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BUILDING CONSUMER TRUST IN CROSS-BORDER E-COMMERCE TRANSACTIONS:
UNCITRAL AND THE GLOBALIZATION OF ONLINE DISPUTE RESOLUTION

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**BUILDING CONSUMER TRUST IN CROSS-BORDER E-COMMERCE TRANSACTIONS:
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SYNOPSIS

Over the last decade significant discussion has mounted concerning the need for and development of a unified international online dispute resolution (“ODR”) mechanism for resolving disputes arising out of cross-border consumer transactions carried out by way of electronic communication. The United Nations Commission on International Trade Law (UNCITRAL) is now at the forefront of this initiative and has appointed a working group to develop recommendations for the establishment of an efficient, fair, transparent, and global ODR system for the resolution of low value-high volume business-to-business (“B2B”) and business-to-consumer (“B2C”) transactions. The following paper will: briefly discuss the evolution of ODR in the context of domestic and cross-border e-commerce; highlight several prominent regional ODR initiatives; examine the progress of UNCITRAL’s Working Group III and current proposals of the group’s Secretariat; analyze the various technical, legal, and cultural challenges appurtenant to devising a global ODR system; and evaluate UNCITRAL’s potential for success in its effort to unify and harmonize the field of ODR in cross-border e-commerce.

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I. INTRODUCTION

Paul Vento is a high school teacher living in Brooklyn. In one month, Paul will travel to Buffalo to join his relatives in celebrating the 100th birthday of his grandfather, Nicholas, an Italian American who emigrated to the U.S. from Palermo, Sicily in the early 1920s. In preparation for the celebration, Paul decides to go online to see if he can find something special to give to his grandfather for the occasion. Paul eventually stumbles upon euroShop.com, a European online shopping website in which consumers and businesses can buy and sell a broad variety of goods and services worldwide.

While surfing through euroShop.com, Paul is delighted to come across an antique handcrafted sculpture of Saint Rosalia, the patron saint of Palermo. The sculpture is carved out of white alabaster extracted from the foothills of Mount Pellegrino and is priced at 560€ (or roughly \$800). The seller is Maestri Artigiani, a small artisanal company, based in Catania, Sicily. Listed within the seller's description of the item, is an estimated international shipping timeline of 10-14 business days. Despite his initial reluctance to spend so much for the piece, Paul can't resist. He subsequently purchases the sculpture with a debit card and anxiously awaits its arrival.

Two weeks pass and Paul begins to wonder why his grandfather's gift has not yet arrived. He checks his account balance to see if the transaction went through and upon seeing that Maestri Artigiani had in fact taken his \$800, Paul sends several emails to the company's customer service department requesting information, but he receives no response. As the celebration day grows nearer, Paul begins leaving voicemail messages on the company's help hotline; messages which also go unanswered. Paul then gets in touch with a euroShop.com customer service representative and is told that although euroShop.com is not personally

responsible for any lost or damaged items, displeased customers may provide negative feedback for defective delivery.

Dissatisfied by the euroShop.com remedy and realizing that he may have been cheated, Paul contacts the Federal Trade Commission (FTC), only to learn that the FTC does not resolve individual consumer complaints. Paul then calls his lawyer, who informs him that unless he is willing to travel to Sicily and be represented by a local lawyer, it is doubtful that he will ever see the sculpture or his \$800. Knowing that the plane ticket alone will cost more than the money he's already lost, Paul decides that his claim is not worth pursuing any further. Tomorrow morning Paul will head to Buffalo – empty-handed and less \$800 in his bank account.

The foregoing tale is an unfortunate one. What is even more unfortunate is that Paul's predicament is relatively common among online consumers. Every day millions of individuals just like Paul engage in electronic commerce, or e-commerce.¹ From Amazon to Zappos, e-commerce represents an efficient and cost-effective means of conducting business, particularly in circumstances where the product or service being offered is of relatively low value and the buyer is located in a different country or on a different continent than the seller.

When problems arise regarding non- or defective-performance, however, consumers engaged in these types of cross-border e-commerce transactions are often unable to realize the benefits of their bargains and unable to seek an appropriate legal recourse to recoup their losses, either because the court systems are backlogged or because bringing suit is economically impractical. It is primarily for this reason that domestic e-commerce has grown at significantly higher rates than cross-border e-commerce – even though, in certain instances, goods and services can only be found cross-border, or are significantly cheaper than if they were purchased

¹ E-commerce is essentially any business transaction that occurs in cyberspace. Most often, e-commerce refers to the buying and selling of products or services over the Internet.

locally.² This breakdown in the availability of remedial mechanisms has significantly eroded consumer confidence in cross-border e-commerce, transforming would-be online prospectors into disenchanting misanthropists.

Building consumer trust is essential to the development of cross-border e-commerce, and it is in this context that online dispute resolution (“ODR”)³ can be particularly valuable. Through the use of ODR, consumers can obtain redress in a manner that is both fair and affordable – two necessities if cross-border e-commerce is to remain a viable method of conducting business in the long-term. Unfortunately, few legal standards on ODR currently exist today and even those that do deal specifically with ODR at the international level take the form of general guidelines,⁴ none of which provide for the establishment of a fully-fledged international ODR system.⁵

² See Rule, Rogers, and Del Duca, *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments*, 42 UCC L.J. 3 (2010) (citing Comm’n of Eur. Cmty., Report on Cross-Border E-Commerce in the EU 26 (Working Document SEC 283, Brussels, May 3, 2009) available at http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf).

³ ODR is an alternative dispute settlement mechanism that uses information and communication technology (“ICT”) and electronic forms of interaction to facilitate the resolution of disputes between parties. ODR can be conducted in whole or in part online and may or may not involve a binding decision made by a third party. ODR may incorporate the use of e-mail communications, streaming media, ODR online platforms such as websites, or other information technology as part of the dispute resolution process. *Online dispute resolution for cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Twenty-second Session, United Nations, Vienna 3, 9 (2010) (A/CN.9/WG.III/WP.105)*.

⁴ See, e.g., the International Chamber of Commerce (ICC) Guidelines on Using Information Technology in Arbitration (“the ICC Guidelines”), which examines issues related to and provides operational standards for the use of information technology (“IT”) in international arbitration settings; the Organization for Economic Cooperation and Development (OECD), which addressed the issues of consumer disputes through the development of e-commerce Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) and the OECD Recommendation for Consumer Dispute Resolution and Redress (2007); the Global Business Dialogue on e-Society (GBDe), a private sector initiative established in 1999 to assist in developing a global policy framework for the emerging online economy and principles relevant to the creation of an ADR system geared toward merchants, providers of services in the field of dispute settlement, and governments; the CEN (European Committee of Standardization) Workshop Agreement on Standardization of Online Dispute Resolution Tools (2007) Guidelines (“the CEN Guidelines”), which give general directions for users to access ADR resources using electronic tools, focusing on ODR, and refer to certain technical aspects of ODR such as electronic communication considerations, confidentiality and security.

