Consumer Trust in the Digital Environment: Dispute Prevention and Alternative Dispute Resolution

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Abstract

[Purpose] The objective of this paper is to study alternative dispute resolution mechanisms in both the electronic contracting of goods and/or services and interactive advertising.
[Methodology/Approach/Design] The Spanish and European regulations will be analyzed in terms of regulation and self-regulation mechanisms. Self-regulation instruments are a suitable complement to current legal regulations.
[Findings] Although disputes that may arise between consumers and businesses can be settled in court, the circumstances of cases involving e-commerce and interactive advertising may determine that the use of out-of-court instruments is appropriate. In this sense, self-regulation systems promote conflict prevention. In the event that it arises, it is about reaching a faster resolution than the courts of justice, cheaper and carried out by specialists in the matter.
[Practical Implications] The implications of this investigation may be applicable to transactions of goods and services in general, to civil society and to the public sector.
[Originality] This investigation demonstrates the convenience and significance of considering out-of-court dispute resolution mechanisms over conventional means, both in Spain and in the European Union. The self-regulation instruments are based on a Code of Conduct and an impartial and independent control body that applies it. Normally, codes of conduct are based on the application of different instruments for extrajudicial conflict resolution.

Keywords: Self-Regulation. e-Commerce. Conflicts. Alternative Dispute Resolution.

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INTRODUCTION

Since the dawn of humanity, conflicts between men and women have always been present. The purpose of the law is to resolve these disputes (LUNA SERRANO, 2001), providing the subjects involved in them with adequate means of resolution (VIOLA DEMESTRE, 2003). Accordingly, as doctrine states (DÍEZ-PICAZO & PONCE DE LEÓN, 1957), the science of law is a science of resolving disputes. A dispute is a pathological legal phenomenon, and law is the science or art of remedying disputes.

In recent times, the resolution of intersubjective conflicts seemed to be primarily the domain of the courts and tribunals of the state. Nonetheless, the state itself recognizes alternative channels to the courts, which should be interpreted as means of resolving disputes based on the freedom of the individual and on the possibility of the individual themselves choosing—among the different options available—how to satisfy their own interests and needs.

As a consequence of electronic contracting and interactive advertising, as in the case of commercial transactions that take place in the physical world, numerous disputes may arise between consumers or users and businesses (KATSH & RIFKIN, 2001; KAUFMANN-KOHLER & SCHULTZ, 2004; HÖRNLE, 2019). Such disagreements could be resolved through a variety of means, most notably in court (DE MIGUEL ASENSIO, 2008) and out of court, the latter involving negotiation instruments established by the company itself, one of the most paradigmatic examples of which is customer service.

Out-of-court dispute resolution mechanisms—hereinafter MERCs, for its initials in Spanish—are, in contrast to the courts, the most appropriate mechanisms for settling disputes arising in matters of private law and particularly in matters relating to e-commerce. Nonetheless, we must move forward from the "consecration" of out-of-court dispute resolution instruments to the reality of their practice; we can agree that they are not a panacea, although the overall assessment is positive.

The best way to avoid a conflict is prevention. Although it may seem to be a minor and superfluous issue, this is not the case. It is useful for information society service providers to respect not only the prevailing legislation in their commercial practices but also, in a complementary manner, certain quality criteria—which will be enforceable in the contract, if any, to be concluded—that improve, in a more or less relevant way, the legal regulations. It is particularly beneficial for the consumer when the verification of compliance with those rules—legal and contractual—is carried out by an impartial third party, such as the supervisory bodies of the self-regulation systems in the area of e-commerce, i.e., the MERC

established in the code of conduct (LÓPEZ JIMÉNEZ, VARGAS PORTILLO & DITTMAR, 2020).

The latter procedure represents a competitive advantage for certain companies, generating greater trust for the potential consumer and/or user (PONTE, 2002; SULLIVAN & KIM, 2018; LESTARI, 2019). Indeed, the latter should be aware that if a conflict arises, they will be able to turn to the MERC—independent and impartial—to which the company has voluntarily adhered. It is extremely important for companies to be able to offer tools to consumers and/or users to prevent or resolve any disputes that may arise in electronic transactions, particularly if they are cross-border transactions (STEWART & MATTHEWS, 2002; WAHAB, 2004).

For this reason, tools that consumers can use if they have a complaint—many of them implemented through what are known as codes of conduct—should be enhanced, as only simple, fast and cost-free methods will be able to convince the consumer to assume the risk of noncompliance or faulty execution on the part of the business (BARKATULLAH & DJUMADI, 2018.).

The catalog of MERCs is truly expansive, as are the criteria by which they can be classified. One of the parameters to which doctrine (PIERANI & RUGGIERO, 2002; HÖRNLE, 2003) has turned most frequently for this purpose has been distinguishing between alternative dispute resolution (ADR) and online dispute resolution (ODR), which considers whether they are provided physically or virtually, respectively. We will examine both the current scenario and possible future prospects for each of these MERCs. We have analyzed MERCs according to the formality present in them, as well as the powers or authority of the third party involved in the dispute resolution. We will distinguish between informal alternative mechanisms (analyzing customer service, automated negotiation, assisted negotiation and tools that can be used on the Web—forums, social networks, etc.—where complaints are published, which can have an impact on virtual reputation) and formal alternative mechanisms (a group in which we will examine settlement agreements, conciliation, mediation, arbitration and the Advertising Self-Regulation Jury).

