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CLASS ACTIONS AS A MECHANISM FOR VULNERABLE CONSUMERS TO ACCESS JUSTICE

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I.- INTRODUCTION

The access to an effective mechanism of redress is one of the most important issues for consumers. Due to mass consumption, suppliers of goods and services chose to standardise the hiring process to make it more rapid and dynamic. In that regard, it can be said that this phenomenon resulted in a series of benefits. However, this change also led to negative conducts adopted by suppliers of goods, which caused consumer detriment, for example the gradual and generalised addition of abusive clauses in adhesion contracts. What is more, some of those conducts have led not only to the performance of abusive practices in order to earn larger profits, but also to the omission of preventive measures aimed to avoid putting dangerous or unsafe products in the market, which may harm the members of the society. For this reason, consumers are exposed to many risks. The mass production phenomenon altered consumers' habits. As a result of that, they face mass damages beyond national frontiers.

Furthermore, vulnerable or hypervulnerable consumers are more affected by these kind of problems and their disadvantages are worse than the rest of the consumers'. One of the main difficulties of vulnerable consumers is that they are often denied the access to jurisdiction for different reasons, such as high litigation costs, lack of provision of information or the economic insignificance of their complaint.

Therefore, the States should create effective mechanisms to provide a fair redress and dispute resolution, in particular for vulnerable consumers who are in a worse situation in comparison to other consumers.

In this paper, I shall argue that class actions are an effective mechanism to access justice, mainly for vulnerable consumers. In this way, I will try to expose that class actions make a judicial redress process more effective and useful for disadvantaged consumers.

II.- GUARANTEES OF EFFECTIVE JUDICIAL PROTECTION AND ACCESS TO JUSTICE

Before explaining the relationship between class actions and the access to justice for vulnerable consumers, it is important to define what access to justice is.

Access to justice can be defined as a principle of all legal systems, which citizens use to protect their rights, and which could help resolve their disputes by involving the State².

The right of access to jurisdiction is included in the guarantee of effective judicial protection, which is also identified with the *pro actione* principle.

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² CAPPELLETTI, Mauro – GARTH, Bryant, *El acceso a la justicia*, Colegio de Abogados del Departamento Judicial de La Plata, La Plata, 1983, pág. 18

The above mentioned principle is regulated by article 8 of the Universal Declaration of Human Rights³, in article 25 of the American Convention of Human Rights⁴ and in article 47 of the Charter of Fundamental Rights of the European Union⁵.

In this context, the Inter-American Convention of Human Rights defined the principle of effective judicial protection as follows: “The principle of judicial protection can be defined as the guarantee of free access to court for the defence of rights and interests against public power, even when ordinary legislation has not recognized a specific resource or action. This principle logically implies a set of basic guarantees in the processing of court proceedings.”⁶

On the other hand, the Court of Justice of the European Union stated that “... the principle of effective judicial protection of an individual's right under Community law should be understood in the sense that it does not require that a free-standing action which has as its main objective the examination of the compatibility of national provisions with Article 49 EC to exist when other effective legal remedies, which are no less favourable than those governing similar domestic actions, allow to appreciate such compatibility, which is a task that falls to the national court.”⁷

Moreover, concerning the access to justice, the Inter-American Court of Human Rights understood that this is a guarantee that follows from what is stated in Article 25 of the Pact of San Jose, Costa Rica. Consequently, it stated that “Article 25 of the Convention also enshrines the right to access to justice.” After analysing the aforementioned Article 25, the Court has noted that this Article lays a positive obligation upon the State to provide all people under its jurisdiction an effective legal remedy against violations of their fundamental rights. It has also observed that the guarantee enshrined in Article 25 is not only applied to the rights contained in the Convention, but also to the rights recognized by the Constitution or the Law. Furthermore, the Court has indicated in numerous occasions that the guarantee of an effective remedy “constitutes one of the fundamental pillars not only of the American Convention but of the very rule of law in a democratic society in the terms of the Convention.” Besides this, for a State to comply with Article 25 of the Convention, not only does it need that the resources formally exist but it also needs them to be effective, that is, citizens must be given a real possibility to lodge a simple and fast appeal. Any rule or measure that obstructs or impedes the use of these resources represents a violation of the right of access to justice, according to the Article 25 of the American Convention (...). This Court considers that even though the right of access to justice is not total and, as a consequence, it can be subject to

³ “Every person has the right of an effective appeal before competent national courts, in which that person is protected from any conduct that violates his/her fundamental rights, those being recognized by the Constitution and by the Law.”

