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## **Dispute resolution and redress**

### **Note by the UNCTAD secretariat**

#### *Executive summary*

This note considers the issue of consumer dispute resolution and redress in the light of the United Nations guidelines for consumer protection. It introduces the rationale for and the legal nature of dispute resolution and redress, and presents current avenues for delivering resolution and redress, namely through courts, collective redress, public regulatory and enforcement action, ombudspersons, alternative dispute resolution, online dispute resolution and business customer care and complaint functions. In addition, the note provides policy options for member States implementing the guidelines on dispute resolution and redress and proposes questions for discussion by the third session of the Intergovernmental Group of Experts on Consumer Protection Law and Policy.



## Introduction

1. The right of consumers to redress is at the centre of modern consumer protection policy. In an address to the Congress of the United States of America in 1962, President John F. Kennedy stated that consumer rights included “the right to be heard – to be assured that consumer interests will receive full and sympathetic consideration [and] fair and expeditious treatment [in] tribunals”.<sup>1</sup> The preliminary programme of the European Economic Community for a consumer protection and information policy, with regard to redress, stated as follows: “Consumers should receive advice and help in respect of complaints and of injury or damage resulting from purchase or use of defective goods or unsatisfactory services. Consumers are also entitled to proper redress for such injury or damage by means of swift, effective and inexpensive procedures.”<sup>2</sup>

2. The right of consumers to access dispute resolution and to obtain redress should be considered in the wider context of the right of consumers to access justice. For consumer rights to be effective, they need to be enforceable, and any damage suffered by consumers should allow for adequate redress. Aggrieved consumers should also be able to solve disputes with businesses in a fair, affordable and swift manner. Access to justice in the context of consumer protection is also related to the responsibility of government authorities to receive and act upon consumer complaints, either to undertake enforcement action to promote effective compliance with consumer protection laws and/or to obtain or facilitate redress for consumers. Such responsibility is key to ensuring healthy markets that increase the welfare of consumers and contribute to more inclusive and sustainable development. With regard to consumer dispute resolution and redress, government authorities usually involve consumer protection enforcement agencies and sectoral regulators.

3. The General Assembly has reaffirmed the United Nations guidelines for consumer protection as “a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States and encouraging the sharing of experiences in consumer protection”.<sup>3</sup> The guidelines are the only internationally agreed instrument on consumer protection, and have been widely implemented by UNCTAD member States.<sup>4</sup>

4. One of the legitimate needs that the guidelines are intended to meet is the availability of effective consumer dispute resolution and redress (para. 5 (g)), and section V.F is devoted to dispute resolution and redress. Other guidelines contain recommendations for businesses on consumer complaints and disputes (para. 11 (f)) and for Member States to establish consumer protection policies that encourage fair, affordable and speedy dispute resolution and redress, and to work towards ensuring that consumer protection enforcement agencies have the necessary human and financial resources to obtain or facilitate redress (paras. 14 and 15); develop consumer education and information programmes that cover relevant legislation and how to access dispute resolution mechanisms and obtain redress (para. 44 (d)); formulate, maintain or strengthen national policies to improve rules and statutes dealing with dispute resolution between consumers and utility service providers (para. 77); and consider participating in multilateral and bilateral arrangements to improve international judicial and inter-agency cooperation in the recovery of foreign assets and the enforcement of decisions in cross-border cases (para. 89).

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<sup>1</sup> JF Kennedy, 1962, Special message to Congress on protecting the consumer interest, address to the United States Congress, 15 March.

<sup>2</sup> European Economic Community, 1975, Preliminary programme of the European Economic Community for a consumer protection and information policy, 25 April.

<sup>3</sup> A/RES/70/186.

<sup>4</sup> TD/B/C.I/CLP/23.

5. Other relevant international instruments that address consumer dispute resolution and redress include the European Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes and communication dated 4 April 2001 on widening consumer access to alternative dispute resolution; the European Union directive of 21 May 2013 on alternative dispute resolution for consumer disputes and regulation of 21 May 2013 on online dispute resolution for consumer disputes; the Organization for Economic Cooperation and Development recommendation on consumer dispute resolution and redress;<sup>5</sup> the United Nations Commission on International Trade Law notes on online dispute resolution;<sup>6</sup> and the International Chamber of Commerce best practices for online dispute resolution in business to consumer and consumer to consumer transactions.

