

**Communiqué on the ODR and Consumers Colloquium
Vancouver, BC, Canada
November 2-3, 2010**

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I. Introduction

eCommerce has grown rapidly, riding the expansion of information and communications technology around the world, and transforming the way goods are bought and sold. Businesses and consumers have more choices than ever before, as every seller is just a click away, no matter where either may physically reside in the world. However, regardless of whether they are transacting face-to-face or online, it is inevitable that some of those transactions will generate disagreements. It therefore stands to reason that as eCommerce expands, so too will the number of problems people experience with online transactions.

Unfortunately, the systems buyers and sellers rely on in face-to-face transactions to resolve transaction problems are almost entirely unavailable in online purchases. The few systems that do exist are too tied to geography, too expensive, or too complex for the type of low-value, high-volume transactions that eCommerce enables, be they domestic or international.

The solution is Online Dispute Resolution (ODR). Over the past ten years many groups around the world have come to the same conclusion: reliable, trustworthy redress systems for eCommerce transactions are essential, and ODR is the best method of providing such systems.

There are several examples of global ODR systems that have achieved scale and effectiveness over the past decade. Non-governmental organizations, for example, have created regional systems that have helped to establish confidence in eCommerce. Despite such achievements no global, coordinated redress system has yet emerged, and systems that have hitherto been posed are inconsistent in design and execution. Further complicating matters, awareness among consumers is low and enforcement of outcomes delivered by existing systems is sporadic.

The inadequacy of these systems is a major reason why cross-border eCommerce has plateaued in recent years. Consumers and sellers are unsure whether they can trust one another across borders, because if a problem arises with the transaction, no global redress system exists to help get the problem corrected.

These issues have been thoroughly discussed in various ODR forums over the years, but in the past ten months, there have been a series of breakthroughs accomplished through various international conversations. The United States has put forward a proposal at the Organization of American States (OAS) advancing a design for a global ODR system for low-value eCommerce disputes. That same proposal was presented just a few months later at a

United Nations Commission on International Trade Law (UNCITRAL) conference in Vienna. In accordance with the conclusions reached at the conference, UNCITRAL has created an ODR Working Group to focus exclusively on this question and to craft recommendations that can be taken back to the full General Assembly. This represents a major development in the effort to build a global ODR system, since it is the first time a body with representation from every sovereign nation in the world has so seriously tackled this complex subject.

In preparation for the first meeting of the UNCITRAL ODR Working Group in December 2010, an international group of experts in international law, commercial arbitration, dispute resolution, systems design, and consumer protection convened in Vancouver, British Columbia, Canada on November 2-3, 2010. Over these two days, the group considered unresolved issues raised by the proposal for a global ODR system and developed possible solutions. Key questions to be answered were vetted by smaller breakout groups which drafted preliminary answers to move the discussion forward. Discussions at the colloquium broached topics likely to be focused on at UNCITRAL, including complex questions of jurisdiction, consumer protection, applicable law, and the role of the UN and individual state governments. Also explored were complex questions of system architecture, funding, enforcement, transparency, system quality, and delivery systems.

This communiqué distills the output of the experts' deliberations at the Vancouver colloquium. All submitted presentations and papers are available in their entirety on the conference website (<http://www.odrandconsumers2010.org>). While the depth of discussions obviously resulted in many subtleties which cannot be represented here, this document serves as the definitive record of the Vancouver gathering. It is organized chronologically, hewing closely to the agenda of the meeting.

Please note that this is not a consensus document; the various attendees to the conference were not asked to approve this document or attest to its accuracy. It is merely an attempt by the conference rapporteurs to memorialize the discussion and reproduce it on the record, so that it can contribute to future conversations on this vitally important topic.

II. November 2, 2010

OPENING REMARKS

After discussing Online Dispute Resolution's (ODR) 14-year history, the aim of the colloquium was clarified as designing a global system for resolving disputes concerning low-value, high-volume, cross-border online transactions. Following this, the key questions to be answered concerning a model for such a system were presented.