⁴ “1. Every person has the right of a rapid and simple appeal and/or to any other effective tool before the judges or courts.”

⁵ “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article (...) Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

⁶ IDH Commission, Report N° 105/99, issued in the case n°10194 (“Palacios, Narciso c/ Argentina”), September 29th, 1999.

⁷ Case C-432/05, *Unibet (London) Ltd., Unibet (International) Ltd. V. Justitiekanslern*, [2007], ECR I-2301.

some discretionary limitations by the State, these limitations must be connected with the means employed and their aim, and they cannot presume the denial of such right”⁸.

As a result, the access to justice includes both the access to judicial courts and a fair procedure, a declaration and mechanisms that make effective the execution of the judicial decision.

To conclude, nowadays the guarantee of access to justice represents a challenge to consumers who are often deprived of it and it is aggravated even in cases where those considered highly vulnerable are involved.

III.- THE CASE OF VULNERABLE CONSUMERS:

The protection of the rights of vulnerable consumers has become a relevant matter considering how third generation rights have upsurged, mainly the economic, social and cultural ones.

In view of this, consumer rights have not been an exception. Nowadays, a specific group of consumers is starting to be considered, because of its own particularities: they possess a higher level of vulnerability than the average consumer does.

This idea of vulnerability stems from the inequality existent among the members of a certain group. Still, to be able to define this group properly, it is necessary to delimit this concept. Taking this into account, the concept of ‘consumer’ is inherent to the concept of vulnerability. This vulnerability is given by the flagrant inequality existing between the supplier and the consumer in relation to the consumption. Firstly, what should be noticed is the asymmetry existing between the information available about the goods and services that both parties might have at their disposal, considering the consumption relations. Moreover, the power of the supplier cannot be unnoticed, since the consumer celebrates mostly every contract by adhesion, without any possibility of negotiation or even having the chance to modify any of the clauses. To begin with, it should be noticed that in the United Nations’ Guidelines for the Protection of the Rights of the Consumer⁹, the “...protection of vulnerable and disadvantaged consumers...” is presented as a general principle¹⁰. In this way, it can be inferred that,

⁸ Corte IDH, *Cantos Vs. Argentina Case*, September 28th, 2002, Series C N° 97, p. 52 and 54. Subsequently, his court had further interpretations: “... this Court states that, to exercise the right to justice is not enough to dictate a final decision through a due process or resource (53), in which rights and obligations are stated o people protection is provided. What is more, is imperative the existence of effective mechanisms to execute decisions or sentences, so that the declared rights are effectively protected. The execution of such decisions and sentences have to be considered as part of the right of access to justice, understood it in a wide sense, including as well, full compliance of such decision. The opposite supposes the negation itself od this right.” (IDH Court, *Baena Ricardo and others vs. Panama.*, November 28th 2003, Series C N° 104, p. 81).

⁹ Resolution 70/2015 of the United Nations General Assembly.¹⁰ Section 5, paragraph b) of the Guidelines. Likewise, this category of consumers is present in the different parts of the guidelines, namely: a) At the moment of mentioning the fair and equitable treatment as a good commercial practice (guideline 11 a); b) In the adoption of dispute and compensation solutions, urging Member States to adopt procedures that take into account the needs of hypervulnerable consumers (Guideline 37); c) In the formulation of education programs, indicating that special attention should be paid to the needs of vulnerable and disadvantaged consumers (Guideline 42); d) The same recommendation was formulated regarding the policies of access to public services, indicating that the situation of vulnerable or disadvantaged consumers should be considered in them (Guideline 77).

¹⁰ Section 5, paragraph b) of the Guidelines. Likewise, this category of consumers is present in the different parts of the guidelines, namely: a) At the moment of mentioning the fair and equitable treatment as a good commercial practice (guideline 11 a); b) In the adoption of dispute and compensation solutions, urging Member States to adopt procedures that take into account the needs of hypervulnerable consumers (Guideline 37); c) In the formulation of education programs, indicating that special attention should be paid to the needs of vulnerable and disadvantaged consumers (Guideline 42); d) The same recommendation was formulated regarding the

throughout the guidelines, it is recommended to Member States that, when consumer protection measures are adopted, special attention must be paid to the needs of those vulnerable or disadvantaged groups. In addition, these Guidelines seek to mitigate the existing inequality and to provide special protection to this group, which presents an aggravated difficulty to enjoy their rights as consumers.

Having said that, it is worth considering what is understood by the concept of vulnerable consumer or hypervulnerable consumer¹¹. This category has upsurged in the last few years. Some European and Latin legislations, such as Brazil, have started to make reference to this group of consumers.

