Indecopi
INSTITUTO NACIONAL DE DEFENSA DE LA COMPETENCIA
Y DE LA PROTECCIÓN DE LA PROPIEDAD INTELECTUAL

Analysis of Indecopi's Functions in Light of the Ruling of its Dispute Settlement Bodies

Consumer Protection

INDECOPI'S TWENTIETH ANNIVERSARY COLLECTION

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PRINTING	:	Q & P Impresores SRL Domicilio Legal: Av. Ignacio Merino 1546 -Lince
TRANSLATION BY	:	Business Communications Consulting S.A.C.

Printed in Lima, Peru
August 2013 – First Edition
Printing: 100 copies

Registered with the National Library of Peru – Nº 2013-09192
ISBN: 978-9972-664-42-7

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CONTENTS

FOREWORD

INDECOPI's contribution to the economic growth of Peru is rooted in its institutionalism, which serves as the foundations of, among other aspects, the technical decisions issued since its establishment. In this regard and in commemoration of the 20th anniversary of the institution, we believe it is important to share the essence of our job, through a number of publications describing the duties carried out by INDECOPI through each one of its decision-making bodies. Our purpose is to present, in an educational way, the work we have performed during these 20 years to fulfill our mandate aimed at consumer protection, intellectual property, defense of free and fair competition, and developing quality infrastructure in our country.

These books have been articulated following educational guidelines and techniques and the contents of each volume of the collection have been structured in a standard manner. Thus, we start with a theoretical framework which underpins the function entrusted to INDECOPI, developing fundamental concepts for each protected institution. Next, we describe the legislative and jurisprudential milestones achieved during the Institute's evolutionary process.

Finally, as could be expected, we have furthermore set aside space to reflect on the lessons learned and to think into the future by moving towards a more proactive INDECOPI, anticipating and providing the answers that our society and market need.

At this moment, you have a copy of the book about Consumer Protection, in which Victor Baca Oneto describes the important role that INDECOPI has played and which includes a study of the legislative evolution of Consumer Protection Law in Peru during these twenty years and the need to count with Consumer Law. There is thorough research and analysis of Peruvian consumer laws and the inception of INDECOPI. Finally, he assesses the relevance of INDECOPIs rulings and its role in protecting consumers, as set forth under the 1993 Constitution and the Consumer Protection Code.

I take this opportunity to express our deepest gratitude to Edwin Aldana, Technical Secretary of the Commission for Consumer Protection 2, for having provided assistance in publishing this work.

We hope you find this book useful and conveys, as intended, the extent of the work performed by INDECOPI throughout these 20 years of technical and independent work serving the nation and the commitment of each one of the collaborators who created these pages, as part of the history we bring to you today.

Hebert Tassano Velaochaga
Chairman of the Board of Directors

INTRODUCTION

Leviticus 19
"19 […] Thou shalt not sow thy field with mingled seed; neither shall a garment mingled of linen and woolen come upon thee […].
35 Ye shall do no unrighteousness in judgment, in meteyard, in weight, or in measure.
36 Just balances, just weights, a just ephah, and a just hin, shall ye have".

Consumer defense and protection has gone beyond schemas, how can a legislation of this nature deal with consumer contracts or abusive clauses? How many questions have been raised by a consumer legislation that "dared," for example, to regulate issues related to banking and financial services? Moreover, at the beginning, it was unusual for a discriminating supplier to be sanctioned by an administrative authority for having discriminated citizens and consumers.

Yet, when I read the doctrine developed by Victor Baca in this publication, which I am honored to introduce, it became increasingly obvious that Consumer Law constitutes an act of social justice, putting an end to disputes in which citizens and consumers generally suffer a loss caused by a public agency. Hence, we can discuss about cases dealing with a defaulting blender to cases of medical malpractice; cases in which the establishment failed to give consumer one cent of his change to cases imposing sanctions for one of the biggest existing imperfection, i.e. consumer discrimination.

Victor Baca shows us the development of Consumer Law and the transcendental role developed by Indecopi 20 years after its inception; a retrospective of one of the most important works carried out by the National Consumer Agency shown in the legislation, jurisdictional, and institutional evolution, which, by the way, I had the privilege to directly witness in 15 of its 20 years.

Hence, we start with a reflection enabling us to ponder on why Consumer Law is needed, linking such thoughts to the creation and evolution of Indecopi and the regulations on consumer protection contained in the Consumer Protection Code -the ultimate tool that, as the result of huge efforts, recognizes consumer protection as a driving principle for the State's social and economic policy and consolidating such proposal as a Public Policy.

Next, there is an analysis on the components of the consumer relationship, on the evolution of the concepts of consumer and supplier and on the analysis of the most emblematic consumer rights: the right to information and service or product suitability and the prohibition against discrimination and unequal treatment, concluding with the analysis on the approach of the Consumer Protection Code to consumer contracts and abusive clauses.

Victor Baca makes us aware of the invaluable opportunity offered by consumer arbitration; a dispute settlement mechanism, free of charge, that does not impose sanctions; however, in the author's own words, "its functioning requires more than importing a mechanism, since the Administration's willingness is required and the existence of material means (…)".

Next, the author reviews Indecopi's administrative sanctioning proceeding which special features have led to a debate on its nature. Is this a trilateral sanctioning proceeding, as some people suggest?

In order to address this question, he previously describes, within Indecopi's proceedings, the determination of the competence of deciding bodies for consumer protection by hierarchy (Deciding Bodies of Summary Proceedings, Consumer Protection Commission, and the Defense of Competition Tribunal), by territorial competence, and by matter (he distinguishes between the competence of the Unfair Competition Oversight Commission and the Consumer Protection Commission).

References to the principles of the administrative sanctioning proceeding are also included emphasizing on the principle of guilt, its application by Indecopi proceedings, and shifting the burden of proof, and wraps up his analysis with a review of the statute of limitations applicable to such infringements and with the ultimate compensation for consumers: the corrective measures.

As a corollary, Victor Baca analyzes Indecopi's jurisprudence on consumer protection, starting with binding precedents (end consumer, the scopes of implied warranty, the characteristics of warnings about the risk of products or services, the scopes of information duty, the scopes of Indecopi competences to protect consumers, to define the responsibility of competition on labeling and advertising and advance payments for teaching services). Finally, he concludes with an analysis on specific subjects such as: discrimination in a shopping center; excessive demonstrations of affection; extent to which insurance companies are entitled to deny hiring an applicant; and compensations and advance payments for banking services and security in parking lots.

Finally, I would like to thank Victor Baca, my dear friend, with whom I have the privilege to work in issues related to consumer protection and defense in the Consumer Protection Commission 2, congratulating him for his flawless and masterful analysis that I have the honor to introduce, and that I am sure will be delightful for readers.

Edwin Aldana Ramos
Technical Secretary
Consumer Protection Commission 2

INTRODUCTION BY THE AUTHOR*

Given its short length, this work is neither a monograph nor a complete paper on Consumer Law; such task would demand revising and consulting a huge bibliography specialized in Comparative Law. On the other hand, it is not intended to be a complete compendium on INDECOPI's jurisprudence throughout its first 20 years, as some kind of updating the Consumer Protection Commission Guidelines set forth in Resolution 001-2006-LIN-CPC/INDECOPI. Its objective is much narrower, it is to be an introduction to INDECOPI's role in protecting consumers within the framework set forth in the 1993 Constitution and the Consumer Protection Code approved by Act 29571 (hereinafter referred to as CPDC).

Therefore, to achieve such modest purpose, I have narrowed the analysis to a few substantial and procedural matters I consider important and that may raise controversy; especially on this point because of my position as professor in Administrative Law, and maybe because it is one of the subjects least studied in Peru.

There is a large number of resolutions quoted on these pages, but I have narrowed the detailed analysis to a few important cases which establish criteria, in which INDECOPI has intervened in especially sensitive areas, or which have great media and academic impact. It is blatant that a specialized reader will find many absences. I apologize for that, I did it sometimes knowingly, sometimes unknowingly, but, in any case, it was inevitable to prevent this work from exceeding the foreseen length.

Moreover, it is worthy adding that opinions expressed in this analysis are the results of personal and academic reflection, and do bond INDECOPI or its deciding bodies in any way, particularly when the reflection does not correspond to the way this institution has settled some cases.

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* Editor's Note: This book was finalized on February 14, 2013, so it includes the statements released prior to this date.

Finally, I would like to thank the people who have made this work possible. First, Giovana Hurtado, Director the Competition and Intellectual Property School, and Hebert Tassano, INDECOPI Chairman of Board of Directors, because they gave me this assignment that I have enjoyed despite the few hours of sleep. Second, Hans Aliaga, who invested a lot of hours from his busy schedule to help me find and systematize most of the resolutions quoted on these pages, and, Edwin Aldana, in his capacity of Technical Secretary of the Defense of Competition and Protection Commission in INDECOPI headquarters and his entire team, with which I was honored to work. Moreover, I would like to recognize the work developed by Eduardo Ortega and Veronica Vergaray, who helped me finish these pages. And to conclude, I would like to specially thank my wife Andrea and my daughters, Andrea and Sofia, for their patience allowing me to write these lines, reducing the quality time I spent with them.

OBJECTIVES

To analyze INDECOPI's role in consumer protection within the framework set forth in the 1993 Constitution and the Consumer Protection Code approved by Act 29571.

CHAPTER 1

Theoretical Framework of the Consumer Law and Consumer Protection in Peru

1.1. The need for a "consumer law": Consumer protection and the protective role of the State

Industrialization changed trade relationships. This phenomenon became more intense in the twentieth century, when massification came into the world of contracts. Comparing an essentially agrarian society model, where both seller and buyer were in similar situation regarding the products or services they were trading, negotiating individually on the content of the agreement, industrialized societies have changed such relationships, giving way to mass contract where one party provides the content and knows much more about the characteristics and conditions of the product or service, since it is professionally engaged in the activity in contrast to the other party which, to a large extent, is limited to accepting the contract offered on the basis of the information known, which may be incomplete, insufficient or even, misleading. Hence, it is in this context that we observe the appearance of the concept of "consumer" as a subject in trade relationships, as someone entitled to a number of rights to be guaranteed by the State, and that were largely summarized by John F. Kennedy in his 1962 speech: the right to safety, to be heard, to be informed, and to choose[1]; to which other rights were added in 1985, when the United Nations Resolution 39/248 was published, regarding the Guidelines for Consumer Protection, subsequently expanded in 1999.

Whether consumer is perceived as a weak link, in its own right or par rapport to its counterpart, or whether consumer is simply considered a disadvantaged party regarding the professional holding all the information[2], we acknowledged the need to afford special care to this subject, claiming for more active intervention by the State, recognizing its rights and establishing mechanisms for their enforcement, whether by court, arbitration panel, or even administrative jurisdiction, when public agencies are conferred intervention powers ranging from the approval of general contracting clauses or performing information and control actions, to the application of sanctions. Therefore, Consumer Law is a mixed discipline focusing on the consumer relationship between a professional supplier and a consumer in a situation of informational asymmetry, but including Public Law (constitutional and administrative) and Private Law (civil and commercial) rules, which cannot be understood without their articulated interpretation.

1 See: http://www.presidency.ucsb.edu/ws/?pid=9108.
2 Regarding both foundations, ALPA, G. (2004). Derecho del consumidor (Consumer Law). Trad. ESPINOZA ESPINOZA, J. Lima, Gaceta Jurídica, p. 45.

Therefore, sometimes the response mechanisms provided by the State shall be consistent with Private law, such as when the State establishes the objective liability for defective products, while, in other cases, such mechanisms will be consistent with Administrative law, such as when a sanction is imposed upon infringement under the law. However, what is important, as we will see in the following pages, is to distinguish between such cases, as we run the risk of applying institutions of Private law to Public law, or vice versa, with the subsequent distortion and confusion that this may generate.

CONSUMER LAW

It is a mixed discipline focusing on the consumer relationship between a professional supplier and a consumer in a situation of informational asymmetry.

It includes regulations of Public Law (constitutional and administrative) and Private Law (civil and commercial).

The response mechanisms provided by the State shall be of Private law in some cases, and in others, they shall be of Administrative law.

The risk is trying to apply institutions of Private law to Public law, or vice versa.

1.2. Evolution of Peruvian legislation on consumer and the inception of Indecopi

The Peruvian law has not been unaware of this development; already the 1979 Constitution provided in Art. 110 that

"The economic system of the Republic is founded on principles of social justice geared towards making work the main source of wealth and a means of personal realization. The State promotes economic and social development by increasing production and productivity, the rational use of resources, full employment and equitable income distribution. With the same purpose, it encourages the various sectors of production and defends the interests of consumers".

Therefore, the State's obligation of protecting the interest of consumers was thus enshrined with a view of, at least, putting consumers in a situation comparable to that of suppliers.

With this constitutional regulation, Supreme Decree 036-83-JUS was issued establishing a series of rights, prohibitions, and even clauses for price regulation, but failed to appoint a single authority responsible for monitoring compliance of such regulations. The next step was taken in November 1991, with the passing of Legislative Decree 716, a significant milestone not only because it is a general rule on consumer protection, but also because our legislature, from this early stage, opted for a punitive system based on supplier's objective liability and the General Directorate of Consumer Defense of the Ministry of Industry, Domestic Trade, Tourism, and Integration[3] was charged with applying the sanctions. However, this was a strictly punitive system, which did not expressly recognize the possibility for the Authority to order corrective measures; this power was actually conferred through Law 27311, dated July 18, 2000 (Law for Strengthening the Consumer Protection System), which decisively changed the role played by the consumer protection procedure, by introducing incentives for injured parties to lodge their complaints; since then the number of claims has increased significantly.

Nonetheless, despite the importance of this last change, there was a previous one, even more relevant to the evolution and development of consumers protection: the creation of the National Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi, acronym in Spanish) by Decree Law 25868, dated November 24, 1992, as amended by Legislative Decree 1033. This rule marks a very important step as it establishes an independent body which, among its obligations, was called upon to oversee all issues related to consumers protection, and since its creation, Indecopi has became a benchmark institution in Peru, under the whim of its first presidents, efforts made until the present, despite budgetary constraints that may eventually hinder its work. Its independence, the possibility of expert joining its deciding bodies without being involved full time in complex administrative tasks,

3 Art. 42 of the original wording of Legislative Decree 716 literally established that *"the application and graduation of a sanction shall be determined by the General Directorate of Consumer Defense of the Domestic trade sector of the Ministry of Industry, Domestic Trade, Tourism, and Integration, based on the scale referred to in the previous section, based on the intentionality of infringing party, the damage resulting from the infringement, the benefits obtained by the supplier due to the infringing fact and supplier's recurrence or recidivism"*. However, pursuant to section 46 of the same rule, the sanctions were imposed first by the Municipal Councils under whose jurisdiction the premises were located.

and the flexibility of organizing the first delegated committees in provinces in the Chambers of Commerce and Universities lured and retained a specially selected group of professionals, some of who remained in Indecopi for many years.

In 1993, the Constitution was amended resulting in the strengthening of consumer protection with the inclusion of Art. 65 to the current Constitution (CP) establishing that "the State defends the interests of consumers and users. To that effect, the State guarantees the right to information on goods and services that are available in the market. Likewise, the State particularly safeguards the population's health and safety". This regulation is very important, not only because it established a solid constitutional anchor for constitutional protection[4], but because it expressly provides that the basis for this is the right of consumers to be properly informed about the goods and services they buy, seeking thereby to correct the negative consequences resulting from asymmetric information (which, in any case, is unavoidable).

The next step in the evolution was the enactment and entry into force of Legislative Decree 807, which provides the powers, rules, and structure of Indecopi, substantially modifying Decree Law 25868 and Legislative Decree 716, not only on substantive issues, but also on procedural ones. As mentioned above, the next step in this story was the enactment and entry into force of Law 27311, which introduced the possibility for Indecopi to impose, together with sanctions, corrective measures. This law brought with it the need to issue the first Consolidated Text of the Regulations governing the Consumer Protection System, by Supreme Decree 039-2000-ITINCI.

On the other hand, shortly afterwards, another less flashy but equally important event occurred: the publication of Law 27444, the General Administrative Proceedings Law (LPAG, acronym in Spanish), which provided the principles of the administrative sanctioning proceedings,

4 Numerous judgments by the Constitutional Tribunal have addressed the role played by the State in consumer protection, considered "the purpose of every economic activity" (STC dated January 31, 2008 regarding Case 1535-2006-PA/TC, among others). In this sense, this judgment further affirms the protective principle of the State enshrined in Article 65 CP and a true subjective right; this is evidenced in the recognition of a series of principles, such as the pro-consumer principle (proposing the State's protection in favor of consumers and users due to challengeable disadvantages and factual asymmetries arising out of their legal relationships with product and service suppliers); principles on forbidding the abuse of the law, real isonomy, *restitutio in integrum,* transparency, veracity, in dubio pro consumer and pro association (STC dated June 20, 2011, Case 01865-2010-PA/TC). In other words, these principles do not stem from any legal recognition, but from the Constitution itself. Therefore, they are entitled to constitutional protection (STC dated November 13, 2007, Case 3189-2007-PA/TC).

which from the early years of the twenty-first century were progressively applied to the procedures lodged with Indecopi, under the Court's explicit efforts at that time, this put out in the open its punitive nature[5], which was difficult to fit in some previous statements. Thus, for example, it determined the Court's obligation to clearly attribute the infringing conduct so as to allow defendant to adequately defend himself or the prohibition of the reformatio in peius[6] was recognized.

In June 2008, the following relevant modification occurred, with the enactment and publication of Legislative Decree 1045, which approves the Supplementary Law of the Consumer Protection System. The scope and amount of the modifications made, many of them made in pursuance of the binding precedents and criteria established by Indecopi, made necessary the adoption of a new Consolidated Text, created by Supreme Decree 006-2009-PCM, published on January 30, 2009 (hereinafter, TUO-CONSUMER). However, the validity of these rules was ephemeral since they were repealed with the entry into force of the CPDC, within thirty days after the date of publication, on September 2, 2010.

The CPDC, unlike the preceding rules, has a globalizing effort, as corresponds to its nature, regulating separately the different areas where the rights of consumers may be affected, such as health, education, products, and real estate services, financial products or services and credit loans provided by entities not supervised by the Superintendence of Banking, Insurance and Private Pension Fund Management (SBS, acronym in Spanish). However, among the main innovations of this rule, we will mention four: (i) a stringent regulation of abusive clauses in consumer contracts, thereby conforming with the provisions of the Civil Code, (ii) the strengthening of consumer arbitration as a means of settling disputes between suppliers and consumers, (iii) the modification of sanctioning proceedings, by creating Deciding bodies for summary proceedings on consumer protection (OPS), as an instance to resolve procedures in a more efficient way, and (iv) the introduction and requirement to all commercial establishments of a complaint book, an obligation which has been regulated by Supreme Decree 011-2011-PCM.

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5 The foregoing was expressly stated by former Chairman to the Indecopi Tribunal (2001 – 2006), in ROJAS LEO, J. F. (2005), "La defense de la competencia en una nueva dimensión", *in Coyuntura. Análisis Económico y Social de Actualidad,* Year 1, Number 4, page 18.

6 Thus, for example, we should mentioned how the Tribunal in Resolution 277-1999/TDC-INDECOPI, dated August 18, 1999, which also establishes a precedent of mandatory compliance, changes the sanction imposed first by increasing from 0.1 Tax Units (UITs) to 1 Tax Unit (UIT). It is hardly framed within the *reformatio in peius* prohibition principle.

Having achieved these developments, two issues have been essentially set out for the future, linked to Indecopi's scope of action. The first is whether, once the consumer arbitration system is regulated, it makes sense for Indecopi to continue trying the sanctioning proceedings of individual complaints, or if they should be settled in such arbitration proceedings, reserving the sanctioning proceedings for class actions seeking to protect collective or diffuse interests, usually initiated ex officio[7]. On the other hand, there is a proposal to confer Indecopi with judicial powers so that its decisions can no longer be reviewed by the courts[8].

Actually, these two proposals are very important and difficult to implement, especially the second one, which would require an amendment to Art. 148 of the CP, which stipulates that all final administrative rulings may be challenged with the judiciary and does not recognize Indecopi's special jurisdiction or, for that matter, the special jurisdiction of any other public administration body, unlike the Colombian model, which follows the French one regarding the State Council. On the other hand, the restriction of sanctioning proceedings would involve a change in the consumer protection model designed in Peru under Legislative Decree 716, which is not limited to settling disputes, but seeks to impose a punishment to supplier, even if it affects an individual interest. Probably, it is a good solution, that would avoid some practical problems (such as the dispute about the trilateral and sanctioning nature of proceedings regarding the consumer protection), but in any case, it would imply a complete paradigm change, which is unlikely to happen[9].

In fact, the biggest challenge for Indecopi is how to manage its success, without losing its essence. The exponential growth of the complaints regarding consumer protection at all levels, both before the OPS and before the Consumer Protection Commissions (CPC), often makes proceedings largely exceed the expected time for resolution; this ultimately affects people's perception of the institution since, as the well-known adage goes, justice delayed is

7 ESPINOZA LOZADA, J. E. (2011), "¿Y ahora quién podrá defendernos? El arbitraje de consume y otros medios de resolución de controversias entre consumidores y proveedores", in *Revista de Derecho Administrativo* (CDA) 10, volume II, page 138.

8 Ibídem, pp. 138 and 139.

9 A third and last question which may be posed in respect of INDECOPI's future and consumer defense proceedings is whether they can become a mechanism to fight against exploitative practices, set aside by the fair competition legislation limited to exclusionary practices, from the central role that would correspond to the consumer in Competition Law, highlighted by DURAND CARRION, J. (2011), "El verdadero alcance normativo de la Legislación de Competencia frente a los Derechos del Consumidor", in *Revista de Derecho Administrativo* (CDA) 10, volume II, 2011, page 57 et seq.

justice denied. It is therefore necessary to find methods to better distribute the procedural workload and not lose the speed required in these cases, thus avoiding the image of an overly slow and bureaucratic entity, like Mafalda's popular turtle. Therefore, consumer arbitration and summary proceedings should be encouraged while counting with appropriate, well-paid staff capable of dealing with the huge task.

1.3. Consumer relationship: The concepts of consumer and supplier in Peruvian Law

Art. IV.5 of the CPDC defines the consumer relationship as the one by which "a consumer buys a product or contracts a service with a supplier/provider in exchange for a payment," notwithstanding the specific cases included in Art. III. Therefore, the elements of such relationship are a consumer, a supplier/provider and a product or service subject to the business transaction as per the law.

1.3.1. The notion of consumer

According to an economic concept, consumer is a

> *"market subject purchasing goods or using services to use them in his own benefit or to satisfy his own personal or family needs [...] The consumer intends to benefit from the use value of what was acquired, without the intention of using or integrating it into his own work or professional activity, i.e. he does not intend to directly use what was acquired to obtain, in turn, other goods or services. In the sense expressed, therefore, the consumer is limited to participating in the last phase of the financial process enjoying, using or being favored with a particular good according to its characteristics and nature, but without integrating it into any productive activity.*[10]"

However, establishing the economic concept of consumer is not equal to determining who a consumer deserving protection is; this task is to be fulfilled by the law and jurisprudence.

10 LASARTE ALVAREZ, C. (2010). *Manual sobre protección de consumidores y usuarios.* Fourth Edition. Madrid, Dykinson, page 55.

Thus, for example, a large company can purchase goods that will not be used in its production chain but, does this make it a consumer who can demand protection from the State, according to the rules established by the CPDC? On the other hand, we may also wonder if only a reasonable consumer is protected or whether anyone failing to behave as a reasonable consumer deserves this same type of protection. The economic concept of consumer is solely based on the destination of the goods or services. On the other hand, when the rules establish the State's duty to provide protection, they do so with a certain consumer in mind: anyone who is in a situation of informational asymmetry and, hence, especially vulnerable to supplier, in respect of which the law tries to reduce such informational asymmetry. Therefore, the definition of consumer we are interested in is a legal definition, not a purely economic one.

The notion of consumer has been changing in line with the successive regulatory amendments over the last 20 years. Legislative Decree 716 provided a brief definition of consumer as "the natural or legal persons who purchase, use, or enjoy products or services as final recipients." This concept was then clarified by the binding precedent approved by Resolution 101-96-TC, dated December 18, 1996. The resolution clearly explains that the basis for the consumer protection is not economic inequality but informational asymmetry, which sometimes justifies the intervention of the relevant authority. This happens in the case of end consumers, whether natural or legal persons, who do not incorporate the good or service to their productive chain.

In applying these criteria, the following was established as binding precedent:

> *"A consumer or user, according to the provisions of sub-paragraph a) of Article 3 of Legislative Decree 716, is the person or entity purchasing, using, or enjoying a product or service for personal, family purposes, or by immediate social surrounding. Therefore, suppliers are not considered consumers or users under the Law when they purchase, use, or enjoy a good or service directly in their activities, according to the definitions contained in Articles 1 and 3 sub-paragraph b) of such Code. In that sense, complaints aimed at protecting the interests of those who do not classify as consumers or users should be declared inadmissible."*

This precedent was overridden by the precedent approved by Resolution 0422-2003/TDC-Indecopi dated October 3, 2010, which encompasses the small businessman within the scope of protection of the law, as an end consumer, because he is in a situation of inequality

(i.e. regarding information) comparable to that one of any individual. In this sense, such resolution states the following:

> *"... the small businessman, suffering from the effects of inequality in the consumption process, qualifies, in certain specific cases, as a consumer for the purposes of the application of the Consumer Protection Law. Such specific cases means the goods or products acquired or use out of necessity of its professional activity; it refers to products regarding which consumer is not expected to have certain degree of knowledge or expertise, otherwise this would eliminate the inequality between the small businessman and the supplier/provider of the good or service in question."*
> (Emphasis added).

This resolution sets as binding precedent that:

> *"1. In accordance with the provisions of Articles 58, 59, and 65 of the Peruvian Political Constitution and articles 2 and 5 of Legislative Decree 716, Consumer Protection is a tool for overcoming informational inequality between suppliers and consumers.*
> *2. Consumer, in accordance with the provisions of paragraph a) of Article 3 of Legislative Decree 716, means any natural or legal person purchasing, using, or enjoying a product, whether a good or service for personal or family purposes or for his immediate social environment.*
> *3. Natural and legal persons belonging to the professional category of small businesses are also subjects affected by inequality of information in the consumer relationship and, therefore, they are considered consumers for the purposes of the Consumer Protection Law when, given the needs of their businesses, they purchase or use products, whether goods or services, for the purchase or use of which such businessmen are not expected to have expertise knowledge comparable to those of suppliers/providers."*

Nonetheless, besides establishing this precedent, the resolution mentioned analyzes when a small business owner might be protected, distinguishing three categories: (i) materials and parts, (ii) capital issues, and (iii) supplies and services. The first category comprises raw materials and manufactured materials and parts, and, in any case, even in the case of small business owners, they would be out of the scope of protection of the Consumer Protection

Law. The same applies to capital issues, which include facilities and fixed equipment, which would be out of the scope of protection, except for office equipment purchased by small business owners who purchase these goods without having knowledge different from that one of any other person. Regarding supplies and services, both buyers and users of this product category do not have any particular knowledge or expertise; small business owners shall be protected, but medium and large companies shall not, since they both have or ought to have logistics departments. Finally, with respect to general services, the resolution in question understands that both small and medium-sized and large companies would be protectable in the case of services not used frequently due to the business needs, for which a special degree of experience and knowledge is not required, while considering frequently of services used due to the business needs, only small business owners shall be protected.

This precedent was affected by the amendment of Art. 3.a of Legislative Decree 716, by the Legislative Decree 1045, from which consumers should be understood as:

> *"... natural persons who, when purchasing, using or enjoying goods or contracting a service, operate in an area different from a business or professional activity and, exceptionally, small business owners evidencing a situation of informational asymmetry with the supplier regarding such products or services unrelated to the line of business. This Law protects the consumer acting in the market with ordinary diligence, in light of the circumstances."*

In other words, this rule excludes from the concept of consumer all legal persons, unless they were micro-entrepreneurs, when two requirements concur: (i) a situation of informational asymmetry, and (ii) the goods or services acquitted are unrelated to the line of business.

In application of this new regulation, totally excluding legal persons from the notion of consumer, Resolution 1598-2010-CPC was issued on July 2, 2010, explaining the necessary filters to fit in the category of protected consumer, which, in any case, excludes small, medium-sized and large business, since

> *"...they can prove that they are in a situation of informational asymmetric before the supplier/provider that has provided them a product or service, given that it is the latter who knows the characteristics and limitations of a product or service placed in the market. Nonetheless, considering its size, economic capacity, internal organization and structure, businesses must be presumed to have the*

> *ability to generate, from its interior, mechanisms to overcome the situation of asymmetric information they may have vis a vis their suppliers/providers. This does not mean commercial agents are unprotected since they can resort to the Judiciary which shall ultimately assert their rights* [11]".

Microenterprises would, by exception, be consider consumers provided that they fulfill three successive filters: (i) the business fits the definition established by the SMEs Law, (ii) the product or service is not related to the company's line of business, and (iii) whether it is reasonable to consider that the complainant suffers from information asymmetry. Line of business refers to activities essential to the production process, without which the business cannot be carried out, for which even the entrepreneur must have a minimum of specialized information. The last filter involves analyzing consumer's situation since, given its circumstances, it may not allege informational asymmetry if it concerns, for example, a repeated transaction.

These criteria have been confirmed by Resolution 2188-2011/SC2-INDECOPI, of August 18, 2011. With respect to products or services related to the line of business, the Court understands that for microentrepreneur's economic activity to take place, the following are essential: (i) raw materials and/or manufactured materials that serve as inputs to manufacture certain products, or (ii) machinery or instruments necessary to provide certain services. By contrast, crosscutting services to all production or marketing scheme, such as advertising services, transport of goods or certain financial services, shall be considered services or products unrelated to the line of business. For these services, the above resolution establishes a change in criteria because it was previously believed that these services, for the sake of being crosscutting, were inherent to every business. Meanwhile, regarding the existence of information asymmetry, the Court states that when the previous two filters are met, it must be assumed, where supplier is charged with proving to the contrary, based on the application of the principle of pro-consumer, the burden of proof rests upon those who are in a better position to provide such evidence[12].

11 Resolution 2266-2011/SC2-INDECOPI relates to the constitutionality of this consumer concept, excluding small, medium, and large companies.

12 For example, crosscutting services with information asymmetry exists in the shipment of packages. In this sense, see Resolution 0075-2012/SC2-INDECOPI.

