

PERSPECTIVES FOR CONSUMER PROTECTION IN THE XXI CENTURY*

Claudia Lima Marques**

ABSTRACT: Consumer law is facing a crisis, in a context of a new digital ‘Revolution’, which is transforming our mass consumer society into a digital and ‘services society’. which create problems for enforcement agencies and the jurisprudence. This is also challenging traditional regulatory concepts and putting problems to enforcement agencies and the jurisprudence. My work hypothesis is that we need to use all instruments, principles and rights in the UNGCP 2015 (A/RES/70/186) to achieve and maintain “adequate protection” for consumers (GL 1), and perhaps develop new tools to face the challenges that consumer protection must face in the digital ‘Age’. It is a chance to reach a new ‘Age’ (or ‘generation’) in consumer law. Perhaps it is an evolutionary crisis and we can face the threats that consumer protection is facing today worldwide.

KEY-WORDS: Consumer protection — digital “Age” — services society — UNGCP 2015

I. Introduction

It is a great honor to be at the IGE to speak in this 4th Session (8-09 July 2019) in the Palais des Nations, Geneva, about the perspectives for consumer protection in the XXI Century, and I want to thank Madame Teresa Moreira for the kind invitation.

Perspective is ‘a way that you look at a thing’. Painters, to make perspectives, draw lines from one starting point to the horizon and to the sky, building traces to support the future design and figures. Today I want to make the same. In my opinion, consumer law is facing a crisis. The fundamental technological changes of the new digital ‘Revolution’¹ transform our mass and consumer society in a digital and ‘services society’. We are at the edge from a new time, which brings us challenges and chances.

Dogmatically speaking, there is a new ‘expansion’ of our consumer protection laws. The enforcement agencies and the jurisprudence are now facing problems with social

*Draft presented at the IGE-UNCTAD, on 8th July 2019. The oral form is maintained. I thank Dr. Ana Muniz (UNCTAD), Prof. Dr. Tatiana Squeff, Federal University of Uberlândia (Brazil) and the UFRGS PhD Candidate Guilherme Mucelin (Brazil) for the English revision. I thank Hans Micklitz for the inspiring discussions and material about the future of consumer law. The idea of the need of a ‘Brundtland’ Report was first suggested at the 40 Years Anniversary Conference of the Journal of Consumer Policy, in Florence (forthcoming).

** Professor at the UFRGS – Federal University of Rio Grande do Sul - Porto Alegre, Brazil; Chair of the Committee on International Protection of Consumers-ILA, London and Director of the IACL-International Association of Consumer Law and Brasilcon. E-mail: dirinter@ufrgs.br.

¹ SCHWAB, Klaus. *The Fourth Industrial Revolution*, Penguin: UK, 2017, p. 1.

media,² data protection,³ digital contracts, new kinds of cross-border fraudulent schemes and an increasing international dimension of consumer protection.⁴

The traditional consumer law, with the division between goods and services, built in ‘sales’ of tangibles goods, is not enough. Especially the traditional division between gratuitous and onerous purchases, between financial services and the main performance – they are not been challenged. There is a new emphasis on consumer’s services (traditional services, digital services and former ‘public utilities’) and intelligent (or connected) goods, goods with digital or immaterial content.⁵ Because of the increasing convergence/compatibility in merging goods with services in intelligent goods, the new variety of goods with a digital content and services that needs a product in order to work (for example, a mobile phone), to be provided, the synergies between goods and services and these two consumer relationship are defying the traditional regulatory and enforcement efforts.

On the one hand, we are seeing an increasing automatization and connectivity of our lives, making it faster, but sophisticated, with our choices being more and more controlled by intermediaries and with long term and complex consumer’s contract relationships.⁶ On the other hand, we need to maintain the traditional level of quality, health and consumer safety on goods and services, as well as to engage all tools on consumer protection developed in the XX Century.⁷

My work hypothesis is that we need to use all instruments, principles and rights in the UNGCP 2015 (A/RES/70/186) to achieve and maintain “adequate protection” for consumers (GL 1),⁸ and perhaps develop new tools to face the challenges that the consumer protection must face in the digital ‘Age’. It is a chance to reach a new ‘Age’ (or ‘generation’) in consumer law. Perhaps it is an evolutionary crisis and we can face the threats that consumer protection is facing today worldwide.

I will divide my observations about how to face the new digital and services society divided in two perspectives: *as a challenge* to consumer protection and *as a chance* to change and to adapt it to the new times.

Because of time constraints, we will focus in two challenges. One great challenge for consumer protection in the Digital and Service’s Society is the raise of the powerful

² See the editorial about the Facebook case in Germany, PODSZUN, Ruppert. Regulatory Mishmash? Competition Law, Facebook and Consumer Protection, in *EuCML – Journal of European Consumer and Market Law- Issue 2/2019*, pp. 49-52.

³ See RIEFA, Christine; CLAUSEN, Laura. Towards Fairness in Digital Influencer’s Marketig Practices. In *EuCML – Journal of European Consumer and Market Law- Issue 2/2019*, pp. 64-74, p. 73.

