

12. FOUNDATIONS THAT JUSTIFY THE USE OF DISTINCTIVE SIGNS TO GENERATE CONFIDENCE AND TRANSPARENCY IN ELECTRONIC CONTRACTING IN THE CONTEXT OF THE COVID-19 PANDEMIC IN PERU

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ABSTRACT

This paper aims to identify the foundations that justify the use of distinctive signs (certification marks) to generate confidence and transparency in the electronic contracting in the context of the Coronavirus (COVID-19) pandemic, specifically in Peru. In this regard, this paper reflects on the importance of legal certainty in contracts and the trust that electronic contractual systems should generate, in such a way that they provide sufficient efficiency under reduced transaction costs in matters of contractual predictability. Therefore, it is urgent that distinctive signs enter the scene to promote efficient and safe economic transactions so the expectations of consumers and suppliers in the market are satisfied. Well, the distinctive signs (certification marks) granted by a certification entity authorized by the National Institute for the Defense of Competition and Intellectual Property (INDECOPI) in Peru, will allow us to identify the supplier that will comply with the terms and conditions agreed in the contract and with it the confidence and security necessary in the framework of electronic contracting. In this way, Member States of the World Trade Organization (WTO) and World Intellectual Property Organization (WIPO), have a preponderant role in promoting the use of distinctive signs that allow us to contract safely and efficiently. This role must be performed by the States with the promotion of the use of certification marks. This will make it possible to promote 100% safe and reliable ecommerce. How would this be

achieved? Through a private insurance system that will allow the provider to respond to the consumer in case of non-compliance with the agreed terms and conditions and because it is essential to insure the consumer against a possible non-conformity of the product or service provided by the supplier in the market.

Keywords: *distinctive signs, electronic procurement, legal security, procurement efficiency, contractual balance, national, and international public policies.*

1. INTRODUCTION

Currently, lack of trust is a problem in electronic contracts in Peru. This in relation to the different stages of electronic contracting. For example, aspects related to the suitability of the product received by the final consumer and compliance with the terms and conditions during the execution of the contract.

For this reason, it is important, given the adverse circumstances created by the pandemic, which has replaced face-to-face contracts with electronic contracts, which has limited, for example, contact between the parties for direct negotiation of the terms and conditions of the contract, to promote security and transparency in electronic contracting.

Faced with this reality, we can ask ourselves: What are the fundamentals that justify the use of distinctive signs to generate trust and transparency in electronic contracting in the context of the COVID-19 pandemic in Peru? Do we have the regulatory framework and the institutions that promote intellectual rights in Peru? How is ecommerce carried out in Peru and how has it spread? How can we promote legal certainty, efficiency and contractual balance in electronic contracting? How could signs contribute to generating security and reliability in

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electronic contracting in Peru? And in the international context, what is the role of Member States of the World Trade Organization (WTO) and World Intellectual Property Organization (WIPO) to promote secure and reliable electronic contracting?

Answering these questions is necessary and essential in order to justify the use of distinctive signs to generate trust and transparency in electronic contracting in the context of the COVID-19 pandemic in Peru, since distinctive signs will allow us to identify economic agents in the market.

In this way, we will provide electronic contracting with legal security mechanisms that mitigate the impact of mistrust generated by the use of information and communication technologies (ICT) and overcome clearly evident legal security problems. In this direction, the use of distinctive signs that allow us to identify economic agents in the market is certainly essential.

Finally, we believe that in this effort both the WTO and WIPO should play a very important role in promoting through the Member States the use of distinctive signs that allow us to contract safely and efficiently.

2. FOUNDATIONS THAT JUSTIFY THE USE OF DISTINCTIVE SIGNS TO GENERATE CONFIDENCE AND TRANSPARENCY IN ELECTRONIC

CONTRACTING IN THE CONTEXT OF THE COVID-19 PANDEMIC IN PERÚ

A. LEGAL PROTECTION OF DISTINCTIVE SIGNS AND THE CONSUMER IN THE 1993 PERUVIAN POLITICAL CONSTITUTION AND SPECIAL LAWS

The Political Constitution of Peru, 1993 (Peruvian Constitution), has established in Sub-section 8 of Article 2 that the State defends intellectual property (IP) rights by establishing that everyone has the right to ‘freedom of intellectual, artistic, technical and scientific creation, as well as to ownership of such creations and to any benefits derived from them. The State fosters access to culture and encourages its development and dissemination’¹.

