

## NEW PLATFORMS FOR CONSUMER CONFLICTS

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**ABSTRACT:** The pandemic caused by COVID-10 has brought the discussion on access to justice through digital platforms to the forefront. However, the debate on access to justice in a globalized world, which recognizes the vulnerabilities of the international consumer, has long been the subject of study and effort by experts and authorities. This article presents the history of these efforts and recent initiatives in the field of online conflict resolution.

**KEY-WORDS:** Consumer Law, consumer disputes, ODR, consumer agencies

The United Nations Guidelines for Consumer Protection (UNGCP) (General Assembly resolution 70/186 of 22 December 2015) advocate a fair, efficient, transparent and impartial mechanism for dealing with consumer complaints, including cross-border cases. The traditional dispute resolution mechanisms relating to consumer complaints of an administrative and judicial nature are increasingly supplemented by an alternative dispute resolution method (Alternative Dispute Resolution), whether it be conciliation, mediation or arbitration. A practical solution to providing ADR to consumers is to use online means.

Online dispute resolution consists of dispute resolution mechanisms facilitated by electronic communications and other information and communication technologies. Consumer ODR is a way to build consumer confidence in electronic commerce, especially cross-border commerce.

States have made considerable efforts to develop online dispute resolution mechanisms. Brazil<sup>107</sup>, Colombia<sup>108</sup> and Mexico<sup>109</sup> have replicated state-sponsored mediation services in online contexts that enable accessible and rapid online and offline dispute resolution based on voluntary corporate participation. In addition, following the publication of the European Union regulation of May 21, 2013, on online dispute resolution for consumer disputes, the European Commission has also created a portal for consumer disputes<sup>110</sup>. The Association of Southeast Asian Nations (ASEAN) plans to set up regional online conflict resolution platform by 2025<sup>111</sup>.

Efficient markets are essential for the successful implementation of the 2030 Agenda for Sustainable Development. This is because markets play an essential role in the allocation of

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<sup>107</sup>Website of the Brazilian online dispute resolution authority: <https://www.consumidor.gov.br/> (accessed on 26 August 2019).

<sup>108</sup>Colombian Online Dispute Resolution Authority website <http://sicfacilita.sic.gov.co/SICFacilita/> (accessed on 26 October 2019).

<sup>109</sup>Website of the Mexican online dispute resolution authority <https://concilianet.profeco.gob.mx> (accessed on 26 August 2019).

<sup>110</sup>Website of the European online dispute resolution authority <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register> (accessed on 26 August 2019)

<sup>111</sup>Association of Southeast Asian Nations (ASEAN, ASEAN) Consumer Protection Policy Plan:[https://aseanconsumer.org/file/pdf\\_file/ASAPCP%20\(UPLOADING\)%20-%2011Nov16%20Final.pdf](https://aseanconsumer.org/file/pdf_file/ASAPCP%20(UPLOADING)%20-%2011Nov16%20Final.pdf) (accessed on 26 August 2019).

resources. However, there are risks of market failure without appropriate regulatory mechanisms, including abuse of monopoly power, negative externalities, and inequalities.

Today's consumers, consumers of the digital age, demand fast, efficient and transparent access to products and services and businesses, information, and dispute resolution. Is it possible to create consumer dispute resolution platforms without the participation of the State? Is state involvement necessary or even relevant in the area of consumer dispute resolution? What is the future of Consumer Online Dispute Resolution (CODR) and state involvement in this process?

### **I. Historical overview and United Nations guidelines for consumer protection**

Historically, consumer rights were first discussed and claimed by civil society. However, the consumer protection movement is the result of a series of economic developments - the establishment of capitalism - as a standard economic system - based on private property, accumulation of capital, wage labour, voluntary trade, the price system, markets and distribution of goods and services determined by market competition. Therefore, this market freedom requires the protection of consumers, whose rights are recognized mainly because of their vulnerabilities concerning suppliers, to those who sell goods and provide services.

The first civil society consumer protection organization was founded in the United States of America in 1936<sup>112</sup>: *Consumer Reports*, “formed as an independent, non-profit organization (...) serves consumers through unbiased product testing and ratings, research, journalism, public education, and advocacy (...)” and today one of the most respected representatives of civil society for consumer protection is Consumers International, based in London and founded in 1960<sup>113</sup> with the mission of “(...) champion Consumer Rights internationally in order to help protect and empower consumers everywhere (...)”.

The Treaty on the Functioning of the European Union (TFEU) of 1957 (entered into force from 1958) and the Treaty on European Union constitute the basis of European Union law. Concerning Consumer Protection (Article 4), more precisely, under Title XV, Article 169 (ex Article 153 of the EC Treaty) lays the foundations for European consumer protection policies: health, safety and economic interests of consumers, right to information and education.

However, the historical benchmark for the recognition of consumer rights, and the first glimpse of what would be consumer protection policy, is the speech by former President of the United States of America, John Kennedy, who, on March 15, 1962, addressed the United States Congress to affirm<sup>114</sup>: “Consumers by definition, include us all, They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group... whose views are often not heard. (...) Additional legislative and administrative action is required, however, if the federal Government is to meet its responsibility to consumers in the exercise of their rights. These rights include: (1) The right to safety [...] (2) The right to be informed--to be protected [information, advertising, labelling]; (3) The right to choose--to be assured, wherever possible, access to a variety of products and services at competitive prices [...]; (4) The right to be heard [consideration of consumer interests in the formulation of Government policy] and fair and expeditious treatment in its administrative tribunals. To promote the fuller realization of these consumer rights, it is necessary that existing Government programs be strengthened, that Government organization be improved, and, in certain areas, that new legislation be enacted.”

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<sup>112</sup> CR, Consumer Reports website : <http://consumersunion.org/about/mission/> (accessed on 26 August 2019)

<sup>113</sup> Consumers International, About Us, Disponible sur : <http://www.consumersinternational.org/who-we-are/about-us/> (accessed on 26 October 2019)

<sup>114</sup> Special Message to Congress on Protecting Consumer Interest, 15 MARCH 1962, JFK Library, Available at: <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx> (accessed on 20 September 2019)

From the adoption of the United Nations Guidelines for Consumer Protection (UNGCP)<sup>115</sup>, on April 9, 1985, the consumer movement grew more robust by providing a basic model for developing laws and policies to protect and defend the rights of consumers. The United Nations Guiding Principles for Consumer Protection (UNGCP) recognized the importance of protecting fundamental rights - as an instrument of economic development - such as the right to safety, the right to be informed, the right to choose and the right to be heard. More than almost five decades later, it is still challenging to guarantee certain basic consumer rights, such as the right to be informed and the right to safety. In these times of electronic commerce and broad and easy access to products and services worldwide, these concerns have become even more critical.

The latest reform of the UNGCP (2015) not only confirmed the importance of consumer rights internationally, but also provides for the creation of an intergovernmental group of experts on consumer protection law and policy, which constitutes the international reference in terms of consumer rights policy and the UNGCP. The IGE on *Consumer Law and Policy*<sup>116</sup> annually provides a forum for multilateral consultations, discussions, and exchanges of views between Member States, experts and relevant stakeholders. As the IGE operates within the framework of the United Nations Conference on Trade and Development (UNCTAD), it also represents the recognition of consumer issues within the framework of the United Nations, in more than 30 years of existence, of a set of international principles which define the main characteristics of the references in terms of effective consumer protection and legislation such as the UNGCP.