⁵ *Online dispute resolution for cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Twenty-second Session, United Nations, Vienna 7 (2010) (A/CN.9/WG.III/WP.105)*.

In response to the absence of an agreed upon international standard on ODR, the United Nations Commission on International Trade Law (UNCITRAL) has appointed a working group and charged it with undertaking the establishment of a unified, global ODR system for the resolution of cross-border e-commerce transactions. The following paper will: briefly discuss the evolution of ODR in contemporary society; examine several regional ODR initiatives; analyze UNCITRAL Working Group III's formation, composition, current progress, and vision for the future; and address the potential barriers that exist in developing a global ODR system.

II. ODR: AN EVOLUTIONARY PROSPECTIVE

In 1990, at (CERN),⁶ in Geneva, Switzerland, Tim Berners-Lee and Robert Cailliau proposed to use "hypertext . . . to link and access information of various kinds as a web of nodes in which the user can browse at will."⁷ The name of their hypertext project was the "World Wide Web," and after its formal debut as a publicly available service on the Internet on August 6, 1991,⁸ the world would never be the same.

a. Contemporary origins

The advent of the Internet and subsequent development of the World Wide Web (or "the Web") ushered in a new era of understanding about the world in which we live and forever changed peoples' conceptions of human interaction. Today, individuals can communicate their ideas across continents, retrieve their news from multiple sources simultaneously, and conduct

⁶ The European Organization for Nuclear Research.

⁷ "Berners-Lee, Tim & Cailliau, Robert" (November 12, 1990), WorldWideWeb: Proposal for a hypertexts Project," available at <http://w3.org/Proposal.html>.

⁸ "Short summary of the World Wide Web project," Groups.google.com., August 6, 1991, available at <http://groups.google.com/group/alt.hypertext/msg/395f282a67a1916c>.

their business in a global marketplace. But just as disputes can arise in the context of real-world interactions, so too can they arise in the context of online-world interactions.

The most frequent online disputes have traditionally been those arising out of disagreements over the rights to domain names.⁹ In the real world, one business can often use the same or similar name as another business with little or no conflict, particularly in circumstances where the businesses are small, their goods or services are different, and the areas within which they do business are separate.¹⁰ In the online world, however, there is only one area of business – cyberspace.¹¹ Thus, conflicts between parties over the right to use a particular domain name were inevitable, and because of cyberspace’s international scope, litigating such disputes was exceedingly burdensome and prohibitively expensive. As a result, devising alternative methods for resolving domain name disputes became necessary.

In January of 2000, the Internet Corporation for Assigned Names and Numbers (ICANN) began operating an online arbitration system to resolve domain name disputes across borders.¹² Instead of forcing a party engaged in trademark infringement to file suit in court, a party could simply submit a complaint to an ICANN-approved dispute resolution provider and resolve the entire matter online.¹³ ICANN’s domain name dispute resolution system was highly successful.

⁹ A domain name is part of an Internet address, e.g. “google.com.” The top level domain (TLD) is the part of the name to the right of the period and represents the type of entity that operates the site, e.g. “com” is an abbreviation for “commercial.” The second level is the part of the name to the left of the period and is chosen by the business entity or individual registering the domain name, e.g. “google.” MILLER & JENTZ, HUMAN RESOURCE MANAGEMENT AND E-COMMERCE: THE ONLINE LEGAL ENVIRONMENT 61-62 (West 2002).

¹⁰ See MILLER & JENTZ, HUMAN RESOURCE MANAGEMENT AND E-COMMERCE: THE ONLINE LEGAL ENVIRONMENT 61-62 (West 2002).

¹¹ *Id.* at 62.

¹² *Id.*

¹³ See “Uniform Domain-Name Dispute-Resolution Policy,” ICANN website, available at <http://www.icann.org/en/udrp/udrp.htm>.

Today, ICANN remains committed to the ODR process, resolving thousands of disputes across borders annually.¹⁴

Several countries have followed the ICANN ODR scheme and have set up organizations to administer domain names and provide online arbitration to resolve disputes arising in that field.¹⁵ These organizations typically provide an electronic platform¹⁶ to arbitrators offering a support technological service for the administration of arbitration cases.¹⁷ The responsibility for the management and administration of the platform lies with the arbitrators.¹⁸ The arbitral procedure itself includes the access of the parties to the file and their keys with various tools to interact with the arbitrators and to participate in the conduct of the arbitral proceedings.¹⁹ If an arbitrator is not appointed through party agreement, the organization will appoint an arbitrator from a list established for that purpose.²⁰ The arbitration, including all evidence and all communications between the participants throughout, is confidential.²¹

¹⁴ *Id.*

¹⁵ *See, e.g.,* Chile's Network Information Center ("NIC Chile"), which administers and regulates domain names as designated by the Internet Assigned Numbers Authority (IANA). *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 10 (2010) (A/CN.9/706).*

¹⁶ A "platform" is a forum provided by the ODR provider or administrator, which may be a platform accessible to the public such as websites on the Internet (i.e. an open platform) or with limited or restricted access such as Intranet or an internal file management system (i.e. a closed platform). *See Online dispute resolution for cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Twenty-second Session, United Nations, Vienna 10 (2010) (A/CN.9/WG.III/WP.105).*

¹⁷ *See id.*

¹⁸ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 10 (2010) (A/CN.9/706).*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

b. Developments in e-commerce ODR

Business-to-business (“B2B”) and business-to-consumer (“B2C”) e-commerce has grown exponentially in the past decade, due in large part to the rising number of individuals connected to the internet.²² In the late 1990s roughly between two and five percent of the world’s population used the internet.²³ By 2010, however, that percentage had increased to nearly thirty percent,²⁴ with users dispersed over every geographic region around the globe.²⁵ The acceptance of the internet as a commercial trading platform is also increasing,²⁶ and as the number of commercial transactions that consumers complete online continues its meteoric rise, so too does the amount these consumers are spending.²⁷ The significant growth of e-commerce in the last decade has spurred the development of various public and private initiatives aimed at providing redress to both businesses and consumers involved in domestic disputes arising out of online transactions.

²² *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 5 (2010) (A/CN.9/706).*

²³ *See id* (citing OECD, “Empowering e-consumers, strengthening consumer protection in the internet economy”, 8-12 December 2009, DSTI/CP(2009)20/FINAL, para. 13.).

²⁴ *See* “Internet Usage and World Population Statistics,” *Internet World Stats: Usage and Population Statistics* (updated as of April 5, 2011), available at <http://www.internetworldstats.com/stats.htm>.

²⁵ There were an estimated 1.4 billion internet users around the world at the end of 2008 and of the 1.6 billion people estimated in 2009, China hosted the largest number of users with 298 million, followed by the United States with 191 million, Japan with 88 million, and Africa with 53 million. While more than half of the population in developed countries has access to the internet, the corresponding share is on average 15-17 percent in developing countries. *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 5 (2010) (A/CN.9/706).*

²⁶ *See supra* note 19.

