

## 6 KNITTING THE SECURITY BLANKET FOR NEW MARKET OPPORTUNITIES

*Establishing a Global Online Dispute Resolution System for Cross-Border Online Transactions for the Sale of Goods*

Vikki Rogers\*

### 1 INTRODUCTION

For the last couple of decades Online Dispute Resolution (ODR) experts have been creating protocols, standards and agreements for the creation of ODR systems that could resolve low-value disputes that extend beyond regional borders. To the dismay of many in this community these various efforts never manifested into a wide-spread program offering redress to parties engaged in cross-border commercial activity. The consequent results to the various stakeholders are clear. Outside a handful of payment intermediaries, consumers have no practical legal protections if they decide to buy cross-border, and as a result – they do not – to the detriment of consumers and businesses.<sup>1</sup> Businesses have lost market opportunities because the legal risks<sup>2</sup> and associated costs are too great.

The domestic legal redress options that exist for low-value disputes are draconian when considering the pulse of the global marketplace and rate of continuous technological innovation and application. Consequently, markets are isolated and practical and effective redress for consumers and businesses that do engage in cross-border exchange is practically non-existent. This chapter proposes that the question of whether the creation of a wide-spread cross-border redress system is necessary and possible is past history. Rather, the pertinent questions for this decade and beyond concern the scope of such a system, the

---

\* The author thanks Nicole Sardinha for her invaluable assistance in the preparation of this chapter.

1 Commission of the European Communities, *Commission Staff Working Document: Report on Cross-Border E-Commerce in the EU*, p. 6 (Brussels, May 3, 2009) (“While e-commerce is taking off at national level (in some countries), it is still relatively uncommon for consumers to use the internet to purchase goods or services in another Member State. As a result, the gap between domestic and cross-border e-commerce is widening: from 2006 to 2008, the share of all EU consumers that have bought at least one item over the internet increased from 27% to 33% while cross border e-commerce remained stable (6% to 7%). The pattern is similar for those with internet access at home: 56% of consumers with the internet at home have made a purchase (in any country including their own) by e-commerce, compared to 50% in 2006, while only 13% (of those with internet access at home) have made a cross-border e-commerce purchase, compared to 12% in 2006.” (citations omitted)).

2 *Id.* at 12.

legal instruments needed to support the system, the logistics and technological building blocks of the system, and identification of the appropriate players that will alter traditional notions of redress to obtain “rough justice”.<sup>3</sup> ODR is the progressive option to fill the current legal and marketplace gap. It represents a dynamic process that can evolve with the changing marketplace and technological opportunities while preserving the states, individuals and merchants interests.

ODR for high-volume, low-value cross-border e-commerce is also the Petri dish to test new possibilities to address the changing perspectives on the role of the judiciary in providing redress in the new technologically-driven globalized marketplace, as well as redress in the context of particular domestic law disputes where it is clear traditional systems either no longer address the current needs or even exist.

This chapter advocates the position that discussions surrounding the adoption of traditional mechanisms and legal constructs to future marketplaces reflects obsolete thinking and suggests that we must fundamentally challenge the lens through which we see the legal world. I propose that concepts of redress – including the systems and law in which we operate – must change to reflect the merger between the physical and virtual world. This chapter firstly explores the changes that catalyzed this new frontier, namely the existence and role of internet intermediaries in the online commercial marketplace; secondly, initiatives by inter-governmental agencies and NGOs to provide legal instruments and protocols to support regional and global ODR mechanism; and thirdly, potential challenges in the creation of a global ODR mechanism.

## 2 AN “INTERMEDIARY REVOLUTION”: CHANGES IN THE ONLINE COMMERCIAL MARKETPLACE

The critical change that has taken place in the online commercial marketplace is the expansive role of the internet intermediary. This change has fundamentally re-shaped global commercial activity and sparked a renewed and more determined effort to design global ODR systems.

In the context of the e-commerce<sup>4</sup> world, an internet intermediary can be defined broadly as any third party that is not the buyer or seller, but provides some sort of service that facilitates a commercial transaction. The OECD in their report on *The Economic and Social Role of Internet Intermediaries*<sup>5</sup> provides that: “Internet intermediaries” bring

3 Scott Cooper, Colin Rule & Louis Del Duca, “From Lex Mercatoria to Online Dispute Resolution: Lessons from History in Building Cross Border Redress Systems”, 43 *UCC L.J.* 3, (forthcoming 2011).

4 The use of the term “e-commerce” is also intended to include “m-commerce”.

5 Organization for Economic Co-operation and Development [OECD], *The Economic and Social Role of Internet Intermediaries* (Declassified 59<sup>th</sup> Session of ICCP Committee March 2010), 9, (April 2010). Available at <[www.oecd.org/dataoecd/49/4/44949023.pdf](http://www.oecd.org/dataoecd/49/4/44949023.pdf)>.

together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.

“Internet intermediaries are mainly from the business sector although there are an increasing number of social platforms. Current Internet intermediaries identified within the scope of this report include [...]:

- Internet access and service providers (ISPs) [*e.g.*, Verizon Comcast, T-mobile, Vodafone]
- Data processing and web hosting providers, including domain name registrars [*e.g.*, Go Daddy, Easyspace]
- Internet search engines and portals [*e.g.*, Google, Yahoo, MSN]
- E-commerce intermediaries, where these platforms do not take title to the goods being sold [*e.g.*, Amazon, eBay, Ali baba]
- Internet payment systems [*e.g.*, Visa, PayPal, MasterCard], and
- Participative networking platforms, which include Internet publishing and broadcasting platforms that do not themselves create or own the content being published or broadcast [*e.g.*, Facebook, LinkedIn, YouTube].”<sup>6</sup>

Both of these are very broad definitions, but they have to be, given the overlapping nature of the services internet intermediaries now provide in facilitating commercial activity.