Accordingly, the European Parliament with the resolution proposed on May 22th 2012 about “Reinforcement of the rights of the vulnerable consumers”, defined this concept in the following way: “Considering that the widely used concept ‘vulnerable consumers’ is based on the notion of endogenous vulnerability and it is referred to a heterogeneous group formed by those permanently considered as such by factors such as mental, physical or psychological capacity, age, credulity or gender. Likewise, the concept of vulnerability must include the consumers suffering from vulnerability circumstances, that is, those consumers who are found in a state of temporal impotence derived from the gap between their state and their individual characteristics on one hand, and their surroundings, on the other; taking into account different criteria such as education, social and financial status (...), internet access, etc. Considering as well, that all consumers, at any point in their lives, could become vulnerable due to external factors and to their interactions with the market, or because they could experiment difficulties to access and understand proper information aimed to consumers and, therefore, could need special protection...”

The latter concept opens the door to countless interpretations, classifications and situations. In fact, the European Consumer Consultative Group recognised the great complexity to find an unique definition¹².

This is why it can be established that vulnerable consumers are those who evidence some kind of vulnerability by belonging to a specific vulnerable category or by some transitory reason that leads them to a situation of inequality in front of the rest of the consumers. In fact, I consider that there is an inequality among the consumers, which requires the adoption of certain measures aimed to erase that inequality.

Because of all these reasons, it is difficult to determine the concept of vulnerable consumers, since there are several situations which might require special attention. It is possible to state

policies of access to public services, indicating that the situation of vulnerable or disadvantaged consumers should be considered in them (Guideline 77).

¹¹ In Latin-America the word “hypervulnerable” is used to refer to this group of disadvantaged consumers. This term is coined by Antonio Herman Benjamín, a member of the Supreme Court of Brazil, in one of his vows (v. STJ, Recurso Especial Nº931.513 – RS, 2007/0045162-7). In addition, this term was used in The Final Report (2012-2016) of ILA Committee on International Protection of Consumers, International Protection of Consumer, Johannesburg Conference (2016). (See footnote Nº 4). Moreover, some Latin-American authors defined it: “Some consumers are more vulnerable than others. It is those consumers who, regarding the structural vulnerability in which consumers are placed in the market, suffer from other vulnerabilities related to their age, psychophysical condition, gender, socioeconomic, cultural or other permanent or transitory circumstances”. (BAROCELLI, Sergio Sebastián, “Towards the construction of ‘hyper-vulnerable consumer’ category”, in *Consumer Protection: Current Challenges and Perspectives*, Coord.: LIMA MARQUES, Claudia; PEARSON, Gael; RAMOS, Fabiana, Ed. Orquestra, Porto Alegre, Brasil, 2017, p. 49).

¹² European Consumer Consultative Group Opinion on consumer and vulnerability, adopted on 7th February 2013, point 3.1.

that some groups will be considered as vulnerable consumers, such as children, women, the elderly and disabled people, since they are historically segregated from everyday practices in every field, contributing to such separation and structural inequality. However, this does not mean that such classification is static: new vulnerable groups may appear. Therefore, future regulations should contemplate flexible criteria to define vulnerable consumers, which, in turn, would allow to protect other consumer groups who are in a vulnerability situation like tourists or Internet users¹³.

IV.- CLASS ACTIONS AS A MECHANISM FOR VULNERABLE CONSUMERS TO ACCESS JUSTICE

Cappeletti and Garth claim that the problem with the access to justice is the inequality between litigators¹⁴. In seeking to short the distance between parties, it is certain that the State should adopt politics in this matter and provide mechanisms to achieve this goal.

The secretariat of UNCTAD has concluded that the right of consumers to obtain redress should be considered a part of the right of consumers to access justice¹⁵. In addition, the secretariat reported: "... judicial proceedings can present significant barriers for consumers. The cost of pursuing proceedings, including exposure to adverse costs if a case is lost, the lengthy duration of procedures, the complexity of the law and legal procedures, the costly requirements of legal assistance and, in particular, the low economic value of claims, serves to dissuade consumers from undertaking ordinary judicial claims"¹⁶.

In a similar way, following different studies, Verbic has identified there are two predominant factors which block access to the judicial system: the lack of financial resources to afford the cost of litigation and the lack of ability to understand and use the legal system¹⁷.

Along with all these factors, the situation of vulnerable consumers in respect to access to justice is worse than other consumers' situations. Precisely, this group of consumers has more difficulties facing the barrier to access the judicial system. As a result of these obstacles, vulnerable consumers cannot access to a fair redress or effective protection of their rights, increasing their disadvantages and segregation.

