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ONLINE SMALL CLAIM DISPUTE RESOLUTION
DEVELOPMENTS – PROGRESS ON A SOFT LAW FOR
CROSS-BORDER CONSUMER SALES AND THE
DEVELOPMENT OF A GLOBAL CONSUMER LAW FORUM

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Fifteen Years of ODR Experience: The BBB Online Reliability Trust Mark Program

Steven J. Cole* and Charles I. Underhill**

Synopsis

This paper is based on the Better Business Bureau's 15 years of experience in launching and administering a North American consumer "trust mark" program, BBBOOnLine. In establishing this program, the BBB saw — and continue to see — the important role such programs could play in building the level of consumer trust necessary to engage in cross-border consumer transactions.

The authors note that the thrust of the paper relates to relatively small-dollar-value (and generally high volume) consumer disputes. As a consequence, its observations and recommendations — particularly with respect to complaint handling and formal arbitration — generally do not apply in the high-dollar-value (and small volume) world of cross-border commercial (B2B) disputes. In that arena, cross-border dispute resolution has been working well for years.

The paper:

- Encourages the use of effective self-regulatory systems and processes, which the authors believe allow nimble responses to a rapidly changing technological and com-

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mercial environment. Examples from the BBB experience are presented;

- Explores three major reasons why discussions on “choice of law” and jurisdiction have been largely unable to address real marketplace problems;
- Discusses standards for cross-border dispute resolution programs, which the authors believe must — at a very minimum — address six key areas;
- Suggests three elements believed essential for a strong, self-regulatory framework in this area; and,
- Discusses the appropriate roles of both industry and governments in nurturing and supporting the suggested “trust mark” and companion, cross-border complaint handling and online dispute resolution (ODR) processes.

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In Summary

Background and Introduction

CBBB and BBBO nLine.

The Council of Better Business Bureaus (CBBB) is a North American, not-for-profit organization representing its 122 member Better Business Bureaus throughout the United States and Canada. With over 400,000 local BBB Accredited Businesses, and over 200 leading-edge national and multinational corporate partners, this alliance supports the Better Business Bureau system and its self-regulation activities through corporate partnerships with CBBB. CBBB’s vision is “An ethical marketplace where buyers and sellers can trust each other”, while its mission is “To be the leader in advancing marketplace trust”.

The BBBO nLine Program, discussed extensively in this document, was originally launched as a subsidiary corpora-

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tion of CBBB, with its own Board of Directors representing leading technology, consumer product, marketing and content-provider companies with a strong interest in the success of ecommerce in a borderless marketplace. In the mid-2000's, BBBO nLine ceased to be a separate corporation, and as of 2010 — with over 64,000 participating companies holding its “trust mark”, it was being integrated into the basic BBB “Accredited Business” program.

Today — almost 15 years after the BBBO nLine program was first conceived — there are still only a limited number of representative models for successful cross-border, third-party¹ consumer dispute resolution mechanisms, since both the dollar value and number of such business to consumer (B2C or C2C) transactions remain relatively small. However, the BBB provides an excellent, real-world example of a mechanism that handled almost one million individual consumer complaints, conducted over 31,000 informal telephone mediations and conducted over 5,000 formal mediation and arbitration hearings in 2009.

Self-Regulation

While business self-regulation enjoys a long tradition in the United States, it is less understood in other parts of the world. For purposes of this paper, the term “self” in self-regulation should not be construed to mean exclusively industry. Rather, it should be considered as a process driven by the enlightened self-interest of industry, supported in key

¹We note that payment systems' (Visa, MasterCard, American Express, PayPal, etc.) dispute resolution mechanisms have already become a major factor in resolving certain types of small-dollar-value consumer/business issues (such as non-delivery or goods not as originally represented; other disputes, such as warranty/product quality/performance issues are generally not covered under the payment systems' procedures). The importance of these systems is certainly demonstrated in the United States (where law and regulation provide a reasonable framework); we believe, with effective enabling legislation in key markets, these will almost certainly become the second “front line” (after direct consumer/business negotiations) for resolution of many consumer/business disputes. When we refer to “limited representative models”, we are referring to third-party ODR mechanisms that are independent of buyer, seller and/or payment mechanism.

ways by government to the ultimate benefit of consumers.² The Better Business Bureau system has significant, highly successful experience with self-regulation in North America. The key elements in the BBB self-regulatory process are performance and voluntary compliance standards:

- **Developed by industry.** Industry representatives have a significant understanding of the depth and breadth of the problems that must be addressed. In addition, they recognize the need for speed, flexibility and commitment as well as the need to responsibly deal with public concerns. Finally, industry standards may be able to gain better voluntary acceptance, achieve substantial compliance faster and more rapidly respond to changing market conditions.
- **Recognized and complemented by government.** By providing incentives for industry to develop good procedures,³ oversight to ensure that industry is vigilant in managing the self-regulatory process and taking vigorous and visible action when necessary to support the process.⁴
- **Credible to the public.** Industry representatives and self-regulatory organizations must understand that a self-regulatory process that lacks substance or fails to deal firmly and openly with conduct at variance with the voluntary guidelines will not be perceived as

²An excellent discussion of self-regulation in the context of e-commerce (“Observations on the State of Self-Regulation of the Internet”), prepared by the Internet Law and Policy Forum for an October 1998 OECD Ottawa conference can be found at: <http://www.ilpf.org/event/selfreg/>.

³The U.S. Congress provided an incentive for industry to implement informal dispute resolution programs by providing that warranties may include a provision requiring customers to try to resolve warranty disputes by means of an informal dispute resolution mechanism before going to court, provided the mechanism meets certain performance standards established by the FTC (For details, see note 26). State “lemon laws” for new vehicle warranties contain similar incentives. As an example, California encourages manufacturers to establish dispute mechanisms “certified” by the state, in essence providing that consumers may be entitled to “double damages” in a successful court proceeding if the manufacturer does not negotiate in “good faith”. Evidence of “good faith” is that a manufacturer operates a “certified” mechanism.

⁴For representative samples in the advertising self-regulatory arena, see many of the CBBB news releases at <http://www.narcpartners.org/>

meaningful by the consuming public. That, in turn, will lead to enactment of precisely the type of often sweeping regulation that can strangle innovation and discourage competition. The BBB experience has established that the synergistic relationship of meaningful industry standards and effective and supportive government actions will result in public confidence that will, in turn, positively reinforce industry's willingness to continue to develop meaningful standards.

Informal Dispute Resolution

Conciliation, mediation and arbitration of various types of disputes enjoy long traditions in many cultures. Arbitration, in particular, has evolved a formal body of national and international rules and procedures.

When disputing parties voluntarily enter these processes, and when the agreed-upon rules and procedures are scrupulously observed, a fast, fair and inexpensive resolution of even a major, complex dispute is probable. While a number of well-known organizations have experience with international commercial arbitration, there are only a few representative models of successful cross-border consumer dispute resolution mechanisms, since both the dollar value and number of such transactions currently remain relatively small, when compared with the much more robust world of international commercial transactions.