PROVIDING A CONTEXT:

ONLINE DISPUTE RESOLUTION FOR ELECTRONIC AND MOBILE COMMERCE

At present, two primary proposals are being advanced: one by Brazil and the other by the United States of America. The prior assumes that low-value, high-volume disputes will be resolved in domestic courts, with the law of the consumer's residence governing the transaction. The latter proposal is presented as a global, cross-border, online dispute resolution system. Against this backdrop, the development of an ODR Working Group was supported at the 43rd general meeting of UNCITRAL. The purposes of this colloquium were to consider substantive and procedural rules, the process of approval for providers, and enforcement mechanisms of the regime in advance of the new Working Group's inaugural December 2010 meeting.

Substantive questions introduced at the colloquium included what the lingua franca of the ODR regime should be, the means by which existing global ODR systems could be incorporated into the new system, and how the new system could ensure efficient remedies. The primary topics considered, organized from easiest to hardest, were summarized as Procedural Rules, Approval of Providers, Substantive Rules, and Enforcement. Also discussed were the questions of whether or not the system should be developed as an inter-governmental undertaking or a quasi public-private one, as well as how the system is to be developed, hosted and financed.

ADMINISTERING A GLOBAL EXTRAJUDICIAL SYSTEM

eCommerce often crosses multiple jurisdictions, making any disputes that arise enormously difficult for courts to adjudicate. When coupled with the expense of litigation and the difficulty of enforcing foreign judgments, attaining redress in low-value eCommerce disputes has proven even more problematic. An ODR regime stands to facilitate merchants' expansion into the global marketplace while at the same time increasing consumer confidence in cross-border online trade.

It is anticipated that such a system would involve a global administrator to serve as clearinghouse for processing claims electronically, as well as national administrators to monitor progress and enforce awards within each participating country. Merchants will voluntarily opt-in to the system at launch. ODR providers will apply to participate and, if they are found to meet certain standards, will be approved and monitored for continuing quality by each national administrator (See Figure 1).