An obvious example of an intermediary is Google. Among their portfolio of constantly innovating services, Google provides an operating system for mobile phones (providing a means for consumers and merchants to link),<sup>7</sup> they do targeted advertising based on the content of emails,<sup>8</sup> they provide the search engines to identify buyers and sellers (Google Product Search),<sup>9</sup> access to product reviews, Google analytics can help to optimize web site design, marketing and sales,<sup>10</sup> and offer a payment mechanism (Google check-out),

6 “Organization for Economic Co-operation and Development [OECD]”, *The Economic and Social Role of Internet Intermediaries* (Declassified 59<sup>th</sup> Session of ICCP Committee March 2010), 9, (April 2010). Available at <[www.oecd.org/dataoecd/49/4/44949023.pdf](http://www.oecd.org/dataoecd/49/4/44949023.pdf)>.

7 Google, Google Projects for Android, retrieved 31 March 2011, <[code.google.com/android](http://code.google.com/android/)>.

8 Google, Targeted Ads in Gmail, retrieved 31 March 2011, <[http://Mail.google.com/mail/help/about\\_privacy.html#targeted\\_ads](http://Mail.google.com/mail/help/about_privacy.html#targeted_ads)>.

9 Google, <[www.google.com](http://www.google.com)>; see also E. Schonefeld, “Google’s Africa Strategy: Search and Trade via SMS”, *The Washington Post*, 29 June 2001, retrieved 31 March 2011, <[www.washingtonpost.com/wp-dyn/content/article/2009/06/29/AR2009062902016.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/06/29/AR2009062902016.html)>.

10 Google, Enterprise-Class Web Analytics Made Smarter, Friendlier and Free, retrieved 31 March 2011, <[www.google.com/analytics](http://www.google.com/analytics)>.

which offers dispute resolution and chargeback services.<sup>11</sup> Google is even launching a social networking site, Google Me<sup>12</sup> and recently announced the launch of Google wallet.<sup>13</sup>

The “modern” intermediary – *i.e.*, the third party bringing buyers and sellers together online – is by no means limited to Google. By way of a representative sample of the “modern” intermediary at the time of writing this article:

Facebook is connecting merchants with their membership of over half a billion consumers.<sup>14</sup> Facebook uses its own virtual currency platform, “Facebook credits”.<sup>15</sup> Although Facebook does not currently take commission from any physical e-commerce sales made on-site, it does collect 30 percent on purchases of virtual goods, which is estimated to be worth some 5 billion annually.<sup>16</sup> According to Booz & Company, “[s]ocial networks promise to be the next generation of e-commerce engines.”<sup>17</sup>

Twitter is also connecting merchants with “followers”, and has launched “TwitPay” to process financial transactions using a proprietary payment system.<sup>18</sup>

“EBay is the largest online marketplace in the world, with more than USD 45 billion dollars of merchandise sold on the site each year between more than 90 million active buyers and sellers around the globe. EBay’s sites are localized in 16 languages around the world, and the site houses more than four billion feedback ratings left by transaction partners for each other.”<sup>19</sup> Although PayPal began modestly as eBay’s payment platform they are also continuously expanding. “PayPal generated more than half of its business outside the US for

---

11 Google, The Google Check-Out Buyer Experience, retrieved 31 March 2011, <<http://check-out.google.com/seller/experience.html>>.

12 Garret Rogers, “Google Me Coming this Fall?”, *ZDNet*, (14 September 2010) <[www.zdnet.com/blog/google/google-me-coming-this-fall/2458](http://www.zdnet.com/blog/google/google-me-coming-this-fall/2458)>.

13 Google, Google Wallet, retrieved June 12, 2011, <[www.google.com/wallet](http://www.google.com/wallet)>.

14 Facebook, Connect Merchant Payment Services, <[www.facebook.com/pages/Connect-Merchant-Payment-Services/54411708737](http://www.facebook.com/pages/Connect-Merchant-Payment-Services/54411708737)>.

15 Facebook Credits, <[www.facebook.com/help/?page=837](http://www.facebook.com/help/?page=837)>.

16 Jake Hird, “Goodbye, E-Commerce, Hello F-Commerce?”, *Econsultancy*, 29 March 2010, <<http://econsultancy.com/blog/5672-goodbye-e-commerce-hello-f-commerce>>.

17 P. Taylor, “Sales Moves from Art to Science,” *Financial Times*, 15 March 2011, <[www.ft.com/cms/s/0/10067dcc-4eb0-11e0-874e-00144feab49a.html#axzz1Gyde0Q9A](http://www.ft.com/cms/s/0/10067dcc-4eb0-11e0-874e-00144feab49a.html#axzz1Gyde0Q9A)>.

18 TwitPay, Social Media Payments, retrieved 31 March 2011, <<http://twitpay.com>>.

19 Cooper, Rule & Del Duca (forthcoming 2011).

the first time in the final months of last year, lifting its payments revenues to USD 926m, up 22 per cent from the year before.”<sup>20</sup>

The impact of the intermediary is not limited to the developed world, but a big change in recent times is the investment by internet intermediaries to promote online commercial activity in the developing world. And their efforts are paying off. For example, at the time of writing, Alibaba out of China is a direct competitor to eBay. Combining their global platform, Chinese platform and Japanese platform, they have more than fifty million users in more than 200 countries.<sup>21</sup> Taobao, a subsidiary of Alibaba, is the largest internet retail website in China, serving almost 200 million users and transaction volume exceeding USD 29 billion in 2009.<sup>22</sup> Recently, PayPal and Alibaba joined forces so that PayPal is now available to AliExpress customers. AliExpress is Alibaba’s B2B platform that allows small business customers to buy wholesale merchandise for resale.<sup>23</sup>

As mentioned in the OECD report on internet intermediaries,<sup>24</sup> it is not only the e-commerce intermediaries and internet payment systems that have become relevant intermediaries in the developed and developing world, but the very equipment that is used to access these sites is a class of intermediary in and of itself. Mobile phones – which have numbered more than 4.6 billion worldwide by the end of last year<sup>25</sup> – are partnering left and right with other intermediaries to maximize on the services they can offer. Motorola is launching phones in China loaded with the Android operating system.<sup>26</sup> PayPal has launched the 2.0 version of its Send Money application for the iPhone.<sup>27</sup> Verizon Wireless launched a mobile payment service that allows customers to charge online purchases to their cellular phone

20 R. Waters, “PayPal Helps eBay Beat Expectations”, *Financial Times*, 20 January 2011, <[www.ft.com/cms/s/0/b1c7b332-2427-11e0-a89a-00144feab49a.html#axzz1I6h3vQvM](http://www.ft.com/cms/s/0/b1c7b332-2427-11e0-a89a-00144feab49a.html#axzz1I6h3vQvM)>.