The Cross-Border, Consumer Context

This paper⁵ discusses transactions consummated entirely online, deals exclusively with "consumer" disputes (those involving a product or service normally used for personal, family or household use) and covers transactions that cross international borders. Many of the rules and norms that have grown up around consumer transactions are fundamen-

⁵Originally presented at a September 2000 session of the Internet Law and Policy Forum's session on Global Networks/Local Rules, this paper — authored by Steven J. Cole and Charles I. Underhill for the Council of Better Business Bureaus and its Internet subsidiary, BBBOnline, Inc. — was entitled *Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution*. While this version of the paper has been updated in a number of respects, the authors believe most of the issues discussed have continued relevance a decade later.

tally very different than those applicable to commercial (B2B) commerce.

Accordingly, there are some important limitations to the discussion in this paper:

- The framework is that of electronic commerce; thus, the paper deals with transactions consummated entirely online.
- The paper deals exclusively with “consumer” disputes — those involving a product or service normally used for personal, family or household purposes. These can be products and services sold by a traditional business to a classic consumer (B2C transactions) or — with the advent of online auctions — may easily include a consumer “seller” marketing to a consumer “buyer” (a C2C transaction).
- The consumer transactions that are the subject of the paper must cross international borders. Where the transaction involves parties within the same country, the paper assumes that the country’s laws, regulations and formal/informal dispute resolution mechanisms will govern.

Drawing on experience in the United States and Canada, the paper’s authors identify three major reasons why discussions on “choice of law” and jurisdiction have been largely unable to address real marketplace problems: 1) Consumers do not utilize their rights to judicial redress for most problems they encounter in the marketplace; 2) Solving cross border jurisdictional and enforcement-related issues in the absence of a common legal framework will require a standardized set of meaningful consumer protections; and, 3) Were issues of jurisdictional and common standards to be satisfactorily resolved, consumers would still require a convenient way to select from among many alternatives those reliable companies with which to do business.

The authors discuss the BBB’s distinguished and widely recognized role in resolving advertising, privacy, warranty and general consumer disputes, citing specific examples from the BBB’s nearly 100 years of experience in establishing industry codes of practice. The paper notes the methods the BBB employs to assist consumers in identifying reliable vendors of consumer products and services.

The paper discusses standards for cross-border consumer dispute resolution programs, which the authors believe must

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— at a very minimum — address six key areas of fairness, visibility, accessibility, timeliness, finality and enforcement. It also raises issues of special interest in building an online mechanism.

The paper makes the following recommendations:

- A self-regulatory framework provides the best model for consumer protection in the global ecommerce environment. That framework includes: 1) a strong Code for online consumer protection; 2) a consumer dispute resolution mechanism that is fast, fair and accessible; 3) a “trust mark” to enable consumers to recognize merchants that have made commitments to the Code and to effective dispute resolution.
- Governments play a vital role in the proposed BBB framework by: 1) Adopting principles that complement and/or encourage the development of private Codes; 2) Establishing flexible standards for dispute resolution programs; 3) Establishing methods of certifying “trust mark” programs and auditing their performance; 4) Taking action under existing legislation/regulation when companies fail to honor commitments.
- Industry plays a pivotal role in: 1) Encouraging the development of meaningful standards for online commerce; 2) Funding the development of the technology infrastructure that will be necessary to ensure dispute resolution mechanisms are both cost-effective and can be made available at little or no cost to consumers; 3) Ensuring that opportunities exist which encourage effective partnering among various countries’ consumer groups, dispute resolution programs and self-regulatory organizations; 4) Developing private sector funding for new programs.
- Online dispute resolution models must be developed to take advantage of new technologies while not sacrificing traditional fairness principles.

Finally, the authors discuss several observations and further thoughts regarding some of the paper’s original assumptions.

The Problem

Many of the early discussions regarding consumer protection in the global, cross-border context centered on so-called “choice of law” and jurisdiction issues. Fifteen years after

the creation of the BBOnLine Reliability Program, it remains clear that these ongoing discussions, while necessary and promising, are only beginning to offer realistic solutions. Further, even if the many “choice of law” issues were resolved, BBB experience in North America suggests that judicial resolution alone would not offer a true, complete solution for cross border consumer disputes. We believe there are three major explanations for this:

- **First, our experience in the North America is that consumers do not utilize their rights to judicial redress for most problems they encounter in the marketplace.** There are many reasons for this reluctance to use the many available formal elements of the redress system:
 - the high cost of litigation in relation to the relatively small amount of the claim;
 - the frequent small dollar value to high emotional and convenience value disputes;
 - varying education levels;
 - fear of the many unfamiliar and complex elements of the legal process; and,
 - the weakness of consumers’ strictly “legal” positions and remedies compared to the perceived harms or inconveniences suffered.

These barriers, coupled with others uniquely attributable to international transactions, surely are all increased significantly with respect to disputes arising cross borders.

Effective out-of-court remedies that are accessible, fair and cost efficient are needed. In the United States, these are provided by the private sector through a variety of techniques, such as third party dispute settlement mechanisms (e.g., the BBB), sophisticated internal company administered consumer service and complaint resolution procedures, and, in some jurisdictions, government-sponsored mediation programs. Small claims court procedures where they exist also provide effective redress where traditional court remedies are ineffective or underutilized, and government enforcement in cases of substantial law violations and significant consumer injury can be helpful. Globally, consumer needs are likely to be at least as great, while the non-judicial remedies remain, overall, less available at the

present time, and are likely to remain so for the foreseeable future.

In short, while it is important to encourage businesses and consumers to participate in ecommerce through the development of governmental rules and procedures that provide predictability and fairness, it is equally important to recognize the limitations of these rules as effective redress mechanisms for most consumers.

We believe that alternative dispute resolution programs will almost certainly prove to be extremely effective self-regulatory tools through which most cross-border, online consumer disputes will be efficiently and effectively resolved.

- **Second, solving cross border jurisdictional and enforcement-related issues, while important, may make it even more essential that consumers and business can look to a standardized framework for minimum consumer protections.**

Without minimum standards, dispute resolvers (whether they represent formal or informal mechanisms) have few, if any, common benchmarks against which to measure adherence or deviation in a given transaction. Furthermore, formal “choice of law” and jurisdictional rules that otherwise appear reasonable may fail to gain widespread acceptance in the public sector and consumer communities. A reasonable fear that a “lowest common denominator” legal framework will prevail that could impede support for otherwise reasonable proposals. Former U. S. Secretary of Commerce William M. Daley summed this up neatly when he expressed his suspicion that:

“ . . . consumer protection officials all over the world will be very reluctant to say that their consumers are not protected by local law . . . They will need a great deal of certainty that effective protections are available, before they would even think about limiting the scope of their local laws.”⁶

In the United States, we have learned much in our own “regulatory laboratory” about the costs and burdens that can result from widely varying consumer protection regimes. Lemon laws, retail advertising laws and

⁶In a 1999 California speech to the Amdahl’s Good Government Series.

environmental protections are three examples of legislative approaches that differ substantially within the U.S. from jurisdiction to jurisdiction. As a consequence, companies that operate across jurisdictional boundaries incur increased compliance costs, a problem that has substantially increased as the number of competing jurisdictions has expanded across the global market.

The BBB believes that — at the least — some sort of uniform, minimum standards of truthful advertising and fair business practices are essential, so consumers will have trust in the online medium and businesses that voluntarily adopt those minimum standards can achieve compliance at reasonable cost. Such minimum standards are theoretically possible to devise through governmental treaties. Unfortunately, however time consuming and difficult it may prove to be to establish such standards within any single country, the difficulty increases a hundred fold when establishing standards which rely on acceptance across national boundaries. Harmonizing conflicting standards has proven difficult to accomplish within meaningful timeframes. On the other hand, timely and effective voluntary standards are very possible to develop through private sector efforts, especially if governments, working cooperatively, provide incentives for those efforts.