Following this, Resolution 67/1 of United Nation emphasises the rights of access to justice of vulnerable groups: "We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid"¹⁸.

At the same time, UN Guidelines for Consumer Protection recognised the availability of effective consumer dispute resolution and redress as a general principle¹⁹. What is more,

¹³ Following the work of UNCTAD, e-commerce involves new risks, rising vulnerability of consumers (UNCTAD, Manual on Consumer Protection (Advanced copy), 2016, p. 107).

¹⁴ CAPPELETTI, Mauro – GARTH, Bryant, *El acceso...*, *op. cit.*, pag. 23.

¹⁵ UNCTAD, *Dispute resolution and redress* (note by the secretariat TD/B/C.I/CPLP/11, 2018) para 2.

¹⁶ UNCTAD, *Dispute resolution and...*, *op. cit.*, para 16.

¹⁷ VERBIC, Francisco, "Access to Justice of Disadvantaged Groups and Judicial Control of Public Policies through Class Actions in Argentina", in CADIET, Loïc - HESS, Burkhard – REQUEJO ISIDORO, Marta (eds.), *Approaches to Procedural Law. The Pluralism of Methods*, Nomos Verlagsgesellschaft, Germany, 2017, pag. 391.¹⁸ UN Resolution 67/1, para. 14.

¹⁸ UN Resolution 67/1, para. 14.

¹⁹ Guideline 4 g).

guideline 37 established: “Member States should encourage the development of fair, effective, transparent and impartial mechanisms to address consumer complaints through administrative, judicial and alternative dispute resolutions, including for cross-border cases. Member States should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, transparent, inexpensive and accessible. Such procedures should take particular account of the needs of vulnerable and disadvantaged consumers. Member States should provide consumers with access to remedies that do not impose a cost, delay or undue burden on the economic value at stake and at the same time do not impose excessive or undue burdens on society and businesses”.

Specifically regarding class actions, guideline 40 states: “Member States should ensure that collective resolution procedures are expeditious, transparent, fair, inexpensive and accessible to both consumers and businesses, including those pertaining to overindebtedness and bankruptcy cases.”

According to OECD recommendations, State authorities should consider the special needs of disadvantaged consumers to dispute a resolution and a redress mechanism²⁰.

At this point, it is important to consider why class actions aid vulnerable consumers and guarantee their rights of access to justice. First of all, an essential feature of class actions is the elimination of the power differential between the group of affected people and the defendant²¹. In fact, one of the most important obstacles to access justice are the economic barriers, which are worse for vulnerable consumers. For example, in the case of small claims, consumer suffers a minor damage as the result of a flaw in a product or a bad service. This minor damage, given the lack of answers from the supplier, would not justify the cost to file a lawsuit. Therefore, the low sum of the complaint, the legal fees and the low economic resources—in connection with what a judicial process would involve—constitute a barrier for the consumer access to a fair redress. In Verbic’s opinion: “From the same access to justice perspective, class action represents a particularly interesting device when it comes to deal with the other sort of barriers to the courts (...) In this sense, class actions can also enable litigation by bringing into the legal system claims which individuals are otherwise unaware of.”²²

From this point of view, UNCTAD reported the importance of class actions for consumer protection, because it helps reducing the individual and overall cost of judicial proceedings²³. In other words, class action causes “judicial economy”, because it shares overall cost of multiple claims, thereby lowering the cost of individual cases and thus increasing access to justice²⁴.

A further advantage of class action is citizen participation in a democratic society. This characteristic of class action is more notorious in the case of vulnerable consumers. Historically, these disadvantaged groups have been segregated and discriminated by the rest of the society. It should be interesting to provide them a powerful and useful tool such as

²⁰ OECD Recommendation on Consumer Dispute Resolution and Redress, March 2014.

²¹ VERBIC, Francisco, “Access to Justice of Disadvantaged Groups...”, *op. cit.*, pag. 391.

²² VERBIC, Francisco, “Access to Justice of Disadvantaged Groups...”, *op. cit.*, pag. 391.

²³ UNCTAD, *Manual on Consumer Protection*, 2017, pag. 84 and UNCTAD, *Dispute resolution and...*, *op. cit.*, para 18.

²⁴ HODGE, Christopher, “US Class Actions: Promise and Reality, European University Institute, Working Paper LAW 2015/36, pag. 1.

class action and give them voice to participate in the politic agenda²⁵. Moreover, through class action citizens could control acts of government and also would break some systematic discrimination practice against disadvantaged consumers.