²⁷ *See* Plunkett Research, Ltd., E-Commerce & Internet Industry Over-view, available at <http://www.plunketresearch.com/Industries/ECommerceInternet/ECommerceInternetStatistics/tabid/167/Default.aspx> (illustrating that consumers in the U.S. spent \$131.8 billion on online commercial transactions in 2009, with a projected increase to \$182.6 billion by 2012).

In Mexico, Concilianet, an online dispute resolution system run by the Federal Consumer Attorney's Office ("Office of the Federal Prosecutor for the Consumer") (PROFECO),²⁸ has been established to strengthen the protection and defense of consumers' rights. Under the Concilianet system, consumers who have purchased goods or services, either electronically or by traditional means can initiate and resolve complaints or claims against participating suppliers via a virtual internet platform.²⁹ In 2009, Netmedia³⁰ and *InformationWeek Mexico*³¹ awarded PROFECO, in recognition of its Concilianet program, a prize for innovation in the public sector.³²

In China, where e-commerce has been one of the fastest growing industries, ODR is divided into four categories: (1) the Online Dispute Resolution Centre of China International Economic and Trade Arbitration Commission (CIETAC),³³ which mainly settles domain name

²⁸ PROFECO is one of two institutions of the Mexican government (the other being the Ministry of Economy (SE)), designed to protect consumers against abuses or fraud by companies operating within Mexico. See "Under Ministry of Domestic Trade and PROFECO," *Consumer Protection Policy in Mexico*, 1 (2000).

²⁹ Concilianet began as a pilot program in 2008 with two participating providers and moved to small deployment with five providers in 2009. Today, Concilianet has expanded to full national implementation with 18 participating providers. See Rule, Rogers, and Del Duca, *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments*, 42 UCC L.J. 3, 224-25 (2010). According to PROFECO, the use of ODR in the initial stages reduced the time for resolving disputes by nearly 50 percent and increased the number of settlements to about 96 percent. Furthermore, 97 percent of the consumers polled reported that they would utilize the Concilianet procedure again. *Id.*

³⁰ NetMedia Inc., founded in 1993, is a leading designer and manufacturer of security video cameras, audio/video distribution equipment, embedded micro-control products, and embedded Ethernet web products. Go to <http://www.netmedia.com/company.html>.

³¹ *InformationWeek Mexico* has been the leading business technology brand in advertising market share and readership in Mexico. *InformationWeek Mexico* reaches 5,000+ individuals in print (published six times a year) and has a monthly digital edition. See "About us," *InformationWeek Mexico*, Netmedia (April 14, 2011), available at <http://www.informationweek.com.mx/about/>.

³² See "Otorgan premio de Innovación a Concilianet de Profeco" ("Innovation Prize Awarded to Profeco Concilianet"), *The Informer* (Nov. 15, 2009), available at <http://www.informador.com.mx/economia/2009/154392/6/otorgan-premio-de-innovacion-a-concilianet-de-profeco.htm>.

³³ In 2009 the Online Arbitration Rules of CIETAC took effect; they are applied to larger volume B2B e-commerce disputes.

disputes, common address disputes and electronic business disputes;³⁴ (2) the Online Dispute Resolution Centre, which offers an information exchange platform and resolves disputes related to electronic commerce;³⁵ (3) the Internal Complaint Mechanism, which refers to the system established by the provider of a network transaction platform and which is used to accept consumer complaints and settle disputes by way of consultation;³⁶ and (4) the Online petitions, which are adopted by many nonprofit organizations such as China's Electronic chamber, the Electronic Commerce Association of Beijing and the E-commerce Industry Association of Shanghai.³⁷

In France, courts offer parties the possibility to solve, through mediation, disputes arising in the context of their online transactions.³⁸ In 2009, the “*forum des droits sur Internet*,” an entity established with the assistance of the French public authorities, signed a protocol with the Court of Appeal of Paris for the settlement of disputes arising in the context of internet transactions.³⁹ The protocol applies specifically to consumer disputes, and provides for mediation, although parties may at any time refer the matter back to the competent court of first instance.⁴⁰

³⁴ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 10 (2010) (A/CN.9/706).*

³⁵ *Id.* The Online Dispute Resolution Centre was established by China's E-commerce Laws Nets and Beijing Deofar Consulting Ltd. By the end of 2009, the centre had closed nearly 1,500 cases online (accepting 299 cases and closing 308 cases in 2009 alone). *Id.*

³⁶ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 10 (2010) (A/CN.9/706).*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Certain non-governmental organizations (“NGOs”) have similarly developed various types of systems and guidelines that have contributed to facilitating ODR domestically and (in some cases) across borders. Over the last decade, several important initiatives have come to fruition, including: the dispute resolution agreement between Consumers International and the Global Business Dialogue on e-Society (GBDe);⁴¹ the launch of the European Extrajudicial Network; the Better Business Bureaus (BBB)⁴²/Eurochambres Trustmark⁴³ alliance; and e.Consumer.gov, a portal, created by the International Consumer Protection Enforcement Network (ICPEN), which allows consumers to report complaints about online and other cross-border transactions with foreign sellers.⁴⁴

Private companies have also built consumer redress systems, some of which handle millions of cases per year.⁴⁵ In 2009, General Electric (“GE”), a multinational corporation handling a large number of suppliers, designed and introduced, in cooperation with the

⁴¹ The GBDe is an international complaint-handling network for cross-border on-line shopping. The GBDe is comprised of government stakeholders (the U.S., Japan, Chinese Taipei, Malaysia, Vietnam, Singapore, and Thailand), international organizations (the Asia-Pacific Economic Cooperation (APEC), and the OECD), and various consumers’ organizations and alternative dispute resolution providers (from the U.S., Japan, Chinese Taipei, Singapore, and Korea).

⁴² The Better Business Bureaus (“BBBs”) are private, non-governmental agencies, made up of 123 member local Better Business Bureaus throughout the U.S. and Canada. In 2009, the BBB system handled nearly one million consumer disputes and reported a substantial increase in cross-border complaints.

⁴³ A “trustmark” in the context of e-commerce generally refers to an image, seal, or logo found on a website that purports to indicate the reliability of the online merchant. The trustmark is offered as a proof that the online merchant is a member of a professional organization or a network, and that the online merchant has a redress mechanism in place. Merchants approved by the Better Business Bureau (BBB), for example, will place a BBBOnLine logo on their websites, which links to the BBB site so that consumers can determine in advance which companies participate in the program and learn about redress mechanisms for when complaints are not resolved internally. To the lay consumer, the trustmark represents a good-housekeeping seal of approval.

⁴⁴ *Possible future work on online dispute resolution in cross-border electronic commerce transactions*, Note by the Secretariat, *Official Records of the General Assembly, Forty-third Session*, United Nations, New York 10 (2010) (A/CN.9/706).

⁴⁵ See Rule and Nagarajan, “Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of Online Dispute Resolution” in *ACResolution Magazine*, Winter 2010, available at <http://www.acrnet.org/publications/acresolution.htm>.