With regard to the use of the term "alternative," it should be emphasized that this adjective, when applied to forms of dispute resolution other than trials, could generate two opposing feelings: first, the feeling of precaution when confronted by a new system that may represent an affront to the system and, second, the feeling that the system is not working properly, for if it were working, there would be no need for these forms of resolution.

ESTABLISHING BEST BUSINESS PRACTICES AS A COMPETITIVE ADVANTAGE IN THE INTERESTS OF THE POTENTIAL CONSUMER AND/OR USER

At a time when households are experiencing financial difficulties (among other issues as a result of the crisis caused by COVID-19), European consumers are spending more time searching and comparing the offerings available on the Internet in the hope of finding the best prices. Cross-border online shopping has two key advantages for consumers: a wider selection of products and the prospect of saving money. Furthermore, in some countries, many products are not available online, and cross-border shopping offers consumers the inherent advantage of finding products that are not distributed online in their respective countries. However, as a result of the remaining barriers in the internal market, European e-commerce is fragmented along national borders.

The European Commission has analyzed cross-border e-commerce in the European Union (EU) and identified the remaining barriers. Consumer trust in the electronic environment depends on numerous factors, such as concerns about the protection of personal data, the risk of receiving counterfeit products, the existence of new types of unfair online business practices and the resolution of any disputes that may arise in practice, as well as the means by which it can be carried out.

Although e-commerce is becoming established at the national level, it is still relatively uncommon for consumers to use the Internet to contract goods or services in another EU Member State. It can be argued that trust in transactions performed in the digital environment is key to achieving full immersion of the European consumer in the internal market. The gap between national and cross-border e-commerce is widening due to internal market barriers.

Directive 2011/83/EU of the European Parliament and of the Council, of October 25, on consumer rights, addresses this major barrier to the creation of a retail internal market (ANDONE & COMAN-KUND, 2017). In any event, it will establish a single set of fully harmonized rules in a specific environment, which will ensure a high common level of consumer protection in the EU and allow merchants to sell to consumers in all twenty-seven Member States, on the same terms as in their national market, using, for example, the same standard contract terms and identical informational materials. Moreover, the adoption of the proposal will strengthen consumer protection and its enforcement in cross-border e-commerce contracts (MARKOU, 2017) and will make it easier for mediators to settle disputes out of court.

Cross-border consumers will shop with greater trust if they are aware that the competent authorities are supervising the business practices of professionals in

the sector (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021a). Regular market surveillance actions carried out by the authorities responsible for enforcing consumer legislation under the Consumer Protection Cooperation Regulation have enabled national authorities to investigate irregularities and ensure compliance with consumer protection laws.

More effective enforcement of the existing rules by Member States is crucial to removing barriers, promoting information transparency (MARTÍN-ROMO ROMERO & DE PABLOS HEREDERO, 2018) and boosting consumer trust in the reliability of online offerings and stores.

In addition to the existing enforcement measures, a number of mechanisms have been established in the EU to facilitate the implementation of effective redress procedures, such as the European Small Claims Procedure, in force since 2009, which reduces costs and simplifies and accelerates procedures for cases not exceeding EUR2,000, and Directive 2008/52/EC of the European Parliament and of the Council, of May 21, on certain aspects of mediation in civil and commercial matters, which reinforces this alternative mechanism.

ADR mechanisms or out-of-court settlements can be a convenient and attractive alternative for consumers who have failed to resolve their dispute with a merchant through informal channels.

Self-regulation measures can, at the same time, reinforce the sectors' commitment to ensuring a high level of compliance, becoming a promising complement to legislation (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021b). In the latter case, it is essential that the measure is not limited to the expected levels but, rather, includes control mechanisms and a procedure for managing complaints. The measures adopted by public authorities and those implemented by self-regulation bodies can be complementary. Indeed, the former would provide the underlying legal and judicial framework and the latter an additional resource for relatively simple cases. Directive 2005/29/EC of the European Parliament and of the Council, of May 11, on Unfair Commercial Practices is a good example of what we are discussing (AZEVEDO DE AMORIM, 2020), as it suggests that self-regulation is compatible with administrative or judicial action and clarifies the role that can be played by those responsible for codes of conduct.

Although all information society service providers operating on the Internet are required to comply with the legislation, not all do so. It is relatively common for disputes to arise between consumers and/or users and businesses. To prevent the situations described above—with clear erosion of the rights of the weaker contracting party—the EU and national legislatures seek to encourage businesses to adhere to codes of conduct regulating e-commerce. In addition to full compliance with the prevailing legislation, those instruments impose on the

businesses that voluntarily adhere to them an additional advantage that is particularly favorable to the potential consumer and/or user—instruments that, it should not be forgotten, go beyond what the legislature establishes as a minimum—instilling a sense of trust. Within the catalog of improvements introduced in the interests of consumers, present in the articles of codes of conduct, the obligation to adhere to the MERC established in the code of best practices is of paramount importance. If the business refuses to comply with the decision made regarding the dispute by the established supervisory body, it could be expelled from the self-disciplinary system of which it is part, which might be actively publicized, leading to a loss of credibility.

ADR AND ODR: CURRENT SCENARIO AND FUTURE PROSPECTS

In a context of a progressively more globalized economy, where the rise of new technologies has taken on a prominent role in comparison to traditional methods of interrelation, ADRs are a political priority for the EU institutions interested in promoting these alternative methods, seeking the best possible environment for their development and striving to ensure their quality (MIŠĆENIĆ, 2019).

