INTERNATIONAL PROTECTION OF THE CONSUMER

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I. INTRODUCTION

It is necessary to make some introductory remarks on this matter in which private international law should provide fair solutions. The right of consumers in private law is reflected as a legal microsystem of consumer protection.

In this sense, Professor Lorenzetti points out some facts that illustrate the gestation of the process of microsystem formation:

a) it installs a protective order that abolishes the general principle of equality of citizens. The supplementary order becomes imperative, virtual nullities arise and it seeks the maintenance of the practical purpose pursued by the contracting parties. Additionally open modules are formed for the qualification of abusive contractual clauses, the listing of black and gray clauses, the previous administrative control, and the rejection of some clauses maintaining the business and redrawing it, although they are not very frequent in common law; and
b) a separation of the principle of comparative effects of contracts exists, when suggesting the imputation of damages to the manufacturer, the distributor, the wholesaler, the owner of the brand that has not celebrated some contract with the consumer, as in Brazilian Law 8078/90.¹

In the same way, the author continues, actions are conceded to the consumer, the user, members of the family, and consumer associations, neither of which have had previous conventional ties.²

In the 1994 constitutional reform of the Republic of Argentina, article 42 has brought about the constitutionalization of consumer rights in the relationship of consumption, such as the protection of health, security and economic interests, appropriate and truthful information, the freedom of choice, and fair and honest treatment. It looks for, says Professor Farina, the reconciliation among the individual and social ends that is carried out on the basis of recognition, respect and the preferred rank which, in the hierarchy of values, corresponds to the human person.³

We find ourselves, without a doubt, facing a protective private right loaded with values, and which the private international law cannot honor, but rather should establish a tool apt for the development of fundamental basic ends, like consumer protection. The entire methodological focus should be guided toward this substantial value at stake.

II. DIFFICULTY IN DEFINING THE CONCEPT OF CONSUMER AND THE NECESSARY SCOPE OF SAME IN THE PRIVATE INTERNATIONAL LAW (P.I.L.)

A definition of consumer should be sufficiently broad to comprise the variety of prospective situations needed. Now, it is already necessary to highlight the difficulties that arise from casuistry to structure any concept, in spite of the inevitable and potential circumstance, generated by the intervention of national Tribunals with different interpretations on the topic. The importance is not minimal, since the concept of consumer

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¹ RICARDO LORENZETTI, LAS NORMAS FUNDAMENTALES DE DERECHO PRIVADO 16 (Rubinzal Culzoni, ed., 1995)
² Id. at 16. It also points out that the most evident example is that of Brazil that has considered the topic at a constitutional level, being dictated by the law 8078/90 that is a code of the consumer's defense that allows coherence, and homogeneity to certain branches of the right, facilitating its autonomy.
constitutes the material scope of application of the protective principle it guides and the special system foreseen for it.

The doctrine has highlighted different parameters in defining the consumer: the final destination of the goods (family, personal or domestic use); the existence or lack of the professional nature of the consumer’s activity when concluding the contract (whether or not it favors the reintroduction of the good in the market); whether or not the goods are integrated into the productive process; final destination of production (although the final destination is the consumption, e.g. recruiting of goods and services with an immediate final destination, but meanwhile integrate benefit to third parties; the purchase of calculation equipment or recruiting of food service); or simply, the legal fact of “consumption” in a consumption relationship or in its function. Let us look at some legislative proposals:

The Rome Convention of 1980 on Applicable Law to Contractual Obligations in effect since 1991 for the European Economic Community, in article 5, defines “contracts concluded with consumers,” as the supply or supplies made to a person “for a use that can be considered foreign to its professional activity.”

The Brussels Convention adopts a similarly negative definition, Lugano 1978, depending on the interpreter, if the use could be considered as foreign to the beneficiary’s professional activity (article 13).

The subjective delimitation is problematic, as Professor Esplugues Mota points out, in relation to this European instrument. It implies the need to appreciate the differential fact that unchains the application of the special normative system of protection foreseen by articles 14 and 15. The non-professionalism of buyers of goods and services is juxtaposed with the theological consideration of the destination, final use; that is to say that the particular destination is verified starting from the negation of the professional use.

This subjective configuration of the agreement has been interpreted by the European Court, excluding the application of the special system to individuals not needing protection; for example, when they act in a professional manner. Conference the sentence in the Bertrand v. Ott KG of June 21, 1978; but subsequently it was more restrictive, in the Hutton v. TVB of January 19, 1993, in which a company was a grantee of consumer rights, the tribunal did not consider it a consumer, since “the plaintiff acts

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5. Id. at 10.
as a professional and therefore does not have the same, consumer condition, aside from one of the enumerated contracts in the first paragraph of this disposition (article 13)" since that "only refers to the private final consumer, not involved in mercantile or professional operations."6

The Switzerland legislation, combines personal use with the existence or lack of the professional nature of the activity developed by the consumer when concluding the contract. Article 120 of the 1987 Swiss Law of Private International Law,7 speaks of "average benefit of consumption dedicated to the consumer's personal or familial use and does not have a relationship with the consumer's professional or commercial activity."8

In the 1980 Hague Project on "Convention on certain sales to the consumers" the consumer was defined as "that person who acquires merchandises, mainly for personal or domestic family use," adding the requirement that the salesperson act "in the course of his/her business or profession." 9

The Vienna Convention of 1980 on Contracts of International Sale and Purchase of Merchandise, excludes "the personal, family or domestic use" unless "the salesperson, at any moment before the execution of the contract, or at the moment of their execution, could not or should not have had knowledge that the merchandise was bought for that use." 10

The Protocol of Buenos Aires on International Jurisdiction in Contractual Matters, excludes from its material scope of application "the sales to the consumer." This narrowness of the material scope has also been criticized.11

In any case, the idea that should gravitate to the ends of establishing a concept, is the scope, and the principle that should guide the

6. See Luis Carillo Pozo, Comentario al Convenio de Bruselas relativo a la Competencia Judicial y a la Ejecución de Resoluciones Judiciales en Materia Civil y Mercantil 274, 275 (Alfonso-Luis Calvo Caravaca, ed., 1995) This author is of the opinion that such a formalist perspective that only protects those who don't hire in exercise of its profession, leaves the small merchant that hires without protection compared to with a great dominant company in the market. . . . It is designed this way for control at two successive levels, defining the subjective aspect, with the triple demand that it is a final consumer, of contract tipificado, and it leaves of the process. Id. at 279. (Editorial note: Translated from Spanish).