With respect to dispute resolution, the United Nations Guidelines for Consumer Protection encourage member states to: *a) Establish mechanisms for the exchange of information on their policies and measures relating to consumer protection, or review, maintain or strengthen existing mechanisms, as appropriate; b) Cooperate or encourage cooperation in the field of the application of consumer protection policies in order to obtain better results with the available resources. As part of this cooperation, they could, in particular, jointly create or jointly use analytical laboratories, develop common analytical procedures, exchange consumer information and education programs, organize common training programs. and jointly develop regulations; c) Cooperate in order to improve the conditions under which essential goods are offered to consumers, with due regard to price and quality. This cooperation could include the joint purchase of essential goods, the exchange of information on various purchasing possibilities and the conclusion of agreements on specifications for products at the regional level.*<sup>117</sup>

The UNGCPs recognize and encourage the engagement of Member States in regional or sub-regional cooperation to strengthen information links regarding banned, withdrawn or severely restricted products (principle 80), providing consumers with a more secure environment and market. In addition, in addition to the relevance of focusing on product safety and / or quality (principles 81 and 82), cooperation between the Member States also offers better protection against fraudulent and deceptive cross-border commercial practices, a subject which has gained in relevance since the development of the digital economy. The authorities' commitment is a statement addressed to companies, which has a very positive impact on the market, as it follows those violations of consumer rights should not be tolerated. Besides protecting consumer rights, consumer policies also ensure that consumers are well informed to make rational and informed decisions. Therefore, consumer law enforcement, market

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<sup>115</sup> Principes Directeurs pour la Protection du Consommateur, Nations Unies. Available at: [https://unctad.org/fr/PublicationsLibrary/ditccplpmisc2016d1\\_fr.pdf](https://unctad.org/fr/PublicationsLibrary/ditccplpmisc2016d1_fr.pdf) (accessed on 20 September 2019)

<sup>116</sup> Intergovernmental Group of Experts on Consumer Law and Policy

<sup>117</sup> UNGCP, Guideline 79

surveillance and effective information, communication and education are essential basic tools for defending consumer rights.

Governments recognize that informed consumers play a driving role in innovation, productivity, and competition. To stimulate competition, consumers need objective, transparent, easily accessible and manageable information to make informed decisions that best meet their needs and interests. In this context, consumer empowerment has become more critical in rapidly changing markets for new and complex products and services<sup>118</sup>. Consumer education can empower consumers by facilitating their access to information and enhancing their ability to properly assess information to make informed decisions.

However, what can we say when it comes to increasingly faster consumer channels. What can we understand from this consumer protection system when a wide variety of products and services are available, no matter where we are in the world? Is the consumer protection system as we know it today sufficient to ensure its protection in a digital economy? What about the role of the state in this system?

## II. Consumer Dispute Resolution

When consumer rights are not respected<sup>119</sup> whether through lack of information, a product or service defect or even an accident, consumers tend to contact the supplier first - the one who sold the product / service - the closest, more immediate contact with the consumer in the consumer relationship. It is infrequent for consumers to contact consumer protection experts, authorities or even the product's manufacturer directly and immediately. Consumers are encouraged by the authorities first to contact the supplier, the seller of the product or service.

Usually, after contacting the supplier, seller of goods or who provided the service (and this contact was unsuccessful), consumers tend to seek help from the consumer authorities. Usually, when consumers file a complaint with the consumer protection authority, there are already many complaint registers, whether by telephone or in-person, in the customer services division of the provider.<sup>120</sup> Therefore, it is crucial to consider and remember that the purpose and procedure for receiving consumer complaints by suppliers/companies, consumer protection agencies or civil society differ in many ways. For example, the objectives intended by consumer protection authorities, consumer associations (civil society) focus on protecting consumer rights and the enforcement of consumer protection legislation. On the other hand, when handling consumer complaints, businesses focus primarily on protecting and improving their products and services.

The UNGCP provide in principle 8 that Member States must put in place and maintain adequate infrastructure to implement and monitor consumer protection policies, also specifying in principle 32 the relevance of monitoring tools ("adequacy of the mechanism "). Consumer protection agencies, whether national, local, or regional, play a significant role because of their proximity to consumers and their realities, as well as for their political powers and mechanisms<sup>121</sup>.

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<sup>118</sup> OECD, 2010, Consumer Policy Toolkit, Paris. Available at: <https://www.oecd.org/sti/consumer/consumer-policy-toolkit-9789264079663-en.htm> (accessed on 26 October 2019).

<sup>119</sup> UNGCP, II. Scope 2. These Guidelines are applicable to business-to-consumer transactions, including the provision of goods and services by state enterprises. (...)

<sup>120</sup> It is useful and necessary to clarify that the services provided to clients by businesses do not provide consumers with the same assistance as consumer agencies or consumer protection civil society. Moreover, depending on the role of the ombudsman (who was originally a human rights defender tasked with dealing with citizens' requests or complaints filed with the government), even the private sector uses such numbers which alter the initial neutrality and the meaning of the term "ombudsman" per se.

<sup>121</sup> IV.Principles for good business practices

Whatever the consumer protection system model, the important thing is to guarantee consumer protection and protect and enforce consumer rights. Furthermore, allowing consumers to complain is one of the most fundamental rights: the right to be heard, complain, and obtain redress, and access information. All of these are intertwined: Consumers have the right to access information easily and to complain about a product, service, or business.

As a fundamental consumer right - to complain - access to complaint methods and channels must be provided not only by consumer protection agencies but also by all those involved in the consumer relationship: suppliers, producers - that is, consumer companies and associations and the regulated sector. The United Nations Guidelines for Consumer Protection<sup>122</sup> (UNGCP) encourage and support the work and commitment of consumer protection agencies: "8. Member States should establish or maintain the necessary infrastructure to develop and apply consumer protection policies and to monitor their implementation. Particular care should be taken to ensure that consumer protection measures are applied to the benefit of all sectors of the population, especially the rural population and the poor. " (Principle 8); "(G) Effective means of dispute resolution and redress", (III. General Principles, g; "15. Member States should ensure that bodies responsible for consumer protection are provided with the necessary human and financial resources to enforce standards and obtain redress on behalf of consumers in cases warranting or facilitating this task. "(V. Principle 15) It makes good sense that consumer protection authorities are best placed to do so. " inform, educate, repair, and develop consumer policies Consumer protection authorities have the expertise to recognize all vulnerabilities of consumers and, yet, to adequately protect them. Consequently, the channels for resolving consumer disputes provided by businesses and consumer associations must be considered complementary to those provided by the authorities in charge of consumption.

There are different ways to resolve consumer disputes and obtain redress. The traditional channel is the consumer complaints channel provided by consumer authorities as part of administrative procedures. However, apart from that, consumers can also seek redress in court. The two most common legal claims (courts) are "small claims" and class actions.<sup>123</sup> It is generally not accessible to every consumer for its costs, accessibility, or even differences between the product/service's cost and the litigation cost.