Consequently, a number of important EU regulatory instruments have been approved in the area of electronic contracting and interactive advertising, which in some cases are nonbinding and only suggest certain aspects and in others are compulsory and must be complied with by the states to which they are applicable. The articles of the rules we are discussing refer, in some cases, to the advisability and, in others, to the need to adhere to an out-of-court dispute resolution mechanism.

The Lisbon European Council drew attention to the establishment of ADR systems, in order to encourage consumer trust in e-commerce in the EU. The role of these systems in a virtual environment has been recognized internationally, and there are a number of initiatives in the area of ADR that are beginning to make it possible to believe in true alternative justice, in particular the growing number of European citizen information and support networks, which provide a strong specific impetus for out-of-court dispute resolution, one notable example of which is The European Consumer Centres Network (ECC-Net), a European Network composed of assistance and support centers created by each Member State, enabling consumers to overcome the barriers that prevent them from turning to an out-of-court body in another Member State. The SOLVIT Network is an online problem-solving network in which EU Member States work together to solve, in a pragmatic way, problems caused by the possible misapplication of EU legislation by public authorities.

The absence of borders opens up a new dimension in internal market operations. Consumers have access to service providers throughout the entire EU, but the supply and demand of cross-border services can only develop satisfactorily in an environment with legal clarity and certainty that fully protects the interests of consumers and investors. To create that environment, it is necessary to address the questions raised by the development of e-commerce, including the need to encourage this new alternative to traditional justice.

The advantages that such alternative instruments represent for addressing disputes arising in the context of electronic contracting have been recognized by both doctrine (KATSH, 2004; BARNETT & DEW, 2005) and the EU and Spanish legislatures. Numerous EU and Spanish regulations have espoused the development of MERCs. We are operating in an environment—not only e-commerce but consumer law in general—in which the Spanish legislature has acted at the urging of the European legislature. We are witnessing a burgeoning consumer and user protection policy, in which Spain's domestic legislative perspective cannot be analyzed in isolation from the legislative policy pursued by EU entities, for the Spanish legislative advances are the result of that broader—EU—legislative policy, such that the many initiatives for protecting consumer and user interests are being reflected in the domestic legislation of EU Member States (GONZÁLEZ GRANDA, 2007).

In terms of the European legislation, it is important to note, among others, Art. 17 of Directive 2000/31/EC, of June 8, on certain legal aspects of information society services, in particular e-commerce in the internal market—ECD. For the Spanish scenario, we can mention, among others, Arts. 18, 32 and Additional Provisions 3 and 8 of Law 34/2002, of July 11, on Information Society Services and E-Commerce (*Servicios de la Sociedad de la Información y de Comercio Electrónico - LSSI-CE*) (which, incidentally, transposes the aforementioned ECD into Spanish law); Arts. 4.2.b) and 7 of Royal Decree 1163/2005, of September 30, which regulates the public trustmark in information society services and e-commerce and the requirements and procedure for granting it; as well as Art. 97.1 (DIEZ BALLESTEROS, 2008) of Royal Legislative Decree 1/2007, of November 16, which approves the Consolidated Text of the General Law for the Protection of Consumers and Users and Other Complementary Laws (*Texto Refundido de la Ley General para Defensa de los Consumidores y Usuarios y otras Leyes complementarias - TRLGDCU*). Reading that set of precepts, it is clear that the European and national legislature is clearly committed to MERCs in the area of e-commerce.

From the different European initiatives, we can deduce that the EU legislature recognizes two main categories of ADRs: first, procedures that lead to the resolution of a dispute through the active intervention of a person who proposes

or imposes a solution—which are regulated by Commission Recommendation 98/257/EC (SERLIKOWSKA, 2018)— and second, procedures that seek a resolution by bringing the parties together, to enable them to settle the dispute by mutual agreement—regulated by Recommendation 2001/310/EC of April 4.

ODR will be a major beneficiary of these new technologies, insofar as they directly impact the core functional areas of ODR: communication, collaboration and interactivity. However, too many ODR providers use obsolete platforms and technology because they are reluctant to make the time and resource investments necessary to bring the platforms up to Web standards.

INFORMAL ALTERNATIVE MECHANISMS

There are numerous criteria for classifying MERCs. We have chosen to differentiate them based on the criterion of their formality as well as on the powers or authority of the third party that intervenes in the dispute resolution. Although an action protocol must be followed in all MERCs and, accordingly, there will be a certain formality, this will be—to a greater extent—more palpable in some of them, as certain mechanisms are subject to EU and Spanish regulations.

Informal MERCs are those that are enacted before the dispute arises or seek to resolve it before the intervention of a third party external to the parties to the contract causing the disagreement (DEL CUVILLO CONTRERAS, 2010). We will examine, among others, well-known dispute resolution instruments, such as customer service (CS), and others that may not be as popular, such as assisted and automated negotiation.

The legal power granted to a person to self-govern their legal sphere encompasses legal transactions concluded with another party whose declarations of will converge in the attempt to resolve the conflict arising between their respective spheres of interest, constituting consent.

The agreement concluded between the parties for the purpose of settling a dispute involves a higher level of compliance. The fact that the conflict is resolved through an agreement by the parties implies that there are no winners or losers, and thus, there is a higher probability that the agreements reached will be complied with. When the solution to the conflict is imposed by a third party—which occurs in adjudicative resolution methods—there is a winner and a loser, who is not willing to comply with the decision that has been made.