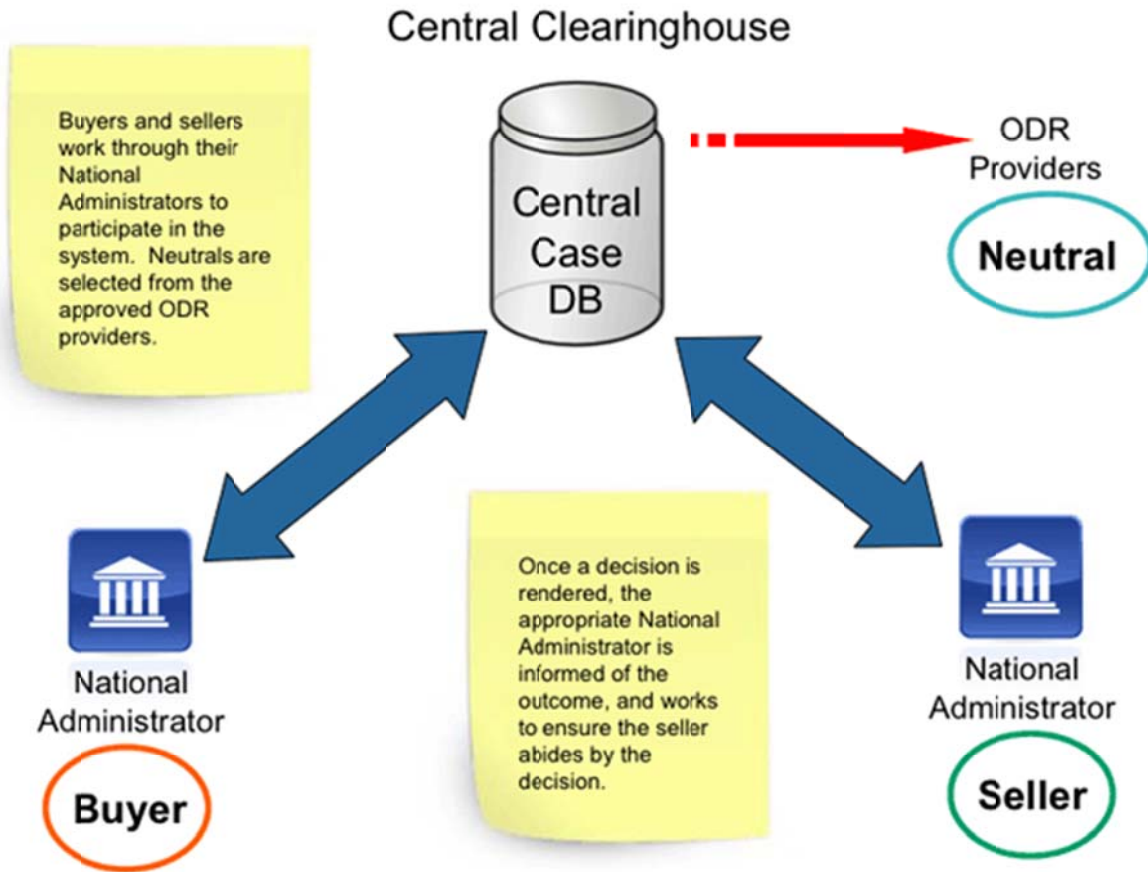


Figure 1: Global Trans-National ODR Model for High-Volume, Low-Value Online Disputes

Under such a system, after a consumer initiates a claim, a diagnostic process would begin during which the disputants would file information supporting their position. If parties were not able to reach a settlement on their own, negotiation would be facilitated by an automated system or a live mediator. If this facilitated negotiation did not yield a settlement, the dispute would be arbitrated and the national administrators informed of the decision so as to enforce the award. The specific means for this enforcement, however, has yet to be determined, but one option would be for escalating means of enforcement to be deployed, providing continuous pressure on sellers to abide by outcomes delivered by the process.

Non-binding “soft law” may be one means of instituting such a system quickly, without requiring the long cycles often required to institutionalize formal “hard law.” Parliamentary enactment would not be required, permitting instead a common frame of reference among the member states. In addition, while voluntary, such an approach would be immediately binding for member states and applicable to transactions between merchants and consumers.

As one of the longest and most successful ODR soft laws, the Uniform Domain-Name Dispute-Resolution Policy (UDRP) is the primary means of arbitrating domestic and cross-border trademark disputes related to domain names. Administered by the Internet Corporation for

Assigned Names and Numbers (ICANN), which maintains a contract with all registries and registrars, UDRP complaints are currently resolved by four ODR providers. With over 20,000 cases filed since its inception, the UDRP is seen as one possible model for crafting a global system for resolving disputes concerning low-value, high-volume, cross-border online transactions.

Unlike the UDRP, ECODIR – another possible ODR model – is a voluntary system that is free to consumers and merchants alike. Funded by the European Commission and Irish Department of Enterprise, Trade and Employment, ECODIR begins with party-to-party negotiation and allows for escalation to a mediator who reviews scenarios and suggests solutions. While it has run for almost a decade, the ECODIR system has never experienced a substantial caseload.

KEYNOTE: HONOURABLE MADAME JUSTICE KITELEY

Madame Justice Kiteley observed that multi-issue, multi-party, and multi-jurisdiction disputes are increasingly the norm in business law and family law, as well as wrongful dismissal and probate cases. Nevertheless, most judicial systems exist in a system of jurisprudence that is resistant to change. Whereas courts have historically been a venue of first resort, alternative dispute resolution has rendered them a venue of last resort. ODR may be able to enhance justice in traditional courtrooms.

SYSTEM DESIGN FOR REGIONAL AND GLOBAL REDRESS

The practice of designing processes to prevent, manage or resolve disputes is known as Dispute Systems Design. As applied to global system for resolving disputes concerning low-value, high-volume, cross-border online transactions, this practice involves considering the system's goals, structure and process options, stakeholders, and resources, as well as measures of its success and accountability. The design of an ODR regime can be enhanced through applying global standards to local conditions. Such "glocalization" stands to balance the integrating forces of globalization (a world that is more global, more interconnected, with cultural boundaries that are more permeated, and transcended by complex processes of socio-legal and political changes) as well as its fragmenting ones (a world that is more divided, more partitioned, with cultural boundaries that are being re-established, and re-invented by complex processes of socio-legal and political changes).

One example of a localized approach to handling cross-border disputes is ICA-Net, which serves southern- and eastern-Asia. Developed from an open-source social networking platform, the system allows for communication both between and among stakeholders. Originally proposed in 2007, the project ran as a two-year pilot and is currently exploring broader implementation. This is being accomplished through cooperation with member states and among complaint handling organizations, enforcement authorities, ADR providers, more public recognition, and governmental agencies.

