
Intergovernmental Group of Experts on Consumer Law and Policy
(IGE Consumer)

3rd SESSION

9-10 July 2018

Room XVII, Palais des Nations, Geneva

Tuesday, 10 July 2018

Morning Session

Agenda Item 3d. Dispute resolution and redress – Contribution 1

Contribution by

Federal Trade Commission (FTC)

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**Questionnaire for UNCTAD secretariat note on: Dispute Resolution and Redress
IGE on Consumer Protection Law and Policy July 2018**

Background

The second session of the Intergovernmental Group of Experts on Consumer Protection Law and Policy requested "the UNCTAD secretariat, in accordance with guideline 97(b) to prepare reports and studies, taking into account the input from member States and other relevant stakeholders, for the third session of the IGE on the following topics:

a. Dispute resolution and redress"¹

The work of UNCTAD relating to dispute resolution and redress comprises:

- [TD/B/C.I/CLP/23](#): Implementation report on the United Nations Guidelines for Consumer Protection (2013): paras. 25 - 27
- Report on modalities for the revision of the United Nations Guidelines for Consumer Protection (2015): paras. 54(financial services), 67 (other issues), 82 (implementation)
- [A/RES/70/186](#) 22 December 2015 on Consumer Protection:
- [United Nations Guidelines for Consumer Protection](#): 5(g); 11(f) 15; 14(g); Section F, 37-41; 44(d), 77

The UNCTAD secretariat will produce a background note to serve as basis for discussions at the third session of the IGE on consumer protection.

Objective

The objective of this questionnaire is to feed into the background note which will provide a general and global overview of the state of dispute resolution and redress in light of the revised United Nations Guidelines for Consumer Protection (UNGCP). The note will contain proposed questions for discussions as well as recommendations for follow-up.

Questionnaire

The UNCTAD secretariat is circulating the present questionnaire to officially designated contact points for the purpose of the UNGCP and relevant stakeholders participating in the IGE. The answers received will not be made public unless requested by the interested respondent and will be attributed to the institution.

Respondents should answer to their best knowledge, answers will not be considered official positions.

¹ [TD/B/C.I/CPLP/9](#): Report of the Intergovernmental Group of Experts on Consumer Protection Law and Policy on its second session

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Question 1: What legal avenues do consumers have to obtain redress? And which ones are the most effective?

Legal Avenues for Redress

There are many ways U.S. consumers can seek monetary redress in commercial disputes. These remedies are provided by federal and state laws, as well as through voluntary self-regulatory and professional licensing organizations. We have divided them into four broad categories: (1) informal; (ii) voluntary; (iii) statutory, and (iv) judicial (and quasi-judicial) proceedings.

(i) Informal: Consumers often first seek informal resolution by directly contacting the business. The FTC provides guidance for consumers who try to dispute their complaints directly with the business. This guidance includes, for example, advice on how to write complaint letters. See, <https://www.consumer.ftc.gov/articles/0228-solving-consumer-problems>.

(ii) Voluntary: Many businesses have established their own dispute resolution platforms. For example, Modria, a cloud-based platform, is designed to resolve cross-border disputes through an easily accessible and fair resolution process. Other U.S. companies, such as eBay, PayPal, and some mobile payment platforms and “sharing economy” businesses, use proprietary Online Dispute Resolution (“ODR”) mechanisms in their ecommerce marketplaces.

Additionally, voluntary dispute resolution and redress programs through public or private professional licensing bodies provide an alternative means for a consumer to resolve a dispute with a business. For example, the Better Business Bureau (“BBB”) – a non-profit business-funded organization that has existed since 1912 – provides information on various businesses, gives consumers details on ethical business practices, receives complaints, and facilitates dispute resolution both online and offline. U.S. consumers routinely use the BBB’s established procedures to resolve disputes with businesses. With affiliates in Mexico and Canada, the BBB can help resolve disputes involving businesses and consumers among the three nations. (See www.bbb.org.)