21 Alibaba, What is Alibaba, retrieved 30 March 2011, Alibaba Company Profile, <[www.alibaba.com/about/en/AboutOurCompany/about.html](http://www.alibaba.com/about/en/AboutOurCompany/about.html)>.

22 Alibaba, Company Overview, retrieved 30 March 2011, <<http://news.alibaba.com/specials/aboutalibaba/ali-group/index.html>>.

23 Alibaba.com’s AliExpress Platform Now Accepts PayPal, <<https://www.thepaypalblog.com/2010/04/alibaba-com%E2%80%99s-aliexpress-platform-now-accepts-paypal/>> (26 April 2010).

24 “Organization for Economic Co-operation and Development [OECD]”, *The Economic and Social Role of Internet Intermediaries* (Declassified 59<sup>th</sup> Session of ICCP Committee March 2010), 9, (April 2010). Available at <[www.oecd.org/dataoecd/49/4/44949023.pdf](http://www.oecd.org/dataoecd/49/4/44949023.pdf)>.

25 “Organization for Economic Co-operation and Development [OECD]”, *The Economic and Social Role of Internet Intermediaries* (Declassified 59<sup>th</sup> Session of ICCP Committee March 2010), 25, (April 2010). Available at <[www.oecd.org/dataoecd/49/4/44949023.pdf](http://www.oecd.org/dataoecd/49/4/44949023.pdf)>.

26 Manikandan Raman, “Motorola to Launch Eight New Android Phones in 2010,” *International Business Times*, 28 September 2010, <[www.ibtimes.com/articles/66280/20100928/motorola-android-android-3-0-gingerbread-ces-verizon-at-t-china-ctia-t-mobile-sprint-us-las-vegas-gh.htm](http://www.ibtimes.com/articles/66280/20100928/motorola-android-android-3-0-gingerbread-ces-verizon-at-t-china-ctia-t-mobile-sprint-us-las-vegas-gh.htm)>.

27 PYMNTS.com, “PayPal Launches New Send Money App for iPhone”, retrieved 30 March 2011, <[www.pymnts.com/paypal-launches-new-send-money-app-for-iphone](http://www.pymnts.com/paypal-launches-new-send-money-app-for-iphone)>.

bill.<sup>28</sup> Amazon introduced its Mobile Payments Service which helps mobile app developers and mobile web site owners let customers pay using shipping and credit card information stored at Amazon.<sup>29</sup> Verizon Wireless and Skype Communications entered into an agreement resulting in Skype's VoIP service being available as an application on Verizon smartphones.<sup>30</sup> M-PESA is a Safaricom service allowing you to transfer money using a mobile phone.<sup>31</sup> Kenya is the first country in the world to use this service, which is offered in partnership between Safaricom and Vodafone. M-PESA is available to all Safaricom subscribers, even if a user does not have a bank account.

The aforementioned stresses that intermediaries are the game changers for the commercial world and their impact will only increase. Because of the surge of services offered by internet intermediaries there has been a corresponding surge in online commercial activity. As noted in the OECD Report on The Economic and Social Role of Internet Intermediaries (the "Report"):

Intermediaries create significant market efficiencies by bringing suppliers and demanders closer together, thus decreasing transaction costs such as the cost of searching for a buyer or a seller. They ensure that markets work better and create more competition as well as allow for a greater internationalization of markets. Indeed, Internet intermediaries facilitated trade by allowing the expansion, aggregation and globalisation of markets as well as the customisation of goods and services.<sup>32</sup>

Regarding the impact of intermediaries on online growth opportunities for micro-enterprises, the Report further states:

Internet intermediaries, in particular e-commerce platforms and search platforms are also considered as enablers of the creation of micro-enterprises. A report by the Interactive Advertising Bureau estimated that over one million people ran one-person firms online in the United States in mid 2009. The report estimated that 120 000 people sell full time on eBay, 500 000 do so part time,

---

28 Andrew Nusca, "Verizon Launches Mobile Payment Service for E-Commerce", *ZDNet*, 22 March 2010, <[www.zdnet.com/blog/gadgetreviews/verizon-launches-mobile-payment-service-for-e-commerce/13466](http://www.zdnet.com/blog/gadgetreviews/verizon-launches-mobile-payment-service-for-e-commerce/13466)>.

29 Olga Harif, "M-Commerce's Big Moment", *Bloomberg Businessweek*, 11 October 2009, <[www.businessweek.com/technology/content/oct2009/tc20091011\\_278825.htm](http://www.businessweek.com/technology/content/oct2009/tc20091011_278825.htm)>.

30 Skype, Verizon Wireless and Skype Join Forces to Create a Global Mobile Calling Community, retrieved 30 March 2011, <<http://about.skype.com/press/2010/02/verizon.html>>.

31 Safaricom, M-PESA Services, retrieved 31 March 2011, <[www.safaricom.co.ke/index.php?id=257](http://www.safaricom.co.ke/index.php?id=257)>.