There are different methods, mechanisms, and remedies for addressing consumer dispute resolution. However, there are basic mechanisms at different levels: administrative procedures, managed and coordinated by the authorities in charge of consumption or other authorities in charge of consumer protection and the judiciary. Finally, some references to alternative dispute resolution and mediation methods (it is important to specify here that the terms relating to mediation and arbitration may vary from one country to another. In Argentina<sup>124</sup> there is a dispute resolution mechanism called "arbitration", which is in fact mediation carried out by the consumer protection authority. In the United States of America, it is possible to resort to

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11. The principles that establish benchmarks for good business practices for conducting online and offline commercial activities with consumers are as follows:

(f) *Consumer complaints and disputes. Businesses should make available complaints-handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy and effective dispute resolution without unnecessary cost or burden. Businesses should consider subscribing to domestic and international standards pertaining to internal complaints handling, alternative dispute resolution services and customer satisfaction codes.*

<sup>122</sup>[http://unctad.org/meetings/en/SessionalDocuments/ares70d186\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ares70d186_en.pdf) (accessed on 20 September 2019)

<sup>123</sup> Manual on Consumer Protection, UNCTAD, 2017. Available at : [https://unctad.org/en/PublicationsLibrary/ditccplp2017d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditccplp2017d1_en.pdf) (accessed on 20 September 2019)

<sup>124</sup> <https://www.argentina.gob.ar/produccion/consumidor/sistema-nacional-de-arbitraje-de-consumo> (accessed on 26 August 2019)

consumer arbitration, in Brazil<sup>125</sup> and in Europe<sup>126</sup> this is not the case; arbitration is limited to disputes between companies or disputes between companies.

The consumer relationship involves two main and different actors: the company (having the expertise on the good or the service, having the legal and financial power) and the consumer (generally pushed to adhere to a pre-established standard contract or without any expertise and no financial power). It is precise because of this power imbalance that consumer protection is needed. Legal, financial, and technical vulnerabilities of consumers<sup>127</sup> (LIMA MARQUES).

However, this does not prevent companies from offering themselves channels and tools to resolve disputes arising from the consumer relationship. In fact, businesses are encouraged and are supposed to be: *IV. Principles to govern business practices, United Nations Guiding Principles f) Complaints and disputes. Businesses should make complaint mechanisms available to consumers that ensure fair, transparent, inexpensive, accessible, swift, and efficient resolution of their disputes without incurring undue costs or burdens. They should consider subscribing to national and international standards for internal complaints review, alternative dispute resolution and consumer satisfaction codes.*

To provide access to information, dispute resolution, and redress is good business practice. To obtain information or resolve a situation, consumers generally contact the company providing the product or service. The seller, the provider, is usually the closest representative to consumers in a purchase. Although businesses are expected to provide consumers with accessible and quick channels to contact them, consumers often experience difficulties once they have purchased a product or service: i., lack of commercial information; ii. lack of business contact information; iii. inaccessible communication channels; iv. lack of appropriate channels and/or mechanisms for consumers to complain. Today, these difficulties are even more evident in e-commerce transactions, prompting consumers to seek advice from the usual second contact: consumer authorities.

The difficulties encountered by consumers in filing a complaint, addressing businesses are naturally linked to a fundamental consumer right: the right to information. The digital economy has made it easier to access goods and services, but what about aftermarket and dispute resolution? Access to businesses themselves so that consumers can resolve their doubts and problems? When consumers are forced to provide as much information about themselves as possible while businesses remain hidden behind a web page or application.

### **III. New forms of consumer relations**

The Fourth Industrial Revolution is unfolding before our eyes, and its primary fuel is the digital economy, developing a variety of electronic business channels. There are many new products and services developed or upgraded by e-commerce, by the virtual world. We can have access to virtual products and even money. People all over the world have instant access to goods and services. However, international trade has flourished thanks to advances in telecommunications, thus enabling what we today call the digital economy: products and virtual services, clothing, books, newspapers, to financial services. Not to mention the influence of new forms of communication, commerce thanks to social media platforms.

The advent of the digital economy has brought a variety - not only of products and services - but above all new channels of consumption. More and more consumers have access to products and services which, some thirty years ago, were only accessible to a select group of society (at least in countries in development). In addition, technological advances have also

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<sup>125</sup> [http://www.planalto.gov.br/ccivil\\_03/leis/19307.htm](http://www.planalto.gov.br/ccivil_03/leis/19307.htm) (accessed on 26 August 2019)

<sup>126</sup> <http://data.europa.eu/eli/dir/2013/11/oj> (accessed on 26 August 2019)

<sup>127</sup> BENJAMIN, Antonio Herman V. Manual de direito do consumidor / Antonio Herman V. Benjamin, Claudia Lima Marques, Leonardo Roscoe Bessa – 5. ed. Ver. Atual. E ampl. – São Paulo : Editora Revista dos Tribunais, 2013.

created new forms of consumer relations: nowadays, consumers act like businesses and businesses are seen as consumers. New platforms where ordinary citizens without any business expertise or having no specific activity as their primary activity are increasingly becoming a source of income or additional income: platforms such as Airbnb, E-bay and Mercado Libre<sup>128</sup>, to name a few; while small and medium enterprises are seen as consumers due to vulnerabilities specific to certain sectors, such as telecommunications and financial services<sup>129</sup>.

Finally, technological advancements are still developing, bringing the "reality" of Web 3.0 and all the data and algorithms involved, supposed to make people's lives easier but at the expense of consumers' privacy and their data. Personalized advertising, products, services, personal assistance (Siri<sup>130</sup>, Alexa<sup>131</sup> and OKGoogle<sup>132</sup>) refers to consumer protection and implies that consumers must be informed of all the risks and conditions to access such services.

In fact, it is not that easy to define e-commerce and the digital economy, as there are several aspects that need to be considered. What started with internet sales transactions, accessing a company's website (or perhaps directly to the supplier)<sup>133</sup> has now developed a series of other relationships, going beyond B2C (Business to Consumer) including several other players.

In addition to the UNCTAD Manual on Consumer Protection, we find references to this complex trade in the 2015 UNCTAD report on the information economy.<sup>134</sup> : *"Purchases and sales conducted over computer networks, using multiple formats and devices, including the web and electronic data interchange, using personal computers, laptops, tablets and mobile phones of varying levels of sophistication. E-commerce may involve physical goods as well as intangible (digital) products and services that can be delivered digitally"*.

The OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999), updated in 2016<sup>135</sup>, refers to *"certain special characteristics of electronic commerce, such as the ease and speed with which businesses and consumers can communicate about goods and services and engage in cross-border transactions, may create commercial situations which are unfamiliar to consumers and which may put their interests at risk, it is increasingly important for consumers and businesses to be informed and aware of their rights and obligations in the electronic marketplace"* recognize the importance of providing consumers with electronic commerce *"protection that is not less than the level of protection afforded in other forms of commerce"*. The same wording is mentioned in point III (j) of the UNGCP, General Principles, as one of the legitimate needs of consumers: 'other forms of commerce.

However, none of these documents or references for consumer protection operators define electronic commerce; what it is and what it entails. In fact, given the high speed of technological development, it might be inappropriate to establish a limited definition. The advent of social media is also playing an important role. Here we will not only be referring to social media as a new communication tool. In reality, it goes beyond that: social media is used today as one of the most successful markets - commercial platforms: Facebook, Instagram and even gaming platforms are used and trade channels. Today, not only do you shop online, you shop through multiple platforms and apps, as well as different access.

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<sup>128</sup> It should be noted that there are court decisions in Latin America (Buenos Aires and Sao Paulo) that interpret Mercado Libre as a supplier, therefore responsible for transactions made on its platform.

<sup>129</sup> [https://www.defesadoconsumidor.gov.br/images/manuais/notas\\_tecnicas/nota-tecnica\\_14-2015\\_mei.pdf](https://www.defesadoconsumidor.gov.br/images/manuais/notas_tecnicas/nota-tecnica_14-2015_mei.pdf)

<sup>130</sup> <https://www.forbes.com/sites/kateoflahertyuk/2019/07/28/apple-siri-eavesdropping-puts-millions-of-users-at-risk/> (accessed on 26 August 2019)

<sup>131</sup> <https://www.cnet.com/how-to/amazon-echo-alexa-everything-you-need-to-know/> (accessed on 26 August 2019)

<sup>132</sup> [https://assistant.google.com/intl/en\\_uk/#?modal\\_active=None](https://assistant.google.com/intl/en_uk/#?modal_active=None) (accessed on 26 August 2019)

<sup>133</sup> UNCTAD Manual on Consumer Protection (UNCTAD/DITC/CPLP/2017/1).