6. The second session of the Intergovernmental Group of Experts on Consumer Protection Law and Policy, held in July 2017, requested the UNCTAD secretariat to prepare reports and studies for the third session, including on dispute resolution and redress, taking into account input from member States and other relevant stakeholders.<sup>7</sup> In this regard, the secretariat circulated a questionnaire, and received inputs from 32 member States, one international organization, one non-governmental organization and one academic institution.<sup>8</sup>

7. This note presents the rationale for and the legal nature of consumer dispute resolution and redress, as well as different avenues for providing resolution and redress. It includes policy options for member States implementing the guidelines for consumer protection and questions for discussion by the third session of the Intergovernmental Group of Experts.

## I. Dispute resolution and redress: Rationale and legal nature

8. The General Assembly, in resolution 67/1, emphasized 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 committed 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. The European Commission, in a green paper on alternative dispute resolution in civil and commercial law dated 19 April 2002 noted as follows: “Access to justice is an obligation which is met by the member States through the provision of swift and inexpensive legal proceedings. Moreover, certain member States have undertaken to modernize their legal system by simplifying referral procedures or by envisaging the possibility of taking legal action by electronic means.”<sup>9</sup>

9. In line with the development of access to justice, the guidelines for consumer protection were updated. The previous version included a section on measures enabling consumers to obtain redress.<sup>10</sup> The revision, in section V.F, guidelines 37–41, addresses dispute resolution and redress (box 1).

<sup>5</sup> Organization for Economic Cooperation and Development, 2007, *Recommendation on Consumer Dispute Resolution and Redress*, Paris.

<sup>6</sup> See [http://www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html).

<sup>7</sup> TD/B/C.I/CPLP/9.

<sup>8</sup> Argentina, Belgium, Bulgaria, Chile, Colombia, Costa Rica, Cyprus, Egypt, El Salvador, France, Germany, Greece, Lebanon, Lithuania, Mauritius, Mexico, Morocco, Myanmar, Netherlands, Oman, Panama, Peru, Philippines, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, United Republic of Tanzania, United States, Zambia, Eurasian Economic Community, Consumers International and University of Sydney, Australia.

<sup>9</sup> See <https://publications.europa.eu/en/publication-detail/-/publication/61c3379d-bc12-431f-a051-d82fefe20a04>.

<sup>10</sup> E/1999/INF/2/Add.2.

Box 1

**United Nations guidelines for consumer protection, section V.F: Dispute resolution and redress**

37. Member States should encourage the development of fair, effective, transparent and impartial mechanisms to address consumer complaints through administrative, judicial and alternative dispute resolution, 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.

38. Member States should encourage all businesses to resolve consumer disputes in an expeditious, fair, transparent, inexpensive, accessible and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers.

39. Information on available redress and other dispute-resolving procedures should be made available to consumers. Access to dispute resolution and redress mechanisms, including alternative dispute resolution, should be enhanced, particularly in cross-border disputes.

40. 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.

41. Member States should cooperate with businesses and consumer groups in furthering consumer and business understanding of how to avoid disputes, of dispute resolution and redress mechanisms available to consumers and of where consumers can file complaints.

*Source: A/RES/70/186.*

10. Consumer dispute resolution and redress have a distinct legal nature. According to the Organization for Economic Cooperation and Development, dispute resolution refers to “the use of mechanisms designed to provide consumers who have suffered economic harm resulting from transactions involving goods or services, including transactions across borders, the opportunity to resolve their complaints against businesses and to obtain redress” and redress refers to “compensation for economic harm, whether in the form of a monetary remedy (e.g. a voluntary payment, damages, restitution or other monetary relief) or a conduct remedy with a restorative element (e.g. exchange of a good or service, specific performance or rescission of a contract)”.<sup>11</sup>

11. Dispute resolution refers to a transactional settlement of disputes between consumers and businesses, while redress usually presupposes the enforcement of consumer rights through corrective or complementary measures. Corrective measures are those aimed at compensating consumers and ensuring reparations for any unlawful damages. Complementary measures are those aimed at ensuring general consumer interests, such as with regard to health or the environment. Measures aimed at ensuring consumer redress can be adopted through administrative, judicial or alternative dispute settlement procedures, depending on the jurisdiction. Most consumer protection laws confer enforcement power upon consumer protection authorities, including for corrective and complementary measures, yet compensation is usually reserved for judicial authorities.<sup>12</sup>

12. Where alternative dispute resolution is administered by non-State bodies, that is, by private out-of-court alternative dispute resolution entities, most countries impose additional

<sup>11</sup> Organization for Economic Cooperation and Development, 2007.

<sup>12</sup> TD/B/C.I/CLP/23, paras. 25 and 26.

legal requirements to guarantee a minimum standard of expertise and due process, in particular with regard to independence, transparency, effectiveness, legality, liberty and representation and the adversarial principle.<sup>13</sup> The aim is to ensure that dispute resolution is delivered with the necessary knowledge and skills, in a fair way, and to ensure supervision according to relevant criteria by State authorities.