32 "Organization for Economic Co-operation and Development [OECD]," *The Economic and Social Role of Internet Intermediaries* (Declassified 59<sup>th</sup> Session of ICCP Committee March 2010), 37, (April 2010). Available at <[www.oecd.org/dataoecd/49/4/44949023.pdf](http://www.oecd.org/dataoecd/49/4/44949023.pdf)>.

and 500 000 earn advertising revenues from blogs, mostly through revenue-sharing schemes of advertising platforms.<sup>33</sup>

Yet given these comments, it is striking that when one looks around the world – even though most of the companies are global – they are operating domestically and cross-border consumer online buying has not expanded at the same level as domestic growth. This is particularly interesting because the regional reports released by governments around the world indicate that businesses are looking to sell cross-border via the internet and that cross-border sales are a necessary component to creating economic stability.<sup>34</sup> As further stated in the Report:

Facilitation of market entry and operation of small and medium-sized enterprises (SMEs) is critical to the economy, as these firms provide a significant source of jobs and economic growth. The ability of new and small firms to innovate is considered crucial to ensure long-term and sustainable growth, since SMEs tend to harness technological or commercial opportunities that have been neglected by established companies and bring them to market. In this context, platforms that help new firms to be established and grow are crucial to the innovation performance of an economy. Empirical evidence also shows that entrepreneurship, and specifically the process of business turbulence of market entries and exits, positively contributes to economic growth through greater efficiency in the allocation of resources.<sup>35</sup>

Despite the enabling impact of internet intermediaries, online cross-border e-commerce is still a market opportunity that has remained largely untapped. In concert with the continued growth, presence, influence and use of internet intermediaries, security blankets must be knitted to correct this cross-border anomaly and create new marketplace opportunities.

<sup>33</sup> *Id.* at 40.

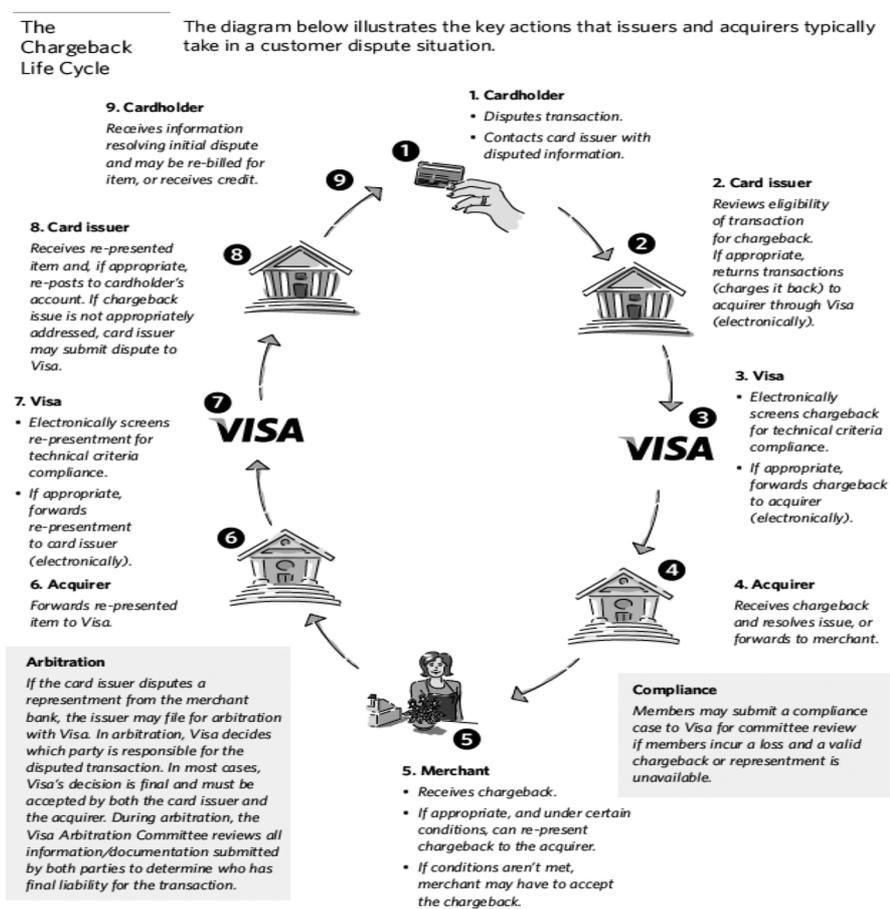
<sup>34</sup> Commission of the European Communities, “Commission Staff Working Document: Report on Cross-Border E-Commerce in the EU”, *SEC (2009) 283 final*, 3 May 2009, available at <[ec.europa.eu/consumers/strategy/docs/com\\_staff\\_wp2009\\_en.pdf](http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf)>. See also ERIA Research Project Report, “Establishment of a Secure and Safe E-Commerce Marketplace”, Fiscal Year 2009, No. 6, March 2010 (Edited by Prof. Tsuneo Matsumoto). Available at <[www.eria.org/research/y2009-no6.html](http://www.eria.org/research/y2009-no6.html)>.

<sup>35</sup> *Id.*

2.1 *Would a Global Chargeback System Singularly Provide an Adequate Global Redress Solution?*

The chargeback process is recognized – at least by credit card associations – as an alternative dispute resolution system. However, some others view it as a way to allocate loss between banks and not a “traditional” dispute resolution system. The process is represented below in the Visa chargeback model (included only as a representative sample of the process).<sup>36</sup>

**Figure 3 The Chargeback Life Cycle**



36 VISA, Chargeback Cycle, retrieved 30 March 2011, <[http://usa.visa.com/merchants/operations/chargebacks\\_dispute\\_resolution/chargeback\\_cycle.html](http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/chargeback_cycle.html)>.

In the United States the chargeback process is regulated by Regulation Z of the Federal Reserve under the Truth in Lending Act; accordingly the process and rights are not necessarily the same for purchases made in other countries (by non-Americans). Grounds for chargebacks are assigned separate “chargeback reason codes”, which vary in content and number by the different credit card associations. The basis for chargebacks includes, but is not limited to:

- “I cancelled the transaction but didn’t get credit on my statement”;
- “I lost my card and someone used it to buy something”;
- “Someone stole my information and card number and used it to buy merchandise on my account or to withdraw money from my bank account” (aka “identity theft”);
- “I never received the goods”; and
- “The amount on my statement is wrong.”