8. Id. at 120.


10. See generally Vienna Convention (1980).

interpreter's task is the protective purpose. The need for protection of the weak party in the consumption relationship, because of the inferior position in the face of the other, justifies the use of broad terms that facilitate the later task of application of the protective right. That an eventual qualification problem may arise neither obstructs nor hinders the protection. The proposal of the construction of a concept of P.I.L. starting with the consideration of the legal systems with which the case is connected always leads us to the possibility of using the one with the larger scope as the starting point, in order to later adopt, naturally, the one that better favors its interests.

It is of supreme interest to highlight that in the confines of the Mercosur a sufficiently wide definition has been proposed in accord with the protective end. The consumer is considered to be “any physical or artificial person who acquires or uses products or services as consignee in a consumption relationship or in performance thereof. It portrays consumers to other people, determinable or not, exposed to consumption relationships.”

In sum, the definition that should be adopted is the one that has the necessary scope as a starting point and for the correct operation of the principle of consumer protection as the weak party in the consumption relationship, enlarging, of course, the concept of the lex fori if it were more narrow than proportioned by the next legislation to the consumption relationship in question.

We come closer to Professor Uzal's methodological proposal that intends to define it by the characteristics of the parts that intervene in the negotiation in that it attributes him such a role as for the use of the acquired merchandises or committed services. The qualification problems should be guided toward the solution that offers more protection to the consumer.


“In internal private law, for example in the Bolivian Project together with contracts, are unilateral acts (behaviors) that create a


reasonable expectation about quality or price of a good or service destined to be consumed."14

The economic act of consumption is a legal fact: whoever utilizes the service is a consumer;15 whoever is a user may not be contracting, or they may be the head of a family or social group who is not a consumer and has used the product.16 There may be unlawful acts which give rise to a consumption relationship: when the products or services given by the importer or owner of the brand cause damage and generate the obligation of reimbursing, assuming the supplier is not contracting. The right of consumption hangs the suppression of the distinction between contractual and non-contractual responsibility.

Private international law should also tend to overcome such a dichotomy (that can lead to different results) and to offer protection for the harmful act by virtue of the existence of a consumption relationship, with or without a contract.17 The right of consumption, says Professor Lorenzetti, forms part of a conception that, taking into account the act of consumption in the market, is not based on only one of its parts. It is, then, a market regulation.18 It is simply the need to "protect the market economy," since "a strong consumer, implies a more solid and more dynamic market." "It is not a revolt against the market,"19 but "a current in favor of the market . . . that corrects the deviations that threaten the dependability and stability of the exchange relationships."20

What should be avoided is that the solution to this eventual problem of qualifications (contractual or non-contractual responsibility) is used to deprive the consumer of appropriate protection levels, since traditionally the positive norms of P.I.L. in regard to unlawful acts, are more rigid than the contractual ones.

IV. METHODOLOGICAL STANDARDS OFFERED FOR APPROPRIATE SOLUTIONS AT THE BEGINNING OF PROTECTION

This will discuss searching for a system of private international law that overcomes the dichotomy of contractual and non-contractual

14. LORENZETTI, supra note 1, at 5 (editorial note: translated from Spanish).
15. CÓDIGO DE DEFENSA DEL CONSUMIDOR DE BRASIL § 8078, art. 2.
17. LORENZETTI, supra note 1, at 5
18. ld. at 3.
responsibility, to unitarily regulate "the international consumption relationship." We will proceed with an analysis of the internal source and with the purpose of carrying out an interpretive and integrated task of the system, trying to preserve the general principle of protection of the weak party in the international consumption relationship.

It is necessary to begin with an interpretation of the norms of Contractual Private International Law contained in Articles 1205 to 1214 of the Civil Code. The norms distinguish between contracts with Argentine contacts and without Argentine contacts, although our proposal will be centered on overcoming this distinction.

V. CONTRACTS WITH ARGENTINEAN CONTACTS: THE LAW OF THE HABITUAL RESIDENCE (ARTICLES 1209, 1210, 1212, AND 1213 OF THE CIVIL CODE)

A. The System to Regulate

The interpretation of such norms should bear in mind the special nature of the "Microsystem" of consumption law. In this sense, if we analyze the nature of the obligations that arise from the contractual consumption relationships, we should point out that there is an apparent weakness with one of the parts in the face of the other for which the legislator intervenes, with a protective purpose, and in more general terms, with the intention of maintaining "a healthy market," based on the principle of "solidarity." As Professor Mosset Iturraspe wisely indicates, a Copernican gyration of civil law takes place toward the protection of the weak in a civil society, characterizing the consumer as "the clumsy one," "the adolescent" of the market, who moves with unsatisfied needs, lack of negotiating power, inexperience, lack of knowledge, etc. It is necessary to create a microsystem, the author continues, contemplates the weaknesses and protects it, that contains norms and special principles sometimes different from those of the Civil Code or Commercial Code and others contrary to them.

It is naturally, a Microsystem "loaded with values," and it is necessary "to communicate them harmoniously through the interpretation

21. CÓD. CIV. arts. 1205-1214.
22. See generally Jorge Mosset Iturraspe, Introducción Al Derecho Del Consumidor, REVISTA DE DERECHO PRIVADO Y COMUNITARIO 5 (editorial note: translated from Spanish).
23. See id.
24. Id.
and integration of the P.I.L. system."\textsuperscript{25} We should keep in mind Professor Von Mehren's warning, in the sense that the genuineness of the decisions of private law cases rests on the substantive fairness of the result and not on the formal legality (similar to cases of internal legal order).\textsuperscript{26}

The traditional rule of neutral conflict, should be adjusted by substantive values and requirements in the context of protecting the weakest party.\textsuperscript{27} The traditional conflicting goals of harmony of laws and solutions, in Professor Vischer's reflection, have lost a certain degree of priority and open ways toward other considerations, such as those of substantive coherence on the basis, for example, of the priority of constitutional rights when cases have sufficient contact with the forum.\textsuperscript{28}

**B. Discarding the Theory of the Characteristic Benefit**

By virtue of Argentine conflicting norms, regulators of contracts with Argentine contacts, the law of the place of execution is decisive.\textsuperscript{29} However, the definition of the place of execution that Article 1212 of the Civil Code,\textsuperscript{30} offers, among its interpretive possibilities, contains references to the debtor's home.