(iii) Statutory: Certain U.S. statutes afford consumers specific dispute resolution and redress rights. One of the most important of these is chargeback rights, which provide consumers with a remedy when the consumer paid for the transaction with a credit card. Under these laws, consumers can dispute any unauthorized or fraudulent use of their credit card account, failure to provide the promised product or to issue a refund, or challenge other instances of billing statement errors with the financial institution that issued the credit account. Resolution may include a refund to the consumer where the consumer’s claim is found to be meritorious. See, The Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* and its implementing Regulation Z, 12 CFR Part 226.

Another federal law provides specific legal dispute resolution standards for warrantors with respect to breaches of warranty issues. Although warrantors are not required to provide access to a dispute

resolution process, when they do offer such recourse, the Magnusson-Moss Warranty Act (which is enforceable by the FTC) requires that the system meet a list of standards, including impartiality, no cost to consumers, and opportunities for each party to present its side of the dispute. 15 U.S.C. §2301, *et seq.* Although the Act encourages non-judicial dispute resolution processes, it also allows consumers to file suit for unresolved warranty problems. An FTC publication spells out how a consumer can seek redress for a product that does not perform in accordance with its warranty. <https://www.consumer.ftc.gov/articles/0252-warranties>.

(iv) Judicial (and Quasi-Judicial) Proceedings: There are several different types of judicial proceedings that may provide consumers with redress, including proceedings in small claims courts, civil actions in state or federal courts, private class action proceedings, and governmental enforcement proceedings. In addition, quasi-judicial proceedings such as arbitration may provide consumers with redress in certain cases.

Small claims courts, which exist in all U.S. states, provide consumers with a method to obtain redress through informal judicial proceedings that do not require legal counsel and have low monetary thresholds. <https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html>. Many of the cases in small claims courts involve consumer disputes.

For disputes involving substantial sums, individuals may choose to sue the business in traditional state or federal courts. In these settings, consumers can rely on common law theories such as breach of contract or on statutory grounds alleging violations of unfair and deceptive practices statutes or more specific consumer laws. For example, the federal Telephone Consumer Protection Act allows consumers to file cases on their own behalf. Sometimes, those courts use alternative dispute resolution procedures, such as mediation or arbitration, to resolve B2C disputes. (See also response to Q2, below.)

A private class action can be an appropriate avenue for redress where the dispute involves common harms and facts among a group of consumers. Although U.S. courts have found that the Federal Arbitration Act limits class actions when the consumer contract mandates dispute resolution by arbitration, see, *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), there remain other circumstances that are not constrained by contractual restrictions. Class actions can result in consumer refunds, rebates and other benefits. Such cases are often resolved through settlements. See, <https://www.classaction.com/settlements/>.

In some civil consumer cases, legal services groups provide low or no-cost representation for low-income consumers who want to dispute claims with a business. Legal Aid of Northwest Texas, for example, launched an initiative to protect consumers from financial predatory conduct. <https://www.lsc.gov/protecting-consumers-against-financial-predators-texas>. To further assist low-income consumers, the FTC initiated a project called “Common Ground.” This project enhances the consumer protection expertise of legal practitioners that helps low-income individuals. See, <https://www.consumer.ftc.gov/blog/2015/07/id-thank>. Through these programs, consumers across the economic spectrum can seek redress.

Additionally, governmental authorities such as the Federal Trade Commission, the Consumer Financial Protection Bureau, the Securities and Exchange Commission or state Attorneys General can provide consumers with monetary redress through law enforcement actions. These agencies bring cases that can provide redress to injured consumers. For example, in fiscal year 2017, FTC cases resulted in more than \$6.4 billion in consumer refunds. Included in these refunds were several significant cases, including the \$6 billion settlement from the Volkswagen Group of America for its deceptive “clean diesel” marketing claims.

<https://www.ftc.gov/system/files/documents/reports/bureau-consumer-protection-office-claims-refunds-annual-report-2017-consumer-refunds-effected-july-redressreportformattedforweb122117.pdf>. The settlements require Volkswagen to pay affected consumers more than \$10 billion to buy back or compensate consumers who choose to have their vehicles repaired. (Notably, the court consolidated the FTC's VW case with a private class action brought on behalf of U.S. purchasers of the "clean diesel" cars.

