

Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS* Developments

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Synopsis:

Ever since the field of online dispute resolution (ODR) started in the late 1990s, there has been talk about creating a global system for resolving cross-border consumer issues. Significant progress has been made over the years with some impressive attempts, but none of the efforts have truly taken root. Recently a proposal has been made at the Organization of American States (OAS) regarding the creation of a regional ODR system to handle cross-border e-commerce disputes. As similar initiatives are taking root elsewhere in the world as well, the timing might be right for the creation of a global ODR system. This short article details the challenges confronting the design of a global consumer ODR system, and offers details about the proposed ODR process flow that is being advanced at the OAS.

Recent Developments—Introduction

For the past decade, there has been much discussion about creating a dispute resolution system to resolve high-volume, small value, cross-border consumer disputes. The need for such a system is clear even to a casual observer. The expansion of traditional computer networks globally, as well as the emergence of mobile commerce, has enabled consumers to purchase goods and services from almost any vendor in the world. But what if something goes wrong? What if the

item does not arrive, or what arrives is different than what the buyer expected? For small-value cross-border transactions, the road for consumer redress becomes very complicated. The complexities have led to the erosion of consumer confidence for this category of transaction. Domestic e-commerce has grown at significantly higher rates than cross-border e-commerce—even though in some cases, goods and services can only be found cross-border, or are available at significantly cheaper rates for the consumer than if purchased locally.¹ Consumers need to have a way to obtain redress if they are to have confidence in making online purchases. There is common consensus that a global consumer redress system is essential to the continued success and growth of e-commerce.² Private and public initiatives have developed around the world to provide redress for domestic face-to-face transactions, and in limited cases, private redress systems have developed for domestic e-commerce transactions (either by third party operators, governments or vendors themselves). But the question remains on how to handle cross-border e-commerce disputes, in which the average transaction is about \$100.³ This paper proposes that traditional domestic judicial mechanisms for legal recourse do not adequately satisfy the needs of consumers or vendors, but rather, the most reasonable, efficient and fair system that can be offered for cross-border e-commerce disputes is a global online dispute resolution (ODR) system. A global ODR system provides a forum in the same virtual marketplace environment in which consumers purchased their goods or services, allowing broad accessibility, as well as swift and affordable recourse for the parties involved.

¹Comm'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.

²OECD, Empowering E-consumers, Strengthening Consumer Protection in the Internet Economy, Dec. 8–12, 2009, paras. 11–12, available at http://www.oecd.org/dataoecd/44/13/44047583.pdf?bcsi_scan_DA3493EE5FC9D524=0&bcsi_scan_filename=44047583.pdf.

³Generally, consumers in the Americas make small purchases over the Internet for items such as books, DVDs, and clothing and shoes. See AMIPCI, Estudio de Comercio Electrónico 2008, Sep. 2008, available at http://www.razonypalabra.org.mx/N/n67/varia/oislas/emarketer_2000531.pdf (empirical study commissioned by Visa). See also Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 J.L. Tech. & Pol'y 1 (2009) (noting that the average online transaction is about \$150).

The challenge comes in figuring out how to design a system that fairly meets the needs of all involved parties. As the transaction values in consumer purchases are relatively low, perspectives on consumer protection vary between countries, and because buyers are often unsophisticated about their rights as compared to vendors, it is quite difficult to design a system that fairly meets the needs of all the involved parties. How can we build a global small claims system that navigates the complex cultural, jurisdictional, and linguistic differences internationally, all while keeping costs manageable and scaling to handle the enormous global volume of cases that are out there looking to be resolved?

While key breakthroughs have been achieved over the last decade (including the groundbreaking dispute resolution agreement between Consumers International and the Global Business Dialogue on eCommerce,⁴ the launch of the European Extrajudicial Network⁵ and the Better Business Bureau/Eurochambres trustmark alliance), the establishment of a seamless global system has proved elusive. Some private companies (e.g., eBay) have built redress systems that handle millions of cases per year,⁶ and some international organizations (e.g., ICANN⁷) have built processes that have resolved thousands of disputes across borders without getting bogged down in the specifics of local jurisdictions. In addition, some countries already provide online systems for the electronic resolution of Consumer disputes, such as the ConciliaNet system run by Profeco in Mexico.⁸ To date, these different elements have not yet come together to establish a

⁴Global Business Dialogue on Electronic Commerce, Alternative Dispute Resolution Guidelines, Agreement Reached Between Consumers International and the Global Business Dialogue on Electronic Commerce, Nov. 2003, *available at* http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution__Nov03.pdf.

⁵“Commission Working Document on the creation of a European Extra-Judicial Network (EEJ-NET)” http://ec.europa.eu/consumers/policy/developments/acce_just/acce_just07_workdoc_en.pdf — last visited 3/17/2010.

⁶Rule, Colin and Nagarajan, Chittu, “Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of Online Dispute Resolution” in *ACResolution Magazine*, Winter 2010. <http://www.acrnet.org/publications/acresolution.htm> — last visited 3/17/2010.

⁷“Uniform Domain-Name Dispute-Resolution Policy,” ICANN website: <http://www.icann.org/en/udrp/udrp.htm> — last visited 3/17/2010.

⁸In Mexico, Concilianet started as a pilot phase in 2008 with two companies, moved to small deployment with five companies in 2009 (169

truly global consumer dispute resolution protocol. However, in the last few months, there are signs that indicate a window of opportunity may be opening to finally achieve this elusive goal.

This paper will more specifically discuss (1) jurisdictional challenges in domestic systems that raise the need for the creation of a global ODR system; (2) the design challenges inherent in the creation of a global redress system; (3) the proposals submitted to CIDIP VII at the Organization of American States (OAS) to provide consumer redress in cross-border business-to-consumer disputes; (4) a detailed description of the US proposal to create a regional ODR system; and (5) a description of the work towards the creation of a global ODR system.

Jurisdictional Issues: The Need for Alternatives Beyond Domestic Courts to Resolve Small Value-High Volume Cross-Border e-Commerce Disputes

For decades, the main question in cross-border consumer redress was: where should consumer disputes be legally located? This has been debated endlessly, particularly as part of the Hague Conference on Private International Law, but we appear to be no closer to resolution. Prior to the expansion of the Internet, at least, this question had two clear answers: either where the consumer was located or where the vendor was located. But the Internet confused the issue even further. What if the marketplace that hosted the transaction was in a third location? Should the dispute be hosted there? Or if the vendor was in one place, but the supplier was located somewhere else, should the dispute be located with the supplier or the vendor who listed the item? What if the servers that hosted the transaction were in a fourth location? Perhaps the dispute should be legally located there. What was a difficult question quickly transformed into a hopelessly complex one.

Practically speaking, when consumers seek redress for goods or services they purchased for \$100 in a cross-border e-commerce transaction, it is unrealistic to assume that they will cross borders and enter a foreign court to have their

queries) and now has started full national implementation (Dec. 2009/ currently ten companies). According to Profeco, the first two stages demonstrated that use of ODR cut the time for resolving disputes by nearly 50 percent and increased the number of settlements to some 96% of the queries. Ninety-seven percent of the consumers reported that they would use the procedure again.

claims resolved.⁹ Consumers also will not likely hire local or foreign legal counsel to obtain legal advice from the court that has proper jurisdiction to hear their dispute, or contest jurisdictional challenges that may be raised by the vendor in a foreign court of law—one hour of legal fees could exceed the amount of the entire dispute.

Theoretically, to overcome these hurdles, one could propose the creation of a set of private international law rules providing for jurisdiction/litigation in the forum of the consumer and through application of the mandatory rules of the consumer's home in certain cases.¹⁰ From the consumer's perspective, this proposal presents a simple solution on its

⁹See Better Business Bureau System et al., *Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution*, (Better Business Bureau White Paper), available at http://www.underhills.us/Docs/PDFS/Internet_Law_Presentation_2000.pdf (“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”).