⁴ So open their book G. Howells, I. Ramsay and T. Wilhelmsson, Consumer law and its international dimension, in G. Howells, I. Ramsay and T. Wilhelmsson, *Handbook of research on International Consumer Law*, Elgar Pub. (2010), p. 1.

⁵ See the new European Directive, PE-CONS 26/19, 03.04.2019, ‘on certain aspects concerning contracts for supply of digital content and digital services’.

⁶ LORENZETTI, Ricardo Luis. *Tratado de los contratos*. Tomo 1. Buenos Aires: Rubinzal Culzoni, 1999, p. 113.

⁷ BENJAMIN.A. H. Consumer Protection in Less-Developed Countries: The Latin American Experience, in I. Ramsay (Ed.), *Consumer Law in the Global Economy*, Asgate: Brookfield, 1996, p. 49.

⁸ See LIMA MARQUES, C. 25 years to celebrate: Horizons of the 1990’s Brazilian Protection Code and new Horizons, Especially on the Protection of consumers. In: MARQUES, C. L.; WEI, D. (Orgs.). *The future of international protection of consumers*. Porto Alegre: PPGD/UFRGS, 2016, p. 111-144

intermediaries, especially in the new form of digital business.⁹ The former middleman is now in the global digital marketplaces as ‘gatekeepers’¹⁰ of the most of the consumer transactions. The UNGCP has a new chapter on E-commerce (GL 63 to 65) aiming to accommodate existing consumer policies to the ‘special features of electronic commerce’ to enhance ‘consumer confidence’ in the new digital marketplaces, also the collaboration between States in this matter. The second very important challenge is sustainable consumption. Sustainability is a new quality of goods and services and comes today along with the need to protect consumers’ personal data and along with the need of a more effective healthy and safety global strategy.

My point here in this first part is to analyze if we can talk about a new ‘vulnerability’ or weakness of consumers in the XXI Century. I was inspired by the fundamental revision of the UNGCP in 2015. It is to note that the UN Guidelines on Consumer Protection before the revision in 2015 only about ‘disadvantage consumers’ and consumers of the ‘rural area’ were included. Now, the UNGCP has new ‘legitimate need’ to protect vulnerable consumers (GL 4, d), enhanced the chapter on international cooperation (GL 79-94) and new chapters on e-commerce (GL 63-65), on financial services (GL 66-68), on especial issues, like international tourism, on energy, on food, on water, on pharmaceuticals, on public utilities (GL 69-78), focusing on ‘vulnerable and disadvantage consumers’. And since the revision of 99, the UNGCP gave us the basis for a more sustainable consumption. For all these principles, I will argue that the UNGCP now recognize a new vulnerability of consumers¹¹ in the XXI Century.

So, my second part is about the chances of this current mandate of the UNGCP and the chances to develop a ‘second generation’ of consumer law with more equality and freedom for consumers and more cooperation and effective enforcement worldwide. The creation of the IGE-Intergovernmental Group of Experts on Consumer Protection Law and Policy at the UNCTAD, as an international institutional machinery, give us hope for a better future of consumer protection worldwide and, more particularly, in developing and emergent countries.¹²

Here my inspiration is the work of my professor from Heidelberg, Erik Jayme,¹³ about the need for protection of the individuals in the globalized world, especially in front of the new digital giants with global dominant positions. Consumers want now not only freedom, but also equality and efficient ways to fight against new discrimination, harm and abuse possibilities. My work hypothesis is that the digital revolution is calling for a

⁹ MELLER-HANNICH, Caroline, Share Economy and Consumer Protection. In: SCHULZE, Reiner; STAUDENMAYER, Dirk (Orgs.). *Digital Revolution: Challenges for Contract Law in Practice*. 1. ed. Baden-Baden: Nomos, 2016. p. 119ff.

¹⁰ Expression used by Prof. Dr. Hans Micklitz in the SECOLA Conference in Oxford. See MARQUES, Claudia Lima. A nova noção de fornecedor no consumo compartilhado: um estudo sobre as correlações do pluralismo contratual e o acesso ao consumo. *Revista de Direito do Consumidor*, v. 111, n. 26, p. 247-268, maio/jun. 2017, p. 247.

¹¹ See also the Book of a German-Brazilian Researchteam, GSELL, B.; MELLER-HANNICH, C.; LIMA MARQUES, C.; ARTZ, M. ; HARKE, J. D. (Hrsg.) . *Wer ist der Verbraucher? Verbraucherbegriffe, Verbraucherleitbilder und situative Differenzierungen im Verbraucherschutz*. Baden-Baden: Nomos, 2018, p. 3ff.

¹² MARQUES, Claudia Lima. Relations Between International Law and Consumer Law in the Globalized World: Challenges and Prospects. In: MARQUES, Claudia Lima; WEI, Dan (Orgs.). *Consumer Law and Socioeconomic Development: National and International Dimensions*. Cham: Springer International Publishing, 2017. p. 211–238.

¹³ JAYME, E. Le Droit International Privé du Nouveau Millénaire: la Protection de la Personne Humaine Face à la Globalisation, in *Recueil de Cours*, v. 282, 2000.

benchmark study on consumer protection in the Digital Era or a fundamental Report on 'our common future' in the XXI Century.