<http://fortune.com/2016/10/26/settlement-vw-diesel-scandal/>.) Another significant case involved the FTC's suit against multi-level marketing company Herbalife. In this settlement, Herbalife was required to refund more than \$200 million to injured consumers. <https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations>.

Other U.S. agencies have also successfully obtained redress for serious monetary consumer harms. For example, the Consumer Financial Protection Bureau obtained a settlement against Wells Fargo Bank for opening deposit and credit card accounts without consumers' knowledge or consent. In addition to assessing a fine, the settlement required Wells Fargo to pay full restitution to all of the consumers who were harmed by the bank's actions. <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts>.

Question 2: What legal avenues do consumers have to access dispute resolution? And which ones are the most effective? Legal Avenues for Dispute Resolution

The array of redress options described in Question 1 are also available for other types of dispute resolution.

Question 3: What are the key characteristics for an effective out-of-court/alternative dispute resolution mechanism?

Alternative Dispute Resolution (ADR) is widely considered an efficient mechanism for resolving consumer disputes, including cross-border disputes. The FTC views ADR as a collaborative and cost-effective approach to dispute resolution in many consumer matters. *See, for example,* <https://www.consumer.ftc.gov/articles/0162-alternative-dispute-resolution>. In the United States, state governments, rather than the federal government, typically provide government-sanctioned frameworks for dispute resolution between consumers and businesses. Many states' attorneys general have programs that provide for arbitration or mediation. The exact details vary by state.

Although the FTC does not provide ADR directly, the FTC has identified some of the key characteristics of effective ADR mechanisms. An FTC staff report on debt collection describes several attributes of an effective arbitration system.

<https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf>.

These elements are "[f]irst, the arbitration forum and the arbitrator cannot be biased or appear to be biased. Second, consumers must receive adequate notice of the arbitration proceeding and be able to participate in it at a reasonable cost. Third, the arbitrator must issue a reasoned decision so that the parties understand the basis for the arbitration award, and parties must have an adequate opportunity to enforce or challenge the award. Finally, the arbitration process and the arbitration itself must be transparent, so that the parties and public can assess the fundamental fairness of arbitration forums and arbitrators." Report at page 46.

At the time of the FTC's staff report on debt collection, the internet was not widely used for dispute resolution. That landscape has changed considerably, and many ADR systems now use online dispute resolution tools. As discussed in Q1, some online vendors have implemented their own ODR systems or use existing systems. *See, for example,* <https://www.virtualcourthouse.com/> and <http://odr.info/provider-list/>. These systems have the benefit of ease of use, accessibility, and the potential to provide recovery in a cross-border transaction. Through its support of www.econsumer.gov, a portal for cross-border fraud complaints and assistance, the FTC provides guidance on the use of A/ODR for cross-border disputes.

The Magnuson-Moss Act, which was detailed in Q1, provides a redress mechanism for breach of warranty in certain circumstances. The Rule also sets forth some of the key aspects of an effective ADR system. These include providing a system that is free of charge to consumers, that decisions be issued within 40 days, that the system follows written procedures, and that the system be audited annually for compliance with the law.

In addition to its value in the context of warranty disputes, arbitration has been used successfully for other types of consumer disputes. Arbitration is widely used as an alternative or complement to formal court proceedings. For example, U.S. law has protocols for referrals of court cases to arbitration, often allowing for a streamlined, efficient, and prompt resolution of the dispute. *See* 28 U.S. C. § 654, establishing the right of a U.S. District Court to refer a civil case to arbitration upon consent of the parties.

Arbitration proceedings can be governed by rules established by the American Arbitration Association, which set guidelines for the appointment of the arbitrator – a neutral third party decision maker – as well as timing, procedures, and details of the final award. <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf>.

One source of “best practices” for dispute resolution is the Organisation for Economic Cooperation and Development’s 2007 Recommendation on consumer redress and dispute resolution. The Recommendation offers a framework for governments and businesses to help both individuals and groups of consumers, and suggests that national consumer protection agencies should have the legal authority to seek redress for consumers. The Recommendation also contains suggested principles for redress in domestic and cross-border disputes, including brick and mortar and online commerce. *See* <http://www.oecd.org/sti/consumer/oecdrecommendationonconsumerdisputeresolutionandredress.htm>.

