prospective buyer, and where the prospective seller's liability could be classified as a case on precontractual liability. Case B refers to an international sales contract made with a violation of a precontractual duty of disclosure by the seller, which caused economic damage to the buyer. In this case B the potential liability of the seller could be in contract and/or *culpa in contrahendo* and thus, the case adds a new problem to test the suitability of the guidelines[71].

PARADIGM CASE A: A German distribution company gets in touch by email in April every year, for three consecutive years, with the Belgian broker of a Chilean export Company and buys 20.000 kgs of fresh shelled walnuts to be delivered FAS to Hamburg port at the end of October and to be sold in German and Austrian supermarkets during Christmas time. The purchase contract is signed and exchanged electronically by the parties in September each year and paid by electronic transfer to a current account of the Chilean company in Miami (USA). In the fourth year, the German company begins the same negotiations with the Belgian broker trusting that, as in previous years, the purchase is going to take place. In September, the German company insists on signing the contract but receives, belatedly, in October notice from the broker informing that the Chilean company has run out of stock and cannot provide the requested 20.000 kgs. of walnuts and, thus, that it will not sign the contract. In fact, the Chilean company sells the walnuts to a Saudi distributor who pays a higher price. Due to this very late rejection, the German company –who needs to fulfil its commitments to its clients- is compelled to buy the walnuts to European producers paying a much higher price and suffering a considerable economic loss. The company decides to sue the Chilean company to claim compensation for this economic damage.

PARADIGM CASE B: In the same case as described above for the three previous years, the Belgian broker, during the fourth's year negotiations, do not inform the German purchaser that the walnuts on offer are cheaper because they belong to the previous year harvest. The contract is made on the assumption, by the German purchaser, that the walnuts are as fresh as they were in the previous purchases. After receiving the walnuts in Hamburg at the end of October and assessing their faulty quality, the German purchaser is forced to buy fresh walnuts from European producers to distribute them on time to its clients, at a higher price and with an important

[67] See above Section 2.2.3. and Rome II, art. 12 N°1.
[68] See above Section 2.2.1. and Rome II, art. 12 N°2 a).
[69] See above Section 2.2.1. and Rome II, art. 12 N°2 b).
[70] See above Section 2.2.4. and Rome II, art. 12 N°2 c).
[71] See a similar case in: CARTWRIGHT AND HESSELINK (2008), p. 362, 370-377 where German substantive law is applied.

economic loss. Therefore, he decides to claim economic compensation from the Chilean company for the damage suffered by its lack of disclosure of an essential information.

In CASES A and B, the damaged German purchaser could sue the Chilean company in Chile to claim compensation because the company is domiciled therein. If so, the Chilean court would have to determine the applicable law to govern this liability, which has arisen from a negotiation done abroad and an economic damage suffered abroad.

In CASE A, where there was a unilateral and damaging breakdown of contractual negotiations, the Chilean court should firstly apply Chilean substantive law (the *lex fori)* to characterize the claim as a case on international precontractual liability [guideline 1st]. If so, then the court needs to ascertain its applicable law. Having the parties made no choice of law in the case [guidelines 2nd and 3rd], the court should apply the law where the precontractual damage was suffered [guideline 4th], that is German substantive law, which seems the law most closely connected to the precontractual liability claim [guideline 6th] and also the law that could guarantee that the Chilean judgement be harmonious with the judgement that could have been issued by German courts, if the claim had been litigated in them.

Otherwise, the possibility of applying the law of the place of performance of the act giving rise to the precontractual liability -the unilateral and damaging breakdown of contractual negotiations- [guideline 5th] should be rejected in this case because it would be more difficult to ascertain and would lead to apply a law with little connection to the case. Thus, if proved that the late decision to breakdown negotiations was taken by the Chilean company in Chile, the applicable law to assess the liability and compensate the damage would be Chilean substantive law, which is a law with little connection to the damage suffered by the German company in Germany, and that could lead to a judgement differing substantially from that which could have been issued by German courts. Besides, if the precontractual misconduct had been performed in Belgium by the broker, who conducted parallel negotiations with the Saudi buyer and gave late notice to the German company, without knowledge of the Chilean company; the applicable law to the case would be Belgium substantive law, which is a law with even less connection to the negotiating parties or the prospective contract and, probably, unexpected for them.