- **Finally, were issues of jurisdiction and common standards to be satisfactorily resolved, a third crucial need would remain. How can a consumer conveniently select — from among so many alternatives -a reliable company with which to do business, in order to minimize future disputes?**

A dominant characteristic of the online market is the low entry barriers for new competitors. Some of these new competitors take liberties with the legal rules and essential honesty. Many others, however, put consumers at risk not with any deliberate intent to commit fraud or deception, but through their inexperience and misjudgment(s) about how to advertise accurately, deliver on promises made and fulfill orders as promised and on a timely basis — particularly when transactions occur across borders, involving differing laws and consumer expectations, not to mention nuances of language and custom.

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The array of information available online can be overwhelming. While this provides consumers with unprecedented opportunities to equalize the imbalance of knowledge that has traditionally existed between buyers and sellers, it also creates new difficulties. Drowning in new sources of information (often of questionable value and occasionally intentionally misleading or deceptive), how can most consumers determine which businesses, products and services are worthy of trust?

In the “brick and mortar” world, the construction of a chain of retail outlets is a time-consuming financial barrier to entry into the traditional business world; as a consequence, it is also one visible measure of the strength of any business that can sustain such a network of locations. In e-commerce, electronic “storefront” web sites are inexpensive to produce, a major, positive factor ensuring ease of market entry. However, absent most of the traditional cues available in the physical marketplace (not only substantial facilities, but such other important resources as the relationship with store personnel, the type of media placements for advertising, the touch and feel of the merchandise, etc.), consumers lack some important traditional “cues” for good decision making before entering into online transactions.

The same can be said of online direct marketing. The costs entailed in traditional mass marketing (e.g. television advertising and the costs of printing and mailing catalogs and other promotional materials), often — and usually correctly — led consumers to conclude that the very existence of the company’s substantial mass marketing program provided evidence of that company’s financial substance and reliability. The minimal costs of online marketing provide consumers with no such reliability “touchstone”.

Arguments over “choice of law” and jurisdictional rules focus only on managing disputes after the fact, without addressing the underlying cause of many disputes — lack of adequate information before completing an online transaction. A reliable system that would allow consumers to identify companies pledged to a set of common standards of online commerce and effective dispute resolution would foster the growth of e-commerce for

both businesses and consumers. Ideally, it would also minimize the number of online disputes.

**The Better Business Bureau's 15-Year Experience:
Three Key Elements In The Self-Regulatory Framework**

The Better Business Bureau system, through activities of the BBBs in local communities, and through the national and, more recently, international activities of the CBBB (with respect to online and offline transactions), together offer a working model for others to emulate. Here's how the BBB has addressed the problems identified above.

- **First, the BBB system is one of the largest and most experienced providers of informal consumer dispute settlement services in the North America, trusted widely by both business and consumers.**

BBB has handled nearly three million cases in its mediation and arbitration programs since the early 1980's, not to mention the additional multi-millions of informal complaint-handling cases undertaken in its history. BBB mediation and arbitration programs are almost always free to consumers, and serve as widely recognized models of speed, convenience, due process, flexibility and competence. BBB cases, in areas as diverse as the automobile industry,⁷ national advertising⁸ and privacy,⁹ are decided using a variety of different techniques applicable to the particular situation, including both equity-based decisions and those based upon the application of legal principles. Trained subject matter professionals and trained volunteers, as appropriate, are used with considerable success.

- **Second, the BBB system has a nearly 100-year tradition of working with the business community to set or administer uniform standards of fair advertising and business practice.**

In October of 2000, following an extensive consultative process, BBBOnLine released its Code of Online Busi-

⁷See: <http://www.bbb.org/us/auto-line/us-process/>

⁸See: <http://www.bbb.org/us/About-National-Advertising-Division/>

⁹See: <http://www.bbb.org/us/european-union-dispute-resolution/>

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ness Practices.¹⁰ The Code provided guidance for all businesses, but BBBO nLine-participating companies were contractually committed to its provisions, which covered not only advertising, and but also “transaction” issues.

This Online Code activity was an outgrowth of the renowned BBB Code of Advertising,¹¹ which evolved over many years, is regularly consulted by the retail industry and has formed the basis for numerous local government advertising codes as well as the important Federal Trade Commission Guides Against Deceptive Pricing.¹² CBBB’s national advertising program, administered by CBBB’s National Advertising Division (NAD)¹³ under policies established by the National Advertising Review Council, an alliance of several major advertising trade associations,¹⁴ has been called by former Federal Trade Commission Chairman Robert Pitofsky the best example of self-regulation he has seen. The CBBB’s Children’s Advertising Review Unit (CARU) has been a leader in setting advertising standards¹⁵ applicable to the unique needs and cognitive abilities of children, and, like NAD, enjoys an outstanding level of voluntary compliance by industry. More recently, the CBBB has implemented self-regulatory programs for electronic retailing¹⁶ and the children’s food and beverage industry¹⁷ and is now working in collaboration with other industry groups in developing an online behavioral advertising (“OBA”) self-regulation

¹⁰Not currently available on the BBB site; most elements of the original Code were subsequently incorporated into other BBB standards. For a copy of the original (in English, French, German and/or Spanish), see: <http://tinyurl.com/2g3umxt>

¹¹See: <http://www.bbb.org/us/code-of-advertising/>

¹²See: <http://www.ftc.gov/bcp/guides/deceptprc.htm>

¹³See: <http://www.bbb.org/us/Advertising-Review-Services/>

¹⁴See: <http://www.narcpartners.org/about/partners.aspx>

¹⁵See: <http://www.bbb.org/us/children-advertising-review-unit-guidelines/>

¹⁶See: <http://www.bbb.org/us/electronic-retailing-self-regulation-program/>

¹⁷See: <http://www.bbb.org/us/children-food-beverage-advertising-initiative/>

process. As a first step, major OBA Principles were released in July 2009.¹⁸

Separate from the advertising industry, the BBB Wise Giving Alliance (WGA) brings the BBB experience in business self-regulation to the U.S. charitable community, setting, implementing and reporting upon (at both national and local levels) widely observed fund raising, governance and accountability standards¹⁹ for soliciting organizations.

BBB standard-setting activities work for three essential reasons. First, they are developed and implemented “with” industry, and are not done “to” industry. They are examples of self-regulation at its best. Second, the BBB corporate partners (and supporters) understand that the self-regulation programs will not serve them if these programs do not effectively and transparently serve their customers.

Consequently, while BBB standards and implementation activities are practical and reasonable from a business perspective, they are fair and responsive to consumers.

Finally, since BBB self-regulation must not only be effective, but must be seen to be effective, businesses — from the largest multi-national companies to the smallest local firms — understand that BBB advertising self-regulation, complaint handling and local dispute resolution programs must be transparent and publicly accountable.

- **Third, BBB’s most widely recognized function is helping consumers find companies in which they can place their trust.**

To begin with, BBB Accredited Businesses must meet minimum requirements²⁰ that speak to truthful advertising and good faith resolution of consumer complaints, among other things. Those businesses that are BBB Accredited may display a BBB Accredited Business mark (in their stores, on their Web sites and in other loca-

¹⁸See: <http://www.bbb.org/us/article/principles-on-collection-and-use-of-behavioral-advertising-data-released-11287>

¹⁹See: <http://www.bbb.org/us/Standards-Charity/>

²⁰See: <http://www.bbb.org/us/bbb-accreditation-standards/>

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tions) and identify themselves as “BBB Accredited” in other forms of advertising.