¹⁰This has been the approach followed in the European Union through the enactment of the Brussels I and Rome I Regulations. Yet, the European Parliament even pondered at the time of enacting the new Rome I regulation that “the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings.” See, European Parliament, Final Compromise amendment 66, Recital 10 a (new), at 9–10. (Nov. 14, 2007) available at [http://www.eurparl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj\(2007\)1119_romei_am_/JURI_OJ\(2007\)1119_RomeI_AM_en.pdf](http://www.eurparl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj(2007)1119_romei_am_/JURI_OJ(2007)1119_RomeI_AM_en.pdf). Moreover, this approach has been rejected by US states. As stated in the paper submitted by the Office of the Legal Advisor, US Department of State, to the OAS CIDIP VII Working Group on Consumer Protection, dated March 19, 2010 (on file with the authors): “A 2001 amendment to Article 1 of the Uniform Commercial Code (UCC) proposed, *inter alia*, special conflict of laws rule for consumer contracts similar in many ways to the European model now found in Rome I Regulations. However, no state accepted the amended conflict of laws rule and, in 2008, the proposal was withdrawn and the official text of the UCC reverted to the original rule permitting party autonomy in consumer (as well as non-consumer) contracts, provided the transaction bears a reasonable relation to the jurisdiction whose laws are chosen and sometimes subject to a court-imposed public policy limitation. In May 2008, the American Law Institute approved a substitute choice-of-law provision for the UCC, which the Uniform Law Commissioners had previously approved, that effectively reinstated the pre-revised section 1-105 of the UCC permitting party in consumer contracts (as well as non-consumer contracts) provided the transaction bears a reasonable relation to the jurisdiction whose laws are chosen and sometimes subject to a court imposed public policy limitation. See Proposal to Amend Official Text of § 1-301 (Territorial Applicability; Parties’ Power to Choose Ap-

face, as the consumer's redress channel is local (at least up until enforcement), probably in the consumer's native language, and likely administered by the country of the consumer's residence.

But that simplicity comes at the expense of vendors, and isn't even the solution adopted by courts of the United States for domestic e-commerce disputes.¹¹ For vendors, the buyer-centered proposal could be a nightmare. A vendor like Amazon, which ships items all over the world to consumers in dozens of countries, would suddenly be subject to court filings in every jurisdiction where one of their buyers resides. Amazon would need to either send or find lawyers to defend itself in every remote courthouse from Nome, Alaska to Ushuaia, Argentina. Getting to the courthouses to respond would only be half the battle, because Amazon would also have to understand the local laws in every jurisdiction around the world where consumers reside. This might be minimally achievable for a big company like Amazon, but it would prove overwhelming for any small business just starting out with a desire to sell internationally. In either case, it would also likely hurt the consumer as large and small

plicable Law) of Revised Article 1 of the UCC (2008)), available at <http://www.ali.org/doc/uccamendment.pdf>.

¹¹See, e.g., *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 42 U.S.P.Q.2d 1062 (W.D. Pa. 1997) (laying the foundation for the finding of "purposeful availment" and specific jurisdiction in the context of electronic commerce, establishing an amorphous "sliding scale" which courts must use to ascertain whether constitutionally-required minimum contacts have been satisfied); *Gather, Inc. v. Gatheroo, LLC*, 443 F. Supp. 2d 108 (D. Mass. 2006) (finding that a website which accepted members from Massachusetts, communicating directly with those members, soliciting advertisement revenue, and providing information to them had purposefully availed itself to the specific jurisdiction of Massachusetts courts by doing business there); *ICG America, Inc. v. Wine of the Month Club, Inc.*, No. 3:09-cv-133 (PCD), 2009 U.S. Dist. LEXIS 77151, at *9-10 (D. Conn. Aug. 24, 2009) (breaking down internet use into three categories—(1) situations where defendants are clearly doing business over the internet; (2) those interactive websites where a user can "exchange information with the host computer;" and (3) a "passive" website which does little more than provide information to users). See also Galves, *supra* note 3 at 8, 24-28. In *Zippo*, the court specifically attempted to set the parameters of the sliding scale by stating that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet," *Zippo*, 952 F. Supp. at 1124; however, it is clear that the court's attempt at guidance has not produced such a concrete test.

companies would transfer these additional costs onto every transaction.

Additionally, the approach raises practical problems. Since most consumer purchases are for relatively low-cost products or services, a dispute rarely warrants use of extremely expensive enforcement mechanisms characteristic of ordinary civil litigation in all countries. When a foreign supplier is involved in e-commerce transactions, additional barriers impair the consumer's ability to utilize enforcement remedies. It is unlikely that the vendor will be amendable to suit in the jurisdiction of the consumer, has assets in that jurisdiction, or come from a jurisdiction that would recognize and enforce a judicial judgment issuing from the consumer's home jurisdiction (and even so at a cost that does not exceed the value of the claim).¹²

A New Opportunity for Consensus by ODR Resolution of Small Value—High Volume Cross-Border Disputes

The creation of a global ODR system provides a consensus solution for high value, small-value cross-border e-commerce disputes. By parties voluntarily opting into an ODR process, traditional problems related to establishment of jurisdiction and resolution in a national court—*i.e.*, legal questions and uncertainties related to personal jurisdiction, accessibility to the court, neutral legal environment, long durations for the resolution of disputes, attorney fees, issues of identity (impact of race, culture or gender), administrative costs, and travel—are minimized or reduced by establishing an online environment for the resolution of disputes.

ODR Systems Design Challenges

There are many structural issues to be overcome in designing a global system on a scale such as this. Some of the primary challenges focus on volume/scalability, complexity, enforcement, and cost.

Volume and Scalability

The biggest challenge in constructing a global system is volume. Conservative estimates put the volume of global consumer disputes in the hundreds of millions of cases a

¹²See Dr. Antonio Pérez, STATUS OF THE CONSUMER PROTECTION NEGOTIATIONS AT THE SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW, CJI/doc.288/08, rev.1), contained in Annual Report of the Inter-American Juridical Committee, at 58, 61.

year, and that number will only grow as e-commerce expands. Designing a program for a couple hundred cases is one thing, but tens of thousands is an order of magnitude more complicated, not to mention tens of millions. Designs that must be manually administered, or which are very work-intensive, become prohibitively burdensome as filing volumes rise. Any system that is created has to account for scalability, *i.e.*, its ability to continue to function effectively as the size of the case loads increase. At the projected volumes, the system will have to rely heavily on sophisticated software, which can scale, as opposed to human-powered approaches that cannot scale.

Complexity

Diverse Languages and Cultures

Another major challenge is navigating the diverse quilt of languages and cultures around the world. Any system that changes its rules based upon these local specifics will quickly become too complicated to navigate, both for consumers and vendors. The administrative burden on the coordinating organization will also become unbearable. The system will need to be flexible enough to encourage the creation of various user experiences that can account for these differences, but it must also insist upon a central structure for data communication protocols that ensures all the various endpoints of the network can communicate seamlessly and instantaneously with each other.

Technology

The software architecture required to support such a complex system introduces its own significant challenges. Every ODR provider or national authority in the world has built their website on slightly different platforms, ranging from Linux/PHP to Windows/ASP to Apple/JSP. Getting all of these diverse web sites to interoperate is not a simple task, and it is unlikely that any participant in the system will be open to recoding their entire web presence just to plug into this new scheme. Data will need to be shared in real time across this complex worldwide system, and common data definitions and structures will need to be strictly enforced to ensure filings made in one location will be intelligible once they have been sent halfway around the world to a completely different environment. Fortunately common web standards have evolved over the last few years to make such exchange possible, but integrating and testing them around the world will not be simple.

Enforcement

Once a decision is rendered, the job is only half done. The real challenge comes in trying to get that decision enforced. All the most successful and sustained ODR programs of the last two decades are able to automatically enforce their outcomes: ICANN can unilaterally change domain name registrations in response to UDRP¹³ proceedings, and PayPal can freeze funds and then move them unilaterally to enforce claim decisions. For cross-border consumer cases, though, things are not that simple. An arbitrator can decide in favor of a buyer, but the arbitrator has no power to force a reversal of the buyer's payment from the vendor's account. Building a system to provide global resolutions independent of jurisdictional constraints does not do much good if the resolutions are dependent on those same jurisdictional constraints for enforcement.