International Centre for Dispute Resolution (ICDR),⁴⁶ a manufacturer/supplier ODR program to resolve fairly and quickly a large volume of supplier-manufacturer small claims.⁴⁷ The GE program functions as follows: a request for resolving a dispute online is initiated via an application called a “webFile,” followed by on-line negotiation; in the case of a failure to settle, ODR is initiated on the basis of documents already submitted via the “webFile.”⁴⁸ Engineers serve as arbitrators for the dispute and a brief, reasoned award is rendered within thirty days from the appointment thereof.⁴⁹

Perhaps the most successful private ODR system has been developed by eBay, an American internet company with experience in B2B, B2C, and C2C⁵⁰ transactions. Launched in 1995, eBay has made numerous acquisitions over the years, including the PayPal payment service in 2002.⁵¹ In 2009, eBay pulled its then-existing dispute resolution services from PayPal and initiated an ODR platform for resolving "item not received" and "item not as described" claims.⁵² The eBay platform handles millions of cross-border e-commerce disputes annually and includes an online dispute resolution center, where parties can attempt to solve problems which might arise during their transactions. Under the eBay system, buyers can file a report when they

⁴⁶ The ICDR is the international division of the American Arbitration Association (“AAA”).

⁴⁷ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 11 (2010) (A/CN.9/706).*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ “Consumer-to-consumer.”

⁵¹ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 12 (2010) (A/CN.9/706).*

⁵² *See supra* note 40.

have not received an item they purchased or if the item was received but did not match the seller's description. Sellers can also file through eBay when they have not received a payment or when they need to cancel a transaction.⁵³

c. The growing need for ODR

Online Dispute Resolution (“ODR”) and Alternative Dispute Resolution (“ADR”) are not synonymous. ADR suggests the availability of several remedial options. For many hapless consumers, ODR is the only option.

Disputes arising in the online context can vary considerably and are often extremely difficult for courts to handle for a number of reasons, including: the high volume of claims; the contrast between the low value of the transaction and the high cost of litigation; the question of applicable law (in both e-commerce and consumer protection contexts); and the difficulty of enforcement of foreign judgments.⁵⁴ For years, courts all over the world have been promoting the use of Alternative Dispute Resolution (“ADR”)⁵⁵ as an effective, and even preferred, substitute for litigation.⁵⁶ ADR has been praised for its speed, flexibility, informality, and its solution-oriented (as opposed to blame-oriented) approach to conflict resolution.⁵⁷ However, traditional

⁵³ See “eBay Buyer Protection Policy,” available at <http://pages.ebay.com/help/policies/buyerprotection.html#resolution>.

⁵⁴ See *supra* note 46.

⁵⁵ ADR is any alternative-to-trial method for resolving disputes between parties. ADR can be separated into adjudicative processes (e.g. arbitration or private tribunal), consensual processes (e.g. negotiation or mediation and/or conciliation), and mixed processes (e.g. mediation-arbitration (“med-arb”), arbitration-mediation (“arb-med”), mini trial, summary jury trial, early neutral evaluation, fact-finding, ombuds, or other settlement processes). See RISKIN et al., DISPUTE RESOLUTION AND LAWYERS 15-18 (West Publishing 2009).

⁵⁶ See ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY 8 (Cambridge University Press 2010).

⁵⁷ *Id.*

ADR methods, such as arbitration, have proven to be less than helpful tools for circumventing the complications inherent in judicial resolution of web-based transactional disputes.

Unlike other dispute resolution processes, ODR is a fast, efficient, flexible, and inexpensive mechanism for governing e-commerce disputes, both at the domestic level and across borders. ODR provides businesses and consumers with a simple and reliable process through which to resolve conflicts arising out of their online business transactions. In short, ODR is an ever-increasing necessity in an ever-shrinking world.

III. REGIONAL ODR INITIATIVES

a. The European Union

Over the last two decades, the European Union (EU) has adopted of a number of legal directives aimed at standardizing the field of consumer protection and electronic commerce.⁵⁸ While differences among the various national regulatory frameworks – in particular consumer protection rules – still exist, a great deal of the disparity has been diminished by requiring e-shops, irrespective of whether they are located inside or outside the EU, to comply with varying national sets of consumer protection rules of the EU member States.⁵⁹ Furthermore, the EU maintains a central database of alternative dispute resolution bodies for consumer complaints,

⁵⁸ See, e.g., Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (“Directive on electronic commerce”) (OJ L 178, 17.7.2000, p. 1–16); Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22-39); and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19–27).

⁵⁹ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 7 (2010) (A/CN.9/706).*

which is considered to be in conformity with the European Commission's Recommendations on Dispute Resolution.⁶⁰

Today, the EU remains focused on resolving the lingering discontinuity of its consumer protection laws, as well as the disincentives that such discontinuity can pose to cross-border e-commerce.⁶¹ At a recent Colloquium entitled “A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant),” held in Vienna in 2010, the EU advocated for the adoption of an optional instrument for the resolution of B2C transactions (referred to as the “Blue Button” approach), which would be available at the behest of the consumer and would encompass a common set of rules and substantive legal and equitable principles for deciding cases and making awards.⁶²

Under the “Blue Button” system, a merchant’s e-shop website might display an icon or button, highlighted in EU-blue, the clicking of which would amount to a choice of its common set of legal rules, as opposed to the national law of either party.⁶³ The EU explained that adoption of this online procedure would facilitate expeditious and economical resolution of disputes based on the agreement of the parties, thereby eliminating the need to resolve difficult problems such as those pertaining to jurisdiction and applicable law.⁶⁴

⁶⁰ Available at http://ec.europa.eu/consumers/redress_cons/adr_en.htm. *See id.*

⁶¹ *See, e.g.*, the Rome Treaty, which requires that consumer disputes be resolved in the courts of the consumer’s residence according to the law of that place.

⁶² *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 7 (2010) (A/CN.9/706).*

⁶³ *Id.*

⁶⁴ *Id.* at 7-8.

b. The Organization of American States (OAS)

The Organization of American States (OAS)⁶⁵ is currently considering several private international law initiatives relating to consumer protection. The first of those initiatives includes a proposal for an Inter-American convention on the law applicable to certain contracts and consumer relations.⁶⁶ The second includes a proposal for a model law on jurisdiction and conflict of laws rules in consumer contracts.⁶⁷ Both proposals provide that e-commerce disputes should be litigated in the forum of the consumer.⁶⁸

In February, 2010, the U.S. Department of State submitted to the OAS a third proposal focused on building a practical framework for consumer protection through *inter alia* an OAS-ODR Initiative for electronic resolution of cross-border e-commerce consumer disputes: a system “designed to promote consumer confidence by providing quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions.”⁶⁹

Under the OAS-ODR Initiative, a consumer would be able to file a cross-border complaint online against a registered vendor in another participating State. Once filed, the

⁶⁵ The OAS is the world’s oldest regional organization, established to achieve among its member states “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.” See *Charter of the Organization of American States (A-41)*, Ch. I, Art. I, Department of International Law, Organization of American States, Washington D.C., available at http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm#ch1. Today the OAS comprises the 35 independent states of the Americas and has granted permanent observer status to 63 states, as well as to the European Union. For more information on the OAS generally, visit the OAS website (available at http://www.oas.org/en/about/who_we_are.asp).