Customer Service

CS involves all the actions carried out by a company to increase the satisfaction level of its customers (PAZ COUSO, 2004), representing a competitive advantage (TSCHOHL & FRANZMEIER, 1994; RITA, OLIVEIRA

& FARISA, 2019) as well as an important point of connection between the two parties (ESTEBAN GARCÍA & MENÉNDEZ GONZÁLEZ, 2007; HUANG & SUDHIR, 2021). The basic objective of quality CS is to reduce customer inconvenience and increase their satisfaction, involving a proactive process in which the company must anticipate any problems that the customer may encounter, not only at the time of purchase but also before and after. In other words, it must be aware of the brakes and accelerators, which are the forces that deter or encourage the customer to make a purchase. It has been proven (CRONIN & TAYLOR, 1992) that customer satisfaction influences future purchase intentions more than the quality of the service itself, and thus, any CS program being implemented should have customer satisfaction as its primary objective (BLANCO PRIETO, 2007).

CS is a feature that different companies usually offer to consumers or users as an after-sales service, presented as an ADR method that seeks to settle conflict amicably, without the need to use adjudicative forms, in which a third party external to the dispute must provide a solution (BENEKHLEF & GELNAS, 2003).

Furthermore, CS must have multiple contact channels, to ensure a subsequent record of both the complaint and the content therein. Such a service must meet certain requirements for the normalization and standardization of the process, i.e., there must be a relatively uniform procedure to address any electronic complaint and satisfy the interests of the consumers or users who use them. Indeed, systems and processes for the optimal resolution of customer complaints are among the best investment opportunities available in CS (HOROVITZ, 2004).

One of the possible functions that CS performs is, specifically, to inform—via website, telephone, email, WhatsApp or Telegram, which are the most commonly used means at present, or other methods—the consumer and/or user about the current status of the contracted good or service.

CS is so important that the Spanish legislature regulates it in Art. 21.2 of the TRLGDCU. The key elements of that rule can be reduced to two. First, a procedure must be established that, regardless of the means of communication, guarantees the recording of the complaints and grievances that the consumer and/or user decides to make against the company. Second, if the business uses contact channels for CS that are essential in the present day, such as telephonic and electronic, in all cases, direct personal attention must be provided, with which the Spanish legislature seems to allude to the need to have people responsible for managing the service via those communication channels. Similarly, special attention should be given to the qualifier "direct," which is intended to establish the need for priority and necessary action by the human element. This requirement seems to exclude the permissibility of admittedly frequent practices, such as

exclusively automatic responses via telematic devices. It is also possible for the business to implement other technical means, in a complementary manner.

Art. 2.1.c) of Law 56/2007, of December 28, on measures to promote the information society, stipulates that companies that provide to the general public services of special economic importance have a duty to provide their users—without prejudice to other means of remote communication with customers—a telematic means of communication that, by virtue of recognized electronic signature certificates, allows them, among other procedures, to submit complaints, incidents, suggestions and claims, thus guaranteeing proof of submission (for the consumer) and ensuring direct personal attention.

Automated Negotiation

Automated negotiation, which has been very successful (KRAUSE, 2001), is a computer-assisted procedure through which disputes are resolved. Generally, these will be purely monetary disputes. It seems particularly suitable either for small value disputes arising from e-commerce or for claims involving insurance companies. Each of the opposing parties proposes an offer, unknown to the other, for which it would be willing to settle the dispute. If the offers are within a certain range, the computer will calculate the average, and the dispute will end with a settlement for the resulting average sum. If, however, the offers are outside the limit, no agreement will be reached (CAMARDI, 2006).

Cybersettle is a particularly noteworthy example of this dispute resolution modality. The company, which has been in operation since 1998 and is based in the United States of America, has a website that facilitates automated negotiation—assisted, if desired by one of the parties, by telephone (DONAHEY, 1999).

Assisted Negotiation

Assisted negotiation is considerably more complex than the modality studied above. It has the advantage of being a resolution tool that is suitable for all types of disputes, not limited to those of a purely economic nature. The procedure is based on providing the parties with an electronic platform free from human intervention (ORE & SPOSATO, 2021). The website provides the parties with an electronic communication platform that indicates the steps to be followed and supplies information and standard formulas for transactions (ANIC, ŠKARE & KURSAN MILAKOVIĆ, 2019). The emphasis is placed more on the technical dossier that develops the dialog between the parties than on the intervention of a third party. This system is remarkably agile and very inexpensive, although the lack of human intervention may undermine the soundness of certain decisions.

The Green Paper on Alternative Dispute Resolution in Civil and Commercial Law excludes these automated negotiation systems, not for this simple reason but because they are provided by the companies themselves and thus lack the defining feature of ODRs involving a third party (MARTÍNEZ DE MURGUÍA, 1999) (either as a facilitator—mediation—or by imposing a solution—arbitration): impartiality. Similarly, Art. 1.2 of the aforementioned Recommendation 2001/310/EC, of April 4, on the principles applicable to out-of-court bodies for the consensual resolution of consumer disputes, expressly excludes consumer complaint mechanisms managed by a company and directly involving the consumer or mechanisms in which a third party manages or applies them on behalf of the company.