13. An integral treatment of dispute resolution and redress ensures that consumer disputes are dealt with effectively while consumer interests are adequately protected. According to one study, designers and operators of consumer dispute resolution systems “recognize that consumer dispute resolution is at least as much about market regulation as it is about dispute resolution”, fulfilling additional important functions related to consumer advice, data aggregation and dissemination and market behaviour improvement.<sup>14</sup> Further, there is at present a normative scepticism, involving the desire to move away from judicial redress towards out-of-court dispute resolution mechanisms, which reinforces the need to maintain a holistic approach to the different avenues available to consumers to access dispute resolution and obtain redress.<sup>15</sup>

14. Dispute resolution and redress can contribute to fostering consumer trust and building more competitive markets. The European Commission estimates that well-functioning and transparent alternative consumer dispute resolution could save an annual €22.5 billion, or 0.19 per cent of the gross domestic product of the European Union.<sup>16</sup>

## II. Dispute resolution and redress: Avenues for delivery

15. Consumers may make complaints for various reasons (box 2). The UNCTAD *Manual on Consumer Protection* identifies the following pathways for delivering consumer dispute resolution and redress: courts, collective redress, public regulatory and enforcement action, ombudspersons, alternative dispute resolution, online dispute resolution and business customer care and complaint functions.

### Box 2

#### Why consumers make complaints

Consumers may make complaints for the following reasons:

- (a) The need to resolve a problem such as the following:
  - (i) Unprofessional service (30 per cent of complaints): More likely in public sectors (40 per cent) than regulated (24 per cent) and non-regulated sectors (28 per cent);
  - (ii) Product or service not up to standard (25 per cent): More likely in non-regulated sectors (32 per cent) than regulated (22 per cent) and public sectors (21 per cent);
  - (iii) Poor information provided (19 per cent): More likely in public sectors (26 per cent) than non-regulated (15 per cent) and regulated sectors (16 per cent);
  - (iv) Problems with charges, fees or bills (18 per cent): More likely in regulated sectors (27 per cent) than non-regulated (10 per cent) and public sectors (11 per cent);

<sup>13</sup> European Commission, 1998, Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, 30 March; European Commission, 2013, Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the member States concerning violations of rights granted under Union law, 11 June.

<sup>14</sup> C Hodges, 2016, Consumer redress: Implementing the vision, In: P Cortés, *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford University Press, Oxford: 351–369.

<sup>15</sup> S Prince, 2016, Access to court?, In: Cortés: 79–100.

<sup>16</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524571549264&uri=CELEX:52011SC1408>.

(b) The desire to obtain an apology or reassurance that steps will be taken to prevent recurrence, in order to prevent the situation happening to others.

*Source:* Citizens Advice, 2016, *Understanding Consumer Experiences of Complaint Handling*, available at <https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/understanding-consumer-experiences-of-complaint-handling/>

## A. Courts

16. Access by consumers to judicial redress is common to all UNCTAD member States.<sup>17</sup> The traditional adversarial system has evolved in the light of the specificities of consumer disputes. First, consumer protection law presumes an imbalance that favours businesses over consumers. The information and bargaining power asymmetry between consumers and businesses justifies supplementing traditional civil court procedures with specific models to provide consumers with a level playing field for settling disputes and defending their rights. Second, 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, serve to dissuade consumers from undertaking ordinary judicial claims.

17. Some countries have introduced palliative measures to make judicial proceedings more consumer friendly. For example, Germany has widely available insurance for legal claims and provides free legal aid to consumers. Other countries have established small claims tribunals for claims of low financial value. For cross-border claims, the European Union has introduced a small claims procedure enforceable through the national court of the consumer's country of residence.

## B. Collective redress

18. Since individual consumer claims generally have a low value, aggregation into class or collective action can provide significant avenues of redress for consumers. Collective redress can arise when "consumers who have suffered the same or very similar loss or harm caused by the same trader come together and seek redress in court as a group, in one legal claim".<sup>18</sup> In this note, collective redress is considered similar to collective litigation, although it has been noted that redress is a goal, litigation a technique and dispute resolution a regulation.<sup>19</sup> The use of class action as a form of collective redress is established in, for example, Chile and the United States, as it empowers consumers and evens the playing field in their disputes with better funded and superiorly situated fraudulent businesses.<sup>20</sup> This trend has been slowly introduced in Europe, where admissibility criteria are stricter.<sup>21</sup>

19. As recommended in the guidelines for consumer protection, a growing number of countries are granting consumer organizations locus standi to defend not only individual claims but also collective ones (para. 37).<sup>22</sup> Many countries allow representative claims by consumer associations for injunctions to protect collective consumer interests, yet the use of collective damages claims by consumer organizations is less widespread. For example,

<sup>17</sup> TD/B/C.I/CLP/23.