II. Challenges for consumer protection

Dogmatically speaking, Consumer Law was built in the XX Century.¹⁴ The first element was *the choice* to assure freedom and party autonomy for the weaker party, so *good faith* was the proper principle, allowing re-personalizing the consumers transactions, assuring more information on the market. The focus was to assure *freedom*, freedom of consumers on the market despite the mass and adhesion contracts. The second element were the *fair treatment* and the assurance of faire commercial practices and combat fraudulent and misleading practices, so *confidence* (trust) was the proper principle, allowing the protection of consumers with more contractual cooperation and forbidding to treat different or unfairly any party. The focus here was *equality* and fairness to all consumers. The third element was the *quality of goods and services*, which created new legal and implied warranties and the principle of *strict liability* of the fabricants and the solidarity of the chain of professionals involved gave the response. The focus here was the fight against 'risk society' and to assure a *fraternal distributive effect* of the consumer protection laws. These legal elements were in all consumer laws on the globe. My last element of this traditional consumer protection is the *local enforcement*. We built very efficient national enforcement systems to protect consumers, sometimes regional or supranational, like in the EU and now in the Mercosur, but we do not have a truly international binding instrument to consumer protection and this soft system is not working anymore.

A. Digital and Service's Society

Here I want to argue that, perhaps, these elements (like modern law ideals: liberty, equality and fraternity) are not enough to assure effective consumer protection in the XXI Century and we need to introduce new elements or approaches on consumer law. The current service's society, with the advances of technologies, the new forms of economy and the winds of globalization have challenged the effectivity of these elements. The changes in consumer society are now worldwide, in Global North, but also in Global South.¹⁵ Indeed the advances of digital technologies' world has allowed new forms of business (through 'Apps') and a new (share or circular) economy, with the raise of powerful 'intermediaries'. Despite of this, globalization means the interdependency of economies, societies and businesses. Consumers have used these facilities in national markets and e-commerce, but also in international tourism. All these phenomena have achieved an unprecedented democratization of international consumption.

¹⁴ Here my inspiration is the article from, WILLET, Chris. Re-Theorising Consumer Law. In *Cambridge Law Journal*, 77(1), March 2018, pp. 179-210, p. 179 to 207 and the new edition of LIMA MARQUES, Claudia. *Contratos no Código de Defesa do Consumidor*.

¹⁵ See NAUDE, Tjakie. Dissemination of Consumer Law and Policy in South Africa, in *J. Consum Policy* (2018) 41: 411-434.

a) More Freedom and Fairness?

In the digital world the consumers have more choice and information than never, but they never know who is controlling the consumer transaction. We spoke about ‘framed’ autonomy (Norbert Reich) from the professionals; today we should speak about ‘framed’ information – we have all information, but not those we need... and no control at all about it. And what about fairness? The conformity of services was always a challenge for consumer law and now with goods of digital content the challenge is renewed. Fairness in contract and in commercial (and data) practices in the digital marketplace is also a hot topic. It is necessary to point out that, here, we have old/new contracts, old like ‘sale contracts’, but with new elements like the digital content. And we have very old contracts, like the roman ‘*locatio conductio*’ with new approaches in services contracts of the digital Era. The facilities to identify and to ‘profile’ the consumer is now allowing new kinds of discrimination, like the geo-blocking and the geo-pricing. With the possibilities of the Big Data, the Internet of Things, the algorithms, the AI, the robot-toys and the intelligent products, these kinds of storage (and treatment) of great number of consumers’ data can also be a used to discriminate in the future.

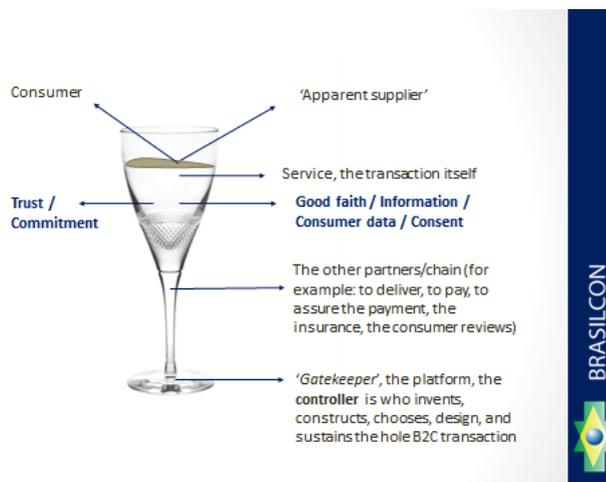
Finally, I want to call the attention for two phenomena, the ‘de-localization’ of the providers and the internationalization of the chain of ‘producers’ or providers of services worldwide and their -like a paradox our digital times- concentration in a handful global digital giants, trademark that all us known. So, we can speak about a standardization of global suppliers, which receive the trust of consumers worldwide. The other is the new symbioses between services and goods, but also from the performance and the payment, sometimes being both controlled by the same global giant. Together with the data storage new kind of harms can occur.¹⁶

b) The Raise of new intermediaries: the ‘Gatekeepers’