In CASE B where the Belgian broker himself or together with the Chilean company willingly or by negligence breached a duty of disclosure during the negotiation of the contract; the Chilean court should characterise it in accordance with Chilean substantive law as a claim on precontractual liability but could also classify it as a claim on inexistence or nullity of the contract due to mistake or deceit or as a claim on breach of an implied term of the contract, based on the previous contracts [guideline 1st]. If the court classify the Case as a claim on precontractual liability, it should, in the absence of a choice of law by the parties [guideline 2nd], adjudicate it applying the *lex contractus in negotio,* that is the substantive law that, according to Chilean conflict rules, should govern the contract, which is the law of its place of performance [guideline 3rd]. In this Case, the contractual duties were to be performed in Miami and Hamburg; however, the performance originating the precontractual claim and most linked to it [guideline 6th], was the delivery of the faulty walnuts in Hamburg and not the payment in Miami; thus, the Chilean court should adjudicate the claim applying German substantive law on precontractual liability. This solution would permit governing the precontractual liability claim, by the same substantive law that governs the claim on the existence or nullity of the contract or on its breach. And would be especially convenient if there were parallel claims in contract and precontractual liability submitted to the Chilean court. This solution would also favour a harmonious decision with that of German courts. Moreover, German substantive law coincides in this Case with the law of the place where the damage was suffered [guideline 4th] and applying this law eliminates the burden of identifying the place where the event giving rise to the precontractual liability occurred, which in this Case could have been Belgium or Chile [guideline 5th].

In sum, the application of the guidelines to the paradigm Cases showed that they helped to solve adequately conflict problems on precontractual liability and secured fair and connected laws to govern these Cases. In addition, the guidelines contributed to reduce legal uncertainty for the

parties by providing, to a certain extent, predictable solutions to these Cases. They also proved useful to harmonise judicial decisions between competing jurisdictions and so, to reduce the attractiveness of "forum shopping". And lastly, the application of the guidelines to these Cases laid bare that their suitability resulted from their use of flexible and subsidiary connecting factors to determine their governing law.

Finally, the usefulness of these guidelines showed the convenience of enacting new and specific conflict rules on precontractual liability in Chilean conflict law that are flexible and use alternative connecting factors to ascertain the most appropriate law to govern this liability. These new conflict rules could be modelled on the rules on *culpa in contrahendo* of art. 12 and 14 of Rome II which - as construed and applied in this work - are in harmony with Chilean general conflict rules in force and so, could supplement Chilean conflict's system, while preserving Chilean legal tradition.

5. Conclusions

Chilean Private International Law has no specific conflict rules to determine the governing law to international precontractual liability and this generates legal uncertainty for the negotiating parties to international contracts linked to Chile.

To ascertain the governing law to claims on international precontractual liability, Chilean courts need to make an extensive and teleological interpretation of arts. 14, 16 and 1545 CC, 113 of the Commercial Code and 168 of the Bustamante Code, that renders applicable different laws. Hence, it is convenient that this interpretation is done harmoniously by Chilean courts. For this, they could follow certain common guidelines -as those suggested in this paper- that lead to congruent judgements between Chilean courts and between them and foreign competing courts. These guidelines should provide solutions to prevent international forum shopping and to guarantee that the law governing these claims is predictable, fair, and is reasonably connected to them.

De lege ferenda, it seems convenient that Chilean Private International law enacts specific conflict provisions on precontractual liability. These new conflict rules could be modelled on those of Rome II, since they are compatible with Chilean conflict's system. They should be flexible, by using alternative or subsidiary connecting factors, to help to identify the most appropriate national substantive law to govern cases on international precontractual liability in Chile.

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