



# e-Commerce

in 25 jurisdictions worldwide

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# Chile

## Claudio Magliona

García Magliona y Cia Ltda

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### General

- 1 How can the government's attitude and approach to internet issues best be described?

The Chilean government's attitude and approach to internet issues is very proactive, positive and concerned with fostering the use and growth of new technologies. The government developed a special public policy (its 'digital strategy') to develop and increase the use of technology as the key to the progress of Chile. The purpose of the digital strategy is to increase the use of technologies by companies, the government and universities and to establish the adequate legal framework to assist in reaching these goals.

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### Legislation

- 2 What legislation governs business on the internet?

Although legislation has been enacted on e-signatures, data protection, computer crime and other internet-related issues such as consumer protection, general provisions in Chilean law govern business on the internet, such as the Constitution, the Civil Code and the Commerce Code. This approach has been confirmed by Chilean courts.

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### Regulatory bodies

- 3 Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

There are no specific regulatory bodies directly responsible for the regulation of e-commerce, but there are some agencies in charge of supervising specific fields related to e-commerce. The consumer protection agency checks the compliance of protective provisions on business-to-consumer electronic agreements.

The Government Agency of Telecommunications (Subtel) considers internet services as complementary telecommunication services where there is no need to have a licence or permit to render internet access services. Notwithstanding that, Subtel supervises ISPs' compliance with the Telecommunications Act, but ISPs may freely set the tariffs and charges for their services.

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### Jurisdiction

- 4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

Normally a company with only an online presence in Chile would not be subject to Chilean law nor to the jurisdiction of Chilean courts, unless the parties agree to submit the dispute to Chilean law or to Chilean courts, which is valid in Chile. However, it is important to mention that certain acts and contracts, as a matter of Chilean public

policy, will be subject to Chilean law despite the agreement of the parties, for example when goods are located in Chile, local law applies.

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### Contracting on the internet

- 5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met.

Yes, it is possible to form and conclude contracts electronically. Contracts can be formed using electronic documents and signatures. Click wrap contracts are enforceable as long as their formation is in compliance with consumer protection provisions, which require, inter alia, that the consumer receive a copy of the executed agreement.

- 6 Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

Yes, together with general provisions there are particular laws governing contracting on the internet, such as the Law on Electronic Documents, Electronic Signature and Electronic Signature Certification Services and the consumer protection law, which contains special provisions for contracting on the internet.

The E-signature Law provides that contracts entered into with electronic signatures shall be equally valid and effective as those executed on paper.

Laws do not distinguish between business-to-consumer and business-to-business contracts, except for the Consumer Protection Act, which only regulates business-to-consumer contracts.

- 7 How does the law recognise or define digital or e-signatures?

The E-signature Act recognises two electronic signatures, the electronic signature and the advanced electronic signature.

Any 'sound, symbol or electronic process that allows the recipient of an electronic document to at least formally identify its author' is an electronic signature. An advanced electronic signature is one 'created using means controlled exclusively by the holder so that it is linked to it and to the data to which it refers, allowing the detection of any alterations, the verification of the identity of the holder and the prevention of the repudiation of its integrity and authorship.' This signature must be certified by a registered third party.

- 8 Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

There are no data retention or software legacy requirements in relation to the formation of electronic contracts in Chile.

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 Security
 

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- 9 What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

There are no specific regulations regarding the security of internet transactions applicable to companies or ISPs. Banks are subject to specific requirements to guarantee the security of internet transactions.

- 10 As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

Courts can require private keys to be made available. Certification services may be freely provided by domestic or foreign legal entities, upon compliance with certain conditions and obligations, without prior authorisation. However, only those certification service providers domiciled in Chile and registered before the undersecretary of economy, promotion and reconstruction may issue advanced electronic signature certificates.

Certification service providers not established in Chile may issue advanced electronic signature certificates (as if issued by an entity domiciled in Chile), provided such certificates are homologised by a certification service provider established in Chile, under its responsibility after compliance with certain requirements contained in the E-signature Law, its regulations or international treaties to which Chile is a party. The E-signature Law regulates the liability of certification authorities.

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 Domain names
 

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- 11 What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

NIC Chile (Network Information Centre Chile; www.nic.cl) is the entity in charge of the registration of domain names .cl TDL. NIC authorisation originates from the IANA (Internet Assigned Numbers Authority). The process for registering a domain name must be made exclusively by electronic means, either by e-mail or via the NIC web page. NIC will automatically send a statement confirming that the applicant complies with the terms and conditions of NIC. NIC will charge a registration fee of US\$40. Following payment, NIC publishes on its website the application for 30 days to allow third parties to acknowledge it and challenge the applicant's right to the domain name. If the domain name goes unchallenged during those 30 days, the applicant will receive notification that the domain name has been registered. If the domain name was challenged or two or more applications for the registration of the same domain name are being processed, the dispute will be resolved by an arbitration panel.

NIC rules provide that all individuals currently domiciled in Chile as well as legal entities, whether public or private, that were incorporated in Chile or that are properly authorised to operate in Chile, can require the registration of a domain name. As regards foreign applicants, they can apply for a .cl domain name through a third party domiciled in Chile and the application must state that the third party is acting as an agent.