BUSINESS, CONSUMER, GOVERNMENT AND PROVIDER PERSPECTIVES

Four eCommerce ODR technologies were shared at the colloquium. The first of these, Smartsettle, aims to overcome the problems common to many negotiations: heavy outlays of time and money, leaving substantial value on the table, damaged relationships, and weaker parties being disadvantaged. Through an automated visual blind bidding process disputants are able to structure a range of acceptable monetary settlements, with the platform creating a deal if the petitioner's and respondent's ranges overlap.

The second technology discussed, Juripax, serves as a system for resolving employment, divorce, small claims, e-commerce, and personal injury disputes. Operating in multi-lingual environment, the company offers cross-cultural competency in English, German and Dutch, as well as online training for mediators. Presently, the system provides both "3rd party" human mediation as well as "4th party" automated negotiation facilitation.

ICA-Net, introduced earlier, provides a secure environment for multiple parties to collaborate in the resolution of disputes. Case-related materials can be shared and discussed among national consumer protection liaisons, members assigned to communicate or handle a complaint, and other concerned individuals. Communications can be made in case rooms which are open to all these parties, or via private communications with the consumer protection liaisons.

The Instituto Latinoamericano de Comercio Electrónico (Latin American eCommerce Institute) serves a population of 547 million Latin Americans across 11 networks. Through its regional ODR program the institute promotes cooperation, disseminates best practices, assists providers, educates constituents, and provides central administration for its network. Given its understanding of both consumers' and merchants' perspectives, the institute may be well-positioned to help identify domestic and regional requirements to the development of a global ODR regime.

III. November 3, 2010

GLOBAL ODR SYSTEM: MODEL PRESENTED

The second day of the colloquium began with a detailed explanation of the US ODR system design that has been submitted to the OAS. As discussed under the “Administering a Global Extrajudicial System” section of this communiqué, the regime is designed so as to be sufficiently robust to handle millions of claims annually. Enforcement of awards might occur via a number of means. The ODR provider – which would be reimbursed for their services after a case is closed – could follow up with the prevailing party to determine if the settlement has been paid. If not, various forms of enforcement could be utilized to urge compliance from the seller (see the summary of the enforcement group’s report under “Break-Out Session #2,” below, for more details.)

BREAK-OUT SESSION #1: STAKEHOLDER GROUPS

During the various breakout sessions, the attendees considered various issues and questions as posed by the facilitators. Attendees were able to select which group interested them in each round of discussions, so the participants in the breakout representing consumers’ interests (for example) were not necessarily consumer advocates, but simply attendees who self-selected into that particular group.

In the first round, each breakout group considered the interests of one of four stakeholders. The breakout group representing business interests reported that the ability to increase sales and reduce costs is an essential requirement of the regime. The group felt that fees for participation, if any, should be minimal and that trustmarks for participating merchants could help incentivize this stakeholder group. A global system for the resolution of cross-border eCommerce disputes was deemed as preferable to an interconnected regional system. A topic the group identified as important for further discussion concerned the definition of what constitutes “a business” in an environment in which the distinction between merchant and consumer is often blurred, resellers abound, and transactions may be completed only partially online.

A consumer breakout group related that neutral evaluations of claims in consumers’ language of choice are necessary components of the system, as are efficiency and having the system be free-of-charge to consumers. It reported that consumers should have the ability to opt-in to the system at the time of dispute rather than being bound to it at the point of sale, and that rulings should be final and binding. Topics the group identified as being important for further discussion concerned the consumers’ opt-in process and the means by which multi-lingual disputes could be handled.

The group representing payment providers’ interests reported incentives to participate in a global ODR regime as including the potential to generate a new profit center, while increasing cross-border sales and reducing liability, chargebacks and complaint caseloads. On

the other hand, it also related that disincentives to participation might involve perceived loss of control over the process, a lack of clarity regarding merchants' incentives for participation, and possible abuse by buyers. The group felt that a means by which to favor private enforcement over arbitration awards was a topic important for further discussion.