⁶⁶ *Possible future work on online dispute resolution in cross-border electronic commerce transactions*, Note by the Secretariat, *Official Records of the General Assembly, Forty-third Session*, United Nations, New York 8 (2010) (A/CN.9/706).

⁶⁷ *Id.*

⁶⁸ Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) - Topic I – Consumer Protection (CP/CAJP – 2652/08 and CP/CAJP – 2652/08 add.1 to add.4).

⁶⁹ See Rule, Rogers, and Del Duca, *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments*, 42 UCC L.J. 3, 234 (2010).

complaint would then proceed in the following successive phases: the initiation/negotiation phase, the online arbitration phase, and the award phase.⁷⁰ During the initiation/negotiation phase, the buyer and vendor would be provided the opportunity to exchange information and proposals, and negotiate – through electronic means – a binding settlement.⁷¹ If an amicable settlement could not be reached during this initial phase, the case would then be brought to the arbitration phase, at which time a online arbitrator would be appointed by a qualified ODR provider where the vendor is located to evaluate the case and either conduct a facilitated settlement (i.e. mediation) or, if necessary, issue a final and binding arbitral award.⁷²

The OAS-ODR Initiative utilizes a central clearinghouse, which, in conjunction with national consumer authorities and national administrators, maintains a single database of certified ODR providers, manages the dispute resolution process, and acts as the central focal point for electronic communication among the parties.⁷³ The initiative also attempts to simplify enforcement issues by providing for ODR in the vendor’s locale. The vendor opts-in to the system with national administrators in the area where the vendor does business and the seat of arbitration for the process is the vendor’s State.⁷⁴ This way, in the event of non-compliance, the award may be enforced by the national consumer authority or national administrator in the

⁷⁰ *Id.* at 236.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 8 (2010) (A/CN.9/706).*

⁷⁴ *Id.*

vendor's home country by taking direct enforcement action, requesting assistance from payment networks, or referring the case to collection agencies.⁷⁵

c. The African Union and African Regional Organizations

The African Union⁷⁶ held a summit in 2010 on information technology and is now in the process of drafting a Convention on digital transactions, which should be adopted before 2012.⁷⁷ Also, as a further illustration of the growing importance of ODR, the Economic Community of West African States (ECOWAS) collaborated with several partner institutions such as the West African Economic and Monetary Union (UEMOA) and the International Telecommunication Union (ITU) to develop regional guidelines for the information and communications technology (ICT)⁷⁸ sector; guidelines which have led to six Supplementary Acts being adopted by Heads of States in 2007, in Ouagadougou.⁷⁹

Furthermore, three additional texts were developed with the assistance of the United Nations Economic Commission for Africa (ECA) on cyber-crime, electronic commerce, and

⁷⁵ *Id.*

⁷⁶ The African Union was established in 2002 and consists of 53 African States. *See* Thabo Mbeki (9 July 2002). "Launch of the African Union, 9 July 2002: Address by the chairperson of the AU, President Thabo Mbeki." ABSA Stadium, Durban, South Africa, *available at* <http://www.africa-union.org>.

⁷⁷ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 9 (2010) (A/CN.9/706).*

⁷⁸ ICT consists of all technical means used to send and receive information, e.g., IT, telecommunications, broadcast media, all types of audio and video processing and transmission, and network based control and monitoring systems. *See* <http://foldoc.org/Information+and+Communication+Technology>.

⁷⁹ *See supra* note 32 (citing West African Common Market Project: Harmonization of Policies Governing the ICT Market in the UEMOA-ECOWAS Space. (Final Guideline) accessed at: http://www.itu.int/ITU-D/treg/projects/itu-ec/Ghana/modules/Compil_Guidelines_final.pdf and Supplementary Act A/SA.1/01/07 on the Harmonization of Policies and of the Regulatory Framework for the Information and Communication Technology (ICT) Sector adopted in the Thirty-First session of the Authority of Heads of State and Government, ECOWAS, Ouagadougou, 19 January 2007 accessed at http://www.ecowas.int/publications/en/actes_add_telecoms/ICT_Policy_ECOWAS_Engl.pdf).

personal data protection.⁸⁰ Finally, the Council of Ministers of the Organization for the Harmonization of Business Law in Africa (OHADA) is now in the process of creating a central database of the Commerce and Movable Credit Register, adopting IT standards for the exchange of data electronically, and considering a project to prepare a draft Uniform Act on digital transactions.⁸¹

d. The Middle East Region

Inspired by the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, the Arab League Model Laws⁸² were recently proposed as guidelines for countries in the region. The Model Laws contain provisions on electronic payments, electronic contracts (including consumer protection) and matters relating to applicable laws and jurisdiction.⁸³ Also, in response to the lack of a global system for resolving online disputes, several states in the Middle East region have adopted legislation aimed at harmonizing the legal framework on e-commerce.⁸⁴

⁸⁰ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 9 (2010) (A/CN.9/706).*

⁸¹ *Id.*

⁸² Model Law for Electronic Transactions and Model Law for Electronic Commerce. *See id.*

⁸³ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 9 (2010) (A/CN.9/706).*

⁸⁴ *Id.*

e. The Caribbean Community (CARICOM)

The Caribbean Community (CARICOM)⁸⁵ has undertaken several initiatives with the general purpose of protecting consumers engaged in e-commerce transactions, including: the CARICOM ICT 4 Development (a program designed to advance the development of the people of the Caribbean Community in a number of areas, e.g., poverty alleviation, capacity building, digital divide, cyber-security, e-governance and e-learning); the draft Model Law on Consumer Protection (2008); and the development of Model Consumer Policies in the areas of electronic commerce, safety, and sustainable consumption.⁸⁶

IV. UNCITRAL: DEVELOPING A GLOBAL ODR SYSTEM

While the progression of regional ODR systems will undoubtedly facilitate the spread of e-commerce between countries located within those regions, such systems are unlikely to have much, if any, effect on the spread of e-commerce between the regions themselves. Many of these systems have their own rules, regulations, time-limits, enforcement mechanisms, etc. and as such, conflicts arising between them are inevitable. In reaction to the growing concerns over these regional disparities, the United Nations Commission on International Trade Law (UNCITRAL) has taken the initiative to establish a global ODR system for the resolution of cross-border e-commerce.

⁸⁵ CARICOM is an organization comprised of 15 Caribbean nations and dependencies, whose main purposes are to promote economic integration and cooperation among its members, to ensure that the benefits of integration are equitably shared, and to coordinate foreign policy. See Ramjeet, Oscar (2009-04-16). "CARICOM countries will speak with one voice in meetings with US and Canadian leaders." *Caribbean Net News*, available at <http://www.caribbeannetnews.com/news-15757--63-63--.html>.