In the digital economy we have not only a plurality of suppliers organized in a chain to provide services and goods, but the raise of new intermediaries, these middlemen, who do not provide, but they organize/they control... The raise of new intermediaries (the ‘gatekeepers’ as Hans Micklitz called) is an interesting phenomenon of the collaborative economy: they control the transaction, the ‘meeting’ point of the consumer and the other person (the apparent ‘professional’) and control as well all important information and guidance during the choice, contract, service, sometimes also foresee form and moment of the payment and the private conflict resolution ways. They do not provide, they create the consumption opportunity, but they have the consumer data, they survey everything and they control it. They control also all practices and contracts; clauses, codes of conducts and policies of the legal relation. They are not ‘hard’ fabricants, but ‘software’ providers (Apps), almost like intermediaries, but the consumers have an over-confidence on their Marks and Names (Uber, Airbnb, Booking, etc.). They control the transaction itself, the choice to make, the information to give by the apparent supplier, they control ‘who’ is allowed to ‘access’ the platform to consume. They control the ‘meeting’ between

¹⁶ NAUDE, Tjakie. Dissemination of Consumer Law and Policy in South Africa, in *J. Consum Policy* (2018) 41: 411-434, p. 426 speaks about overestimated or ill-suited telecommunication plans, about ‘data disparting faster than expected’ and many ‘micro-injuries’ in South Africa.

the ‘apparent supplier’ and the consumer. It is to note that now the freedom is insight the ambiance, insight the digital world, which we could call freedom ‘through’ one ‘App’. The language figure could be a ‘cup’, where the gatekeeper is the one on control of the consumption “meeting point”, the contract or the policies, the commercial practices, the ‘pricing’, the ‘service’/delivering itself, how and when it happens, the guidance and the information to collect and to give to the consumer. Sometimes they control also the payment, but always they control the consumer’s data, the real ‘money’ in the digital world. Sometimes they also provide counting on private schemes to solve the conflict. These powerful intermediaries are the keepers of the B2C transactions, their labels, Trademarks and names are known worldwide. The result is an overconfidence of the consumer... My vision of this “meeting point” inside the cup, created by the controller, could be exemplified as:



B. Sustainability, Data Protection and Security

Now we should focus in what is the quality of performance in our digital and service’s society. For sure there are three elements that come to mind: Sustainability, Data Protection and Security. Security is an open expression, beyond safety, it includes respect and privacy (GL 5,k; 11, e; 14,h UNGCP)¹⁷ to legitimate expectations of the goods/service and the consumer’s data used now and in the future...

Since 1999, the UNGCP provides a very detailed set of rules and principles on sustainable consumption (GL 49-62), and since the Revision of 2015, the Sustainable Development Goals are one of the objectives of the UNGCP (GL 1, h; GL 4, i) and of both the mandate to international cooperation (GL 91) and the work in capacity-building of the UNCTAD IGE (GL 92). UNGCP defines the bases to sustainable consumption in GL 49: “Sustainable consumption includes meeting the needs of present and future generations for goods and services in ways that are economically, socially and environmentally sustainable.” Here I do not want to repeat this mandate, but only to emphasize that in order to achieve these goals in the digital world, we need to enhance the dialogue among disciplines, among competition, data and consumer protection. Our

¹⁷ MUNIZ CIPRIANO, Ana Cândida. The Intergovernmental group of experts on consumer protection: forseeing a new time for consumer protection worldwide, in C. LIMA MARQUES; G. PEARSON; F. D. RAMOS (Eds.). *Consumer Protection: Current Challenges and Perspectives – Proceedings of the 25 Years of IACL Congress- 16-19 July 2017*, Porto Alegre/IACL, 2017, pp. 453-469, p. 459.

common future depends of our capacity to embrace the need for a holistic view of quality. Concerns with health and security should not only focus in physical injury, but also in new kinds of offense (social, environmental and personal data offenses etc.) My final observation is about the importance of the environmental information to consumers, as the UNGCP explains. How to follow the responsibilities of a sustainable choice without information about the origin, the genetic modification, the energy costs, the production and the reverse-liability for the disposal of the product later... Environmental information and environmental education are the symbol of the level we want to achieve in the future in consumer protection.

When we talk about dialogue, we mean that, nowadays, a dialogue between consumer agencies and other agencies, especially the data protection and environmental ones, is also necessary. Besides, the application of all these laws, as the ‘Dieselgate’ has shown, is needed. This phenomenon was called by Erik Jayme, ‘dialogue of sources’: ‘sources dialogue’, it consists in the simultaneous and coherent application of more than one law in a single case.

I want to end this part with the following question: Is the legal framework sufficient? Especially in the Global South? The UNCTAD has made a summary of legislation:

52% countries with consumer protection laws

58% countries with privacy laws

72% countries with cybercrime laws

*78% countries with e-transactions or e-commerce laws*¹⁸

For the success of the e-commerce legislation worldwide, I am sure the UNCITRAL Model Law has largely contributed. In a research about African countries, Thierry Bourgoinie and Marie-Collette Kamme Mouaffo¹⁹ conclude that from the 54 countries in Africa 18 have no general legal framework for consumer protection, 5 have bills on the subject and 2 have especial legislation about food safety.²⁰

These researches show us that the legal framework is not sufficient and the situation is not the best in Global South countries. More capacity building and efforts from the UNCTAD could help these countries. We have global suppliers and they could impose ‘double standards’ (*deux poids, deux mesures?*) in countries without a strong legislation. As Gabriel Stiglitz alerts, this is a risk for the Global South. As a final remark, there is an opportunity for the development of a new generation of consumer law, adapted to the digital revolution.