<sup>134</sup> UNCTAD, 'Information Economy Report 2015 Unlocking the Potential of E-Commerce for Developing Countries' (2015) UNCTAD/IER/2015

<sup>135</sup> <https://www.oecd.org/sti/consumer/34023811.pdf> (accessed on 26 August 2019)

Therefore, besides e-commerce, we have “mobile commerce”; commerce available through the mobile phone, where you can install and access several other platforms: applications for airlines, applications for hotels, applications for purchasing products, transport applications, applications for financial services, games, etc. Moreover, the way these platforms were created and designed is comparable to that of games: they are designed in such a way that consumers spend more and more time watching them, check them out, becoming addicted to them and to be subject to thousands of ads and incentives to buy online.

The leading facilitator of this access has been smartphones, which have reached different markets around the world: clothing, education, food, and entertainment, as well as the financial sector. Thus, a tool, such as a smartphone provides access to goods and services in different parts of the world. Therefore, the digital economy has impacted various markets, such as the financial sector, which are changing the lives of consumers all over the world. Such a fact has, indeed, a massive impact on the lives of people, consumers, especially in developing economies: in developing countries, consumption, especially access to financial services and certain electronic products, has a significant impact on inclusion.

Precisely, for the simple fact of having access to a bank account, a credit card, a smartphone, consumers feel included in society and thus feel empowered as citizens. Once these “new consumers” are included, how do you protect them? Also, how to protect consumers in general when new consumption channels appear, be it e-commerce websites or different apps and services (eBay, Mercado Libre, Alibaba, Instagram, Facebook, financial apps and others) posing challenges for developed and developing economies? How to debate the settlement of consumer disputes when developing countries and developed countries face the same challenges in the same sectors, telecommunications, financial services, e-commerce, for example? What about the fact that trade is becoming more and more international?<sup>136</sup>

We can access books and music from all over the world. Moreover, so-called digital products are available from different vendors and channels: websites, social media channels and apps. But what about after-sales? What are the channels through which consumers can complain? What effective tools exist that protect consumers and provide them with the fundamental right to complain.

The digital economy and technological advancements<sup>137</sup> provide consumers with tailor-made advertising and products and services, but what about repair? What about dispute resolution? The level of personalization, access and sophistication of products and services of the offer of products and services has not been the same as regards access to information, access to channels for after-sales consumers. Whatever their efforts to put a framework covering e-commerce transactions, it may involve developing enforcement measures based on consumer protection rights such as fairness and adequate information, access to information and redress, good faith, security, privacy. Considering that these consumer protection principles are universal, how to guarantee and apply them? How to guarantee access to justice by providing tools for resolving consumer disputes?

#### **IV. Options for resolving consumer disputes in a globalized trade**

There are different models of consumer complaints procedure, which vary depending on the country's consumer protection structure, among other factors. As briefly stated in consumer protection laws and systems, consumer protection policies and their application may vary

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<sup>136</sup> BEUC VzBV, report by Christine Riefa, Julie Hunter, The challenges of protecting consumers in Global market places (2017) [https://www.vzbv.de/sites/default/files/downloads/2017/11/08/17-11-08\\_brochure-vzbv-beuc-lr3.pdf](https://www.vzbv.de/sites/default/files/downloads/2017/11/08/17-11-08_brochure-vzbv-beuc-lr3.pdf). (accessed on 26 August 2019)

<sup>137</sup> <https://pages.rts.ch/emissions/abe/10748017-le-fric-ce-nest-plus-chic.html#timeline-anchor-integral-10748018> (accessed on 26 August 2019)



from country to country: being a single body responsible for the consumer protection agenda; be several different authorities sharing competence in consumer protection; or sometimes of great importance for the work of consumer protection associations (civil society)?

Consumer protection authorities may also be given specific and special powers related to market surveillance, product safety, product quality and price control, education, and policy coordination. Some models also adopt a decentralized political program of consumer protection, divided into regulatory agencies (telecommunications, metrology, transport, health, etc.) and/or other bodies such as consumer associations and local authorities.

Consumers sue companies that respect their rights; pursue products that meet their needs; and with the changing digital economy, consumers are looking for fast and efficient procedures, information, answers, and deliveries. For example, when consumers experience a breach of contract, they seek information first - and expect the solution or information to be delivered quickly, efficiently, and conveniently.

This efficiency is the reason why consumers generally prefer the fastest and most effective out-of-court redress mechanisms. In addition, after the development of digital tools, consumers tend to seek convenient methods such as those offered online. Consumers are often unaware of the differences between a complaint procedure supervised or coordinated by a consumer rights expert and one which is not monitored or coordinated by a formal consumer rights authority.

Therefore, consumer protection bodies and civil society (associations) must launch awareness campaigns to clarify consumer rights and the risks of seeing these rights diminished or ignored when resolving out-of-court disputes. Nevertheless, before commenting on the existing online dispute resolution platforms in consumer dispute resolution, it is relevant to refer to the initiatives of the last 10 years. There have been some initiatives to create platforms or at least some kind of cooperation to provide international consumers with access to justice.

One initiative worth mentioning is the Inter-American Conference on Private International Law within the framework of the General Assembly of the Organization of American States. The idea initially proposed by Brazil, Argentina, and Paraguay to draw up an Inter-American Convention on the Law Applicable to Certain International Consumer Contracts and Transactions<sup>138</sup>. The so called « *Buenos Aires Proposal* »<sup>139</sup> aimed to “(...) establish a legal regime in the matter of applicable law that affords more favourable and special protection to consumer in their international contracts and transactions with professionals and providers of goods and services, whether as tourists or distance sales, thereby making it possible to expand the circulation of goods and services as well as consumers options, without discrimination, in the regional market”.

Unfortunately, the proposal was not successful without the support of the United States of America. These ideas of international cooperation were not, however, totally ignored, which later led to the creation of the Consumer Safety and Health Network. (RSSC)<sup>140</sup> (an online system similar to the European Safety Gate<sup>141</sup>, previously called Rapex, a recall platform). The same objective was within the « *Buenos Aires Proposal* », an international cooperation agreement offering consumers access to justice and dispute resolution in two other different bodies was taken up in other bodies: the countries of South America in MERCOSUR and the Hague Conference on Private International Law (HCCH).

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<sup>138</sup> [http://www.oas.org/dil/CIDIP-VII\\_working\\_doc\\_cp\\_simplified\\_version\\_final\\_brazilian\\_proposal.pdf](http://www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf) (accessed on 26 August 2019)

<sup>139</sup> [http://www.oas.org/dil/CIDIPVII\\_documents\\_working\\_group\\_consumer\\_protection.htm](http://www.oas.org/dil/CIDIPVII_documents_working_group_consumer_protection.htm) (accessed on 26 August 2019)

<sup>140</sup> <http://www.oas.org/fr/sla/rssc/default.asp> (accessed on 26 August 2019)

Available at [https://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/alerts/repository/content/pages/rapex/in dex\\_en.htm](https://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/repository/content/pages/rapex/in dex_en.htm) (accessed on 26 August 2019)

Under MERCOSUR, cooperation between consumer protection agencies in member states has been positive from the start, supporting the idea of a formal bloc<sup>142</sup> deal. The successful efforts and cooperation were documented and became a case study for the proposal presented at the HCCH level.