Cost Differentiation Between Large and Small Claims

The final major challenge, and in many respects the challenge that has doomed most past efforts to build a global consumer protection system, is cost. The existing global judicial system for B2B transactions is enormously expensive as legal fees and costs quickly mount in this sort of system. However, because of the large dollar values at stake, the parties are usually willing to pay those costs. For consumer disputes, however, the challenge is different. How much money are the disputing parties going to be willing to pay to resolve a dispute over a \$50 purchase? If the fees are higher than the value of the dispute, then the fees might as well just go to pay off the buyer. *Any ODR proposal that attempts to deliver for consumer disputes the same type of juridical proceeding used in million dollar disputes is doomed to failure as a result of this basic cost-benefit analysis. So, even though there may be as much money moving around in the B2C space as in the B2B space, the average transaction values are lower, and that creates a very different kind of cost pressure requiring a different system to handle such disputes.*

¹³Cho, Soohye. "Reforming UDRP Arbitration: The Suggestions to Eliminate Potential Inefficiency" from the *Cornell Law School Inter-University Graduate Student Conference Papers*, 2006. http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1027&context=lps_clacp—last visited 3/17/2010.

A New Opportunity for Consensus by Online Dispute Resolution of Small Claims Proposed at CIDIP VII at OAS

In 2003, the General Assembly of the Organization of American States (OAS) convened the Seventh Inter-American Specialized Conference on Private International Law (known as CIDIP-VII). These conferences produce international instruments which shape the private law framework for OAS member states. In 2005, the OAS Permanent Council's Committee on Juridical and Political Affairs, after consultation with the Member States, recommended an agenda for CIDIP VII to focus on consumer protection¹⁴ and secured transaction registries.¹⁵ These topics were approved by the General Assembly as the agenda for CIDIP VII.¹⁶

The next meeting of CIDIP VII is expected to take place sometime in the latter half of 2010. It will focus on the three proposals that have been submitted regarding consumer protection.¹⁷ Two of the proposals submitted not only assume domestic courts are the appropriate forum for the resolution of small-value, high volume, cross-border e-commerce disputes, but that—in contraposition with our observations above—disputes should always be resolved in the consumer's forum. Specifically, in December 2009, the Brazilian, Argentine and Paraguayan delegations to the CIDIP VII ne-

¹⁴See also, Antonio Perez, *Consumer Protection in the Americas: A Second Wave of American Revolutions*, 5 U. St. Thomas L.J. 698, 705 (2009) (discussing why international consumer protection matters in the OAS).

¹⁵“Based on these recommendations, the General Assembly, through resolution AG/RES 2065 (XXXV-O/05), formally approved the agenda for CIDIP-VII, as follows: (topic one) Consumer Protection, Including Applicable Law, Jurisdiction, and Monetary Redress (Conventions and Model Laws); and (topic two) Secured Transactions, Electronic Registry Implementation of the Model Inter-American Law on Secured Transactions.” See CIDIP-VII: PREPARATORY WORK FOR THE SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW, Department of International Legal Affairs, Organization of American States, October 20, 2005 at http://www.oas.org/DIL/CIDIP-VII_home.htm. The Model Inter-American Law on Secured Transactions produced via the efforts at CIDIP VII can be found at http://www.oas.org/DIL/CIDIP-VI-securedtransactions_Eng.htm.

¹⁶*Id.*

¹⁷Three public meetings of the OAS CIDIP Study Group have already been held on December 14, 2009 and January 15 and February 1, 2010, to continue the discussion of issues relating to the OAS CIDIP VII process.

gotiations submitted a revised proposal for a convention that would void choice of forum clauses in consumer e-commerce contracts and locate all cross-border consumer disputes at the location of the consumer or in another forum if the consumer so elects.¹⁸ The Canadian delegation later in January 2010 resubmitted a proposal for a model law that would require all e-commerce disputes to be litigated in the forum of the consumer.¹⁹ Both proposals also included provisions that would effectively void choice of law provisions in consumer contracts and apply the mandatory laws of the consumer habitual residence in most cases.

The intent of these two proposals is to decide the issue clearly so that countries could then begin to tackle the knotty downstream problems proactively. However, these proposals have the potential to cause more problems than they could solve.²⁰

It does not appear that these proposals, in practice, will adequately address the needs of, or provide adequate safeguards for, consumers or vendors seeking to resolve cross-border e-commerce disputes. As the 2003 Agreement between Consumers International and the Global Business Dialogue has recognized:

¹⁸On file with authors and available from the Office of Legal Adviser upon requests (dennismj@state.gov).

¹⁹*Id.*

²⁰Not only does court resolution not protect consumers because they have to ultimately go to another court to enforce any judgment where the assets are located, but the threat of litigation in a foreign court utilizing the law of that court (i.e., the consumer) seems to be driving up costs and/or limiting product availability. The point was earlier recognized in the 2003 consumers international/GBD agreement and more recently in the October 2009 European Commission study showing the benefits of cross-border shopping by pointing out that orders are not processed 61 percent of the time because traders refuse to serve the consumer's country. An earlier March 2009 European Commission study reported that while 51% of the EU27 retailers sell via the Internet, only 21 percent sell cross border (this is a decrease from 29% in 2006). The European Parliament also recognized this during the Rome I negotiations. The EU is trying to come up with a single set of consumer protection laws for the EU through EU Directives but that is clearly not going to work on a global basis. The US cannot even come up with a single set of consumer protection laws. The Pace Institute of International Commercial Law has launched its Global Forum for Consumer Law to fill this gap, and it currently undertaking an effort to create a set of Global Principles for International Consumer Contracts (for further information go to http://www.pace.edu/page.cfm?doc_id=35520).

Recourse to courts in disputes resulting from international Internet transactions is often complicated by the difficult questions of which law applies, and which authorities have jurisdiction over such disputes. Furthermore, international court proceedings can be expensive, often exceeding the value of the goods or services in dispute . . .

For consumers this principle [special jurisdiction and conflicts of laws rules] may only provide illusory protection, as in many cases the cost and complexity of crossborder enforcement stands in the way of effective redress. Probably the best way out of this dilemma and an important catalyst for consumer confidence in electronic commerce is that Internet merchants offer their customers attractive extra-judicial procedures for settling disputes [i.e., ODR] as an alternative to the cumbersome and expensive resort to courts.

A similar sentiment was expressed during the negotiations concerning European Union Regulation (EC) No. 593/2008 of the European Parliament and Council of June 17, 2008 on the law applicable to contractual obligations (Rome I).²¹ In proposing a compromise amendment for consumer contracts during the negotiations, the European Parliament was skeptical about the effectiveness of the protection afforded by a special conflict of laws rule for consumers:

With further reference to consumer contracts, recourse to the courts must be regarded as the last resort. Legal proceedings, especially where foreign law has to be applied, are expensive and slow . . . the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. It is therefore considered that, particularly as regards electronic commerce, the conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems. The Member States are encouraged to promote such systems.²²

In effect, while the goal is to build a system that can protect

²¹For the Rome I Regulations, see (EC) No. 593/2008 of the European Parliament and Council of June 17, 2008 on the law applicable to contractual obligations (Rome I). Article 3 of Rome I provides that contracts are governed by the law chosen by the parties. Under Article 6(2), the freedom to contract applies to consumer contracts in certain marketing cases, so long as non-derogable provisions of the law which would otherwise have applied are unaffected.

²²Cristian Dumitrescu, *Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I)*, Compromise Amendments 2-44, EUR. PPR.L.REP. (PE 374.427v01-00, at 7-8 (Comm. On Legal Affairs, Draft Report), available

consumers when they make online purchases, it is at the same time to avoid the development of a system that utilizes objectively simplistic approaches which impose unmanageable (jurisdictional and conflict of law) burdens onto vendors. What is needed is a new process, one that can deliver the goals of the Brazilian and Canadian proposals (i.e., consumer protection and national sovereignty) without creating the massive churn of endless litigation focused on jurisdiction. This objective could possibly be obtained via the third proposal submitted by the United States.

After reaching out to experts on the subject, the Office of the Legal Advisor, US Department of State, came to the conclusion that a global consumer online dispute resolution system, running parallel to existing judicial processes, might meet the objectives of the Brazilian and Canadian proposals without generating all the downstream challenges around jurisdiction and consequent unfairness and burdens on consumers and vendors.²³ In accord with the general sentiments and observations from the international community, the US has proposed a solution to redress for cross-border e-commerce disputes that is more closely aligned to international consensus regarding this issue, and is in greater accord with the idea of the creation of a global ODR system proposed in this paper.