III. Chances for a ‘second generation’ of consumer laws

The expression ‘second generation of consumer law’ is from Hans-W. Micklitz.²¹ The author establishes a link between the ‘privatization of public utilities’ (and the transition

¹⁸ Source: UNCTAD+CSO+Newsletter+16+November, <https://unctad.org/en> .

¹⁹ Research Presented in 2017 in the Summer Course at the UQAM , Montreal. I thank the authors to allowed me to use their research.

²⁰ The countries mentioned in this first research it were (in French): Burkina-Fasso, Burundi, Comores, Congo, Erythrea, Gabon, Gambie, Ghana, Guiné-Bissau, Guiné Equatoriale, Lybie, Mauritanie, São tomé et Príncipe, Senegal (dec. 1968), Somalie, Soudan, Soudan Sud, Suaziland. (Also Le Sahara Occidental, not yet regonized by the international community).

²¹ MICKLITZ, Hans-W. Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse, in *Yearbook of European Law*, Vo. 32, N. 1 (2013) , pp. 266-367, p. 294.

from the Welfare State to a more regulatory State) and the ‘second generation’ of consumer legislations, that focus on services and also the recognition of special ‘vulnerable consumers’ in order to compensate the weakness of part of the consumers. Here, I want to use this central idea to point out that the chances that consumer law and policy can face the challenges of the digital revolution are linked with the recognition of a new vulnerability of consumers in this digital era.

A. Freedom/Equality: global dominant position and discrimination

If perspectives are ‘the way that you look at an object or landscape’, now I want to reflect about the negative and the positive impact of the digital revolution on the consumer society. The negative impacts I want to highlight are the new possibilities of discrimination among consumers, and the positive ones are the use of digital technology to empower consumers and also to enhance flexible means to resolve dispute resolution online.

Discrimination is one of the ‘new’ subjects of Private Law, as the European Union has made clear, in a study made by the European Parliament collecting “*information on discrimination against consumers on grounds of place of residence or nationality in the Digital Single Market (DSM). Collected evidence indicates such practices as refusals to sell or discriminatory conditions depriving consumers of access to goods and services on DSM or obliging consumers to pay higher prices*”.²² The concentration in few providers allows us to think about global standards, which would be used worldwide.

The digital revolution can, however, be seen as chance to develop a ‘second generation of consumer law’ with more equality and not only freedom for consumers. Here my inspiration is the work of Erik Jayme,²³ on the need to protect the individuals in the globalized world. We can identify these new digital giants and their global dominant positions, so consumers want now not only freedom, but also equality and efficiency to combat these new discrimination, harm and possibilities of abuse.

But not everything is bad with this new ‘global dominant position’ of a few giant corporations; perhaps here there is a chance to also enhance the efficacy of the dispute resolution with online tools, and especially non-binding instruments to consumer dispute resolutions that maintain the access to the judges, if the consumer considers necessary. One new aspect is that some of these relations between consumers and the giants of the digital world are long term contracts. The exclusion of the consumer can be very negative for him/her. I used to call this new kind of long-term contracts ‘captive’, in which the consumer’s fidelity is an asset, but the time of the contract is not always favorable to consumers.

Here we can learn from sociology when it considers the new influence of the Time-Space changes in our XXI Century. The digital world gives ubiquity to consumers, they do many things in a few seconds; they are always on the mobile and connected, but time seems to be always ‘against’ the consumers. Time is now an element of marketing and

²² See IP/A/IMCO/ST/2013-03, accessible in http://www.europarl.europa.eu/meetdocs/2014_2019/documents/imco/dv/discrim_consumers_/discrim_consumers_en.pdf.

²³ JAYME, E. Le Droit International Privé du Nouveau Millénaire: la Protection de la Personne Humaine Face à la Globalisation, in *Recueil de Cours*, v. 282, 2000.

control, we need to protect the time of the consumers and develop redress mechanisms when the professionals or intermediaries are responsible for the ‘time lost’ by consumers, when the professionals use time as a pressure factor or cause damages to consumers. The access to services, the differences they can make, can be a new turning point.

B. Cooperation/Enforcement/Harm: tourism, global standards and health

The studies by Hans Micklitz point out the importance of the enforcement²⁴ and enhancement of international cooperation.²⁵ Some examples can provide clarity about the natural link between international cooperation and efficient enforcement in a global scenario.

a) Shaping International Cooperation

The need for more international cooperation in consumer’s health and safety is a common demand in international fora. In the absence of global standards, the enforcement agencies have created voluntary networks and they aim to work together to create a link between the existent systems of Rapid Alert (from the OAS, RAPEX etc.).