Later in 2017, the cooperation proposal was finally approved within the framework of the Common Market Council (CMC), the highest regional market authority in MERCOSUL. The “*Acuerdo del MERCOSUR sobre derecho aplicable en materia de contratos internacionales de consumo*”<sup>143</sup> or MERCOSUR Agreement on the law applicable to international consumer contracts, in French, in addition to constituting a historic step for the international protection of consumers, it also creates a very interesting and relevant precedent regarding competence in the field of consumer protection: in article 4, the Mercosur agreement establishes that:

*Article 4, 1 - International contracts concluded when the consumer is in the State Party of his domicile, in particular in the case of a distance contract, are governed by the law chosen by the parties, who may choose the law of the consumer's domicile, of the place of celebration or the execution of the contract or the seat of the supplier of the products or services. The chosen law will be applicable whenever it is more advantageous for the consumer.*

And :

*Article 5 - Contracts concluded by the consumer outside the State party of his domicile  
1 - International consumer contracts concluded by the consumer outside the State party of his domicile are governed by the law chosen by the parties, who may validly choose the law of the place of conclusion or performance of the contract or by the home of the consumer. **The chosen law will be applicable whenever it is more advantageous for the consumer.***<sup>144</sup>

Recognizing the vulnerabilities of consumers internationally, in international trade, offering them not only the possibility of choosing the applicable law, but also the most favourable law (as a consumer) opens an important path. In addition, the MERCOSUR Agreement refers to - and is applicable - to offline and online commerce, thus being applicable to international electronic commerce (within MERCOSUR member states).

As mentioned, the MERCOSUR initiative also paved the way for a similar rationale proposal to The Hague Conference on Private International Law (HCCH) to create an international cooperation convention to settle consumer disputes, both proposals, advocated by Professor Claudia Lima Marques. The proposed convention on cooperation and access to justice for international tourists was presented for the first time by Brazil, supported by all Latin American countries, as well as by other members of the HCCH such as China<sup>145</sup>.

The proposal was initially poorly received and viewed as a regional affair (MERCOSUR). However, China and Russia have shown interest in allowing the proposal to be placed on the HCCH agenda. This very fact already represents another historical fact: for the first time in the

<sup>142</sup> See: LIMA MARQUES, Claudia. Lei mais favorável ao consumidor e o Acordo do MERCOSUL sobre Direito aplicável em matéria de contratos internacionais de consumo de 2017. RDC, Revista de Direito do Consumidor | vol. 121/2019, p. 419 – 457, Jan – Fev, 2019. DTR, 2019.26073.

<sup>143</sup> Available at [http://www.cartillaciudadania.mercosur.int/oldAssets/uploads/67229\\_DEC\\_036-2017\\_ES\\_Acuerdo%20Inter%20Consumo.pdf](http://www.cartillaciudadania.mercosur.int/oldAssets/uploads/67229_DEC_036-2017_ES_Acuerdo%20Inter%20Consumo.pdf) (accessed on 26 August 2019)

<sup>144</sup> Free translation by the author.

<sup>145</sup> Available at : <https://www.hcch.net/en/projects/legislative-projects/protection-of-tourists> (accessed on 26 August 2019)

history of the HCCH (120 years at the time), a proposal from a developing country was accepted for discussion and officially listed. the day of the legislative projects of the Conference<sup>146</sup>.

The proposed Convention within the HCCH on cooperation and access to justice for international tourists is an international initiative aimed at providing consumers (as tourists) with effective access to justice through cooperation with consumer protection agencies and the judicial system of the Member States. This means that the HCCH proposal represents an effective action in the field of international cooperation, as recommended by the UNGCP (Principle 89)<sup>147</sup>

These examples demonstrate the growing importance of international consumer protection and the inevitability of the development of new platforms for quick, accessible, and efficient resolution of consumer disputes.

Concerning the Americas, South America has been a leader in improving cooperation to protect consumers in the region better. At the same time, Europe has its free trade system (mentioned below), and ASEAN countries need to develop their platform. While the economy operates, products and services are created and developed as needed, and the digital economy demands equally accessible and timely access to justice from consumers.

## V. New forms of conflict resolution and the role of the state

The UNGCP mentions consumer dispute resolution and redress procedures in Section F, Dispute Resolution and Appeal, Nos. 37-41, which calls on Member States to publicize existing redress mechanisms, which should be affordable and accessible while considering the vulnerabilities of, for example, low-income consumers.

Along with access to information, dispute resolution and the right to appeal are also fundamental consumer rights. Perhaps the subject, which only concerned the competence of consumer authorities and specific consumer associations in the past, has grown in importance and diversity over the past decade. With new forms of commerce, new access to products and services and, of course, the advent of the digital economy, consumers are also being offered new forms, methods, and access to dispute resolution and redress.

The consumer's right to redress is the consequence of a breach of contract, an unfair practice or, sometimes, an injury, in the case of the health and safety of the consumer. Therefore, guaranteeing consumers remedies, allowing them to seek redress, constitutes a fundamental right of consumers: "The more the world moves towards economic relations based on transactions, the more the systems of conflict resolution become necessary. This is partly due to the sheer volume of transactions and the trend observed in many areas previously considered to be state jurisdiction and aimed at consumers".<sup>148</sup>

Some interesting recently developed models provide consumers with better access to information, dispute resolution and redress.

There are different types of procedures for resolving consumer disputes, such as arbitration, mediation, and negotiation. The vocabulary may vary and have different meanings from one country to another, from one legislation to another. Therefore, it is important to clarify and explain that any type of tool can be valid when it comes to consumer rights, provided that there are specific rules written and approved (by the consumer protection authorities). consumers),

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<sup>146</sup> See KLEIN VIEIRA, Luciane; SQUEFF CARDOSO, Tatiana. A proteção internacional do consumidor turista na agenda da Conferência da Haia de Direito Internacional Privado e do MERCOSUL: avanços e retrocessos. RDC, Revista de Direito do Consumidor, vol. 130/2020, p. 237 – 272, Jul - Ago / 2020, DTR\2020\8422

<sup>147</sup> «Member States should consider participating in multilateral and bilateral mechanisms in order to strengthen judicial and inter-agency cooperation for the purposes of the recovery of foreign assets and the enforcement of decisions in cross-border disputes. »

<sup>148</sup> UNCTAD Manual on Consumer Protection.

namely: recognizing the vulnerabilities of in fact justifying the protection of consumers - the vulnerabilities of ADR proceedings are growing in popularity in the age of the digital economy and the development of online dispute resolution.

There are successful examples of ADR tools: online dispute resolution of the European Union<sup>149</sup>, the Brazilian platform *Consumidor.gov*<sup>150</sup> and the Mexican *Concilianet*<sup>151</sup>.

According to the United Nations Guidelines for Consumer Protection<sup>152</sup>, access to dispute resolution and redress mechanisms, including alternative dispute resolution, should be improved, especially in cross-border disputes. This is particularly relevant for e-commerce: a consumer who purchases a good or service online expects an online way to resolve disputes with the company/supplier.