Finally, class actions could improve judicial redress procedure and render it more suitable for consumer dispute, in particular for vulnerable consumers. First, this kind of action avoids collision between two judicial sentences about the same case but with different solutions. A good example of this is mass tort, which is caused by one event but has a large number of victims. In this case, it would be possible that two judges appreciate the same case in a different ways, providing contradictory solutions. Also, class actions offer an effective mechanism for consumers, because all claims will be concentrated in only one collective action. As a result of this concentration, courts will be more liberated and it would be possible to give a better judicial service.

Another reason to make consumer judicial redress more suitable includes existent claims in the name of vulnerable consumers, which aim to protect their rights. In fact, disadvantaged consumers are in a worse condition to face a judicial proceeding. Nevertheless, through class actions, vulnerable consumers could obtain a fair redress without making any claim, having a representative to claim for them. In the last G20 Consumer Summit in Buenos Aires, where children's protection in the digital age was an issue for the program, consumer's authorities agreed on paying attention to the need to protect vulnerable consumers from risks of harm caused by digital technology. Specially, they focused on children: "In particular, there is an urgent need for action to **protect children and young people in the digital age**"²⁶. Due to these considerations, it would seem that class actions provide an effective protection to vulnerable consumers and guarantee them access to justice to obtain a fair redress. It is important to mention that disadvantaged consumers (for example, children) often face digital technology dangers and on rare occasions do they make individual claims for this issues. Class actions are a great opportunity for vulnerable consumers, helping facilitate access to fair redress through collective claim, which would be lead by consumer associations or consumer Ombudsmen without their judicial participation.

V.- CONCLUSION

Our reality has been changing since the appearance of the United Nation Guidelines for Consumer Protection in 1985. The protection of consumers around the world increased. However, the new century arrived with new challenges such as the protection of vulnerable consumers. Certain groups of consumers have difficulties to fully exercise their rights. Due to this situation, class actions appear as the possibility for vulnerable consumers to have their rights guaranteed, mainly by accessing justice. This is one of the biggest problems disadvantaged consumers are facing. Therefore, State authorities should provide effective mechanisms like class actions to offer them a way to obtain a redress.

Despite a large duration and other disadvantages, judicial redress is chosen by consumers who fight against all the odds²⁷. Consequently, it is important to encourage this mechanism and improve it for consumers' disputes. Thus, class actions could be viewed as a part of the solution. The UN Guidelines for Consumer Protection provided some principles to make

²⁵ VERBIC, Francisco, *Procesos colectivo*, Astrea, Ciudad de Buenos Aires, Argentina, 2007, pag. 69.

²⁶ G20 Consumer Summit 2018 Statement, para. 9 (available in <http://consumersfederation.org.au/wp-content/uploads/2018/05/G20-Consumer-Summit-statement.pdf>).

²⁷ UNCTAD, *Dispute resolution and...*, *op. cit.*, para 42.

judicial redress into an effective mechanism and to break down barriers to access it, especially guidelines 37 and 40.

Class actions are a powerful tool for vulnerable consumer for many reasons. First of all, it provides an effective mechanism to access justice, because it concentrates in one judicial dispute for all claims about the same matter. One way to achieve these benefits is by allowing consumer associations or Ombudsmen lead collective redress, because vulnerable consumers are liberated to sue for their redress, especially in small claims.

Class actions are a powerful tool for vulnerable consumers due to the fact that they provide an effective mechanism to access justice, since they concentrate all the claims about the same matter in only one judicial dispute. One way to achieve this benefit is by allowing consumer associations or Ombudsmen to lead a collective redress, so vulnerable consumers are liberated to start a suit for their own case, especially small claims.

Furthermore, class actions could be a solution for suppliers. They could resolve all their disputes in one collective proceeding. As a result of that, suppliers would save money in litigation costs and could have an active participation in the mass dispute.

To conclude, it should never be forgotten that justice is the root value that guides any legal system. For this reason, we should always assure the exercise of the rights as fully as possible so as not to affect other people's rights. When consumer rights are violated, an efficient remedy and a compensation for the damages must be granted in order to reinforce the root value of justice. Vulnerable consumers are in disadvantage respect to other consumers and the barriers they face to access a fair redress are higher than others'.

Overall, class actions are a powerful and useful mechanism to protect vulnerable consumers and grant them access to justice in view of obtaining their redress. This tool would avoid a large numbers of dispersed claims around all courts and would turn judicial procedures redress a more effective mechanism for disadvantaged consumers.

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