Another important point of cooperation is the sharing of information, especially about recalls, that is not always easy, but it would be an important evolution to achieve. The cases are getting complex and globalized, so the sharing of information and also of evidences would be a very positive step. The ‘Dieselgate’ scandal has shown that software can be used and implanted also to fraud environmental standards.²⁶ Other recall cases normally begin in the global North, with more conditions to establish scientific evidences about the harm and impact of defective product or services, so the sharing of these evidences would be beneficial for all countries in the global South, if the legal framework for that cooperation exists. Class litigation is more successful in some countries than others, so if the sharing of recall evidences (not only information and alerts) was a practice, the state agencies and the jurisprudence could use them. The Tobacco industry case also has shown how difficult it is to achieve cooperation and to achieve equal treatment for consumers from different regions.

The digital revolution has changed the way we contract. Distance contracts and international tourism is not a privilege of few. With the democratization of digital goods comes also a democratization of international consumption, so the physical localization of the consumer and provider become less important. The localization in different countries remains important for Private International Law issues. But also in Private International Law, the division between the so-called ‘passive’ consumers (contracting through the Internet, but remaining in the country of residence/domicile) and active

²⁴ See General Rapport, in MICKLITZ, Hans-W.; SAUMIER, G. (Eds.) *Enforcement and Effectiveness of Consumer Law*, Springer, 2018, p. 15ff.

²⁵ MICKLITZ, Hans-W.; DUROVIC, Mateja. *Internationalization of Consumer Law - A Game Changer*, Springer, 2017, p. 5ff.

²⁶ CHOSSIÈRE, Guillaume P. et al. Public health impacts of excess NO_x emissions from Volkswagen diesel passenger vehicles in Germany, in *2017 Environ. Res. Lett.* 12 034014, 1-14. Available at: <http://iopscience.iop.org/article/10.1088/1748-9326/aa5987/pdf>.

consumers (tourists, that voluntarily -all consumption is voluntary!- goes to another country) is losing importance.²⁷

Brazil has a proposal to draft a Convention on the protection of tourists as consumers (“*Proposal concerning a Draft Convention on Co-operation and Access to Justice for International Tourists*”) at the Hague Conference of Private International Law.²⁸ This Proposal aims to create a global network on consumer agencies to inform and help tourists to get access to justice, like small claims, ADR and court proceedings. It also allows tourists to get administrative help at the local consumer enforcement agency, if there is one, without discrimination vis-à-vis national tourists.

The fact that, today, 45% of the tourist’s destinations are emergent economies and developing countries,²⁹ “*which not always are well equipped to inform, to assist and help the tourists to have access to Justice, ADR and other channels to solve their problems quick and inexpensively*”³⁰ has caught the attention of the Brazilian government. Worldwide, we are living a new diversification of tourism destinations: arrivals in emerging countries destinations increased from 30% in 1980 to 45% in 2014, and it is expected to reach 57% by 2030, the equivalent of more than 1 billion international tourist arrivals in emergent economies.³¹

The good results of the Mercosur Tourist’s Network and the positive experience during the World FIFA CUP in 2014 and the Olympic Games in Rio de Janeiro in 2016 with the proposed *ex ante* intervention of consumer agencies to inform and help international tourists have consolidated the Proposal of the Brazilian government. The second draft of the Proposal was presented in 2015 with 10 Articles.³² Article 1 states the objectives of the proposed Convention: “*a) Provide international tourists who are habitually resident in, or nationals of, any Contracting State and who are travelling to, or in, another Contracting State ("the State visited"), with access to judicial proceedings, and alternative procedures for the settlement of disputes, such as conciliation, mediation or*

²⁷ LIMA MARQUES, C. Towards a global approach to protect foreign tourists: building governance through a new cooperation net in consumer and tourist issues, *In*: A. Sierraltra; C. Lima Marques. (Org.). *Derecho internacional, mundialización y gobernanza*. Asunción: CEDEP/ASADIP, p. 425-455, 2012, p. 425

²⁸ See LIMA MARQUES, C. The Brazilian “Draft Convention on Co-operation in Respect of Tourists and Visitors Abroad” at the Hague Conference and the UN World Tourism Organization’s Draft Convention, in J. Moreno Rodríguez; C. Lima Marques. *Los servicios en el Derecho Internacional Privado – Jornadas de la ASADIP 2014*, ASADIP: Porto Alegre (2014) pp. 823-848.

²⁹ The data are: 1,4 million international arrivals in 2018. <http://www2.unwto.org/press-release/2019-01-21/international-tourist-arrivals-reach-14-billion-two-years-ahead-forecasts> International tourism arrivals in 2017: 1,322 million (growth of 7% in relation to 2016); Advanced economies arrivals in 2017: 724 million (54,8%); Emerging economies arrivals in 2017: 597 million (45,2%). Source: 2017 UNWTO Tourism Highlights. Available in: <<https://www.e-unwto.org/doi/pdf/10.18111/9789284419029>>.