In February, 2010, the U.S. submitted its revised proposal to the OAS. The US revised proposal focuses on building a practical framework for consumer protection through: (1) an OAS-ODR Initiative for electronic resolution of cross-border e-commerce consumer disputes designed to promote consumer confidence in e-commerce by providing quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions; (2) a model law for alternative dispute resolution of cross-border B2C e-commerce claims whereby payment card issuers are responsible for considering the claims of the consumer against a vendor for unauthorized use, non-delivery or non-conforming goods and services; (3) a model law for low cost expedited small claims tribunals offering consumers access to monetary redress at a

at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/am/681/681958/681958en.pdf.

²³Michael Dennis, *Developing a Practical Agenda for Consumer Protection in the Americas*, XXXIV CCURSO DE DERECHO INTERNACIONAL (2007) Dennis serves as the head of the US delegation for CIDIIP VII.

cost and burden not disproportionate to the amount of their claim; (4) and a legislative guide on redress and dispute resolution including provisions that would recommend States permit collective or representational legal actions for common consumer injuries; and (5) a model law for establishing competent consumer protection authorities vesting them with the authority to obtain redress for consumers; enabling them to cooperate with their foreign counterparts; and facilitating the enforcement of certain judgments for consumer redress across borders.²⁴

The Office of Legal Adviser convened three public meetings of the OAS CIDIP Study Group, held on December 14, 2009 and January 15 and February 1, 2010, to discuss the ODR proposal with representatives from a variety of consumer regulators, businesses, industry associations, consumer groups, academic bodies and civil society.²⁵ After several re-drafts around protections, coverage, language, and scope, the proposal was vetted with national consumer protection authorities, both in the Americas and around the world. Other regions, such as Europe and Asia, are already hard at work on their own system design processes for solving this challenge; so efforts began around harmonizing the proposals to ensure interoperability. It now appears for the first time that critical mass is building and a unified solution to this difficult problem could be on the near horizon.

A Proposed Solution for Small Cross-Border Claims— How it Works

This section focuses in particular on the US proposal for the OAS-ODR Initiative for the electronic resolution of cross-border e-commerce consumer disputes.²⁶ The structure of the proposal is tiered. The over-arching document is a Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross—Border E-Commerce Consumer Disputes (“Model Law/Cooperative Framework”). Addendum 1 to the Model Law/Cooperative Framework is the Draft Model Rules for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes. Addendum II is a copy of the Electronic Initiation Form for claims. Addendum III is the Electronic

²⁴On file with authors. Available on request from the Office of Legal Adviser (dennismj@state.gov).

²⁵The Office of Legal Adviser intends to convene another public meeting of its OAS CIDIP Study Group on April 9, 2010.

²⁶See Appendix A.

Award form, and Addendum IV is the Sample Online Questionnaire to Consumers About ODR Providers. In the past several months, the ODR process flow described in these documents was constantly changed and updated based on feedback in the public meetings from a wide variety of experts and stakeholders. The description below represents the latest systems design as of the writing of this article. (Please note that much of the language in this article describing the process has been copied directly from the Model Rules because accuracy of phrasing is important in such a document.)

The process utilizes ODR technology to provide negotiation, mediation and arbitration for cross-border consumer claims up to USD \$10,000. The buyer retains full rights to pursue other forms of redress, including protection programs provided by third party organizations or payment channels. Both parties also retain the right to be represented by an attorney, though representation is not mandatory.

Under this process, a buyer may file a cross-border complaint online against a registered vendor if they both reside in countries that have agreed to participate in the system. The default language of communication during the process will be the language used to conduct the transaction in the first place.

By way of overview, the process is divided into three phases: the initiation/negotiation phase, the online arbitration phase, and the award. During the first phase of the procedure, the Buyer and Vendor are provided an opportunity to exchange information and proposals, and negotiate a binding settlement, through electronic means. If the parties cannot reach an agreement, they move to the second phase, where a qualified online dispute resolution (ODR) provider is appointed to mediate and, if necessary arbitrate, the case and issue a binding award. If an award is rendered, the process moves to the third phase, where relevant local organizations take steps to ensure that the vendor complies with the award. Each stage is more fully described below to establish a complete picture of how the entire system works.

The Initiation/Negotiation Phase

The Initiation/Negotiation phase is designed to be managed entirely by software, without requiring the involvement of a human case manager. It is also designed to be efficient, using software to move the process along. Leveraging software in this manner will help the process be efficient,

contain costs (ensuring these services can be delivered even for low-dollar value cases) and minimize Buyer frustration associated with long delays.

To begin the process, the buyer visits the web site of one of a variety of approved national ODR providers and completes the online initiation form available there. As a general rule, this form must be filed within six months of the purchase date to be eligible. On the form, the buyer states his or her version of the facts and any proposed solutions to resolve the dispute.

Once the form is electronically submitted, the vendor is notified and is given seven calendar days to respond. If the vendor does not respond within the seven day period, the case automatically moves to the online arbitration phase. However, if the vendor does respond, it can either accept or reject the buyer's proposed solutions. If the vendor does not accept the proposed solution, it can present its perspective and propose solutions of its own. If none of the solutions proposed by the vendor are accepted by the buyer, the parties can either continue to negotiate or either party can request to move the case on to the online arbitration phase.

The parties have twenty calendar days to negotiate and exchange as many proposals and as much information as they wish from the date the filing form is electronically submitted. If after the twenty day period the parties have not reached a settlement, they will be notified that they must either escalate the case to the online arbitration phase or terminate the process.

Online Arbitration Phase

Once the case is escalated to the arbitration phase, an online arbitrator will be selected by the ODR provider from its approved panel of neutrals. The neutral cannot be working for either the buyer or vendor. The parties may object to the arbitrator's appointment within forty-eight hours of the notice of appointment in order to request a new arbitrator.

Once the online arbitrator is appointed, he or she will be provided access to all of the communications regarding the dispute sent by the buyer and vendor during the negotiation phase. The online arbitrator will then determine whether the dispute would benefit from a facilitated settlement. If so, the arbitrator may communicate with the buyer and vendor to attempt to reach an agreement. If the parties reach an agreement, the arbitrator can render an award on that basis.

If the arbitrator determines that no resolution through

facilitated settlement is possible, the online arbitrator will give the parties a final opportunity to explain their perspective on the issues at hand and to provide any last pieces of information they believe to be relevant. In exceptional circumstances, the online arbitrator may request additional written evidence from the parties.

The Award

Once all the relevant information is collected, the arbitrator will make his or her decision based on the documents submitted, without a hearing. These deliberations will be completed within 20 days of the arbitrator's appointment, but in exceptional cases, the arbitrator may request an extension of time to render an award. Possible outcomes include payment of money, return of a product or service, and/or replacement of a product or service. An arbitrator cannot compel a consumer to provide any monetary refund to the vendor, if applicable. Once the award is rendered, it will be electronically delivered to the parties by their ODR Providers.

The award will be final and binding. By participating in the process, vendors will be indicating that they have consented to the award being enforced in any court with appropriate jurisdiction. Once the decision is rendered and the parties have been notified, the vendor will have seven days to abide by the outcome (unless the award indicates otherwise). The buyer will be asked to confirm that the vendor has followed through with the terms of the online arbitrator's decision. If the buyer indicates that the vendor has not complied with the terms of the award, the case may be referred to the vendor's local consumer protection agency for enforcement. [Clarify?]

Funding

The ODR Initiative is designed to be free for buyers and inexpensive for vendors. Vendors will be charged a modest monthly fee, scaled to transaction volume, to participate in this program. Vendors will also be charged a very modest per-filing fee which will also be paid to the National Administrator/Central Clearinghouse. The fee shall not exceed 10% of the buyer's claim. Vendors will pay these fees directly into a shared fund.

ODR providers will be paid from this shared fund for their services. Based on volume and economics, modest membership fees may be levied on participating vendors to defray

the costs of program administration. The proposal also envisions that the Vendor will receive a significant benefit from the customer trust that participation in the system will confer. The Vendor will be entitled to advertise their participation in the program, perhaps through the use of on-site web seals and the like.