Online Consumer Dispute Resolution (CODR) consists of dispute resolution mechanisms facilitated using electronic communications and other information and communication technologies and is on the rise as a means of strengthening consumer confidence in electronic commerce, especially cross-border.<sup>153</sup> CODR systems were first developed by online platforms, such as eBay and PayPal, eager to increase the level of consumer satisfaction in their markets. These platforms currently handle more than 60 million cases per year, compared to less than 300,000 in the United States court system<sup>154</sup> Other catering companies, such as Modria, Resolver, SmartSettleOne, VirtualCourtHouse, and Youstice, have recently popped up.

There is a growing concern for the oversight of private online settlement transactions. Consumers could be easily misled about their procedural and substantive rights, which has increased public oversight in recent years. Procedures at the consumer protection authority level continue to lack publicity, so more consumers can be made aware of their rights and the possibility of using other dispute resolution tools. There have been many examples of actions in this direction, as we can see in the following lines.

### *European Model*

The EU's online dispute resolution platform is a very efficient and interesting process (*ODR platform*<sup>155</sup>), which is a web platform developed by the European Commission. It aims to help consumers and traders resolve their contractual disputes relating to short-term, low-cost, online shopping for goods and services simply and quickly.

It allows consumers to submit their disputes online in any of the 23 official languages of the European Union. The online dispute resolution platform only transmits disputes to quality dispute resolution bodies communicated by the Member States. Like the MERCOSUR project, Member States are establishing a national contact point to provide assistance to users of the online dispute resolution platform that has been in operation since February 2016. According to the Consumer Dispute Resolution Directive<sup>156</sup>, all businesses established in the EU selling

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<sup>149</sup> Available at : <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN> (accessed on 26 August 2019)

<sup>150</sup> Available at : <https://www.consumidor.gov.br/pages/conteudo/sobre-servico> (accessed on 26 August 2019)

<sup>151</sup> Available at <https://concilianet.profeco.gob.mx/Concilianet/> (accessed on 26 August 2019)

<sup>152</sup> UNCTAD/DITC/CPLP/MISC/2016/1 (en) (es)

<sup>153</sup> United Nations Guidelines for Consumer Protection, Section I

<sup>154</sup> Rule C (2012). Quantifying the economic benefits of effective redress: Large e-commerce data sets and the cost-benefit case for investing in dispute resolution. University of Arkansas at Little Rock Law Review. 34(4):6

<sup>155</sup> Online Dispute Resolution, European Commission. Available at : <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.show&lng=EN> (accessed on 26 August 2019)

<sup>156</sup> REGULATION (EU) No 524/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013

on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). Available at : <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0524&from=EN> (accessed on 26 August 2019)

goods or providing services to consumers online must comply with REL / ODR legislation. They are obligated to use ADR mechanisms and inform consumers of the dispute resolution bodies they are covered.

#### *Portuguese Model*

Na interesting example is the Portuguese “*Livro de Reclamações*<sup>157</sup>” or complaint’s book. Following Legislative Decree No. 156/2005, companies' duty is to provide consumers with the complaints book in each commercial premises. The book has numbered pages (and the register contains up to 25 complaints), and each registered complaint has three copies: one to stay in the book (in yellow), one for the consumer (in blue) and one to send to the authorities (red) within 15 days. In this case, the General Directorate of Consumption is the public entity, part of the Ministry of the Economy, responsible for contributing to the development, definition, and implementation of the policy of consumer protection in Portugal, as well as the coordination and management of the complaints book.

This complaints register is therefore not just an enforcement tool; it provides consumers with transparency, information, and the right to complain about a business, product or service. Since July 1, 2018, the complaints book is also available online<sup>158</sup>. The new online version of the book is in fact, a program and involves the General Directorate of Consumption the Portuguese Consumer Protection Agency and regulators for different industries. The electronic complaints register to all consumers, including overseas consumers, with the platform also hosting an English version.

Companies are now required to have both versions of the complaints book: on-premises and online. According to the legislation<sup>159</sup>, companies must also inform consumers of the new online access to the Complaints Book and post it on their websites in an accessible manner and independent of other complaint mechanisms. The penalties for non-compliance with the law can vary from 150 to 15,000 euros.

#### *Mexican Model*

Provided and coordinated by PROFECO (*Procuraduria Federal del Consumidor, Concilianet*<sup>160</sup>) is an online dispute resolution solution providing mediation via the Internet after presentation by a representative of PROFECO, a representative of the company and the consumer. This initiative offers consumers the possibility to resolve their disputes from home by accessing the consumer authority platform. The whole procedure is via the Internet; all documents and registers are done online via a platform. In addition, any necessary or relevant documentation images, proof of payment can all be downloaded online. Within ten working days, the consumer authority responds to the complaint, declaring itself competent to receive it, rejecting it or requesting additional information. Once the complaint is accepted, the authority sets a date for online mediation. At the end of the mediation procedure, the consumer will receive a questionnaire on the service provided by Concilianet.

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<sup>157</sup> Livro de Reclamações, Direção Geral do Consumidor, Portugal. Available at : <https://www.consumidor.gov.pt/livro-de-reclamacoes.aspx> (accessed on 26 August 2019)

<sup>158</sup> Livro de Reclamações, Government of Portugal. Available at : <https://www.livroreclamacoes.pt/inicio> (accessed on 26 August 2019)

<sup>159</sup> Decreto-Lei n.º 74/2017, Implementa as medidas SIMPLEX+ 2016 «Livro de reclamações on-line», «Livro de reclamações amarelo» e «Atendimento Público avaliado», Portugal, Available at: <http://data.dre.pt/eli/dec-lei/74/2017/06/21/p/dre/pt/html> (accessed on 26 August 2019)

<sup>160</sup> Concilianet, PROFECO, Gouvernement du Mexique. <https://concilianet.profeco.gob.mx/Concilianet/faq.jsp> (accessed on 26 August 2019)

According to Profeco's annual report <sup>161</sup>, in 2018, *Concilianet* treated 6.790 cases, and a resolution percentage of 86,50%.

#### *Colombian model*

The *Superintendencia del Comercio e Industria* (SIC), Colombian, also has its own online consumer dispute resolution system, in which SIC acts as a “facilitator” so that consumers and suppliers can reach an agreement. SIC Facilita<sup>162</sup> provides businesses and consumers with a platform (chat) where suppliers and consumers, with the help of SIC, can reach an agreement on disputes arising from guarantees, product or service offers, misleading advertising) avoiding legal action.

The initiative aims to develop the culture of after-sales service provision among suppliers (including giving consumers access to information and complaints); provide businesses and consumers with another alternative for conflict resolution, thus avoiding consumer discontent and additional demands on the judiciary.

According to SIC data, up to 70% of complaints submitted are resolved through online mediation.

#### *Brazilian Model*

The creation of the Brazilian platform is based on the provisions of article 4, point V of Law 8.078 / 1990 (Consumer Code) and article 7, points I, II and III of Decree 7.963 / 2013.

As a result of a series of initiatives related to improving the Brazilian economy and providing access for the first time to millions of consumers of several products and services (access to electronics, financial services and health insurance, to name only the main ones), the Brazilian authorities have drawn up a national plan (PLANDEC, decree 7.963 / 2013) in order to give consumers, access to justice.

Brazil has more than 5,000 cities and not all of them have a consumer protection authority. *Consumidor.gov.br* was developed and created to fill this gap and provide consumers with a new tool for resolving disputes. It is a public service that allows direct dialogue between consumers and businesses to resolve consumer disputes via the Internet platform *Consumidor.gov*. One of the main factors explaining the success of this initiative lies in the fact that it is based on cooperation between the national authority, the National Consumption Secretariat - Senacon - of the Ministry of Justice and the companies that give it a legal basis. Companies are free to join the system by signing a cooperation agreement with Senacon.