However, these criteria must be assessed in light of the provisions of the CPDC, which establishes a new formula to define consumers. On the one hand, the CPDC includes those who make gratuitous transactions with a business purpose intended to motivate or encourage consumption, and those who are directly or indirectly exposed or covered by consumer relationship or a previous stage (Art. III of CPDC). In other words, the category of "equated consumer"[13] is explicitly recognized. Yet, it also defines consumers and users away from the model established by Legislative Decree 1045, by recognizing again that character not only to individuals but also to legal persons, when both

> *"... acquire, use or enjoy such products or services, tangible and intangible as final recipients, for personal or family or social group benefit, thus acting in a field outside business or professional activity. For purposes of this Code, a consumer is not the individual who acquires, uses or enjoys a product or service usually intended for the purposes of its business as a supplier."*

In this sense, microentrepreneurs are considered consumers "when evidencing a situation of information asymmetry with regard to the provider in respect of products or services that are not part of their actual line of business."[14]

Although the rule of the CPDC sought to introduce greater clarity in the concept of the consumer, has achieved the contrary effect to the point that there are at least two models of resolutions that differ substantially. According to the first, there is a first general filter, which is to establish whether the product or service is acquired, used or enjoyed for personal, family or immediate social environment purposes. If this were the case, we would be in front of a consumer, whether it is a natural or legal person, whether micro, small, medium or large company. That is, a large company can be a protected consumer. Only when we

13 ESPINOZA ESPINOZA, J. (2009). "Hacia la protección del 'eslabón perdido'. El reconocimiento de la categoría del consumidor equiparado". In: *Actualidad Jurídica.* No. 188., page 313 et seq.; and, from the same author: ESPINOZA ESPINOZA, J. (2010b). "Primeras reflexiones a propósito del Código de Protección y Defensa del Consumidor". In: *Actualidad Jurídica.* No. 205, page 16. In any case, consumers were not deemed third parties receiving collection letters because, in this case, he is not exposed to a consumer relationship (Resolution 0409-2012/SC2-INDECOPI, dated February 15, 2012).

14 For information against the protection limitation for micro-entrepreneurs since small businessmen should be also included therein, see ESPINOZA ESPINOZA, J. (2011a). "Las nuevas coordenadas del concepto de consumidor: volviendo a aceptar a las personas jurídicas y excluyendo injustificadamente a la pequeña empresa en situación de asimetría informativa". In: *Actualidad Jurídica.* No. 215, page 278 et seq.

are in front of a good or service that is not acquired with such personal, family or immediate social environment purposes, it makes sense to apply an additional filter because, in this case, consumers will only be qualified as micro companies, never the small, medium or large companies, provided that two additional requirements are met: (i) the product or service is not related to the line of business as an essential element for the production process of micro company, and (ii) the microcompany is in a situation of information asymmetry according to the product or service. If these two conditions occur, the microcompany would be qualified as protected consumer, despite acting on a business level.[15].

On the other hand, the second model maintains an analysis scheme similar to that established during the time the Legislative Decree 1045 was in force, with the exception that now legal persons may qualify as consumers, but always acting on a field outside a business or professional activity. Therefore, the non- profit legal persons which would be considered consumers, as it had been stipulated by the jurisprudence of Indecopi, provided that they act in a field outside its business activity[16]. The reference to microcompanies as consumers remains therefore exceptional, so that small, medium and large companies could never enjoy the protection mechanisms in the CPDC. For its part, for a small business is considered a consumer, the two filters we know should be exceeded: (i) if the product is related to the proper line of business, and (ii) if a situation of information asymmetry is met[17].

Finally, to end the concept of the consumer, it must determine whether it is or not the reasonable consumer standard, already introduced since the early binding precedent established by Resolution 085-96/TDC, of November 13, 1996, or if it has been replaced by another, that of the ordinary consumer. In this regard, Legislative Decree 1045, by modifying the concept of consumer, stated the law "protects the consumer acting on the market with ordinary diligence, according to the circumstances". This reference to the ordinary diligence under the circumstances, could be interpreted as a denial of the reasonable consumer parameter, but in the background it was actually its statutory recognition, because ordinary diligence (not extraordinary) in its performance is what defines the reasonable consumer,

15 In this regard, see Resolution 386-2011/CPC, dated March 16, 2011.
16 In this sense, see Resolution 1605-2011/SC2-INDECOPI, dated June 27, 2007.
17 See, for example, Resolution 4093-2012/CPC, dated November 13, 2012.

as had been raised even before the Legislative Decree 1045[18] comes into effect. After a failed attempt in the Draft Code of Consumer for which it was intended to establish the ordinary, non-specialist[19], consumer standard, the CPDC has not formally introduced the parameter of the ordinary consumer, but neither strongly advocates the criterion of reasonable consumer. Similar to Legislative Decree 1045, it refers only to ordinary diligence, but now referred to the characteristics gathering information and warnings about the risk and hazard of products[20]. However, it explicitly devote the principle of pro-consumer and the condition of vulnerability of consumers in the market (especially from some of them), which fits poorly with an absolute reasonable consumer standard, understood as a diligent consumer.[21].

In any case, although the CPDC does not longer refer generally to ordinary diligence as a requirement for consumers to be protected, except in cases of risky goods or services (so it might be understood that in other cases it is not necessary this enhanced requirement), the concept of reasonable consumer is still present in Indecopi resolutions. Thus, for example, would be necessary to ask the consumers to read the clauses of a contract, although the ordinary consumer standard implies that, in fact, very few of them carefully read the banking contracts. However, if the clause is abusive, even the most negligent of consumers is protected. Therefore, it is a useful standard in some cases, as can happen when refers to the notion of implied warranty, but unnecessary in others.

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18 ESPINOZA ESPINOZA, J. (2006). Derecho de los consumidores. Lima, Editorial Rhodas, page 23 et seq. See also, from the same author and after the entry into force of Legislative Decree No. 1045: ESPINOZA ESPINOZA, J. (2008). "¿La muerte del 'consumidor razonable' y el nacimiento de la responsabilidad objetiva absoluta del proveedor? Análisis de la Ley Complementaria del Sistema de Protección al Consumidor". In: Revista Jurídica del Perú. No. 89., page 363 et seq.

19 The wording of the original project established that "To interpret the behavior of these agents in the market, the parameter of a non-specialized, ordinary consumer shall be considered a reference and that the supplier acted in accordance with the principle of good faith and reasonability". (Emphasis added). See BULLARD, A. (2010). "¿Es el consumidor un idiota? El falso dilema entre el consumidor razonable y el consumidor ordinario". In: Revista de la Competencia y la Propiedad Intelectual. No. 10, page 8.

20 "Art. 29. Criteria applicable to information and warnings about risks and dangers. The risk and danger warning regularly appearing on certain products or services, or non-foreseen or unforeseen risks and dangers detected subsequently to the placement of products or provision of services in the market, must be made in accordance with the following criteria: […] e. An accessible and comprehensible language may be used for the consumer acting with ordinary diligence according to the circumstances of the case. Therefore, the use of excessively technical or scientific language may not be made using, on the contrary, terms allowing the consumer to understand which are the warned risks or dangers."

21 To find criticism against CPDC based on the foregoing, FERNANDEZ-MALDONADO, A. (2010). "El curioso caso del consumidor 'Benjamin Button'". In: Actualidad Jurídica. No. 202. FOR OPPOSING IDEAS, GONZALES BARRÓN. (2010). "El mito del consumidor razonable". In: *Actualidad Jurídica*. N° 202, whereby the notion of reasonable consumer is criticized since even a negligent consumer would have the right to be protected if there information asymmetry.

It is acknowledged that the concept of reasonable consumer may be useful in some cases to determine who may be protected, but it is not in other cases, it is important to determine what means that "reasonableness", which in any case may involve requiring a diligence standard out of the ordinary. As I said the TUO-CONSUMER, the control parameter will be the ordinary diligence (not extraordinary), one that can be enforced according to the circumstances for which it will be necessary to examine the case.

1.3.2. The notion of supplier

The other side of the consumer relationship is the provider, which is generously regulated by the CPDC. Thus, according to Art. IV.2, a provider/supplier is

> *"... Natural or legal persons, of public or private law, which routinely manufacture, process, handle, condition, mix, pack, store, prepare, dispense, supply goods or render services of any kind to consumers."*

Included in this concept are the dealers or traders, producers or manufacturers, importers and service providers, each of them defined in the CPDC. An essential element to grant the provider status is that it is a natural or legal person performing the behavior as usual, so that, for example, it is not considered that there is a consumer relationship when a person not dedicated to real estate activity sells its home.

A first issue that should be clarified is when a supplier is considered a public legal person, as these cannot be denounced when acting in the exercise of their public duties[22], or when they perform a care activity. Regarding the latter, Indecopi maintains a very restrictive position, embodied in Resolution 1818-2006/TDC-INDECOPI, of November 15, 2006. In this case, ESSALUD was denounced for having rendered a service not ideal, for not having detected a tumor early, due to the erroneous interpretation of mammograms taken to the

22 Among those cases where this question has been analyzed, there is an appealing one because the respondent was Indecopi itself. Indecopi was charged with the fact of failing to give a certificate after a conference it organized. In Resolution 1916-2010/SC2-INDECOPI, the Tribunal understood that it was not acting as a supplier because even though the service could be materially equivalent to an educational one, in this case, Indecopi had acted in compliance with its duties, by disseminating its services and applicable regulations.

complainant during the years 2002-2004. The Court of Indecopi established that ESSALUD is not a provider, for the purposes of applying the rule then in force, because it requires that the services are offered on the market at a fee (Art. 3 TUO-CONSUMER), not being the case in so-called care services, in which "the activity is required for social aims and intends to balance social differences reaching health, education, transportation to the most needy sectors." In these cases, the services are not provided in the market; it lacks a profit motive, and is remunerated by public funds (although there may be a payment by the consumer). It is about, continues the above resolution, the services in which the provider is required to provide them, and the user going to a state agency has no choice.

Moreover, the Court added, it is not reasonable the State to punish itself, if the funds to pay the fine will come from the public treasury. Therefore, it says, "there is no expected that State entities are sanctioned each other, because ultimately it is the State punishing itself," so that

> *"... The law should only apply to activities that are within its own context of private law, while activities where state regulation is exorbitant, that is, public law, and, in specific, on the activities qualified as public care services should only be applied to rules of its area."*

By contrast, in the case of activities that do not qualify as care services such as those providing ESSALUD pursuant to optional insurance would be effectively subject to the rules on consumer protection, as stated in Resolution 1477 -2008/TDC-INDECOPI, of July 25, 2012[23].

Notwithstanding the reasonableness of the arguments in the Resolution 1818-2006/ TDC-INDECOPI, the assumed criterion raises a problem; it creates first and second class consumers. In the case of the former, they would be those who use the services of clinics or private insurance, which can obtain protection from Indecopi, not only to achieve a fine is imposed, but also for the establishment of corrective action. In turn, the latter usually the most vulnerable, do not have this protection mechanism, and must rely only on the

23 On the other hand, Multired loans granted by Banco de la Nación are not considered assistance services (Resolution 3449-2011/SC2-INDECOPI).

disciplinary responsibility or patrimony liability of the Directors, in our country the latter is almost completely unknown, despite existing regulation[24].

On the other hand, the difference between health care services and economic services can make sense when looking at the subsidiarity of the State, as has been done not long ago to establish the criteria for Indecopi to assess whether business activity of State involves unfair competition or no, but not necessarily to determine the nature of the consumer relationship. Finally, a user who works in a hospital, in exchange for a fee paid at the time or by the contributions established normatively, receives the same service as a user who receives the service in a private clinic. In any case, the fact is that the criterion of Indecopi is clear and excludes from the notion of consumer to the public entities acting in the exercise of powers and those providing care services.[25]

1.4. Consumer rights: Information and product or service suitability within the framework of a consumer relationship and the prohibition of discrimination and injustified unequal treatment

1.4.1. The right to information and the suitability of the product or service.

Suitability is defined as the correspondence between what consumers expect and what they actually receive, according to what had been offered, advertising and information transmitted or the characteristics and nature of the product, among other factors, under the circumstances of the case. Furthermore, the suitability depends on the nature of the product and its ability to satisfy the purpose for which it has been placed on the market. Suitability and information are therefore closely linked. However, this should not lead us

24 See, BACA ONETO, V.S. (2010a). "¿Es objetiva la responsabilidad patrimonial de la Administración pública en el Derecho peruano? Razones para una respuesta negativa". In: *Revista de Derecho Administrativo* (CDA). No. 9, page 233 et seq.

25 Thus, for example, see Resolution 1818-2006/TDC-INDECOPI, which shall be cited afterwards.

to understand that the single parameter to determine the suitability of a product is the information received, as the former depends on consumer expectations, which are subject to the nature of good[26]. Therefore, the duty of suitability is present, as established from early Resolution 085-96/TDC in three warranties: a legal warranty, other express and other one implied[27]. The first is imposed on the following two so it can never be excluded by the parties to the contract of consumption. The second can get priority over the third, as they are the conditions agreed by the supplier and the consumer that will finally establish the scope of the obligations of that against it, except in the case of alleged exclusions of warranty that may be regarded as abusive, because they involve the denaturation of product that might not be in any way suitable to meet its purpose, in which case the implied warranty could be invoked even against an express warranty.

Recently, the Court has issued a very important Resolution, in order to know how to interpret the scope of the warranties provided by the suppliers, in order to determine when there is an infringement for selling a product or providing an unsuitable service. Thus, according to Resolution 2221-2012/SC2-INDECOPI, of July 19, 2012, the provider cannot guarantee that none of the goods offered in the market will suffer a breakdown. Just for that reason an express warranty is offered, so the infringement will be configured only if, finding a failure, it is proven the supplier limited, excluded or denied the application of solution mechanisms recognized by law or offered explicitly or implicitly by the supplier.

In the words of the Court:

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26 The relationship between suitability and information should not lead us to think that the second right may not be ignored independently. As repeatedly indicated by INDECOPI, the information is a dynamic process, it is not required not only before commencing a consumer relationship, but it is an accompanying element during the whole existence. Therefore, this right shall be violated when the supplier fails his duty to deliver the necessary information before commencing the consumer relationship, which would have been requested or required to the consumer to prove it or make the corresponding claims (pay slips, sale tickets, etc.). The supplier may be only exempted from his/her obligation to comply with an information request if it (i) is in possession of the consumer or he is in a better position to possess it; and (ii) when it is a piece of information unrelated to the purchased product or offered or contracted products. However, it does not mean that he may not respond, but he always has to do so, even when it is simply done to refuse the provision of requested information (Resolution 3224-2011/SC2-INDECOPI).

27 Actually, the implicit guarantee is related to the notion of a reasonable consumer, as established by Resolution 2808-2010/SC2-INDECOPI.

> *"... The duty of suitability in selling products is not based on the mere finding of fault in its operation, but on the performance of the provider that after having become aware of such failure did nothing or refused or simply refused to correct that failure, that is, provided no other alternative solutions."*

The exception to this rule would be given in cases where the goods cause damage to consumers or when there is gross negligence or intentional misconduct on the supplier at the time of placing a defective product on the market, because it knew or should have known about the failure. Actually, this is a major change in approach in the jurisprudence of Indecopi, we do not know whether this will be confirmed or not by the Chamber in its current conformation.

1.4.2. The prohibition of discrimination and unequal treatment

One of the most serious infringements that can make a provider is discrimination, breaching thus the actual language of the Constitution, according to which *"... no one can be discriminated on grounds of origin, race, sex, language, religion, opinion, economic or any other status"* (Article 2.2.)[28]. However, the original text of Legislative Decree 716 did not refer to this issue, which was regulated by Law 27049, which introduced the Art. 7.B., which stated expressly the prohibition of discrimination in premises open to the public and select the customers, excluding individuals or performing similar practices, without reasonable causes of safety to the premises, tranquility of its customers or other objective and justified reasons. Consumer must prove unequal treatment and to the provider to prove the existence of objective reasons to justify it. This same law also amends Art. 5.d of Legislative Decree 716, and includes the prohibition of discrimination as part of the right to protection of economic interests.

The CPDC establishes as a consumer's right to receive fair and equitable treatment in all commercial transactions and not to be discriminated on grounds of origin, race, sex, language, religion, opinion, economic or other nature (Art. 1. d). Later, following the previous scheme

28 However, despite this seriousness, in any case a discriminatory behavior has been only sanctioned with a penalty, as occurred in Resolution 0001-2011/SC2-INDECOPI. Therefore, a bank was sanctioned for failure to allow a disabled person to get a credit card since he could not affix his/her signature when no obstacle existed for him/her to have access to a savings account.

generally prohibits discrimination (Art. 38.1) and the exclusion of people without reasonable security causes of establishment or tranquility of its customers or other similar grounds (Art. 38.2). It further provides expressly that the differential treatment must have objective and reasonable grounds (Art. 38.3).

Beyond the analysis of the jurisprudence of Indecopi on the issue and requirements in order to constitute a discriminatory act, is conceptually important to consider whether it is possible to distinguish discrimination and unjustified differential treatment. In this regard, there are two clearly marked jurisprudence lines, depending on the composition of the Court. So, first, until 2006 it was understood that differential treatment can be permissible, if based on objective and reasonable cause, and illegal, in which case such differentiation constituted a case of discrimination. That is, provided that an unjustified distinction is made, this conduct was discriminatory, regardless of the actual causes explaining it[29].

However, since 2008, and especially since 2010, the Court of Indecopi has changed of mind, restricting the concept of discrimination to certain differential treatment if the individual belongs to a group and not only affecting the consumer, but if it is contempt of inherent and specific characteristics to certain human communities. Meanwhile, there would be other cases of illegal differential treatment, equally prohibited as not justified on objective and reasonable reasons, but they do not constitute a discriminatory treatment. That is, for the Court, Art. 7B of Legislative Decree 716 typified two different behaviors: one general (Prohibition of illegal differential treatment) and another aggravated (discrimination). On the other hand, the Court, in addition to this difference, finally bears the burden of proof on the consumer (or the Indecopi, under the principles of presentation of evidence and material truth), because once claimed by the provider the alleged justification of its conduct, is the one who must prove that it is an assumed discrimination because, otherwise, we would be only before the basic type mentioned above.

This judicial interpretation began with the Resolution 0421-2008/SC2-INDECOPI, of November 28, 2008, by which it was considered that a tailoring business could not refuse

29 Without being express, such conclusions may be a result of Resolution 0665-2006/TDC-INDECOPI. Notwithstanding, in no case a sanction occurred due to differentiated treatment, but without indicating it was a behavior different from discrimination, which is also mentioned. As in the case of Resolution 1329-2005/CPC, whereby a bank is sanctioned because it refused to open a banking account without any justification.

without good cause to make a suit to a person, in exercising its freedom of contract. In this resolution, it already distinguishes between discrimination and unjustified refusal to hire. Thus, the first one will be set when is perceived the consumer belongs to a particular group, characterized by sexual preference, race, sex, language, among others. The second one, meanwhile, can be done legally if not going against public order rules, such as when discrimination occurs. That is, it may lawfully refuse to hire someone, as long as it is not made by an individual belonging to a particular group, which would imply a case of discrimination, even if there is no objective and reasonable cause for doing so.

This argument was completed in 2010, when it was declared that Art. 7B of Legislative Decree 716 established two different types of offenders. As was established, first, in Resolution 030-2010/SC2-INDECOPI although in this case, that statement had no practical consequences, as it was considered that the decision of preventing the complainant from entering to the premises of the denounced was justified on objective grounds, so that there was no infringement. This theoretical distinction was finally applied to the Resolution 1731-2010/SC2-INDECOPI, of August 11, 2010, which again was called into question the decision taken by premises open to the public of preventing a consumer for entering, claiming in this case that it was drunken. Since such justification was never proven, and illegal differential treatment had been materialized, it was determined that there was an infringement. The question, therefore, was to determine which infringement was committed, being sanctioned only by the generic type because it was not shown that the differential treatment was due to consumer belonging to a particular group, which constituted the factor of discrimination[30].

In this way, the criterion used by Indecopi to define discrimination would have changed the former criterion, as simple wrongful or unjustified differential treatment. However, beyond the reasonableness of distinguishing between cases in which the differential treatment is based on reasons that undermine the dignity of those, which would not have been established, there are two objections that have been raised against this new jurisprudence line.

30 In this same sense, citations should be made as to Resolution 0554-2011/SC2-INDECOPI, 0840-2011/SC2-INDECOPI, 2276-2011/SC2-INDECOPI and 0876-2012/SC2-INDECOPI, among others. In all these cases it was understood that a case of discrimination was not configured but only an illicit differentiated treatment.

First, according to the jurisprudence of the Constitutional Court, when a differentiation is not based on objective and reasonable causes, we will be in front of a case of discrimination[31]. That is, there would not be an intermediate category of non-discriminatory illegal differentiation, as argues the Court of Indecopi. Also, always on the same line, it could be said that the CPDC does not expressly distinguish between a generic category of unjustified selection of customers and other aggravated category of discrimination, but, on the one hand, they prohibit discrimination while on the other, provide that the differential treatment can be justified on objective and reasonable reasons, among which the security measures of the establishment or the consumers' tranquility are included. That is, if the differential treatment is justified, it is not an infringement, but if it does not, it will be a case of discrimination. It is clear that some cases of illegal differential treatment will be more serious than others, but this would not justify creating two different infringing types but grading the sanction, taking into account the involvement that would have occurred to the dignity of persons.

However, it is clear that here the wording of the CPDC is unfortunate for being unclear at regulating in two different items the prohibition of discrimination and prohibition of exclusion, can give rise to understand that these are two different infringements, with important consequences for the realization of the first one. And, secondly, it is questionable also the interpretation of the rules governing the test load, as a result of the difference between the two types offenders, has been made. According to positive law, consumer must prove that the conduct is discriminatory when the supplier has got to establish the existence of an objective and reasonable cause. However, according to the Court's interpretation, it is sufficient the provider alleges a cause –whether actually it is verified in the case or not, so that the consumer has to prove that it is a discriminatory behavior, while it affects as part of a group whose characteristics are valued negatively[32]. Discrimination test, therefore, becomes very difficult. However, what the CPDC states, and previously did the TUO-CONSUMER, is that the consumer must prove that the treatment is differentiated and only if the provider demonstrates that the difference is objective and reasonable, must also prove

31 Judgment dated December 13, 2011 entered on Docket No. 02835-2010/PA-TC.

32 Art. 39 of CPDC establishes that, to prove the existence of a differentiated treatment, it is unnecessary that the aggrieved party belongs to a certain group. Understanding that there are two different infringements (differentiated treatment and discrimination), this rule would be interpreted in the sense that for the last one it is necessary to prove the belonging to a certain group and not for the first one. However, the foregoing does not necessary result from the Code, which actually seems to avoid that the consumer has to prove his/her belonging to a certain group to allege discrimination.

that it hides discrimination. But if the differentiation is not reasonable and objective, should the provider also prove having been discriminated?[33] Obviously, this is a really hard task that has led to a lack of resolutions on discrimination in recent years.

1.5. Consumer contracts and abusive clauses[34]

The CPDC defines consumer contracts such as those having *"... as an object a legal relationship in which a consumer and a supplier are involved for the acquisition of goods or services in exchange for economic consideration"* (Art. 45). The consumer contract is related to mass contracts, wherein it is massive or standard contracts and because its content is biased by the supplier, reducing entirely or almost entirely the bargaining power as a way to reduce transaction costs. Bulk contracts are contracts of adhesion with general contractual clauses, although it is possible that a consumer contract is not necessarily a bulk contract, but it generally will be. As stated Álvaro, the basis of the consumer contract is an economic and sociological criterion, which can be summarized in the organizational and informational asymmetry (and sometimes financial) between the contracting parties[35].

The first problem with the legal definition of consumer contract is that it disregards gratuitous contracts, while there is a financial consideration. How to reconcile this statement with the provisions of the third paragraph of Art. III CPDC, according to which *"... they are also*

33 In fact, the alleged limit would be that where a supplier accredits his/her behavior is justified on an objective and reasonable cause that, however, is not applicable to the specific case. For example, in the event that a disco prohibits the entry of a twin of an individual who caused an incident the previous day and, so, a restriction was given for him not to enter anymore. In this case, it is clear that there is an inadmissible reason of differentiation and it is also clear that it is not a case of discrimination. There are two questions in this case: Is it an infringement? And, if it is, which precept would be the one justifying the imposition of a sanction? In this regard, it is not clear whether it is an infringement because a guiltiness analysis should be made. However, it is understood that the error between the twins is at least negligent because his identity should have been confirmed, and it would be a breach to the suitability duty, not a discriminatory behavior.

34 In this regard, we are mainly following the work scheme presented by ZEGARRA MULANOVICH, A. (2012). "Notas de contratos mercantiles. Contratos en masa, pro-manuscrito", y el resumen publicado bajo el título "Contratos de consumo y cláusulas abusivas". In: *Boletín de la Revista Ita Ius Esto* (Revista electrónica de los alumnos de la Universidad de Piura). Seen at *www.itaiusesto.com*.

35 ZEGARRA MULANOVICH, A., (2012), Op. Cit., §78, pp. 15 of 26.

covered by this Code the free operations when they have a business purpose intended to motivate or encourage consumption?" Perhaps in these contracts, free but targeted to motivate or encourage consumption, minimum protection rules laid down in Art. 47 CPDC are not applied, nor those prohibiting abusive clauses, but only the provisions of the Civil Code? Really, it has no much sense understanding like this.

With respect to consumer contracts, Art. 47 of CPDC establishes the minimum protection that should have, which passes through (i) the unambiguous evidence of the will of the consumer, being the responsibility of the supplier to establish special restrictions or conditions of the product or service that limit or restrict the implied warranty; (ii) prohibition of inclusion of clauses that impose onerous or disproportionate obstacles for the exercise of the rights granted to consumers in contracts, (iii) recognition of the right to use, to terminate the contract, the same means used to celebrate it, without additional formalities may be required, (iv) respect to the minimum size of 3 mm for the characters of contractual terms to ensure its readability, and (v) the obligation of the supplier to deliver a copy of the consumer contracts, including general contractual clauses when they are held in writing. Any clause, condition or provision contrary to the provisions of that article is not enforceable, considered not incorporated in assumptions (i), (iv) and (v) or abusive in cases (ii) and (iii). This paper establishes control of incorporation or inclusion but also content control, to establish some clauses to be considered abusive, establishing even a general rule in that respect, that would be the one we mentioned in (ii) above.

As can be seen, these are limitations on the contractual freedom, because while these clauses could be admissible in contracts where both parties will freely negotiate the content, not when this freedom is lacking, as in consumer contracts of adhesion with general clauses, in which case they are considered abusive or vexatious. Really, CPDC distinguishes between absolutely forbidden clauses (black list), understood as abusive in all circumstances, and clauses that may be prohibited (gray list), and are presumed to be abusive unless the supplier proves to the contrary, besides establishing not one but up to four prohibitive general clauses. In addition, the CPDC also differentiates between administratively approved clauses and which are not. This last classification is important because while the provisions of Chapter I of Title II of the CPDC is also applied in the case of administratively approved clauses,

because it is expressly provided by the rule, the same is not true for the provisions of Chapter II of the same title, which establishes the definition of abusive clauses, the list of absolute inefficiency clauses and those of relative inefficiency.

As noted above, there are up to four general clauses in the CPDC: (i) Art. 47.b, whereby clauses cannot be included or exercised practices that impose onerous or disproportionate obstacles for the exercise of the rights granted to consumers in contracts, (ii) the Art. 48.c, according to which in consumer contracts of adhesion with general contractual clauses, must respect the good faith and the necessary balance in the rights and obligations of the parties, which in any case precludes the use of abusive clauses, (iii) the Art. 49.1, which provides that in contracts of adhesion and in administratively approved general clauses are considered abusive and therefore unenforceable, to all those not individually negotiated provisions that, contrary to the requirement of good faith, place the consumer, at its expense, a disadvantage or inequality situation or annul its rights, and (iv) the Art. 51.a, according to which they are considered abusive, considering the case, those that impose onerous or disproportionate obstacles for the exercise of the rights granted to consumers in contracts.

In fact, the importance of recognizing these four general clauses is that the first two are found in Chapter I of Title II, also applied to contracts with administratively approved general clauses. Therefore, they can also be abusive, corresponding to the authority who approved them or the judiciary its annulment with general effects, although the Indecopi can, provided it is the competent authority, be applied in a particular case under Art. 54.3 of CPDC.

According to Art. 50 of CPDC, which for the purposes of consumer contracts replaces the Civil Code regulations, the following are considered totally ineffective clauses:

> *"1. Those excluding or restricting the liability of the supplier or their employees for fraud or negligence, or those who bears responsibility to the consumer for the acts or omissions of the supplier.*
>
> *2. Those entitling the supplier to unilaterally suspend or terminate a contract, unless a different legal provision or application of prudential norms duly supported, issued by the appropriate authority.*

3. *Those entitling the supplier to terminate a contract without prior notice or terminate a contract of indeterminate duration without reasonable notice, unless a different legal provision or application of prudential norms duly supported, issued by the appropriate authority.*
4. *Those establishing in favor of the supplier the unilateral power to extend or renew the contract.*
5. *Those excluding or limiting the legal rights granted to consumers, such as the right to make advance payments or prepayments, or raise the non-compliance exception or exert the right of retention, consignment, etc.*
6. *Those establishing any limitation to the consumer as to his/her authority to file procedural exemptions, any limitations for the production of evidence, any inclusion in the burden of proof, and other rights related to the due process.*
7. *Those establishing the consumer waiver to file a complaint due to the infringement of the rules contained in this Code.*
8. *Those contrary or which may violate any rule of public order or of imperative nature."*

On the contrary, the main characteristic of grey clauses is that they are allegedly abusive. However, it is an iuris tantum assumption since the supplier may show they are actually not, due to the characteristics of the good or service and other circumstances appearing in the entry into force of the agreement. If the first one is excluded, which actually conceals a general rule, the abusive clauses set forth in the CPDC are as follow:

"1. Those allowing the supplier to change unilaterally the conditions and terms of a continued duration agreement, to the detriment of the consumer, unless it is related to the reasons expressed therein and the consumer may be entitled to not be binding by this agreement without the payment of any penalty. The provisions set forth in this letter do not affect the clauses of price adjustment to a legally adjusted index or the public service price fixing subject to economic regulation.

> *2. Those establishing an automatic extension of the agreement by setting an extremely short term in order that the consumer expresses his/her willingness to termination.*
>
> *3. Those establishing economic burdens or cumbersome proceedings to file claims before the supplier, as well as those establishing cumbersome proceedings to repair the unsuitable product or which may cause a previous act or action by the consumer that makes the due protection of rights impossible.*
>
> *4. Those allowing the supplier to commission the provision of services to a third party when that person was elected due to his/her personal qualities.*
>
> *5. Those establishing that the supplier can unilaterally change the currency with which the agreement was entered into to the detriment of the consumer."*

According to the decision pronounced by the Defense of Competition Tribunal of Indecopi, the inclusion of an abusive clause is a breach to the duty of suitability; therefore, it can be sanctioned[36]. Consequently, a series of criteria has been established which must be taken into account upon deciding whether the clause is abusive or not. In this regard, pursuant to CPC (Resolution 2603-2010/CPC), three elements should appear upon deciding on the degrading nature:

- Failure to deal
- If it is plausible to think there are no other alternatives for the consumers. Therefore, there is no other supplier offering a clause different from the one subject matter of questioning.
- There is an unjustified disproportion between the benefits, risks and costs taken on by both parties, to the detriment of the consumer.