<sup>18</sup> The European Consumer Organization, 2017, *European Collective Redress: What is the European Union Waiting For?* Brussels.

<sup>19</sup> C Hodges, 2014, Collective redress: A breakthrough or a damp squib? *Journal of Consumer Policy*, 37: 67–89.

<sup>20</sup> Teller v. Bill Hayes Limited, 1995.

<sup>21</sup> The European Consumer Organization, 2017, *Where Does Collective Redress for Individual Damages Exist?* Brussels.

<sup>22</sup> UNCTAD, 2012, *Revisión de las Directrices de Naciones Unidas sobre Protección al Consumidor*, presented at the second International Consumer Protection Forum, 11 and 12 November, Lima.

Algeria, China, France, Morocco and Peru, among others, require specific accreditation from government authorities for consumer organizations to act.

20. A significant difference among collective redress models is in the method of participation of consumers in collective claims. The United States has an opt-out model, whereby consumers are part of a collective action unless they take specific steps to exclude themselves.<sup>23</sup> The European Union has an opt-in model, whereby consumers must take specific steps to join a collective action.<sup>24</sup> Chile allows consumers to either opt in before proceedings begin, opt out within 30 days after the second call for affected consumers or wait until a decision is final to benefit from its effects.

### **C. Public regulatory and enforcement action**

21. An effective technique for delivering redress to consumers is to empower public enforcement authorities with the possibility of collective regulatory redress, whereby they can order or seek a court to order redress.<sup>25</sup> Most countries in Latin America, as well as some countries in Asia, Africa and Western Asia allow for corrective and complementary measures to obtain redress for consumers either directly, by administrative procedure, or before a judge, through an injunction.<sup>26</sup> For example, in 2017, enforcement action by the Federal Trade Commission of the United States resulted in more than \$6.4 billion in consumer refunds through judicial settlements, mainly from the settlement of two cases.<sup>27</sup>

22. Some countries provide for dispute resolution, such as through conciliation, coupled with enforcement. For example, in the context of government-sponsored conciliation in Mexico, which is compulsory for businesses, if a business departs from its legal obligations, the government mediator can refer the case to the agency's enforcement branch for disciplinary measures to be undertaken. In practice, this means that businesses participating in conciliation have a significant incentive to consistently comply with the minimum legal requirements, yielding satisfactory results for consumers.

### **D. Ombudspersons**

23. Countries in Northern Europe pioneered the modern ombudsperson concept, intended to safeguard citizens with regard to services provided by Governments. Ombudsperson schemes in Latin America involve formal and informal investigation and adjudication by a case handler from an independent public authority, who investigates complaints and proposes or imposes a solution. One of the strengths of ombudspersons is that they are better informed and more aware of market conditions and consumer rights than most ordinary judges.<sup>28</sup> One successful example of such schemes is that of the financial ombudsman services of the United Kingdom of Great Britain and Northern Ireland.

### **E. Alternative dispute resolution**

24. In line with the recommendation in the guidelines for consumer protection to provide access to remedies that do not impose costs, delays or undue burdens on the economic value at stake or on society and businesses (para. 37), policymakers have

<sup>23</sup> Organization for Economic Cooperation and Development, 2007.

<sup>24</sup> Ibid; European Commission, 2013, Communication on towards a European horizontal framework for collective redress, 11 June.

<sup>25</sup> C Hodges, 2015, Mass collective redress: Consumer alternative dispute resolution and regulatory techniques, *European Review of Private Law*, 23(5): 829–874.

<sup>26</sup> UNCTAD, 2012. Examples include Argentina, Colombia, Costa Rica, the Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Honduras, Nicaragua, Oman, Panama, Paraguay, Peru, the Plurinational State of Bolivia, South Africa, Sri Lanka, Swaziland, the United Republic of Tanzania, Uruguay and Zambia.

<sup>27</sup> Contribution from the United States Federal Trade Commission to UNCTAD questionnaire.

<sup>28</sup> C Hodges, 2016, p. 364.

developed alternative dispute resolution, whereby an impartial third party, whether public or private, intervenes to solve a dispute between consumers and businesses. Alternative dispute resolution systems are, in most instances, designed to settle disputes, not to provide redress or compensation for consumers, which is a power usually reserved for judicial authorities.