In any event, electronic negotiation systems established by companies themselves, such as virtual complaint centers, lack the impartiality that is usually required of third parties involved in a dispute resolution process, although proper management of a potential breach by the service provider and a satisfactory response to it can increase the potential of the prospective consumer in e-commerce.

The Web as a New Medium for Publishing Complaints

The emergence of new technologies with a distinctly social nature has resulted in a high degree of interconnectivity among Internet users (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021c; SPOSATO, 2021), allowing them to exchange all types of opinions about different products and experiences with other people. Thus, on the Web—which, among others, takes the form of forums and social networks—people share their opinions about products, people and organizations. In the present day, companies are increasingly aware that comments by their current customers posted on the social Web have become one of the main referral sources for potential new customers. Negative user opinions on specialized websites represent a significant loss of credibility for a company offering certain goods and/or services.

Although the list of websites aimed at channeling the opinions and, when applicable, complaints of consumers and/or users regarding the products and/or services offered by a particular company is wide, all of them attempt, where appropriate, to channel the public complaints and dissatisfaction that consumers and/or users may have experienced in connection with them. Reading opinions or reviews of certain products and/or services on specialized sites, it is clear that the potentially interested public will form an impression about the convenience or inconvenience of purchasing the good and/or service mentioned in the personal evaluation published on the Internet.

When consumers wish to purchase a certain good and/or service in the traditional world, they first turn to the Internet to obtain more information about its characteristics and prices, although it has recently been observed that, if they have doubts or lack knowledge, they also search to discover the degree of satisfaction of other users.

FORMAL ALTERNATIVE MECHANISMS

Disputes arising in e-commerce can be resolved in different ways. One of them, studied above, is represented by what we have called informal mechanisms, in which, as a general rule, a third party external to the parties does not intervene. The other two are judicial proceedings and ADRs, the latter of which we will examine below. These instruments can be implemented electronically, in which case they are called ODRs, combining the efficiency of ADRs with the advantages inherent to new technologies (KAUFMANN-KOHLER & SCHULTZ, 2004; CYMAN, 2017). Although those mechanisms are called ODRs, in the opinion of one sector of the doctrine (HALOUSH & MALKAWI, 2008), the name online alternative dispute resolution (OADR) would be more appropriate, as this would exclude nonalternative methods such as e-courts, which are court proceedings that are conducted entirely online.

Consumer complaints related to e-commerce channeled through ADRs tend to primarily concern property. Most consumer complaints fall within the category of what are known as small claims, i.e., the economic value of the consumer's complaint is not high. This has two consequences. First, if there is no quick and inexpensive mechanism for resolving these claims, they are unlikely to be taken to the Courts of Justice. In particular, in the case of cross-border disputes, the potential difficulties associated with judicial proceedings may dissuade consumers from asserting their rights. The imbalance between the value of what has been purchased and the cost of a complaint—particularly at the judicial level—supports what has been stated about small claims and the fact that ADRs or ODRs may be the only channel for effectively resolving the dispute. Furthermore, even if the damage to each consumer is of little value, the sum of the action against all consumers can have great dimensions.

Despite the significant advantages of ODRs, they are not a resource that parties use to resolve the differences that arise in e-commerce (KATSH & RIFKIN, 2001; LEWINSKY, 2003). The reasons for this include, among others, a significant lack of knowledge about their existence, a lack of belief in their powers, and the distrust that consumers may have towards them. The most appropriate approach, as has been made clear by national and EU governmental bodies, is to establish and consolidate them as part of the regular operation of e-commerce (SCHULTZ, 2005; MONTESINOS GARCIA, 2007). One of the ways

in which this phenomenon is being addressed is through codes of conduct regulating e-commerce, which we will discuss later.

Settlement

Settlement refers to the agreement reached between individuals who initially held different positions, each ceding something in their respective positions to end the dispute that may exist between them. This is a means of resolving disputes that have already been formally raised or those that have yet to be raised in court. In other words, as a result of the agreement we are analyzing, a legal dispute that has been raised before the court or is subject to legal proceedings comes to an end.

In the settlement contract, the obligations of the parties may be related not only to the object of the dispute (GRACIA PELIGERO & MAINAR ENE, 1998) connected to electronic contracting and/or interactive advertising but also to other things, such as services, subjective rights, goods, activities, etc., external to it. With regard to the object of the settlement, it is possible to speak of two types of objects: first, an internal object, coinciding with that of the dispute and, second, a possible external object, conceived as distinct from that which constitutes the dispute. The internal object is an indispensable element of the settlement contract, inasmuch as the dispute has arisen in the field of e-commerce, and by reaching such an agreement, the parties intend to put an end to it. However, whether the object of the settlement contract also includes an external object is contingent and depends on the will of the contracting parties.

Conciliation

A not inconsiderable number of legal systems in the EU Member States recognize this MERC at the regulatory level. There are, however, significant differences on several points: the third party who may be a conciliator; the scope of their function; and the relationship of that figure with the legal process. In some countries—France, Italy and Germany—there is a clear distinction between in-court and out-of-court conciliation, while in others, there is only in-court conciliation—Greece, Austria and Sweden—and in others only out-of-court conciliation—Portugal.

It is a MERC that is nonbinding for the parties, in which the conciliator encourages dialog between them, interacting through it, but without imposing any obligation whatsoever.