However, the Tribunal understood that the second element was not required since

> *"… the law is not purported to condition the existence of abusive clauses to factors different from the clause itself and the agreement where it is contained […] but it is understood that the abusive nature is within the consideration of the questioned clause itself"*[37].

36 Resolution 0078-2012/SC2-INDECOPI, dated January 11, 2012.
37 Ibíd.

Besides, the Division continues to say, the argument of the Commission supposes the existence of a perfect market where the consumer, before the decision-making, can be fully informed about the market offers and general conditions offered by each premise, to select the one which does not establish abusive clauses, which in fact does not occur.

Actually, in the event of grey list clauses, the fact that there is an unbalance between the supplier and consumer should be subject matter of analysis, which must be significant and juridical (it should be referred to the obligations and rights of the parties), not the economic one. Thus, following the opinion expressed by Guido Alpa[38], the Tribunal deems that to decide on the abusive nature of a clause it is necessary that:

- The consumer has a disadvantage,
- It is included in an agreement that, interpreted as a whole, does not justify the disadvantages imposed to the consumer
- A significant disadvantage occurs in the sense of unbalancing the relationship existing between the supplier and consumer.

1.6. Consumer protection proceedings: Consumer arbitration and sanctioning proceeding under Indecopi

The controversies affecting a consumer relationship may be solved through judicial channels that, in some cases, is the only one available when we are not facing a consumer who may resort to the provisions set forth in CPDC. Finally, we should not forget that in spite of the intervention of a public administration, it is a juridical relation of private law, a characteristic of the Commercial Law, defined by the presence of a supplier, a figure similar to the notion of a trader. Based on the foregoing, as previously indicated, the CPDC is not an act which must be applicable to Indecopi only, but also to judges and arbitrators when they take over private controversies arisen out in consumer relationships. However, for the purposes of this preliminary study, we will be only in charge of proceedings wherein, in any form, Indecopi

38 ALPA, G. (2004). Op. Cit.

or other administrative authority intervenes, either in sanctioning proceeding or consumer arbitrage administered and managed by the Arbitrage Board, depending on the Public Administration.

1.6.1 Consumer arbitration: a good idea, poor practical application

Along with the sanctioning proceedings that will be discussed below, the CPDC intended to enhance the consumer arbitration in our legal system, through which the supplier and the consumer seek to resolve their dispute before an independent authority, who will determine who is right, but without imposing a penalty as a result of a prior infraction. Moreover, according to the Article 145 of the CPDC:

> *"... The consumer's voluntary submission to consumer arbitration excludes the possibility that he starts an administrative proceeding due to infringement to the rules of this Code or intends to benefit from a corrective action handed down by a consumer authority in proceedings that it may initiate to protect the public interest of consumers."*

The figure of the consumer arbitration is not an innovation of the Peruvian law, although its inclusion in our legal system may be. The model we have followed is the Spanish consumer arbitration, which is carried out through Arbitration Boards (municipal, provincial and regional), and from which assumptions that have resulted in poisoning, injury, death are excluded, or there are a rational crime evidence. This is a free procedure, integrated by the arbitral bodies, representatives of the interested business sectors of consumer and users organizations and public authorities, admitting the presence of the unique arbitrator when the parties agree that or the President of the Arbitration Board decide it, provided that the dispute does not exceed € 300 and the lack of complexity makes it advisable[39]. Despite its voluntary character, the clauses which submit the resolution of disputes in the consumer contracts to other forms of arbitration, generally expensive and more complicated, will be considered abusive, except in the case of institutional arbitration bodies created by special rules.

39 LASARTE ALVAREZ, C. (2010). Op. Cit., pp. 357 and seq.

In Peru, consumer arbitration has replicated some of these features[40]. It was introduced by the CPDC and later regulated trough Regulations approved by Supreme Decree 046-2011-PCM (Regulation of Consumer Arbitration, hereinafter, RAC), it is a free arbitration (although the ordered payment of expenses and costs is admitted if it becomes apparent recklessness or bad faith in the request of arbitration), voluntary, lawful, by motion of the consumer, slightly formal and managed by the State. It shall be individual or collegiate, depending whether or not the controversy amount exceeds the 5 UITs[41]. As in the Spanish case, certain matters have being excluded from consumer arbitration, provided in Art. 9 of the RAC: the disputes dealing with products or hazardous substances, discrimination acts or differential treatment, medical services and acts affecting the collective or diffuse interests.

From the operational viewpoint, consumer arbitration is managed by the Arbitration Boards, being part of the local and regional governments or, in case these do not constitute them, they will be part of the regional offices Indecopi. If there is only one arbitrator, The Public Administration headquarters of the Arbitration Board will designated it, who in any case, will designate the President of the Court, being it necessary to choose the other two members among arbitrators proposed by suppliers or consumers, through associations. The submission to arbitration can occur under an arbitration clause incorporated into the contract, by the acceptance of the consumer of the public offer, made by the supplier to join the Consumer Arbitration System, or by express agreement between consumer and supplier once controversy occurs.

Moreover, in contrast with the administrative procedures, in which only corrective actions can be ordered, in the arbitration punitive damages can be ordered, so, in this case, it is not necessary to go after an administrative proceeding, to the courts to obtain a complete reparation.

One of the questions generated by the consumer arbitration is if it would be still possible to go to sanctioning administrative proceedings provided by legislation. In other arbitration agreements, it is understood that they do not prevent the complaint before Indecopi since it

40 Regarding the consumer arbitration in Peruvian law, with an interesting analysis of comparative law, see ESPINOZA LOZADA, J.E. (2011). "Who will defend us now? The consumer arbitration and other means of resolution of disputes between consumers and suppliers." In: *Journal of Administrative Law (*CDA). No.10. Vol II., P. 121 and seq.

41 Tax Unit (UIT for its acronym in Spanish).

is only a contractual clause excluding the controversies of the ordinary judicial process but does not affect the Administration capacity to take position if there is a complaint. That is, an arbitration clause would only prevent to appear to the legal channel, but would not prevent from going to the Administration to request the imposition of a penalty and where applicable, the establishment of corrective actions. However, in case of consumer arbitration, Art. 145 of the CPDC provide that once the consumer has accepted to appeal to it, what it may occur in the contract is that the consumer cannot recur to administrative procedures for breaching the Code regulations.

However, facing the undoubted advantages of this dispute resolution of the consumer, well-described by Lozada Espinoza (Less time in the final settlement, due to the character of res judicata of the arbitral award; savings in the costs due to the brevity of the procedure; it encourages the inclusion of new consumers in the system and the participation of the entrepreneurial sector, among others), its operation requires something more than the mechanism import, as it is necessary the administration willingness and the means and material required, which so far has not happened. There are many reasons to explain this situation, such as the fear of having a proliferation of municipal Arbitration Boards, the lack of qualified professionals in some parts of the country, among others. However, nothing justifies this dispute settlement mechanism, which was introduced as an important development in the CPDC, is finally relegated to the drawer of forgotten things, as has been happening up to now.

1.6.2. The sanctioning proceedings by Indecopi

As indicated above, in the Peruvian law, the guardianship and protection of consumers and users has been entrusted to Indecopi, except in cases where there are other protection systems, such as in telecommunications or electric distribution services. Indecopi performs this function developing information campaigns aimed at both consumers and providers, and especially through the sanctioning proceeding, regulated by the Consumer Protection Code, by which infractions to this policy are punished imposing corrective measures, designed essentially to replace the injured party in the situation prior the incompliance, which occurs in the context of a private law relationship between a consumer and a supplier.

The non-compliance or abuse by the supplier as part of a private relationship is sanctioned by the State, as a result of the protective nature that the legal system grants to it, beyond the

fact that consumers always have the resource available to the responsibility civil, by which he looks for a compensation for damage caused[42]. However, this sanctioning proceeding is special because it allows the consumer participation as an interested party, provided that he pay the corresponding fee, in a procedure in which, the consumer can get a corrective measure that, many times, constitute his real interest regardless of the penalty to be imposed by the Directors and which do not directly benefit the Consumer participation as interested party implies that this sanctioning proceeding has some special features, such as the application of negative administrative silence or the possibility that the complainant submits proceedings against the decision by which it decided not to punish the accused, which has led to a discussion of the nature of this proceeding, characterized by some as trilateral sanctioning procedure or even as a true legal Frankenstein[43].

a. The description of the proceedings. The difficulties of the distribution of powers

a.1. The procedure and the hierarchical distribution of powers

According to Art.106 of the CPDC, Indecopi is in charge of three procedures: the sanctioning proceedings, the sanctioning proceedings for breach of terms and the proceedings of costs liquidation and costs of proceedings. We are interested in the first proceedings, that according to Art.107 of the CPDC, are initiated as an ex officio, either by the authority initiative, (ii) a complaint of the consumer who has been affected, (iii) complaint of the consumer who could potentially be affected, (iv) or a consumer or users association, on behalf of its partners or in defense of collective or diffuse interests. In case the consumers or the associations acting on

42 It is important to note that while administrative responsibility seeks to punish an offender in civil liability looks for move the negative consequences of a behavior of an estate to another. As will indicated below, this creates important differences in the face of the admissibility of a liability. The difference between the civil and administrative responsibility has been fully recognized by INDECOPI, but not remove it all possible consequences. Thus, in Resolution 1261-2005/TDC-INDECOPI, November 25, 2005, affirms: *"the substantive difference between the civil and administrative liability is that the first one has as finality to address the harm that the action causes an individual to another [...] while the administrative responsibility is determine the State in an agent that fails legal provisions aimed at protecting legal rights to special protection. The Administrative responsibility identifies an 'offender', It means, a subject agent violates a statute that becomes worthy of the power of state rule that states a penalty. The administrative nature of the penalty makes it impossible for administrative responsibility to be confused with civil liability [...] In other words, by a civil liability legal system compensates citizens who are affected by the actions of other citizens, while administrative responsibility is the expression of the punishment for the citizen who, in the exercise of a regulated activity, breaches the rules of that legal framework."*

43 ESPINOZA ESPINOZA, J. (2010 a)."Circulation of legal models of civil liability in the administrative supervision of consumer rights." In: *Actualidad Jurídica.* No. 197. p.304

behalf of their partners, the pay the appropriate fee for the complaint, they will be considered parties to the proceedings. If the associations act in defense of collective or diffuse interests, they will be considered third parties. Both the parties and the third parties may, according to Art.107 of the CPDC, questioning the decision to deny the start of the procedure and any other resolution that cause them grievance, including the final resolution, although this legitimacy does not reach the contesting of the fine imposed. This regulation involves a significant change according to the Legislative Decree 807, according to the Art. 23, the proceedings on consumer protection could be initiated at the request of a party or ex officio. Currently, adapting to the provisions by the Art.235.1 Of the General Administrative Procedure Law (hereinafter LPAG) for the general sanctioning procedures, the procedure is always initiated ex officio, even when requested by the complainant, which may become a party or not.

The administrative procedure regarding consumer protection can be initiated in the Consumer Protection Commission (CPC) or in summary proceedings Resolution Bodies of consumer protection (OPS).The latter are individual bodies that resolve ex-officio proceedings initiated as a result of a complaint, in the following cases:

- When the amount determined by the product value or the controversy service does not exceed three (3) Tax Units (UIT), taking into account the value of this when filing the complaint. On this subject, one of the most controversial cases is that in which a consumer denounces an act undue for a debt in an amount not exceeding 3 UITs. Recently, the Court has resolved the conflict of jurisdiction raised, determining that in undue reports the imputed debt amount will determine the hierarchical competition[44]. Moreover, it is necessary to determine the power when the good subject of the complaint is an integral part or an accessory for another good, whose value exceed 3 UITs. f it is an accessory, the OPS shall be the responsible for that, however if it is a good without which the nature or economic content integrating it, it will be also taken into account the later value to determine the competition.
- Where complaints exclusively are concerning about information requirements, abusive debt collection methods and delay in delivery of the product, regardless its amount.
- Complaints for breaching the corrective measure, breaching the conciliation agreement and breaching and settlement of costs and expenses.

44 See Resolution 2143-2012/SC2-INDECOPI, dated July 12, 2012

The maximum duration of the summary procedure is 30 days, limiting the presentation of evidence to documentaries, although the OPS may request testing the performance of different nature. However he cannot be expected the oral report in this instance, although a hearing may be convened, to some extent, allow fulfilling the same purpose. It should also be noted that, due to the special promptitude sought for this procedure, it is established that we apply the principle of preclusion, usually not admitted in the general administrative procedure, by which the stages and phases of the proceedings conclude[45]. However, at the same time it is recognized that the application of this principle does not preclude the principle application impulse office and truth craft material covered by LPAG. Obviously this is a problem for the OPS, especially when presented any evidence to the limit of time to resolve (after the deadline for submission, which is limited to the time of filing of the complaint or the disclaimers), which might influence the sense of resolution, but before, it must be communicated to the other party to the proceedings: should the OPS holder proceeding to the test, under the principle of material truth, or should privilege the speed and resolving within the deadline? Unfortunately, there is no clear answer, which is particularly serious, since the Court has established that it is impossible to evaluate in second instance the evidentiary presented with the appeal, which do not relate to new facts[46].

For its part, the CPC will conserve in all cases the skills to initiate proceedings ex officio, without a complaint, and to hear complaints:

- Involving claims for products or hazardous substances
- Acts of discrimination or differential treatment
- Medical service
- Acts affecting collective or diffuse interests
- Those related to products or services, it is understood that other than the above, whose estimated assets exceed 3 UITs or are invaluable in money.

45 Art. 4.1.b. of the Directive 004-2010/DIR-COD-INDECOPI, approved by Resolution of the President of the Board of INDECOPI No. 159-2010-INDECOPI/COD (hereinafter DPS).This rule has been recently amended by Resolution of the President of the Board of INDECOPI No. 028-2013-INDECOPI/COD, published on February 11.

46 Resolution 1228-2012/SC2-INDECOPI.This problem of summary proceedings was also shown by Rodríguez Garcia, G. (2010)."Para que te quiero sumarísmo? Critical comments at the summary procedure about consumer protection." In: *Actualidad Jurídica*. No. 205. Thus, according to this author, summary procedure regulation obliges the complainant to present perfect complain, which is not required in other instances

Whenever the proceedings shown on any of these matters, the power will be of the CPC, regardless if there are others that would individually be considered of OPS competition. Furthermore, in the case of proceedings initiated before an OPS, the CPC shall hear appeals, that may be filed against: (i) acts that terminates proceedings, (ii) against those who resolved the request for precautionary measures and (iii) acts approving the suspension of the proceedings, on the grounds provided in Art.65 of Legislative Decree 807[47]. The deadline for filing the appeal is five days from the day after the decision being challenged.

Finally, the Competition Tribunal (now through Courtroom 2) shall meet at last and final instance the appeal procedures against the decisions of the commissions in proceedings in them, and the resources review against decisions of the Commissions proceedings before the OPS. The latest resource looks for to unify Indecopi decisions with a last central instance. Accordingly, it is an ipso-jure appeal, which is based on the improper application of the Code or the binding precedent [48], in which there is no evidence performance (although oral report is allowed) or accession. Both in the case of the appeal and the review, the deadline to appeal is five days, but they differ in that the last resort does not have suspensive effects, while the first does.

a.2. The criteria for distribution of territorial jurisdiction

For its part, the territorial competition is regulated by Directive 005-2010/DIR-COD-INDECOPI[49] (hereinafter DCT). This rule is very important because nowadays there are many Indecopi deconcentrated offices, where there are Consumer Protection Committees.

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47 *"Article 65. INDECOPI functional bodies will suspend the conduct of proceedings only in the event that, prior to the commencement of the administrative proceeding is initiated proceedings that would be on the same subject, or whenever a contentious issue that, in the judgment of the Court of Competition and Intellectual Property or the Commission or respective Bureau, precise without a prior ruling which cannot be resolved the matter which is pending before INDECOPI ".*

48 In the case of precedents of mandatory compliance, the binding force of these derives from the precedent itself, unlike the preceding under the equality right. Therefore, it is actually debatable whether these precedents are not actually normative or regulation precedents. On this issue see: Baca Oneto, V.S. (2010B)."¿Son el precedente y la doctrina fuentes del derecho administrativo?" In: Rodriguez-Arana Muñoz, Jaime; Sendin Garcia, Miguel Angel, Perez Hualde, Alejandro; Farrando, Ismael, and Comadira, Julio Pablo (ED.).(2010).*Sources of Administrative Law (international treaties, contracts and rule of law, jurisprudence, doctrine and administrative precedent).IX Forum of Iberoamerican Administrative Law.* Buenos Aires, Editions' RAP, p. 639-652.

49 Approved by Resolution of the Presidence of the Board of INDECOPI No. 178-2010-INDECOPI/COD.

Moreover, in the case of Lima, there are three committees: two in the headquarters, which determine its jurisdiction by the number of procedure and not due to territorial reasons, and one in Northern Lima, which itself has a specific territorial jurisdiction. It is therefore essential to clearly define the criteria for establishing territorial jurisdiction. According to the DCT, the Commission will be effective where the accused is domiciled, for both parts, natural persons and legal entities (its headquarters are considered). If an individual has multiple addresses, may be denounced in any of them. In the case of legal entities, if it has branches, agencies, establishments or duly authorized representatives elsewhere than the address of its headquarters, the complaint may be filed, at the option of the claimant in the district where any of these residence *"...where there occurred any of the facts that motivated the relevant complaint"*. Therefore, in this case, together with the criterion of domicile of the defendant, the place of the infringement is also used.

The problem, however, occurs at the moment of applying the arts.5.1.3 and 5.1.4 of the DCT. The first one regulates the jurisdiction to punish unlawful conduct with national reach, case in which the CPC Central Headquarters (Southern Lima) initiate the investigations and ex-officio procedure in theory, it seems reasonable rule, but the difficulty will be to identify when we have a national scope delinquent behavior, since the policy simply states that:

> *"...A possibly infringing conduct will be of national scope when it involves the provision of goods and services in the market, or has effects on it, within the territorial jurisdiction conferred to the Consumer Protection Commission of the headquarters (Southern Lima) and also within the territory attributed to any other Commission with decentralized competence in consumer protection".*

That is, applying it literally, if misconduct occurs in the districts of Lima Sur and Lima Norte, it will be enough for the Central Headquarters proceeds. It is necessary, therefore, to establish a clear criterion for determining when infringing conduct has national scope.

On the other hand, Art.5.1.4 of the DCT regulates the distribution of powers in cases where an infringing conduct has no national scope, but involves

> *"...The provision of goods and services in the market, or has effects on it, within the territorial jurisdiction assigned to more than one decentralized Commission with powers, regarding consumer protection, it shall be competent the one which is able to initiate first the ex officio proceedings."*

The purpose of this regulation, as the one outlined in the previous paragraph, is to avoid a bis in ídem if two or more Commissions initiate sanctioning proceedings by the same misconduct. In these cases, instead of establishing that each can only punish (and graduate the penalty) based on the events incurred in its district, the competition is only recognized to whom has started the first procedure, who must sanction due to the events in all districts, which certainly requires a great coordination among the various Committees and Technical Secretariats.

a.3. The material distribution of competition: the conflict between the Commission of Unfair Competition and Consumer Protection Commission

As we know, the suitability of the property or service is closely related to the information provided about its characteristics. However, sometimes this information is passed on to consumers through advertising mechanisms, so that the powers of the CPC may conflict with the Unfair Competition Audit Commission (CCD). It is necessary, therefore, to have a criterion for defining the scope of each of these dobies, especially in the case of the Committees of the Decentralized Offices, where the same collegiate has different assigned powers.

These criteria have been set by Resolution 035-2012/SC2-INDECOPI, dated March 20, 2012, also known as the Jabulani case, official name of the 2010 South Africa World Cup soccer ball, characterizing by three geometric shapes, that was offered in a promotion by Ripley at S/.59.90. When a consumer entered at the store, she was told that she can buy another soccer ball for the same price, also manufactured by Adidas under the name of Jabulani, but not the one that was characterized by geometric shapes, which was offered at S/. 79.90, although it was advertised on supplements and promotional media. Although advertising does not correspond to the good offered, the consumer decided to buy the ball she was looking for, this subject is crucial to understand the resolution of the Indecopi Tribunal.

As it has been supported in a generalized way, the CCD is able to intervene when advertising produces a potential affectation to consumers, without the need to materialize a consumer relationship, real or potential, so that the infringement can be set, what is really necessary for the intervention of the CPC. However, Resolution 035-2012/SC2-INDECOPI, quoting a resolution in the same oldest direction (Resolution 003-1998/TDC-INDECOPI), adds another requirement to recognize the competence of CPC, since it can only be understood that there is a violation of consumer rights when it, once aware of the real conditions of the offer, decide not to acquire it.

b. The nature of the proceedings before Indecopi

The special features of this procedure, in which the complainant is not limited to ask for a penalty but is involved in the proceedings in which he can even get a corrective measure, has led some authors to understand that we are facing a mixed proceedings, a mix between a pure sanctioning proceeding and a trilateral one[50]. Trilateral proceedings are regulated by LPAG, and are those proceedings in which the Administration resolves a dispute between two parties, in an area whose custody has been entrusted. Known in other areas such as administrative arbitration, or even administrative escalations to distinguish them from the true arbitration because the administrative decision is always controllable by the judges, in these proceedings the Administration assumes the role of an impartial third party, facing two private ones who have a dispute, and seem not to fit at the jurisdiction of sanctioning powers, in which exercise the public administration does not act as an impartial third party, but as a guarantor of a public interest which supervision and protection has been entrusted. However, Art. 222 of the LPAG sets that the complaint, for which the trilateral proceedings are initiated.

> *"...Shall contain the requirements of writs set forth in Article 113 of this Law, as well as the name and address of each claimed, the reasons for the complaint and request for sanctions or other type of affirmative action."*
> (Emphasis added).

50 Particularly, in the case of Gomez Apac, H. (2011). "El procedimiento Trilateral: ¿Cuasi-jurisdiccional? In: *Revista de Derecho Administrativo (CDA)*. No.10.Vol II., P.15 et ss. Actually, Professor GÓMEZ APAC understands that in these trilateral sanctioning proceedings "*there are two proceeding legal relationships: A bilateral, for punishment, where public interest takes precedence, and other trilateral, where they private interests are discussed*" (p.29) Thus, rather than being before a trilateral sanctioning proceeding, we would be before a sanctioning and trilateral proceeding, or rather, before a proceeding with two proceeding legal relationships.

That is, it considers the possibility that in a trilateral proceeding the imposition of sanctions is requested, which could well explain the position of those who defend the category of the trilateral sanctioning proceedings[51].

However, in addition to this explanation, it would be possible to consider whether it is necessary to go to this creation mixing two disparate procedures, such as the sanctioning one and the trilateral one. Beyond the impartiality that must characterize the holder or holders of deciding body, the position of the Administration in such proceedings is different: while in a trilateral proceeding is neutral regarding the controversy, in a sanctioning proceeding it is not, since it will finally decide whether to impose a sanction, due to an infraction of law that it has been charged to protect[52].

To characterize a proceeding as trilateral and sanctioning is a risk since the applicable principles to each of these proceedings are very different which might lead or cause distortions. For instance, can the Administration carry out an impulse activity in the proceeding to achieve the material truth beyond any evidence provided by the parties? But if it does, how does it fit in a trilateral proceeding? Is it possible that the claimant and respondent conciliate according to the CPDC? How does this conciliation fit in a sanctioning proceeding? Is it possible to conciliate before the penalty imposition or to conciliate in a court of appeal? Finally, if it is about a sanctioning proceeding, how is it possible that it obeys to a negative silence?.

It is important to recognize that when Indecopi has faced this situation, it did not find obstacles to declare the trilateral and sanctioning nature of the proceeding[53]. What is more, this category

51 Espinoza Espinoza, J. (2010a). Op. cit. p 304 goes even further, and understands as unnecessary the reference to a trilateral sanctioning proceeding, since adding "penalties" is actually tautological, since it adds nothing to the trilateral proceedings definition as under this law sanctions may be imposed .

52 Thus, according to Parada Vazquez (2004). *Derecho Administrativo*. Volume I. Fifteenth Edition. Madrid, Marcial Pons, p.216, the trilateral proceedings (or triangular) are characterized because the administration has absolutely no party status, is totally alien to the legal relationship discussed. Obviously, this does not happen in a sanctioning proceedings. As indicated in the text, the impartiality of the official is not into question, which necessary in any proceeding (even in the sanctioning parties where the complainant is not interested), but the Administration's position on the dispute. It is necessary to note that elsewhere Parada suggests that these arbitration proceedings should be the consequence of sanctioning proceedings, allowing the competition authority to award damages after sanctioned and issued commands and prohibitions to restore free competence (Ibid, p.532 and 533). However, nothing in these statements leads us to conclude that this author acknowledges a dual nature of sanctioning proceedings.

53 For example, see Resolutions 1296-2009/SC2-INDECOPI, 1386-2010/SC2-INDECOPI, 1908-2010/SC2-INDECOPI, 2075-2010/SC2-INDECOPI, 2249-2012/SC2-INDECOPI and 1448-2012/SC2-INDECOPI.

is expressly recognized in the regulations, in article 18.2 of the Legislative Decree 1034 and article 28.2 of the Legislative Decree 1044, even in the applicable regulation to the consumer protection proceedings, since the DPS understands that in the cases of summary proceeding starts ex officio by virtue of an ex officio complaint, they would have a trilateral condition that does not question its sanctioning nature. Nevertheless, the issue is if this is really needed or if it is sufficient to recognize that we are facing a special class of sanctioning proceeding, for what it is not necessary to denature the concept of the trilateral proceeding. The doctrine and the comparative law have recognized that the complainant can play two very different functions in a sanctioning proceeding: it can be limited to communicate the infringement and stay out of the proceeding or to have any kind of legitimate interest in the final decision what justifies its inclusion in the proceeding[54]. It is about sanctioning proceedings with an interested complainant who, have some specialties, while remaining sanctioning, due to the presence of the complainant.

Thus, in these proceedings, the complainant is legitimized to impugn the decision whereby a sanctioning proceeding is not initiated, as well as to impugn the act whereby the mentioned proceeding ends, since it does not recognize the commission of the infringement or because it does not establishes the corrective measures requested, although it cannot question the severity of the sanction[55]. Moreover, it can be admitted that in these cases, the limitation period will be interrupted with the filing of the complaint, not with the notification of the imputation of charges. In the same sense, the complainant legitimation, who is expecting an answer by Administration, is what justifies the application of the negative silence despite of being a formally initiated ex officio proceeding according to its sanctioning nature.

However, if is a sanctioning proceeding, how can we explain the cases of conciliation or waiver? In the case of proceedings of the Consumer Protection, there is an explicit recognition of the conciliation, even during the process of the proceedings, as a way to solve the dispute (it must be clear that civil, derived from consumption) between consumer and supplier (article 147 of the CPDC). How can we explain that this conciliation may put an end to the sanctioning proceeding, if the administration understands that there are no reasons to continue? And what is even more difficult, how much longer must such conciliation be

54 See Cobreros Mendazona, E. (2000). "El reconocimiento al denunciante de la condición de interesado en el procedimiento sancionador" In: Sosa Wagner, F. (Coord.). (2000). *El Derecho Administrativo en el umbral del Siglo XXI. Homenaje al profesor Dr. D. Ramón Martín Mateo. (The Administrative Law in the threshold of the XXI. Tribute to professor Dr. D. Ramón Martín Mateo)*. Volume II. Valencia, Tirant lo Blanch, pp. 1437 and seq.

55 In this respect, see Resolution 852-2011/CPC, dated April 29, 2011

admitted? In that regard, we think that the starting point is the discretionary nature of the commencement of the sanctioning proceeding, which although it is has been dogmatically argued, it is absolutely clear in the praxis. For instance, should the police let up his task of taking control of the traffic to be a witness of an infringement? If he does, wouldn't he produce a major chaos and therefore, will he be against the reason whereby he was attributed with legal authority and even the power to punish? This discretionary is what justifies that the sanction proceeding ends as a consequence of the conciliation or waiver since, if there is no public interest affected, it is not necessarily that the Administration penalize all the infringements that could have been done[56].

For the same reason that the interested party cannot impugn the fine, it is arguable that the conciliation or the waiver has the same consequence in the remedy processing, once the sanction is imposed. In first instance, a punitive proceeding is processed that had ended with a sanction imposition, which is an act by which a power is exercised and anymore available for the parties. In second instance, a power of inspection is practiced instead of a punitive stricted power for that reason the legality of the previous decision is controlled[57]. The sanction is not available to the parties whereas they cannot badly dispose of it by means of a conciliation or waiver.

Actually, if conciliation in second instance is produced and it is tried to put end to the proceeding declaring null the sanction, the correct thing will be that the Administration revokes the sanction, not available anymore for the parties, in application of Art. 203.2.3 of the LPAG allowing to revoke the unfavorable acts. It would be, in fact, a kind of sanction cancellation or pardon provided that there is no justification of public interest explaining its conservation. However, it is also about a very arguable figure, which has been unfavorably opined by an important author, Alejandro Nieto by stating that:

> *"… when a sanction is imposed, it will not be legal its ex officio revocation without any formality alleging that it is about an encumbrance act not subject to the specific legal process of such revocation. Or more specifically, the revocation is admissible if it is possible to confirm that the sanction was illegally imposed, not being admissible, in turn, if its imposition was correct"*[58].

56 About the discretional nature or the regulated decision to start a sanctioning proceeding, see Gomez Tomillo, M. y Sanz Rubiales, I. (2010). *Sanctioning Administrative Law. General Part.* Second Edition. Madrid. Aranzadi-Thomson Reuters, pp. 729 and seq.

57 Sentence of the Spanish Supreme Court dated December 15, 2004, Repertorio Jurídico Aranzadi 2005/4800.

Nevertheless, in this case given that it is about a sanction in a proceeding where the complainant had a legitimate interest, it would be possible to think if we are facing an exceptional assumption where the mentioned revocation is possible provided that the misconduct has not produced an additional affection to other interests justifying the sanction maintenance.

This issue has been subject of discussions and opposed resolutions in Indecopi, showing how controversial the issue is. Thus, during a long time, without planning any questioning, Indecopi admitted without major problems the waiver during the process of appeal. Nevertheless, the doubt raised when the Decentralized Commission of Piura rejected the admission of the waiver in a case that it knew as second instance alleging that, once the sanction is imposed, it is not available anymore for the parties, recognizing only the possibility to conciliate about the correctives measures or the costs and expenses[59]. Facing this decision, the Indecopi Tribunal decided to annul it and recognizing the possibility of conciliating in second instance, supported in the double nature, sanctioning and trilateral of the proceeding[60]. Nonetheless, when the conformations in the courtroom is changed, it has been recently dictated the Resolution 3448-2012-SC2/INDECOPI, dated November 22, 2012 in which it is establish that the conventional waiver only will be done before the resolution notification that put an end to the instance, according to the sanctioning nature of this proceeding[61], position that we agreed as can be indicated up to the moment[62].

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58 Nieto Garcia, Alejandro. (2008). *Sanctioning Administrative Law*. Fourth Edition, Second Reprint. Madrid, Editorial Tecnos, p. 132.