The breakout group representing governments' interests related that the role of states should be in the provision of procedural rules for ODR providers as well as substantive procedural rules, and in the development of enforcement plans. It felt the global administrator should be responsible for day-to-day matters concerning providers and fees, and suggested that some states may elect to outsource the national administration while others may elect to use a public governing agency. The states themselves, the group asserted, should bear the initial expense of creating the national administration, but that once launched the system should be self-financing, with fees paid by businesses.

KEYNOTE: PETER FOGH KNUDSEN

Set up by the European Commission to increase cross-border trade within the EU, the European Consumer Centers Network (ECC-Net) consists of 29 centers in the European Union, Norway and Iceland. Financed by the European Commission and members states, and staffed by individuals trained in law, the network seeks to increase consumer confidence in its internal market. Mr. Knudsen explained that 40,000 to 60,000 complaints and information requests are typically addressed each year, and that eCommerce complaints outstrip on-premise and non-eCommerce distance sales on an order of 2:1. Approximately half of the complaints the ECC-Net oversee are resolved through mediation. The majority of those that are not resolved are due to lack of agreement from merchants. While it does not have any legal power, the network offers legal and practical advice to consumers via national centers in the consumer's language of preference.

BREAK-OUT SESSION #2: SYSTEMS DESIGN AND IMPLEMENTATION

In the second round, five breakout groups considered the design of the ODR regime and its implementation. The first addressed ODR providers and the standards by which they would operate. It reified those standards advocated by the European Commission: independence, transparency, adversarial principle, effectiveness, legality, liberty, representation and data security. The group felt that ODR providers and national consumer protection authorities must be able to share data so that claims may be forwarded to the prior and results reported to the latter for public dissemination. Varied possibilities for promoting innovation were proposed, including allowing some access to source code, prohibiting competitors from the non-profit arena, or encouraging the licensing of patented intellectual property.

The breakout group addressing the processes by which the regime would operate should include accessible technology, access to justice, and the promotion of e-commerce. It concurred that processes to be enacted should ensure efficiency and effectiveness, create

satisfaction with the results it produces, be consistent with legal norms regarding justice, respect cultural differences, and operate with transparency and independence.

The breakout group considering the enforcement of awards offered that it is neither realistic to assume that sellers will voluntarily comply with settlement agreements nor that public enforcement will be adequate. Group members also agreed that there is no viable means for ensuring enforcement given the possibility of business collapse and susceptibility to fraud. The group also stressed that the seat of arbitration should be at the same place in which enforcement would occur. The group discussed a stair-step approach to enforcement, using more voluntary methods at first and escalating to more aggressive forms as necessary. When public involvement is necessitated, the global and national administrators could press for enforcement. Alternately, an administrator could coordinate with the local consumer protection agencies, or may press for chargeback from the payment intermediary. Another option could involve making an award enforceable via the courts by having decisions ratified by arbitration board. A provisional credit could also be debited from the respondent upon initiation of the ODR process, or the terms of use of the system could specify that decisions are binding as a contract. Yet other means of enforcement – such as the placement of negative reviews on public websites, shutting down domain names or server connectivity, or depreciating results in prominent search engines – were also discussed.

A legislation breakout group contended that the inflexibility of international treaty concerning an ODR regime would be unhelpful at the moment, and that a pilot project employing a model law or guiding principle from UNICTRAL would be more apropos. In the meantime, it asserted that a soft law harmonizing instrument should be pursued that operates independently of local laws and at the same time allows for the resolution of extra-jurisdictional disputes as no such system currently exists.

The breakout group tasked with exploring regional concerns expressed several requirements for addressing idiosyncrasies from state to state. First, it asserted that a consumer redress model such as that proposed by the US to the OAS is necessary. It also stressed the importance of attending to the unique requirements of local consumers and businesses, as well as the attenuating global standards to local conditions. This, the group emphasized, requires cooperation between and among states. Additional requirements include ensuring that the system is accessible in local languages and that harmonization is not achieved at the expense of local norms.

NEXT STEPS

IV. Conclusions

It was evident from the two-day gathering that this meeting represented the beginning of a conversation, not its end. Many complex challenges were surfaced, and the various breakout groups made great progress in defining the problems and devising promising approaches for addressing them. At the same time, the construction of concrete

implementation plans at the Vancouver colloquium was made unrealistic, due largely to the extent to which the broader context for the system is presently undefined.