All BBBs assist consumers in pre-purchase research by providing “BBB Business Reviews” — BBB reports on members and non-members alike — describing the business’ marketplace record. These reviews are available online at: <http://www.bbb.org/us/Find-Business-Reviews/>.

Today, not only can consumers quickly identify BBB Accredited Businesses that meet BBB standards and participate in BBB dispute resolution, but such BBB information is nearly universally accessible through smart phone and web browser applications, major Internet search engines and through automated telephone voice response systems maintained by most local BBB offices.

Alternative Dispute Resolution In The Cross-Border Context

In the context of global e-commerce, disputes involving online transactions are likely to run the gamut from very small dollar value conflicts involving two individuals (for example, collectibles sold through online auction sites), to multi-million dollar business-to-business (B2B) transactions.

While the complexity of the B2B disputes may be significantly greater, that very complexity and the high dollar value help ensure:

- that there will be fewer disputes arising out of these transactions; and,
- that the parties to these transactions are much more likely to have incorporated sophisticated, tailored dispute resolution mechanisms, by mutual and informed consent, into their underlying contracts.

By contrast, the sheer volume of consumer transactions, coupled with the relative lack of sophistication on the part of the parties, easily has the potential to generate a significantly large caseload. At the same time, the parties will be less likely to be familiar with any form of alternative dispute resolution.

This presents a daunting challenge for the design of a consumer dispute resolution system.

While this paper is intended to focus on disputes where consumers, sellers and various transaction “facilitators”

(credit card issuers, banks, delivery systems, ISPs, etc.) reside in different nations and, therefore, different legal jurisdictions, we believe the existence of readily accessible mechanisms will help facilitate informal dispute resolution within jurisdictions, augmenting laws within individual national borders.

Certainly, within any given country, informal dispute resolution systems should be encouraged as quick, informal ways to obtain redress. In 1985, in an effort to extend consumer protection protocols throughout the global community, the United Nations approved its Guidelines for Consumer Protection. The Guidelines (as expanded in 1999 to include issues involving sustainable consumption)²¹ are designed “. . . to assist countries in achieving or maintaining adequate consumer protection for their population as consumers”. Of the several needs these Guidelines are intended to address, one is to ensure the “availability of effective consumer redress”. Similarly, the OECD “Guidelines for Consumer Protection in the Context of Electronic Commerce” (1999)²² and the OECD “Cross-Border Fraud Guidelines” (2003).²³ Both documents contain significant references to the need for both effective, informal dispute resolution mechanisms and cross-border recognition of resolutions (whether decisions or recommendations) achieved through such systems. Finally, in 2007, the OECD issued its Consumer Dispute Resolution and Redress Recommendation,²⁴ specifically addressing the issues. The International Standards Organization (ISO) has also issued guidelines both for internal company complaint handling (ISO 10002)²⁵ and for external dispute resolution processes (ISO 10003).²⁶

Since it is clear that governmental and extra-governmental

²¹See: http://www.un.org/esa/sustdev/publications/consumption_en.pdf

²²See: <http://www.oecd.org/dataoecd/18/13/34023235.pdf>. In 2009, OECD launched a review of the Guidelines in light of the rapidly changing ecommerce environment (<http://www.oecd.org/dataoecd/32/10/45061590.pdf>)

²³See: <http://www.oecd.org/dataoecd/24/33/2956464.pdf>

²⁴See: <http://www.oecd.org/dataoecd/43/50/38960101.pdf>

²⁵See: http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=35539

²⁶See: http://www.iso.org/iso/catalogue_detail.htm?csnumber=38449

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systems (some nascent, some enjoying long traditions) exist in many countries, nothing in this paper is intended to supplant those systems. Where consumer disputes cross national borders and jurisdictions, a special system is required. Consumers and businesses need a reasonable certainty that redress mechanism(s) will be available and will be utilized. Perhaps most important, there must be positive advantages to participation and negative consequences for failing to honor commitments made during the dispute resolution process. Finally, the cost to the parties (both in time and money) to participate and to gain adherence to decisions made through the process must be proportional; they cannot be so significant (with respect to the amount of the transaction) that the process is effectively rendered moot.

There are a number of key issues that should be addressed in any cross-border consumer dispute resolution mechanism. We consider six to be essential. These are:

- **Fairness.** Consumer dispute mechanisms must have structure, rules and procedures that ensure that all parties' rights are protected and that every aspect of the mechanism operates with regard to the parties' rights to due process.
- **Visibility.** Consumers must be fully aware of the existence of any mechanism. While it is desirable that consumers have this knowledge prior to entering into a transaction, it is critical that this information be available at the time a dispute arises.
- **Accessibility.** The mechanism must be readily accessible by consumers when a dispute arises. Accessibility not only means that the mechanism can be called upon when needed, but that there are no unreasonable barriers to access (including unreasonable costs).
- **Timeliness.** There is an old adage that "justice delayed is justice denied"; it applies particularly to consumer dispute resolution. Disputes should be resolved as quickly as possible, taking into account the need for the parties to provide (or the mechanism to collect) sufficient information upon which to base a resolution.
- **Finality.** The mechanism should, to the greatest extent possible, ensure that decisions fully and finally resolve individual consumer disputes. The BBB offers a number of models that achieve this end including binding arbitration, conditionally binding dispute resolution,

non-binding informal dispute settlement and non-binding measurements against performance standards.

- **Enforceability.** The mechanism should ensure that decisions it renders are quickly and completely honored.

Each of these guidelines interconnects with the others; together, they form an excellent framework under which to discuss cross-border, online dispute resolution.

Fairness.

Perhaps no one element of a consumer dispute resolution process is of greater importance than the essential fairness of the mechanism. Parties to any dispute have a right to expect that the process will operate in a completely impartial manner.

The Federal Trade Commission, in proposing Informal Dispute Resolution Rules²⁷ under the Magnuson-Moss Product Warranty Act²⁸ in 1975, set forth detailed requirements giving significant specificity to the Warranty Act's stated intention to encourage warrantors to develop fast, fair, informal procedures for the resolution of warranty disputes.

In 1999, the European Commission, after significant consultations among its members, established a set of basic principles for out-of-court settlement of consumer disputes.²⁹ These seven principles (which mirror, in many respects, the FTC Rule 703 "standards") deal directly with the following broad policy areas:

- The "independence" of the mechanism and decision maker(s);
- The "transparency" of the procedure(s);
- The "adversarial process", allowing for arguments and cross-examination by both parties and/or their representatives;

²⁷See: <http://www.bbb.org/us/auto-line/ftc-dispute/>

²⁸See: http://en.wikipedia.org/wiki/Magnuson%E2%80%93Moss_Warranty_Act

²⁹The European Commission, Health and Consumer Protection, "Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes" (1999) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51998IR0441:EN:NOT>. The Global Business Dialogue on e-Society (GBDe), in cooperation with Consumers International, also released ADR guidelines for consumer disputes in 2003 (see: http://www.gbd-e.org/pubs/ADR_Guideline.pdf).