In this order, Legislative Decree 1075² Which Approves Supplementary Provisions of Legislative Decree 486 of the Commission of the Andean Community that Establishes the Common Regime on Industrial Property (Legislative Decree 1075) regulates the aspects related to the legal protection of the distinctive signs and refers to specific procedures as provided in the Single Text of Administrative Procedures of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI)³.

Thus, if we consider Article 80 – Certification Mark: ‘Without prejudice to Article 185 of Decision 486, a certification mark may consist of any element identifying the product to which it applies as originating in a particular geographical place, where a given quality, reputation, or other characteristics of the product is essentially attributable to its geographical origin’. Here is the possibility of using certification marks in electronic contracting.

¹ Political Constitution of Peru of 1993 (as amended up to Law No. 28607, published on 4 October 2005) <<https://wipolex.wipo.int/en/legislation/details/6544>> accessed 24 July 2021.

² Legislative Decree 1075 (28 June 2008)

<<https://wipolex.wipo.int/en/text/487227>> accessed 24 July 2021.

³ Text of Unified Administrative Procedure (TUPA) of INDECOPI (Supreme Decree No. 088-2005-PCM) (22 November 2005) <<https://wipolex.wipo.int/en/legislation/details/6512>> accessed 24 July 2021.

Likewise, it has been established in Article 65 of the Peruvian Constitution that the legal protection of consumers and users constitutes the cornerstone on which the Peruvian consumer protection system has been built. This normative provision has institutionalized this defense and provides that the State protect the rights of consumers and users and guarantee the right to information goods and services available to them on the market and security.

One of the manifestations and materialization of the said protection is found in special legislations. In this particular case, reference is made to the Consumer Protection and Defense Code (CPDC) contained in Law 29571⁴ which includes as one of the fundamental rights, the right to information (specifically in Articles 2 and 5).

It should also be noted that another of the pillars on which the consumer protection system in Peru is based is the legal protection of expectations, which is often linked to the duty of suitability of suppliers in relation to consumers. This protection is contained in Articles 18 and 19 of the CPDC⁵.

B. INSTITUTIONS THAT PROTECT DISTINCTIVE SIGNS AND CONSUMERS IN PERU

From its institution to date, INDECOPI has served as the decisive actor in consumer protection in Peru. As stated in Article 1 of the Legislative Decree 1033 that Approves the Law of Organization and Functions of the National Institute for the Defense of Competition and the Protection of Intellectual Property (Legislative Decree 1033), INDECOPI 'is a specialized public body with legal status under internal public law, which enjoys functional, technical, economic, budgetary, and administrative autonomy. It is attached to the Presidency

of the Council of Ministers and governs its operation in accordance with the provisions contained in this Law and its complementary and regulatory norms'.⁶

We are, therefore, before an administrative body, which is functionally attached to the Presidency of the Council of Ministers in the field of the Executive Power of the Peruvian public administration.

In line with this, by virtue of the provisions of Sub-section d) of Section 2.1 of Article 2 of Legislative Decree 1033, its function is 'to protect the rights of consumers, ensuring that the information in the markets is correct, ensuring the suitability of goods and services based on the information provided and avoiding discrimination in consumer relationships.'⁷

Likewise, it has been specified in Section 2.2. of Article 2 of Legislative Decree 1033 that 'For the fulfillment of its functions, INDECOPI is empowered to issue directives with general effects, supervise and supervise economic activities, impose sanctions, order preventive and precautionary measures, issue mandates and corrective measures, resolve controversies, as well as the other powers provided for in this Law'.⁸

Within the framework of the Legislative Decree 1033, INDECOPI is organized and structured mainly at the level of administrative decision-making bodies through Directorates, Commissions, and Chambers, with Technical Secretaries attached to each of them. This organization is outlined in accordance with the provisions stated earlier as well as the Supreme Decree 099-2017-PCM that modifies the Regulation of Organization and Functions of the National Institute for the Defense of Competition and the Protection of Intellectual Property – INDECOPI in which it describes its organizational structure.⁹

⁴ Law 29571, CPDC (2 September 2010) <http://spijlibre.minjus.gob.pe/normativa_libre/main.asp> accessed 24 July 2021.