- 12 Do domain names confer any additional rights (for instance in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

Under the NIC regulations, domain names do not confer any additional rights in relation to trademarks or passing-off beyond the rights which are naturally vested in the domain name. Additionally, Chilean trademark regulations are based on the Roman system, so common law rights do not arise from use of a domain name.

- 13 Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Chilean law protects trademarks by recognising a property right over the expressions and distinctive signs. However, this is limited to products and services protected by the corresponding registry, thus the owner of a trademark cannot pretend to have a per se right over a denomination on the internet just by virtue of having the registration of a trademark. A challenge to an existing domain name will only be effective if it infringes the scope of the trademark's protection. In the event that a trademark owner challenges the ownership of a domain name during the 30-day period when the application is published, NIC rules establish that the registration will be suspended until the arbitration panel resolves the dispute. Once the process is initiated, no new applications for the domain name in dispute will be received. NIC Chile does not have any participation in the arbitration stage rather than the designation of the arbitration panel. The registration may be revoked if the arbitration panel determines that the relevant applicant was in fact violating the trademark rights of the challenger by the use of the domain name, when its registration is abusive or was performed fraudulently (similar to the Uniform Dispute Resolution Policy of ICANN).

The existence of this procedure within the NIC rules does not prohibit the parties from suing through ordinary procedures that Chilean law provides, such as those for trademark infringements, or a complaint to the antitrust authorities.

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 Advertising
 

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- 14 What rules govern advertising on the internet?

There are no special rules governing advertising on the internet in Chile. Therefore, in the absence of specific legislation, general provisions of Chilean law will apply. Provisions governing advertising activities may be found in Law No. 19,733 on freedom to report, the Consumers Protection Act, and in the non-binding rules imposed by an ethics commission created within the advertising industry (CONAR).

- 15 Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

There are no specific regulations that refer to advertising or content on the internet. However, under the general principles of Chilean law, courts can rule that certain indecent content (whether shown on the internet or elsewhere) is prohibited.

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 Financial services
 

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- 16 Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and if so by whom and how?

General rules apply to the advertising or selling of financial services products to consumers or to businesses via the internet, since there is no special regulation. Therefore, in general terms, management of third-party assets, lending activities, money brokerage, insurance services and public offering of securities are restricted to legally authorised entities and advertisement must be done according to specific rules.

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 Defamation
 

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- 17 Are ISPs liable for content displayed on their sites?

There are no special rules regarding limitation of ISP liability. General rules apply to this matter and therefore an ISP may or may not be liable depending on whether the unlawful content was displayed with wilful misconduct or negligence.

- 18 Can an ISP shut down a web page containing defamatory material without court authorisation?

There are no safe harbours established in the law. However, an ISP may shut down a web page containing defamatory material based on the termination provisions of the user agreement.

#### Intellectual property

- 19 Can a website owner link to third-party websites without permission?

The website owner may link to a third-party website without permission, provided that it does not infringe copyright, trademark or unfair competition laws.

- 20 Can a website owner use third-party content on its website without permission from the third-party content provider?

Website owners cannot use third-party content on their websites without permission from the third-party, unless the content is in the public domain.

- 21 Can a website owner exploit the software used for a website by licensing the software to third parties?

If the website owner is the copyright holder of the software or is entitled to sub-license the software, the website owner may license the software to third parties. If the website owner is not the copyright holder of the software or has no right to license the software used for the website, the website owner may not be entitled to license the software to third parties.

- 22 Are any liabilities incurred by links to third-party websites?

There are no special regulations on this matter, but general provisions may apply if by the link a copyright, trademark or unfair competition infringement is committed.

#### Data protection and privacy

- 23 What legislation defines 'personal data' within the jurisdiction?

Data protection in Chile is governed by Law No. 19,628. This law regulates the automatic and non-automatic processing of personal data by government or private entities in data registries or banks. Personal data is defined by the law as 'any data related to any information concerning identified or identifiable natural persons'. It is not clear whether expression of opinions and intentions are within the scope of the law and, consequently, whether they may be processed by data users. It seems that the definition of 'any information' includes both objective facts as well as subjective opinions.

- 24 Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

No, a website provider does not have to register with any controlling body in order to process personal data. However, databases managed by public bodies must be recorded in a public record carried out by the Civil Registration and Identification Service (the Service). The records kept by the Service must be made public. Additionally, each record must include statements that explain the legal grounds for its existence, the purpose and type of data stored within and a description of the scope of persons that it covers. This information must be provided by the responsible government agency to the Service. Furthermore, any changes to the information contained in the data must be reported to the Service within 15 days of their occurrence.

Personal data may only be used for the purposes for which it was compiled, unless it originates or has been compiled from sources accessible to the public. Therefore, a website provider may not sell personal data about website users to third parties when the personal data was provided directly from the user to the website provider. Notwithstanding the above, the website provider may sell personal data about website users to third parties when the personal data originates or has been compiled from sources accessible to the public when such data is: economic, financial, banking or commercial in nature; contained in lists relating to a class of persons and limited to indicating information such as that of belonging to a particular group, the person's professional or business activities, educational degrees, address, or date of birth; or necessary for a direct response to commercial communications or the direct sale of goods and services.