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- The “effectiveness” of the process;
- The “legality” of the process;
- “Liberty” within the process (process may be binding only if parties were informed in advance and specifically consented);
- “Representation” in the process;

As the leading consumer dispute settlement organization in North America, the Better Business Bureau’s rules and procedures have long embodied these fairness principles, as have those of commercial dispute resolution mechanisms, such as the American Arbitration Association.³⁰ In the consumer context, BBB has long maintained that these fundamental fairness principles should include:

- Ready access to meaningful information about the dispute resolution process;
- Neutral, independent program administration and dispute resolvers possessing sufficient knowledge and skills to perform their duties responsibly;
- Dispute resolution services provided at no cost or at a low cost when measured against the value of the transaction in dispute;
- The absence of geographic, linguistic or other barriers to the fullest practical participation in the entire dispute resolution process;
- Time frames that ensure a quick resolution of the dispute, taking into account various aspects of the nature of the transaction;
- A right to have adequate representation during the process.

The principles outlined in these various protocols (with a few limited exceptions) all form a solid framework within which to address concerns about the fairness of the process.

Visibility.

Regardless of the fairness of a program’s rules and procedures, a dispute resolution mechanism that is invisible is useless.

The Federal Trade Commission recognized the critical

³⁰The American Arbitration Association, A Due Process Protocol for Mediation and Arbitration of Consumer Disputes, April 17, 1998. See: <http://www.adr.org/sp.asp?id=22019>.

importance of the visibility of a dispute mechanism in product warranty disputes in the United States. The FTC requires a warrantor under its Rule 703 (See note 26) to make basic disclosures about the availability of a complying dispute resolution mechanism (including the name, address and toll-free telephone number of the mechanism) on the face of the consumer warranty. Further, the FTC requires that warrantors take a number of additional steps to inform consumers about the availability of the mechanism at the time a warranty dispute arises.

In the United States and Canada, Better Business Bureaus have high public name recognition. In a 2004 Princeton Research Survey, eight in 10 members of the general public (81%) said they had seen, heard or read something about the BBB, and two-thirds of adults said they had a “favorable view of the organization”. Specifically germane to dispute resolution, when asked to name organizations or agencies that received, investigated and helped resolve consumer complaints about businesses, nearly half of the public (49%) in the same survey volunteered the BBB as a resource — nearly four times the next most frequently mentioned resource.

As a consequence of that high recognition and regard, consumers often find their way into BBB dispute resolution programs without specific knowledge that an individual company has “precommitted” to dispute resolution. This experience may be true for other public and private agencies in other jurisdictions.

While this “public recognition quotient” may be one critical key to success, it is also important that information about a mechanism be clearly available at the point of the transaction. For this reason, information about the BBB Accreditation Standards, including a link to BBB dispute resolution services, is available on BBB Business Reviews of individual companies. This can be found whenever a consumer either obtains a report directly from the BBB or clicks on the BBB Accreditation mark (displayed on the company’s Web site) to confirm the company’s Accreditation.

Accessibility.

A mechanism that is not visible could hardly be considered accessible. However, there are many other proven barriers to access that must be considered. First among these may be

cost. Costs imposed on a consumer for using a dispute resolution mechanism, will increasingly hinder consumer access as the cost of the dispute resolution approaches the value of the issue(s) in dispute. In the United States, there have been several examples (generally in the context of “pre-dispute”, binding arbitration clauses incorporated into consumer contracts) where courts have held that the costs and filing fees of the arbitration process were unconscionable when measured against the cost of the product.

The Better Business Bureau believes that consumer dispute resolution services should be provided at low or no cost to consumers. Otherwise, given the relatively low dollar value of issues in dispute, fees would prove a significant barrier to meaningful redress.

It is important to note that “low or no cost to the consumer” does not mean that a dispute resolution mechanism is without cost. A mechanism must be adequately funded at a level sufficient to ensure that it is capable of fully meeting its obligations to the parties. As recognized by the U.S. Federal Trade Commission in its warranty regulations, that almost invariably necessitates business funding. Accordingly, some key steps must be taken to ensure impartiality of the mechanism, both in fact and in appearance, or else free/low cost quality consumer dispute resolution processes are unlikely to exist — to everyone’s detriment.

In addition to cost, there may be a number of other barriers to access. These would include such issues (among others) as cumbersome case filing procedures, slow (or no) response to consumer inquiries and timeliness in the handling of cases after filing (see below). To these, in the global context, there are additional barriers that must be addressed and overcome. These include language, custom and time zone differences.

Timeliness.

At a time when courts in the United States can have multi-year waiting lists before cases even appear on a docket, one of the major advantages of alternative dispute resolution in the consumer context has been its potential to handle cases timely. However, if a dispute resolution mechanism, by design or through mismanagement, routinely delays the ultimate resolution of cases, consumers will become discouraged. Either the issue in dispute is no longer mate-

rial (e.g. the buyer has disposed of the product or — the most extreme case -is deceased) or the consumer becomes discouraged and withdraws from the process.

BBB Rules of Binding Arbitration provide that cases will be concluded within 60 days from the date of initial filing to the date of final resolution/decision; the BBB AUTO LINE Rules provide for case handling within 40 days. This shorter time frame is consistent with the FTC's Rule 703, which requires that warranty dispute mechanisms in the United States issue a decision on a case within 40 calendar days of the date that the claim was formally filed with the warrantor's mechanism. While 40 calendar days may be considered speedy in the "brick and mortar" world, given the much more instantaneous nature of e-commerce, we believe consumers today will have an expectation of faster case-handling times in the future. This will require that online dispute resolution programs make significant investments in technology to meet user expectations under Internet time frames.

Finality.

A dispute resolution process that holds out the promise of "resolution" must deliver on that promise. This means the parties (both consumer and business) have a right to expect that — if all other techniques fail — the process will formally "decide" the issues that have been submitted. Mechanisms should be encouraged to facilitate direct contact between disputing parties in the early stages of a dispute and to encourage mediation; however, those which merely facilitate without ultimately making a formal recommendation or decision available to the parties perform no service if one of the parties proves recalcitrant. There are many ways to ensure finality in the consumer dispute resolution process. The BBB provides several different models:

- **Binding Arbitration.** Both parties enter the dispute resolution process and agree to be legally bound by the decision.
- **Conditionally-Binding Arbitration.** The business "pre-agrees" to arbitrate disputes at the consumer's request. The arbitrator's decision is not binding on either party unless the consumer formally accepts the decision. Once accepted, the decision becomes binding on both the company and the consumer.

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- **Informal Dispute Settlement.** The parties enter a non-binding process that provides a settlement recommendation. Neither party is bound by this recommendation, but the company must act in good faith in determining whether and to what extent to honor it.
- **“Trust mark” Programs.** The “trust mark” holder agrees to a set of standards and a dispute resolution process to resolve disputes relating to adherence to those standards. The decision of the process is not legally binding on the company, but failure to honor the decision may result in a revocation of the “trust mark” and/or other sanctions (e.g. “name and shame” public exposure).

In all these models, the disputants have a right to expect a timely decision free from ambiguity.

Enforcement.