Professor Schnitzer's theory of characteristic benefit was proposed by Professor Boggiano as an interpretive and harmonizing approach to the possibilities that Article 1212 of the Civil Code offers; like that theory that has \textit{localizing virtuality}; also specifying that the place where the characteristic benefit should be physically completed does not prevail, but the debtor's domicile that should complete the characteristic benefit.\textsuperscript{31}

The theory of the characteristic benefit, from Professor Juenger's sharply realistic optic, was born as a \textit{tie-breaker} to satisfy the yearning to obtain a simple, connecting objective factor that works well on the

\begin{itemize}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{See Recognition and Enforcement of Foreign Judgements, R.C.D.I.} (1980).
\item \textsuperscript{27} \textit{See Antonio Boggiano, International Standard Contracts, R.C.D.I.} 59 (1981).
\item \textsuperscript{28} \textit{See Arthur Taylor Von Mehran, General Course on Private International Law, R.C.D.I.} 95 (1986).
\item \textsuperscript{29} CÓD. Cív. arts. 1209, 1210.
\item \textsuperscript{30} \textit{Id.} art. 1212.
\item \textsuperscript{31} \textit{See ANTONIO BOGGIANO, DERECHO INTERNACIONAL PRIVADO} 719 (1983). This author recognizes, nevertheless, observations to such a theory, regarding the sought function of connection of the contract with the socioeconomic environment of a country; this way for e.g. the price of a sale and purchase is not less gravitational than the merchandise. \textit{See also CONTRATOS INTERNACIONALES} 47 (Depalma ed.), who affirms the undeniable value to establish a functional localization of the contract in spite of the critics and difficulties that it presents the theory of the characteristic benefit, facilitating reasonable certainty, international harmony of decisions and effectiveness.
\end{itemize}
assumption of common domicile of the parties or of simple business. . . . 32 The equation was explained by the noted professor: "The higher the complexity, the lower benefit obtained from the theory." 33

Now then, the most committed point in the theory, in such a vision, is that it tends to confer "unjustified privileges:" the supplier of merchandises or professional services is usually in a better position of evaluating the risks that involve the realization of international business and of isolating them for choice of law clauses. To give such companies additional advantages of having their domiciliary law as controlling adds force to the powerful situation. 34 The solution we achieve will obligate the supplier to anticipate the effective legal systems in the place where its goods and services are commercialized.

C. The Appropriate Interpretation at the End of the System.

It is necessary then, to interpret Article 1212 of the Civil Code, beginning with "the nature of the obligations." In the consumption relationship, we should not lose sight of the qualifying, typifying and decisive element that distinguishes it from all other contracts and to the ends of subjecting it to a special regime to offer legal protection: that is, the final destination of the goods or services, the final consumption, and has been this way since the existence of consumers.

The right of the consumer's habitual residence, then, is decisive. This solution places in the "strong" part of the relationship, the obligation of knowing protective norms of the consumer's habitual residence, where the acts of consumption normally take place, final destination of the goods and services. Without affecting it, one should also know the norms of such a place if the consumption acts take place outside the consumer's habitual residence.

VI. TOWARD THE LAW OF THE PRINCIPLE ESTABLISHMENT OR RESIDENCE OF THE SUPPLIER: CONSUMER'S ELECTIVE ABILITY

The theory of characteristic benefit offers the supplier the possibility of applying the law to its "center of commercial life." In such a place, the supplier is naturally committed to the normative protection of the local consumers. There is no reason why consumers, not domiciled in such a place, cannot invoke such a right if it is more favorable to their

33. Id. at 180.
34. Id. at 181.
interests. The single fact that consumers reside in a state other than that of
their principal establishment is not an impediment so that the supplier can
escape from the local law. Of course, it is more favorable to consumers
with residence abroad.

The norms of such a system naturally accompany the production
and commercialization of goods and services from the supplier’s principal
establishment. This way, for example, a salesperson established in Brazil
who contracts with a consumer with habitual residence in Argentina, faces
the option of the latter, by the right of the established (the Brazilian right).
There is no reason to seek the supplier, the irrelevancy of such a right,
because of the fact that the consumer resides in a market other than the
national one. It is their duty as the strong party in the relationship and
because they find themselves in better conditions of doing it, to foresee the
legislation of the consumer’s habitual residence. With more reason, they
should do it with the local law of their principal establishment.

The position of superiority in the contractual relationship loads on
their backs the obligation of foreseeing the risks that carrying out business
internationally involves. The general principle of Good Faith that should
reign in contractual relationships, impedes for a contract, by a “powerful”
contracting party to breakaway from its “natural statute” of right of
consumption if it is more favorable for the consumer than others narrowly
construed.

The choice cannot be neutral, the establishment of alternative
contacts proclaims, founded in the interpretation of our norms of internal
source, facing consumer choices, discarding naturally the establishment of
a point of simple connection. The implied “nature of the obligations”
demands it this way.

VII. CONTRACTS WITH OR WITHOUT ARGENTINE CONTACTS:
TOWARD THE LAW OF THE PLACE OF ACQUISITION OF THE PRODUCT AS
THE ELECTIVE ABILITY OF THE CONSUMER

A. Place of Performance as Place of Acquisition of the Product

The place of execution of the supplier’s benefit (the delivery of the
good or benefit of the service) can be found outside of the previously
described points (the consumer’s habitual residence and the supplier’s
principal establishment).

Correlatively, this implies the acceptance or acquisition of the
product by the consumer (act of consuming). One cannot overlook this
circumstance when interpreting the execution place, taking into account the
nature of the obligations involved. The place of acquisition of the product represents an inflection point between the supplier's obligation (commercialization act), and the consumer's right of consenting to the consumption (consumption act). The place of acquisition of the product should be taken into account in the catalog of consumer's options.

B. The Place of Execution of the Contract as Place of Acquisition of the Product

It is also necessary to consider the solution that Article 1205 of the Civil Code offers, the one that leads us to the contact celebration place (lex loci celebrationis). As Professor Juenger says, the tendency to focus on the actions manifested by the parties to the contract, for example, the signature of a paper or social customs followed by the parties with the formation of the business, determined by the classic doctrine and leaning towards the lex loci celebrationis originates with Bartolus.