There is no question that this system offers a level of protection for consumers who make online purchases using their credit cards. It also helps the seller engage customers because this protection is available. Despite these benefits, however, the protection only exists in a limited number of countries for purchases made with a credit card and ignores that there is a significant trend towards the use of other payment mechanisms, including those online payment means as listed in the OECD Draft Report on Consumer Protection in Online and Mobile Payments:<sup>37</sup>

- Personal bank accounts (cheques);
- Debit cards;
- Mediating services (*e.g.*, PayPal, Automated Clearing House (ACH) processing used to move funds electronically);
- Automated mechanism bill payment (*e.g.*, in the US, under the Electronic Benefit Transfer);
- Online Wallets;
- Electronic currency systems (or prepaid payment services);
- Online banking based Internet payments;
- Cash on delivery;
- Escrow services;

---

37 Commission of the European Communities, “Commission Staff Working Document: Report on Cross-Border E-Commerce in the EU”, SEC (2009) 283 final, 3 May 2009, available at <[http://ec.europa.eu/consumers/strategy/docs/com\\_staff\\_wp2009\\_en.pdf](http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf)>. See also ERIA Research Project Report, Establishment of a Secure and Safe E-Commerce Marketplace, 8, Fiscal Year 2009, No. 6, March 2010 (Prof. Tsuneo Matsumoto (ed.)). Available at <[www.eria.org/research/y2009-no6.html](http://www.eria.org/research/y2009-no6.html)>.

VIKKI ROGERS

- Mobile payment means (Mobile, POS, contactless payments; mobile remote payments made through short messaging (text) services or wireless application protocol (WAP).

On the seller's end there are also some drawbacks to the chargeback system:

- Merchants are charged a fee per chargeback received – generally the higher the frequency, the higher the payment.
- Also there could be habitual reversal of transactions by consumers. If merchants reach a certain level of chargebacks they could lose their right to use a particular credit card.
- The merchant is subject to strict time limits to respond to information requests.

The most striking feature of the chargeback system is that the dispute resolution process is taken out of the hands of the buyer and seller and put into the hands of their banks – which may have competing interests in the resolution of the dispute than the buyer and seller. This may have consequences for sellers that were never intended. In other words, the parties might have settled much sooner or on different terms had they been going through a different process. Moreover, the seller and buyer are also left without transparency, access to information, and assurances regarding the competency of the system.

Given these issues, it has to be questioned whether this system can be categorized purely as a consumer protection mechanism or is it a customer service tool created by credit card companies to promote the use of credit cards? It might be a little of both. In any case, although it does offer some level of complaint handling and protections for disputes over purchases made with a credit card in credit driven environments, it does not reflect the future of payment trends and should probably be considered just one of the options for consumers and merchants, amongst a package of protection, including ODR.

### 3 APPLICABLE LAW AND JURISDICTION: HAVE STATES TARGETED THE RIGHT ISSUES?

Over the past decades discussions regarding (international) consumer protection and redress in the realm of cross-border e-commerce have assumed ODR as the best – and needed – mechanism to resolve such disputes. Papers, protocols and agreements have been generated supporting this conclusion.<sup>38</sup> eBay/PayPal has created a closed ODR system for

---

38 International Chamber of Commerce [ICC], "Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C transactions," 2003, available at <[www.iccwbo.org/uploaded-Files/ICC/.../ResolvingDisputesOnline.pdf](http://www.iccwbo.org/uploaded-Files/ICC/.../ResolvingDisputesOnline.pdf)>; International Organization of Standardization [ISO], "Quality Management – Customer Satisfaction – Guidelines for Dispute Resolution External to Organizations", ISO10003:2007, 2007; OECD, "Recommendation on Consumer Dispute Resolution and Redress", 2007, available at <[www.oecd.org/dataoecd/43/50/38960101.pdf](http://www.oecd.org/dataoecd/43/50/38960101.pdf)>; Agreement Reached between Consumers International and the Global Business Dialogue on Electronic Commerce, "Alternative Dispute Resolution

its users and some domestic ODR systems have emerged. Yet, no successful ODR mechanism to resolve cross-border disputes on a regional or global scale (independent of a payment method) has been established. Interestingly, however, inter-governmental agencies and States are now taking a very proactive lead to find solutions and options for the creation of a security blanket in order to encourage an increase in cross-border online B2B and B2C commerce. In particular, proposed options at the Organization of American States (OAS) have taken a couple of forms as described below – not all of which correspond to the recommended ODR option made by consumer, business and inter-governmental organizations.

The OAS, specifically The Seventh Inter-American Specialized Conference on Private International Law, otherwise known as CIDIP VII, is now focusing on consumer protection within the Americas.<sup>39</sup> There are two proposals currently on the table related to cross-border consumer transactions. A Convention on Applicable law proposed by Brazil, Argentina and Paraguay (the “Brazil proposal”),<sup>40</sup> and a proposal to create a region wide cooperative framework for ODR by the US, along with a proposed model law for consumer payment card protection – which includes credit cards and debit cards, and a model law for strengthening consumer protection authorities.<sup>41</sup> There was a third Model Law on jurisdiction proposed by Canada but they have since withdrawn their proposal.<sup>42</sup>

There are two very different approaches being taken, based on different assumptions. The Brazil proposal assumes that high-volume, low-value disputes will be resolved in domestic courts – and therefore they focus on the law that would be applicable in the local