Closely connected to, but separate from, the issue of “finality” is the issue of “enforcement”. A clear, unambiguous dispute mechanism decision that is not followed weakens the parties’ faith in all dispute resolution mechanisms. There are a number of different enforcement techniques:

- **Easy enforcement in court.** Arbitration statutes in the U.S. and elsewhere recognize disputants’ right to voluntarily submit disputes to binding arbitration. If key “due process” requirements are met during the arbitration process, courts will confirm arbitrators’ decisions without rehearing the issues in dispute.
- **Recognition of dispute resolution processes in court.** Certain Better Business Bureau arbitration agreements contain provisions that non-binding decisions of an “informal dispute resolution” process may be introduced in evidence in subsequent court proceedings. U.S. Federal Trade Commission warranty dispute rules contain similar provisions. In the global cross-border context, however, enforcement takes on greater significance, yet traditional judicial “enforcement” may prove elusive. While enforcement of arbitration awards in multi-million dollar international commercial disputes is quite likely under existing treaties, the costs of legal enforcement of consumer dispute mechanism decisions may be as impractical as the costs of litigating them. We believe that other non-judicial remedies may

ultimately provide equal — and perhaps better — assurance of enforcement than formal legal “confirmation” procedures. Here are some examples from the BBB’s experience:

- **Withdrawal of BBB Accreditation.** Section 6C of the BBB Code of Business Practices (also known as BBB Accreditation Standards)³¹ requires a company to “. . . comply with any settlements, agreements or decisions reached as an outcome of a BBB dispute resolution process.” Failure to honor a duly rendered recommendation or arbitrator’s decision will result in a formal proceeding to publicly revoke a firm’s BBB Accreditation. Notice of that revocation is incorporated into the company’s BBB report, which is given to consumers who call the BBB to make a pre-purchase inquiry on the company’s reliability.
- **Withdrawal of the BBB “trust mark”.** If the company’s BBB Accreditation is formally revoked, the company’s license to display the BBB trust mark will be revoked.
- **Public Reporting of Non-Compliance.** Failure to honor recommendations/decisions is also reported in the company’s “BBB Business Review (publicly available BBB report on the company’s marketplace reputation, as assessed by BBB), and it will have an impact on the company’s BBB Rating (a letter grade assigned to each company, based upon a number of factors relating to the consumer/business relationship). In a similar vein, the CBBB’s National Advertising Division publicly reports failures to cooperate with the self-regulatory process in both press releases and on its Web site(s).
- **Government Back Up.** As noted earlier, the FTC has investigated and taken action against advertisers when advertisers have failed to honor decisions emanating from the self-regulatory process. We believe that if consumers are encouraged to conduct e-commerce on sites which offer “certified” dispute resolution programs, and if those certification procedures require that programs remove from participation those “trust mark”

³¹See: <http://www.bbb.org/us/bbb-accreditation-standards/>

holders that fail to abide by a decision, there may be greater incentives to comply (or disincentives for non-compliance) than might exist through the normal legal processes of any individual jurisdiction.

“Off line” Local to Online Global — Unique Issues for Discussion. None of the problems and solutions outlined thus far is unique to the online environment; they are fundamental issues that are applicable to any consumer dispute resolution mechanism. However, as has been repeatedly proven, the Internet continues to reshape commerce with lightning-like speed.

We note that there have been a number of experiments with online dispute resolution, and there are new online mechanisms, non-profit and for-profit, offering to put the latest Internet technologies at the service of disputing parties. These have generally focused on more complex commercial transactions and disputes where the “cost/benefit” of using these technologies is obvious. As we noted earlier,³² payment systems (Visa, MasterCard, American Express, PayPal, etc.), with a financial interest in the seamless (and uneventful) execution of millions of separate smaller transactions, have become major players. There have been (and continue to be) a variety of initiatives experimenting with the use of Web technology for smaller consumer and commercial disputes. In our view, as we previously noted, while there are a growing number of successful commercial ODR models — and a number of current experiments in cross-border, small-dollar-value consumer dispute resolution — there remain few truly representative models of successful online consumer dispute resolution programs.

In addition to its generic consumer complaint form³³ (in use for the past 13 years), BBBs use other, special purpose online consumer complaint forms — notably for the BBB AUTO LINE program,³⁴ for wireless/cell phone complaints,³⁵ for complaints regarding publicly-soliciting charitable organi-

³²See footnote 1.

³³See: <https://odr.bbb.org/odrweb/public/getstarted.aspx>; note that “special purpose” complaint forms can be accessed off this entry page, depending on the consumer’s answers to specific “gateway” questions.

³⁴See: <https://odr.bbb.org/odrweb/public/ComplaintRedirect.aspx>

³⁵See: <https://odr.bbb.org/odrweb/public/NewComplaint.aspx?ComplaintTypeID=1&countryid=1>

zations³⁶ and for complaints regarding national advertising directed at children.³⁷ In 2000, BBB estimated that somewhere between 20 to 30 percent of its basic consumer complaint activity was being filed on one of the BBB family of Web sites (the balance being filed by mail, either on a BBB complaint form or in a letter to a BBB office, or over the telephone in some BBB offices). Today, based on a 2010 analysis of BBB complaints, an average of roughly 80% of all BBB complaints were filed by consumers using the BBB online complaint form. In some individual BBB offices, that number is even higher (90 to 95%). Although the incremental growth in the percentage of BBB online complaint filings has slowed (as the percentage approaches 100%), the shift from paper to online was initially quite dramatic. BBB noted that — on an average month during 1999, roughly 24% of all BBB complaints were filed online. By January 2000, the single-month percentage had increased to between 36% and 40%. This presents a number of unique issues that will ultimately need to be addressed. However, from our experience, coupled with our growing understanding of a number of related issues, we believe the following issues — many of which are tightly linked — will need to be addressed immediately:

- **Volume.** Most dispute resolution mechanisms, including the courts, rely on a system of barriers (however benign) to retard entry and encourage resolution at lower levels. If one assumes that an online, global consumer dispute resolution mechanism exists, that it meets the requirements for accessibility and visibility, that it is fair, impartial and trusted by consumers and that online merchants have pre-agreed to use such a mechanism, then the Internet eliminates most traditional barriers. It may be difficult and time consuming for a consumer to go down to a small claims court, pay a filing fee and receive a date upon which to return and argue a case. However, for the investment of a few minutes of time online, a consumer can initiate a BBB dispute resolution process without ever leaving home, for no filing fee. Given the explosive growth of online commerce, the potential consumer complaint volumes

³⁶See: <http://charityreports.bbb.org/public/complaint/complaint.aspx>

³⁷See: <http://www.caru.org/complaint/index.aspx>

— and attendant costs — have become a major factor with which dispute resolution mechanisms must effectively deal.

- **Speed.** As we previously noted, a 40-calendar-day time frame (from complaint filing through decision) may be considered quite fast in the “brick and mortar” world, but it may seem extraordinarily slow in a world where “excellent customer service” may mean responding to a consumer request in minutes or hours, rather than days or weeks. Dispute resolution mechanisms will need to adapt to Internet time frames or consumers and merchants will find them unsatisfactory.
- **Technology.** The major solution to both concerns about volume and speed lies in adapting Internet technologies to consumer dispute resolution. Unfortunately, the low dollar value of consumer disputes, coupled with the desire to provide dispute services at relatively low or no cost, gives little incentive for entrepreneurial investment. At the same time, the potential volume of consumer cases will require a larger investment in robust technology that can be rapidly scaled up to meet demand. We believe that a variety of different types of partnerships among governments, non-profit foundations, academic institutions and the private sector will be necessary to ensure that the technological infrastructure will be (and remain) in place.
- **Language and Cultural Issues.** As online commerce transcends national borders, it crosses major language and cultural barriers as well. Without speaking another language well (or perhaps at all), a consumer from one country may be able to navigate through a well-constructed web site in another country well enough to place an online order, particularly now that “on the fly” translation services³⁸ can make many Web sites readily understandable — even if the translation is not perfectly nuanced. That said, it is quite another matter for that same customer to try and explain the complexities of his or her dissatisfaction to the foreign company or to a third party using only his or her native language. Similarly, it may be difficult for a company or third party to understand a specific cultural context within

³⁸An example is Google Translate; see: <http://translate.google.com/>

which lies a foreign customer's dissatisfaction with a product or service. Treating these cross-lingual and cultural issues in the consumer dispute context will be an early challenge for the construction of effective dispute resolution programs.