⁸⁶ See *supra* note 38.

a. Background

UNCITRAL was established by the United Nations General Assembly in 1966 to promote the progressive harmonization⁸⁷ and unification⁸⁸ of international trade law.⁸⁹ UNCITRAL has since prepared a wide range of conventions,⁹⁰ model laws⁹¹ and other instruments⁹² dealing with the substantive law governing trade transactions and other aspects of business law which have an impact on international trade.⁹³ UNCITRAL's work is organized and conducted at three levels. The first level is UNCITRAL itself (hereinafter "the Commission").⁹⁴

⁸⁷ "Harmonization" may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. *FAQ – Origin, Mandate and Composition of UNCITRAL*, UNCITRAL (2011), available at http://www.uncitral.org/uncitral/en/about/origin_faq.html. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law. *See id.*

⁸⁸ "Unification" may be seen as the adoption by States of a common legal standard which governs particular aspects of international business transactions. *See id.* A convention is an example of an international instrument which is adopted by States for the unification of the law at an international level. *Id.*

⁸⁹ *See The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law*, United Nations, Vienna 1 (2007), available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf.

⁹⁰ *See, e.g.*, the Convention on the Limitation Period in the International Sale of Goods (1974); the United Nations Convention on the Carriage of Goods by Sea (1978); the United Nations Convention on Contracts for the International Sale of Goods (CISG) (1980); the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988); the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995); the United Nations Convention on the Assignment of Receivables in International Trade (2001); the United Nations Convention on the Use of Electronic Communications in International Contracts (2005); the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the "Rotterdam Rules" (2008).

⁹¹ *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration (1985); Model Law on International Credit Transfers (1992); UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994); Model Law on Cross-border Insolvency (1997); UNCITRAL Model Law on Electronic Signatures (2001); UNCITRAL Model Law on International Commercial Conciliation (2002); Model Legislative Provisions on Privately Financed Infrastructure Projects (2003); UNCITRAL Legislative Guide on Secured Transactions (2007).

⁹² *See, e.g.*, UNCITRAL Arbitration Rules (2010); UNCITRAL Conciliation Rules (1980); UNCITRAL Arbitration Rules (1982); UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

⁹³ *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law*, United Nations, Vienna 1 (2007), available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf.

⁹⁴ *Id.* at 3.

The second level is the intergovernmental working groups comprising all 60 member States⁹⁵ of the Commission. These working groups undertake the development of the topics on the Commission's work program, which devises legal standards specifically designed to simplify trade transactions and reduce associated costs.⁹⁶ The third level is the Secretariat, which assists the Commission and its working groups in the preparation and conduct of their work.⁹⁷

In 2000, the Commission held a preliminary exchange of views and proposals to include ODR in its future work program.⁹⁸ During this exchange, the Commission determined that special attention should be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers.⁹⁹ The member States were in wide agreement that the use of e-commerce tended to blur the distinction between these two groups and that, in a number of countries, the use of arbitration for the settlement of commercial disputes was unavailable for reasons involving public policy considerations.¹⁰⁰

Many States also voiced concerns that traditional dispute resolution mechanisms, including litigation through the courts, were inappropriate for addressing cross-border e-

⁹⁵ Algeria, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, Fiji, France, Gabon, Germany, Greece, Honduras, India, Iran, Israel, Italy, Japan, Jordan, Kenya, Latvia, Malaysia, Malta, Mauritius, Mexico, Morocco, Namibia, Nigeria, Norway, Pakistan, Portugal, Philippines, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Sri Lanka, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela. *See id.*

⁹⁶ *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law*, United Nations, Vienna 3 (2007), available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf.

⁹⁷ *Id.*

⁹⁸ *See Annotated provisional agenda, Official Records of the General Assembly, Twenty-second Session*, United Nations, Vienna 3 (2010) (A/CN.9/WG.III/WP.104).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

commerce disputes because they were too costly and time-consuming in relation to the value of the transaction in controversy. Furthermore, difficult questions often arose in the cross-border context with regard to the appropriate forum, as well as the legal consequences attached thereto.

One approach, followed in the EU, through the enactment of the Brussels I and Rome I Regulations, has been to provide for jurisdiction in the forum of the consumer. That solution, although ideal for consumers, raises a number of practical problems if transposed to the international level, the most obvious of which being the difficulty for the consumer to utilize enforcement remedies and for the vendor to handle large volumes of claims in many different countries where consumers were located.¹⁰¹ Thus, there was a generally-shared view that cross-border enforcement of awards was difficult, if not impossible, in light of the lack of treaties providing for such enforcement.¹⁰²

b. Composition of Working Group III

In 2010, after nearly a decade of discussion and concomitant research and study on the issue, Working Group III (or “the Working Group”) was established to undertake work in the field of ODR relating to cross-border e-commerce transactions, including B2B and B2C transactions.¹⁰³ Working Group III is composed of all States members of the Commission. States which are not members of the Commission, as well as international governmental organizations may attend sessions as observers and participate in deliberations.¹⁰⁴ In addition, invited

¹⁰¹ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 12 (2010) (A/CN.9/706).*

¹⁰² *Annotated provisional agenda, Official Records of the General Assembly, Twenty-second Session, United Nations, Vienna 4 (2010) (A/CN.9/WG.III/WP.104).*

¹⁰³ *Id.*

¹⁰⁴ *See Annotated provisional agenda, Official Records of the General Assembly, Twenty-second Session, United Nations, Vienna 1 (2010) (A/CN.9/WG.III/WP.104).*

international NGOs may attend the session as observers and represent their organizations' views on matters where the organization concerned has expertise or international experience.¹⁰⁵

c. Scope of work

At its forty-third session in New York, 2010 the Commission expressed some concerns regarding the scope of work to be undertaken. It was initially posited that the scope should be limited to B2B transactions, as issues related to consumer protection were difficult to harmonize because consumer protection laws and policies varied significantly from State to State.¹⁰⁶ It was further stated that work in that area should be conducted with extreme caution in order to avoid undue interference with consumer protection legislation.¹⁰⁷

In response to these suggestions, the view was expressed that, in the present electronic environment, consumer transactions constituted a significant portion of cross-border electronic and mobile commercial transactions.¹⁰⁸ It was also argued that it was practically and theoretically difficult to distinguish not only between B2B and B2C transactions but also between merchants and consumers.¹⁰⁹ The Commission concluded that, although the scope of work undertaken must be carefully designed not to affect the rights of consumers, it would be feasible to develop a generic set of rules applicable to both kinds of transactions. Working Group III is now in the process of developing a system of legal standards that will facilitate the increased use of ODR

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *Annotated provisional agenda, Official Records of the General Assembly, Twenty-second Session, United Nations, Vienna 4 (2010) (A/CN.9/WG.III/WP.104).*

mechanisms necessary to provide for the quick resolution and enforcement of both low value-high volume B2B and B2C disputes across borders.

d. Drafting the procedural framework

At its twenty-second session in Vienna, 2010, the Working Group requested that the Secretariat prepare draft generic procedural rules for ODR, taking into account that the types of claims with which ODR would deal should be B2B and B2C cross-border, low value-high volume transactions.¹¹⁰ On March 17, 2011, the Secretariat distributed a note containing an annotated draft of fast-track procedural rules (“the Rules”). According to the Secretariat, these “simple, user-friendly generic rules . . . reflect the low-value of claims involved, the need for a speedy procedure, and . . . emphasize conciliation, since the majority of cases are resolved at that stage. . . .”¹¹¹

Initial Observations

The Rules are somewhat vague with regards to their scope. While they provide for the settlement of disputes arising from “any” cross-border e-commerce transaction, it remains unclear whether their application will ultimately be limited to a certain kind of dispute (e.g. the sale of goods), or whether certain kinds of disputes will be excluded from their scope (e.g. disputes which raise issues of bodily injury, family law, taxation, intellectual property, privacy violations, torts, or claims for indirect and consequential loss).¹¹² It is likely that the Working

¹¹⁰ *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, Note by the Secretariat, Official Records of the General Assembly, Twenty-third Session, United Nations, New York 2 (2011) (A/CN.9/WG.III/WP.107).*

¹¹¹ *Id.* at 3.