The proposal has included additional safeguards to enable the system to operate at a minimal cost. For example, it does not provide a neutral at the conciliation stage as occurs under the system developed by PROFECO in Mexico.²⁷ Instead, it is designed to be managed entirely by software at initiation/negotiation stage, without requiring the involvement of a human case manager. The start-up software costs will be higher, but the cost to use the system should be substantially lower. It also does not provide for a hearing at the arbitration stage, consistent with other B2B ODR rules.²⁸ The proposal does not envision that the neutrals would necessarily be lawyers (EBay, for example, uses very low cost neutrals to resolve disputes); yet, they would probably have to be fluent in different languages to resolve cross-border disputes. Moreover, the award form in Annex II only requires “a statement of the nature of the contract at issue, the amounts in dispute, the arbitrator’s determination on the merits [and provide a brief description of the reasons therefore].” As such, costs associated with the drafting of a detailed reasoned award are avoided.

Enforcement

An arbitration award generated through this process will be final and binding but subject to review in accordance with applicable member state statutes governing arbitration awards. Local agencies in a vendor’s home country will be empowered to pursue vendor compliance with awards, including taking direct enforcement action, requesting assistance from payment networks, or referring cases to collection agencies.

Feedback

Every user of the system will receive a survey at the

²⁷See <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp> regarding the conciliation process offered by Profeco in Mexico.

²⁸See, e.g., ICDR Protocol for Online Manufacturer/Supplier Disputes created by the International Centre for Dispute Resolution, American Arbitration Association.

conclusion of the process asking questions about how the process went, such as, “Was your ODR provider well-qualified to handle your dispute?” or, “Was your experience with this ODR provider accessible/convenient?” The feedback will then be used to evaluate the performance of the system and the individual actors within it.

Key Players

Recognizing a cross-border process cannot be adequately implemented without multi-party participation, this process involves many different actors, from the buyer and vendor, the neutral, the ODR provider, to the national consumer authorities and the Central Administrator.

Below is an overview of the roles of these players within the system as outlined in the US proposal.

The Central Administrator

This system design centers on a Central Administrator who manages the process for all regional OAS member state participants. This administrator provides a single secure database for storing the documents and other information related to the resolution of claims. The Central Administrator also maintains a public list of eligible vendors who have agreed to be listed on the home page and have claims processed/arbitrated against them. The Central Administrator will maintain this list based on information provided by National Administrators in participating member states.

The Central Administrator and each National Administrator will work together to ensure that all communications and information exchanges involving them, Buyers, Vendors, and ODR providers will be secure enough to prevent the disclosure of confidential information. The administrator will also host an ODR Committee that consists of representatives from each of the participating member states. This committee will periodically report out on the performance of the system.

National Authorities

Any ODR member state that wants to participate in this process can opt in. Once a state opts in, it will join into a cross-border network for resolving cross-border e-commerce disputes by implementing commonly agreed reciprocal procedures for data exchange and case management. All participating states will also regularly provide information to consumers in their jurisdiction on options for achieving resolution to cross-border e-commerce disputes.

DESIGNING A GLOBAL ODR SYSTEM

Each opted-in state will either establish or designate a National Administrator to monitor the progress, resolution and enforcement of cross-border e-commerce consumer disputes. This National Administrator may be part of the state's Consumer Authority, or it may be a different entity, but it will act as the primary contact into the systems administered by the Central Administrator.²⁹

ODR Providers

The Central Administrator will maintain a list of independent ODR providers approved to undertake dispute resolution responsibilities as a part of this process. Before adding an ODR provider to its list, the Central Administrator will secure written certification of the ODR provider's compliance with the Recommendations to ADR Service Providers contained within the Alternative Dispute Resolution Guidelines of the Global Business Dialogue in E-Commerce and Consumers International, as well as a commitment to comply with the process requirements.

All approved ODR providers will report back to the Central Administrator after the closure of every case, indicating whether the claim has been resolved by mediation, abandoned, or resulted in an arbitral award.

The Central Administrator will monitor each ODR provider's continued compliance with the requirements of the program. If an ODR provider falls out of compliance, the Central Administrator will be able to remove that ODR provider from its official list.

ODR providers will be required to gather aggregated information about their case volumes and to submit that information to their respective National Authorities by the end of each June and December. The Central Administrator shall compile the data received from its approved ODR providers and report yearly.

Vendors

Vendors will be able to participate in this program once they opt-in to the system. The National Administrators will encourage vendors in their state to enter into agreements to be listed on the Central Administrator's web site and have claims processed through this process. If a complaint is filed against a vendor that has not yet signed on to this system, the National Administrator can encourage that vendor to join.

²⁹See Appendix B.

Each vendor must agree to participate in the dispute resolution procedure, keep its contact information current, and abide by arbitral awards. Once a vendor is accepted into the system, it has the right to advertise its participation in the process by displaying a seal prominently on its home page to reassure buyers that redress is available. Vendors will also receive notice of new filings through their preferred ODR provider or national administrator.³⁰

Each National Administrator will monitor individual vendor compliance. If a vendor fails to comply with rules of the program, the National Administrator will notify the vendor and allow a reasonable time to re-establish compliance. If the vendor fails to comply within a reasonable time, the National Administrator shall remove that vendor from the program, and shall notify the relevant Consumer Authority and Central Administrator promptly about such action.

Next Steps: The Creation of a Global System

This proposal (which will undoubtedly evolve and change over the coming months) also benefited from a colloquium that took place at the end of March 2010 at the United Nations Vienna International Centre in Austria.³¹ Hosted by UNCITRAL, the Institute of International Commercial Law of Pace Law School, and Penn State's Dickinson School of Law, this gathering convened an international group of experts to discuss the creation of a global ODR system for B2B and B2C disputes, and undoubtedly influenced the model described above and fostered further feedback. It is expected that the UNCITRAL Secretariat will make a recommendation to the Commission on the basis of the results of this colloquium on future work with regard to the these proposals. It is the hope of the authors that the Commission will move on the basis of that report to establish a working group to further elaborate these proposals in the fall of 2010. These developments will be addressed in subsequent issues of the Uniform Commercial Code Law Journal.

The current activities at the OAS, the European Commis-

³⁰See Appendix C Figure 2.

³¹U.N. Comm'n on Int'l Trade L. [UNCITRAL], June 29-July 17, 2009, Possible Future Work on Electronic Commerce—Proposal of the United States of America on Online Dispute Resolution, U.N. Doc. A/CN.9/681/Add.2 (June 18, 2009)(proposing a colloquium to discuss ODR for disputes for e-commerce transactions).

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sion and UNCITRAL have also prompted a vision for a series of meetings to take place over the Summer and Fall of 2010 to circulate ideas regarding the creation of a global ODR system, culminating in a final wrap up meeting, hosted by ICANN, in Vancouver during November. If all the cards fall the right way, the hope is to have a consensus design in place that can be approved regionally or internationally and launched on a pilot basis in 2011.

The challenge of providing redress to global buyers across the Internet, for all e-commerce purchases regardless of size or venue, is unquestionably a formidable one. The variety of payment types, the wide spectrum of vendors, and the risk of buyer fraud all complicate things even further. But it does appear that the time has come for such a system, even considering all of the difficult challenges it will need to surmount.

Appendix A ONLINE DISPUTE RESOLUTION PROPOSAL

Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes

1. Purpose
2. Model Rules
3. Network and Central Website
4. Operation of Central Clearinghouse
5. Consumer Authority and National Administrator
6. ODR Providers
7. Confidentiality and Reporting Requirements
8. Participating Vendors
9. Enforcement of Arbitration Awards and Agreements
10. Definitions

Addendum I

Draft Model Rules for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes

1. Purpose
2. Types of Claims
3. Vendor Acceptance of Procedure
4. Online Initiation/Negotiation Phase
5. Online Arbitration Phase
6. The Award
7. Representation and Assistance
8. Language
9. Cost of ODR

Addendum II

Electronic Initiation Form

Addendum III

Electronic Award Form

Addendum IV

Sample Online Questionnaire to Consumers About ODR Providers

Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes

1. Purpose

This Model [Law/Cooperative Framework] (“Model Law/Cooperative Framework”) establishes a state-sponsored initiative to help resolve cross-border e-commerce disputes using online dispute resolution (“ODR Initiative”). The ODR Initiative is designed to promote Consumer confidence by providing quick electronic resolution and enforcement of small Consumer disputes across borders, languages, and different legal jurisdictions.