- **Credibility Issues.** The classic fact-finder often relies on ascertaining the veracity of witnesses by the appearance and demeanor of the parties and their witnesses — “looking them in the eye”. Such visual cues may be absent from a dispute resolution process where the parties and the neutral may be separated by several thousand miles. In any event, such cues might actually be quite misleading, since they are set in a cultural context. For example, a witness who looks another person in the eye may be considered to be truthful in one culture, while giving great offense in another. Dispute resolution processes will certainly need to take these issues into account and may need to modify procedures or find new and different methods to deal with these issues.
- **Production of Evidence.** In the “brick and mortar” world, the parties produce evidence or witnesses by bringing the documents or the witnesses with them to a hearing. In the electronic world, where documents cross continents in a nanosecond via email, it is simple to believe that evidence will be produced the same way. While that expectation may be valid in major commercial disputes, it is unreasonable to assume that every consumer with Internet access is also a document imaging specialist. Accordingly, thought needs to be given to the means through which the average consumer may submit evidence to the mechanism (certainly not ruling out ordinary mail) and how a mechanism may obtain credible testimony from witnesses (including how and when electronic “witnesses” may be questioned).
- **Inspections.** In the BBB's consumer programs, arbitrators often conduct “on site” inspections of a product or service that is the subject of a dispute. Such inspections might prove pivotal in determining whether a fault exists and, if so, where that fault lies. What types of provisions might an online mechanism make for the equivalent of such inspections?
- **Compelling Consumer Participation.** There is one significant policy issue not previously addressed in this

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document. Companies in the United States have a long history of incorporating binding arbitration provisions into commercial and union/management contracts. Courts have recognized the validity of these pre-dispute agreements and have upheld them routinely.

Over the past two decades in the U.S., however, there had been a growing movement toward incorporating such clauses in consumer contracts. This became a highly charged, controversial issue.

The European principles (under its category of “liberty” within a binding dispute resolution process) address the issue of the voluntary nature of arbitration, attempting to ensure that the consumer has knowingly and freely chosen to elect to bind him/herself to a mechanism’s decision. Under the European Principle, a consumer’s election to arbitrate may not be the result of a commitment prior to the actual disputing arising.³⁹

In a similar context, the Better Business Bureau system established a Policy for Voluntary Consumer/Business Arbitration in Contractual Commitments.⁴⁰ In 1998, recognizing that courts in the U.S. had generally upheld these clauses, with certain restrictions, the BBB policy established guidelines under which a business could name the BBB in one of these clauses.

In 2003, the Global Business Dialogue on e-Society (GBDe), a world-wide, business-driven forum dealing with electronic commerce issues, issued a set of ADR Guidelines in collaboration with Consumers International, a global federation of 220 consumer groups operating in 115 countries. While those guidelines cover a broad range of consumer dispute resolution issues, they speak specifically to the issue of compulsory arbitration of consumer disputes. The guidelines state: “Merchants should generally avoid using arbitration

³⁹ A good, technical explanation of the issues involved, with a European perspective, can be found in a 2008 paper by Christine Riefa (see: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354590).

⁴⁰ Council of Better Business Bureaus, Inc., Policy for Voluntary Consumer/Business Arbitration in Contractual Commitments, March 25, 1998. The American Arbitration Association did likewise, with its Consumer Due Process Protocols, also in 1998 (see: <http://www.adr.org/sp.asp?id=22019>).

that is binding on consumers because it may impair consumer confidence in electronic commerce.”⁴¹

The use of these clauses has lost considerable favor in the U.S., following the Minnesota Attorney General’s July 2009 settlement with the largest U.S. pre-dispute arbitration provider, National Arbitration Forums (NAF),⁴² which provided arbitration services to many of the largest business users of pre-dispute clauses (e.g. firms within the financial services sector). In the period since that announced settlement (and NAF’s agreement to discontinue providing these services), a number of its business clients announced they were discontinuing the use of pre-dispute clauses entirely.⁴³ Finally, in addition to the recently enacted financial reform act⁴⁴ several bills have been introduced in the U.S. Congress that would further restrict the use of such clauses in various specific circumstances.

While this remains a controversial issue in the United States, we believe that pre-dispute clauses in cross-border consumer contracts may ultimately be an issue of little practical significance. As with many other aspects already discussed in this paper, legal enforcement of such contract clauses may likely prove impractical in the global, cross-border context. The generally small dollar value of consumer transactions, coupled with the difficulty and cost of attempting to enforce a pre-dispute clause in some international forum, will likely make the issue moot in practice.

The Role Of Governments

At the beginning of this paper, in discussing the role of self-regulation, we observed that it facilitates consumer self-

⁴¹For complete text, see: http://www.gbd-e.org/pubs/ADR_Guideline.pdf,

⁴²See: <http://www.ag.state.mn.us/consumer/pressrelease/090720nationalarbitrationagremnt.asp>

⁴³See: <http://www.creditcards.com/credit-card-news/credit-card-binding-arbitration-going-away-1282.php>

⁴⁴Known as the Dodd-Frank Wall Street Reform and Consumer Protection Act, it was signed into law in July, 2010 (see: http://en.wikipedia.org/wiki/Dodd%E2%80%93Frank_Wall_Street_Reform_and_Consumer_Protection_Act).

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reliance, encourages industry innovation and provides a true “safety net” for consumers and responsible industry members. We noted the important role we believe alternative dispute resolution can play. Finally, and perhaps of greatest importance, we voiced our conviction that thoughtful government oversight and enforcement provides a necessary fertile medium in which self-regulation can flourish.

We believe that the role of governments, in the framework of cross-border consumer protection, should be:

- To agree upon a set of international “standards” for consumer dispute resolution programs;
- To give some formal “standing” to programs which meet these standards. The US/EU “Safe Harbor” framework for resolving privacy disputes is certainly one example of how governments can create positive incentives for self-regulation;
- To provide reciprocal, uniform audit mechanisms to ensure citizens of their respective jurisdictions that “trust mark” programs live up to their commitments. For consumers, finding reliable “trust mark” programs will be as important as finding reliable companies. This will be particularly true where trust mark organizations are new and not recognized by consumers and businesses;
- To use the force of local laws and regulation to aggressively pursue those companies that fail to live up to their commitments, abuse the system or engage in fraudulent or deceptive acts or practices. (For example, a company that either falsely claims to hold a reputational “trust mark” (counterfeiting the mark on its Web site) or actually holds such a mark but demonstrably fails to honor its commitments, might be found to have engaged in fraudulent or deceptive business practices under local law/regulation.)

Some Lessons Learned

Over the past 15 years, BBB has learned a number of lessons relating to cross-border consumer/business issues. In some cases, assumptions made proved incorrect; lessons learned, course corrections (and programmatic changes made) have been reflected in this paper. However, some key issues undoubtedly deserve to be highlighted.