- 
- Guidelines”, 2003, available at <[www.globaltrustmarkalliance.org/GBDe](http://www.globaltrustmarkalliance.org/GBDe)>; Better Business Bureau [BBB], “Dispute Resolution Processes and Guides,” retrieved 31 March 2011, <[www.bbb.org/us/Dispute-Resolution-Services/Process](http://www.bbb.org/us/Dispute-Resolution-Services/Process)>.
- 39 Permanent Council of the Organization of American States [OAS], Simplified Version of the Final Brazilian Proposal “Buenos Aires Proposal”, CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <[www.oas.org/dil/CIDIP-VII\\_working\\_doc\\_cp\\_simplified\\_version\\_final\\_brazilian\\_proposal.pdf](http://www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf)>. See also OAS, Draft United States Proposal, “Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Dispute”, (19 February 2010). Available at <[www.oas.org/dil/esp/CIDIP-VII\\_doc\\_trabajo\\_gt\\_proteccion\\_consumidor\\_anexo\\_A\\_\\_Borrador\\_Ley\\_Marco\\_Cooperativo\\_Modelo\\_Solucion\\_Electro.pdf](http://www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf)>.
- 40 Permanent Council of the Organization of American States [OAS], Simplified Version of the Final Brazilian Proposal “Buenos Aires Proposal”, CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <[www.oas.org/dil/CIDIP-VII\\_working\\_doc\\_cp\\_simplified\\_version\\_final\\_brazilian\\_proposal.pdf](http://www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf)>.
- 41 OAS, Draft United States Proposal, “Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Dispute”, (19 February 2010). Available at <[www.oas.org/dil/esp/CIDIP-VII\\_doc\\_trabajo\\_gt\\_proteccion\\_consumidor\\_anexo\\_A\\_\\_Borrador\\_Ley\\_Marco\\_Cooperativo\\_Modelo\\_Solucion\\_Electro.pdf](http://www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf)>.
- 42 OAS, Note from the Permanent Mission of Canada Concerning the Topic: Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) – Consumer Protection, CP/CAJP-2912/10 (18 October 2010). Available at <[www.oas.org/dil/CIDIP-VII\\_consumer\\_protection\\_canada\\_proposal.pdf](http://www.oas.org/dil/CIDIP-VII_consumer_protection_canada_proposal.pdf)>. (The Canadian Proposal was withdrawn on 14 October 2010 <[www.oas.org/dil/CP-CAJP\\_2912-10\\_eng.pdf](http://www.oas.org/dil/CP-CAJP_2912-10_eng.pdf)>).

forums.<sup>43</sup> The US takes the position that it is unrealistic to assume that these low-value, cross-border disputes will be settled in court, and they rather propose a system that provides easy access to the consumer to get some sort of redress, without placing an excessive and expensive burden on the merchant.<sup>44</sup>

It should be stressed that Brazil is proposing a convention<sup>45</sup> – hard law, as opposed to the other model law and soft law options available. Second, the Brazil proposal seems to provide as a rule that the law most favorable to the consumer involved in the dispute will be applicable. So, in other words, it effectively eliminates the application of the choice of law clause for cross-border consumer contracts. As for jurisdiction, it appears to create a rule against choice of forum clauses in consumer e-commerce transactions, and generally provides for jurisdiction in the courts of the consumers' home state.

It is difficult to imagine how the Brazilian proposal will benefit the consumer, the merchant or support the growth of cross-border e-commerce. The consumer is required to go to court for a small value dispute – which can be costly and timely, and at the end, the proposal does not provide for an adequate enforcement mechanism. So in reality, there is no means for the consumer to practically get redress. The merchant on the other hand, if they want to sell cross-border has to operate in a legal regime that exposes them to the laws and forum of 34 states. It is equivalent to trying to make a DOS floppy disk work in an iPad. The old approaches are no longer compatible and serve the needs of the new marketplace.

The US proposal reacts to the same set of issues via a completely different approach, based on the assumption that we should not be dealing with conflict of law and forum issues, but rather developing an ADR system to handle all of the high-volume, low value disputes. This concept is generally in accord with other governmental regional programs and sentiments – namely, in Europe – with ECC-Net and Asia with ICA-Net, but the US OAS-ODR proposal is the most classical ODR-like proposal in the world to date.

The ODR proposal includes two parts: the first deals with players. The proposal calls for the creation of a Central Administrator who manages the process, the regional OAS member participants, and approves ODR providers. Then there are the national authorities

---

43 OAS, Simplified Version of the Final Brazilian Proposal “Buenos Aires Proposal”, 3, 5, CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <[www.oas.org/dil/CIDIP-VII\\_working\\_doc\\_cp\\_simplified\\_version\\_final\\_brazilian\\_proposal.pdf](http://www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf)>.

44 OAS, Draft United States Proposal, Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Dispute, (19 February 2010). Available at <[www.oas.org/dil/esp/CIDIP-VII\\_doc\\_trabajo\\_gt\\_proteccion\\_consumidor\\_anexo\\_A\\_\\_Borrador\\_Ley\\_Marco\\_Cooperativo\\_Modelo\\_Solucion\\_Electro.pdf](http://www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf)>.

45 OAS, Simplified Version of the Final Brazilian Proposal “Buenos Aires Proposal”, 3, 5, CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <[www.oas.org/dil/CIDIP-VII\\_working\\_doc\\_cp\\_simplified\\_version\\_final\\_brazilian\\_proposal.pdf](http://www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf)>.

that will designate a national administrator to monitor the progress, resolution and enforcement of cross-border disputes.

The second part concerns the rules for the operation of the ODR system. It assumes that a merchant will opt into the system and then it gives the consumer the option to initiate a claim against a merchant. The value of the claim is capped at USD 10,000, and the process includes two stages. First, negotiation, to be conducted via the use of software without third party intervention and, and second arbitration, if the consumer agrees to go to this stage. If the dispute reaches stage two, the ODR provider will appoint an arbitrator.

The arbitrator may attempt a facilitated settlement if he or she feels it appropriate to the case – so this is a pseudo mediation stage. Otherwise, the arbitrator issues a final and binding award and places the responsibility on national administrators to enforce if the vendor does not voluntarily comply. The process assumes the costs of the entire process will be placed on the merchant.

This proposal also provides for a relatively high level of consumer agency involvement, which calls into question the resources that governments can put into their agencies in the OAS states, and the consequent scalability of such a system. It also assumes that states throughout the OAS will compromise on the use of arbitration for B2C cross-border disputes. It also remains hard to predict how many consumers will find the system and how many merchants will be willing to opt-in. However, the underlying purpose of the system – to protect consumers and encourage cross-border e-commerce – is preserved in the design.