The ODR Initiative creates a multi-state electronic system to provide negotiation, mediation and arbitration for small consumer claims. Under this ODR Initiative, a Consumer (“Buyer”) may file a cross-border complaint online against a registered Vendor in another participating state. During the first phase of the procedure, the Buyer and Vendor are allowed to exchange information and proposals, and negotiate a binding settlement, through electronic means. If the parties cannot reach an agreement, a government agency or government authorized entity where the Vendor is located appoints a qualified online dispute resolution (ODR) provider to arbitrate the case and issue a binding award.

The ODR Initiative is designed to be free for Buyers and inexpensive for Vendors. It is also structured so that Vendors and ODR providers are monitored as to compliance with the terms in this Model Law/Cooperative Framework.

Comment: Experts at Porto Alegre in 2006 called for consideration of a role for central authorities in international alternate dispute resolution, including whether to provide alternative draft model provisions reflecting the different dispute resolution mechanisms that are possible. This instrument is intended to fulfill that vision for ODR and is designed as a framework for implementation of the OAS Model Rules for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes, attached as Addendum I.

Regarding the form of this document, OAS states have different existing legal regimes in place regarding ODR. Some

states have functioning ODR systems that permit consumers in other states to file a cross-border complaint online against a registered Vendor in that state. Those states might be able to participate simply by endorsing an informal reciprocal cooperative framework with other OAS states. Other OAS states do not have functioning ODR systems, and depending on their legal systems, may need to implement provisions of this document as a model law in order to participate in the ODR initiative. The document is therefore cast as a model law or in the alternative a cooperative framework. Additionally, the language of the document has been drafted in a way to facilitate both possible uses. When the content and form of the document are determined the language may be adjusted accordingly.

Participating states would likely operate the ODR Initiative initially as a pilot project for a limited period to time, with the structure of the project affected by the funding available. At the end of that period, participating states would confer to decide whether to continue, modify, or terminate the ODR Initiative.

2. Model Rules

Participating OAS states operating under this ODR Initiative agree to use the Model Rules for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes (“Model Rules”), attached as Addendum I to this Model Law/Cooperative Framework, for the resolution of claims handled pursuant to this ODR Initiative.

Comment: The Model Rules and ODR Initiative are not intended to interfere with the operation by participating states of their own alternative dispute resolution systems, to the extent those systems supplement and are consistent with the operation of the Model Rules.

3. Network and Central Website

3.1 OAS states adopting/entering into this Model Law/Cooperative Framework [will/ intend to] join a cross-border network for resolving cross-border e-commerce disputes by implementing commonly agreed reciprocal procedures for online dispute resolution and providing information to Consumers on the resolution of cross-border E-commerce disputes.

3.2 The central clearinghouse and administrator for the network (“Central Clearinghouse”) shall endeavor to provide

a single secure website and database for storing information related to the resolution of claims covered by this ODR Initiative.

3.3 The Central Clearinghouse will use best efforts to maintain on its web page a list of Vendors from participating OAS states that have agreed to be listed on the home page and have claims processed/arbitrated against them. The Central Clearinghouse should maintain this list based on information provided by National Administrators in participating states.

3.4 After a Consumer files a complaint through the Central Clearinghouse's website, the Initiation/Negotiation phase [will/should] be managed automatically by software without requiring human involvement. If the complaint is elevated to the Arbitration phase, the Central Clearinghouse [will/should] ensure that the relevant documents are directed to the appointed ODR provider.

Comment: Some OAS states already provide a secure system web site for the electronic resolution of Consumer dispute including inter alia listing Vendors that have agreed to have claims processed against them under the ODR procedures. See e.g., <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>.

4. Operation of Central Clearinghouse

4.1 The Central Clearinghouse should consist of a Committee on Inter American Consumer Dispute Resolution (the "ODR Committee"), which should provide the Initiative's overall direction and supervision, and the [name of office] at the [OAS Department of International Law/other designated institution], which, subject to direction from the ODR Committee, shall endeavor to provide ongoing website, database and administrative support and coordination.

4.2 The ODR Committee should consist of representatives from each of the participating states.

4.3 The members of the ODR Committee intend to elect a Chair among them at the beginning of each calendar year. The ODR Committee should attempt to meet in person or by telephone at least once per month.

4.4 Two years after the beginning of this ODR Initiative, the ODR Committee shall endeavor to draft a report detailing the ODR Initiative's activities and significant developments regarding the cross-border Consumer dispute resolution mechanism outlined in this document. The ODR

Committee should deliver copies of the ODR Committee Report to the Consumer Authorities in participating states.

5. Consumer Authority and National Administrator

5.1 Participating states [shall/should] designate a national Consumer Protection Authority (“Consumer Authority”) to oversee the implementation of the terms of this ODR Initiative in their respective state. The Consumer Authority [shall/may] be any national public body that has as a principal mission implementing laws against fraudulent, misleading, or unfair commercial practices affecting consumers and has powers (a) to conduct investigations or (b) to pursue enforcement proceedings, or (c) to do both.

5.2 Each Consumer Authority [shall/should] establish or designate a National Administrator/s to monitor the progress, resolution and enforcement of cross-border E-commerce Consumer disputes covered by this ODR Initiative. The National Administrator/s may be part of a Consumer Authority, or may be a different entity, and need not be a government agency.

Comment: Most OAS member states have Consumer Authorities like that envisioned in this section. Some OAS state Consumer Authorities already oversee online dispute resolution processes including for cross-border Consumer disputes.

6. ODR Providers

6.1 Each National Administrator [shall /should use its best efforts] to maintain a list of independent ODR providers willing to undertake dispute resolution under the terms of this ODR Initiative. Before incorporating an ODR provider into its list, the National Administrator [shall/should] require that an ODR provider submit written certification (“ODR Provider Certification”) of its (1) compliance with the Recommendations to ADR Service Providers contained within the Alternative Dispute Resolution Guidelines of the Global Business Dialogue in E-Commerce and Consumers International (November 2003) (“ADR Guidelines”); and (2) a commitment to comply with the Model Rules. The National Administrator [shall/should use its best efforts to] provide the Central Clearinghouse with at least monthly updates of its list of opted in Vendors to be posted on the Central Clearinghouse web site.

6.2 At the end of each individual dispute referred to an

ODR provider pursuant to Section 5.1 of the Model Rules, the ODR provider [shall/should] to report back to the Central Clearinghouse whether the claim has been resolved by negotiation, abandoned, or resulted in an arbitral award.

6.3 At the end of each individual dispute resolution proceeding, the Central Clearinghouse [shall/should] ask the Buyer to complete a brief and optional online feedback questionnaire about the ODR provider assigned to that dispute (see Addendum IV). The National Administrator [shall/should use its best efforts to] review the responses to these questionnaires on a periodic basis to monitor the continued compliance of each ODR provider it has listed pursuant to Article 6.1 with the ADR Guidelines and Model Rules.

6.4 If an ODR provider appears not to be in compliance with the ADR Guidelines or Model Rules, the National Administrator [shall/should] give the ODR provider an opportunity to explain any such issues and to remedy them in 30 days, or as soon thereafter as possible for good cause shown. If the ODR provider fails to do so, the National Administrator [shall/should] remove that ODR provider from its official list, and notify the Central Clearinghouse, within 15 days.

Comment: The U.S. Federal Trade Commission and Consumer Authorities in Mexico, Canada and other countries have maintained an International ADR directory containing contact information of dispute resolution service providers that can help Consumers resolve problems with cross-border Vendors. Each of these ADR providers has certified their compliance with the ADR Guidelines approved by the Global Business Dialogue in E-Commerce and negotiated with Consumers International. Available at <http://www.econsumers.gov/english/resolve/directory-of-adrs.shtm>. Similarly, the European Commission currently maintains a central database of ADR bodies which are considered to be in conformity with the Commission's Recommendations on Dispute Resolution. Available at http://ec.europa.eu/consumers/redress_cons/adr_en.htm.

7. Confidentiality and Reporting Requirements

7.1 Except as provided in Section 7.3, or as otherwise required by a participating state's law, all information or documents submitted by a Buyer or a Vendor under this ODR Initiative to any ODR provider is to remain confidential.

7.2 The Central Clearinghouse, and each National Administrator, [shall/should use their best efforts to] devise and implement a system so that communications and information exchanges involving them, Buyers, Vendors, and ODR providers, can be conducted through secure electronic means designed to prevent disclosure of confidential information.