- Larger forces intrude on the best plans. As the late-

2008 collapse of the global financial markets impacted economies and business plans in myriad ways, so too did the bursting of the “dot com” bubble impact the launch and growth of trust mark and cross-border consumer dispute resolution programs. Many organizations’ assumptions about the continued “boom” of Internet-based retailing were proven dramatically wrong when tech-heavy NASDAQ lost nearly 10% of its value in mid-March, 2001. By itself, that collapse severely impacted the planning and execution of many (including fledgling trust mark programs) in the technology sector. Coupled with the terrorist attacks of September 11th (which themselves had both a significant and immediate impact on global economies and generated longer-term, ripple effects on all areas of cross-border trade), interest in — and growth of — trust mark programs significantly slowed or halted.

- Consumer dispute resolution and consumer trust mark programs may be more difficult to replicate and grow than BBB (and others) had originally foreseen. The BBB — with its nearly 100 year history of self-regulatory programs in the United States and Canada — was already providing many core services (as part of its institutional mandate) that would become an essential part of any “trust mark” program. In addition to the established BBB brand — extremely well-recognized in North America — BBB was already reviewing companies (its prospective and current members) against a set of standards, handling consumer complaints against both member and non-member businesses, and transparently providing its “reputational” reports on 2 — 4 million retail/service businesses. Under those circumstances, building the BBBO nLine Reliability Program — while requiring significant time, energy and start-up investment — involved modifying and updating already existing programs and services for the new, online environment. Organizations seeking to launch a dispute resolution or trust mark service without having the benefit of the BBB’s existing infrastructure found significant financial and institutional challenges, as did new, “start up” services. While there are now quite a number of “reputational” trust mark programs, particularly in Europe and Asia, most have experienced

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relatively slow growth; none has approached the participation level of the BBB trust mark program.⁴⁵

- The excellent is the enemy of the good. BBB has noted the propensity of some groups to unnecessarily complicate the dispute resolution process. This happens as a consequence of a focus on the latter stages of dispute resolution — formal mediation and arbitration (or some other decision-rendering mechanism). Consumer disputes can (and should) move through a resolution hierarchy — from the least to the most complex (and expensive) method. In BBB’s experience, most consumer disputes involve relatively small dollar value items and a very significant percentage (generally between 60% and 95%, depending on the industry category⁴⁶) are settled in the initial “conciliation” phase of the dispute resolution process — the back and forth between the customer and a responsible official at the company, facilitated through the BBB. When a higher value dispute has proven difficult or impossible to resolve at less formal levels, great attention must, of course, be paid to all the “due process” protocols (program rules, forms, notifications, administrative procedures, etc.). However, a consumer dispute program could — in theory — dispense with formal mediation and arbitration phases of the dispute resolution process, and still be highly successful (if success is measured by numbers of users gaining resolution at the “conciliation” level).
- Sometimes a cigar is just a cigar. Some elements of the dispute resolution process are proving to be not quite the barriers the author’s imagined. We based certain assumptions and concerns on our prior consumer experience with in-person or telephone mediation and arbitration; however, some are not proving to be the barriers we initially expected. For example:
 - Language and cultural issues. Where the parties to

⁴⁵Over 67,000 participating companies in North America, as of August, 2010.

⁴⁶BBB 2009 complaint statistics — publicly available on the BBB web site — reflect “settlement” percentages (cases where the BBB determined the complaint was entirely or largely settled to the customers satisfaction or the company’s offer was reasonable when considering the circumstances of the case) for each industry category. See: http://www.bbb.org/us/storage/16/documents/stats%20pdf/us_canada_industry1.pdf.

a dispute intend to have some ongoing relationship (many B2B disputes would fall into this category), where the parties have had a lengthy history (a home remodeling project taking many months to complete), where the issues in dispute are multiple and/or complex, different languages and cultural backgrounds can be serious impediments to resolution.⁴⁷ However, as noted earlier, most garden variety consumer disputes arising from online purchases (and particularly those in cross-border commerce) result from a single transaction, between parties that do not have any relationship apart from that online transaction, and usually involve one, simple request — fix the problem or refund the monies paid (the request can be taken at face value; nuances of language and culture may not be so critically important with the largest number of disputes that may present themselves at the earliest stages of the dispute resolution process).

- Credibility Issues. Again, in the earliest stages of small dollar value consumer transaction disputes, where the buyer and seller have never met (and undoubtedly never will), the likelihood that a case will turn on the credible appearance of either party is almost non-existent. In most cases, a few key pieces of documentation (the web site itself, the purchase confirmation, email exchanges between the parties, etc.) will prove compelling.
- Inspections. In the authors' experience with consumer mediation and arbitrations in North America — particularly with large dollar value purchases such as an automobile or a major home repair — a dispute resolver's ability to actually view the product or service in dispute often proved persuasive. We expressed a concern an inability to view something (a broken item, the damaged packaging, etc.) might be a serious limitation. Over the past 15 years — with photo capabilities now built into

⁴⁷Mary Hiscock, Emeritus Professor of Law at Australia's Bond University, presented some of these issues as part of her remarks at an UNCITRAL Colloquium on Online Dispute Resolution in March, 2010. For additional information, see: <http://www.pace.edu/lawschool/files/iicl/odr/Hiscock.ppt>.

practically every mobile telephone and consumers passing images almost as readily as they exchange email — this is less of a concern.

We note these examples not to suggest that the underlying issues are unimportant, but rather to suggest that online dispute resolution programs not over-think and over-engineer” in an effort to build compensating capabilities into ODR platforms. In our opinion, a very significant number of all consumer cases coming into an ODR pipeline will not require much of this sophistication. The ODR platforms will undoubtedly need to provide the capacity to resolve all of these concerns at the “recommendation” or “decision” phases of the process. However, introducing them into the early phases of the process may make the entire platform cumbersome and unfriendly for the majority of users who will never need these functionalities.

In Summary

BBB believes that a self-regulatory framework may provide the best (and most readily available) model for consumer protection in the global e-commerce environment. That framework must include, at an absolute minimum: 1) A strong set of standards for online consumer protection — one which can provide benchmarks against which actual company performance may be measured; 2) An online consumer dispute resolution mechanism that is fast, fair and accessible; and, 3) A dynamically delivered “trust mark”, enabling consumers to identify merchants that have made commitments to the standards and to effective dispute resolution.

Governments play a vital role by: 1) Adopting principles that complement and/or encourage the development of private codes; 2) Establishing flexible standards for dispute resolution programs; 3) Establishing various methods of certifying “trust mark” programs and auditing their performance; 4) Taking action under existing legislation/regulation when companies fail to honor commitments.

The private sector can play a pivotal role by: 1) Encouraging the development of standards for online commerce; 2) Funding the development of the technology infrastructure that will be necessary to ensure dispute resolution mechanisms are both cost-effective and can be made available at little or no cost to consumers; 3) Ensuring that opportunities

exist which encourage effective partnering among various countries' consumer groups, dispute resolution programs and self-regulatory organizations; 4) Developing private sector funding for new programs.

We continue to believe that sustained efforts by all interested groups to build alliances and relationships will be absolutely essential as civil society works toward the goal of fostering global online commerce to the benefit of consumers and merchants in every country. BBB has demonstrated the practical value of a commitment to that ideal.