Today, the execution is carried out by fax, cable, television, the Internet, "making it impossible to discover which form of communication is decisive" or simply "it is carried out in flight," hence the celebration place can be entirely "fortuitous." Notice that the assumptions in question have a high degree of proximity with the place of acquisition of the product, and when the same is acquired abroad, outside the consumer's habitual residence and the supplier's principal establishment (for example, the consumer domiciled in Brazil that hires a service during their vacation in Uruguay from a company wholesaler whose main establishment is in Spain).

The application of the law of the place of execution, which is usually the place of acquisition, would seem justified and appropriate. Although the place of execution may not coincide with the place of material acquisition of the product (e.g. taking the previous case, if the service is linked with Chile). In this example, the place of execution loses localizing force, for the place appears "fortuitous," for what is the application in such a supposition the law of the place of acquisition of the product.

Then Article 1205 of the Civil Code should always be interpreted in favor of the consumer as the place of acquisition of the product when it

35. Id.
36. CÓD. CIV. art. 1205.
37. Id. at 175.
39. CÓD. CIV. art. 1205.
coincides with the place of execution, and it is possible to identify the
latter. Otherwise, the law of the place of acquisition of the product is
always important as the consumer’s elective ability. It also implies the
supplier’s obligation to foresee the effective legislation of the place of
commercialization of goods and services.

C. Concerning the Unreasonableness of the Distinction as Far as
Solutions 1205, 1209, and 1210 of the Civil Code

However, it is still necessary to evaluate the reasonableness of
such a solution foreseen by the legislator. Is it reasonable to maintain the
duality, based on the sole fact of Argentine contacts? It would seem an
unconscionable and discriminatory solution, if we keep in mind the
flexibility of the connection factors foreseen for contracts with Argentine
contacts, that as we saw, can work more appropriately the ends of offering
guidance to the weakest party of the business transaction. It is evident that
it does not concern those minimum standards of justice that Professor
Lipstein spoke of, producing unconscionable discriminations. We offer the
same international protection with or without Argentine contacts: the
international contract of consumption. This way, we integrate the
protection in the foreseen system Articles 1205, 1209-1210 of the Civil
Code, without discrimination against the contact.

VIII. DISPLACEMENT OF THE SOLUTION OF ARTICLE 1214 OF THE
CIVIL CODE

With such an interpretation, Article 1214 of the Civil Code would
be without sustenance. The place of performance in any event would be
determined by way of the previously expressed criteria, which would
displace, per se, the possibility of application of Article 1214 of the Civil
Code.

A. The Autonomy of Disposition and its Limits

The Argentine P.I.L. admits the autonomy of the disposition in
both its forms: conflicting and material.40 It is necessary to clarify that
such an ability recognizes as general limits: a) the Judge’s Public Order;
and b) police norms or rigorous imperatives of the judge or foreigners that
present narrow bonds with the contract. Without neglecting general
limitations, the parts should be interpreted, in light of the principle of
protection of the weakest party in the business transaction: the favor
debilis.

40. Boggiano, supra note 27, at 23.
The option of excluding the autonomy, has more inconveniences than advantages: on its own, it does not resolve the imbalance and it is against the minimum degree of security and legal predictability required in commercial traffic, even in contracts with general conditions.\textsuperscript{41}

\textbf{B. Choice of Law Agreements: Expressed or Implied Forms; Real Agreement, not Hypothetical}

The choice of restricted reach, in implicit form, arises from the jurisdiction of the parties in the framework of Article 1212 of the Civil Code: "designating the place of performance."\textsuperscript{42} The choice of broad reach, arises from the jurisdiction of the parties in choosing a judge or arbitrator, with its foundation in article 1 of the Civil and Commercial Procedural Code of the Nation: when choosing a foreign tribunal, the D.I.P.r. system of the tribunal is chosen and if they can choose this last one, they can choose the Rectorate Private Right of the business, argument to maiore ad minus.\textsuperscript{43}

The election of a right (without imposing a limit of reasonable or sufficient connection) in expressed or tacit form, also arises from article 7 of the 1986 Hague Convention on Applicable Law to International Contracts of Sale and Purchase of Merchandise; Sanctioned and Promulgated by law 23.916.\textsuperscript{44} The incorporation of the Convention also imports its principles to the positive internal D.I.P.r. But it is necessary to illustrate that this principle of freedom has precise limits: internationally imperative norms (exclusive and excluding police norms) and Public Order (principles of public order).

Nevertheless, we should interpret the autonomy in this area with a protective purpose. Such a result is achieved by departing from its permission, although conditional, of the protection levels that are offered to consumers in their habitual residence, in the supplier's principal establishment, and the place of acquisition of the product.

In this sense, Professor Boggiano understands that the principle of autonomy is limited especially in international contracts, when one of the parties is "typically weak."\textsuperscript{45} This way, the interest of the producer, says

\begin{footnotesize}
\textsuperscript{41} Santiago Alvarez Gonzalez, \textit{Condiciones Generales En La Contratacion Internacional}, LA LEY 159 (1992) (proposing the construction of a system based on the idea of protection of the trust that struggles for the consideration of the law of the contractual or social environment of the weak part: that is to say, on the base of law of the habitual residence or of the home of this part).

\textsuperscript{42} CÓD. CIV. art. 1212 (editorial note: translated from Spanish).

\textsuperscript{43} BOGGIANO, \textit{supra} note 31, at 696.

\textsuperscript{44} \textit{Id}.

\textsuperscript{45} See Gonzalez, \textit{supra} note 41, at 55 (editorial note: translated from Spanish).
\end{footnotesize}
Professor Boggiano, can offer greater levels of protection, as politics of
ternational sales, holding the autonomy subject to certain minimum limits
of protection like those offered to buyer’s or seller’s right.46

This way, we estimate that the parties can choose a right to govern
their contract, but this ability, cannot be detrimental to the protection levels
that offer the rights of the consumer’s habitual residence nor those of the
co-contracting party’s principal establishment, nor those of the place of
acquisition of the product. Everything naturally, should always be at the
consumer’s option.