Question 4: Summarize (include link if possible) the most salient court decisions regarding consumer issues

Courts have widely recognized the importance of meaningful redress for consumers. Courts have affirmed this principle in the context of state laws that allow private individuals to bring cases to enforce an important right affecting the public interest. Generally, referred to as private attorney general laws, these laws enable individuals to seek redress and injunctive relief against entities that violate state consumer protection laws. (*See, for example,* Cal. Code of Civ. Proc. 1021.5). In New York State, a private party can bring a case to enforce the state law that prohibits unfair and deceptive acts and practices. *See, Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (N.Y. 2000), and NY. GBL § 349(h) and N.Y. GBL § 350-e. This provision is intended to “empower consumers; to even the playing field in their disputes with better funded and superiorly situated fraudulent business.” *Teller*

v. Bill Hayes, Ltd., 630 N.Y.S.2d 769, 744 (2d Dep't 1995). Some of these statutes provide for an award of legal fees to the prevailing plaintiffs to provide litigants with greater incentives to bring such cases. Many other states have similar laws. See DEE PRIGDEN, CONSUMER PROTECTION AND THE LAW § 5:9 (2002).

As discussed earlier in response to Q1, in recent years courts have limited the availability of consumer class actions, an important source of redress for low value claims. In AT&T Mobile v. Concepcion, the Supreme Court concluded that the Federal Arbitration Act favored arbitration and restricted the use of class actions when the consumer was a party to a contract that required arbitration. See *also* American Express Co. v. Italian Colours Restaurant, 559 U. S. 1103 (2010), where the Supreme Court reversed a mid-level appeals court that found a class action waiver unenforceable where the respondents faced prohibitive costs if forced to arbitrate. The Supreme Court relied on the class action waiver in the contract that bound the parties to resolve all disputes through arbitration.

As noted in Q1, the FTC 2017 Annual Highlights report contains a summary of some of the most salient FTC court cases. <https://www.ftc.gov/system/files/documents/reports/bureau-consumer-protection-office-claims-refunds-annual-report-2017-consumer-refunds-effected-july/redressreportformattedforweb122117.pdf>.

**Cuestionario para la nota del secretariado de la UNCTAD sobre: Solución de controversias y
compensación
GIE de leyes y políticas de Protección del Consumidor julio 2018**

Contexto

La segunda sesión del Grupo intergubernamental de expertos en leyes y políticas de protección del consumidor solicitó a la secretaría de la UNCTAD "de acuerdo con la directriz 97(b), preparar informes y estudios, teniendo en cuenta la aportación de los Estados miembros otras partes interesadas, para la tercera sesión del GIE sobre los siguientes temas:

a. Solución de controversias y compensación ²

El trabajo de la UNCTAD relativos a la solución de controversias y compensación incluye:

- [TD/B/C.I/CLP/23](#): Informe sobre la implementación de las Directrices de Naciones Unidas para la protección del consumidor (2013): paras. 25 - 27
- Report on modalities for the revision of the United Nations Guidelines for Consumer Protection (2015): paras. 54(financial services), 67 (other issues), 82 (implementation)
- [A/RES/70/186](#) 22 December 2015 sobre Protección del Consumidor:
- [Directrices de Naciones Unidas para la protección del consumidor](#): 5(g); 11(f) 15; 14(g); Section F, 37-41; 44(d), 77

La secretaría de la UNCTAD presentará una nota de antecedentes que servirá de base para los debates en el tercer período de sesiones de la IGE sobre protección del consumidor.

Objetivo

El objetivo de este cuestionario es informar la nota de antecedentes que proporcionará una descripción general y global del estado de la solución de controversias y compensación a la luz de las Directrices de Naciones Unidas para la protección del consumidor (DNUPC). La nota contendrá las preguntas propuestas para las discusiones, así como las recomendaciones para el seguimiento.