25. As noted in one study, alternative dispute resolution systems increase access to justice and the application of the law whenever a person uses such a system to raise a consumer to business claim, “rather than do nothing about it because they do not have time or think that a court or a lawyer would just not be worth it”.<sup>29</sup> Since consumers are generally discouraged from pursuing judicial procedures, which can be expensive, formal and slow in reaching decisions on small value claims, one study states that the word alternative in the context of consumer to business disputes is becoming progressively superfluous, as, in many instances, consumers simply do not contemplate the courts as a forum to obtain redress.<sup>30</sup>

26. The European Union directive of 21 May 2013 on alternative dispute resolution for consumer disputes contains mandatory requirements, implementation of which is monitored by public supervisory bodies. First, the alternative dispute resolution entity must possess the necessary expertise and be independent and impartial. Second, the process must be accessible, transparent, fair and effective. Third, consumers must have the liberty to consent to alternative dispute resolution. Finally, alternative dispute resolution procedures may not deprive consumers of their rights or produce situations where consumer rights are violated. Each of these elements involves detailed and concrete requirements for the alternative dispute resolution entity and the natural person in charge of alternative dispute resolution.

27. There are three traditional models of alternative dispute resolution, depending on the role of the impartial third party. In mediation, the alternative dispute resolution entity facilitates a space for parties to exchange information and guides them towards a solution. In conciliation, the entity is also responsible for proposing a solution. In arbitration, the entity has the power to impose a solution, which can only be appealed on strict conditions, usually on grounds of nullity.

28. Another key distinction between various alternative dispute resolution mechanisms is the level of voluntariness, that is, whether businesses are free to participate in the resolution and whether the resulting decision is binding upon the parties. Countries in Latin America have a long tradition of offering State-sponsored mediation services for consumers, which are voluntary for consumers but not for businesses, except in cases of online dispute resolution, which are always voluntary for businesses. National enforcement agencies chair mediation sessions and ensure that legal obligations are respected by traders. The results of mediation can be directly enforceable. Some countries in Europe have established public and private mediation and conciliation services that are voluntary for consumers and businesses; the resulting decisions are not binding upon the parties. In most instances, if the result of mediation and conciliation is binding, it can be the object of judicial appeal. Chile has developed collective mediation, led by its consumer protection agency.

29. Recourse to arbitration, once agreed by the parties, is no longer voluntary, which may jeopardize ultimate access to courts by consumers. In the United States, arbitration agreements prevail over judicial avenues for consumers to obtain redress, such as in the case of *AT&T Mobility v. Concepcion*, even when such agreements are part of general contract clauses, and thus in place before a dispute arises. The Code of Civil Procedure (2005) of Germany allows for pre-dispute arbitral agreements only if consumer consent is unequivocal, that is, if it is presented in writing in a separate document with the sole purpose of submitting a dispute for arbitration (section 1031 (3)). The Arbitration Act (1999) of Sweden states that pre-dispute arbitration clauses may not be invoked (section 6).

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<sup>29</sup> Ibid, p. 360.

<sup>30</sup> Cortés, 2016, p. 2.

30. Another important element in the characterization of alternative dispute resolution is the source of funding. Countries in Latin America and some countries in Europe<sup>31</sup> have established a State-sponsored system covering all sectors, while the United States and some other countries in Europe<sup>32</sup> have favoured privately funded alternative dispute resolution mechanisms with a sectoral focus. To avoid the moral hazard of industry-funded alternative dispute resolution, most countries have put in place a system for the accreditation of entities, either directly monitored by the State or by a reputable private institution, such as the Better Business Bureau in North America.

31. To ensure the adequate monitoring of market practices, it is common to require alternative dispute resolution entities to publish annual activity reports, which are of special interest to government policymakers and enforcers in devising consumer policies or monitoring business practices. Privately administered alternative dispute resolution systems are usually subject to stricter scrutiny by public authorities, to ensure transparency, non-discriminatory practices, accountability and procedural fairness, in particular for consumers.

## F. Online dispute resolution

32. Online dispute resolution consists of mechanisms for resolving disputes facilitated by the use of electronic communications and other information and communications technology,<sup>33</sup> and has been on the rise as a means to boost consumer trust in electronic commerce, particularly cross-border commerce. Such resolution can take different forms, depending on the degree of automatization.<sup>34</sup> The simplest mechanisms replicate face-to-face mediation by electronic means, using written forms or telephone or videoconferencing. Some software facilitates negotiations through standardized communications, which facilitate settlement. The most sophisticated and controversial mechanisms, such as those of Smartsettle, deliver predictive justice, in which the platform factors the positions and interests of the parties using algorithms and, based on precedent, proposes a solution without human interaction.