7.3 A Consumer Authority may request information about participating Vendors from National Administrators and ODR providers during the course of any investigation they are otherwise authorized to conduct, and ODR providers may alert a National Administrator or Consumer Authority in both the Buyer's and Vendor's state about possible instances of fraud. Moreover, ODR providers [shall/should] be required to gather the following aggregate information, and to submit that information to their respective National Authorities by the end of each June and December:

- a. number of disputes assigned to them;
- b. number of those disputes that were abandoned;
- c. number of those disputes that were resolved through settlement;
- d. number of those disputes that were resolved through arbitration;
- e. number of those disputes in which monetary redress was awarded to a Buyer;
- f. average ratio of amounts in Buyer demands versus settlement agreements;
- g. average ratio of amounts in Buyer demands versus arbitral awards;
- h. the range and average for monetary awards in favor of Buyers;
- i. number of disputes resulting in the Vendor being required to undertake some corrective action (other than monetary redress) and the types of corrective actions involved in such disputes.
- j. the range of times and average time elapsed from the ODR provider's receipt of a complaint until issuance of an award, and in the case of abandoned cases from receipt of a complaint until the claim is abandoned.

7.4 The Central Clearinghouse [shall/should use its best efforts to] compile the data received from the listed ODR Providers and submit a yearly report by the end of March every year, covering the previous calendar year. This Report [shall/should] also include input from the National Administrators, including a section outlining Buyer feedback about ODR providers (see section 6.3).

8. Participating Vendors

8.1 The National Administrators [shall/should] encourage Vendors in their state to enter into agreements to be listed on the Central Clearinghouse web site and have claims processed/arbitrated against them under this process. Vendors should only register with the National Administrator of the state of their principal place of business.

8.2 Before a Vendor in a participating state may join this ODR Initiative it must provide a written certification to the National Administrator that it will:

- a. participate in the dispute resolution procedure set out in this Model Law/Cooperative Framework and Model Rules and have claims processed through a listed ODR provider;
- b. be listed as being a participant on its own website and on the Central Clearinghouse website;
- c. provide updated contact information to the National Administrator to notify the Vendor of any claims or other issues;
- d. satisfy the requirements of an agreement formalizing settlement and an arbitration award in a timely manner;
- e. compensate the Buyer [cost of recovery / liquidated damages] for the cost of any additional action to collect on an arbitration award that is not satisfied;
- f. withdraw from the dispute resolution procedure only after providing 30 calendar days email notice to the Central Clearinghouse and its National Administrator, and removing the references to participation from its own website;
- g. after withdrawal, continue to participate in the dispute resolution procedure with regard to any consumer transaction that occurred during the period that the vendor was registered with the program.

8.3 Each National Administrator [shall/should make its best efforts to] maintain and publish a current list of participating Vendors on its web site. Each National Administrator should monitor compliance with the Vendor Certification. If a Vendor fails to comply with the Vendor Certification, the National Administrator [shall/should] notify the Vendor and allow it a reasonable time to return to compliance. If the Vendor fails to comply within a reasonable time, the National Administrator [shall/should] remove

that Vendor from its list of participating Vendors, and [shall/should make its best efforts to] notify the relevant Consumer Authority and Central Clearinghouse promptly about such action.

8.4 The Vendor [will/may] be charged a modest and reasonable fee for participation in this process and for each case filed under this process. See Section 9 of the Model Rules. Vendors [shall/should] pay these fees directly to [its National Administrator/the Central Clearinghouse].

Comment: Under the Model Rules it is envisioned that, for those Vendors registered with the Central Clearinghouse, the complaint will be automatically transmitted to them electronically. It might also be possible for the National Administrators, upon receiving a claim against entities that have not registered, to contact the entity and request its participation in the complaints process. In this regard, some states require that before concluding any e-commerce transaction with consumers, the supplier must provide to the consumer its email address, physical address, telephone numbers and other means by which the consumer could be contact the supplier. Some states further require that all Vendors participate in state sponsored mediation/arbitration mechanism for consumer claims. Other states permit the consumer to enter into a pre-dispute and or post-dispute mediation or arbitration agreements. The Model Law/Cooperative Framework does not address these issues.

Vendors may be charged a modest monthly fee, scaled to transaction volume, to participate in this program. The payment will be made directly to the National Administrator/Central Clearinghouse, and in return the Vendor will be entitled to advertise their participation in the program, perhaps through the use of on-site web seals and the like. It is envisioned that Vendors will receive a significant market benefit from the consumer trust that participation in this program will confer. Vendors may also be charged a very modest per-filing fee which will also be paid to the National Administrator/Central Clearinghouse. Upon the completion of a case, the National Administrator/Central Clearinghouse will use these accumulated funds to compensate the involved ODR Providers for their services.

9. Enforcement of Arbitration Awards and Agreements

9.1 An Arbitration Award [shall/should] be final and binding on all parties to the individual dispute, with preclusive

effect up to [US\$10,000] solely with respect to those parties, but subject to review in accordance with applicable state statutes governing arbitration awards.

9.2 The National Administrator or Consumer Authority in a vendor's home country may take such steps as it deems appropriate to pursue that Vendor's compliance with arbitration awards rendered pursuant to the Model Law, including taking direct enforcement action, non-governmental or private standards monitoring/enforcement agencies requesting assistance from payment networks, or referring cases to collection agencies.

9.3 Except as required by law, or as is necessary for application of the provisions of this Model Law/Cooperative Framework, there [shall/should] be no review of the merits of the Arbitration Award.

Comment: In addition to direct interactions with Vendors, National authorities may also elect to partner with payment networks (for example MasterCard, Visa, PayPal, or debit-card associations) to recoup and enforce outcomes. Private organizations (such as private "Trustmark" organizations) may also have an important role to play in enforcement of awards.

10. Definitions

For purposes of this Model Law/Cooperative Framework and the Model Rules in Addendum I:

- 10.1. "Arbitration Award" is any arbitral award rendered pursuant to the Model Rules.
- 10.2. "Business-to-Consumer Transaction" means a commercial transaction for value between a Vendor and a Consumer.
- 10.3. "Central Clearinghouse" means the coordinator of the entire ODR process providing ongoing database, website and administrative support.
- 10.4. "Consumer" or "Buyer" is a natural person who enters into a Consumer Transaction for personal, family, or household use, and not for resale or other commercial activity.
- 10.5. "Consumer Authority" is the government consumer protection agency designated by each participating state to oversee the implementation of the terms of the Model Law/Cooperative Framework in their respective state.
- 10.6. "Consumer's State" is the contracting state in which

- the Vendor renders a service, delivers or should deliver or make available the thing purchased or leased by the Consumer.
- 10.7. “Consumer Transaction” is a transaction by a Consumer with a Vendor.
- 10.8. “Court addressed” is a court, board, or panel, whatever it may be called, authorized by the Vendor’s state to recognize and enforce an arbitration award, and which is presented with such an award for recognition or enforcement by the buyers or the state-designated entity.
- 10.9. “E-commerce” means transactions over computer mediated networks.
- 10.10. “Economic Harm” means actual monetary loss sustained by a Consumer in a Consumer Transaction.
- 10.11. “National Administrator” is the entity established or designated by the Consumer Authority to manage the progress, resolution and enforcement of cross-border E-commerce Consumer disputes.
- 10.12. “ODR Committee” is the Committee on Inter American Consumer Dispute Resolution, consisting of representatives from each of the participating states.
- 10.13. “Setoff” means a defense to the whole or a portion of the Consumer’s claim arising under the transaction in question but not amounts owing under other transactions.
- 10.14. “Vendor” is a natural or legal person entering into a consumer transaction as part of its business, commercial, or professional activities.
- 10.15. “Vendor’s State” is the contracting state in which the vendor has its principal place of business.
- 10.16. “Writing” and “Written” includes data messages in both physical and electronic form, so long as the information contained therein is accessible to the Parties and Arbitrator so as to be usable for subsequent reference.

**Addendum I. Draft Model Rules for Electronic
Resolution of Cross-Border E-Commerce Consumer
Disputes**

1. Purpose

These Rules are intended for use in conjunction the OAS

Model Law/Cooperative Framework establishing a state-sponsored ODR Initiative to help resolve cross-border e-commerce disputes. They are designed to resolve disputes in a simple, transparent, swift, and inexpensive manner through online negotiation, mediation, or arbitration.