This solution still governs the choice of law cases by way of
adhesion contracts with predisposed clauses: respecting the existent
protection levels in the “half-closed spatial or contractual adherent”; that
is, their “habitual residence or domicile.”47 Now then, it is always
necessary to set forth the possibility of the application of police norms or
rigorously imperative of the law with which the contract has close links.48

The contacts that appear as sufficiently narrow in consumption contracts
are: place of execution; acquisition of the product; the consumer’s
habitual residence; principal establishment of the co-contracting party; and
place of effectuation of the final destination (usually the place of the loss).

But it is necessary to highlight that, as propounded in this realm,
the consumer can always choose among the most favorable solutions; for
the option realized has supreme importance to the ends of the application
of the rigorously imperative right of the legal classification chosen by
consumers when they file the claim.

The police norms of the forum would also be applied on the
condition that the foreigners, for those that opted for the consumer to file
the claim, cannot be more favorable. Naturally, always subject to the
control of public order of the forum carried out by the judge.

46. Id. at 59. It outlines the autonomy of the will, like a vehicle of elevation of the levels
of justness, in the protection of the typically weak part.

47. Id. at 165. This author’s proposal is relative to the contracts with conditions generals
predisposed in general, and limited to the home or habitual residence of the weak contracting
party. The exception, when in the group of circumstances another thing arises. For example, it
offers the existence of previous contractual relationships among the parts or previous negotiations
that could determine a different solution. Without these circumstances, the law of the habitual
residence or of the home it should be taken in consideration by the proposer; Id. at 104.
(Editorial note: translated from Spanish).

48. CÓD. CIV. art. 1208; Boggiano, supra note 27, at 325 (defining it like a “decisive
economic connection” with the contract of the law it seeks to escape); Id. at 716.
C. The Material Autonomy

The possibility of incorporating material clauses into the contract, excluding the coercive norms of internal private right, is affirmed and recognized by our doctrine and jurisprudence. It is necessary to clarify that the exclusion is partial: not to mediate substantial incorporation, the coercive norms of the competent private right are not displaced.

It is evident that they govern the general limitations as much as the special ones: a) public order of the judge; b) Police Norms of the Judge or Foreigners with a narrow link to the contract, with the ability of the consumer’s option playing an important role; and c) One could say then that the material autonomy confronts the minimum public order, constituted by the minimum levels of protection of the consumer’s habitual residence, of the principal establishment of its co-contracting party, of the place of acquisition of the product, and of the choice by the parties, to the consumer’s option.

The norms of private right rigorously imperative, to reflect a minimum public order of protection, constitute a doubtless limitation to the exercise of such a material autonomy, their exercise should tend to improve, never to worsen the consumer’s legal situation in the consumption relationship. The nature of the regulated question in some systems has its roots in fundamental, constitutional principles, that make us think of the strong authoritative ingredient, fruit of similar conquests to those taken place in the field of labor rights.

Also, in adhesion contracts with predisposed clauses, the incorporation of same to the business undoubtedly originates from the exercise of the material autonomy. And the solution is no different. The questions referring to interpretation, validity and effectiveness are subjected to general and special limitations indicated at supra, when they appear inserted in the contractual relationships of consumption.

The complicated problems referred to the validity and effectiveness of predisposed clauses should be guided by the protective principle of the weak parties in the business transaction, for what pre-indicated limitations play an important role in control.

It is of the utmost importance to understand it this way because the contractual superiority of the supplier of goods and services places on its back the risk of international commercialization, and should foresee the

49. BOGGIANO, supra note 31, at 700. This author justifies his exercise, starting from the possibility that they have the role of excluding the coercive norms of the private right chosen by the legislator, by the election of another right entirely that the elect for the legislator, they can also exclude partially coercive norms, by means of the exercise of the material autonomy.

50. Id.
protective legislation of the states where the commercialization was effectuated. The possibility of an option offered to the consumer constitutes an appropriate mechanism for protection of interests and also, it is manifested as a precursory step toward the leveling in the superior protective systems.

On the contrary, it does no more than to legitimize the profit obtained, starting with the diversity that exists in the legal guide to the weak party in the consumption relationship.

IX. THE PUBLICITY OR OFFER IN THE COUNTRY OF THE CONSUMER’S HABITUAL RESIDENCE (ARTICLE 5, CLAUSE 2 OF THE AGREEMENT OF ROME 1980)

It has been said that new marketing and publicity techniques have impelled the development of the human consumer. Marketing constitutes the appropriate vehicle, dedicated to bringing the product closer to the consumer, by offers in domiciliary sales, publicity by massive means of communication, internet, etc. Such means produce a flow of information that overcomes the political boundaries of the States, shortening the distances and penetrating directly into the consumer’s residence.

It is of evident normality, the situation that the publicity arrives and penetrates in the habitual residence of the weak party in the business transaction, encouraging the consumption, generating necessities, with which the contact, charges bigger localizing force, beyond the place where the contract is executed acquiring the product.

A. The Need to Harmonize Substantial Norms for the Consumer’s Effective International Protection

The material unifications are conquests by the international legislator, but necessarily limited to matters in which a common ground of principles exists. Cooperation and solidarity among countries, based on the valuation of superior ideas of justice, justify the fight for the adoption of fair, uniform solutions. In this branch of protective law, with last ratio in human dignity, it fully justifies any unification intent.

But as Professor Benjamin has emphasized, the fruit of the labor of unification of the Law of Consumption in Mercosur, we will not see in this


52. BOGGIANO, supra note 31, at 120. The independence and equality of the national juridical systems are opposed to the unification.

53. Id. at 121.
century.\textsuperscript{54} True that the task is as necessary as it is difficult, but in any event, it is not completely impossible.\textsuperscript{55} Nevertheless, it is always necessary to develop a uniform D.I.P.r. system that accompanies such substantial unifications.\textsuperscript{56} The task then should be common: to private law and international private law experts.

B. Examples of Unlawful Acts

There is a lagoon in the internal source regarding the regulation of unlawful acts.\textsuperscript{57} The lagoon should be filled with the analogy and the general principles of law.\textsuperscript{58} Article 43 of the 1940 Treaty of International Civil Law of Montevideo mandates the application of \textit{lex loci delicti}. There has been widespread criticism of this rigid contact: the so-called \textit{Conflictual Revolution} in the United States against this system is good proof of it.\textsuperscript{59}

That is why it is necessary to keep in mind the material orientations of favor, and with more reason still, in the face of the need for filling such a lagoon, we should build the conflict norm that responds to those general principles of law.\textsuperscript{60}

And in the consumption relationship, the victims are the consumers, establishing themselves as the weak parties of such a relationship, with the natural need for protection (in systems like ours, their rights were recognized as fundamental).\textsuperscript{61}

Any construction that we carry out, should not lose sight of this protective purpose, nor be different from the proposal in a contractual matter. Let us look at a proposal in the international source.