59 Resolution 021-2012/INDECOPI-PIU.

60 Resolution 2249-2012/SC2-INDECOPI dated July 19, 2012. The Piura Commission, nevertheless, had insisted in its point of view, providing answers to the arguments of the Court through the Resolution 610-2012/INDECOPI-PIU.

61 This resolution was pronounced in a review resource contemplated against Resolution 274-2012/INDECOPI-PIU.

62 It is also is very interesting what the resolution mentioned in its paragraph 15 in which it is stated that "*… the ways of initiating a sanctioning proceeding in this matter only establishes the modalities that gives rise to the beginning of an state action without setting for it or on it, different nature in the sanctioning proceeding, as a it is mentioned in article 107 of [CPDC] pointing out expressively that independently of the way the proceeding began, this is a sanctioning proceeding.*" Without expressly saying it, this witting allows seriously doubting if the Courtroom, in its new composition, shall keep the previous statements about the sanctioning and trilateral nature of the proceeding. On the other hand, in the paragraph 18 of the mentioned resolution establishes the obligatory nature of the practice of the sanctioning power, once INDECOPI realizes a possible infraction act, when exercised under an order or for the Administration initiative which, in fact, can take us to question even the termination of the sanctioning proceeding by the virtue of a conciliation (material controversy) during the processing of the proceeding in district courts.

c. The application of the principles of the sanctioning administrative proceeding: focusing on the principles of culpability

c.1 The principles of culpability in the sanctioning administrative law.

Regardless of the recognition of a strictly punitive or trilateral nature, there is an unanimous agreement related to the necessity of applying the principles of sanctioning power to the consumer protection proceedings according to the LPAG. Thus, a sanctioning proceeding before Indecopi uses the legality principles (in its four signs: the legal reservation or formal legality, taxable or material legality, non-retroactivity and *non bis in idem*), proportionality, presumption of innocence and culpability, among others.

It is necessary to make some important additional clarifications to understand it better, especially since it is about a principle that has at least four different signs: (i) the principle of personality of sanctions, for which it cannot be responsible for a subject for performing alien facts, (ii) the principle of responsibility of the fact according to which, no single damage can be relevant if it is not produced as a consequence of an action from which, in turn, brings three consequences: the punish exclusion of merely internal attitudes, when the behaviors expected does not deserve sanction – although they have imminent production or its author- and the prohibition of a sanctioning law from author and not about act, (iii) the principle of subjective imputation by virtue of which to impose a sanction, it should be demanded a trial for contempt for which it is necessary that the behavior is intentional or at least negligent and (iv) principle of attributability or culpability in a strict sense in which to consider guilty the author of the intentional or culpability fact, the mistake can be attributed, as a product of a normal rational motivation therefore it can work to limit the responsibility (as it is established in the article 236-A in the LPAG) or even to exclude it[63].

We are mainly interested in the first and third principles. The first principle has been expressly recognized in the LPAG under the name of "causality principle" and it proscribes the subsidiary responsibility and admissible in the civil responsibility but it is not punitive so that the responds the behavior of the author. Nevertheless, LPAG as much as CPDC admit

63 About the different scopes of culpability principle, see Gomez Tomillo, M., and Sanz Rubiales, I. (2010). Op. Cit., pp. 373 and seq.

the severally liable for what it is important to wonder if this constitutes an affection to the causality principle since one of the parties is entirely obligated to answer for the infraction. On that subject, the solution is in the article 232.2 of the LPAG that admits the severally liable "… when the performance of the expected obligation in a legal order corresponds to many people jointly". It is not about a partial or supporting obligation (when everybody has to accomplish something) as it is defined in our Civil Code (anybody can fulfill with the obligation) but of a true jointly obligation which performance it is according to the parties. In this case it has been admitted exceptionally, the imposition of supporting sanctions[64].

What happens in the CPDC? According article 111:

> *"… exceptionally and taking in account the gravity and nature of the infraction, the parties, who practice the management, administration or representation of the supplier, are severally liable if they participate with inexcusable intention or culpability in the planning, realization or execution of the administrative infraction."*

As we will see later, in the administrative law is admitted the responsibility of the legal entity in contrast with the Criminal Law that the issue is very controversial. Nevertheless, in this case, a natural person is severally liable because of his/her participation at the moment of the infringement. In these cases, in addition of the organization defect that justifies the responsibility of the legal entity, it exists a specific foundation to attribute responsibility to the executive, manager or representative, as it is his own intention or inexcusable culpability. Obviously, it is about a limited assumption that achieves complete sense in the case of legal entities used as façade for infringements, for that reason it makes sense to follow the true offender which would be the natural person that takes advantage of them.

For its part, the third party of the mentioned principles (the exigency of intention or at least of culpability) has not been mentioned in the LPAG. However, it cannot be excluded with no reason or even doing it alleging the article 230.3 according to the existence of purpose is a factor of the sanctioning graduation. The purpose is the intention for that reason it will be used as a graduation criteria, in contrast of what happens in Criminal Law in which the

64 *Ibíd.*, pp. 599and seq.

general rule is that only it takes responsibility of the fraudulent conduct and exceptionally for the negligent acts, nevertheless, in the sanctioning Administrative Law would happen the contrary since it would be enough the culpability although it cannot be penalized without it just because the absence of a trial for contempt: the person who did everything fine would be punished. In this sense it should be taken in account that in the punitive responsibility the objective is to impose a sanction that is a measure of distressing content, and that is why it is necessarily to demand at least the culpability, in contrast with the patrimonial responsibility in which a person to assume the caused damages is sought (which does not have an afflicted goal), and for that reason an objective responsibility can be justified.

According to that ,the comparative doctrine, after an initial phase in which the objective responsibility in sanctioning matters now demands in a general way at least the culpability as criteria of subjective imputation[65]. In our legal organization the rule is not clear, however, there are plenty resolutions of the Constitutional Court in which this recognizes that the culpability principle is a ius puniendi principles applicable to the sanctioning power of the public Administration (see the judgment delivered in the Files 2050-2002-AA/TC and 2192-2004-AA/TC on April 16, 2003 and October 11, 2004, respectively). Nevertheless, The Constitutional Court declaration does not explain more, for this reason is not clear the culpability exigency scope, in fact, it will correspond to the jurisprudence and to the doctrine to fill the void that it is not covered with the rules in force.

It is especially important what the sentence establishes on November 24, 2004 delivered in the File 2868-2004 AA/TC. It expresses that it is not possible to penalize for an illegal act whose realization is attributed to a third party. Nevertheless, what is remarkable in this sentence is that makes reference to the sentence of the November 3, 2003 delivered in the File 0010-2002-AI/TC to affirm that *"the limit of the sanctioning power of the State is represented by the culpability principle."*

Nevertheless, this second resolution does not only refer to the personality principle of the individual nature of penalties as a consequence of the culpability principle, but also establishes that:

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65 See De Palma Del Teso, A. (1996). *El principio de culpabilidad en el Derecho Administrativo Sancionador* (*The principle of culpability in the Sanctioning Administrative Law*). Madrid, Tecnos, *pássim*. Regarding this matter, see also Baca Oneto, V. S. (2010c). "¿Responsabilidad subjetiva u objetiva en materia sancionadora? Una propuesta de respuesta a partir del ordenamiento peruano". En: *Actualidad Jurídica*. No. 204. November 2010. pp. 165-173.

"… an interpretation that considers the action under commentary has the condition of objective element, it results illegal against the culpability principle that as exigency of the clause of Rule of law, it is originated as an implied constitutional principle that limits the punitive power of the State. Therefore, it is not enough to have the affectation or to put at risk determined legal assets that the Criminal Law protects. The principle according to "there is no sentence without bad faith or guilt" demands that the author had had the intention of affecting […]. That is, the interpreting sense that excludes any reference of the responsibility or culpability of the subject is unconstitutional. Therefore, the judges cannot sentence, regarding the mentioned article 2 of the Decree Law 25475 to a person for the fact that has been hurt or put the legal assets into risk in the same legal disposition without having into consideration the analysis of his/her culpability […]. The principle of culpability is a guarantee and at the same times a limit to the punitive power of the State; for this reason, the application of the article 2 of the Decree Law No 25475 depends of the infringement of the legal assets for the sentence indicated in the criminal law, it was done with the agent intention. To major abundance, the prohibition that "The sentence only can be based in a kind of objective responsibility is expected in the article VII of the Preliminary Title of the Code of Criminal according to which "the s entence requires of the criminal responsibility of the author. It is outlawed any form of objective responsibility."

In consequence, when it refers to the delivered sentence in the File 2868-2004 AA/TC to the culpability principle as it is defined for the delivered sentence in the File 0010-2002-AI/TC and refers to the culpability as exigency of bad faith or guilt, it is possible to interpret that the TC is against admissibility of the objective infractions, also in the Administrative Law (at least when a determined legal assets is affected or putted into risk, according to the sentence text). As a consequence, this is the way the numerous "culpability" references should be interpreted as one of the principles of the sanctioning Administrative law. The fact remains, when there is no clear positioning of our maximum Court that has into account the specialties administrative field at the moment of establishing general criteria.

In any case, even though there are some sectional regulations that establish it, it would be prohibited the objective responsibility, when the judgment of reproach, which is necessary to impose a punishment. The only cases in which its admissibility can be argue would be the assumptions of formal omissions, in which the mere incompletion of the regulation implies a

neglected performance since in these cases it is required a minor guilt, sometimes too hard to distinguish the objective responsibility. However, the sanctioning administrative law in general and in the consumer law in particular, generally the proceedings starts against other legal entities. How is it possible in these cases to consider the exigency of the culpability or bad faith, if the legal entities cannot be guilty since does not have will? It is has been maintained, for this reason, that the legal entities are responsible, no authors, and their responsibility can be objective, as long as does not have sense look for the bad faint or culpability of the material author since for one side, it is not easy to determine and on the hand this exigency could work to set free the legal entities from all responsibility. As a consequence, it would not have true sense to consider that the legal entities are responsible of their dependents *in fault of in vigilando* or *in eligendo* since they cannot be guilty.

The Spanish jurisprudence, and in consequence its doctrine, has maintained the "culpability" exigency in the case of legal entities but "adjusting" to its nature, if there is not a volitive element in the strict sense, has the infringe capacity (STCE 246/1991). Nevertheless this interpretation of the culpability principle to legal entities is not enough not even to those who consider it essential to the sanctioning administrative Law. According to Gomez Tomillo to whom, in case of individuals, the guilt is the judgment of reproach delivered to a subject that could had perform according to the law and he did not, while in the case of legal entities is necessary to verify that the infraction was committed because of an organization defect[66]. In this way, the culpability is understood as

> *"… judgment of reproach that is make to a legal entity because the adoption of the caution measures that are requirable to guarantee an orderly development and no infraction of a relative activity to the fact of the company was omitted"*[67].

Moreover, this would require an individual consideration of appreciatory nature, case by case and with no presumption from any kind according to that the company can be relived from the responsibility when confirm the correct organization to avoid illegal administrative.

66 Gomez Tomillo, M. and Sanz Rubiales, I. (2010). Op. cit., pp. 523 and seq.
67 Ibíd, p. 530.

c.2. The culpability principle in the sanctioning proceeding to Indecopi and the investment of the burden of proof

This is the general theory, but what happens in the sanctioning proceeding began in Indecopi? On that subject, it should be distinguished the stricted patrimonial responsibility that can be objective (as it happens in the cases of responsibility for defective products or when it is about risky activities) of the punitive responsibility for that it is needed a judgment of reproach that leads us, necessarily, to a responsibility for guilt. In that sense, the resolutions of the CPC in the central headquarter of Indecopi usually includes a paragraph indicating that once that defect was proved, with the evidence presented by the consumer or for the contributors of office for the Commission Technical Secretary , if the supplier pretends to be freed of responsibilities, he should provide evidence that make sure the facture of the causal nexus (case by chance, strong reason, a determined fact of the victim or the third party) that performed the requires diligence[68].

Nevertheless, the regulation considers only express the following causals to exclude the responsibility of the supplier, the accreditation of a *"… objective cause, justified and no expected that configures the breaching the causal link for a fortuitous case or force majeure, of determined fact of a third party or about the imprudence of the affected consumer"* (article 104 of the CPDC). This leads the Court to understand that we are facing assumption of objective responsibility. However, from the difference between the civil and administrative responsibility, it has been interpreted that we are not facing a real objective responsibility of civil patrimony, except that this "objective" responsibly simply means that it operates an inversion of the evidence burden so that, once a consumer has demonstrate the realization of the facts, the supplier must demonstrate that cannot answer. In fact, in some cases the mentioned inversion was taken further when the theory of the dynamic burden evidences[69]

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68 Actually, the reference to the acts of God should already exclude a regime of objective responsibility although our Civil Code introduces a dose of confusion, by identifying this assumption with the force majeure one. The objective responsibility is the responsibility without guilt that can be identified with the responsibility for accidents that it is the responsibility due to acts of God in which an internal risk is materialized to the business, in contrast to the cases of the force majeure in where the risk is external to the business. This distinction between acts of God and force majeure is common from the work of Exner, A. (1905). *De la fuerza mayor en el Derecho Mercantil Romano y en el actual*. Translator. Emilio Miñana y Villagrasa. Madrid, Librería General de Victoriano Suarez, *pássim*.

69 About this issue, see Bullard, A. (2006). "Cuando las cosas hablan: el res ipsa loquitur y la carga de la prueba en la responsabilidad civil." In: BULLARD, A. (2006). *Derecho* y *Economía. The economic analysis of legal institutions*. Second Edition. Lima, Palestra, pp. 757 and seq.

whereby a proof of a fact is demanded to whom has the best conditions to perform it. Recognized by the Constitutional Court[70], this theory is supported by Indecopi, essentially in cases of non-recognized money withdrawals or non-recognized consumptions with credit cards: the complainant is not asked to prove the consumption or withdrawal (it is enough showing that there was a withdrawal or consumption), but the bank is asked to prove that this transaction was made using the security mechanisms required[71].

However, this conceptual clarity is not always moved to the resolutions, especially when dealing with complex cases. Thus, for example, in the case of some car accidents, it seems that the responsibility comes up due to the accident itself, not to the guilty intervention of the supplier. Actually, this would only respond when there is a defect in the organization that caused or not prevented the realization of the infringement (perhaps if your driver did not know the route or drove longer than established, the vehicle did not meet the technical requirements, etc.) but not due to the simple realization of the accident. Although it may seem flashy, it is not enough the driver fault or intention for the company answers, because it does not vicarially respond, but does directly, so there must be a judgment of blame to it, which is shown in defect in its organization, which can be presumed, corresponding to prove to the accused party that he acted diligently.

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70 Judgment of the Constitutional Court dated January 26, 2007, issued in the File No. 1776-2004-AA/TC. According to this resolution, *"It has been prima facie noted that the burden of proof lies with those who state facts constituting their claim, or whoever contradicts them alleging new facts, as shown by Article 196 of the Civil Procedure Code. Facing this, the dynamic burden of proof means a separation from the regular canons of the distribution of the burden of proof when it clearly has unfortunate implications for the purpose of process or proceedings, so it is necessary to propose new rules of evidentiary imposition, by shifting the onus probandi on the party that is in better professional, technical or factual conditions to produce the respective evidence [...] The doctrine of dynamic evidentiary burdens intervenes to respond to a conception of an adaptable right and a more dynamic process of developing the proceedings, as the assumption proposed calls for. Thus, the burden of proof of the fact (negative) would not correspond to the claimant but that the defendant would have the burden of proving the positive fact. It is important to remember that the dynamic evidence is not alien to our system. For example, there have been used in the following assumptions: violation of human rights (paragraph 70 of the judgment of Paniagua Morales and others, paragraph 65 of the judgment in the Durand and Ugarte case and paragraph 63 of the judgment in the Castillo Petruzzi case, all of them pronounced at the Inter-American Commission on Human Rights), compliance of conditions of workers (Article 27 of the Procedural Labor Law, Law 26636) and disputes over payment of municipal tax rate (judgments in File No. 0041 - 2004-AI/TC and File No. 0053-2004-AI/TC). Likewise, in the scope of protection of the user, and based on the informational asymmetry, it has been allowed the variation of the burden of proof, seeking to protect consumers from the impossibility of proving that he was deceived or received insufficient information (point 2 of Resolution 102-97-TDC-INDECOPI)."*

71 Nonetheless, this criterion has been used in other cases different to the banking ones, such as medical services. This happened, for example, in Resolution 1934-2009/SC2-INDECOPI linked to medical services. In this case, it was established that the accreditation of default (on the suitability of anesthesiology service) was an unenforceable charge for complainants. According to the Court, the respondent should then prove that there was no link between medical treatment and deterioration of health of the patient (in a coma after the surgery), which would not have happened. Resolution 1343-2010/SC2-INDECOPI can also be seen.

At other times, Indecopi states that this is an objective liability and in its reasoning, it cites various works of private law. This applies, for example, in Resolution 2455-2010/SC2-Indecopi, dated October 28, 2010, in which a land transport company was fined for lack of fitness in service, due to a delay occurred because the vehicle carrying passengers had mechanical damage while working. In this sense, according to the Court,

> *"... As a general rule, the breaches of travel itineraries set by transport companies, to the extent they do not meet the expectations in consumers, define a service lacking of suitability to be punished, unless it is proved that the service defect was due to a cause outside the company exempting it from the liability."*

The reference to the external cause is important, since it holds the resolution cited is that the supplier cannot be exempted from liability by proving that your vehicle was in perfect condition when leaving or that the incident was caused by the poor state of the road, because this is a domestic risk to the business, not relieve you of responsibility. Indeed, it is an internal risk, whose materialization is an event of unforeseen circumstances as compared doctrine, and does not exempt from strict civil liability. The Court, as shown by the doctrine he cites in his support, confuses civil objective liability, which can be objectively and occurs even if it is proved that there was an accident, with administrative responsibility, which requires a judgment of reproach that in this case is entirely absent. However, it is also true that in this case the provider failed to prove that the accident occurred due to the state of the road, did not prove conclusively the vehicle's condition and neither sent a bus of catching to help their passengers, so the violation would have occurred.

On other occasions, when the Court of Indecopi understands that the obligation of the supplier is an obligation of result, expressly states that it responds even when it has demonstrated that it acted with ordinary diligence[72]. Actually, this is the problem of configuring a breach of contract (civil) as an administrative infringement: the first one can be completely objective,

72 In this sense, for example, see Resolution 0078-2012/SC2-INDECOPI, dated January 11, 2012. Nonetheless, in this case, the infringement occurs as a result of the theft of a briefcase, where the supplier carried rolls of film and cameras that he had filmed in the various locations of the company. The Court assumed, rightly, that this conduct increased significantly the risk of theft or losses, which was attributable to the supplier; since it was a result of its own business organization. Therefore, in this specific case, it would be very possible to find a defect in the organization justifying the imposition of a penalty, without coming to a completely objective responsibility.

but when applied the second, is not necessary the judgment of reproach? There is no problem in understanding that the provider responds objectively by the breach, and therefore must compensate and indemnify to the consumer. But, should he be punished further if he can demonstrate that made everything all right? From my point of view, this is the big question pending our consumer law, resulting from the overlap of private law and administrative law.

d. Statute of limitations of infringements

d.1. Nature and concept of statute of limitations of infringements

One of the most interesting topics in the analysis of disciplinary proceedings is the prescription of the infringement, according to Art. 121 of the CPDC occur within two years from the time it was committed or since ceased, if a continued. Moreover, the CPDC states that for calculating the period of limitation or suspension applies the provisions of Art. 233 of the LPAG, unlike that available to the Law 27311, whereby supplementary application were the provisions of the Criminal Code relating to the computation of the limitation period, in the case of interruption of prescription and suspension prescription.

The difference is very important because systems interruption or suspension of the limitation is very different in both cases, as is also the extension of limitation period. Thus, in the criminal law the limitation period is set in function to the maximum penalty of imprisonment established for a crime, corresponding to a period of two years for infringements that do not punish by imprisonment. This period is interrupted by the actions of the public prosecutor or the judicial authorities running out without effect on elapsed time, and starting to run a new period after the last diligence (Article 83, first paragraph, of the Penal Code). However, the disruption is limited, as the period cannot be interrupted again and again, until turning the infringement in imprescriptible. Thus, the fourth paragraph of Art. 83 establishes that *"... the criminal action requires, in any case, when the elapsed time exceeds by one-half the normal period of limitations."* Therefore, applying these rules to infringements on consumer protection, in any case they prescribed (regardless if it was a process running) at two years of committed or since have ceased.

The application of the LPAG completely changes this system. Thus, the limitation period is suspended when you report the resolution by which disciplinary proceedings are opened and allocated charges. This period will resume counting which had passed at least until it was suspended[73] when the process is paralyzed for more than 25 days for a cause not attributable to the administered. The standard does not clarify whether it has to be claimed by the administrator or can automatically declared, but to answer this question must take into account the nature by which the inactivity during a time period of liability claims administered by the lack committed[74], together with the action of the Administration to pursue it[75]. In the case of Indecopi, the power to assess ex officio the prescription has been declared by the Court, based on that Art. 80 of the LPAG of which states that the administrative authorities must ensure their own competence before starting a procedure.[76]"

This is a tardy exercise limitation the ius puniendi, which has a dual foundation: from the perspective of the taxpayer, on legal certainty, which requires that the threat of punishment have a final term, and, from the perspective of the Administration in the efficiency of their action, requiring him to devote his attention to current infringements rather than to the past, to optimize its resources[77]. The prescription in the penalty area is given by the objective observation of the period, and is not based on a supposed will of the Administration of not punish, nor seeks to punish inaction. Thus, unlike what happens in private law, it is understood that the prescription of infringements is public, while preventing the exercise of administrative power, and must be declared ex officio[78].

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73 In contrast, Zegarra Valdivia, D. (2010). "The figure of the limitation in the sanctioning scope and its regulation in Law 27444 - General Administrative Procedure Law". In: *Revista de Derecho Administrativo (CDA)*. No. 9, Year 5, P. 212, for whom the prescription regulated in LPAG implies that it starts from cero.

74 Caballero Sanchez, R. (1999). *Prescripción y caducidad en el ordenamiento administrativo.* Madrid, McGraw Hill, pp. 413 and seq.

75 De Diego Diez, L. A. (2009). *Prescripción y caducidad en el Derecho administrativo sancionador.* Second Edition. Barcelona, Bosch, pp. 30 and seq.

76 Resolution 2201-2012/SC2-INDECOPI dated July 16, 2012.

77 Sanchez Caballero, R. (1999). Op., pp. 74, and, by the same author, Sanchez Caballero, R. (2010). "Termination of infringements and penalties". In: Lozano Cutanda, B. (Dir). (2010). Dictionary of administrative penalties. Madrid, Iustel, pp. 641-642. Add this work as the basis of the principle of proportionality requirement, as "*disproportionate pursue a breach or demand punishment beyond a reasonable time.*" Therefore, it is supported that the limitation period has to be proportional to the seriousness of the conduct.

78 Ibid., pp. 443 et seq. Moreover, according to De Diego Diez. (2009). Op., pp. 43, can be seen ex officio in court and then being consider administered by the administrated one without knowing that the conclusion was no opposed in the prior administrative means.

For clarity, include the Spanish Supreme Court judgment dated December 5, 1988 (Repertorio Aranzadi 9320), according to which:

> *"The assessment made by the court judgment does not refer to the acquisitive prescription or extintiva of shares or rights, which may enter the device of the parties, as civil doctrine, but a necessary objective condition for that the sanctioning power of compulsory administration is exerted for that and inalienable for the offender [...] during the period prescribed by law without that the sanction will be imposed, determines the legal impossibility to be made and, if done, is produced in the nullity sanction*[79].

There are two issues that need clarification regarding the prescription of the infringement in administrative law in general, and in the procedure of protection to the consumer in particular: (i) from when prescription period of the infraction was started counting the, and (ii) when it suspended and when it restarts, which brings us to the question of the deadline to punish a conduct.

d.2. The time from which the limitation period begins

In relation to the first, as a general rule the time of onset depend on the nature of the infringement. So, this will begin to count since the offending conduct was achieved in the infringements instant and infringements instant with permanent effects (or infraction of state, in which there is an instant behavior under which produces a state of things contrary the legal system), since the behavior ceases in the permanent or continuous infractions (where the accused is held in an infringement situation in these cases the behavior is what persists, not only its effects), since the last performance constitute an infringement in the case of repeated infractions (those where different behaviors are made, each of which constitutes a separate infringement, but are considered a single infringement, as long as they are part of a single process to which asks for unity of action, homogeneity of legal property injured and active subject, which must act in execution of a preconceived plan or taking advantage identical occasion), and since the last action is performed, that consume the infringement in the case of complex infringements[80].

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79 In such sense, De Diego Diez, L. A. (2009). Op.Cit., p. 35; and de Palma del Teso, A. (2001). "The continued administrative infringements, the permanent infringements, State infringement and the infringement of multiple acts: distinction to the effect of the count of the termination term." In *Revista Española de Derecho administrativo*. No. 112, p. 554.

80 On this matter, it can be seen in detail in Ibíd, *passim*.

On the other hand, always on when the account of the limitation period is started, it has been discussed if it begins when the offense is committed or when it is known. In this regard, the general rule is that the period shall begin to run from the offense is committed, not since the Administration in charge punish it know it. It has been suggested, however, an exception, which would be one in where the author makes positive acts of concealment, in which count the period will be admitted since the time when the conduct is discovered or at least is able to be discovered[81]. However, it is not a figure with regulatory recognition nor is generally accepted[82].

However, in cases of penalty procedure in consumer protection is given a special circumstance which makes necessary to qualify the general rule. It is about a procedure that although officially starts, recognizes the legitimacy of the person concerned to lodge a complaint, under which becomes part. As noted above, it is a penalty procedure with complainant concerned; therefore when setting the start of the limitation period should be taken into account the actual attitude of this consumer to know the offense that affects him, as otherwise, he will be preventing access to this means of protection. This is the case, always used as an example, the consumer who buys a vehicle believing it had airbag, according to information provided to it by the supplier, and that four years after the purchase he has an accident, meeting with the surprise that the airbag did not exist. How long should the prescriptor period be counted? In this case, we believe that the period for the consumer to file a complaint begins to run from the time in that he knows the defect (or reasonably he could know it), not since the sale is occurred (which it would really be the act of infringement)[83].

d.3. Suspension, restarting, and end of statute of limitation period.

On the other hand, and here the LPAG reference gains all its important instead the Criminal Code. According to the first of these rules the prescription period is suspended when the imputation is notified, and then restarted if the procedure is paralyzed for 25 days. On this issue, it should be noted that, first, if after the penalization that leads to the resumption of the period prescriptor the procedure continues, this does not mean that the period is suspended again. According to LPAG, only the notification of the charge imputation suspends the

81 Caballero Sánchez, R. (1999). Op. Cit., pp. 649-650.
82 Gómez Tomillo, M. and Sanz Rubiales, I. (2010) . Op. Cit., p. 654.
83 Gomez Apac, H. (2011). Op. Cit., p. 37.

prescriptor period, so that if it is resumed, it may not be suspended or interrupted again. This conclusion is necessary, since in administrative law does not establish a maximum period and unfailing for that the prescription occurs, so that in principle it could happen that an offense prescribe in many years, if the penalty procedure never stops, despite the maximum period exceed amply to process it, it is not regulated in our country lapsing expiration[84].

However, the really complex issue is determine when the procedure produced a standstill for 25 days, attributable to the Administration, for while some authors understand that this will be verified when the period has expired without external acts (reported)[85], others are difficult assume this position, as the Administration does not work so fast[86]. In this regard, there is no simple solution, but perhaps it is not risky to suggest that in any case is understood resumed the prescriptorio when spend 25 days since the maximum period expires for that the Administration (in this case, Indecopi), culminates the proceedings at first instance[87]. Thus, in the procedures cases started many time ago and that have not been resolved in the first instance, the prescription of the offense must be analyzed. Finally, a special case and particularly complex is one in which, after several years of proceedings, the Court annuls the decision by which charges were imputed. If these were never imputed,

84 According to this figure, if the sanctioning proceedings does not finish in a maximum term, this shall finish and shall be considered as never commenced, so that it would not have been interrupted (or suspended) the limit period, discussing if it is possible to start a new sanctioning proceeding if the infringement is not barred, or if this is no longer possible.

85 De Diego Díez, L. A. (2009). Op.Cit., p. 169.

86 Caballero Sanchez, R. (1999). Op.Cit., p. 436.

87 This clarification is important because some author have argued that the order also applies to the remedy proceedings. This is the case of De Diego Diez. (2009). Op.Cit., P. 102 et seq., who says that in the Spanish criminal law the delay or halt of the proceedings, produced at the stage of appeal against the judgment pronounced in the instance is computable for the purposes of limitation for criminal infringement, so that the same rule should be applicable to Administrative law (pp. 111 et seq.) Other authors (such as Caballero Sanchez, R. (1999). op.cit., p. 659), recognizing what jurisprudential position is (which, in any case, was approved with an individual opinion signed by two judges against it), have understood that *"is completely reasonable that the negligence of the Administration when solving the remedies must have a temporal time limit, which may be the termination of the infringement after exceeding the theoretical term of response."* However, there is an obvious difference between the action in the administrative proceedings and the criminal proceedings, which justifies the difference in this case, since in the first one, the negative silence is set (which authorizes an appeal to a higher court), missing in the second one, where it remains to wait for the court decision. Furthermore, as stated in the Judgment of the Spanish Supreme Court's dated December 15, 2004 (Repertorio Aranzadi 2005/4800), once resolved the matter in the district court, it is no longer being counted the limitation period, as the power that exerts on the appeal court is not properly a sanctioning one, but rather a reviewer. Nevertheless, it is true that this statement could be questioned in the case of proceedings ending in acquittal in the first instance courtroom, where the consumer files a remedy, since in fact it is hereby intended that the reviewer body impose a sanction.

would not have suspended the limitation period, so the offense could no longer be penalized if it has expired[88].

e. Corrective measures (and its difficult distinction from compensation)

As indicated above, one of the most important changes in legislation on consumer protection was produced to give Indecopi powers to establish remedial measures which sought to correct the negative effects on the consumer that they are with the infringement. It is not about penalty measures, but measures by which seek to replace the state law prior to its breach, as generally permitted by Art. 232.1 of the LPAG. However, the main difficulty of this type of action was, from the beginning, his distinction of compensation exclusive grant the judiciary, not the public administration. The thin line between both categories has become even more tenuous, if possible, from the provisions of the CPDC, which distinguishes between corrective measures remedies and complementary corrective measures.

Thus, the Art. 100 of the CPDC provides that compensation for liability will be asked in the appropriate judicial process, while regulating remedial corrective measures and complementary. The first ones, according to Art. 115 of the CPDC, "... are intended to compensate the direct and immediate economic consequences caused to the consumer by the administrative offense to its previous state", establishing that no indemnity basis, so that you can order with civil liability. However, the thin line between the two figures is revealed when Art. 115.7 states that "... it is deducted from equity compensation deductible asset that satisfaction that the consumer has received as a result of the issuance of a remedial measure in administrative." Thus, for example, in Resolution 1934-2009/SC2-INDECOPI was established as a corrective measure that the clinic covers all medical expenses of a patient, who had been left in a vegetative coma, until complete recovery ... which not sure that at some point will happen.