33. Online dispute resolution systems were first developed by online platforms, such as eBay and PayPal, that wished to increase the level of consumer satisfaction with their marketplaces. Such platforms manage more than 60 million disputes annually, compared with, for example, nearly 300,000 in the court system of the United States.<sup>35</sup> Other businesses providing online dispute resolution services have recently emerged, such as Modria, Resolver, Smartsettle, Virtual Courthouse and Youstice. There is growing concern over the need to supervise private online dispute resolution platforms, as consumers may more easily be misled regarding their procedural and substantive rights, and this has led to closer public oversight in recent years.

34. States have invested significant efforts in developing online dispute resolution mechanisms. Brazil, Colombia and Mexico, for example, have replicated State-sponsored mediation services in online contexts that provide for the accessible and speedy resolution of both online and offline disputes, based on voluntary participation by businesses. Following the issuance of the European Union regulation of 21 May 2013 on online dispute resolution for consumer disputes, the European Commission established a European Union-wide online portal for consumer disputes. The Association of Southeast Asian

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<sup>31</sup> Belgium, Bulgaria, Denmark, Greece, Norway, Portugal, Spain and Sweden.

<sup>32</sup> France, Germany, Netherlands and United Kingdom.

<sup>33</sup> A/CN.9/WG.III/XXXII/CRP.3.

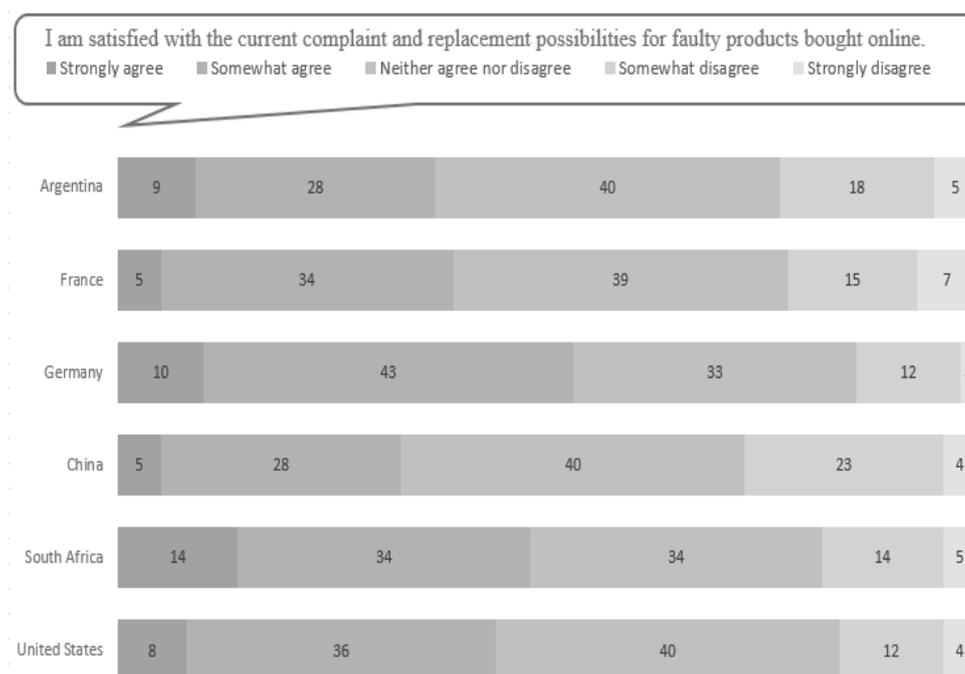
<sup>34</sup> Cortés, 2016.

<sup>35</sup> C Rule, 2012, Quantifying the economic benefits of effective redress: Large [electronic commerce] data sets and the cost-benefit case for investing in dispute resolution, *University of Arkansas at Little Rock Law Review*, 34(4): 767–777.

Nations (ASEAN) plans to set up a regional online dispute resolution platform before 2025.<sup>36</sup>

35. In 2006–2016, Working Group III on Online Dispute Resolution of the United Nations Commission on International Trade Law provided guidance on procedural rules in the establishment of online dispute resolution mechanisms for cross-border low-value business-to-business and business-to-consumer disputes arising from contracts concluded using electronic communications. Due to a lack of international consensus, notes prepared by the Commission did not address issues related to the accreditation of online dispute resolution platforms and neutral third parties, the enforcement of online dispute resolution decisions or the legal principles for dispute resolution. This situation is at odds with the need for legal certainty and predictability in dispute resolution for cross-border electronic commerce to flourish. According to Consumers International, 56 per cent of their member organizations state that online dispute resolution systems are not offered by digital providers in their country and that there is no legal obligation to do so.<sup>37</sup> The figure shows the results related to satisfaction with redress from a survey of online consumer satisfaction.