The difference between conciliation and mediation, which we will examine below, is that in the latter, the mediator plays the role of bringing positions closer together, even proposing agreements (OROZCO PARDO & PÉREZ SERRABONA GONZÁLEZ, 2008), while in conciliation, the parties interact

through the conciliator, who does not attempt to bring the parties closer together, taking a more passive position than a mediator (BARONA VILAR, 1999). This method has not yet been used in practice to resolve disputes arising in the field of e-commerce.

Mediation

This is an amicable and peaceful, albeit nonbinding—lacking decision-making power—dispute resolution system. At all times, the parties have the power to negotiate and determine the applicable regulations. The mediator is a neutral third party who facilitates communication between the parties, guaranteeing confidentiality, in order to resolve the dispute between them. It is a MERC that requires good faith from the parties because they must behave as collaborators rather than adversaries, with the intention of resolving the conflict that separates them. Mediation combines legal and emotional aspects in any field of its application, as it is necessary to regulate the aspects reached by the parties, in a private manner, while managing the emotions that arise in the process of reaching an agreement (BERNAL SAMPER, 2007).

The communication between the parties may take place electronically (e.g., via email) or even through the creation of a virtual room, where the mediator is able to meet with both parties or, where appropriate, with only one of them.

It differs from arbitration and judicial proceedings in that the mediator—unlike the arbitrator and the judge—does not issue a binding decision; rather, their role is to protect the parties and enable them to reach or develop an agreement (MÄLER, 1989).

The use of mediation as an instrument for resolving disputes arising in e-commerce has numerous advantages, including lower costs, a lack of formality or rigidity, speed and the possibility for the mediator to make a creative decision tailored to the circumstances of the case under assessment, which, in any case, will provide a resolution.

Arbitration

The current Arbitration Law (*Ley de Arbitraje - LA*) 60/2003, of December 23, does not provide a definition of arbitration, although the previous definition remains in effect, configured as a system for resolving legal disputes or conflicts based on free will (CONA, 1997).

Arbitration is an institution intended to resolve disputes between citizens without the need to turn to the judicial bodies of the state. It is not compulsory but takes place when accepted by the parties to the conflict, who agree to have their disputes resolved in accordance with the decision—award—made by an

arbitrator; however, it should be stressed that, once it has been agreed upon by the parties, the decision that has made must be complied with, notwithstanding any actions that, in accordance with the Spanish law, may be initiated to challenge it.

Arbitration differs significantly from conciliation and mediation. Accordingly, it is important to note that it is binding on the parties, is a more formal MERC, and it is common, although not necessary, for the parties to be advised by lawyers.

With regard to dispute resolution in the area of e-commerce, we can identify two main types of arbitration: conventional or traditional arbitration and consumer arbitration. Both types of arbitration may occur physically or in-person and/or telematically or virtually. In disputes over electronic contracting, interactive advertising and other related questions, two main types of arbitration may be used, i.e., traditional and consumer arbitration, which may be carried out through two different channels, i.e., physical or in-person and virtual or electronic.

In virtual or telematic arbitration, the proceedings are largely carried out electronically (ZHIVOTOVA, 2003; PONTE & CAVENAGH, 2004), while in conventional arbitration, the proceedings preferably take place physically or in-person.

Telematic or virtual arbitration has been described as a special type of arbitration (MERINO MERCHÁN, 2002) that can be defined as "a nonjudicial process of dispute resolution by an arbitrator that is carried out, in whole or in large part, via electronic or telematic means" (MONTESINOS GARCÍA, 2007).

Electronic arbitration usually involves, where appropriate, physical or in-person proceedings—for example, in the probative sphere—and as a result, it may not always be possible for it to be entirely virtual. Indeed, there was no comprehensive legislation for this type of arbitration in Spain until February 2008, with Royal Decree 231/2008, of February 15, which regulates the consumer arbitration system, the electronic form of which is regulated in Arts. 51 to 55 inclusive.

In accordance with the LSSI-CE, the Spanish legislature has considered that codes of conduct are particularly appropriate self-regulation instruments for adapting the different precepts of the aforementioned rule to the special characteristics of the provision of the different services that may be offered and/or provided via the Internet and that arbitration—in particular, virtual arbitration—is particularly suitable for resolving any conflicts that may arise.

In addition to the advantages of traditional arbitration, this type of arbitration has other advantages connected to the special characteristics of the medium through which it is carried out. Obviously, it is important to consider that we are operating in a field that is extremely closely linked to electronic communications,

and it is thus essential to guarantee the authenticity of the messages that will be delivered and the integrity of the documents, as well as privacy.

The inherent advantages of virtual arbitration include, among others 1) in international disputes, the parties themselves determine the law applicable to the case; 2) there is no need for the parties to travel, as they can follow and participate in the proceedings wherever and whenever they wish because both geographical distances and time barriers are eliminated; 3) reduced cost, i.e., the ease of communication offered by the Internet has a significant impact on the low cost of out-of-court proceedings; and; 4) flexibility and monitoring, i.e., electronic arbitration makes it possible to verify, supervise and control the status of the proceedings, which, in turn, results in the parties taking a more active role in the settlement of the dispute.

Nonetheless, there are certain drawbacks, also inherent to the virtual medium through which the arbitration is carried out. They include, among others 1) some evidence has to be presented in-person; 2) there is still a certain distrust of the virtual world (GINOSAR & ARIEL, 2017; GERBER, GERBER, & VOLKAMER, 2018); and 3) problems associated with the very functioning of new technologies, e.g., lost emails, malfunctioning communications, computer viruses, and hacking by third parties, in short, problems related to electronic security (CHEN, BEAUDOIN & HONG, 2017).