According to Art. 115 of the CPDC, the remedial measures (which can be ordered cumulatively, except in the case provided for in subsection h.) May include:

88 This is what happened in the file solved by Resolution 2201-2012/SC2-INDECOPI since the infringement was first attributed to a school, which had no legal personality, having terminated it when they wanted to charge it to the promoter.

"a. Repair products.

b. Change products by other same or similar characteristics, when the repair is not possible or not become reasonable according to the circumstances.

c. Deliver a product of identical characteristics or, when this is not possible, with similar characteristics, in the event of loss or damage attributable to the supplier, provided that there is consumer interest.

d. Comply with the execution of the performance or obligation assumed, and if this is not possible or not reasonable, other equivalent effect, including cash benefits.

e. Comply with the execution of other performances or legal or contractual obligations to his charge.

f. Return the consideration paid by the consumer, plus statutory interest corresponding, when the repair, replacement, or possibility of performance or obligation, as applicable, is not possible or not reasonable according to the circumstances.

g. In the cases of overpayment or excess return these amounts, plus the corresponding interest

h. Pay the costs incurred by the consumer to mitigate the consequences of the administrative offense.

i. Other remedial measures analogous having equivalent effect to the above".

Meanwhile, complementary measures have the effect of reversing the effects of infringing conduct or prevent it from occurring again in the future. In this case, the difference between compensatory measures is clearer, and its constitutionality has been expressly recognized by the judgment dated December 5, 2006, issued in the File 1963-2006/PC-TC[89]. Art. 116 of CPDC states that complementary measures could be:

89 On this subject, see Higa, C. (2009). "El reconocimiento constitucional de la potestad del Indecopi para imponer medidas complementarias: Análisis de la Sentencia N ° 1963-2006-PA/TC (caso Dino)". ["The constitutional recognition of the power of Indecopi to impose measures: Analysis of Sentence N ° 1963-2006-PA/TC (Dino case)"]. In: *Journal of Competition and Intellectual Property.* N ° 5, p. 259 et seq. In this case was whether the measure imposed by the Indecopi, which ordered the cessation of measures contrary to free competition, irrogara implied that the power to declare the invalidity of contracts reserved to the judiciary.

a. *That the supplier meets with the request for information required by the consumer, provided that such requirement relates to the purchased product or service purchased.*

b. *Declare unenforceable clauses that have been identified as abusive in the process.*

c. *The seizure and destruction of the goods, containers, wrappers or labels.*

d. *In case of very serious offenses and recidivism or reiteration:*

e. *Request the appropriate authority the temporary closure of industrial, commercial or services for a period of six (6) months*

f. *Request the competent authority the disqualification, temporary or permanent, depending on the provider of the scope of the infringement.*

g. *Publishing of rectifying notices or information in a manner determined by the Indecopi, taking into consideration the means that are appropriate to reverse the effects that subject to sanction has caused.*

h. *Any other action that has the purpose of reversing the effects of delinquent behavior or prevent that it will occur again in the future.*

CHAPTER 2

Analysis of Indecopi's Jurisprudence

2.1. Binding precedents

On recent years, Indecopi has ordered binding precedents on the following matters:

2.1.1. Precedents of the concept of end consumer[90]

a. Resolution 101-1996/TDC, dated December 18, 1996, disregarded by Resolution 0422-2003/TDC-INDECOPI

Pursuant to this resolution, the following was established as binding precedent :

> *"Pursuant to subsection a) of section 3 of Legislative Decree 716, the consumer or user is considered the natural or legal person who buys, uses or has a product or service for personal, familiar or immediate social environment purposes. Therefore, for legal purposes, the providers buying, using or having property or services for purposes of their activities as such are not considered consumers and users, per the definitions contained in sections 1 and 3, subsection b) of the above Decree. In this manner, the complaints which purpose is to seek the protection of interests of the people who cannot be considered consumers or users, must be declared invalid".*

b. Resolution 0422-2003/TDC-INDECOPI, dated October 03, 2003.

Pursuant to this Resolution, the following is established as binding precedent :

> *"1. Pursuant to sections 58, 59 and 65 of the Political Constitution of Peru and pursuant to sections 2 and 5 of Legislative Decree 716, the Consumer Protection is the tool for overcoming the inequality of information existing between providers and consumers.*

90 The analysis of these precedents can be found in paragraph 3.1 of the first part of this document.

2. Pursuant to subsection a) of section 3 of Legislative Decree 716, the consumer or user is considered the natural or legal person who buys, uses or has a product, either a good or service for personal, familiar or immediate social environment purposes.

3. The natural and legal persons from the professional category of the businessmen of small business are also affected by the inequality of information in the consumer relationship and; thus, are considered consumers for the purposes of the Law on Consumer Protection when, due to the needs of their business activities, they buy or use products, either goods or services, for which acquisition or use it is not expected that it was necessary to have specialized knowledge comparable to the knowledge of the providers".

Even though this precedent was not been expressly nulled, the Tribunal of Indecopi believes that this implicitly took place with the approval of Legislative Decree 1045, which modified the definition of consumer, which has suffered a subsequent evolution to which we have referred above.

2.1.2. Precedent about the scopes of the implied warranty that all transacting service or product must have. Resolution 085-96-TDC, dated November 13, 1996, adopted in Case 005-96-CPC.

Pursuant to this resolution, the following is considered binding precedent :

"a) According to the first part of section 8 of Legislative Decree 716, it is presumed that all providers offer as an implied warranty that the transacting good or service is suitable for the purposes and uses for which they are normally acquired in the market, according to what a reasonable consumer would expect, considering the conditions in which the products were acquired, or in which the services were hired; this includes the reasonably expected period of the goods sold. However, whether the terms and conditions informed to the consumer or which could have been known by using the ordinary diligence by the consumer, included in the documents, packages, receipts, warranties or other instruments

through which the consumer is informed, expressly exclude or limit the scopes of the implied warranty; these exclusions or limitations will be enforceable against the consumers.
b) The burden of proof about the suitability of the product is assumed by the provider of the same. Such proof does not necessarily imply determining with accuracy the origin or real cause of a defect, but simply, that such is not attributable to causes attributable to manufacturing, trading or handing.
c) The conciliatory desire of the parties, shown through the offerings that each other made in the conciliatory hearings or outside them, cannot be used as evidence of their responsibility, except that such offerings include an express or undoubtedly recognition of responsibility by the person who proposes".

This case is one of the best proofs of apparently less important complaints, as they do not imply complex services or big quantities of money; it is possible to establish general regulations. In this manner, in the dossier determined by this resolution, a leather shoe was reported to be broken after just two months of use. Due to this situation, the Tribunal of Indecopi understood that all goods have an implied warranty, which does not imply that all products or services must be of the highest possible quality, but that must be suitable for the purposes of contracting in the market, considering the conditions in which the products were acquired or contracted (such as the place of purchase, the information given, the advertisement, its presentation), that might have produced expectation in a reasonable consumer. Therefore, the existence of an implied warranty regarding the suitability of the product is recognized, which must be abstractly valued; though, it must be valued based on the reasonability of the consumer, which must be appreciated with basis on the circumstances surrounding consumption.

Additionally, the importance of this precedent lies also in the fact of establishing the regulation of shifting the burden of proof, which has even conducted later to the application of the dynamic evidentiary burdens, not just regarding to the suitability of the product or service, but even, regarding the violation.

2.1.3. Precedent about the characteristics that precautions must have about the risk of a product or service. Resolution 095-96-TDC, dated December 18, 1996, adopted in Case 202-96-CPC.

On 1996, the CPC was advised that a laboratory had notified to DIGEMID that in the preparation of a diuretic drug, an antipsychotic drug was used by mistake, which affected a full lot. Once the problem was detected by the laboratory, the commercialization of such product was stopped, and it was requested to DIGEMID that all nationwide pharmacies were ordered to stop with the sale of the drug. Both the commission and the Tribunal understood that SmithKline and Hersil were responsible for the commercialization of such defective product, because it did not meet its purposes nor included the components indicated in its box, but, another one which produced an unsupported risk for the consumers. Both companies defended themselves by alleging to have tried to warn of the defect once it was detected; though, according to Indecopi, this does not avoid the execution of the violation, but just its reduction, provided that, several guidelines are also met, which are established by the binding precedent and been substantially adopted in section 29 of the CPDC:

> *"The reasonability of a warning, either referred to the risks and dangers which several products normally have (this means, the warnings referred to in the second paragraph of section 9 of Legislative Decree 716), or referred to the non-expected risks and dangers detected after positioning the products in the market (this means, the obligation of warning the consumer contained in the last part of section 10 of Legislative Decree 716), must be analyzed regarding to the following basic elements:*
> *a) The warning must be quickly disseminated. The warnings must be disseminated in an appropriate period of time according to the seriousness of the risk or danger involved. This implies that, if it is a severe danger to the consumers, the warnings must be immediately disseminated, as soon as there is reasonable evidence to suppose the existence of danger.*
> *b) The use of a heading or warning sign appropriate to the warned risk or danger. The "title" pretended to call the attention of the consumer must be proper for, without unnecessarily warning, calling the attention sufficiently in regard to the magnitude of the risk to the affected population segment looking to be advised, and allowing the interested parties to identify the importance of the warning for such.*

c) The magnitude and the frequency of the warning must be appropriate. The dimensions of the warning and frequency by which it is done (in case the waning is made through the media) must reasonably allow that the majority of the affected consumers see it.
d) The nature of the warning risk or danger must be specified. This implies indicating whether we are, for example, facing a risk against health, property of the consumer, or can simply imply the loss of the acquired product. For example, if a product is toxic when it is drank or dangerous if applied over the eyes, such effects must be indicated.
e) An accessible and understandable language for a reasonable consumer must be used. Therefore, the excessive technical or scientific language must be disregarded, using – on the contrary – terms allowing the consumer to understand which are the risks or dangers being warned.
f) The level of certainty surrounding the foreseeable risk or danger must be indicated. If the risk is only possible or there is not absolute certainty of it, this can be indicated in the warning ad, being able in these cases the use of conditional expressions. On the contrary, if it is a true and precise risk, a language making the consumer to understand the risk must be used.
g) The measures to be adopted for avoiding the risk or for reducing the effects that can be produced must be explained. The warning must, if possible, point out how to correct these problems in a simple and clear way.
These elements must be analyzed according to the criteria developed in the body of this Resolution, for the purpose of determining whether the warning given was reasonable or not, and; thus, suitable pursuant to Law."

2.1.4. Precedent about the scopes of the duty to provide information. Resolution 102-97-TDC, dated April 16, 1997, adopted in Case 327-96-CPC.

Pursuant to this resolution, the following is considered binding precedent:

"1. Providers have the obligation to provide consumers with all the important information regarding to the terms and conditions of the products and services offered, so that, it can be known or knowable by a reasonable consumer by paying attention to it. To determine which considerations and characteristics

are incorporated to the terms and conditions of an operation in case of absence of any response by the parties or in case that there are no other elements of proof showing what the parties really agreed on, the commercial uses and customs, the circumstances surrounding the acquisition, and other elements considered relevant will be turned to. In the non-expected, it will be considered that the parties agreed that the good or service is suitable for the ordinary purposes by which these tend to be acquired or hired per the level of expectation that a reasonable consumer would have. 2. The proof of the existence of a condition different to the normally expected one by a reasonable consumer given the circumstances, it will correspond to the benefited person for such condition in the contractual relationship. In this manner, in case that the consumer alleges that the good or service must have higher characteristics than the normally expected ones given the circumstances, the burden of proof of such characteristic will fall on such – this means, the consumer must prove that he was offered with an additional promotion or that he was offered with additional or extraordinary characteristics to those normally expected. On the contrary, in case the provider is the one who alleges that the good or service has characteristics minor than those expected given the circumstances, the burden of proving that those were the conditions of the contract will fall on it – this means, the provider must prove that he offered less beneficial conditions to those that would normally be expected".

In this precedent, as well as in the precedent about the scope of the implied warranty, the standard of the reasonable consumer is used as a parameter, and shows how the suitability of the product and the information are two sides of a same coin; while the first one must be valued with basis on the second one. In this regard, it is established as general criterion that all goods have to be suitable for their functions having the provider to respond in this case in virtue of the implied warranty, except for the exclusions that could have been expressly established (and that, it is worth saying, not be considered abusive). Thus, the suitability of the good based on this general criterion must be proved by the provider, once the reported defect was proved. However, whether the consumers state that the product or service must have met characteristics higher than those expected ones according to the circumstances, they must prove it, as well as the provider, if alleging the contrary.

2.1.5. Precedent about the scope of the competencies of Indecopi to protect consumers, unless when a lawful regulation confers such competency upon another entity. Resolution 0277-1999/ TDC-INDECOPI, dated August 18, 1999, adopted in Case 217-1997-CPC.

One of the issues that have generated most problems in recent years is determining the competency of Indecopi against other public organisms when there is a superposition in the control environments. Nevertheless, since many years ago, a binding precedent was established; this only excluded the competition of Indecopi if a lawful regulation established one exception:

> *"All providers nationwide are subject to the subjective application of Legislative Decree 716 – Law on Consumer Protection – pursuant to section 1 of such law. On the other hand, the Consumer Protection Commission of Indecopi is the competent administrative body nationwide to know the processes referred in the presumed violations to Legislative Decree 716 which may occur in all sectors of consumption, unless the exception provided in "express lawful regulation", in compliance with section 46 of the above legislation.*
> *Due to exception established in "express lawful regulation", only the provisions contained in laws or other regulations of the same level can be understood, which point out that an administrative entity, different to the Consumer Protection Commission of Indecopi, will be competent to penalize the presumed violations to Legislative Decree 716 that may be committed in the consumer relationships which arise in a specific sector."*

However, the difficult thing is to determine when a lawful regulation has established the exception. In this manner, the Tribunal knows that it is not sufficient that a law confers competencies upon other entity in regard to the same matters that to Indecopi, but, it is necessary that the regime expected in such case replies the consumer protection mechanisms provided in the general regime, which supervision was designated to Indecopi[91]. In any

91 This way, for example, see Resolution 1610-2010/SC2-INDECOPI. This criterion would be just deduced from some previous resolutions, as Resolution 251-2006/TDC-INDECOPI, which insists on the constitutional character of the consumer rights, and on the complementary role that INDECOPI may have in regard to the sector authorities.

case, this institution may not displace the entities to which they were conferred a general competition of regulation or supervision about a specific sector, by giving licenses or controlling the compliance of the requirements provided in the regulation. Such regulations can have as final objective to protect consumers, but Indecopi is not responsible for penalizing its failure, except in those cases where there is an effective violation to their rights that cannot be punished by the sector authority. In this regard, Resolution 2310-2012/SC2-INDECOPI is interesting, by which the Superintendence of Land Transportation of Persons, Load and Merchandise (SUTRAN, in Spanish) was recognized as the competent entity to penalize the companies rendering transportation service without the GPS, as demanded by the regulation.

2.1.6. Precedent in which the competition of CPC in the matter of information in packages and of CCD in the matter of advertisement in packages is clarified. Resolution 0197-2005/TDC-INDECOPI, dated February 16, 2005, adopted in Case 112-2004/CPC.

During recent years, the margarine has been involved in several cases in the jurisprudence of Indecopi, and even a binding precedent . In this case, a package of margarine indicated that it was a 100% natural product and with 0% cholesterol. This was reported before the CPC for defects in the information, when discussing the veracity of such statements[92]. Upon knowing the case, the Tribunal distinguished the information in the package, by which the characteristics of the product is neutrally communicated, from the advertisement in the package, by which the promotion of its sale is being seeking. CCD would be competent in this regard, and not CPC. In this manner, the following was declared as binding precedent:

> *"1. The element distinguishing the advertisement – subject to the application scope of Legislative Decree 691 – from other ways of communication that do not consist of advertisement, is the purpose of promoting the purchase of the announced products, through exalting any of its advantages.*
> *2. The advertisement in the packages, due to its advertising nature, responds*

92 Also related to the information in the packages of these products, there is Resolution 2289-2012/SC2-INDECOPI, which denied that calling them "spreadable" or "able to be buttered" meets the demands of the information in the package, because it is an adjective that did not reflect its true nature.

to the purpose of every advertisement; this is, to promote the purchase of the product. This means that, all indications intended to promote the purchase of the announced product included in the product package make up, by its nature, the advertisement in the package, subject to the application scope of the Regulations of the Advertisement for Consumer Defense, and; hence, to the competition of the Unfair Competition Suppression Commission.

3. The promotion of the purchase of the announced product can be executed through the simple fact of highlighting any element of the product composition which the advertiser considers it can be perceived as beneficial or favorable by the consumer. This eliminates neutrality or mere description of the highlighted element; hence, converting it, in a naturally constituent part of advertisement in the package.

4. The information of products – purpose of the regulations on consumer protection – is made of all the information about a product, which is printable or attached to its package, including inserts, and which is shown in neutral or mere descriptive terms, without valuations or appreciations about the characteristics or benefits that the advised situation benefits the product; this means, without the purpose of promoting, directly or indirectly, the purchase of the product.

5. The information in the package of a product can be mandatory or optional. The obligatory one refers to technical rules, because only these are obligatorily met by the providers. The optional one refers to the recommended quality standards, mainly to Technical Regulations, without meaning losing its neutral or descriptive nature. Both types of information share the same nature, and; thus, are subject to the provisions of the Law on Consumer Protection, and; therefore, under the competition of the Consumer Protection Commission.

6. The obligatory information on packages is subject to the provisions of section 7 of the Law on Customer Protection; while the optional one is governed by paragraph b) of section 5 and by section 15 of the Law on Consumer Protection.

7. The Consumer Protection Commission is competent in the matter of information in packages, either obligatory or optional, pursuant to section 39 of the Law on Consumer Protection; meanwhile, the Unfair Competition Suppression Commission is competent in the matter of advertisement in the package pursuant to section 29 of the Regulations of Advertisement for Consumer Defense".

2.1.7. Precedent about advance charges in teaching services: Resolution 0202-2010/SC2-INDECOPI, dated January 29, 2010, adopted in Case 003-2009/CPC-INDECOPI-CAJ

The last of the precedents of mandatory compliance approved by Indecopi. To date, it refers to one of the topics which the jurisprudence of Indecopi has spent more time on it, fully complying with Law 27665, Law on Protection of the Home Economy in regard to the Payment of Tuitions in Private Educational Programs and Centers. This regulation expressly forbids the educational centers to oblige to pay advance charges, demand the non-authorized installments payment or to indicate a specific place for the purchase of uniforms or school supplies. Moreover, the enrollment cost cannot be higher than that of an ordinary monthly fee[93]. According to Resolution 1485-2006/TDC, the following were understood as expressly prohibited manners:

> *"(i) Conditioning the attention of the complaints made by the service users or conditioning the evaluation of the students with the payment of tuitions.*
> *(ii) Obliging users to pay amounts or charges different to those of tuitions, entrance or enrollment fees.*
> *(iii) Collecting one or more tuitions in advance, except in the case that those payments substitute the entrance fees.*
> *(iv) Conditioning the registration and/or enrollment with the payment of contributions.*
> *(v) Obliging the parents to present all the school supplies at the beginning of the school´s year.*
> *(vi) Obliging the parents to purchase uniforms and/or school supplies or materials in establishments exclusively indicated by the schools".*

In the case concerning us, the Tribunal established that demanding the payment of the tuition during the payable month makes up an assumption of advance tuition, per the following binding precedent:

> *"It is considered an advance collection of school tuitions, per section 16 of Law 26549, amended by Law 27665, when it is made: (i) prior to the beginning of the academic month paid; or (ii) during the academic month and when it has not ended"* [94].

93 Resolution 0864-2011/SC2-INDECOPI.
94 The rules provided in this precedent have been then included in sections 73 et seq. of the CPDC.

On the other hand, regarding the collection of non-authorized tuitions and the designation of a specific place for the purchase of school supplies, pursuant to Resolution 0202-2010/SC2-Indecopi, the grounds by which Law 27665 regulates these matters is not to warranty an accessible or specific level of tuitions, but:

> *"…to make the offer of regular basic level education services clear, regarding its costs, as occurs in other cases of regulated services. For this, it is necessary that all costs to be assumed by the parents are incorporated within specific parameters; in this case, the enrollment, the tuitions and eventually, the entrance fees, so, the comparison is made in an easier way".*

In the case of extraordinary fees, Indecopi understands that the acceptance by the parents does not entitle the school to demand these payments, because, for doing so, it needs the respective approval, as Law 27665 does not accept any agreements to the contrary[95].

Additionally, also regarding educational centers, Indecopi has established that they cannot collect default interests above the maximum limit provided by the Central Reserve Bank of Peru. Therefore, the penalty which they collect, even when it is not established by percentages, but by a fixed monthly amount, cannot exceed such limit, per Resolution 2925-2012/SC2-Indecopi.

2.2. Indecopi's jurisprudence on some specific issues

Without the intention to run out the vast jurisprudence of Indecopi on specific topics, we have selected as the objective of this remark some resolutions about the following topics: the notion of consumer, provider and the consumer relationship; the unjustifiable refusal and discrimination to hire; suitability of air and land transportation services; the compensations and the advance payment in banking services; the security in parking lots; and some procedural issues. Clearly, many others remain to be discussed, but we believe that the analyzed ones help to describe the position of the Tribunal about some basic and controversial topics.

95 Resolution 2160-2010/SC2-INDECOPI, Resolution 0245-2011/SC2-INDECOPI, among many others.

2.2.1. Resolutions of Indecopi about the notions of consumer, provider (supplier), and consumer relationship.

a. The notion of consumer relationship and guarantor. Resolution 2721-2012/SC2-INDECOPI, dated September 11, 2012, adopted in Case 044-2012/PS0-INDECOPI-CUS, which the previous criterion is changed.

One of the most complex cases when determining whether a consumer relationship exists is when a complaint is presented by a guarantor or endorser. In this matter, Indecopi had provided many resolutions which in these cases there was not any consumer relationship, which requires the presence of a product or service rendered by a provider in favor of a final user or consumer, in exchange for a payment. In those cases, the jurisprudence established that:

> *"… the bank does not render a service to the guarantor or endorser, but it participates as a third party towards the configured relationship between the bank entity and the debtor, committing itself to support with its equity the credits or loans which this entity conferred upon the warrantied client"96.*

However, this criterion has been modified by the Tribunal, on the basis of section III, subsection 1 of the CPDC, according to which the persons who are directly or indirectly exposed or included in a consumer relationship or in a preliminary stage are included within the concept of consumer. This regulation, together with the one arranging the post consumer interpretation, makes the Tribunal understand that the guarantors can be consumers, meanwhile, they are exposed to the negative effective effects of a consumer relationship, as they can be the purpose of: (i) wrongful collection of a debt already paid, (ii) refusal to provide information about the debt, (iii) refusal to cover the reduction insurance, and (iv) wrongful reports to risk centers, among other situations. It is, hence, a 180 degree turn in the execution of the regulation for the guarantors or endorsers that I understand it is justified, but it must be confirmed by the Tribunal in its new composition, especially because the reasons of the change of the criterion were not explained.

96 Resolution 3440-2011/SC2-INDECOPI and prior ones, Resolutions 0424-2009/SC2-INDECOPI, 1347-2009/SC2-INDECOPI, 1348-2009/SC2-INDECOPI, 1167-2010/SC2-INDECOPI and 1957-2011/SC2-INDECOPI.

b. Does a commercial center assume responsibility for the actions carried out by the police hired in their leave days?
Resolution 2540-2012/SC2-INDECOPI, dated August 16, 2012, adopted in Case 543-2010/CPC.

This case is especially interesting because it takes the scope of the competition of Indecopi to its limits. According to the facts proved in the dossier, one police officer dressed as civilian, who rendered services for Jockey Plaza in her leave days, arrested one person, as she believed that such person looked suspicious. However, the CPC (through Resolution 424-2011/CPC, adopted in Case 543-2010/CPC) considered that such arrest was carried out without considering any objective cause. Hence, it was established that a violation against the duty of suitability was produced, so a fine of 5 taxable units (UITs) was imposed. The defendant filed an appeal, which was resolved through Resolution 2540-2012/SC2-INDECOPI, by which the fine was confirmed, understanding that the security conditions in the commercial facilities make part of the duty of suitability, so, the provider is responsible for it; and therefore, for the actions performed by the personnel hired to provide security services, even when they are police officers. In such case, according to the Tribunal, it is true that the police, when rendering services in their leave days, they are still police officers (therefore, they have powers to arrest in order to prevent or avoid crime), but it does not imply that the person hiring them to look after a commercial center stops being the provider. Thus, according to the indicated Resolution:

> *"35. As well as the police function executed under a contract with third parties does not stop being a police function, as well as a provider does not stop being such due to the contracting of such services for the compliance of its services.*
> *36. Exactly, the Regulations recognize that the individualized complementary extraordinary services of security and custody are performed by direct agreements (service location contracts) between the police officer and the institution or person requesting the service, being the parties who freely agree on the conditions of the service, as the economical consideration – which only makes up an economic income of the police officer and not of the Peruvian Police Force -, the schedule and place where the service is rendered, the term of the contract, among others, having to consider at least the provisions and the contract model provided in the Regulations.*

37. The police function performed through these individualized complementary extraordinary services and its control by the Inspectorate of the Peruvian Police Force does not weaken the responsibility of the providers who use these services to warranty that they are developed according to the legal parameters provided in the Regulations, by watching over the rights of the consumers.

38. It must be considered that providers, voluntarily, hire police officers not only for the purpose that they can render security and custody services for their benefits, but also that they can execute the attributions conferred by law, for the purpose of maintaining security within their facilities. This duty, as we have seen previously, concerns to providers.

39. Under this order of ideas, the police officers act within the framework of a contractual relationship by which they are obliged to execute their functions, and considering the conditions indicated by the provider, as the applied measures, lastly, have the purpose of assuring the minimum conditions of security in their facilities.

40. In these cases, the provider must warranty that the hired services meet, besides the agreed conditions, the requirements established by the Regulations, as the rendering of such services by the officers properly dressed. In this manner, it would be possible that in the rendering of individualized complementary extraordinary services of security and custody for the provider, the police officers affect the rights of consumers, in which case, the responsibility of the providers who turn to these services must be evaluated, considering if such violation was due to the failure of complying with the legal requirements provided in the Regulations. This is a legal obligation in their service rendering.

41. In this way, whether the providers can freely decide to hire police officers to render individualized services of security and custody, and; thus, to exercise the attributions conferred by law; in case they choose this mechanism, they must watch over that such services are rendered per the regulations in force and respecting the rights of the consumers who visit their facilities; besides that the possible excesses of a police officer can be supervised by the Inspectorate of the Peruvian Police Force, pursuant to the Third Complementary Provision of the Regulations"

Consequently, a provider would be responsible for the actions of a police exercising his powers, provided that he has been hired to render security services within the commercial center. However, it is still an authority action[97], in relation to which Indecopi has been traditionally recognized as incompetent. As we said above, it is about a really limiting assumption.

2.2.2. Resolutions of Indecopi on unjustifiable refusal and discrimination to hire.

a. Discrimination due to avoiding the entrance for racial reasons: Resolution 114-2003-CPCSUR (dated December 12, 2003, adopted in Case 022-2003/CPCSUR/CUS), Resolution 0939-2005/TDC-INDECOPI (dated August 26, 2005, adopted in Case 1356-2004/CPC), Resolution 1015-2006/TDC-INDECOPI (dated September 13, 2006, adopted in Case 176-2006/CPC), and Resolution 1029-2007/TDC-INDECOPI (dated June 18, 2007, adopted in Case 2188-2006/CPC).

In our country is difficult to deny it; discrimination is generally related to racial reasons, and this has been the case that has defined the jurisprudence on this issue. Actually, all cases are similar. In this regard, in the decision taken through Resolution 114-2003-CPCSUR, four persons reported Pub Mama América for not allowing them to enter, unlike the foreigners, whom were allowed to enter. Nevertheless, in this case, it could have been discussed whether it was a differentiated treatment based on objective causes (nationality), but the reported company did not defended itself, so, it could never give the necessary explanations.

On the other hand, in the case resolved through Resolution 939-2005/TDC-INDECOPI, the disco which is object of this procedure alleged that it only allowed the entrance to the establishment to partners, guests and tourists making the corresponding payment. Thus, it stated that it was not an open establishment for the public, but it reserved the right of admission

97 Pursuant to the first complementary provision of Supreme Decree 004-2009-IN, approving the Regulations on Rendering of Extraordinary Services Supplementary to the Police Functions, *"the executed extraordinary services supplementary to the police functions stated in the provisions of these Regulations, have police function nature for legal, statutory, disciplinary and ethical effects"*.

according to its Entrance Regulations. However, in the inspection, these arguments were confirmed as false, as a Peruvian couple with Caucasian characteristics could enter without any problem, unlike other couple with mixed characteristics, to whom were advised that only the partners or their guests could enter. Further, the Tribunal states that only allowing the entrance for foreigners means a discriminatory practice with the fact of geographical place of origin of the client. In this regard, it would be necessary to ask if in this case, an objective reason might exist (nationality) which would justify the difference in the treatment, and if this would be acceptable or is per se illegal, as happens with discriminatory practices.

Finally, we have two cases in which a popular coffee shop and a disco were fined, also due to the prohibition to two mixed-trait persons to enter to the establishment and to allow without any limitations that people with Caucasian traits get in. These are referred by Resolutions 1015-2006/TDC-INDECOPI and 1029-2007/TDC-INDECOPI. The second resolution is special, as, unlike the first one, it was not based on an inspection carried out by the officers of the entity, but in a press report, which was considered proper to prove such violation. Moreover, in this case, the general rules applicable to determine whether discrimination exists are established:

> *"18. In consumption, a behavior is considered discriminatory when the same commercial conditions are not applied to consumers who are in equal situation; this means, when there is not any objective reason justifying the differentiated treatment. Proving the existence of this objective criterion is what distinguishes a differentiated treatment from a discriminatory treatment. The differentiated treatment supported in mere subjective and unjustifiable reasons and which are not in the assumptions detailed in the next paragraph means a discriminatory treatment, and; thus, illegal. On the other hand, the differentiated treatment or the market segmentation is a legal behavior provided that there is an objective reason supporting it. For this, it is necessary that the following requirements are met:*
>
> *(i) that consumers receiving a different treatment are in different factual cases, in the extent that these admit or can require a different treatment;*
>
> *(ii) the unequal treatment given must have a purpose, as the consumers cannot receive a different treatment without any reason;*

(iii) such purpose must be reasonable;

(iv) must exist coherence – a logic, consistent relation – between the unequal treatment received and the concerned purpose; and

(v) the unequal treatment received and the concerned purpose must be balanced.