Another factor that explains the platform's effectiveness is that the federal authority, Senacon, and local authorities (known as Procons, local consumer protection bodies), advocates, prosecutors, and society can control the system. In addition, the system provides live updates on information such as the most requested sectors, the most requested cases, the rapid responses of companies, the level of consumer satisfaction, among others, creating a natural and healthy competition between companies in handling complaints.

Thus, the platform makes it possible to resolve consumer disputes quickly and without bureaucracy. According to Senacon data, currently, 80% of complaints registered in *Consumidor.gov.br* are resolved by companies that respond to consumer inquiries within an average of 7 days.

Transparency on the data provided in the platform has proven to be positive concerning the information and the public information that the authorities are obliged to share and that the

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<sup>161</sup> Informe Anual PROFECO 2018, PROFECO, Mexique. Available at : [https://www.gob.mx/cms/uploads/attachment/file/485958/INFORME\\_ANUAL\\_PROFECO\\_2018.pdf](https://www.gob.mx/cms/uploads/attachment/file/485958/INFORME_ANUAL_PROFECO_2018.pdf) (accessed on 26 August 2019)

<sup>162</sup> SICFacilita, Gouvernement de la Colombie. Disponible sur : <http://sicfacilita.sic.gov.co/SICFacilita/> (accessed on 26 August 2019)

companies are supposed to provide, but also the system and at the market. Unlike the initiatives mentioned earlier of Mexico and Colombia, the Brazilian model does not require any “live” online mediation via “chat” or videoconference. The consumer contacts the company via the Consumidor.gov (.br) platform, providing all the documentation and information relating to the case. The company must react in 10 days; otherwise, it can be requested by the consumer authority, who is monitoring the process.

Apart from this, if the request is not resolved or the supplier does not comply with what was agreed, the consumer can use the history registered in the platform and execute it at the consumer authority (a local, municipal, or regional).

Given the efficiency of the platform and the fact that more than 70% of the claims brought before the courts (small claims) are consumer-related, an agreement was recently signed between the federal authority, Senacon, and the Council. National de la Justice (CNJ, Conselho Nacional de Justiça) for the integration of the Consumidor.gov.br platform into the electronic judicial process (PJe)<sup>163</sup>. The partnership must be more effective in resolving consumer disputes, or even prevent claims from reaching the legal sphere.

As noted above, the mentioned initiatives are all implemented and/or controlled by the state. In fact, concerning consumer rights, alternative dispute resolution (ADR) is recommended when they are coordinated, supported, and monitored by consumer protection authorities or civil society organizations. Any other ADR that does not involve a consumer protection authority or a representative of the civil society organization may reduce consumer rights in any type of negotiation.

According to Consumers International, 56% of their member consumer organizations worldwide say that digital service providers do not offer self-service systems in their country and that there is no legal obligation to do so.<sup>164</sup>

Today's consumers, consumers of the digital age, demand fast and transparent access to products and services and businesses, information, and dispute resolution. Is it possible to create consumer dispute resolution platforms without the participation of the State? Is state participation necessary or even relevant? What is the future of consumer ODR and state participation in this process?

### *The participation of the State*

Consumer law, like labour law, are the two classic examples of paternalistic legal systems that inevitably challenge new forms of conflict resolution or, perhaps, limit its development to other forms - not necessarily new - conflict resolution. It is crucial to clarify consumer protection based on legislation, consumer law (in most countries), a fact that cannot be ignored. At the same time, new forms of dispute resolution may be needed.

The point is that in the event of a consumer dispute, consumer law cannot be ignored. The fact that consumers are the vulnerable actors in the business-consumer relationship justifies special protection (which some may qualify as paternalistic, as noted above) to have a more balanced relationship. Today, we are witnessing a transformation of the system that is undergoing the digital economy's impact: consumers are increasingly demanding. New generations of consumers are used to fast transactions: the purchase of products and services; paying bills with one click and in the event of a problem; in the event of product or service failure, consumers also expect quick and efficient solutions, which is usually not the case. To respond to these new demands, governments, and other actors (such as regional organizations

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<sup>163</sup>Plataforma Consumidor.gov.br integra o PJe para soluções online dos conflitos de consumo, AASP, Available at: <https://www.aasp.org.br/noticias/plataforma-consumidor-gov-br-integra-o-pje-para-solucoes-online-dos-conflitos-de-consumo/> (accessed on 26 August 2019)

<sup>164</sup> Consumers International (2017). World Consumer Rights Day Briefing: Redress, Building a Digital World Consumers Can Trust. Available at <https://www.consumersinternational.org> (accessed on 26 August 2019)

from ASEAN, MERCOSUR or even UNCTAD) have worked to forge partnerships to create new platforms for resolving disputes, consumer disputes.

As seen in the previous pages, consumer protection refers to the protection of a weaker party in an imbalanced consumer relationship, and therefore, the absence of the state cannot be accepted. With the advent of the digital economy, consumer relations in cyberspace can put consumers in an even more vulnerable and disadvantaged position: the international aspect must also be considered when we realize that a large part of online consumption is indeed international consumption.

As mentioned by SCHULTZ<sup>165</sup>, There are many challenges to resolving disputes in cyberspace due to the physical distance between the parties. The fact that the transactions are small or medium and that seeking redress can entail costs that would exceed the value of the product-service and, finally, the theme of efficiency, party engagement, law enforcement. The examples mentioned above, notably those of Portugal, Mexico, and Brazil, show that in the case of CODR, the state's participation, the presence of the state to confer this binding effect, is crucial.

In addition, the example of Consumidor.gov (Brazil) shows that State - Company - Consumer cooperation is possible and can be fruitful. In this case, the system built and based on a cooperation agreement - signed agreement - between companies and the State confers transparency and efficiency, binding the parties concerned.<sup>166</sup>

The Special Case of International Consumer Related Litigation and Consumer Vulnerability The imbalance of power in internet litigation alleged by HÖRNLE specifically refers to the vulnerabilities of consumers. As widely argued in the proposed convention presented to the Conference on Private International Law (HCCH), international consumers are even more vulnerable and disadvantaged for a range of factors such as cultural differences, language, different environments (tourism) or precisely because of the different environment that cyberspace is. Professor Luciane KLEIN VIEIRA<sup>167</sup>, classifies a new category of consumers, the "cross-border consumer", who are even more vulnerable to purchasing goods and services outside their national territory. In his doctoral thesis, KLEIN VIEIRA also argued that it was not possible to ensure the resolution of consumer disputes without the presence of the State. In addition, if we consider that the vulnerabilities of consumers concerning businesses (financial vulnerability, legal vulnerability, technical vulnerability) are reinforced at the international level, it is neither possible nor acceptable to imagine the resolution of consumer disputes online without some state involvement.

As HÖRNLE and SCHULTZ have also argued, litigation and arbitration both perform a public function. The same can be said of what is called online consumer dispute resolution. However, in this case, the presence of the state has a necessary consequence for efficiency. Considering the aforementioned consumer vulnerabilities, the peculiarities of consumer law, the difficulties of resolving disputes online, placing consumers - again - in a vulnerable position, it is not yet possible to think about the consumer dispute resolution, alternative methods of successful dispute resolution and platforms without the participation, presence or oversight of the state.