### 3.1 *ODR at UNCITRAL*

In 2009, at the same time the State Department was developing its OAS proposal, it also submitted a proposal to UNCITRAL to hold a colloquium to explore the possibility of assigning ODR to an UNCITRAL Working Group.<sup>46</sup> Subsequently, it was agreed that Pace Law School's Institute of International and Commercial Law (IICL) would co-sponsor a conference with UNCITRAL on the topic, along with Penn State Dickinson School of Law.

In March 2010, a conference was convened at UNCITRAL in Vienna<sup>47</sup> – where it drew in leading experts and about 200 participants to discuss various aspects of the creation of a global ODR system and whether the time was right for UNCITRAL to assign the topic

<sup>46</sup> UN Commission on Int'l Trade Law [UNCITRAL], Possible Future Work on Electronic Commerce – Proposal of the United States of America on Online Dispute Resolution, U.N. Doc. A/CN.9/681/Add.2 (18 June 2009) (proposing a colloquium to discuss ODR for disputes for e-commerce transactions). Available at <<http://daccess-ods.un.org/TMP/441195.964813232.html>>.

<sup>47</sup> Pace Law School, A Fresh Look at Online Dispute Resolution (ODR) and Global E-Commerce: Toward a Practical and Fair Redress System for the 21<sup>st</sup> Century Trader Consumer and Merchant Conference Agenda, retrieved 30 March 2011, <[http://web.pace.edu/page.cfm?doc\\_id=35565#SCHEDULE](http://web.pace.edu/page.cfm?doc_id=35565#SCHEDULE)>.

to a Working Group. After this meeting, the IICL drafted a paper that was submitted to UNCITRAL, supporting the assignment of a Working group for ODR, to cover both B2B and B2C disputes.<sup>48</sup> Notably, this paper was supported by approximately forty prominent associations around the world, representing academic, commercial and consumer interests reflecting the international consensus to establish a global ODR mechanism.

The formal debate on the assignment was held in July 2010 at the 43<sup>rd</sup> General Assembly meeting for UNCITRAL in New York.<sup>49</sup> There was overwhelming support for the creation of a Working Group on the subject from all parts of the globe. However, the limited debate focused on how broad the mandate should be for the Working Group, whether to encompass both B2C and B2B disputes, or just the latter. At the close of the debate, a sufficient number of states supported a broader mandate, that it was determined that a Working Group would be established for ODR and it would cover disputes for B2B and B2C online transactions.<sup>50</sup> Given the blur in the identification of a merchant and consumer in the online environment, there was a consensus that the ODR system could be set up to handle high-volume, low-value online disputes between *buyers* and *sellers*.

The first Working Group meeting took place in Vienna in December 2010. A provisional agenda was issued by UNCITRAL indicating that the focus would be on creating generic rules for both types of transactions.<sup>51</sup> The Report of the Working Group identified future work, stating in relevant part:<sup>52</sup>

Draft generic procedural rules for ODR, including taking into account: the types of claims with which ODR would deal (B2B and B2C cross-border low-value, high-volume transactions); initiation of the online procedure; alerting parties to any agreement with regard to dispute settlement that might be entered into at the time of contracting; stages in the dispute resolution process – including negotiation, conciliation and arbitration; describing substantive legal principles, including equitable principles, for deciding cases and making awards; addressing procedural matters such as representation and language of proceedings; the application of the New York Convention, as discussed; reference to rules of other ODR systems; setting out options, where appropriate;

48 UNCITRAL, Note Supporting, Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, A/CN.9/710 (26 May 2010) (submitted by the Institute of International Commercial Law). Available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V10/539/85/PDF/V1053985.pdf?OpenElement>>.

49 UNCITRAL, Report of the United Nations Committee on International Trade Law, 51, U.N. Doc. A/65/17 (21 June – 9 July 2010). Available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V10/556/48/PDF/V1055648.pdf?OpenElement>>.

50 *Id.*

51 UNCITRAL, Provisional Agenda, U.N. Doc. A/CN.9/WG/III/WP. 104 (26 August 2010). Available at <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/559/93/PDF/V1055993.pdf?OpenElement>>.

52 *Id.*

Draft document setting out principles and issues involved in the design of an ODR system. All documents or other references to ODR to known to the Secretariat would be listed by the Secretariat with references to websites or other sources where they may be found.<sup>53</sup>

Notably, the report also stated:

98. [...] There was a general consensus that it could be assumed the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B3C cross-border disputes, but that the reliance on that mechanism alone was insufficient. Discussion then centered on other options that might be used to enforce awards in a more practicable and expedited fashion. One option was to emphasize the use of trustmarks and reliance on merchants to comply with their obligations thereunder. Another was to require certification of merchants, who would undertake to comply with ODR decisions rendered against them. In that regard, it was said to be helpful to gather statistics to show the extent of compliance with awards. Finally, it was stressed that an effective and timely ODR process would contribute to compliance by the parties [...]

101. Many delegations supported the approach of using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions – bearing in mind the need for a high consumer protection content – as the basis for deciding case, thus avoiding complex problems that may arise in the interpretation of rules as to applicable law [...]

Since the first Working Group meeting, the Secretariat released a draft set of Procedural Rules.<sup>54</sup> The Rules are intended to cover ODR for B2B and B2C disputes. At the time of drafting this chapter, the draft rules provide for (1) Scope of Application; (2) Definitions; (3) Communications; (4) Commencement [of ODR proceedings]; (5) Negotiation; (6) Appointment of neutral; (7) Facilitated Settlement; (8) Conduct of ODR proceedings; (9) [Issuing of][Communication of][decision][award]; (10) Language of proceedings; (11) Representation; (12) Exclusion of liability; and (13) Costs. States will continue working on these Rules at future Working Group meetings on ODR held twice per year.

---

<sup>53</sup> This has been completed by the Secretariat at <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/559/93/PDF/V1055993.pdf?OpenElement>>.

<sup>54</sup> UNCITRAL, Working Group III, “Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules”, U.N. Doc. A/CN.9/WG.III/WP.107 (17 March 2011).