19. Discriminating by race, religion, beliefs, sexual orientation, among others, is a despicable behavior seriously affecting the basic rights of the persons, who are object of such practice, whom, due to prejudices and closed-minded attitudes, receive an unfair treatment for human dignity. Due to the cultural nature of discriminatory practices, it is not necessary to prove that the violator has an institutional discriminatory policy in order to produce such events. It must be taken into account that it is possible that the policy is not discriminatory per se, but discrimination acts by the personnel of the company can be produced.

20. It is important to point out that if that is the case, under none assumption it might be as grounds of exemption of responsibility of the offending entities, as the vicarious responsibility provided in section 1981 of the Civil Code obliges them to assume solidary responsibility for the damages caused by their subordinates in the execution of their duties. In this manner, the establishments opened for the public have to train their personnel and to adopt all the necessary measures to avoid such practices.

It is difficult not to agree with the criteria provided by the Tribunal to establish in which cases discrimination exists, though, the reference to the vicarious responsibility of the Civil Code is reprehensible, referred to civil responsibility, which the same Tribunal made an effort to distinguish from the administrative responsibility.

b. Discrimination in a commercial center and the demonstrations of excessive affection: Resolution 0665-2006/TDC-INDECOPI, dated May 17, 2006, adopted in Case1183-2005/CPC.

The importance and interest of this case lies in the fact that it is one of the few where Indecopi has faced a complaint for discrimination based on sexual orientation by the plaintiffs[98]. To summarize, the facts of the case are the following: one couple is eating in the coffee shop of a supermarket when the personnel of the establishment approached them and they are asked

to stop showing their love demonstrations, which they believe are inappropriate, as, also, there were children.

On first instance it analyzes whether the expose to homosexual influences affect children, to determine if their higher interest would justify a limitation of the love demonstrations in public between couples of the same sex. The vote in majority, signed by commissioners Juan Luis Daly Arbulú, Mercedes Garcia Belaunde and Alonso Morales, refers to the dignity of the interest of the child, which could be affected by such love demonstrations. This is not agreed by the minority voters, signed by commissioners Adriana Giudice and Uriel Garcia, for whom this is a discriminatory behavior. However, though the majority accounts for the dignity of the interest of the children; finally, it is justified in the lack of proof of the differentiated treatment. Consequently, independently of sharing or nor sharing their arguments, the true is that they unnecessarily participate in a very controversial issue.

Thus, the Defense of Competition Tribunal receives an unnecessary complex case referred basically to evidence issues, as the controversial issue would be if the reason by which the homosexual couple was asked to stop their love demonstrations was due to their sexual orientation, as supported by the plaintiffs, or due to the excess of such demonstrations, as supported by the defendants. It is important, also, to highlight that for the Tribunal, upon not having proved the differentiated treatment, and being a penalizing procedure, there is no place to penalize the accused parties because the presumption of innocence must come first.

> *"The Law on Consumer Protection establishes a series of rights of consumers, among which we expressly found the right to acquire a variety of competitively priced products and services, which allow consumers to choose freely what they*

98 Another case where this issue has been put on the table is the one resolved through Resolution 2264-2010/CPC, dated September 24, 2010. In this case, one male, but who dressed and socialized as a woman, intended to register in a gym, where he was advised that he would not use the ladies bathroom, and, also, he would be called by phone with the name appearing in his identity card, which belongs to a man. Upon the complaint, the Commission analyzes the right of sexual identity of the people denominated as "transgender", which he understands that though he cannot demand using the ladies bathroom, (as this might affect other users), he can do ask to use the name according to his sexual orientation (female), as these are daily acts, unlike signing contracts, where it necessarily needs to identify oneself with the details of his/her National Identity Card. Finally, this resolution has been recently terminated through Resolution 3444–2012/SPC-INDECOPI, supported on the failure to prove the existence of the differentiated treatment, upon not proving that other users were called by their social names. Without this, there is no possible discrimination.

prefer. Likewise, they must be treated fairly and equitably in any commercial transaction. This rule develops the basic principle of equality on the treatment and no discrimination, which means that any consumer has the right to receive an equal and fair treatment.

Specifically, the law states that, in establishments opened for the public, the providers are not allowed to make any kind of discrimination in regard to the consumers of the products and services offered. Only, a practice of selection or differentiated treatment would be allowed when there is an objective or justifiable cause, such as the security or tranquility of the rest of consumers. The restriction established by the Constitution and the Law does not contravene the right of freedom to contract, also provided in subsection 14 of section 2 of the Political Constitution of Peru, and which established that providers are free to decide what people to hire; this means, differentiating from the mass of consumers the target audience to which they will offer their products and services. As indicated in the Constitution, this right to freedom of hiring can be executed provided that the public order laws are not contravened. One of these acts confirms, exactly, the right to not be discriminated.

In other words, the differentiated treatment or the market segmentation is a legal conduct, provided that there is an objective reason justifying such difference. Otherwise, the differentiated treatment supported with mere subjective and unjustifiable reasons will be a discriminatory treatment, and so, illegal.

An example of illegal conduct of selection of consumers of a service is the one used by some night clubs in the city of Lima, allowing access to consumers of a specific racial trait and ignoring others from another racial trait. In such cases, both the Commission and this Tribunal have declared that these conducts are inacceptable discriminatory conducts for the legal system, and consequently, mean violations to the Law on Consumer Protection.

[…]

The services offered by the accused party are not limited to the sale of goods and/or services for a price in return, because it is understood that also, an environment of security and comfort is given to clients for their purchases and/or consumption. In the specific case of coffee shops, besides the offer of prepared food and beverages, providers offer their clients a space for their consumption

in conditions of hygiene, tranquility, an efficient service, as well as, a kindly treatment and with courtesy for everyone as equal.

Considering the foregoing, any consumer visiting this kind of establishments should can access freely to them, using their installations in the same conditions as the other consumers. Enjoying these spaces open for the public is conditioned to the fact that the regulations of security, coexistence and tranquility of the other consumers are respected. In this manner, it is justified that providers adopt measures to prohibit some acts inappropriate to the condition and usual use of the establishment, as for example, to avoid violent acts, use of an offensive language, entrance with pets, political proselytism, sale of products and services by the clients, and any other type of antisocial behaviors that disrupt the security and tranquility of other consumers.

In the case of behaviors of coupes or related to the intimacy of the persons, it is valid that the establishment penalizes, among others, demonstrations such as nudism, sexual intercourse, or couple affection demonstrations which are not in accordance with the public nature of the establishment and with the intimacy of the behaviors. In these assumptions, due to its nature related to the socially accepted customs, the establishment must be very careful to not consider subjective-type or discriminatory conditions as part of prohibiting the said behaviors".

c. How far does the right of insurance companies go to refuse to hire a person? The case of Sandra Paola Célis and people with down syndrome: Resolution 2135-2012/SC2-INDECOPI, dated July 11, 2012, issued in Case 272-2011/CPC.

The last case of discrimination that will be taken as a reference is one of the most complicated in recent years, as evidenced by the final decision of the Court which approved it only by majority, largely confirming (the fine was only reduced from 50 to 45 UITs) Resolution 3329-2011/CPC, to understand that the insurance company had engaged in a discriminatory conduct by not allowing a person with down syndrome to contract an insurance policy. As the record shows, the insurance company refused to issue a policy in favor of Miss Céliz claiming first for technical reasons, and then explaining that the condition of Down syndrome was an uninsurable risk.

In the opinion of the Commission, having down syndrome is not a disease but a genetic condition, that cannot be used as the basis for a person to completely exclude the possibility of an insurance, especially when there are international and national standards prohibiting discrimination against disabled people in general and accessing to the provision of health and life insurance in particular. Moreover, having proven unequal treatment (since it was allowed the affiliation of the other children of the complainant), it was up to the insurance company to prove the existence of an objective and reasonable cause to justify such unequal treatment.

In this regard, the Commission understood that although the defendant company reported that it did not issue the policy because having down syndrome was an uninsurable risk, *"they did not meet or sustain objective and reasonable grounds to support this qualification"*. Thus, neither justified the statistical reasons that lead those to say that people with down syndrome are more likely than the general population to develop certain diseases neither they made any testing to Miss Céliz to determine her health status, all of them might have justified the application of additional exclusions.

Actually, the reason the company decides not to insure her, is due to a condition that is intrinsic to her, such as sex or race, which is a criteria of differentiation that cannot be covered in our system. Consequently, even if people belonging to a certain group or collective, for reasons of their nature (such as sex or race), had a higher rate of disease, this does not make them uninsurable. It is therefore demonstrated that the company has made unlawful differential treatment according to the criteria used by the Court of Indecopi since 2010 to which we have referred above[99], in turn it constitutes discrimination, since this is justified because it belongs to certain collective group or group of people, not only to a particular customer. Obviously, beyond the discussion of the difference between discrimination and unlawful differential treatment, which in this case does not arise because it was understood that it is an alleged discriminator, I share the arguments of the Commission of which I am part.

As previously indicated, this resolution was largely confirmed by Resolution 2135-2012/SC2-INDECOPI, but only by the casting vote of the President, as there are three different votes. On one side, members Camilo Carrillo Nicanor Gomez and Miguel Antonio Quiros

99 See section 1.4.2 of Chapter I of this document.

Garcia agree with the arguments of CPC, and understood that we were facing a case of discrimination, because the company would not have provided the objective and justified reasons that would explain the difference in treatment, at the point that in some cases down syndrome itself is a covered peril (when someone is born with such a condition within the coverage of the policy). Therefore, to consider this as a lawful conduct, it must approve the test of reasonableness or proportionality, through the sub-principles of suitability, need and proportionality in the strict sense which does not happen, because there were other less harmful means to achieve the target of the insurance company without preventing access to the insurance, such as establishing exclusions or increasing premiums. Also, it would not be an unjustified refusal to appoint because although involvement is individual, it is based on belonging to a constitutionally protected group.

Meanwhile, for members Francisco Pedro Ernesto Mujica Serelle and Hernando Montoya Alberti it was not configured a discriminatory conduct, but an unjustified selection of clientele. First, this vote is based on the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, the Convention) which establishes only an obligation for States but not for individuals, so there is no rule for insurance companies to contract people with disabilities. However, the complainant company itself insured people with down syndrome, so there is not an allegation of discrimination but one of differential treatment, because they have not justified the reason Ms. Céliz was not allowed to be insured. Note how the difference between a generic type of unjustified differential treatment and discrimination uphill put evidence of the latter, even in cases where the complainant objectively belongs to a special group, even it would be needed to confirm that the reason why the supplier has refused to contract him is because she belongs to that group.

Finally, for member Oscar Dario Arrus Olivera it would not be an infringement, so appeal should have been declared as settled. Among other reasons, his decision was justified on exclusion, on the grounds that it is up to the insurance companies to manage their risks, by buying this decision with Resolution 2845-2010/SC2-INDECOPI, as it was understood as justified to charge different prices for SOAT of certain vehicles, due to higher claims. However, beyond the reason that in this case we have the total exclusion of the insurance, the fact is that in the case of SOAT, insurance companies probed accident rates. It also maintains the singular vote from member Arrus Olivera, the Convention, which has been used as basis for the decision, establishes obligations for States but not for individuals.

2.2.3. Suitability in air and ground transportation

a. How far does the responsibility in case of accident go? The case Soyuz and Resolutions 3464-2009/CPC, 2677-2010/SC2-INDECOPI, 302-2011/CPC, 1714-2011/SC2-INDECOPI, 2522-2011/CPC and 0752-2012/SC2-INDECOPI, all relapse in Case 1881-2008/CPC

The story of the case is complex, both for their own behavior as analyzed by successive resolutions of the CPC and the Court, as there are three resolutions in each proceeding. First let's recap the case: on July 20, 2008 there was a traffic accident, the collision of a bus from Soyuz company and bus from the Caplina company, because the first invaded the lane of the second, taking by mistake the access road from Pasamayo variant. The commission fined both companies, imposing a fine of 300 UITs to Soyuz for violating arts. 8 and 9 of TUO-CONSUMIDOR. The company challenged the decision, claiming that the Commission had not distinguished the administrative civil liability, applying to the second parameters of the first one, without having established the infraction because the infringement was identified with the accident itself. Soyuz argued that accidents are a natural hazard in ground transportation service, so that charge could not be assigned due to an accident but for its contributory conduct or source, in this specific case, its existence was denied as all possible precautions were taken, fault of signals in the pathway was the cause of the accident.

This appeal is resolved by Resolution 2677-2010/SC2-INDECOPI. Actually, there are two issues in this instance that are discussed: (i) is there an infringement or just an accident?, (ii) has the Commission done well to impose a fine of 300 UITs by the commission of a two offense contest: impaired competence duty and the introduction of an unreasonable risk or not advised for the health or safety of customers?

In relation to the first one, it remains unclear the boundary between civil liability for accidents, which is objective, and administrative responsibility. For example, it is stated in paragraph 35 wherein:

> *"... The violation of Article 8 is referred to the disappointment of the legitimate expectations of the users to be transported smoothly, that would have been affected by Soyuz and Caplina because in the provision of their services they*

collided in a traffic accident. The charge is related to the involvement of the regular service, regardless of the causes that have generated the accident."

However, later (paragraph 39) it seems to imply that there would only be a need to impose a penalty when an accident happens and there is a 'contributory factor' in between, which takes us away from the objective civil liability. In this regard, the Board considered that subjective responsibility was credited with the negligence or recklessness, manifested when driving the vehicle in opposite sense.

However, despite this being true, the importance of this case is that it allows us to ask whether it has been established the liability of the company or just the driver, which is important, since the first one will be subject of penalty. As explained above, if we accept the responsibility of legal persons and that they may be subject to a separate guilty proceeding, from the existence of failings in the organization which facilitate or prevent the commission of the offense. From that point, Soyuz's arguments regarding compliance with safety standards, that would pretend to show that in this particular case the accident took place because of the driver's personal negligence (not assigned to the company) and due to deficiencies in signaling the road.

Therefore, to be an expert driver path, properly selected and trained, could it be possible to penalize the company's negligence or even criminal behavior of the driver[100]. By using an analogy that sometimes I use in class: what will happen if the driver of a bus receives, just before leaving, a call from his wife, telling him that she is leaving, and he, in an outburst of madness, decides to commit suicide, crashing his car into a truck? Should the company respond? Of course it should respond, legally. But also for the administrative responsibility, although the company did all they could to prevent and avoid accidents? Is it possible a punishment without a reprimand trial? In any case, and in this the Court is right, it is up to the defendant to prove that there is no fault in the organization or that the accident occurred due to external factors (which is not the same as saying that they did not prevent the realization of the accident).

100 However, the fact is, that in the precedent of INDECOPI, even it does not recognize objective liability in case of accidents, it is understood that the driver's negligence is enough to attribute liability to the company. Thus, for example, see Resolution 340-2006/TDC-INDECOPI.

On the other hand, the Court, while confirming the existence of infringement, cancels categorization made by the Commission to understand that there is a case of concurrent offenses, as it is the same conduct that constitutes an emphasis to the duty of suitability and make undue risk to the safety of customers. It applies, therefore, to the provisions of art. Of LPAG 230.6, which provides that "when the same conduct qualifies as more as one offense, it will be applied the penalty provided for the most serious one, without prejudice to their other responsibilities required to establish the law." Therefore, it would only be penalized for one of the alleged facts, which cannot be made by the Courtroom because the Commission had not established a differentiated fine for each. Consequently, it is canceled and ordered to the CPC to make a new categorization, starting to a series of resolutions.

Thus, by Resolution 302-2011/CPC, the Commission found that the infringement to the duty of suitability was punishable with a fine of 100 UITs and the introduction of an unwarranted risk with 300 UITs, having to comply only with the latter. Naturally, this decision was challenged, the Court answered by Resolution 1714-2011/SC2-INDECOPI again annulling the decision of the Commission, to understand that it had violated the principle of prohibition of reformatio in peius, as the sum of both penalties will exceed the 300 UITs, which was originally imposed as a penalty for the commission of the two. Considering this, the case was again decided by the Commission through Resolution 2522-2011/CPC, which imposed a fine of 100 UITs by the infringement of the duty of suitability and 200 UITs for introducing unnecessary risks, having to meet only latter. Finally, in the last episode of this case up to date (which is judicialized), the Court reduced the fine to 60 UITs by the lack of suitability and 110 UITs by introducing undue risks.

However, beyond the analysis of categorization criteria used in each case, this resolution is interesting because it shows the existing confusion in the rules over the criteria for determining the seriousness of an offense related to the definition, with the criteria to categorize a penalty. So, serious or not a conduct is determined to impose a fine, that does not even constitute a minimum. Thus, according to CPDC, for a minor offense it can be imposed a fine of up to 50 UITs, for a serious offense, a fine of up to 150 UITs, while for a very serious offense the fine may reach 450 UITs. However, at no time establishes which offenses are minor, serious or very serious, this is being done at the time of sanctioning, which leads us to a strange situation, in which the definition of the conduct takes place in the resolution whereby it is punished.

b. Air transportation in successive sections. Resolution 1261-2005/TDC-INDECOPI, dated November 25, 2005, issued in Case 660-2003/CPC, which states that whoever issued the ticket is responsible for all sections, and Resolution 2309-2012/SC2-INDECOPI, dated July 30, 2012, issued in Case 1284-2011/PS3, why change the criteria, based on the principle of causality, so that each airline responds per the flight path that is responsible.

Probably the case handled by Resolution 1261-2005/TDC-INDECOPI is the best known of all those referred to aviation liability, which has led to several INDECOPI resolutions and which is currently discussed at headquarters court. Summarizing the facts, Mrs. Shvedova bought a ticket on Lufthansa, to take her from Lima to Moscow. However, as such airline does not depart from Lima, the journey between this city and Caracas was managed by Taca. Due to problems in the booking made by the travel agency and system compatibility with Taca, the ticket for the section Lima-Caracas was canceled, but Ms. Shvedova was not informed by the travel agency, who learned of that decision a month before the date of travel and did nothing to reverse the situation. The responsibility of the travel agency was never questioned, unlike responsibility of Lufthansa and Taca.

By Final Resolution 1060-2003/CPC dated November 19, 2003, the travel agency and Taca were only pleaded responsible at the first instance, exonerating Lufthansa, while only be responsible the carrier who performed the flight where default occurs. This resolution is annulled by the Court pursuant to Resolution 0267-2004/TDC-INDECOPI, understanding that the company that sells the ticket is responsible for all sections to the customer who is hiring it.

Therefore, it was necessary for the Commission to rule again, analyzing Lufthansa responsibility, which was done by Resolution 1151-2004/CPC. Reference is made to art. 1325 of the Civil Code in which the debtor who uses third parties to fulfill their obligations will be liable for willful or negligent acts of these. The fact that the airline had used others does not withdraw its performance as supplier to the complainant, as she is the one who has contracted, so that the complaint was declared inadmissible for Taca, who responds to Lufthansa, not to the customer. However, at the discretion of CPC, Lufthansa violation of the duty of suitability does not derive simply to Taca's behavior, but to its own, because the cancellation would have occurred under a deficiency in transferring information between Taca and Lufthansa, as

> *"... if Lufthansa made a commitment with its passengers to transport them to Caracas through Taca to continue the trip to Russia, it must have previously verified that the system for that airline was able to receive and compare the flights' information".*

This decision was finally confirmed by Resolution 1261-2005/TDC-INDECOPI, dated November 25, 2005 whereby the legal liability corresponds only to the carrier who is responsible of each leg of the flight, as the airline that offers transportation in Peru assumes "the administrative responsibility of transporting the customer to its final destination, regardless of the intervention of other agents in the course of transportation." In such cases, continuing majority voting (signed by the members Juan Francisco Rojas Leo, Julio Baltazar Durand Carrion and Jose Alberto Oscategui Arteta), the airline that sold the ticket in Peru is responsible to the customer for the appropriateness of the service, including the ones provided by the airlines responsible for other sections, since otherwise it will be defenceless. There are also very important arguments of the resolution which distinguishes the administrative liability, in order to justify that there may be a latter without a former. Thus, the Court holds:

> *"The substantive difference between the civil and administrative liability is that the former is intended to address the harm that the action of an individual does to another, whether arising from infringement of a contract or due to a tort action, while administrative responsibility is the one that identifies the State into an agent that violates legal provisions aimed at protecting legal rights to special protection. Administrative responsibility identifies an 'offender', ie, a subject agent who violates a legal disposition that becomes worthy of the power of state rule that states a penalty. The administrative nature of the penalty makes it impossible for administrative responsibility to be confused with civil liability.*
>
> *In other words, by the civil liability, the legal system reimburses citizens who are affected by the actions of other citizens, while administrative responsibility is the expression of the punishment for the citizen who, in the exercise of a regulated activity, infringes the rules of that legal framework.*
>
> *An additional aspect that needs analysis is to determine whether civil liability could coincide with administrative responsibility. Indeed, the same event could result in the birth of two types of responsibilities, and even three different types of responsibility if considered also criminal liability. In fact, if a vendor sells an*

obviously defective product he may be liable to an administrative penalty under the Customer Protection Act (inadequacy of the good) could also be judicially sanctioned with payment of compensation for the damage of purchasing of said product has caused the customer (civil damages due to the infringement of contract) and also could be sentenced to deprivation of freedom, it it is established that his conduct was governed by a criminal intent (fraud).

Now, it might happen that civil liability does not coincide with administrative liability; it means that a certain fact will only generate a civil liability and not an administrative liability or, on the contrary, that certain fact will only generate administrative liability but not civil liability.

Indeed, the case under analysis raises the need to define whether the civil liability is attributed by civil aviation laws, and that clearly does not correspond to Lufthansa and that coincide with the administrative responsibility of the Customer Protection Act attributed to agents who offer goods or services in the country and that are under its regulatory scope. In other words, is the subject of this statement to determine if Lufthansa may be waived of administrative liability for what happened with the air ticket sold to the complainant, alleging that the section in which the infringement occurred was not attributable to its liability under civil aviation laws.

In this market, any ticket or air ticket is issued by any airline carrier, which is the one that will be paid for the service that the passenger demands. Consequently, the airlines that issue the tickets are the ones which should answer for the consequences of infringement of the conditions previously contracted to transport passengers and include transportation, delays, attention, and any other event that would prevent to complete successfully transportation from point to point. The corresponding liability to the airline issuing the ticket is civil liability and administrative liability.

[…]

In the case of consecutive air transportation there is a single carrier issuing the ticket, even though other carriers may be involved in the development of the various portions of the flight. This situation, and the distribution of liability to various carriers involved in their respective sections provided by the law of civil aviation, it is necessary to define whether the administrative responsibility remains on the

issuer of the ticket or if it is transferred to each of the carriers involved in the portions that corresponds.

[…]

In this context, if an airline sells a ticket or air bill in the country, in which it is offering the transfer of a passenger from one point in the Peruvian territory to anywhere in the world, inside or outside the country, the obligation of ideal transportation that the airline assumes before the customer protection laws extends to all sections of the transportation, including those in other airlines which intervene as a result of successive transportation.

The administrative responsibility, which was already noted before, is in the State over the behavior of individuals for the application of the existing guidelines, it inevitably occurs at the moment when a ticket or air bill is marketed in Peru in which it is being offered to the Peruvian customer transportation from one point of the country to another part of the world, even when on the ticket or air bill it was considered the involvement of other transport agents. In other words, the airline that offer transportation in Peru assumes, under the Customer Protection Act, the administrative responsibility of transporting the customer to its final destination, regardless of the intervention of other agents in the course of transportation.

[…]

An additional issue that prevails in the above line is that aviation legislation has to establish the rules governing the relationship between the companies providing air transportation services, in which all of them are on equal situation and, in principle, in uniform trading conditions. It also contains an operational provision that regulates the way in which services should be provided to its passengers. However, its provisions are not exclusive and will never be due to the provisions in Customer Protection that also govern in Peru and that aim to balance the disparity of information between the customer and the provider of a good or service, it means, to balance a situation of disparity in the relationship.

Also admit as valid, Lufthansa's argument in which each airline should only take civil and administrative responsibility for the portion that is in charge, determining that in cases where defects in the service are verified in portions by companies that do not operate in the country, Peruvian law is not applicable and customers

remain unprotected, because they would be deprived of the possibility to operate in respect to services that were contracted in Peruvian territory, configuring, an illegal mechanism to evade compliance to customer protection.

Adequate protection of the rights of the customer who buys transportation service in Peruvian territory and the inevitable application of the Customer Protection Act determines, as this Court has pointed out on previous occasions, it is the airline issuing the ticket or air bill the one to respond administratively by the suitability of the service sold to the customer, whether it be the successive transportation mode and without prejudice to, civilly, the administrative responsibility of the sale of service may repeat against civil responsible of the unsuitability that would have caused the customer's injury.

Following the reasoning above and for the purposes of determining the corresponding administrative liability in the absence of expertise in the provision of the contracted service by the complainant to be transported from Lima to Moscow, Lufthansa would have had the administrative responsibility for the sale of the ticket or air bill in the country. However, Lufthansa has argued in the proceedings that they did not sell that ticket or air bill because it was issued by the travel agency that was not registered at IATA international system and that, precisely, they would have made mistakes in the registration of seat reservation and later cancellation that led to the inability to transport the complainant in the portion in the care of Taca. Lufthansa's approach requires developing considerations around the system used by airlines to sell tickets or airline tickets by travel agencies and the role these play in the mediation of these sales.

In fact, travel agents sell brokerage services and earn from airlines a fee for their intervention. In other words, tickets or air bills are always from airlines and they are who receive the compensation that the customer pays for transportation. Travel agents are only intermediaries in the transaction and obtained a commission in return for their participation in the sales process.

Airlines support this system of selling tickets or air bills, it means, they admit that tickets are issued by travel agencies in charge of them or for which they will respond and collect the money that will be deliver as compensation for the air transportation service later. By supporting and encouraging this situation, that reality shows as necessary to boost the marketing of airfares, airlines are obliged

to respond administratively for the appropriate service supported in their tickets or air bills which are sold by the agency. In this specific case, the administrative responsibility arises from the fact that the ticket is sold with the consent of the airline and its direct benefit, and that the aforementioned protective action of the Customer Protection Act reaches the service provider of air transportation that is no other than the carrier involved in the process.

The responsibility is not derived from the stipulation contained in Article 1325 of the Civil Code, as erroneously stated by the Commission, because that transfer of liability is strictly civilian. In this case, the administrative liability arises from the fact of authorizing the travel agency a function of intermediation for the sale of a service that is provided directly by the airline and that means selling the same in the country.

The above does not mean in any case to exempt administrative responsibility of the travel agency, as it is also subject to administrative responsibility in providing brokerage services in the country who earn a percentage of the payment that the customer makes when purchasing his tickets. In other words, the agency is responsible for the lack of suitability in the brokerage service that might be related, for example, mistakes in the formulation of a reservation, to alert customers of problems that may arise, inadequate information, misleading advertising, etc.

[…]

Lufthansa's liability is set as they sold through third parties, a ticket or air bill to transport Mrs. Shvedova from Lima to Moscow, at a price of US$ 970, on a previously established date and have not fulfilled the provision of service due to operational reasons, originated by the capacity of the aircraft in charge to attend a portion of that service.

In the circumstance that the case under analysis raises, a reasonable customer would not expect that buying a ticket or air bill and meeting the requirements of the airline such as paying the ticket or air bill, be at the airport on time, but not being transported on the scheduled day and time. In any case, if there was a fact eventually determining that the passenger is unable to make the trip as planned, a reasonable customer would understand that the provider of the transportation services will take actions to overcome the inconvenience, and that they will look for options for his transportation.

The reasons that support this responsibility have been developed in the preceding section. However, when an airline authorize the issuance of an airline ticket or an air bill through a third party-whether it is another airline or a travel agent, with or without IATA certification-it must be able to monitor the performance of all of their brokers who acts on their behalf and benefit, because it is the airline which finally gets the income corresponding to the price of their tickets. Notwithstanding the fact that third party intervention can be considered a mitigating factor to adjust the corresponding sanction to the issuer of the airfare".

This position was not shared by members Sergio Alejandro Leon Martinez and Luis Bruno Seminario de Marzi, for whom each airline should respond only to the portion in charge. For Lufthansa, it should have been excluded from the proceedings because they did not have any involvement in the events that led to the booking and subsequent cancellation, so any responsibility will reach them in this case. The responsibility would be only of the agency, while it was the one that erroneously introduced data when booking and did not advised Mrs. Shvedova of the cancellation neither took any action to solve or amend this problem.

Finally, member Lorenzo Antonio Zolezzi Ibarcena agrees with the vote of the majority on Lufthansa passive standing, as the airline that sold the ticket must respond administratively for the entire route because, otherwise, customers who purchase tickets would be left defenceless in our country to an airline and involves various carriers to take them to their final destination. However, he did not agree that Lufthansa may be penalized because the situation in question was due to a lack of skill and diligence of the travel agency, as well as a lack of control in managing Taca systems "Amadeus" and "Sabre". Therefore, Lufthansa not having intervened in this matter under complaint, will not be subject to demand punitive liability.

From the data of resolutions, liability attributed to Lufthansa was not originated from a lack of suitability in a portion of the transportation, in which respect the general criteria was established, but the problems at the time of issuing the reservation. In this sense, as argued by ESPINOZA ESPINOZA, it would not be a flight problem really, but of ticketing, so it was irrelevant for the case to determine whether it was a case of successive air transportation, even though it is very important with respect to the overall market. There would be no doubt of the

liability of the agency for failing to notify Mrs. Shvedova that her flight had been canceled due to an incompatibility between its booking system and the one from Taca. However, again according to this author, such liability cannot reach in any way Lufhansa but Taca, because the first one did not intervene in the infringement act[101].

In any case, whether it is a problem in successive portions or derivate from booking the flights, the importance of this case is that it allows us to analyze whether the responsibility for Lufthansa is an operating subsidiary liability or only responds directly. As the resolution states mostly, the responsibility of the airline that sold the ticket is extended to all segments of the flight, even if it does not provide the service directly. However, while it is punitive liability, it should be limited to punishment for acts that were within their sphere of control, punishing such as his own conduct was not suitable to choose the carrier or for failing to supervise or control their actions. Transfer them, immediately, liability for any infringement of the airline performing the service directly (or company making the reservation, in this case), without seeking direct allocation criteria, that would make them take responsibility additionally, which is hardly admissible.

Without making reference to this criterion, CPC seems to try to avoid a possible question about this, indicating that Lufthansa responds because they must have verified compatibility between systems, so they will respond by their own behavior. In the same sense, the Court indicated, after showing Lufthansa passive standing, that the infringement of the duty of suitability that justifies the infringement would occur because when an airline authorizes issuance of a ticket by a third party, they must be able to monitor the performance of all those which intermediate to their favor or benefit, because it is Lufthansa that finally gets the revenue for the price of their tickets. It means, that they will not only answer for the conduct of the agency but by their own omission of supervision.