⁵ *ibid.*

⁶ Legislative Decree 1033 (24 June 2008) <<https://wipolex-res.wipo.int/edocs/lexdocs/laws/es/pe/pe027es.html>> accessed

24 July 2021.

⁷ *ibid.*

⁸ *ibid.*

⁹ Supreme Decree 099-2017-PCM Amending the Regulations for the Organization and Functions of the National Institute for the Defense of Competition and the Protection of Intellectual Property – INDECOPI

Thus, depending on its organizational structure and the provisions of Article 2 of Legislative Decree 1033, INDECOPI has the following functions:

- 1) Monitor free private initiative and freedom of business through subsequent control and elimination of illegal and irrational bureaucratic barriers that affect citizens and companies, as well as ensuring compliance with the rules and principles of administrative simplification;
- 2) Defend free and fair competition, sanctioning anti-competitive and unfair behavior, preventing the anti-competitive effects of business concentration operations and ensuring that there is effective competition in the markets;¹⁰
- 3) Correct distortions in the market caused by the damage derived from dumping practices and subsidies;
- 4) Protect the rights of consumers, ensuring that the information in the markets is correct, ensuring the suitability of goods and services based on the information provided and avoiding discrimination in consumer relations;
- 5) Monitor the process of facilitation of foreign trade through the elimination of non-tariff trade barriers in accordance with the legislation on the matter;
- 6) Protect credit by conducting a bankruptcy system that reduces transaction costs and promotes the efficient allocation of resources;
- 7) Establish standardization, accreditation and metrology policies¹¹;
- 8) Manage the system of granting and protection of IP rights in all its manifestations, in administrative

headquarters, in accordance with the provisions of this Law; and,

- 9) Guarantee other rights and guiding principles whose supervision is assigned, in accordance with current legislation.¹²

In this way, INDECOPI legally protects free private initiative and freedom of business. It also promotes free competition in the internal and external market through the facilitation of international trade to national economic agents, the legal protection of consumers, protection of creditors' credit, as well as IP rights.

C. ELECTRONIC PROCUREMENT

In the economic growth in Peru and the new forms of contracting products and services, electronic contracts have become vitally important. In this sense, Mr. Cáceda, President of the Chamber of Electronic Commerce (CAPECE), explains, 'Ecommerce in Peru in 2019 registered a growth of 30%, one of the highest rates in the region. However, we still rank sixth in Latin America in terms of ecommerce volume'. Additionally, he explains, 'e-commerce already exceeded the USD 4,000 million at the end of 2019, 30% more than last year'.¹³

Similarly, Mr. Blacksip explained the annual growth rates by saying:

[...] the fact that Peru has good annual growth rates is mainly due to the fact that the value of categories in Internet retailing, such as consumer electronics (technology), multimedia products, and clothing and footwear, the three largest in

(5 May 2017) <<http://spijlibre.minjus.gob.pe/>> accessed 25 July 2021.

¹⁰ Literal b) was modified by the Sole Supplementary Modifying Provision of Emergency Decree No. 013-2019, published on 19 November 2019 which will enter into force within a period of nine months, counted from the day after its publication, and will remain in force for a period of five years. Subsequently, the aforementioned validity was modified by Article 2 of Legislative Decree No. 1510, published on 11 May 2020, entering into force on 1 March 2021, and remains in force for a period of five years, the text of which is provided in the next paragraph.

¹¹ This Sub-section was repealed by Sub-section 4 of the Sole Repeal

Complementary Provision of Law No. 30224, published on 11 July 2014, effective after the end of the period of 270 calendar days of the validity of cited Law.

¹² Legislative Decree (n 7).

¹³ Cáceda H, 'La industria del ecommerce en Perú ha experimentado un rápido crecimiento en esto últimos cuatro años, generando todo un ecosistema de negocios y nuevas oportunidades ¿Cómo nos fue en el 2019?' (*Cámara Peruana de Comercio Electrónico – CAPECE*, 24 October 2019) <<https://www.capece.org.pe/blog/ecommerce-peru-2019-como-nos-fue-este-ano/>> accessed 24 July 2021.

the nation, they have made the annual value go from 611.6 million soles to 2,339 million in less than seven years, between 2013 and 2019, this being just the beginning.¹⁴

In this way, statistics show a very favorable outlook for electronic contracts. According to the Official Report of the Electronic Commerce Industry in Peru. Impact of COVID-19 on ecommerce in Peru and prospects for 2021, the figures of ecommerce 2020, are:

- (i) Penetration of ecommerce in consumption through cards, from 12.5% in January 2020, it increased to 45% in July 2020; total at the end of 2020 of 35%;
- (ii) Ecommerce growth (YTY), from 43% in January 2020, increased to 160% in July 2020; total at the end of 2020 of 50%;
- (iii) Online shoppers, from six million in January 2020, increased to 8.9 million in July 2020; total at the end of 2020 of 11.8 million. [...];
- (iv) Penetration of ecommerce over total commerce, from 1.5% in January 2020, increased to 3.5% in July 2020; total at the end of 2020 of 5%.¹⁵

The same panorama is evident in investments. According to Pacheco, '[Thanks to digitization], more and more Peruvians are opting for digital channels to acquire and market different goods and services'.¹⁶ This has been explained in a news article as follows:

As Peruvians become familiar with digital channels and a more varied offer, they also adopt certain attitudes. For IPSOS Peru, the connection reaches 41% of the national urban population

(72% in Lima), which is equivalent to 13 million inhabitants who connect to the internet at least six times a week, and cell phone use has also increased to unthinkable levels due to wide post-paid offers from various local telephone companies which allows brand campaigns and strategies to reach the consumer more directly. Cell phones allow the user to be always active. In this way, we can affirm that as in Peru, Latin America is in the midst of a fast-moving technological revolution. It is estimated that by 2020 there will be 171 million new smartphone users in the region, according to Facebook IQ.¹⁷

In this sense, it can be pointed out that ecommerce, at different levels of contracting (for example, at the business-to-business (B2B) level), has allowed companies to organize themselves horizontally and vertically to enable supply and meet the requirements of the end consumers. At the business-to-consumer (B2C) level, ecommerce has improved with the use of technological platforms to bring products and services closer to final consumers. At the consumer-to-consumer (C2C) level, the exchange of goods and services has been attempted using the consumer-product experience itself to reach more consumers. And finally, at the business-to-government (B2G) level, public procurement has been improved.

Thus, it should be noted that electronic contracts involve all economic agents in the market and contribute to improving the experience of the final consumer, such as

¹⁴ *ibid.*

¹⁵ 'The Official Report of the Ecommerce Industry in Peru. Impact of COVID-19 on Electronic Commerce in Peru and Prospects for 2021' (Capece, 2021) <<https://www.capece.org.pe/wp-content/uploads/2021/03/Observatorio-Ecommerce-Peru-2020-2021.pdf>> accessed 16 March 2022.

¹⁶ Pacheco JA, '¿Son digitales los peruanos? El comercio electrónico en el país andino y más atractivo para las inversiones españolas' (*Legal today*, 18 November 2019) <<https://www.legaltoday.com/legaltech/nuevas-tecnologias/son-digitales-los-peruanos-el-comercio-electronico-en-el-pais-andino-y-mas-atractivo-para-las-inversiones-espanolas-2019-11-18/>> accessed 24 July 2021.

¹⁷ Sección Noticias, 'Características del consumidor peruano del 2018, ¿Las redes sociales realmente funcionan?' (*Sección Noticias*, 22 August 2018) <<http://seccionnoticias.net.pe/index.php/2018/08/22/caracteristicas-del-consumidor-peruano-del-2018/>> accessed 24 July 2021.

the service implemented in Real Plaza Go, as detailed by the Commerce:

Real Plaza Go "Is the proposal of the firm with which it seeks to reach its customers through digital channels, thus giving way to electronic commerce. Real Plaza Go is much more than a marketplace; it is the extension of our 21 shopping centers.

With this platform, we seek to transfer our purpose of happiness to the digital world, in open space 365 days a year and 24 hours a day, which will allow our customers to buy without having to leave home and choose the way they want to receive their products, either through traditional delivery or another of the options we offer", said Daniel Duharte, CEO of Real Plaza¹⁸, above all because it contributes decisively to the reduction of transaction costs.

On this line of thought, Blacksip also stated that:

In the last five years, Internet retail in Peru has evolved remarkably. If we analyze the numbers of this type of commerce in 2013 and compare them with current figures, it is evident that Peruvians each year bet much more on digital channels to supply their needs, be it goods or services.¹⁹

This progress has been made, thanks to the support of multilateral organizations such as the United Nations Commission for International Trade Law (UNCITRAL) in reducing obstacles to trade. As has been explained, the UNCITRAL was established by the General Assembly in

1966²⁰. The General Assembly, in establishing the Commission, recognized that disparities between national laws governing international trade created obstacles to that trade, and considered that, through the UNCITRAL, the United Nations (UN) could play a more active role in reducing or eliminating of those obstacles²¹.