**Consumers International survey of online consumers**



Source: Institute for Consumer Policy, 2017, *Indicators of Consumer Protection and Empowerment in the Digital World*, Berlin.

**G. Business customer care and complaint functions**

36. Businesses must abide by consumer protection laws, which are enforced by government authorities by, inter alia, receiving and acting upon consumer complaints. If breaches of consumer protection law are not at stake, the guidelines for consumer protection recommend that Member States should encourage businesses to resolve consumer disputes in an informal manner and to establish voluntary mechanisms that can provide assistance to consumers (para. 38). They also recommend that Member States should cooperate with businesses and consumer groups to increase understanding of how to avoid disputes (para. 41), and recommend that businesses should make available

<sup>36</sup> ASEAN, 2016, The ASEAN strategic action plan for consumer protection 2016–2025: Meeting The challenges of a people-centred ASEAN beyond 2015.

<sup>37</sup> Consumers International, 2017, World Consumer Rights Day briefing: Redress – building a digital world consumers can trust, Campaign pack.

complaints-handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy and effective dispute resolution without unnecessary costs or burdens and that businesses should consider subscribing to domestic and international standards pertaining to internal complaints handling, alternative dispute resolution services and customer satisfaction codes (para. 11 (f)).

37. In highly competitive markets in which businesses need to maintain a good reputation, it is in their interest to invest in customer care services that may provide advisory services to customers. Standard 10002 on quality management – customer satisfaction of the International Organization for Standardization contains good practices recommendations on communications; the receipt, tracking, acknowledgement, initial assessment, investigation of and response to complaints; communication of a decision; and the closing of complaints.

38. Although of a different legal nature than dispute resolution and redress, charge-back and escrow mechanisms are highly effective in providing consumers with immediate relief. Charge-back is a mechanism whereby consumers are able to reverse credit card transactions if they experience undue harm from a business. Escrow is a payment option, used for example in China through Alipay, that holds back consumer deposits from businesses until consumers receive the goods or services without opposition.<sup>38</sup> Such systems are not dispute resolution mechanisms in themselves, yet provide consumers with a more favourable position when a dispute arises; should dispute resolution procedures ensue, the funds remain in the possession of consumers instead of businesses.

### III. The international dimension

39. There are various ongoing initiatives at the international level to evaluate and measure dispute resolution and redress systems, which use different methodologies, yet always place consumer satisfaction at the forefront. For example, the UNCTAD research partnership platform on competition and consumer protection hosts an ongoing project on best practices for consumer redress aimed at analysing relevant and effective redress tools as best practice models and synthesizing an approach for a cross-border consumer redress platform.<sup>39</sup> The European Commission provides regular consumer market scoreboards, market monitoring, consumer and retailer surveys, market studies, behavioural research and consumer complaint statistics for evidence-based consumer policy. Based on the guidelines for consumer protection, one study proposes basic principles to ensure due process in consumer disputes, and the Institute for Consumer Policy has developed indicators for dispute resolution and redress.<sup>40</sup>

40. The liberalization of international trade has brought consumers to the forefront of cross-border operations. The growth of cross-border business–consumer trade, enabled by the digital revolution, has led to an increased need for satisfactory cross-border dispute resolution and redress mechanisms. However, countries have different frameworks for consumer dispute resolution and redress, which is far from optimal for promoting consumer trust in cross-border trade. Notes by the United Nations Commission on International Trade Law provide a good starting point for a solution in this regard. However, States need to find innovative ways to increase legal certainty and boost consumer confidence in international trade. The guidelines for consumer protection (paras. 37, 39 and 89) and the Organization for Economic Cooperation and Development *Recommendation on Consumer Dispute Resolution and Redress*, which stress the need to enhance the effectiveness of cross-border dispute resolution and international judicial and inter-agency cooperation in the recovery of foreign assets and the enforcement of decisions in cross-border cases, can also be useful in

<sup>38</sup> Y Yu and M Shen, 2015, Consumer protection as the open sesame that allows Alibaba to crush the forty thieves, *Journal of Antitrust Enforcement*, 3(1): 228–241.

<sup>39</sup> See <http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Consumer-Redress.aspx>.