There are other examples of virtual arbitration created within the EU, such as the Electronic Consumer Dispute Resolution Platform (ECODIR), Global Business Dialogue on E-commerce (GBDE), Transatlantic Business Dialogue (TABD) and Transatlantic Consumer Dialogue (TACE).

International experiences include, among others, the Arbitration and Mediation Center of the World Intellectual Property Organization, the International Chamber of Commerce, which has been very active in many cases connected to e-commerce, the Virtual Magistrate, which was the first ODR center, Online Resolution and the Cybertribunal.

Conventional Arbitration

As can be deduced from the above definition of arbitration, it is a adjudicative form of conflict resolution in which an impartial third party—called an arbitrator—intervenes and imposes a final and binding solution that the parties must necessarily comply with (BARONA VILAR, 2007).

If arbitration is to be consolidated as an effective dispute resolution mechanism compared to judicial dispute resolution, it should offer advantages that the latter lacks and circumvent its disadvantages. Otherwise, it would be an ADR instrument with no prospects for consolidation. The advantages include, among

others 1) greater assurance in the decision, i.e., each of the parties, or by mutual agreement, may appoint arbitrators to settle the dispute between them; 2) a high degree of specialization (ORTUÑO MUÑOZ, 2003), i.e., the parties may appoint arbitrators who are specialists in a given subject, resulting in a higher degree of expertise in resolving the disputed matter than that of ordinary judges; 3) a greater speed of arbitration proceedings compared to judicial proceedings, and; 4) greater privacy for their disputes.

These are some of the advantages that characterize arbitration. Undoubtedly, as with any other dispute resolution mechanism, there are certain drawbacks, the most notable of which is a higher cost. All the advantages we mentioned above would be worthless if the decision that puts an end to the arbitration proceedings—the award—were a simple pronouncement that merely recognized the argument of one of the opposing parties. If the decision ultimately agreed upon by the arbitrators could not be compulsorily enforced, it would be entirely useless (GARBERÍ LLOBREGAT, 2004). If the legislature intends arbitration to be an alternative to the judicial resolution of conflicts, it should ensure—as the Spanish legislature does in the LA—that the award has enforceability, more or less equal to that of rulings; in any case, it must have the status of an enforcement order.

Consumer Arbitration

This is regulated by Royal Decree 231/2008, of February 15, governing the consumer arbitration system, which, in turn, implements Arts. 57 and 58 of the TRLGDCU. It is a system that has demonstrated notable efficiency and extraordinarily satisfactory growth. In recent years, there has been a significant increase in the number of businesses that have adhered to it.

One of the most interesting innovations of Royal Decree 231/2008 is the possibility that in certain cases, there may be a single arbitrator. The fact that there may be only one arbitrator, when certain requirements are met, is recognized in Art. 19 of Royal Decree 231/2008.

In e-commerce arbitration, which shall be conducted in accordance with the general legal regulations set forth in the Royal Decree, the regulation of those specific aspects necessary for its operation is addressed, such as the determination of the competent Arbitration Board, the use of electronic signatures, the location of the arbitration and notification, introducing the electronic publication of edicts in the event that notification at the location designated by the parties is not possible.

Pursuant to the first paragraph of Art. 51.2 of Royal Decree 231/2008, electronic consumer arbitration shall be conducted through the electronic

application created by the Ministry of Health and Consumer Affairs expressly for the Consumer Arbitration System.

Art. 51.3 of Royal Decree 231/2008 stipulates that the Public Administration, with authority in consumer affairs, shall encourage the use of e-commerce arbitration to settle disputes that may be the object of consumer arbitration—for which purpose it is necessary to consider Art. 2 of Royal Decree 231/2008, in addition to the provisions of Art. 1.

Nonetheless, there are still discrepancies and inconsistencies between the new LA and the regulations governing certain specific types of arbitration, such as consumer arbitration. Accordingly, for example, in the field of consumer arbitration, contrary to the provisions of the LA, equity arbitration takes precedence over arbitration at law. Despite these inconsistencies, which are certainly unavoidable, we must consider—preferentially over the LA itself—the wording of the RD regulating consumer arbitration, as the LA only applies on a supplementary basis.

The Advertising Self-Regulation Jury

In addition to the MERCs we have examined, all of which are valid for e-commerce dispute resolution, the list published by the European Commission on ADR systems for consumers includes a mechanism called the Advertising Self-Regulation Jury (*Jurado de Autocontrol de la Publicidad - JAP*) (FEENSTRA & GONZÁLEZ ESTEBAN, 2019), the raison d'être of which is to resolve questions related to advertising that appears, in our case, on the Internet.

The Jury only intervenes when a dispute has arisen and acts in accordance with a regulated procedure based on the principles of the equality of the parties, the right to be heard and the right to challenge. While it is true that the Jury is an administrative unit of the Advertising Self-Regulatory Organisation (*Asociación Autocontrol de la Publicidad - Autocontrol*), it is not an internal body.