³⁰ Letter from the Foro Iberoamericano de las Agencias Gubernamentales de Protección al Consumidor (FIAGC) to the Hague Conference’s Secretary-General, from 3. September 2018. The original is: “Vivimos en un tiempo de creciente diversificación de destinos y países generadores del turismo internacional, así como la auto-reserva de servicios turísticos. Hoy el 45% de los destinos turísticos son economías emergentes (puntos destacados de la OMT 2017), que no siempre están bien equipados para informar, ayudar y apoyar a los turistas a tener acceso a Justicia, ADR y otros canales para resolver sus problemas de manera rápida y económica. Sabemos que su institución está estudiando canales para ayudar a llenar este vacío de instrumentos internacionales o esquemas cooperativos para ayudar a los consumidores que enfrentan problemas en el extranjero en los países visitados. En la actualidad, 1.300 millones de personas que realizan turismo transfronterizo y la proyección de la OMT es que en 2030 habrá 1,8 millones: la mayoría de los destinos turísticos internacionales serán economías emergentes (57%). Este turista debería tener sus derechos respetados en todo el mundo.”

³¹ See UNWTO World Tourism Barometer – v. 16. January 2018. Available in: <http://cf.cdn.unwto.org/sites/all/files/pdf/unwto_barom18_01_january_excerpt_hr.pdf .

³² <https://assets.hcch.net/docs/74b12153-45a4-45fa-a86e-814fa5bf9d2a.pdf>

arbitration including complaint procedures for the protection of consumers' interests available in the State visited on an equal footing with persons who are nationals of and habitually resident in that State; b) Provide such tourists with accessible information on such procedures, and with a uniform multilingual form for complaints regarding common travel and related issues, as well as an accessible channel to present such complaints so that prompt and expeditious may be taken to resolve these issues; Establish a system of cooperation between authorities of each Contracting State.”

The creation of a global network on consumer protection has also a positive effect to overcome Conflict of law problems, by the application of the law of the visited country (law/forum rule) so the tourist will be helped like a national tourist-consumer, and if the case is not solved by the administrative or judicial (ADR) instruments available in the country he/she visited, the complaint form will give the tourist the chance to use their own law in their own country of residence, if the tourist chooses to file a complain abroad. It is the first time that Brazil proposes a subject at the Hague Conference, a matter of great importance for emerging countries, so it is a real chance to improve the cooperation between Global South and North.

b) Enforcement/Harm: global standards and health

As we said, enforcement is the driven force of success of the consumer protection. Local or national enforcement should be increased, with the help of the regional (like the Mercosur's *Acuerdo* on Protection of Visitors) or supranational enforcement network (like the ECC-Net). The digital technology facilitates the creation of networks and the sharing of information between competent and enforcement authorities from various countries. In issues with recall of products and services, we should evolve to share information and data in order to create new global standards in health and safety.

Allow me to speak briefly about the role of the State in consumer enforcement. The digital revolution has also opened the doors to a so-called ‘privatization of individual disputes’, now offered by the providers itself. Although all new alternatives to solve dispute resolution are positive, some attention must be given to these phenomena. Normally, private ADR or ODR have no data available for the consumer agencies and the consumers, so there is no transparency in the process. Therefore, these new private schemes should be non-binding for consumers, allowing then to access the judges and also to joint class actions in a short period after the decision is released.³³

The last observation is about the necessary public enforcement in some consumer issues, like the ones that involve ‘vulnerable’ consumers that involve a necessary collective redress, or cases with international dimension and or needing preventive and dissuasive sanctions, such as fines.

Final observations

In my opinion, we can conclude that there is a new consumer vulnerability/weakness in the digital marketplace. It is a ‘situational’ vulnerability and it should be considered.

³³ In June 2019 the Hague Conference has reach consensus in a new judgment convention. Art. 5, 2 of the draft has an especial rule on the recognition of decisions involving consumers and employments. However, the text is not yet on the website.

Hence, we must redirect our look towards the providers, to see the professional organization, chain or network behind the scenes. It is also important to value the ‘digital’ information, knowing that it is a mix of marketing and information. It is important not to create or enhance the digital division between global South and North, so that global standards will avoid discrimination and double standards. Special attention must be given to data protection; data are the new ‘value’, sometimes even the currency in the digital world. New offenses are being identified and authors from Europe are calling for a general ‘duty to trade fairly’ in social media and in digital markets.³⁴

The discussions that will come are about the conformity of services and the liability of the ‘gatekeeper’ as such, for data control and for *culpa in eligendo*. Not only that, the principal or subsidiary liability of all professionals involved in the organization (network or controlled business) is also important.

In emergent economies, the role of the State remains necessary to enforce consumer law. We are facing global challenges without global standards other than the UNGCP and clearly national law is not enough anymore. So the cooperation between jurisdictions and States are needed to improve the International Machinery. The IGE at UNCTAD is an important forum to be developed and supported.

And my final point is that the UNGCP gives the IGE the possibility “to undertake studies and research periodically on consumer protection issues related to the Guidelines” (GL 97, b). It seems to me that the digital revolution is comparable to the changes brought by the climate change, regarding the future of consumer protection and the sustainable consumption. The efforts of all States should be to complete the UNGCP mandate. So, my suggestion is to build a ‘Brundtland Report’ at the IGE. In my opinion, the profound and rapid technological and social changes impose the organization –like the environmental protection has already done with the Brundtland Commission– of a ‘our common future’ report, with the idea of ‘leaving no consumer’ behind. The UNCTAD and the Member States are calling to act.