<sup>40</sup> Y Yu and DJ Galligan, 2016, Due process of consumer protection: A study of the united nations guidelines [for] consumer protection, available at [https://www.law.ox.ac.uk/sites/files/oxlaw/oxford\\_ungcp\\_due\\_process\\_w\\_fljs\\_logo.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oxford_ungcp_due_process_w_fljs_logo.pdf); Institute for Consumer Policy, 2017.

this regard. The econsumer portal, an initiative of the International Consumer Protection and Enforcement Network for cross-border fraud complaints and assistance, provides guidance on the use of alternative and online dispute resolution for cross-border disputes and can provide valuable intelligence for evidence-based policymaking in this area. Similarly, the European Consumer Centres Network provides information, advice and assistance directly to consumers for intra-European Union consumer disputes, which can also inform policy decisions. Similarly, Argentina, Brazil and the European Union have introduced rules of private international law to specify the applicable laws and jurisdictions in consumer disputes. The General Assembly, in resolution 70/186, recognizes that such issues may be addressed most effectively through international coordination and partnership.

41. It is desirable to minimize legal barriers for applicants from other countries having recourse to domestic consumer dispute resolution and redress mechanisms.<sup>41</sup> Providing effective consumer dispute resolution and redress is a shared responsibility of Governments, businesses and consumer groups. It is probably one of the most critical investments to make in order to empower consumers in national and international marketplaces and thereby contribute to the achievement of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.

#### IV. Policy options

42. There is a trend to favour alternative dispute resolution for consumer disputes rather than judicial mechanisms. Yet, however slow and resource intensive, judicial redress is the avenue that offers the greatest respect for the rule of law and due process and that is capable of imposing damages for undue consumer harm. It is also the favoured mechanism to provide collective redress for consumers. In addition, judicial redress allows for enforcement, as courts have powers to impose sanctions on non-compliant businesses. As noted in one study, alternative dispute resolution is not designed to enforce consumer rights but simply to settle disputes.<sup>42</sup> Increasing the effectiveness and accessibility of courts is necessary to enhance consumer welfare in the marketplace and ensure better market surveillance.

43. In the light of the guidelines for consumer protection, the *Manual on Consumer Protection* and inputs received from member States, quality criteria against which consumer dispute resolution and redress may be evaluated and regulated may be delineated, as follows:

(a) Accessibility: Dispute resolution and redress should be of easy access and inexpensive, or even free, for consumers, in accordance with the economic value of the claim in question, and should waive the requirement for legal representation and allow consumer groups to represent consumer interests;

(b) Awareness: Governments, businesses and consumer groups should strive to increase consumer awareness of dispute resolution and redress through education and information programmes;

(c) Expertise, independence and impartiality of neutral third parties: Dispute resolution and redress entities, whether public or private, should be experts, should be independent and should be held to a high standard of ethical conduct;

(d) Transparency: Procedures should be transparent, including rules of procedure and reasoned decisions, in order that parties, policymakers, enforcers and other interested stakeholders can assess the fundamental fairness of dispute resolution and redress;

(e) Effectiveness, expeditiousness and enforceability: These criteria should include online accessibility, prompt notification to the parties by the dispute resolution and

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<sup>41</sup> Organization for Economic Cooperation and Development, 2007.

<sup>42</sup> Cortés, 2016, p. 3.

redress entity, outcome within a short period, such as 90 days, and bestowal with direct enforceability;

(f) Fairness: There should be a reasonable possibility for parties to express their views, an opportunity to withdraw and due process;

(g) Voluntariness: Solutions should only be binding if the parties are so informed in advance and if they consent in full knowledge of the facts and, in some instances, redress systems should be compulsory for businesses, at least in some areas, such as key utility services and banking services, which may prove beneficial for enhancing access to dispute resolution and redress;

(h) Legality: The law should be strictly respected in cases of imposed solutions, there should be rules on the conflict of law and jurisdiction, referral to judicial bodies for clarification of points of law should be allowed and there should be an obligation to respect consumer rights at all times;

(i) Coverage: Dispute resolution and redress systems should be able to cover all sectors in a systematic way, to increase awareness, certainty and understanding;

(j) Special consideration for the needs of vulnerable and disadvantaged consumers: Such criteria should include special education and information programmes and tailored advisory services;<sup>43</sup>

(k) Accountability: Regulators and enforcers should have access to aggregated data on dispute resolution and redress, especially from alternative dispute resolution mechanisms, to ensure evidence-based policymaking and adequate market surveillance.

## V. Questions for discussion

44. The third session of the Intergovernmental Group of Experts on Consumer Protection Law and Policy may wish to consider the following questions for discussion:

(a) How can judicial redress procedures be rendered more suitable for consumer disputes?

(b) What are the key characteristics of effective out-of-court and/or alternative dispute resolution?

(c) What avenues are there for participation by businesses in dispute resolution and redress?

(d) How might UNCTAD contribute to consumer dispute resolution and redress?

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<sup>43</sup> See, for example, the Common Ground project of the United States on enhancing the consumer protection expertise of legal practitioners that helps low-income individuals (<https://www.consumer.ftc.gov/blog/2015/07/id-thank>).