It is a dispute resolution instrument established for this purpose by the Spanish code of conduct Confianza Online. This self-regulation system regulating e-commerce has a two-tier dispute resolution system under the auspices of the Confianza Online secretariat. Any disputes arising in connection with electronic contracting between companies adhering to the system and the consumers and/or users of those companies will be resolved by the National Consumer Arbitration Board (*Junta Arbitral Nacional de Consumo - JANC*), after an attempt at mediation, while those related to interactive advertising will be resolved by the Advertising Jury, when mediation by Autocontrol has been unsuccessful. In terms of the mediation carried out by Autocontrol, for questions related to interactive advertising, this mechanism is a dispute resolution method prior to the

intervention of the Jury and optional for the parties, in which a third party is entrusted with the task of bringing the parties together and determining the positions that would be acceptable to both parties.

Despite the voluntary nature of the system, which can only be statutorily binding on the associated entities, it is impossible to deny the moral strength of the pronouncements by Autocontrol's Advertising Jury throughout the industry, among both companies that have adhered to the system and those that have not. For nonassociates that refuse to participate in any proceedings that may be opened, the Jury will limit itself to issuing a ruling that expresses its ethical and nonbinding opinion about the advertisement in question.

VIABILITY OF SELF-REGULATION ON THE MATTER

Considering the rules that emphasize the benefits of out-of-court dispute resolution, it is appropriate to mention one of the mechanisms through which the use of MERCs has been encouraged. We are referring here to codes of conduct regulating e-commerce. They are a very significant component of self-discipline systems, although they must coexist with others no less important, such as the out-of-court dispute resolution system.

One of the forms that self-regulation can take in the area of e-commerce is codes of conduct. These instruments contain a set of business best practices that should be observed in the area of e-commerce because, in addition to including the necessary compliance with the legislation regulating the different activities related to e-commerce, they represent an additional advantage—enhancing the minimum legal protection provided to consumers and users—that must be respected by the businesses that adhere to these instruments.

In addition to being an important innovation, because they transfer the task of regulating a specific issue to the private sector, codes of conduct in the area of electronic contracting represent a significant step forward, as the public sector is aware of the many advantages of self-regulation in the area of electronic contracting (VARGAS PORTILLO, 2020).

Reading the LSSI-CE, we can deduce that one of the possible elements that codes of conduct in the area of e-commerce may, or even "should" contain—because, as we shall see, it is a necessary condition for receiving the Online Public Trustmark regulated by Royal Decree 1163/2005, of September 30—are MERCs that will, as stipulated in the Explanatory Memorandum, "settle disputes that may arise in electronic contracting and in the use of other services in the information society."

Art. 32 of the LSSI-CE reiterates some of the provisions of Art. 18 of that same legal text. However, it alludes to a very significant issue for our purposes, which is that in addition to the traditional MERCs, it recognizes the full viability

and validity of the specific MERCs created by the self-regulation systems established in codes of conduct.

We understand that although Art. 18.1 of the LSSI-CE refers to MERCs with the expression "arbitration," this includes all other types of MERCs that preferably comply with the principles established for this purpose by the European Commission. In this regard, it is important to mention, among others, Commission Recommendation 98/257/EC, of March 30, on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, and Commission Recommendation 2001/310/EC, of April 4, on the principles applicable to out-of-court bodies for the consensual resolution of consumer disputes.

As a further development of the stipulations of the 8th Additional Provision of the LSSI-CE, the aforementioned Royal Decree regulating the Online Public Trustmark was approved, the granting of which is subject to the fulfillment of certain conditions. One of them is, specifically, that the code of conduct to which it is granted provides for the resolution of disputes arising in the area of e-commerce, based on the MERC, which should be understood to include consumer arbitration. To this end, service providers adhering to the self-disciplinary system in question must necessarily have previously committed to resolving any disputes that might arise with the MERCs established in the self-regulation instrument.

Consideration should be given to the fact that ODRs are effective not only in disputes arising in e-commerce but also in disputes arising from the use of electronic and computer media (SALI, 2002).

CONCLUSIONS

The growing prevalence of e-commerce, an activity carried out between information society service providers and recipients, makes it possible to perform commercial transactions through any electronic media, resulting in different types of business, the most significant of which—quantitatively—is carried out between companies; however, given their enormous importance, it is essential to not forget those aimed at consumers—e-commerce known as B2C.

E-commerce encompasses not only the electronic contracting of goods and/or services but also activities related to interactive advertising. Considering the relative frequency with which, in practice, disputes arise between businesses and consumers in the traditional world, it is not surprising that they also occur in the virtual space. The disputes that arise may be settled through the courts, although the circumstances of e-commerce cases make it advisable to use out-of-court instruments. The latter have a proven effectiveness in settling conflicts that arise in this scenario.

With regard to transnational e-commerce (even within the EU itself), the large number of geographical regions and the high number of laws governing the activities of the parties involved in transactions hinder the traditional mechanisms for resolving disputes that arise within these business relationships. Historically, as is widely known, issues related to the applicable law and the appropriate forum have been tied to the place where the transaction took place; however, there must be exceptions. When the transaction occurs in cyberspace, determining the applicable law and other issues of jurisdiction over the dispute are sometimes complex. Those issues, as we have had the opportunity to discuss, do not arise to the same extent in the case of MERCs.

The catalog of out-of-court mechanisms that exist in Spain in the area of e-commerce is relatively expansive, and we have therefore chosen to classify them according to their formality, distinguishing between formal and informal instruments. After examining each of them individually, we have become aware of the benefits offered by each.

We have also devoted special attention to the promotion of out-of-court dispute resolution by certain e-commerce self-discipline systems.

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