This has ultimately allowed progress in the legislative field of digital signature and certificates, based on the sustainable development goals (SDGs): 'UNCITRAL supports the SDGs. In the Addis Ababa Action Agenda, the States supported the efforts and initiatives of the UNCITRAL, as the central legal body of the UN system in the field of international trade law, aimed at increasing coordination and cooperation in the legal activities of international and regional organizations operating in the field of international trade law and promoting the rule of law at the national and international levels in this field.²²

At this point, two normative laws of the UNCITRAL must be mentioned:

- (i) Model Law on Electronic Commerce (1996) (together with its new Article 5 approved in 1998) which aims to [...] enable and facilitate ecommerce by offering legislators a set of internationally acceptable rules aimed at removing legal obstacles and making ecommerce more predictable;²³ and
- (ii) UNCITRAL Model Law on Electronic Signatures (2001), which aims to [...] enable and facilitate the use of electronic signatures by establishing technical reliability criteria for the equivalence between electronic and handwritten signatures²⁴. Both Model laws have contributed

¹⁸ 'Real Plaza da el salto al comercio electrónico con su nuevo formato "Real Plaza Go"' (*El Comercio*, 3 June 2020) <<https://elcomercio.pe/economia/coronavirus-peru-real-plaza-da-el-salto-al-comercio-electronico-con-su-nuevo-formato-real-plaza-go-ndc-noticia/>> accessed 24 July 2021.

¹⁹ Blacksip (n 13).

²⁰ UNGA Res 2205 (XXI) (17 December 1966).

²¹ 'Origin, mandate and composition of UNCITRAL' (UNCITRAL) <https://uncitral.un.org/en/about/faq/mandate_composition> accessed 24 July 2021.

²² 'Sustainable Development Goals' (UNCITRAL) <<https://uncitral.un.org/en/about/sdg>> accessed 24 July 2021.

²³ UNCITRAL Model Law on Electronic Commerce (1996) with additional Article 5bis as adopted in 1998 (12 June 1996) <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce> accessed 24 July 2021.

²⁴ UNCITRAL Model Law on Electronic Signatures (2001) (5 July 2001) <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures> accessed 24 July 2021.

in an outstanding way to the regulation of electronic commerce in Peru.

It should be noted that these Model texts have been reflected in Law 27269 – Law of Digital Signatures and Certificates of Peru²⁵, thanks to the support of the Competent Administrative Authority within the framework of the Official Infrastructure of Electronic Signature for Peru, and the support of the Commission for the Standardization and Inspection of Non-Tariff and Non-Tariff Trade Barriers (CNB), the INDECOPI, in accordance with Article 57 of Supreme Decree 052-2008-PCM Regulation of the Law on Digital Signatures and Certificates²⁶. The abovementioned rules approve the Certification Policies, Registration or Verification and Added Value, Certification Practice Statements, Registration or Verification and Added Value, the Security Policies, and the Privacy Policies and Plans of the Certification Entities, Registration or Verification and Added Value, of both public and private Certification Service Providers, and other policies.

In the case of the Law of Digital Signatures and Certificates, it promotes electronic contracting in a reliable and secure manner. The norm regulates the use of the electronic signature, granting it the same validity and legal effectiveness as the use of a handwritten signature or another analogous one that implies a manifestation of will.

Thanks to the Official Electronic Signature Infrastructure, public policies are aimed at providing greater legal certainty in electronic contracting. Here we can find the promotion of the use of distinctive signs for reliable and safe hiring harmonized with international policies and regulations.

Likewise, due to inter-institutional coordination between the National Registry of Identification and Civil Status (RENIEC)²⁷ and the National Superintendency of Customs and Tax Administration (SUNAT)²⁸, pilot projects have been developed for personal identification through the use of the DNI – E or Electronic DNI.²⁹ Additionally, progress in issues of digital certification of electronic signatures will allow greater legal certainty in electronic contracts. In this direction, these projects seek to improve the tax determination, collection, and inspection system from the issuance of electronic payment vouchers.

In this sense, due to the availability of sufficient legal platforms and the necessary legal protection in relation to personal identification issues, electronic contracting in general and consumer contracting is opening, one that involves the interaction of the final consumer of goods and services with the suppliers. And that has seen an unprecedented advance in the history of ecommerce in Peru³⁰.