\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{See,} LORENZETTI, \textit{supra} note 1. Where she/he informs us the task of the Technical Committee note 7.
\textsuperscript{57} BOGGIANO, \textit{supra} note 31, at 1160.
\textsuperscript{58} CÓD. CIV. art. 16.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} CONST. ARG. art. 42.
C. The Hague Convention's Solution on Applicable Law to the Responsibility for the Manufacture of the Product

In the Hague Convention on the Applicable Law to the Responsibility for the Manufacture of Products on October 2, 1973 (convention that went into effect October 1, 1977), the injured party's habitual residence and the place of the loss play a predominant role, instead of the place of acquisition of the product or of the defendant's principal establishment. This is determined by analyzing the suppositions of coincidence of the habitual residence: a) with the law of the place where the loss occurred; and b) with the law of the defendant's principal establishment; or c) with the place of acquisition of the product by the injured party.\(^6\)

The hierarchy of the connection factors is given only for two of the four: the place of the habitual residence and that place where the loss occurred. The defendant's principal establishment and the place of acquisition of the product are "subordinate connection factors" and if these coincide, it does not drive the application of the law of the principal establishment.\(^6\)

A hierarchy of combinations also exists in the instances where the habitual residence of the injured party coincides with the principal establishment or with the State of acquisition of the product.\(^6\) The result then is that when the loss occurs outside the habitual residence of the injured party, for example when they are on vacation in another State, not article 4, but article 5 of the aforementioned Convention is applicable.\(^6\)


63. Fawcett, supra note 56, at 141; this noted author, mentions a failure of the Dutch Court of Alkmaar in the case Nieuw Rotterdam Schade NV v. Baier & Koeppel Gmb H & Co. It is necessary the main combination of both with the subordinates. This way, it is applicable the Law of the Place of habitual residence if it coincides: to) with place of the fact; or b) with the person's main Establishment whose responsibility is invoked; or c) the place of acquisition of the product for the directly damaged person.

64. Hague Convention, art. 5.

65. Fawcett, supra note 56, at 141. This author analyzes the Convention from a European perspective and he makes us important precisions. It is in vigor in four members of the EEC: France, Luxemburg, The Low Countries, Spain; and between two of the EFTA: Norway and Finland; it has been signed and not ratified by Belgium, Italy and Portugal. Few registered cases of the Convention exist. The lack of harmonization of norms of D.I.P.r. in the European area of illicit facts projected toward the responsibility by the product, hinders certainty and security of the solutions. Is the point in question: like they operate the norms from relative D.I.P.r. to illicit facts, in matters of responsibility for the product elaborated in countries non ratificantes of the Convention of The Hague? This author realizes proposals of creation of norms of special D.I.P.r., so that they work in the Community material environment of the Directive ones, with the rising danger that would represent to have two rules of D.I.P.r.: one for the cases
The possibility of choosing the applicable right comes from article 6, when none of the laws designated in articles 4 and 5 are applicable. It mandates that the law of the place of the defendant’s establishment be applied, allowing the actor to opt in subsidiary form for the law of the place where the loss occurred.

**D. Solution in the International Source: The Habitual Residence of the injured Party Coinciding with Lex Loci Actus**

The habitual residence of the injured party, consumer, should be favored as the starting point for the construction of the Norm of Conflict. It is the place where the consumer has its center of life and the harmonization takes place with the contractual solution, that in the face of the lack of a specific solution in our internal source, we can integrate it with the same principles of the P.I.L. in the contractual area.

This way, the traditional *lex loci actus* would be justified, as long as and as soon as it coincides with the victim’s habitual residence. And it should consist of, in the principal connection, when it would be this way (similar to the supposition of Article 4, Clause A, of the 1973 Hague Agreement on Responsibility for the Product).

**E. Elective Solution in Favor of the Consumer: Principle: Establishment of the Defendant; Place of Acquisition of the Product**

Nevertheless, it is important to introduce in the methodology the victim’s ability to choose alternatively between the laws: a) of the principal establishment of the defendant; b) of the place of acquisition of the product (these last possibilities are contemplated in Switzerland: article 135, 1(a) and (b) of the 1987 Switzerland Law of Private International Law).

In sum, the system of P.I.L. will be identified in the order of its ability to overcome the dichotomy (contractual and non-contractual responsibility).

We do not find axiological justification for the fact that the solution is different from the one outlined in contractual matter and for the sole fact that there is no prior contract between the ultimately responsible party and the injured consumer.

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contemplated in the Directive ones, where armonización would exist, and another for the rest, where harmonization would not exist. *Id.* at 228-40.

66. Treaty of Montevideo, art. 43 (1940).
The protective purpose should prevail over the solution, in the sense of producing such a conquest.

X. LIMITS ON THE APPLICABLE LAW

By the characteristics of the protective private law and its projected solutions there are two extremely important factors: first, the option offered to the consumer, and secondly, the judge’s public order. The rigorously authoritative norms of the forum always maintain a minimum limit of protection.

A. The Realm of the Rigorously Authoritative Norms of the Judge and the Foreigners Tightly Connected with the Case

Police norms, mentioned supra, constitute a limit to the applicable right that excludes all types of applicable possibilities, always encapsulated under the favor principle and in the consumer’s option. The police norms which we refer to, are those of the judge and the foreigners with intimate links to the consumption relationship. Naturally it arises from the previously indicated function that foreign police norms are applicable on the condition that they do not violate the principles of public order of the Argentine legal arrangement.

Nevertheless, the existence of an Argentine police norm would not constitute a limit on the application of a foreign police norm, if this were more favorable to the consumer (by virtue of the interpretation principle in favor of the weak party). The protection principle, is a general principle of Argentine international public order. If the rigorously imperative foreign right (foreign police norm) is more favorable to the consumer than that of the forum (police norm of the forum), we should give priority to the foreigner, unless, fundamental principles of the Argentine judge’s public order are violated.