Recently, however, the Board has had occasion to rule on this issue again in Resolution 2309-2012/SC2-INDECOPI. In this case, Mr. Yury Kasyanov bought a ticket Lima-Kiev-Lima to KLM, which had the following scales: Lima-Bogota, operated by Taca, Bogota-Paris, Paris-Kiev, Kiev-Paris and Paris-Lima, all these operated by Air France. However, there was a delay in the section Paris-Kiev, prompting Mr. Kasyanov to file a complaint to KLM and Air

101 Espinoza Espinoza, J. (2010a), Ob. Cit., p. 311.

France. In the first instance, OPS upheld complaint against Air France but not against KLM, since this was not the one operating the flight (Resolution 1327-2011, PS3, dated October 21, 2011). The first company appealed the decision, arguing that the delay was caused by a strike at the airport, so that it was not liable. The CPC followed the criteria established by the Board in the case of Mrs. Shvedova about successive air transportation, because the issuer of the ticket (KLM) will respond for all the portions as issuer of the ticket (Resolution 538-2012, CPC, dated February 21 2012). This decision was challenged by judicial review, which is resolved by Resolution 2309-2012/TDC-INDECOPI which is declared admissible, stating (or modifying, depending on your point of view) the previously established criteria, based on the principle of causality, as detailed below:

> *"9. The air service referred contains the following features: (i) is carried out by different air carriers continuously, (ii) are intended to cover a specific itinerary, and (iii) are performed as a single operation. In this kind of transportation, there also may be the case that an airline is the one that issues the ticket, even when others participate in the development of the different sections of the same. This situation, and the distribution of liability to the various carriers involved in their respective sections provided by the laws of civil aviation, it is necessary to define whether the administrative responsibility remains on the issuer of the ticket or it can be transfer to each of the other parties involved in their respective sections.*
>
> *10. On this particular, in several pronouncements, this Collegiate has arranged that the ticket issuer is responsible for the failings that can arise because it is the party that introduces to the customer successive transport sale and, thus, guarantee the suitability throughout the service offered, therefore, when a possible fail arise, the customer will go to the company considering that they allow him to it.*
>
> *11. However, cases where the Board has established the criterion concerned the late delivery or loss of luggage of users of air transport services. In such cases, it is difficult to reach a determination on which section the failing was originated and therefore no responsibility can be attributed to a particular operating airline, falling the same in the air ticket issuer in order to protect customer rights, who would not know which provider to formulate their claims.*
>
> *12. In that sense, in the case of delays or lost luggage, the responsible for failings presented in an air consecutive transport, will be the issuing carrier, they will only*

be exonerated of that responsibility, while stating that one of the operators of the trip was the one that infringe its duty of taking care of the luggage, it means, they did not returned the luggage on timely basis and in the same condition in which it was delivered.

13. Indeed, there are certain cases where it can fully identify which operator has presented the failing during the air transportation service, for example, accidents, cancellations or delays in flight departures.

14. In these cases, although there will be a ticket issuer that offers customers the successive air transportation service, to be able to recognize that the problems in service delivery were generated during the portion operated by a particular airline, it will be responsible, being only exonerated of its liability, if it proves the existence of circumstances such as acts of God, force majeure, acts of third parties or customer's own negligence. The airline issuing the ticket will be excluded from administrative liability considering that they did not have any kind of intervention in the events that led to the failings in the flight.

15. This approach is consistent with the principle of causality governing administrative procedures and provides that administrative responsibility must fall on the person making the negligent act of commission or act of omission of punishable offense.

16. It is upon this principle that the administrative authority has the obligation to verify that the recipient of the administrative penalty is the natural or legal person who committed the offense. So, if the supplier responsible for the lack of suitability in the successive air transportation service is identified, and despite that, the issuer of the ticket is punished in the understanding that he was the one who introduced the sale to the customer, it would violate the principle of causality collected by the General Administrative Procedure Act.

17. The foregoing criterion coincides with the provisions of the Montreal Convention and the Civil Aeronautics Act, with respect to accidents and delays in flight departures. In these cases, these rules provide that the responsible of the section where there were failures, will answer for the damage caused."

The principle of causality requires, therefore, making accountable the airline that provided the service not suitable in the portion in which the infringement materializes. However, there would be an exception in which the issuer of the ticket must answer: if the company that could be responsible for the conduct does not have an address in the country because, otherwise, the Peruvian customer would be prejudiced not having where to appeal:

> *"21. Notwithstanding the foregoing, the Collegiate warns that there are certain cases in which the failings in service are presented in sections by companies not operating in the country. In this regard, adequate protection of customer rights who contract transportation services in Peruvian territory and the inevitable application of the Code, determine that in these cases the airline issuing the ticket with address in the country is administratively responsible for the suitable service sold to the customer, whether it be the mode of consecutive transport referred and without prejudice that the civil administrative responsible of selling the service may repeat against civilian responsible on the lack of suitability that had caused the damage to the customer.*
>
> *23. In this other end, while it may be common practice among airlines to issue tickets for sections to be provided abroad by other airlines that does not have a representation in the country, such practice may not involve the provider's disclaimer which finally issue air tickets as this would not recognize customer relationship established by the latter with the ticket customers.*
>
> *24. An opposite interpretation would allow companies not operating in the country, this means, that are not authorized for this purpose, to position their services through other companies that will introduce them without liability, whereby customers would be vulnerable to operate in Peru regarding such services, setting a mechanism to evade compliance with customer protection rules.*
>
> *25. In conclusion, in the provision of international air transportation services contracted with companies addressed in Peru in which the operator of the section where the failure of the service does not have an address in the country, he will always be responsible before the customer the airfare issuer who established the relationship of purchase. "*

In this case, the protective purpose of the resolution is clear because, in fact, it will be making responsible to the organization issuing the ticket, regardless of what the infringement produced in a portion where they did not operate, if the company in charge does not have an address in the country. However, how can we reconcile this rule with the principle of causality, explained above? The criteria would not be to determine the responsible and sanction for his facts, but punish those that can be reached to protect the customer, regardless of their participation in the infringement or to determine that he, in his capacity as seller of the ticket, will assume in front of the customer, certain monitoring and control obligations in regard to the direct provider, the infringement would justify the sanction, if applicable.

2.2.4. Indecopi and two banking issues: compensation and advance payment

a. Resolutions on banking compensation (Resolution 0199-2010/SC2-INDECOPI, of January 29, 2010, issued in Case 270-2008/CPC and Resolution 3448-2011/SC2-INDECOPI, December 15 2011, issued in Case 067-2010/CPC-INDECOPI-ICA): History of a rectification

By Resolution 0199-2010/SC2-INDECOPI, the Court made a decision, which at the time was the subject of a media frenzy-, by which it was understood that financial institutions could not perform compensations on the account with payroll deposits of a complainant, over the amount set forth in the Code of Civil Procedure for the seizure. The Court's reasoning was simple: while one of the mechanisms that all the financial institutions have to collect debts is compensation, it has limitations. In this regard, art. 132 of Law 26702 provides that "... legal assets or contractually declared as intangibles will not be subject of compensation or exempt from this law". According to art. 1290 of the Civil Code, one of the cases where compensation is not applicable is the one referred to unseizable credit. Meanwhile, the Code of Civil Procedure provides that salaries cannot be seized, if it does not exceed 5 Units of Reference Procedure (URP, equivalent to one tenth of one UIT), being the excess seizable up to a third. Consequently, banks cannot make compensations over payroll, to the extent that they can be seized.

In contrast, the banks argued, first, that remuneration lose their status when being deposited in a savings account. Regarding the latter, the Court understood that this nature is maintained, especially if the bank has the means to know that money is the result of the payment of salaries, especially if it is an account with payroll deposits, as understood in the Constitutional Court (Sentence of June 28, 2004, issued in Case 0691-2004-AA/TC, where it is understood that limited is the right of the tax Administration to seize bank accounts for the payment of salaries). On the other hand, it was also argued that the compensation was made under a provision agreed by the parties, to which the Court responded by stating that a consumer who accepts this possibility, will expect that it will be in effect in accordance to the current legal framework, which sets applicable limits.

This resolution was the subject of a large controversy, especially since it led to repeated disciplinary proceedings because of compensation made by banks. First, economic arguments were raised saying that limiting the right of banks to make such compensation will limit and raise credits, ultimately damaging consumers who are to be protected. On the other hand, it was also discussed the legal correctness of the decision, while bank deposits from the payroll deposits would not be included in the factual circumstances of art. 132 of Law 26702, as it was not intangible (the employee could dispose of them) and they were not unseizable credits, because remunerative nature was lost once the deposit was made in a savings account[102].

Raised the dispute, the Court again faced Indecopi to issue Resolution 3448-2011/SC2-INDECOPI, for which it resolves contesting to Resolution 067-2010/CPC-INDECOPI-ICA, which had applied the precedent of the Court. Part of this resolution implies that there is no rule that clearly and expressly prohibit financial institutions to make compensations with remunerations or pensions of less than 5 URPs, but this is the result of an interpretation by Indecopi so, it can be deduced that it can change, as it indeed did. Thus, according to the Court:

102 EZCURRA Rivero, H. and VALENCIA-DONGO, A. (2011). "Is it possible bank compensation in an account of payroll deposit? Who wins and who loses with INDECOPI decision? In: Journal of Administrative Law (CDA). No.10. Vol II. , P. 51 and foll.

"17. In the view of this Collegiate, the prohibition of affecting remuneration and pensions of less than 5 URP requires differentiate that case where consumers freely and voluntarily choose unreservedly to affect the funds from their payroll or pension account to pay their obligations with a bank, any other situation in which a creditor turn to the jurisdictional authority to forcibly achieve a measure of seizure on accounts with payroll deposits and pensions with the purpose to ensure compliance with the due performance.

18. In the first case, we are in the presence of an act that should be always treated as harmful to the consumer and generate a rule of absolute prohibition. For example, he can decide freely and voluntarily that mortgage loan payments, credit card or car loans with a bank, can be charged to his account with payroll deposit.

19. This automatic charge is a facility for the consumer, who is freed from the responsibility to approach a bank agency to achieve compliance with the obligation and can better manage their various debts and their own time, as under the prior authorization, the Bank will automatically compensate the consumer assets they held (savings) to the credits that the Bank maintains against him.

20. In this regard, Ljubica Vodanovic Ronquillo notes that "The charge in customers' accounts, or joint obligors, is a 'contractual' figure which is a common practice in the financial system, and it consist that as the loan installments are maturing, the amount is directly debited from the deposit accounts that any of them maintains in the creditor banking firm, which is known as authorization to debit. This assumption is not a compensation –and it is not a seizure- because no matter the unilateral application of the deposit to the debt after maturity, but that position has been previously instructed by debtor, equivalent to a payment, for what, being an authorized funds withdrawal to be applied to the total or partial cancellation of a debt, its execution is feasible even on money that may be considered intangible to the extent that is freely available to the client, including, in the case of the remunerations'.

21. The same author adds that a limitation on the exercise of this contractual figure 'could have adverse effects on the financial system, translated into a

slow recovery of the portfolio, increasing account delinquencies of the entity and a breach of its obligations to third parties, the same as, if being financial institutions and depending on their level of debt against them, it could cause systemic problems. Finally, an affectation of this figure would risk that an entity breaches its obligations to their savers, when being affected its liquidity and possibly, depending on the magnitude, its solvency.

22. In the second case, the consumer unexpectedly has his earnings affected due to the nature of the seizure which also dictates outrageous, a situation that could affect the design and provision of income made by the consumer for the attention of his basic needs in the short term, and even risking their own subsistence. In the same vulnerability that consumer would be affected on his assets without having previously agreed compensation to his creditor. This is where protection by the legal system of workers remuneration makes sense when considering it as unseized.

23. The case known by the Constitutional Court processed under File 0691-2004-AA/TC falls in the second case mentioned, so that its scope should not be extended to a scenario in which consumers decide freely and voluntarily to affect their remuneration. In that case, Mr. Joseph Linder Salinas Aguilar filed a petition for relief as though questioning the retention on his savings account ordered by the Coercive Executor of the District Municipality of Nuevo Chimbote and that should be executed by the bank that managed such account. In the sentence, the Constitutional Court stated:

'... Therefore, Article 33, paragraph d) of Law 26979, from attachment in the form of withholding tax on deposits held by third parties, in no way can be interpreted in a system that allows seizure of bank accounts - which is proven to correspond to-payment of salaries, ignoring Article 648, paragraph 6) of the Code of Civil Procedure, since it is not possible to authorize in administrative headquarters what a judge in the court has the faculty to affect'.

24. Compensation is an act of equity disposition and everyone is free to arrange its own estate, so that any limitation must be narrowly construed so as not to affect the sphere of freedom inherent in every person. When a consumer decides

that their earnings can be used to meet the obligations he has with a bank, he is acting within the framework of private autonomy which is recognized from the Constitution itself.

25. An interpretation in an opposite sense would validate the breach of obligations by creating an exception in favor of debtors, which opposes to its previous proceeding when he voluntarily consented to a possible compensation, a circumstance which in practice often have an impact on bank lending credits by constituting a charge facility for the bank.

26. The interpretation assumed also becomes more expensive credit for those people who claim to be paradoxically protected with the prohibition of compensation. It is no coincidence that people with low incomes have lower interest rates than those with high incomes. The credit risk of low income people is higher, because most of their income is intended for immediate basic needs and little income remains to fulfill credit obligations.

27. According to the information published on February 14 2010 at Gestion newspaper, whose data source is the SUNAT, close to 3 million employees earn less than S/. 1,800.00 per month, which shows the number of people who would be with a ban on compensation that will make them a difficult access to credit.

28. The right to compensation of the banks is one of among other measures designed to mitigate credit risk, allowing the credits to be allocated to lower interest rates. In the opposite direction, the prohibition to compensate with a charge on salaries or pensions increase the credit cost, and in the worst scenario, it could cause a contraction in the supply of credit from the banking system.

29. In response to above considerations, the Court considers to refine the approach contained in Resolution 0199-2010/SC2-INDECOPI, differentiating the seizure on salaries or pension of the course in which the consumer voluntarily affects his remuneration or pension to meet his obligations. The prohibition of compromising salaries and pensions contained in article 648 of the Code of Civil Procedure makes sense only in the exact form; this is, in the specific case of seizures, but not in the compensation freely and voluntarily agreed with the customer.

30. However, this Collegiate estimates that the freedom of the consumer could be argued to accept the compensation from its remuneration or pension, under the argument that there is no full will when the acceptance is incorporated in general clauses of the agreement. The reality of the contemporary agreement is not new for this Court, therefore we consider appropriate to recommend to the Superintendence of Banking, Insurance and AFP to evaluate the possibility of requiring from companies of the financial system that in the future this compensation agreements will not take part of contractual conditions made by one side and previously by the supplier, but that the formats used by banking institutions indicate pigeonhole to mark in which the consumer can choose one condition or another, it means, whether or not to accept the compensation".

Obviously, the economic arguments seeped into the disposition of the Court, to the point that it expressly mentions them. However, from a legal point of view, the reason for the change of approach is in the different scope that the first resolution gave the autonomy of the will in front of the second one. Thus, in Resolution 0199-2010/SC2-INDECOPI indicated that the consent of the consumer to the compensation should be interpreted in the legal framework, so that he would not be accepting what the law prohibits. On the contrary, Resolution 3448-2011/SC2-INDECOPI emphasizes the consumer's willingness to freely agree with compensation, this implies that the statutory limitations do not apply to unseizability of remunerations. At the bottom, it also underlies the idea that the limits to the seizure should be interpreted literally, therefore it does not apply to compensations.

However, and although the various decision-making bodies of Indecopi have been applying this new approach, the question-as the Court does- if indeed there is a contractual freedom upon acceptance of this clause, which is actually part of a contract of adhesion: if a consumer does not want to include it in his contract, would he have access to credit? On the other hand, it is true that the Civil Procedure Code refers to unseizable credits, but it is also true that the Civil Code prohibits compensation on unseizable credits: would not this be enough for a broader interpretation of the product limits of unseizability?

b. The right of consumers to make payments in advance of their bank credits, without the financial institution imposing any penalties or commissions or collecting interests foregone. The Resolution 0387-2004/TDC-INDECOPI, dated August 25, 2004, issued in Case 769-2003/CPC

The starting point of this resolution is simple: a bank customer wants to make advance payment of a debt, paying the corresponding capital. However, the bank intends to charge a commission of 3% of the amount paid, as stipulated in the contract. Actually, making advance payments is a right, recognized both in the Legislative Decree 716 (as amended by Law 27251) and in art. 86 of the CPDC, which art. 50 also considers as unfair terms of absolute ineffectiveness those *"which exclude or limit statutory rights legally recognized to consumers, such as the right to make advance payments or prepayments"*.

As is well understood by the Court, it is a course where private autonomy and contractual freedom may be limited in mass recruitment, where one of the parties is in a weaker position, whose fundamental rights can be protected and should not be ignored, even contractually (sentence dated March 24, 2004, issued in Case 0858-2003-AA/TC). In this sense, the right of consumers to make advance payments or prepayments will be removed if financial institutions penalize for it, to recover all or part of the interest forgone, of which the debtor pretends to avoid, paying his debt prior to maturity. Consequently, the bank cannot collect such penalty or a similar commission, although this does not mean that the bank cannot collect any amount, but this fee must be justified in the administrative costs involved in the cancellation of the loan and not in the interest forgone[103].

103 Resolution 2190-2010/SC2-INDECOPI. On this topic, it can be appreciated in LEON LUNA, L. M. (2011), "The right to prepay loans in consumer protection legislation: jurisprudential conceptual scope and criteria." In: *Journal of Administrative Law (CDA)*. No. 10. Vol. II., pp. 143 and ss.

2.2.5. Safety in parking places, Indecopi and approval of Law 29461

One of the assumptions that Indecopi intervention has been important, and it has also been reflected in a legislative innovation in the case of parking services, both when they are provided as a main principal as well as when they are additional services. In this regard, the starting point was to allow the waiver of liability, even when the information was provided when customers had entered the parking lot, also indicating that in cases where the supplier did not bring a ticket, the consumer could assume that they did not provide the guardianship service[104]. However, after this first resolution, and even before Law 29461 is issued, Indecopi had been outlining a series of criteria to determine which cases could be a defense for the parking service provider, and when they cannot.

So, first of all, when it comes to a provider that essentially provides parking services, in that virtue he charges a fee, he could not establish a general clause which release him from all liability, even if they report this to their customers before they materialize the business relationship. For additional parking services, a reasonable consumer can assume that the supplier will provide the required security services, although he could be released from liability as long as he inform the consumer prior to entering the parking lot and the service is free, even if it was provided during an onerous transaction.

Thus, according to the uniform CPC criteria, a reasonable consumer could expect that providers of goods or services that provide the additional parking service will be offering the security service in the following cases:

> "*(i) When expressly offered consumers the surveillance of their vehicles as an additional service to the free parking service provided, in which case the supplier is responsible for the removal of any object inside the vehicle or any damage in its structure.*
>
> *(i) When the circumstances, a reasonable consumer might infer that the provider offers the surveillance of vehicles. In such case, the supplier is obliged to inform consumers about the nature of the service provided and,*

104 On CPC Resolution dated October 5, 1995, and Resolution 012-97-TDC, mentioned by Espinoza Espinoza, J. (2011b). "On the delineation of responsibilities and obligations of the suppliers in parking" In: *Journal of Administrative Law (CDA)*. No. 10, Vol. II., pp. 66 and 67.

> *in any case, define the services being provided expressly, so that consumers will know if the service provided is only for parking (space available) and / or vehicle surveillance105".*

These criteria were confirmed by Resolution 0269-2004/TDC-INDECOPI, which establishes that:

> *"A reasonable consumer would expect when the provider offers a free parking space as part of the main service-if-food sales, to ensure that the parking is safe, otherwise he may choose to contract another company that is not offering parking but could offer a lower cost. It should be noted that the supplier is responsible for the adequacy of the entire service, including additional attributes like parking, which gives advantages to their supply over other competitors. This, unless the supplier reports clearly and sufficiently that they do not bring the surveillance.*
>
> *Therefore, when a supplier provides a free parking space to consumers who come to his facility, he shall take the necessary measures for the safety parking offered. It does not correspond to the Commission or to this Court to establish which are the specific measures to be taken by the provider, because as administrative authority responsible for monitoring the compliance of the Consumer Protection Act, it will only be determined if the service was appropriate or not.*
>
> *This Court disagrees with the approach adopted in Resolution 012-97, TDC, since a reasonable consumer would expect that the free parking offered by the provider as part of his service is safe, without prejudice of the measures taken in each particular case by the supplier. It should be noted that a provider that has a place in a safe area of the city could choose not to take security measures by its own, taking advantage of the public service of public safety, but this situation does not absolve him of responsibility in case of a theft occurrence".*

105 For example, on Resolution 2393-2006/CPC, dated December 27 2006, in File No. 1985-2006/CPC and Resolution 913-2007-CPC, dated May 9 2007, in File No. 2342-2006/CPC. In the case resolved through Resolution 1411-2006/CPC, dated August 2, 2006, in File No. 605-2006/CPC, Larcomar was jointly sanctioned with Central Parking System, to understand that they provided a security service, which could not be exempted by the receipt information, not only because the service was expensive but also because such information was not limited prior to a consumption relation.

In this context, Law 29461 is dictated, in order to regulate the services provided by the parking lots. This law has recognized the suppliers' obligation of providing such service, both as a main service or as an additional to respond for theft and damage to vehicles. It is not established if in the latter case they can be excluded of this service by the information provided. Additionally, the rule provides an especially complex procedure for the recognition of losses, including immediate notification to the holder of the loss or damage, presenting the police report within three hours (and shall be moved without using the vehicle because otherwise the expertise on this will be remarkably difficult) and the accreditation of the consumer relationship. Therefore, this rule that was initially intended to facilitate the accountability of parking services providers practically has made this difficult for consumer complaints.

2.2.6. Resolutions on procedural matters.

a. Determination of territorial jurisdiction. Resolution 1902-2011/SC2-INDECOPI, dated July 22, 2011, issued in Case 402-2011/PS3 on negative challenge of competition.

Indecopi as a protective entity of consumer rights is required to be present throughout the country, where potentially acts of consumption can be produced, and, therefore, the resulting violations. In this case, a distant institution is useless because there are often tiny cases in which territorial displacements are not justified. Therefore, from many years ago, Indecopi has had an active policy of growth at the national level, first through agreements with Chambers of Commerce and subsequently by implementing decentralized offices, more and more numerous. However, the existence of different regional offices, and the possibility that the consumer and the supplier's address are in different places, which in turn may not coincide with the place where the consumption event has occurred, makes it necessary to determine the territorial jurisdiction. In this sense, as explained above, the first factor that DCT establishes is the connection of the complainant's address, perhaps favoring the punitive nature of the procedure. However, as discussed below, the Court has said:

> *"10. Decentralization of functions on consumer protection by the Board, needs to be supplemented following the procedural rules of protective purpose in this matter, that will prevent the processing of their application being onerous for consumers,*

diluting virtually their rights, as the determination of the ORI [Indecopi Regional Office] authority - when the parties domiciled in different jurisdictions – it can generate significant procedural burdens for the parties. This considering that Article 34.3 of Legislative Decree 1033, Law on the Organization and Functions of Indecopi, establishes the duty of the parties to point out in their complaint or appearance, their legal address within the constituency of the competent ORI.

11. This collegiate-and earlier with another conformation- has already determined competition on territory because of consumer protection, it is a common problem when functions are decentralized at a territorial level, even if such determination has not been given through a proper contest competition but in the review of appeals against rulings that declared inadmissible for reasons based on the current place of residence.

12. In these cases, it has been a recurring application of Article 17 of the Civil Procedure Code for being a regulation of supplementary application to administrative procedures, which states that when suing a corporation, the judge is competent in the address where he has his main office, except if it has branches, agencies, representing establishments elsewhere, a situation where it can be sued at the option of the plaintiff, in the courts of the main office address or any of the other addresses mentioned above, but always that, such places correspond to the one where the fact that motivates the demand happened (the fact that was derived from the claim of the plaintiff or based on this), or where the claim would be enforceable by the complainant.

13. This last parameter is particularly important in the case of proceedings for violations of consumer protection rules as it is a connecting element with criminal court rules also need to be considered, given the punitive nature concerning these procedures and are also present even as optional jurisdiction in Article 24 of the Civil Procedure Code.

14. Just in vehicles' case, ORPS [also known as OPS] 3 CPC South Lima warned, unlike Loreto ORPS, that Atlantis has administrative offices in Nazca Mz.1, Lot 3, District of Yarinacocha, province of Coronel Portillo in the Ucayali department, location that is within the territorial jurisdiction assigned to the Indecopi Regional Office of Loreto and which is attached to Loreto ORPS, where Mr. Chistama contracted the service which is the subject of the complaint, and where he ultimately domiciled.

15. In shopping services through virtual media, distance education and similar, where it is common that the product or service is engaged in a particular place and provision is done elsewhere, and also that consumer and provider have addresses in different jurisdictions, the supplementary application of Article 17 of the Civil Procedure Code, may be insufficient to protect the consumer if the supplier only has an address but provides services in a larger territory.

16. The priority of the criteria to be applied in determining territorial jurisdiction should be aware that the procedures for violations of consumer protection rules are Court protective proceedings for one of the parties, it means, they do not operate under the traditional principle of parity bargaining, hence the favorable subjective criteria ultimately applicable to the investigated provider does not maintain connection with the nature and ultimate purpose of these procedures.

17. In these scenarios, to provide a possibility for the consumer to make his complaint to the competent authority of the place where the offense was configured or of his address, even if the provider does not have an establishment in that city, it can be fully valid, because the truth is that the culmination of their services was projected in that territory, and this is an objective connecting factor underlying the territorial jurisdiction of the authority chosen by the complainant consumer because consumer protection requires the choice to favor the exercise of rights since the latter is a professional supplier in the market and as such can assume his defense in the field he has chosen to provide his services. This criterion is applied in consumerist matter elsewhere as Spain, which even qualifies as abusive the clause of submission to different courts other than those corresponding to the consumer's address.

18. In this case, the Article 17 and Article 24 of the Civil Procedure Code applicable by extension, support competition of Loreto's ORPS authority where Mr. Chistama filed the complaint against Atlantis, which is the reason why the court must declare the judicial body as competent in the territory to hear and rule on the complaint filed by the complainant".

As explained above, the DCT provides the territorial distribution of competition between Indecopi various bodies, indicating that in the case of OPS, it will have the same jurisdiction as the Consumer Protection Committees which is attached to the same venue of the institution or Regional Office. In the present case, the claimant was domiciled at Loreto's

OPS headquarters, because there was an administrative office, for that reason, this last one should have been responsible since the beginning.

However, what makes it interesting to this resolution and others in the same sense[106], is that they expressly go against the DCT provisions, which establishes the connection factor of the defendant's address, allowing that if he has multiple addresses, he can present the complaint *"where any of the facts underlying the relevant complaint have occurred"*. That is, the address of complainant is not a connecting factor in the rule.

However, the Indecopi Court has recognized the as applicable criterion that, applicable in extension of procedural rules, it can be

> *"… Establish the possibility that the consumer make his complaint with the competent authority of the place where the infringement was configured or from his address, even if the supplier does not have a establishment in the city, [which] can be fully valid".*

Understands the Indecopi's highest resolution body of Indecopi that these procedures should protect consumer interest, while the supplier, working professionally in the activity, should bear the costs of defending themselves in all places where his business is conducted. In fact, the criteria put forward by the Court are perfectly arguable, but the problem is that it seems contradictory to the DCT.

b. The interest to proceed as requirement for processing a complaint: Resolution1448-2012/SC2-INDECOPI, dated May 17, 2012, pronounced in Case 219-2011/PS2, and the change of the criterion, through Resolution3533-2012/SPC-INDECOPI, dated December 04, 2012, regarding Case 005-2012/PS0-INDECOPI-PUN.

One of the issues on which the Tribunal had recent opportunity to rule is on the consequences that it has for the proceedings that tee plaintiff would have corrected the infringing conduct before this is denounced by the consumer.

106 Thus, for example, go to Resolutions 1898-2011/SC2-INDECOPI and 1901-2011/SC2-INDECOPI, both dated July 22, 2011. The rules provided in this precedent have been then included in sections 73 et seq. of the CPDC.

Generally, this situation was considered grounds for adjusting the penalty, even, it may be just a simple warning. However, in some resolutions of year 2012, the Tribunal established a new criterion, indicating that in these cases, the interest to proceed would have been lost, requirement established in the Civil Procedure Code, which would be fully applicable. In this regard, it is stated in Resolution1448-2012/SC2-INDECOPI that:

> *"9. Although administrative procedures on consumer protection initiated by Indecopi at the request of a party, like the present, imply the exercise of the Administration sanctioning power, it is the nonetheless true that in them subjective rights and legal interest of particular nature are discussed, so that they as well have trilateral nature. This has been pointed out by this Collegiate in repeated rulings since 2009.*
>
> *10. In the case of summary proceedings created by the Code, the trilateral natures is confirmed by Directive 004-2010/DIR-COD-Indecopi, complementary Rules applicable to summary proceedings concerning consumer protection, which is stated in number 4.3.1 following: "The Summary Proceeding is initiated ex officio, on a complaint, which grants it a trilateral condition that does not alter the trilateral sanctioning nature of said proceeding" [highlighting added]. As well, administrative doctrines agree with the previously stated.*
>
> *11. Thus the trilateral component of consumer protection proceedings initiated by Indecopi on request of a party, for example, the evaluation of admissibility pre-suppositions and the origin of the complaint, the culmination of the proceeding due to extrajudicial conciliation or transaction, and, eventually, the order to pay costs and expenses. As well, in said context, the power to order restorative corrective measures has been given to Indecopi. 244886*
>
> *12. Through resolution concerning the review, the Commission referred to article 427 of the Civil Procedure Code abovementioned, noting that, in court, the interest to proceed was the necessity of the plaintiff to go to court as the only means capable of processing and, subsequently, rule a decision on a conflict of interests; thus, it added, if the supposition satisfying the claim requested is verified, that shall determine the inexistence to proceed and consequently, it corresponded to a declaration of inadmissibility of the appeal.*

13. However, it continued its analysis indicating that '(…) in the administrative scope and specially in the administrative proceeding or by infringement to the consumer protection regulation assigned to Indecopi, the Peruvian legislator has determined that the satisfaction of the plaintiff's claim does not entail to a loss of interest to proceed, but it only constitutes a circumstance that may mitigate the possible sanction to apply'. Next, it added that said interpretation was arisen from articles 112 of the Code and 236-A of the Law of General Administrative Proceeding.

14. Through said analysis, the Commission recognizes that article 427 of the Civil Procedure Code regulates the interest to proceed as a pre-supposition to file a claim; however, it is inadmissible in this case because it is considered, erroneously, in the judgment of this court, that in the administrative scope, satisfaction of consumers interest verified prior to filing a complaint does not imply the loss of interest to proceed of the plaintiff, thus said behavior may be considered an extenuating circumstance of the sanction to be imposed.

15. Thus, it may determine that article 427 of the Civil Procedure Law establishes a supposition of fact applicable solely to civil proceedings; being that, in administrative proceedings, the Peruvian legislator through Article 236-A of the Law of General Administrative Proceeding states that, although a conduct aimed to satisfy the claim of the plaintiff prior to filing the complaint is verified, that does not imply the loss of interest to proceed- contrary to what may happen in the civil proceeding, pursuant to article 427 of the Civil Procedure Code – and only constitutes a extenuating circumstance to the sanction to be imposed.