In this context, the government of Peru, through INDECOPI, the Consumer Protection Commission must guarantee the right to information in relation to the products and services marketed in the digital-physical market, making it important to identify the products and services in a safe and reliable way both in the national and international market using distinctive signs. It should also be noted that in electronic consumer contracts, aspects related to commercial advertising and guaranteeing the veracity of the information transmitted to the consumer, the customer experience and aspects related to industrial property are important to guarantee security and trust when hiring.

²⁵ Law 27269 (28 May 2000) <<https://espij.minjus.gob.pe/spij-ext-web/detallenorma/H791142>> accessed 26 July 2021.

²⁶ Supreme Decree 052-2008-PCM (19 July 2008) <<https://espij.minjus.gob.pe/spij-ext-web/detallenorma/H969081>> accessed 26 July 2021.

²⁷ Law 26497, Organic Law of the National Registry of Identification and Civil Status (12 July 1995) <<http://spijlibre.minjus.gob.pe/>> accessed

26 July 2021.

²⁸ Law 29816, Law to Strengthen SUNAT (22 December 2011) <<https://espij.minjus.gob.pe/spij-ext-web/detallenorma/H1045658>> accessed 26 July 2021.

²⁹ ‘El DNI Electrónico – Seguridad, facilidad y rapidez’ (RENIEC) <<https://portales.reniec.gob.pe/web/dni>> accessed 24 July 2021.

³⁰ Blacksip (n 13).

Let us remember in relation to the latter that in the Peruvian geographical space, there is a propensity for marketing products that may not be authorized by the holders of distinctive signs and/or marketing the products as simply defective, which has an unfavorable impact on the consumer experience. As Bravo explains, efforts such as those of the CAPECE have been made in this direction, which has sent a proposal that includes the formalization, banking, inclusion, and respect for IP. It is summarized as follows:

1. Allow the entry of 100% formal MYPES – Micro, Small and Medium Enterprises (MSMEs) through marketplaces, who undertake to safeguard the formality and IP of the products;
2. Guarantee the use of biosafety protocols, dispatching their products through a certified logistics operator, who are committed to safeguarding health and social distancing; and,
3. No MYPE should carry out its own dispatches but outsource it to a company specialized in it'.³¹

An important aspect in consumer relations is the solution of controversies, within the forms of solution we find the private or public ones; however, one of the ways to prevent conflicts and solutions could be to generate trust and security in consumer relationships in the market through the use of distinctive signs, because as Bravo has pointed out:

Although online mistrust is one of the heels of Achilles in ecommerce. However, it has started to gain ground in 2019, as 33% of Peruvians feel more confident when buying than last year, according to a study carried out by Ipsos Peru.³²

It is necessary to emphasize that when a private solution is not possible, the intervention of the State through

INDECOPI will be necessary and indispensable, specifically the Consumer Protection Commission, the Regional Office Commissions, or the Executive Summary Procedures Bodies. There is also an urgent need to strengthen the online dispute resolution (ODR) mechanisms in this field and expand the institutional basis for the legal protection of consumers on equal terms with regard to economic agents in the market as forms of dispute resolution in contracts.

D. LEGAL SECURITY IN ELECTRONIC PROCUREMENT

Legal security, as Rosas explains to us, is defined as follows:

Legal security within the legal framework translates into the "certainty" of the permanence of the legal framework, as well as protection against an anomalous situation, in case of inconveniences in the execution of the contract, without the possibility of unexpected legislative modifications, which violate the principle of trust.³³

In this way, it is important to ask the following question: How do we guarantee legal certainty in terms of predictability and create a more efficient market in which consumer rights are protected? To answer, this task could be achieved to the extent the consumer knows they have suitable mechanisms that allow them to prevail their rights against the suppliers of goods and services.

For this reason, legal certainty in the framework of consumer contracts is essential. In this sense, at the contractual level in the case of written contracts, adhesion contracts, contracts with general contracting clauses approved administratively or not, verbal

³¹ Bravo F, 'CAPECE: comercio electrónico es mucho más que sólo delivery por aplicativos' (*Ecommerce news*, 29 May 2020) <<https://www.ecommercenews.pe/comercio-electronico/2020/capece-ecommerce-delivery.html>> accessed 26 July 2021.

³² Bravo F, 'Cuál es el perfil del comprador online en el Perú? 7 claves que debes conocer' (*Ecommerce news*, 2 April 2020)

<<https://www.ecommercenews.pe/comercio-electronico/2020/perfil-comprador-online-peru.html>> accessed 26 July 2021.