Many of the participants noted their intention to attend the UNCITRAL Working Group meeting in December 2010, and it was made clear that the conclusions of the Vancouver colloquium would be shared there. It was also clear that additional meetings like the colloquium – with a focus on the specifics of system administration, design, and execution – should likely continue in parallel to the UNCITRAL Working Group meetings as the latter are more likely to focus on legal or political questions. Garnering input from a variety of constituents, including representatives from developing and least developed countries, will be an important aspect of this work.

The Vancouver colloquium built on progress achieved at earlier meetings in Buenos Aires, Argentina (in conjunction with the 9th annual International Forum on ODR) and Stanford Law School. In much the same way, upcoming ODR meetings (such as the 10th annual International Forum on ODR in Chennai, India) would build upon progress achieved in Vancouver and Vienna. Operating in a constantly changing environment, the ODR system envisioned will most likely be sufficiently complex such that very few questions will ever be answered permanently. Instead, the system will evolve organically over time, and will require continuous refinement to account for new challenges. Attendees of the Vancouver colloquium indicated their desire to remain engaged with this effort moving forward, and offered their commitment to learn and refine these systems in-flight as new challenges present themselves. Similar future meetings will enable the reflection required to enable the system to grow and evolve. The authors offer a special note of thanks to the participants of the Vancouver colloquium:

Tracy Baker	Smartsettle	Canada
David Bilinsky	The Law Society of British Columbia	Canada
Kari Boyle	Mediate BC Society	Canada
Colleen Cattell	Mediator	Canada
Mitch Chihara	NEC Corporation	Japan
Andrew Clark	Sunny Hill Consulting	Canada
Tim Cole	ICANN	United States
Louis Del Duca	Penn State Dickinson School of Law	United States
Michael Dennis	Department of State Office of Legal Adviser	United States
Frank Fowlie	ICANN	Canada
Fred Galves	University of the Pacific McGeorge School of Law	United States
Dana Haviland	Independent	United States
Bruce Hiebert	Smartsettle	Canada

Susanna Jani	Mediate BC	Canada
Frances Kiteley	Ontario Superior Court of Justice	Canada
Peter Knudsen	European Consumer Center Denmark	Denmark
May-Britt Kollenhof-Bruning	Juripax B.V.	Netherlands
Kimberlee Kovach	South Texas College of Law	United States
Doug Leigh	Pepperdine University	United States
Zbynek Loebel	ADR.EU	Czech Republic
Agustin Madrid-Parra	Universidad Pablo De Olavide, De Sevilla	Spain
Eiichiro Mandai	ODR Room Network Inc.	Japan
Janet Martinez	Stanford Law School	United States
William G. MacLeod	MacLeod & Company	Canada
M. Jerry McHale	Ministry of Attorney General	Canada
James Melamed	Mediate.com	United States
Paul Miniato	iCan Systems Inc.	Canada
Jennifer Nakamura	Hewlett-Packard	United States
Sue Pratt	Ministry of Attorney General Court Services Branch	Canada
Vikki Rogers	Pace Institute of International Commercial Law	United States
Martin Roy	Government of Alberta	Canada
Colin Rule	PayPal	United States
Trish Shwart	Ministry of Attorney General	Canada
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Jessica Sullivan	Ministry of Attorney General Court Services Branch	Canada
Gabriela Szlak	Instituto Latinoamericano de Comercio Electrónico	Argentina
Ernest Thiessen	Smartsettle	Canada
Mohamed Abdel Wahab	Faculty of Law - Cairo University	Egypt

APPENDICES

All of the presentations delivered at the Vancouver conference (as well as several papers submitted by attendees) are available in-line in the Online Agenda at <http://www.odrandconsumers2010.org/agenda>.

All of the materials circulated in the conference binders and on a conference CD is available for download at <http://novomeeting.com/vancouver.zip>. This file includes:

- UNCITRAL documents related to the ODR Working Group
- Provisional Agenda for the ODR Working Group meeting in December 2010
- UN Secretariat note on work in ODR
- ODR Note from the 43rd session
- US proposal to the OAS
- OAS documents
- Draft model law/cooperative framework
- Proposal for Global ODR Standard Setting body

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