It is necessary to examine if the separation of Argentine police norm harm other fundamental principles of the forum (e.g. the economic public order).

68. Id. art. 16.
69. Id. art. 14; CONST. ARG. art. 42.
B. The Dimension of the International Public Order and the Function of Judges in the International Protection of the Consumer

The principles of international public order, play a dominant role in the control of the solutions in the multinational private law cases. The protective function in the P.I.L. system planned for the consumer’s international protection, unfolds in three ways: a) election of a system connected with the relationship, granting the consumer the ability to choose the most favorable option; b) framing the autonomies with the protective principle; c) always rigorously playing the consideration of the imperative law most favorable to the consumer (in the one who presents the action or that of the forum).

The whole proposal is subject to the condition that the principles of Argentine international public order are not violated. When we speak of protective legislation, consumer protection is the purpose for bringing into existence a series of fundamental values that have as the ultimate rationale, the respect for human dignity. Law 24.240, in Article 65 states that the present law is one of public order.

Naturally, such a declaration makes reference to the internal public order, not the international one. But we should not overlook the fact that the aforementioned law, is based on Article 42 of the National Constitution which begins speaking of the “consumption relationship” and establishes the rights of the consumers and users:

a) to the protection of their health;
b) to the protection of their security and economic interests;
c) to adequate and truthful information;
d) to the freedom of choice; and
e) to conditions of equal and appropriate treatment.

The text also expresses that the authorities will provide for the protection of those rights, to education for consumption, to the defense of competition against all forms of distortion of the markets, to the control of the natural and legal monopolies. Without a doubt, law 24.240 contains protective parameters on which the protection of consumers in consumption relationships rests. Now then, basic rights like the protection of risks that may affect the consumer’s health or security, of their legitimate economic and social interests, of adequate information, of the freedom of choice; constitute respect of their dignity as the fundamental principle of the human being. They are basic principles that any foreign solution, or solution brought about by the exercise of the autonomy of the will, cannot ignore.
It is on these principles that the Argentine system of P.I.L. of consumer protection should be built. Here is the importance of the jurisdictional function, in the consumer's international protection: The comparative task of the judges, that contact the foreign solution or agreement to by the parties, with these principles that are necessarily planned on same.

C. The Jurisdictional Function in the International Protection of Consumers

The jurisdictional contacts as tutorage means, should also surpass the diverse source of the international relationship of consumption (contractual or non-contractual). The international jurisdiction should have as its fundamental pillar, access to the jurisdiction, which is a human right with constitutional hierarchy. Through this right, the Argentine norms of international jurisdiction should be interpreted.\(^\text{70}\)

D. The Consumer's Habitual Residence

This is a forum that enjoys undeniable advantages to protective ends. The interpretation of Article 1215 of the Civil Code allows one to reach this conclusion. The contact place of performance should be understood in a wide sense, any place of performance facilitates access to the justice system, an international principle that enjoys constitutional importance.\(^\text{71}\)

In this sense, when the consumer is the plaintiff, it notably facilitates the access to the justice system. Access which on the other hand, has its roots in fundamental rights recognized by international treaties of human rights with constitutional importance in our country.\(^\text{72}\)

The plaintiff's forum, would only be justified, says Professor Vicher, in matters where it is pursued to facilitate the execution.\(^\text{73}\) In this

\(^{70}\) See TONIOLLO, supra note 11.

\(^{71}\) Werner Goldschmidt, teaches about private international law at the conference of Derecho Internacional Privado, Derecho De La Tolerancia (1982).

\(^{72}\) CONST. ARG. art. 75, § 22; The American Convention of Human Rights of San Jose, Costa Rica, National Supreme Court of Justice, Dec. 22, 1994, especially the vote of Dr. Fayt, considerations 21 and 22 of the case Manuata, Juan Jose C/ Embajada De La Federacion Rusa S/ Danos Y Perjuicios.

\(^{73}\) Id. at 211.
instance, such a contact would not appear as an inappropriate forum, but is justified in the special nature of the action.\textsuperscript{74}

In the consumption relationships, justification is undeniable. In this sense the consumer can file a complaint in his habitual residence invoking \textit{lex fori} (the identification forum, which has undeniable advantages beginning with the judge’s knowledge of the proper law, and of undeniable importance of public order as a reservation clause).\textsuperscript{75}

Not doubting that the solutions based on such an identification have received favorable opinion of qualified wisdom, Professor Von Mehren has suggested that whoever believes that in the multinational private law cases, satisfactory results in terms of Standards of Justice can be obtained, like in those reached in purely internal cases, is condemned to deception.\textsuperscript{76}

This delicate problem is centered on the consideration that on the one hand, there is an inequality between the foreign right and the \textit{lex fori} at the moment of the resolution of a multinational private law case.\textsuperscript{77} The public order exception, \textit{to veto} the foreign rules of decision, has been taken by Professor Juenger as an ending point in which one is forced to trust the multilateralism as much the unilateralism: the preference of the forum to avoid inequitable results.\textsuperscript{78} On the other hand, when the matters understood in the cases, are based on the human person’s fundamental rights, the ingredient of principista international public order plays a predominant role generating the need for homogeneous results in the forum. The same considerations can come into play when the consumer is sued.

\textbf{E. Domicile of the Defendant}

The interests of the consumer’s co-contracting party when sued, are preserved in the general jurisdictional contact: domicile of the defendant. It is one of the jurisdictional approaches universally accepted and respectful of the fundamental right of defense at trial (which is also


\textsuperscript{75} CÓD. CIV. art. 14, § 2.


\textsuperscript{77} BOGGIANO, \textit{supra} note 31, at 94. Boggiano puts accent in the function \textit{inspector} of the Norma of Conflict, manifested in the exception of Public Order that implies to not admit the foreign solution that contradicts the principles of substantial justice in those that she/he settles the juridical classification of the forum. The principles of international public order “they always govern the cases”; “it is always necessary the material comparison.” \textit{Id.} at 94, 95.

\textsuperscript{78} \textit{Id.} at 258.
based on the National Constitution and International Treaties of Human Rights. See previous point).

This contact is not foreign to the consumer's interests either. When consumers are the plaintiffs, they can also choose lex fori if it is favorable to them (the principal establishment of the co-contracting party).