#### 4 CHALLENGES IN CREATING A GLOBAL ODR SYSTEM

The thought of creating a cross-border dispute resolution system is daunting, but possible. It requires, however, taking the “open” online commercial environment and connecting some dots to create a system that would entice merchants to participate, be easily accessible to consumers, and provide enforceable outcomes. These components can be identified as separate but necessarily inter-connected to the system design considerations. As detailed by Rule, Rogers and Del Duca,<sup>55</sup> there are several challenges in the construction of a Global ODR system. Two of the main challenges are summarized below:

**Volume and Scalability:** Currently, “eBay’s ODR systems now resolve more than 60 million disputes a year, with that number increasing steadily as transaction volume on the site increases”.<sup>56</sup> This reflects volume from one company, while conservative estimates put the volume of global consumer disputes in the hundreds of millions. Any global system must be able to scale for the steady increase in volume as electronic and mobile commerce grows, as well as be sophisticated to transfer cases between jurisdictions and handle relative caseload volumes within jurisdictions.

**Diverse Language and Cultures:** This is probably one of the more challenging aspects in designing a global redress system. Most likely, local or regional branch offices will need to be established to account for local language, customs and laws (or ODR providers could fill this gap), with a central administrative authority to manage the system software and case flow. Although these centers would be customized to reflect local nuances, the technology implemented across the regions would be uniform.<sup>57</sup> A proposal has been tabled for the creation of an E-Commerce Claims Redress Interchange Standard (ECRI), a multi-lingual standard for cross-border ODR in the form of an open Industry Specification of ETSI. This standard would be created independent of applicable national law and applicable ODR Rules. The initial draft ECRI proposal provides that the standard would be comprised of the following principal components:

- Claims
- Arguments

---

55 Colin Rule, Vikki Rogers & Louis Del Duca, “Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments”, (2010) 42 *UCC L.J.* 221.

56 Cooper, Rule & Del Duca (forthcoming 2011).

57 See OASIS LegalXML Online Dispute Resolution TC, retrieved 31 March 2011, <[www.oasis-open.org/committees/tc\\_home.php?wg\\_abbrev=legalxml-odr](http://www.oasis-open.org/committees/tc_home.php?wg_abbrev=legalxml-odr)>.

- Remedies
- Words and Sentences
- Resolution including Case Categorization
- Applicable ODR Rules
- Enforcement follow-up
- Identification of disputed items
- Values/date<sup>58</sup>

Significant work has already been accomplished by way of establishing guidelines for the creation of ODR systems.<sup>59</sup> In addition, some countries have established redress systems and/or partnerships with other countries for cross-border complaint handling, *e.g.*, those systems/partnerships established by *e-consumer.gov*, ICA-Net and Profeco (in Mexico). These guidelines and systems/partnerships must be integrated as efforts to create a global ODR system move forward. Design system issues, as well as the existing standards and systems/partnerships must also be considered within the context of the UNCITRAL instruments to be developed by the Working Group. Many questions still remain to be resolved. What will be the point of intersection between legal rules and system design? How will the creation of the global ODR system be driven, via the creation of the UNCITRAL instruments or the resolution of the system design issues listed above? Will the UNCITRAL legal instruments be sufficient to provide the necessary backbone for a global system? Can one set of instruments satisfy the procedural needs for the resolution of B2B and B2C disputes? Does an effective resolution system require pre-dispute agreements, arbitrators and awards, or would agreements post-dispute, neutrals and decisions be sufficient? What is going to attract merchants to the system (how can contractual relationships be created to bind merchants?), and who would be the relevant parties to the agreement? “Modern” intermediaries revived the work on this subject and logically should be part of the functioning of the system, but where and at what stage? What should be the scope of the substantive principles to base decisions upon – should we have detailed principles for USD 70 disputes or are “symbolic” principles sufficient? How will voluntary

58 ECRI proposal is on file with the author.

59 International Chamber of Commerce [ICC], *Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C transactions*, 2003, available at <[www.iccwbo.org/uploaded-Files/ICC/.../ResolvingDisputesOnline.pdf](http://www.iccwbo.org/uploaded-Files/ICC/.../ResolvingDisputesOnline.pdf)>; International Organization of Standardization [ISO], “Quality Management – Customer Satisfaction – Guidelines for Dispute Resolution External to Organizations”, ISO10003:2007, 2007; OECD, *Recommendation on Consumer Dispute Resolution and Redress*, 2007, available at <[www.oecd.org/dataoecd/43/50/38960101.pdf](http://www.oecd.org/dataoecd/43/50/38960101.pdf)>; Agreement Reached between Consumers International and the Global Business Dialogue on Electronic Commerce, *Alternative Dispute Resolution Guidelines*, 2003, available at <[www.globaltrustmarkalliance.org/GBDe/](http://www.globaltrustmarkalliance.org/GBDe/)>; Better Business Bureau [BBB], *Dispute Resolution Processes and Guides*, retrieved 31 March 2011, <[www.bbb.org/us/Dispute-Resolution-Services/Process/](http://www.bbb.org/us/Dispute-Resolution-Services/Process/)>; EConsumer.gov, retrieved 31 March 2011, <[www.econsumer.gov/english/](http://www.econsumer.gov/english/)>; ECC-Net, retrieved 31 March 2011, <[www.ecc-net.info](http://www.ecc-net.info)>.

VIKKI ROGERS

compliance with decisions be encouraged? In the alternative, how will cost-effective and practical enforcement be achieved?

As we move forward in answering these questions, I end this chapter with a quote by Alfred North Whitehead, the famous mathematician and philosopher: “Fundamental progress has to do with the reinterpretation of basic ideas”.<sup>60</sup>

In creating a global ODR system we must inevitably shape our basic ideas on alternative dispute resolution to make room for technology and the evolving world so we can develop a system that best protects consumers while providing sellers in emerging and developed markets new economic opportunities.

---

<sup>60</sup> W.H. Auden & L. Kronenberger, *The Viking Book of Aphorisms: A Personal Selection* (1962), p. 346.