³³ Rosas I, 'Seguridad jurídica en contratos de consumo celebrados por medios electrónicos' (*Lumina*, 30 March 2020) <<http://revistasum.umanizales.edu.co/ojs/index.php/Lumina/article/view/3466>> accessed 26 July 2021.

contracts, it is necessary to incorporate within the contractual forms certain mechanisms that would allow consumers to access the resolution of disputes immediately, easily, free of charge.

In this way, we will guarantee, in terms of legal certainty, sufficient predictability for the parties involved in the contracting of consumption and users. As Hernandez explains:

Predictability can be explained as the situation in which the subjects can know what the current rules of the game are, and, with some certainty, they can trust that these will not be modified between the time of decision making and that of execution. These rules of the game are provided by the law and that predictability is provided by legal certainty.³⁴

In this manner, efficiencies are generated within the market to the extent that the consumer knows and knows they have suitable mechanisms allowing them to defend their rights.

A more efficient market in terms of predictability will provide greater economic growth as it will provide us with the necessary platform to generate confidence in the consumer at the time of contracting, since consumers will know how to materialize their rights in case they have been violated.

Likewise, providers will be provided with the possibility of resolving disputes in less time, effort, and with reduced transaction costs, which will provide them with greater sustainability over time in relation to the economic activity they carry out in the market, allowing them to improve the consumer experience.

E. EFFICIENCY IN ELECTRONIC PROCUREMENT

In the framework of electronic contracting, one aspect that would improve contractual efficiency is predictability where both the supplier and the consumer are aware of the favorable and unfavorable aspects to which they are subjected when contracting in the different stages of recruitment; that is, in the pre-contractual, contractual and post-contractual stage.

They can also verify the aspects related to the identity of the parties with whom they are contracting, the object and content of the contracts they enter into, the forms of dispute resolution, and in the face of inefficiencies that may exist, clearly have alternative mechanisms dispute resolution solutions could be useful for its prompt resolution.

In this way, it will be essential that the economic agents providing suitable goods and services in the market can be properly identified, and in that direction, it is urgent to have the means that allow users to fully identify them.

In this direction, distinctive signs enter the scene, whether at a private or public level, using which consumers will be able to find properly identified suppliers through certification marks in electronic contracts.

F. THE CONTRACTUAL BALANCE IN ELECTRONIC PROCUREMENT

If we can identify suppliers in the market through distinctive signs informing us that our purchase of product or service is safe and reliable, we could ask the question: Is it possible to generate the contractual balance between the subjects that intervene in the framework of consumer contracting?

In this regard, we could answer in the affirmative since consumers will have the information regarding the

³⁴ Hernández J, 'Seguridad Jurídica y Costos de Transacción: Algunas distorsiones en el Código Civil' (*Revista Derecho y Sociedad*, 1997)

<<http://revistas.pucp.edu.pe/index.php/derechosociedad/article/view/16644>> accessed 26 July 2021.

provider's profile and the type of product that it sells in the market. Furthermore, the consumer will know that regarding the possible risks involved in contracting the good or service, even if, for example, during the different stages of contracting he is protected by an insurance system, which will allow greater reliability at the time to make the purchase.

Likewise, we can point out that the contractual balance between the intervening parties would also be reestablished when we empower the consumer *vis-à-vis* the provider by providing them with sufficient tools to enforce their rights, while reducing the existing asymmetry in the contractual legal relationship between the provider and the consumer.

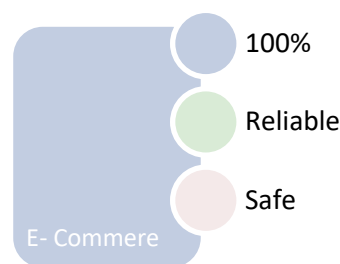
G. THE CONTRIBUTION OF DISTINCTIVE SIGNS IN SAFE AND RELIABLE ELECTRONIC CONTRACTING IN PERU

As indicated above, the use of distinctive signs in Peru can favor the identification of suppliers in the market that are committed to improving the experience of the final consumer. Even in case of failures and distortions that may be generated in electronic contracts, the same suppliers could implement an insurance system that allows the reimbursement of money in case the consumer exercises their right of restitution and/or the possible risks and damages that may be generated as a result of the contracting of the goods and services in the market.

In this context, the promoting role of the State is important through INDECOPI and the private sector that may be empowered to carry out the certification of suppliers in the market.

What is the distinctive sign that we propose and what elements could it incorporate?