Here, the most interesting and successful model is that of Brazil, Consumidor.gov (.br), which was developed in collaboration with companies, playing with the competition of

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<sup>165</sup> SCHULTZ, Thomas, in *Online Arbitration: Binding or Non-Binding?* Available at : <http://www.ombuds.org/center/adr2002-11-schultz.html> (accessed on 26 August 2019)

<sup>166</sup> SCHULTZ, Thomas. *Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle*. *International Journal of Law and Information Technology*, 2011, vol 19, no 2, p. 153-163. Available at <http://archive-ouverte.unige.ch/unige:101370>. (accessed on 26 August 2019)

<sup>167</sup> KLEIN VIEIRA, Luciane, *La hipervulnerabilidad del consumidor transfronterizo y la función material del Derecho Internacional Privado*. 1ª Ed. – Ciudad Autónoma de Buenos Aires : La Ley, 2017.



companies among themselves, thus producing positive results. Apart from this, state surveillance (carried out by both the federal authority and local and regional consumer protection authorities) online and formally binding by a cooperation agreement signed between the companies and the Consumer Protection Authority, SENACON provides legal support to the initiative.

Is it, therefore, possible to create consumer dispute resolution platforms without the participation of the State? No, in the case of consumer protection, in the case of consumer law, for the vulnerabilities of consumers which are heightened internationally and in cyberspace, it is impossible to create effective platforms to resolve disputes consumption without the participation of the State.

Therefore, state participation in the creation, development, and monitoring (at least) of an online dispute resolution platform for consumers is necessary and relevant so that the weaker party, the consumer, is duly protected so that consumers' vulnerabilities to businesses are, perhaps, balanced.

Regarding the future of these platforms and initiatives, it is relevant to observe recent developments such as the cooperation of Asian countries<sup>168</sup> (*Regional Comprehensive Economic Partnership - RCEP*)<sup>169</sup>, the BRICS summit in Brazil (13-14 November 2019) and the partnership UNCTAD - *China 170 Silk Road Group*, explained in the next paragraphs.

## VI. Perspectives for the future

We are witnessing a new phase in the consumer relationship, resulting from the digital economy, which has led to new products and services to new modes of consumption. With these new consumption patterns, new channels, and new services comes the need for faster and more efficient resolution of consumer disputes. These requirements are not dissociated from consumer law; on the contrary, they complement the existing basic principles of consumer protection by supporting market developments: rapid consumption requires rapid settlement of consumer disputes<sup>171</sup>.

The relevance of consumer protection at the international level can be identified as the result of two significant developments: globalization and the advent of the digital economy. Globalization, accompanied by the development of the economy in several regions; the increasing international transport of people and workers; the digital economy, offer more and more access to goods and services which, 30 years ago, were only accessible to a certain number of people. We can cite a few examples of actions aimed at setting up an international consumer protection system and which are proof of the development of consumer protection in the international field: 1. Within the framework of the Organization of American States (OEA), which led to the creation of the Health and Safety Network of the Americas at the European Rapex, a product recall alert system); 2. the draft convention on the protection of tourists (consumers as tourists) at the Hague Conference on Private International Law, which focus on the creation of a network of consumer protection authorities (both at the level administrative and judicial procedures) to resolve international consumer disputes, and more

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<sup>168</sup> China, Japan, South Korea, Australia and New Zealand, as well as the ten ASEAN countries Indonesia, Thailand, Singapore, Malaysia, Philippines, Vietnam, Myanmar, Cambodia, Laos and Brunei.

<sup>169</sup> Quince países de Asia acuerdan la mayor zona de libre comercio mundial, El País, available at: [https://elpais.com/internacional/2019/11/04/actualidad/1572888525\\_052080.html](https://elpais.com/internacional/2019/11/04/actualidad/1572888525_052080.html) (accessed on 26 August 2019)

<sup>170</sup> <https://amp.scmp.com/tech/apps-social/article/2180194/heres-how-chinas-new-e-commerce-law-will-affect-consumers-platform> (accessed on 26 August 2019)

<sup>171</sup> Graf-Peter Calliess "Transnational Consumer Law: Co-Regulation of B2C-E-Commerce" in Olaf Dilling, Martin Herberg & Gerd Winter (eds), *Responsible Business: Self-governance in transitional economic transactions*, Hart 2006.

recently (2015) 3.the revision of the United Nations Guidelines for Consumer Protection<sup>172</sup>, which led to entrusting UNCTAD with the mandate Consumer Law and Policy (UNGCP) as well as the creation of an intergovernmental group of experts in the field of consumer protection and policy (IGE -Consumer)<sup>173</sup>.

Today, the advent of new platforms and channels to resolve consumer disputes, such as the European online dispute resolution platform, the Mexican Concilianet, the Colombian Sicfacilita or the Brazilian Consumidor.gov focus on the development of tools that will facilitate the resolution of consumer disputes. ASEAN member countries have been working on developing platforms in the area of consumer protection, such as one platform for recalls and one for dispute resolution. However, the recent cooperation of Asian countries (Regional Comprehensive Economic Partnership - RCEP) also testifies that the future of consumer protection has yet to be developed in other regions of the world.

To complete this information, we can refer to the recently concluded cooperation agreement between UNCTAD and the China Silk Road Group to enable consumers in Southeast Asia to settle their disputes online, to improve international trade and electronic commerce. The project is to help consumers take advantage of the closer business relationship in the digital economy, thus becoming a major example of international cooperation for implementing UNGCPs. The project will start with a pilot project bringing together two beneficiaries from the South Asian region. In addition, the initiative benefits from the added value of a unique experience in blockchain and ODR development through policy research, a partnership with UNCTAD and the China Silk Road Group.

## VII. Conclusion

In trade, it is difficult to find a more appropriate or better-balanced mechanism, without rules, to guide trade relations. In the case of B2C relations, where a vulnerability factor plays an important role, we will hardly find a more “mature” market where the participation - or at least the supervision - of the State is not necessary.

As mentioned, discussing the maturity of markets and cultures to envision consumer relations without the controlling power of the State would lead to more philosophical approaches. Although we are in a globalized world, it is still not appropriate to compare nations. If we compare countries like Brazil, Germany, and Switzerland, all three being federal systems, the abysmal differences will arise in what refers to history - and therefore to culture - to the number of inhabitants; and, of course, the size. It is difficult, for example, to consider that Switzerland has a more mature culture to set up a system for settling consumer disputes without at least the supervision of the State and the authorities. It is not a question of culture, of being more, or less developed; it is the logic of the consumer relationship, with two different actors, suppliers, and consumers, which requires the supervision of an authority responsible for supervising actions and the results of such acts for the benefit of the economy.

States can help correct market failures, create a legal, regulatory, and institutional framework, and provide appropriate incentives for market players to contribute more effectively to sustainable development. However, business participation and cooperation are essential for the success of consumer protection policies.

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<sup>172</sup> The second and final reform of the UNGCP reviewed and approved an international document in record time, in less than five years, not only introducing relevant topics such as data protection and privacy and e-commerce but also recognizing the importance of consumer protection at the international level by creating a specific forum for cooperation, technical assistance and capacity building in the field of consumer protection.

<sup>173</sup> Intergovernmental Group of Experts on Consumer Protection Law and Policy, CNUCED, available: <https://unctad.org/topic/competition-and-consumer-protection/intergovernmental-group-of-experts-on-consumer-protection> (accessed on 26 August 2019)

Online dispute resolution platforms provide an opportunity for businesses to demonstrate their commitment to their customers by giving them access to dispute resolution and resolving consumer disputes.

However, such an option cannot be accepted or must not be entirely fruitful or effective without the State's participation; without state oversight, so that consumer protection is fully guaranteed, so that consumers are less harmed because of their increased vulnerability in the international sphere.

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