¹¹² *See Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, Note by the Secretariat, Official Records of the General Assembly, Twenty-third Session, United Nations, New York 3 (2011) (A/CN.9/WG.III/WP.107).*

Group will develop a set of “guidelines for ODR providers” that will clarify this issue in more detail at a later time.¹¹³

The Rules set forth a settlement structure similar to that of the OAS/ODR Initiative¹¹⁴ and include an initial negotiation phase, followed by a facilitated settlement phase and, if that second phase is inconclusive, by the final and binding decision of an ODR provider-appointed neutral.¹¹⁵ The general consensus is that a majority of e-commerce disputes will be resolved in either the first or second stages of the process.¹¹⁶ Also, to take into account the need for a speedy procedure, the neutral may handle both the phases of facilitated settlement and arbitration.¹¹⁷

The Rules also establish what the notice of dispute and appropriate response should include and although these notice and response requirements reflect a certain degree of formality, the parties are encouraged to propose solutions to resolve the dispute at the outset.¹¹⁸ The Rules do not stipulate a specific period of time after which a neutral (i.e. mediator) will be appointed to help facilitate resolution of a dispute, but the parties are provided two calendar days from the date of this appointment within which to object.¹¹⁹

¹¹³ *Id.*

¹¹⁴ *See supra* note 70 and corresponding text.

¹¹⁵ *See generally Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, Note by the Secretariat, Official Records of the General Assembly, Twenty-third Session, United Nations, New York (2011) (A/CN.9/WG.III/WP.107).*

¹¹⁶ *See id.* at 3.

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 10.

¹¹⁹ *See id.* at 13.

An appointed neutral's duties of impartiality, independence, and disclosure mirror the UNCITRAL Arbitration Rules,¹²⁰ and, in accepting such appointment, the neutral represents that he or she has made sufficient time available to adequately resolve the parties' dispute.¹²¹ This neutral exercises considerable discretion over the conduct of the proceeding and may rule on his or her own jurisdiction, including any objections over the existence or validity of the ODR agreement itself.¹²²

The Secretariat notes *inter alia* the possibility of consolidation of claims,¹²³ although it is unclear whether such consolidation would ultimately be restricted to the multiple claims of a single consumer or be available to several different consumer complaints filed with the same vendor. It may be the case that a single vendor must respond to several claims at once, and assuming these claims relate to that vendor's particularly fraudulent selling tactics, the concomitant reporting of multiple claims will certainly raise a consumer protection red flag. Unfortunately, the BBB and other agencies are not equipped to deal with the multitude of such claims. Therefore, the bundling of several small claims all involving the same recalcitrant vendor could alleviate some of this agency strain by allowing for justice on a consolidated basis.

The Rules are specially tailored to apply to low cost-high volume e-commerce disputes and are designed in such a way as to provide for the simple, accessible, and expedient resolution

¹²⁰ See UNCITRAL RULES OF ARBITRATION, Art. 11, Revised (2010).

¹²¹ See *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules*, Note by the Secretariat, *Official Records of the General Assembly, Twenty-third Session*, United Nations, New York 13 (2011) (A/CN.9/WG.III/WP.107).

¹²² *Id.*

¹²³ See *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules*, Note by the Secretariat, *Official Records of the General Assembly, Twenty-third Session*, United Nations, New York 7 (2011) (A/CN.9/WG.III/WP.107).

of those disputes. The Rules mark the Commission's explicit first steps in constructing a global ODR system, but many challenges lie ahead.

V. BARRIERS TO GLOBALIZATION

In designing a global ODR system, UNCITRAL faces a rather formidable task: devising a cross-border dispute settlement scheme that can navigate the inherently complex technical, legal, and cultural differences of the international community, all the while ensuring that the needs of all the parties involved are adequately addressed. Accomplishing such a task requires tremendous ingenuity, diligence, and cooperation; further illustrating why, after more than a decade of research and discussion, the global system has only recently begun to take form.

a. Technical challenges

Administrative concerns

Several of the challenges facing the construction of a global ODR system are of a technical nature and relate to the ability to create and administer: a system which is able to account for scalability (i.e. it is able to continue functioning effectively as the number of cases increases); and a central structure, or clearinghouse, for data communication protocols that will ensure that all of the various endpoints of the network can communicate in real time with one other, despite any existing differences in language and culture.¹²⁴ Confidentiality and issues relating to the security of party communications are also of great importance to the system's success.

Conservative estimates currently place the volume of global consumer disputes in the hundreds of millions of cases annually, and this number is projected to rise as e-commerce

¹²⁴ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 15 (2010) (A/CN.9/706).*

expands.¹²⁵ Therefore, any system that the Commission develops will have to rely heavily on sophisticated software capable of scaling.¹²⁶ Furthermore, every ODR provider or national authority in the world has constructed their website on slightly different platforms.¹²⁷ Thus, the Commission's success in building a multinational ODR system will ultimately depend on the cooperation of each individual provider in the sharing of its data and subsequent willingness to participate within an integrated international ODR conglomerate; no small feat considering that there are currently several differing schools of thought regarding with whom responsibility over ODR system administration should lie. Some envisage an ODR system operated entirely by private entities,¹²⁸ while others envisage a semi-private ODR system with government aiding in enforcement,¹²⁹ and still others, a wholly government-run ODR system.¹³⁰

Another challenge for ODR designers is establishing what the term "low value" means. Obviously, perspectives regarding value of a dispute are going to vary depending on where individuals are globally situated. What is deemed to be of high value in one country may be of relatively low value in another. Furthermore, the cost of the proceeding itself must also be a factor of consideration. For example, the cost of filing an arbitration proceeding with the BBB is about \$70.¹³¹ If a consumer is contesting a \$50 purchase, resolving this dispute with the BBB will actually cost that consumer more than the dispute itself. No reasonable person would ever

¹²⁵ See Rule, Rogers, and Del Duca, *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments*, 42 UCC L.J. 3, 229 (2010).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *supra* notes 65-69 & corresponding text ("U.S. proposals").