The distinctive sign that we propose the supplier to exhibit is the distinctive sign with the name 'E-Commerce – 100% Reliable and Safe' which can be granted by a private or public certification body and that could involve a distinctive sign at a global level. The design would be under construction, but the following graphic can be taken as a reference:



The distinctive sign would enable consumers to identify that the purchase on the Internet is reliable and safe and that there is an insurance system providing compensation for any aspect that could emerge in electronic contracts, whether of a consumer nature or linked to international trade in which ICT are involved, since the idea is to guarantee the execution of the contract while safeguarding the interests of the parties.

Likewise, in the adverse context that humanity is going through, it will allow us to identify suppliers that comply with sufficient biosafety and hygiene protocols to safeguard the interests of the end consumer by significantly improving their experience with the product or service put into operation and available to the consumer.

H. PROMOTING RELIABLE AND SECURE ELECTRONIC CONTRACTING AT THE INTERNATIONAL LEVEL

Finally, from this perspective, Member States of the WTO and WIPO can make efforts to harmonize public policies aimed at promoting reliable and secure electronic contracting, which allows the expansion of the economy of Member States at the national and international level.

Additionally, we consider that this aspect can be incorporated into the Model Law of Electronic Procurement and establish the incorporation of aspects related to the use of distinctive signs for the promotion of Reliable and Secure Electronic Procurement.

The use of distinctive signs and certification marks in the current context of electronic contracting cannot be implemented at the Member State level because it is an aspect not specifically contemplated. However, it can be included within the Model Law on Electronic Commerce.

The regulation in the Model Law on Electronic Commerce will allow us to harmonize the legislation of the Member States at the national and international levels and to identify suppliers that offer reliable and safe products. In this way, the markets will be strengthened. Let us remember that, in the international normative field, we are always faced with flexible solutions against the rigidity that on some occasions means the laws of each of the Member States.

In this way, we will have a sufficient platform to contract reliably and securely, something highly anticipated by all consumers globally.

3. CONCLUSIONS

- (i) The legal foundations which justify the use of distinctive signs in the electronic contracting in the context of the COVID-19 pandemic, for the Peruvian case, are the Peruvian Political Constitution of 1993, Legislative Decree 1075 at the level of special legislation on distinctive signs, and the Regulation of the Peruvian Consumer Protection System. For the particular case, we refer to the CPDC, contained in Law 29571, counting for this with institutions such as INDECOPI.
- (ii) The economic foundations which justify the use of distinctive signs in the electronic contracting in the context of the COVID-19 pandemic, for the Peruvian case, are economic growth for the new forms of contracting of products and services, which presents positive annual growth rates. Latin America is in the midst of a technological revolution that is advancing rapidly at the different levels of electronic contracting.
- (iii) Within the framework of electronic contracting in Peru, progress has been made in the legislative field of digital signatures and certificates, based on the sustainable development objectives based on the Model Law, thanks to UNCITRAL Model Law on Electronic Commerce (1996); and the UNCITRAL Model Law on Electronic Signatures (2001). However, it is necessary to incorporate public policies at the national and international level that allow us to promote the use of distinctive signs to generate trust and security in digital contracting and face-to-face contracting, based on the identification of suppliers offering standards in the commercialization of reliable and safe products and services.
- (iv) Legal certainty in the framework of consumer contracts is essential. In this sense, it is necessary to incorporate into the contractual forms the mechanisms that allow us to access conflict resolution immediately, easily, and free of charge. It is possible that the distinctive signs offer us the possibility of contracting in a reliable and secure manner, since we could identify suppliers that comply with the contracts and resolve disputes with consumers.
- (v) In terms of contracting efficiency, it will be essential to adequately identify the economic agents that provide suitable products and services in the market, and in this sense, it is urgent to have distinctive signs, such as certification marks, which allow us to verify said conditions.
- (vi) Distinctive signs, particularly at the level of the Member States, can favor the identification of providers in the market that are committed to

improving the experience of the final consumer.

Even in the face of failures and distortions that may be generated in the field of electronic contracting, the same providers could implement an insurance system that allows money to be reimbursed if the consumer exercises his right of restitution and/or the possible risks and damages that may be generated as a result of contracting the products and services in the market.

- (vii) It is possible can make efforts to harmonize public policies aimed at promoting reliable and secure electronic contracting based on the incorporation into the Model Law on Electronic Commerce of aspects related to the use of distinctive signs for Reliable Electronic Contracting.

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