- 25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction?

This issue is not specifically regulated in Chilean jurisdiction and we do not see any legal problem if a website provider is intending to profile its customer base in order to target advertising on its website. However, please bear in mind that data subjects have the right to opt out of receipt of marketing material. This right can be exercised by data subjects at any time.

- 26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

The application of the Chilean data protection law could be challenged when an internet company's server is located abroad. Notwithstanding that, the transferring of personal data from Chile to other jurisdictions is still subject to Chilean data protection law, therefore depending on the nature of the personal data, which will have to be reviewed on a case-by-case basis, the personal data may or may not be transferred abroad.

#### Taxation

- 27 Is the sale of online products (for example software downloaded directly from a website) subject to taxation?

Yes it is subject to tax, though the rate may vary depending on the transaction. The general rule is that payments by a local company to a foreign provider for software licences are subject to a 15 per cent income withholding tax. The withholding must be carried out by the licensee.

- 28 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

We are not aware of any public ruling of the Chilean IRS on this subject. However, placing the server in Chile may expose the company to local taxation if the Chilean tax authorities determine that such placement configures a permanent establishment of the foreign company in Chile.

## Update and trends

Bill No. 6.120-07 was presented to Congress (House of Representatives) by the government on 10 October 2008 to amend Law No. 19,628 on Protection of Privacy. The bill introduces new regulations, which include:

- the appointment of an agency to supervise the enforcement of the law;
- the creation of a master database where all databases must be registered;
- the extension of protection to legal entities;
- restrictions on transfers of data to countries without adequate data protection levels; and
- the drafting of a regulation on security measures to protect data.

Two earlier bills are being discussed in the Senate. Bill No. 5012-03 was presented to Congress by the government on 2 May 2007

to amend Law No. 17,336 on Intellectual Property. The Bill was passed by the House of Representatives on 10 October 2007 and the approved text is now being reviewed by the Senate. The hearings started on 31 October 2007 in the committee of education, culture, science and technology and are ongoing in 2009.

The Bill introduces new regulations on: civil and criminal enforcement of intellectual property rights; exceptions and limitations of intellectual property rights; and ISP limitation of liability, to implement the US–Chile Free Trade Agreement provisions of article 17.11, section 23, chapter 17.

Bill No. 4915-19 was presented to Congress by members of the House of Representative on 20 March 2007 to establish and guarantee net neutrality for consumer protection. The Bill was passed by the House of Representatives and the approved text is still being reviewed by the Senate.

**29** When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

Only individuals or entities with a domicile in Chile are obliged to register as local VAT taxpayers. Individuals or entities with their domicile abroad are not allowed to do so. Registration and invoice stamping must be done before commencing taxable activities. Local sales through the internet do not have a special regulation, so they follow regular rules.

**30** If an offshore company is used to supply goods over the internet, how will returns (goods returned in exchange for a refund) be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Chilean law regulates re-exportation, or the procedure whereby goods imported into the country are returned to the foreign provider. This procedure is destined to obtain a refund of customs duties and VAT levied on the importation. However, it is too complicated for it to be used by consumers on sporadic purchases of goods, especially if they are not expensive enough to justify the formalities and requirements of such a procedure. If the goods are returned to a local branch of the foreign provider, then no taxes should be triggered on the transfer, but this would not allow a refund of taxes paid on the importation. The activity of the branch as a deputy of the foreign provider may also be considered by the Chilean IRS as a form of permanent establishment in Chile, triggering Chilean taxation on foreign income of the foreign provider.

## Gambling

**31** Is it permissible to operate an online betting or gaming business from the jurisdiction?

As a general rule online betting or gaming business will require prior authorisation by means of a law to operate. Lotteries, gaming and gambling are strictly regulated in Chile.

**32** Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

There are no specific limitations for users of online casinos; in general, betting activities are restricted to individuals over 18 years old.

## Outsourcing

**33** What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

Labour laws establish that the principal remains liable for paying full compensation and benefits to outsourced employees, including the obligation to withhold taxes should the contractor default on payments.

**34** What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation? Do the rules apply to all employees within the jurisdiction?

Labour laws establish that principal remains liable for paying full compensation and benefits to outsourced employees should the contractor default on payments. The principal may withhold payment to the contractor if the contractor does not evidence compliance with labour laws.

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**Online publishing**

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**35** When would a website provider be liable for mistakes in information that it provides online? Can it avoid that liability?

There is no strict liability in Chile. A website would be liable for mistakes only if the information is or was provided with wilful misconduct or with negligence. It can avoid liability by proving the absence of wilful misconduct or negligence in the provision of the mistaken information.

**36** If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

Yes, if the databases are protected by copyright. If they are not, website terms and conditions shall apply to stop others from using or reproducing data from those databases or computer crime legislation. The trespass of chattel theory has not been tested by local courts.