16. Procedural suppositions constitute indispensable elements that allow the administrative authority to grant a valid ruling about the merits of the controversy. As stated in the procedural doctrine, procedural suppositions are the judge competence, the capacity of the parts, the essential forms of the proceeding, the interest to proceed and the legitimacy to proceed.

17. The interest to proceed is defined as the unavailable or irreplaceable necessity of judicial protection for the resolution of an intersubjective conflict of interests or a legal uncertainty, both of legal relevance. In other words "it is the necessity to go to the jurisdictional body, as the only means capable of processing and, subsequently, rule a decision on the conflict being faced".

18. Thus, the interest to proceed constitutes a procedural pre-supposition that allows the judge to determine the admissibility of the claim, pursuant to the stated in article 427 of the Civil Procedure Code. This requirement of admissibility is as well applicable to claims that are transmitted to Indecopi regarding consumer protection, due to the subsidiary character of said regulatory body.

19. In effect, although administrative proceedings on consumer protection started at the request of a party, like the present, imply the exercise of the Administration sanctioning power, it is the nonetheless true that in them subjective rights and legal interest of particular nature are discussed, so that they as well have trilateral nature and the subsidiary application of admissibility conditions the civil process is justified.

20. Now, the interest to proceed shall be evaluated according to the subsistence of harm for the consumer, real or potential, according to article 107 of the Code. Thus, if the supplier has corrected the infringing behavior that affected consumer before the claim is filed, it shall be declared inadmissible due to lack of interest to proceed.

21. At this point, and according to previous rulings of this Collegiate, it is important to highlight that for a consumer to lose the interest to proceed, when filing the claim, the supplier shall have exhausted the mechanisms and procedures that he may carry out in order to rectify pernicious consequences caused to the consumer, which generates as consequence that the plaintiff lacks the state of need, which is a supposition to ask for the intervention of the administrative authority, because all corrective measures of said authority may order in favor of the plaintiff were adopted opportunely by the supplier.

22. Only the supplier's behavior that complies with the referred characteristics shall qualify as remedy of the allegedly infringing conduct and shall imply the loss of interest to proceed with the consistent inadmissibility of the complaint.

23. It is important to state that the reasoning explained before applies to proceedings indicated by Indecopi at the request of a party, which has been stated, are of trilateral and sanctioning nature.

24. The Commission noted that article 236-A of the Law of General Administrative Proceeding and article 112 of the Code establish that the satisfaction of the plaintiff's claim constitute only a circumstance that shall mitigate the possible sanction to be imposed.

25. It is worth noting that both regulations mentioned in the previous point, regulate the same suppositions of fact, mitigating conditions or circumstances of administrative responsibility. However, article 236-A of the Law of General Administrative Proceeding constitutes the general regulation, applicable to every sanctioning administrative proceeding processed before the Consumer Agency.

26. In effect, article 112 of the Code regulates the criteria that Indecopi shall apply when graduating administrative sanctions, establishing expressly as a special extenuating circumstance the "voluntary remedy of the supplier of the act or omission filed as allege administrative infringement, previous to the notification of the imputation of charges" [highlighting added].

27. The reasoning used by the Commission, in the opinion of this Collegiate, is mistaken because said regulation cannot be read separately but systematically with other regulations related to consumer protection, among which regulations referred to the interest to proceed as requirement of origin of complaints in proceedings started at the request of a party.

28. In the judgment of this Court, the analysis of the Commission ignores the opportunity when the stated in article 427 of the Civil Procedure Code may be applied, applicable supplementary to trilateral sanctioning administrative proceedings. In this regard, to the extent that the regulation regulates a procedural pre-supposition to determine the origin of the complaint, its application is appropriate to analyze if the complaint shall be admitted to the proceeding, this is to say, before the administrative proceeding starts.

29. We are in a different scenario when it is expected to apply the stated in article 236-A of the Law of General Administrative Proceeding. Said article expressly regulates an extenuating circumstance of the administrative responsibility. This signifies that, if in the processing of an administrative proceeding the administrative authority determines that the person aggrieved has infringed the applicable regulation, determining like this administrative responsibility, the actions of the supplier aimed to give a remedy to the infringing conduct before the notification of imputation of charges, shall be valuated as a mitigation of the sanction to be imposed.

30. For that reason, it shall be interpret that voluntary remedy carried out by the supplier is a extenuating circumstance when it occurs between the filing of the

complaint and the notification of the imputation of charges, been that when it is verified before the complaint is filed it implies the absence of interest to proceed and the consequent inadmissibility of the complaint in accordance to the above stated.

31. In the opinion of this Collegiate and opposing to the stated by the Commission, article 236-A of the Law of General Administrative Proceeding shall be systematically interpret with article 427 of the Civil Procedure Code, rules applicable to this proceeding, regarding not only its sanctioning nature but its trilateral nature, in accordance with the stated in preceding paragraphs; so that:

(i) If the infringing conduct is remedied prior filing the complaint, this is inadmissible due to lack of interest to proceed;

(ii) if the infringing conduct is remedied after filing the complaint, but before the notification of imputation of charges, the complaint is admissible, there is an infringement and remedy shall be considered an extenuating circumstance of the sanction to be imposed; and,

(iii) If the infringing conduct is remedied after the notification of charges, the complaint is still admissible, the infringement persists and it does not correspond to consider the remedy as an extenuating circumstance of the sanction to be imposed".

As is evident from reading the text quoted, in this interpretation conflicts arising from the trilateral nature attributed to the sanctioning proceeding is demonstrated. Unlike to what CPC stated, the Tribunal understands that giving a remedy prior to filing the complaint, involves the loss of interest to proceed of the plaintiff, applying additionally the stated in article 427 of the Civil Procedure Code and not the stated in article 236-A of LPAG, which expressly states that "... the voluntary remedy by the possible sanctioning body of the act or omission alleged as constitutive and administrative infringement, prior to the notification of the imputation of charges, referred to in Article 3) of article 235 " which is deemed applicable only if the remedy occurs between the complaint and the imputation of charges.

However, it could be asked, beyond the correction or not of the application of the regulation of the Civil Procedure Code claiming the trilateral nature of the proceeding, if it is really suitable to deny completely legitimation to the plaintiff if the supplier corrects his/her conduct

(which , lest we forget, has the character of an infringement), although this does not satisfies him/her completely, as evidenced by having initiated a sanctioning proceeding through the complaint and without having produced any settlement or agreement before the proceeding. What would happen, for example, in the case of a person who was wrongly reported and that puts this matter to the attention of a responsible financial institution that corrects its mistake? Does that mean that the person cannot demand punishment, despite the harm that may have occurred, and that the complaint shall be considered inadmissible?

When this work was already in the stage of correcting evidence, the Tribunal of Indecopi, in its new form, has changed the aforementioned criteria through Resolution 3533-2012/SPC-INDECOPI. The Tribunal parts from the sanctioning nature of the proceeding, which officially starts even when there is an ex parte order, because there would be a legal mandate to pursue illegal behaviors. Moreover, CPDC itself considers that the correction of the infringing behavior before the notification of imputation of charges is a criterion for graduation, so it would not make sense to understand what prevents to start or continue with a sanctioning proceeding. Thus, according to this Resolution:

> *"4. Legitimate interest, figure of the civil procedural law, which is also contemplated within the scope of the administrative proceeding, is a procedural institution that guarantees the usefulness of the proceeding for the person who initiates it, which may coincide with the consumer's claim seeking a particular compensation for the harm suffered, as a corrective measure, but that is not the essence or the justification of the action of the public administration that has already known about the existence of a possible action contrary to the legal framework, which is entrusted by express order of constitutional character and given that there already exists a sanctioning proceeding, the authority is required by rule of law to act according to its competence in the pursuit of the alleged breach of the legal framework known, which caution is entrusted.*
> *5. Sanctioning proceedings for consumer protection are the formal logical mechanism designed by the legislator to enforce the action of public interest that the State has entrusted to public administrations in fulfilling their functions, among which consumer protection is located. The administrative sanctioning proceeding defined in these terms by the pertinent Law is the instrument to channel the Estate punitive action for failing to fulfill with the obligations established for suppliers of goods or services in the*

Consumer Protection and Defense Code, and also for the control that is required on them for the respect of consumers rights, according to the constitutional mandate established in article 65 of our Political Constitution, which implies the State's special protection duty on consumers' rights, recognized even by the Constitutional Court.

8. According to the mentioned in the foregoing sections, the interest to proceed of the particular plaintiff does not suspend, or revokes or affects the duty to act of the administrative authority in sanctioning violations of the law in this case the Consumer Protection and Defense Code, although it becomes aware, by any means, that the behavior has been corrected or the harm has been mitigated. The administrative authority shall always act in compliance with its legal powers and mandate, it cannot ignore the existence of a possible infringement of the legal framework, which is on its guard, in compliance with its institutional functions and duties.

9. Therefore, it is common sense that the amount of a sanction is based on different factors that are related to the gravity of the act itself it and the offender's conduct. Thus, an offender who takes actions to correct its infringing conduct or mitigate the harm that it may have produced shall be seen in a more benevolent way than the one that keeps it conduct or ignores the possibility to compensate it, leading to a mitigating circumstance foreseen in the Consumer Protection and Defense Code.

10. That is precisely the criteria developed expressly by the legislator in article 112 of the Consumer Protection Code to regulate the so-called 'special mitigating circumstances'. Thus, the first thing to take into consideration when reading the regulation integrally is that the legislator understands that there is an infringement; that the infringement has been produced; that the conduct violating the legal framework has materialized. However, there are special reasons justifying the attenuation or reduction of the amount of the sanction to be imposed and that the legislator demonstrated in different illustrative suppositions regulated therein.

11.The supposition referred to as number 1 states: 'the voluntary remedy by the supplier of the act or omission charged as the alleged administrative infringement prior to the notification of the imputation of charges'. The legislator considers that the sanction should be attenuated when the alleged infringement supplier corrects, modifies, or reverses the infringing conduct - by act or omission-. This is the case in which a good is not delivered and it is delivered before the imputation of charges; or refuses to repair or replace a product and exchanged or repaired it before the imputation of charges.

12. The regulation makes it clear that the proceeding starts- in all cases - with the imputation of charges and that the correction of the offender does not determine the culmination of the proceeding or its inadmissibility, but only the attenuation of the penalty.

13. Similarly, the supposition contemplated in number 3 states: 'when the supplier accredits to have concluded with the illegal conduct as soon as he became aware of it and have initiated necessary actions to remedy the adverse effects of the same'. The legislator considers to reward, in this case, the attitude of the offender who seeks to immediately correct his/her behavior and which also seeks to mitigate the harm that such behavior may have generated. This is to say, unlike that which only corrects the infringing activity (number 1), the characteristic of numeral under analysis is the immediacy of the offender to stop developing the infringing conduct and the readiness to develop behaviors to repair the harm that had been caused.

14. Suppositions in number 1 and number 3 are different in their consideration, as there could be an offender that changes his/her behavior, and one that not only corrects it but does it immediately and also remedies promptly any harm that may have caused. In both cases, the legislator does not assume the inadmissibility of the infringing action or lack of imputation of charges. On the contrary, in both suppositions, as in all suppositions contained in the article, the sanctioning proceeding starts with the imputation of charges and does not conclude by any of these possible supplier's behaviors, these behaviors affect only the gravity of the sanction.

15. It is important to highlight the favorable incentive of the legislator in the mitigation of the sanction, because the aim is that the supplier changes his/her behavior before the sanctioning proceeding is initiated. In that supposition, in which the correction occurred before the imputation of charges, the offender may plead for the mitigation of the sanction. The coherence with the development made in this resolution is systemic, because the sanctioning proceeding is always appropriate and even mandatory in its development, while the offender is entitled to mitigation of the sanction as an instrument favorable to his/her conduct, when this is corrected immediately before the imputation of the charges with which the sanctioning proceedings started."

c. Requirements for an appeal for review. Resolution 802-2011/SC2-INDECOPI, dated April 13, 2011, entered in Case 001-2010/OPS-INDECOPI-ICA.

The introduction of summary proceedings has undeniable advantages, but could lead to an obvious risk of fragmentation of Indecopi's jurisprudence, since their decisions are challenged before the Consumer Protection Commissions, both in Lima and in the regional offices. That is, if there were only two instances, it is possible that there were as many criteria as Commissions, affecting seriously predictability. For this reason, the CPDC introduced an appeal for review, which was characterized as an ipso jure appeal, where facts are no longer discussed. However, this resource, although its regulation may be justified, can also introduce a risk since it transforms the summary proceedings into a procedure in three instances, even though it is a resource and without suspensive effect. Accordingly, the Tribunal has tried to face this problem, for which purpose it established in Resolution 802-2011/SC2-INDECOPI, the criteria for the admissibility of the appeal for review:

> *"13. In the context of summary proceedings concerning consumer protection, the Code provides that exceptionally an appeal for review may be filed before the Court Room against decisions taken as a second administrative level by the Consumer Protection Commission or the Commission with deconcentrated powers in that matter, when the rules of such law have not been applied or have been misapplied, or the precedents of mandatory compliance approved have not been complied.*
> *14. Although the Code indicates that this is an administrative appeal for review under Article 210 of the Law on General Administrative Procedure cited above, as it can be seen, the Code itself also notes that it is an exceptional recourse for it only proceeds towards alleged errors of law in the contested Resolution.*
> *15. In response to this, this member of the association considers that the Code regulates an administrative appeal for review of a special nature that resembles the recourse Review and analysis of civil cassation, which precisely has an exceptional nature limited to the review of errors of law.*
> *16. Therefore, law, jurisprudence and doctrine on civil cassation are an important reference for analyzing the appeal for review regulated by the Code, without lessening the value of their administrative nature. However, it should be noted that the criteria for civil cassation must be taken into account only as a reference and provided that they are compatible with the nature of the administrative*

procedure in matters of consumer protection, in accordance with the First Final Provision of the Civil Procedural Code.

17. The purpose of the appeal for review, as we can infer from the code, is the correct application and interpretation of that law, notwithstanding this fact, like all recourse, it also constitutes the exercise of a true and suitable right to object. It is based, in short, in an inseparable cooperation between public and private interest, which should guide the Court Room when evaluating its grounds of admissibility.

18. Article 125 of the Code cited above and number 5.3 of the Directive 004-2010/DIR-COD-INDECOPI on additional rules applicable to summary proceedings (hereinafter the Directive) provide that the appeal for review is on question of law, so that there is no evidence proceedings and adherence, which admissibility the Court Room will assess by verifying whether the claim of the appellant formulates 'the alleged inapplicability or misapplication of the rules of the Code, or disregard of precedents of mandatory compliance'.

19. According to the scheme provided by the Code, and taking as reference the Civil Procedural Code, the national doctrine that has studied grounds of admissibility of the appeal for reversal as well as the relevant jurisprudence by a court of last resort, this member of the association considers the following are admissibility requirements of the appeal for review governed by the Code: (i) the appellant alleges an assumed error of law in the decision of the Commission, and (ii) that the error of law invoked directly affects on the decision of the Commission.

20. Regarding the first requirement, it should be noted that the alleged error of law in the decision of the Commission may consist of:

(i) Inapplicability of a rule of the Code: when there is failure to apply a rule from that legislative body corresponding to the particular case. In other words, although in reality it has been verified the generic and abstract factual assumption provided by a rule of the Code, the Commission does not apply the legal effect thereof.

(i) Inaplicación de una norma del Código: cuando no se aplica una norma de dicho cuerpo legislativo que corresponde al caso concreto. En otras palabras, cuando pese a que en la realidad se ha verificado el supuesto de hecho genérico y abstracto previsto por una norma del Código, la Comisión no aplica los efectos jurídicos de la misma.

(ii) Misapplication of a rule of the Code, which may refer to:

- *Misapplication: when the rule of the Code applied does not correspond to the particular case. That is, when although it has not been verified in reality the generic and abstract factual*

assumption provided by a rule of the Code, the Commission applies its legal effects.

- *Misinterpretation: when although applying the relevant rule of the Code to the particular case, it is given a misinterpretation. In other words, once verified in reality the generic and abstract factual assumption provided by a rule of the Code, the Commission, for the purpose of settling the complaint subject matter, appeals to that rule but misapplies it, based on an inaccurate interpretation.*

(iii) Disregard of a binding precedent : when a binding precedent is unapplied, misapplied or misinterpreted in terms of consumer protection.

[…]

24. Considering the above reasoning, the appeal for review aims at assessing questions of law and not examining again all allegations and evidence submitted by the parties throughout the proceedings, so that when the claim of the appellant is directed to obtain a review of his particular case without substantiating an alleged error of law in the terms stated, the appeal must be declared unfounded.

[...]

28. Because the review is an extraordinary recourse that is aimed at examining questions of law and re-evaluation of the allegations and evidence submitted by the parties throughout the proceedings, as explained in the previous section, filing is not required to exhaust administrative procedures, being sufficient the final decision of the Commission as the second administrative instance of the summary proceedings to exhaust administrative procedures and appeal for judicial protection.

29. It is therefore essential to note that if in the frame of a summary proceedings the administered disagree with the decision taken by the Commission, they are free to exercise their right to challenge such administrative action before the Judiciary, since it exhausts the administrative procedures, and they have no need at all to submit the appeal for review in order to make such a challenge. In other words, it is not required for the submission of the appeal for review in order to file the contentious administrative proceeding.

Therefore, the Indecopi's Tribunal has established the requirements for filing the appeal for review as a resource equivalent to the judicial cassation, also considering it as an extraordinary recourse which filing is not required for the exhaustion of the administrative procedures, differentiating it from the appeal for review provided in the LPAG, which must necessarily

be submitted in the cases provided to appeal for court action. In part, this interpretation can be drawn from the provisions of the DPS and art. 125 of the CPDC, which considers the appeal for review as an ipso jure appeal, in which only the correct application of the rules of the Code is valued or that of the precedents of mandatory compliance without the possibility of acting new evidence, therefore the facts are not questioned. It is also understandable the Tribunal's concern to prevent the appeal for review to become an obstacle for the exhaustion of the administrative procedures in a proceedings which, it should be remembered, began in the summary proceedings.

However, beyond the justification that may be found to the position of the Court Room, it is arguable that it suits the provisions of art. 125 of the CPDC, which states that there will be an appeal for review "... in accordance with the provisions of Article 210 of Act 27444". That is, it is an appeal for review under the provisions of LPAG, which is mandatory. The exceptional nature to which this rule refers is that it is a resource that will be regulated only when the appeal is settled by a body that has no national jurisdiction. Therefore, although the Tribunal can be right when establishing background requirements for the admission of an appeal for review, performance of the rule by which it only discusses the application of the law of the precedents of mandatory compliance, it is at least arguable what it provides about the fact that it is unnecessary to exhaust the administrative procedures, as it would be opposite to the LPAG provisions and the nature of this resource in the rule, which eventually seeks a national body to unify the criteria of all second instance bodies.

CONCLUSIONS

1. The Consumer Protection Code aims at encompassing all matters, as is consistent with its nature, separately regulating the different areas in which the rights of consumers can be affected, such as health, education, real estate products or services, or financial and credit services provided by Entities not supervised by the Superintendence of Banking, Insurance, and Private Pension Fund Management (SBS).

2. The Consumer Protection Code defines consumer relationship as the one by which "a consumer buys a product or hires a service with a supplier (provider) in exchange for a financial consideration." Therefore, the elements comprising such relationship are: a consumer, a supplier (provider), and a product or service subject matter to the commercial transaction under the scope of law.

3. Suitability or adequacy is defined as the correspondence between what consumers expect and what they actually receive, according to what they had been offered, advertising, and information conveyed or the characteristics and nature of the product, among other factors, considering the circumstances of the case. Also, suitability/adequacy depends on the nature of the product and its ability to satisfy the purpose for which it has been put on the market.

4. The Consumer Protection Code establishes the right of consumers to obtain fair and equitable treatment in all commercial transactions and non-discrimination on grounds of origin, race, sex, language, religion, opinion, economic status, or otherwise. It generally prohibits discrimination and exclusion of people without reasonable cause of security of the premises or the tranquility of its customers, or otherwise. Unequal treatment must be warranted on objective and reasonable causes.

5. Indecopi is responsible for the care and protection of consumers and users, except in cases where there are other protection systems, such as in the cases of telecommunications or electric distribution services. Indecopi exercises this function developing information campaigns aimed at both consumers and providers, and especially through the sanctioning procedure, governed by the Consumer Protection Code, by which violations of this policy are punished and corrective measures are imposed, designed essentially to place the injured party back to the situation he held before the failure; this occurs in the context of a private law relationship between a consumer and a provider (supplier).

6. The Defense of Competition Tribunal shall hear in the last and final instance the appeals submitted against decisions of the Commissions in proceedings initiated in them, and the appeals for review against decisions of the Commissions in proceedings initiated before the decision bodies of summary proceedings for consumer protection (OPS).

7. The Appeal for review seeks to unify Indecopi's decisions with an ultimate central instance. Consequently, this remedy is ipso jure based on the improper application of the Code or of binding precedents; there is no room for the production or submittal of evidence (although an oral report is possible).

8. Indecopi, as the organization called upon to ensure consumer rights, has the obligation to be present throughout the country, where acts of consumption can occur and, therefore, the resulting violations. Indecopi has had an active policy of growth nationwide, first through agreements with the Chambers of Commerce and the implementation of deconcentrated offices. However, the existence of different regional offices and the possibility for consumers and suppliers (providers) to be domiciled in different places, which may not coincide with the place where the act of consumption occurs, makes it necessary to determine territorial jurisdiction.

APPENDIX

Appendix No. 1

Chart of the Board Members of the Analized Resolutions

Nº	RESOLUTION	MEMBERS
1	085-96-TDC	Alfredo Bullard González, Hugo Eyzaguirre del Sante, Luis Hernández Berenguel, José Antonio Payet Puccio, Jorge Vega Castro y Gabriel Ortíz de Zevallos
2	095-96-TDC	Bullard González, Hugo Eyzaguirre del Sante, Jorge Vega Castro y Antonio Payet Puccio.
3	101-1996/TDC	Alfredo Bullard González, Hugo Eyzaguirre del Sante, Jorge Vega Castro, Luis Hernández Berenguel y José Antonio Payet Puccio
4	102-97-TDC	Alfredo Bullard González, Hugo Eyzaguirre del Sante, Jorge Vega Castro y José Antonio Payet Puccio.
5	0277-1999/TDC-INDECOPI	Alfredo Bullard González, Hugo Eyzaguirre del Sante, Luis Hernández Berenguel, Gabriel Ortíz de Zevallos Madueño, Mario Pasco Cosmópolis y Liliana Ruiz de Alonso
6	0422-2003/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Durand Carrión, Santiago Francisco Roca Tavella, Luis Bruno Seminario de Marzi y Lorenzo Antonio Zolezzi Ibárcena
7	0269-2004/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Durand Carrión, Luis Bruno Seminario de Marzi y Lorenzo Antonio Zolezzi Ibárcena
8	0197-2005/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Baltazar Durand Carrión, Sergio Alejandro León Martínez, José Alberto Oscátegui Arteta, Luis Bruno Seminario de Marzi y Lorenzo Antonio Zolezzi Ibárcena
9	0939-2005/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Baltazar Durand Carrión, Sergio Alejandro León Martínez, José Alberto Oscátegui Arteta, Luis Bruno Seminario de Marzi y Lorenzo Antonio Zolezzi Ibárcena
10	0665-2006/TDC-INDECOPI	Juan Francisco Rojas Leo, Sergio Alejandro León Martínez, Luis Bruno Seminario de Marzi y Lorenzo Antonio Zolezzi Ibárcena

Nº	RESOLUTION	MEMBERS
11	340-2006/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Baltazar Durand Carrión, Sergio Alejandro León Martínez, José Alberto Oscátegui Arteta y Luis Bruno Seminario de Marzi
12	1261-2005/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Baltazar Durand Carrión y José Alberto Oscátegui Arteta
13	1015-2006/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Baltazar Durand Carrión, Sergio Alejandro León Martínez, José Alberto Oscátegui Arteta y Luis Bruno Seminario de Marzi
14	251-2006/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Baltazar Durand Carrión, Sergio Alejandro León Martínez, José Alberto Oscátegui Arteta y Lorenzo Antonio Zolezzi Ibárcena
15	1485-2006/TDC.	Julio Baltazar Durand Carrión, Sergio Alejandro León Martínez, José Alberto Oscátegui Arteta y Luis Bruno Seminario de Marzi
16	1818-2006/TDC-INDECOPI	Juan Francisco Rojas Leo, Julio Baltazar Durand Carrión, Sergio Alejandro León Martínez, José Alberto Oscátegui Arteta, Luis Bruno Seminario de Marzi y Lorenzo Antonio Zolezzi Ibárcena
17	1029-2007/TDC-INDECOPI	Rosa María Graciela Ortíz Origgi, Juan Angel Candela Gómez de la Torre, Juan Luis Avendaño Valdez, Luis José Diez Canseco Núñez y José Luis Fernando Piérola Mellet
18	0421-2008/SC2-INDECOPI,	Oscar Darío Arrús Olivera, Hernando Montoya Alberti, Héctor Tapia Cano y María Soledad Ferreyros Castañeda
19	0424-2009/SC2-INDECOPI	Francisco Pedro Ernesto Mujica Serelle, Camilo Nicanor Carrillo Gómez, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Héctor Tapia Cano
20	1296-2009/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
21	1347-2009/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García

Nº	RESOLUTION	MEMBERS
22	1348-2009/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
23	1934-2009/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
24	030-2010/SC2-INDECOPI.	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
25	0199-2010/SC2-INDECOPI.	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
26	0202-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
27	1167-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
28	1343-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
29	1386-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
30	1610-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
31	1731-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
32	1908-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García

Nº	RESOLUTION	MEMBERS
33	2075-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
34	2160-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
35	2190-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
36	2455-2010/SC2-INDECOPI	Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
37	2677-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
38	2808-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
39	2845-2010/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
40	0001-2011/SC2-INDECOPI.	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
41	0245-2011/SC2-INDECOPI.	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
42	0554-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
43	802-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García

Nº	RESOLUTION	MEMBERS
44	0840-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
45	0864-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Hernando Montoya Alberti, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
46	1605-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
47	1714-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
48	1898-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Hernando Montoya Alberti y Miguel Antonio Quirós García
49	1901-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Hernando Montoya Alberti y Miguel Antonio Quirós García
50	1902-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Hernando Montoya Alberti y Miguel Antonio Quirós García
51	1957-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Hernando Montoya Alberti y Miguel Antonio Quirós García
52	3224-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
53	3440-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
54	3448-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García

Nº	RESOLUTION	MEMBERS
55	3449-2011/SC2-INDECOPI.	Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Hernando Montoya Alberti
56	035-2012/SC2-INDECOPI.	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
57	0078-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
58	0409-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
59	0752-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
60	0876-2012/SC2-INDECOPI.	Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
61	1228-2012/SC2-INDECOPI	Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
62	1448-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Hernando Montoya Alberti, Oscar Dario Arrús Olivera y Miguel Antonio Quirós García
63	2135-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Miguel Antonio Quirós García, Francisco Pedro Ernesto Mujica Serelle y Hernando Montoya Alberti
64	2143-2012/SC2-INDECOP	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
65	2201-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García

Nº	RESOLUTION	MEMBERS
66	2249-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
67	2276-2011/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
68	2289-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Hernando Montoya Alberti y Miguel Antonio Quirós García
69	2309-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
70	2310-2012/SC2-INDECOPI	Camilo Nicanor Carrillo Gómez, Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera y Miguel Antonio Quirós García
71	2540-2012/SC2-INDECOPI	Francisco Pedro Ernesto Mujica Serelle, Oscar Darío Arrús Olivera, Juan Luis Avendaño Valdez y Héctor Tapia Cano
72	2721-2012/SC2-INDECOPI	Julio Baltazar Durand Carrión, Ana Asunción Ampuero Miranda, Alejandro José Rospigliosi Veja y Javier Francisco Zúñiga Quevedo
73	2925-2012/SC2-INDECOPI	Julio Baltazar Durand Carrión, Hernando Montoya Alberti, Ana Asunción Ampuero Miranda, Alejandro José Rospigliosi Vega y Javier Francisco Zúñiga Quevedo
74	3444–2012/SPC-INDECOPI	Hernando Montoya Alberti, Ana Asunción Ampuero Miranda, Alejandro José Rospigliosi Vega y Javier Francisco Zúñiga Quevedo
75	3448-2012-SC2/ INDECOPI	Julio Baltazar Durand Carrión, Hernando Montoya Alberti, Alejandro José Rospigliosi Vega y Javier Francisco Zúñiga Quevedo
76	3533-2012/SPC-INDECOPI	Julio Baltazar Durand Carrión, Alejandro José Rospigliosi Vega y Javier Francisco Zúñiga Quevedo

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- Legislative Decree 716, Legislative Decree about consumer protection.
- Legislative Decree 807 that establishes the faculties, norms and organization of the INDECOPI.
- Decree Law 25868, Law on the Organization and functions of INDECOPI (repealed by the Legislative Decree 1033)
- Law 27049, that precise the right of the citizens to not being discriminated in the consumption, modifying diverse articles of the Legislative Decree 716.
- Law 27311, of July 18, 2000, law for strengthening of the consumer protection system.
- Supreme Decree 039-2000-MITINCI, approving Unique Ordered Text of Legislative Decree 716, law of consumer protection.
- Law 27444, law on general administrative procedure.
- Law 27665, law of protection to the familiar economy with regarding the payment of pensions in centers and private educational programs.
- Legislative Decree 1033, approving the law on the organization and functions of INDECOPI.
- Legislative Decree 1034, approving the law on repression of the anti-competitive conducts.

- Legislative Decree 1044, approving the law on repression of Unfair Competition.
- Legislative Decree 1045, approving the complementary law of the system of consumer protection.
- Supreme Decree 006-2009-PCM, approving Unique Ordered Text of Legislative Decree 716, law of consumer protection.
- Law 29461 that regulates the parking service.
- Law 29571, approving the Consumer Protection and Defense Code.
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- Constitutional Court Judgment of December13, 2011, Case 02835-2010/PA-TC

LIST OF ACCRONYMS

CPDC	:	Consumer Protection and Defense Code.
CCD	:	Unfair Competition Oversight Commission.
CPC	:	Consumer Protection Commission.
CP	:	1993 Peruvian Constitution
DPS	:	Directive 004-2010/DIR-COD-INDECOPI approved by the Resolution of the Presidency of the board of directors of INDECOPI 159-2010-INDECOPI/COD.
DCT	:	Directive 005-2010/DIR-COD-INDECOPI that establishes the distribution of the territorial competence.
LPAG	:	Law 27444, law on general administrative procedure.
OPS	:	Deciding bodies of summary procedures of consumer protection.
RAC	:	Supreme Decree 046-2011-PCM approving the Regulation of consumer arbitration.
TUO-CONSUMIDOR	:	Unique Consolidated Text of the Law of Consumer protection, approved by the Supreme Decree 006-2009-PCM.