F. The Place of Acquisition of the Product: The Reasonableness of Lex Loci Delicti (article 5, C.P.C.C.N.) and Place of Performance (Articles 1215 and 1216 of the Civil Code) as the Consumer's Option

The lex loci delicti,\textsuperscript{79} may appear to be a reasonable contact to the ends of international jurisdiction in the instances that they coincide with the consumer's habitual residence, with the establishment of the co-contracting party and finally with the place of acquisition of the product.

They should also be endowed of international jurisdiction, at the consumer's option, if the judges of the place where the loss occurred coincides with the place where the product was acquired. The consumer would always be the plaintiff and thus, guarantee his/her access.

The same reasonable solution occurs, when we are faced with a broad interpretation of the place of performance.\textsuperscript{80} It would also be presented as a contractual matter in the forum of the place of acquisition of the product. This would allow the consumer as plaintiff to sue before those judges and invoke lex fori, if it is procedurally reasonable.

The solution becomes difficult when consumers are sued in the place of acquisition of the product because consumers may find themselves outside of their habitual residence and forced to consent to the jurisdiction in order to defend their rights. That fact alone justifies discarding such a jurisdictional contact as infringing on the principle of international public order; and with the consequential obstacle to the execution of the sentence in the habitual residence of same.

It is impossible to discard such inconveniences, since the principle of access to the jurisdiction to defend its rights, has an undisputed hierarchy in the Argentine legal system.

XI. JURISDICTION EXTENSION

The principle of freedom of the competent judge's election foreseen by Article 1 of the C.P.C.C.N., presents some controversial edges in this field. Naturally, any interpretation of the principle of

\begin{itemize}
\item \textsuperscript{79} CÓD. PROC. CIV. Y COM. art. 5.
\item \textsuperscript{80} CÓD. CIV. arts. 1215, 1216.
\end{itemize}
freedom foreseen by the aforementioned norm, does not have to neglect the principle of guiding the weak party in the business transaction. The freedom of choice usually belongs in contracts among parties with equal negotiating power. The situation is different when we deal with consumption relationships. The extension should be treated differently in contracts with consumers.81

A. The Commitment Clause

The commitment clause included in consumption contracts brings us to the problem of its validity and effectiveness. It is also normal to include adhesion contracts with predisposed clauses. We should distinguish, when the consumer is the defendant from when the consumer is the plaintiff. The interpretation is always in the consumer’s favor.

B. Sued Consumer (Procedural and Substantive Obstacles)

In this instance, we should recall once again that the reality of the consumption relationship involves an evident disparity in the negotiating power of the parties and that for this reason, a new intervening right appears to balance it. It has usually been sustained that the extension, many times, establishes a clause of irresponsibility.82 In this sense, to force the consumer to move to a distant country, can amount to one of the abusive clauses forbidden in article 37 of law 24.240. Access to the jurisdiction is hindered.83

It is also necessary to remember that among the limitations that Article 1 of the C.P.C.C.N. sets out, is “the prohibition of the law”; and the abusive clauses regulated in article 37 of law 24.240, is outright ineffective for being “non conventional” without prejudice of the integration of the contract by the Judge when she/he declares the partial nullity. The implicit prohibition of the election clause, does not cease to

83. BOGGIANO, supra note 31, at 242. This author understands that should appreciate the extension, by the light of the defense principle in trial, when it is placed to the adherent one in situation indefensión, that is to say to be able to go to a reasonable jurisdiction.
be an argument with serious foundations in our special legislation for consumer protection.84

In the instance of international relationships of consumption, the extension can not deprive the consumer from the access to the preindicated forums, neither can it limit the responsibility of the cocontracting party, nor place restrictions or denouncements on its rights. It is highly unlikely that in an Argentine jurisdiction, an extension clause can pass the test projected by the parameters of consumer protection.

On the other hand, the applicable right to this agreement, in order for its validity, by the force of the protective dispositions and the interpretive proposal of the system of norms of P.I.L., makes us think that we should necessarily take into account the substantial systems of protection: of the habitual residence, or establishment of the cocontracting party or of acquisition of the product, a right elected by the parties, at the consumer's option. The complications are evident.

C. Consumer as Plaintiff (the Permissive Character for the Consumer)

The inconveniences of the situation previously described, would seem not to play a role in this instance. The consumers could take advantage of the extension clause if it is favorable to their interests, since it would constitute one more forum to sue in and it implies a favorable situation and is in accord with the principle of access to the jurisdiction. The defendant, counterpart of the consumption relationship, who usually predisposed the clause under its general conditions, would have no reason to complain about such a choice by the consumer. Usually that is who should carry the risks of the insertion of the clause.

It may be said then that the extension in the judges of the consumer's habitual residence appear as a contact free from bad habits and for the supplier, a degree of security and unbeatable certainty.

D. The Commitment (Extension Post Litem Natam) and its Feasibility

The commitment (extension post litem natam) does not have the same inconveniences, provided it takes place by expressed agreement, in written form and properly subscribed by the consumer. An evident...

84. FARINA, supra note 3, at 426. When it outlines the extension of internal competition, it foresees the possibility that the consumer, invoking article 37, clause b of the law, happen before the judges of their home.
approach takes place, with the previously contemplated situation, when the ability is granted to the consumer as plaintiff.

Without harm to it, we estimate that one of the less debatable and sure ways, is the post litem natam for procedural agreement, that is to say, "after having promoted the action," as prescribed by Montevideo Treaty of International Civil Law 1940, article 56. Such a situation does not stop to come together with the elective principle in favor of the consumer. Such a procedural agreement implies that the consumer has indeed chosen the tribunal to which it appears and it preserves this way, the fundamental right of access to the jurisdiction. This is a way of achieving the extension, also and in a certain way, it avoids the inconveniences generated by the applicable right to the extension agreement, since here, it rotates around the right of the elected tribunal (to the one that indeed appeared). Anyway, the projection of the solution toward the principle of effectiveness always remains latent, in the instance that international cooperation is necessary when the judgment must be recognized in another different legal system.

XII. CONCLUSION

This P.I.L. system proposed for the consumer's international protection, was devised starting from the time man became as consumer, in a relationship of international consumption, with their needs, their nimbleness, and their evident weakness. Beyond the contractual or non-contractual character in which the need for protection appears. This general principle should constitute the axis for the solutions to multinational private law cases, and for that sole reason, it deserves respect for its dignity.

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