Cuestionario

La secretaría de la UNCTAD distribuye el presente cuestionario a los puntos de contacto oficialmente designados a los efectos de las DNUPC y las partes interesadas pertinentes que participan en el IGE. Las respuestas recibidas no se harán públicas a menos que lo solicite el encuestado interesado y se atribuirán a la institución.

Los encuestados deben responder según su mejor conocimiento, las respuestas no se considerarán cargos oficiales.

² [TD/B/C.I/CPLP/9](#): Report of the Intergovernmental Group of Experts on Consumer Protection Law and Policy on its second session

Nombre del país:

Nombre de la institución:

Nombre, correo electrónico y teléfono del oficial:

Pregunta 1: ¿Qué avenidas legales tienen los consumidores para obtener compensación? ¿Y cuáles son las más efectivas?

Pregunta 2: ¿Qué avenidas legales tienen los consumidores para acceder a la solución de controversias? ¿Y cuáles son las más efectivas?

Pregunta 3: ¿Cuáles son las características clave para un mecanismo efectivo para la resolución extra-judicial/alterna de controversias?

Pregunta 4: Resuma (incluya enlaces si es posible) las decisiones judiciales más destacadas con respecto a la protección del consumidor

Questionnaire pour la note du secrétariat de la CNUCED sur: Règlement des litiges et réparation GIE du droit et de la politique de la protection du consommateur juillet 2018
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Contexte

La deuxième séance du Groupe intergouvernemental d'experts du droit et de la politique de la protection du consommateur demanda au secrétariat de la CNUCED "conformément au principe directeur 97 (b), de préparer des rapports et des études, en tenant compte des contributions des États membres et d'autres parties prenantes concernées, pour la troisième session de l'IGE sur les sujets suivants:

a. Règlement des litiges et réparation "³

Le travail de la CNUCED sur le règlement des litiges et la réparation comprend:

- [TD/B/C.I/CLP/23](#): Implementation report on the United Nations Guidelines for Consumer Protection (2013): paras. 25 - 27
- Rapport sur les modalités pour la révision des principes directeurs des Nations Unies pour la protection du consommateur (2015): paras. 54 (services financiers), 67 (autres sujets), 82 (mise en œuvre)
- [A/RES/70/186](#) 22 décembre 2015 sur la protection du consommateur:
- [Principes directeurs de Nations Unies sur la protection du consommateur](#): 5(g); 11(f) 15; 14(g); Section F, 37-41; 44(d), 77

Le secrétariat de la CNUCED produira une note d'information qui servira de base aux discussions de la troisième session du GIE sur la protection du consommateur.

Objectif

L'objectif de ce questionnaire est d'alimenter la note d'information qui fournira un aperçu général et global de l'état du règlement des litiges et de la réparation à la lumière des Principes directeurs des Nations Unies pour la protection du consommateur (PDNUPC). La note contiendra des questions proposées pour les discussions ainsi que des recommandations pour le suivi.

Questionnaire

Le secrétariat de la CNUCED distribue le présent questionnaire aux points de contact officiellement désignés aux fins des PDNUPC et des parties prenantes participant au GIE. Les réponses reçues ne seront pas rendues publiques sauf sur demande du répondant intéressé et seront attribuées à l'institution.

Les répondants doivent répondre à leur meilleure connaissance, les réponses ne seront pas considérées comme des positions officielles.

³ [TD/B/C.I/CPLP/9](#): Report of the Intergovernmental Group of Experts on Consumer Protection Law and Policy on its second session

Nom du pays:

Nom de la institution:

Nom e-mail et téléphone de l'officier répondant:

Question 1: Quelles voies juridiques les consommateurs ont-ils pour obtenir réparation? Et lesquels sont les plus efficaces?

Question 2: Quelles voies juridiques les consommateurs ont-ils pour accéder au règlement des litiges? Et lesquels sont les plus efficaces?

Question 3: Quelles sont les principales caractéristiques d'un mécanisme efficace de règlement extrajudiciaire / alternatif des litiges?

Question 4: Résumez (incluez si possible un lien) les décisions de justice les plus saillantes concernant les questions de la protection du consommateur