¹²⁹ See *supra* notes 57-64 & corresponding text ("European proposals").

¹³⁰ See *supra* notes 76-81 & corresponding text ("African proposals").

¹³¹ Conversation with John Singer, of Counsel, the Federal Trade Commission (FTC) (March 22, 2011).

agree to such a proposition. If, however, that consumer could obtain the same type of juridical proceeding at a cost of only \$5, it would be not only practical for the consumer to attempt to obtain relief, but highly probable.

Some commentators have put forth the notion that it may be to the benefit of the system to leave unspecified what is appropriately considered “of value” for the purposes of online dispute resolution. The Concilianet System in Mexico, for example, does not have a minimum/maximum requirement for the resolution of disputes under its system, the primary reasoning being that an ODR system specifically engineered to resolve low cost-high volume disputes will ultimately regulate itself and that setting value limits on such disputes could potentially create an additional burden on many already-inhibited consumers.¹³²

b. Legal challenges

Applicable law and enforcement issues

Other challenges facing the global system designers are of a legal nature, and relate to the difficulty of designing a speedy, inexpensive, global conciliation and arbitration system that can deal specifically with e-commerce disputes, while remaining fully compliant with due process requirements and ensuring the enforcement of its resolutions. Regulatory frameworks for e-commerce tend to vary among countries. In addition to differences in their substantive laws, many countries have different approaches toward regulation.¹³³ This disparity in e-commerce regulation can have implications for both businesses and consumers, particularly when they are engaged in cross-border trade.¹³⁴ Thus, the goal for the Commission must be to develop a system

¹³² For more information on Concilianet, go to <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>.

¹³³ See OECD Conference Report, Empowering e-commerce consumers, December 8-10, 2009, DSTI/CP(2009)20/FINAL, para. 38.

¹³⁴ Consumer rights and obligations vary considerably from one jurisdiction to another. For example, some countries use generic regulations, developed in other consumer protection contexts, to address e-commerce issues, while

based on general principles and generic rules of fairness and commercial practices that can be adapted to the local needs of the parties involved, wherever they may be situated.¹³⁵

The issue of enforcement is of tremendous importance as well. As the draft procedural rules illustrate, any award issued by the neutral is final and binding on both parties.¹³⁶ Without a proper enforcement mechanism, however, such an award is worth little more than the paper upon which it is printed. There is a general consensus among Commission members that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),¹³⁷ would be applicable to the enforcement of arbitral awards under ODR cases involving B2B and B2C disputes, although a strong minority of dissenters are skeptical that this is in fact the case.¹³⁸

Even assuming *arguendo* that the New York Convention did apply to the enforcement of consumer awards, this process can be both expensive and time-consuming. As such, reliance on the New York Convention mechanism alone would be insufficient.¹³⁹ Other private options have therefore been suggested, including: the use of payment providers (e.g. PayPal, Visa, Mastercard,

others have adopted regulations dealing specifically with e-commerce and consumers. *See Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 15 (2010) (A/CN.9/706).*

¹³⁵ *See Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 15 (2010) (A/CN.9/706).*

¹³⁶ *See supra* note 151.

¹³⁷ The New York Convention, prepared by the United Nations and adopted by diplomatic conference on June 10, 1958, is widely recognized as the foundational instrument of international arbitration. The Convention requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. *See generally* CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (THE “NEW YORK CONVENTION”) (1958).

¹³⁸ *See Report of Working Group III (Online Dispute Resolution), Twenty-second Session, United Nations, Vienna 17 (2011) (A/CN.9/716).*

¹³⁹ *Id.*

etc.), who would be capable of freezing accounts and transferring funds between disputants; the certifying of merchants who would undertake to comply with ODR decisions rendered against them and be required to post notices of previous non-compliance; and utilizing trustmarks (e.g. the Better Business Bureaus' BBBOnLine logo) to increase merchant transparency and help consumers indentify reputable firms.¹⁴⁰

Res judicata issues may also exist when considering the appropriateness of claims brought under the ODR system. The system envisaged by the Commission does not contemplate the resolution of claims for which consequential damages are sought. This feature raises the question of whether the resolution of a dispute under the ODR method would subsequently preclude the resolution of separate claims arising from the same online transaction. Perhaps there is a credible difference between the statements, “the toaster was defective” and “the defective toaster burned down my house.” Arguably these are two entirely separate claims – one specifically addressing the contract itself and one addressing the consequential damages arising out of the contract. It remains to be seen, however, how a court would address this issue and what if any deference it would give to an ODR neutral’s factual and/or legal determinations.

c. Cultural challenges

The language divide

The Commission must also overcome various cultural and linguistic hurdles. Certain local systems for resolving disputes arising in the context of cross-border consumer transactions may actually be more culturally-appropriate than a global system.¹⁴¹ This is primarily due to the

¹⁴⁰ *See id.*

¹⁴¹ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 16 (2010) (A/CN.9/706).*

fact that many less-developed nations lack the online environment and infrastructure common to the developed world.¹⁴²

The draft procedural rules provide that ODR proceedings will be conducted in the language used in connection with the transaction in dispute, but that the parties can mutually consent to another language.¹⁴³ Furthermore, many online providers are able to translate a multitude of languages at the parties' convenience. These developments are a good starting point for tackling the language barriers, but the Rules currently do little else to account for the broader disparity in the nature and type of disputes prevailing within different societies. Thus, the global system must develop incrementally to ensure that the technology and processes adapt to local conditions and cultures.¹⁴⁴

VI. CONCLUSION

*“Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions.”*¹⁴⁵

Traditional judicial mechanisms do not offer an adequate legal recourse for the resolution of cross-border e-commerce disputes. Domestic and regional ODR initiatives are equally incapable of governing the resolution of these disputes at an international level. Thus, consumer

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, Official Records of the General Assembly, Forty-third Session, United Nations, New York 16 (2010) (A/CN.9/706).*

¹⁴⁵ *FAQ – Origin, Mandate and Composition of UNCITRAL*, UNCITRAL (2011), available at http://www.uncitral.org/uncitral/en/about/origin_faq.html.

confidence in cross-border e-commerce transactions is virtually obsolete. In response to the growing concern over the erosion of consumer trust and the lack of an agreed upon international standard on ODR, the United Nations Commission on International Trade Law (UNCITRAL) has established a working group to design and implement a global ODR system aimed at resolving low value-high volume B2B and B2C e-commerce disputes, without imposing costs, delays, or burdens that are prohibitively disproportionate to the economic values at stake.

Many challenges face the creation of a global ODR system that can meet the needs of all parties involved, while simultaneously accounting for the various jurisdictional differences appurtenant to those parties. To tackle these challenges, the Commission must continue to raise global awareness among merchants and consumers regarding the impact and increasing importance of ODR in the context of cross-border e-commerce disputes. The Commission must also ensure that national legislation recognizes the validity and enforceability the international ODR mechanism. Finally, the Commission must devote sufficient attention to the technical, legal, and cultural differences of the nations under which this ODR mechanism is utilized.