References

- Benjamin. A. H. “Consumer Protection in Less-Developed Countries: The Latin American Experience”. In I. Ramsay (ed.). *Consumer Law in the Global Economy*. Asgate: Brookfield, 1996.
- Chossière, G. P. et al. “Public health impacts of excess NO_x emissions from Volkswagen diesel passenger vehicles in Germany”. *Environ. Res. Lett.* 12 034014, 2017.
- Gsell, B.; Meller-Hannich, C.; Lima Marques, C.; Artz, M.; Harke, J. D. (Hrsg.). “Wer ist der Verbraucher? Verbraucherbegriffe, Verbraucherleitbilder und situative Differenzierungen im Verbraucherschutz”. Baden-Baden: Nomos, 2018.
- Howells, G.; Ramsay I. & Wilhelmsson, T. “Consumer law and its international dimension”. In Howells, G.; Ramsay I. & T. Wilhelmsson. *Handbook of research on International Consumer Law*. Elgar Pub., 2010.

³⁴ RIEFA, Christine; CLAUSEN, Laura. Towards Fairness in Digital Influencer’s Marketig Practices. In *EuCML – Journal of European Consumer and Market Law- Issue 2/2019*, pp. 64-74, p. 73ff.

- Jayne, E. “Le Droit International Privé du Nouveau Millénaire: la Protection de la Personne Humaine Face à la Globalisation”. In *Recueil de Cours*. Vol. 282, 2000.
- Lima Marques, C. “A nova noção de fornecedor no consumo compartilhado: um estudo sobre as correlações do pluralismo contratual e o acesso ao consumo”. *Revista de Direito do Consumidor*. Vol. 111(26), p. 247-268, maio/jun. 2017.
- _____. “Relations Between International Law and Consumer Law in the Globalized World: Challenges and Prospects”. In: Lima Marques, C. & WEI, D. (Orgs.). *Consumer Law and Socioeconomic Development: National and International Dimensions*. Springer International Publishing: Cham, 2017.
- _____. “The Brazilian “Draft Convention on Co-operation in Respect of Tourists and Visitors Abroad” at the Hague Conference and the UN World Tourism Organization’s Draft Convention”. In Moreno Rodriguez, J. & Lima Marques, C. *Los servicios en el Derecho Internacional Privado – Jornadas de la ASADIP 2014*, ASADIP: Porto Alegre. pp. 823-848, 2014.
- _____. “Towards a global approach to protect foreign tourists: building governance through a new cooperation net in consumer and tourist issues”. In: Sierraltra, A. & Lima Marques, C. (Org.). *Derecho internacional, mundialización y gobernanza*. Asunción: CEDEP/ASADIP, p. 425-455, 2012.
- _____. “25 years to celebrate: Horizons of the 1990’s Brazilian Protection Code and new Horizons, Especially on the Protection of Consumers”. In: Lima Marques, C. & Wei, D. (Orgs.). *The future of international protection of consumers*. PPGD/UFRGS: Porto Alegre, 2016.
- Lorenzetti, R. L. “Tratado de los contratos”. Tomo 1. Rubinzal Culzoni: Buenos Aires, 1999.
- Meller-Hannich, C. “Share Economy and Consumer Protection”. In: Schulze, R. & Staudenmayer, D. (Orgs.). *Digital Revolution: Challenges for Contract Law in Practice*. 1st ed. Nomos: Baden-Baden, 2016.
- Micklitz, H.-W. “Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse”. In: *Yearbook of European Law*. Vo. 32(1), pp. 266-367, 2013.
- _____. & Durovic, M. “Internationalization of Consumer Law - A Game Changer”. Springer, 2017.
- _____. & Saumier, G. (eds.) *Enforcement and Effectiveness of Consumer Law*. Springer, 2018.
- Muniz Cipriano, A. C. The Intergovernmental group of experts on consumer protection: foreseeing a new time for consumer protection worldwide. In Lima Marques, C.; Pearson, G. & Ramos, F. D. (eds.). “Consumer Protection: Current Challenges and Perspectives”. *Proceedings of the 25 Years of IACL Congress*, 16-19 July 2017, Porto Alegre/IACL, pp. 453-469, 2017.
- Naude, T. “Dissemination of Consumer Law and Policy in South Africa”. In *J. Consum Policy* 41, 2018.
- Podszun, R. “Regulatory Mishmash? Competition Law, Facebook and Consumer Protection”. In: *EuCML – Journal of European Consumer and Market Law*. Issue 2, 2019.

- Riefa, C. & Clausen, L. "Towards Fairness in Digital Influencer's Marketing Practices".
In: *EuCML – Journal of European Consumer and Market Law*. Issue 2, 2019.
- Schwab, K. "The Fourth Industrial Revolution". Penguin: UK, 2017.
- UNWTO World Tourism Barometer. Vol. 16, January 2018.
- Willet, C. "Re-Theorising Consumer Law". *Cambridge Law Journal*. Vol. 77(1), pp. 179-210, March 2018.