2. Types of Claims

2.1 These Rules only apply to contract disputes involving a Business-to-Consumer Transaction where:

a. the amount claimed by the Buyer is not more than [US\$10,000], or the equivalent in other currency, and to any setoff claims up to that amount raised by the Vendor;

b. the dispute arises between a Buyer domiciled or legally resident in one contracting state, and a Vendor both doing business and engaging in the transaction in another contracting state, at the time of the transaction; and

(i) involves a claim that the goods sold or leased or services rendered were not delivered, not timely delivered, not properly charged or debited, not provided to the Buyer or his or her designee in accordance with the agreement made at the time of the transaction; or

(ii) there was a misrepresentation in connection with the transaction that reasonably affected the Consumer's decision to enter into the transaction; or

(iii) the Parties earlier reached a settlement under this procedure, but the Vendor failed to comply with the settlement contract.

2.2 Addendum II (Electronic Initiation Form) provides the Buyer with the exclusive list of the claims covered by Section 2.1.

2.3 No provision in these Rules shall be construed as limiting the freedom of the Buyer to pursue other forms of redress, such as non-binding mediation, arbitration, or protection programs provided by third party organizations or payment systems.

2.4 No provision in these Rules shall be construed as waiving the right of the Buyer or Vendor to bring any claims that are beyond the scope of the claims identified in this section before the state channels for redress.

3. Vendor Acceptance of Procedure

3.1 Claims may be brought by a Buyer using this process against Vendors that have agreed to have claims processed/arbitrated against them under this procedure in accordance with Article 8 of the Model Law/Cooperative Framework.

4. Online Initiation/Negotiation Phase

4.1 The Buyer may only initiate this process for a purchase within six months of paying for the purchase or contracted delivery of the product or service, whichever is later. In the case of installment sales, the Buyer may only initiate this process within 6 months from the date of purchase or contracted delivery of the product or service, whichever is later. In the case of claims initiated pursuant to section 2.1(b)(iii) of these Rules for unsatisfied settlement contracts, the Buyer may reopen his/her case within three months of the date set for completion of the terms of the settlement contract. The Buyer may reopen his/her case at the same process level it had reached when the settlement was finalized.

4.2 In order to begin the process, the Buyer must visit the Central Clearinghouse web site and complete the online Initiation form available there. See Article 5.3 of the Model Law/Agreement and Addendum II.

Comment: It is also possible to structure this part of the process to include National Authorities and/or ODR providers. For example, the process could permit Buyers to file their complaints either through the central website or through other web portals that collect the same complaint data and pass it through the central database.

4.3 On the online Initiation form the Buyer states his/her version of the facts and any proposed solutions to resolve the dispute.

4.4 Once the form is submitted, a notice of the new filing along with the information collected is sent automatically by the Central Clearinghouse to the National Administrator and the Vendor. After this notice is sent, the Vendor will have seven (7) calendar days to respond.

4.5 If the Vendor does not respond within the seven (7) day period, the Vendor is presumed to have refused to negotiate and the case automatically moves to the online Arbitration phase.

4.6 If the Vendor responds to the invitation to negotiate within the seven (7) day period and accepts a solution proposed by the Buyer, a message is sent automatically to the Buyer evidencing the agreement and the case is terminated. An Agreement form formalizing the online Settlement is generated and sent to both parties.

4.7 If the Vendor responds to the invitation to negotiate

within the seven-day period and does not accept any of the solutions proposed by the Buyer, the Vendor will also be given an opportunity to state the Vendor's version of the facts and any proposed solutions to resolve the dispute.

4.8 If none of the solutions proposed by the Vendor is accepted by the Buyer, the Parties can either continue to negotiate or either party can request to move the case to the online Arbitration phase.

4.9 After the Buyer's submission of the online Initiation form, the Parties have twenty (20) calendar days to negotiate and exchange as many proposals and as much information as they wish. If after the twenty (20) day period the Parties have not reached a settlement, a message will be sent to give them the opportunity to either move to the next phase or terminate the process.

Comment: The Initiation/Negotiation phase is designed to be managed entirely by software, without requiring the involvement of a human case manager. It is also designed to be efficient, using software to move the process along. Studies have shown that buyers want E-commerce resolution processes to complete expeditiously, and that drawn-out procedures create dissatisfaction, even if they eventually work out in the buyer's favor. This type of design will help both to contain costs (ensuring these services can be delivered even for low-dollar value cases) and minimize Buyer frustration associated with long delays.

5. Online Arbitration Phase

5.1 If the Buyer decides in writing through an electronic submission to pursue online Arbitration, the National Administrator in the Vendor's State will select an online ODR provider from the list of ODR providers maintained by the Central Clearinghouse. The seat of arbitration is the Vendor's State.

Comment: It might be possible to further centralize the system, so that the Central Clearinghouse could perform the ministerial task of appointing ODR providers in each particular case pursuant to more general directions from the National Administrators.

5.2 The ODR provider will proceed with online arbitration by appointing a single online arbitrator and notifying the parties of the arbitrator's name and any disclosures by electronic communication. The parties may object to the arbitrator's appointment within forty-eight (48) hours of the

notice of appointment. If no objection has been received by the ODR provider within forty-eight (48) hours, the arbitrator will be reaffirmed. In the event of an objection, the ODR provider will invite electronic comments from the other party to be submitted within 48 hours and then either reaffirm the arbitrator or appoint a new arbitrator.

Comment: The Article is drawn from the AAA-ICDR Online Protocol for Manufacturer/ Supplier Disputes. The Article is not intended to restrict the future development of online arbitration panels such as jury pools or other innovative ODR developments.

5.3 Once the online Arbitrator is appointed, the Central Clearinghouse shall give the Arbitrator access to all of the communications regarding the dispute sent by the Buyer or the Vendor pursuant to these procedures.

5.4 The online Arbitrator shall then evaluate the case based on the information submitted and determine whether the dispute would benefit from a facilitated settlement. If so, the Arbitrator then may communicate with the Buyer and Vendor to attempt to reach an agreement. If the Parties reach agreement, the Arbitrator shall render an award on that basis.

Comment: Consideration might be given to having the ODR Provider conduct any online mediation before the online arbitrator is selected. There is disagreement among the ADR stakeholders about the propriety and benefits of mixing mediation and arbitration.

5.5 If no resolution through mutual agreement/facilitated settlement is possible, the online Arbitrator gives the Parties a final opportunity and deadline to explain each Party's perspective on the issues at hand and to provide any last pieces of information they believe to be relevant.

5.6 In exceptional circumstances the online Arbitrator may request additional written evidence from the parties.

5.7 Except as other provided in this section, the online arbitration shall be completed by an award within 20 days of the arbitrator's appointment or, in case of a challenge, his/her reaffirmation. The ODR provider on behalf of the online arbitrator may in exceptional cases request an extension of time from the National Administrator to render an award.

5.8 All communications will be in electronic form unless otherwise directed by the online Arbitrator.

6. The Award

6.1 The online Arbitrator deciding a disputed claim shall

make a final decision as to the appropriate outcome by reviewing all the documents and statements. In arriving at his/her decision, the arbitrator shall consider the claims the Buyer has made from the checklist; the pertinent facts and circumstances; and the terms and conditions of the contract. If a solution is not found in the terms of the contract, the Arbitrator shall decide such claims and grant such relief on an equitable basis, based on an interpretation of these rules and without referencing or requiring proof of applicable law. In granting relief, the Arbitrator may order, consistent with these rules, payment of money, return of a product or service, and/or replacement of a product or service. The Arbitrator shall in calculating economic harm take into account any economic value the Buyer retains as a result of the transaction. The Arbitrator may use a Vendor's claims arising from the same transaction to reduce or eliminate the amount owed by a Vendor, but otherwise shall have no authority to enter an award for such relief against a Buyer. Whether a claim involved a misrepresentation (see section 2.1(b)(ii)) shall be determined by the net impression reasonably created by the seller's advertising, and hidden disclaimers shall not prevent advertising from being a misrepresentation. The arbitrator should treat claims involving a previous, mutually agreed-upon settlement negotiated under these Rules (see section 2.1(b)(iii) as a contract between the parties).

6.2 The online Arbitrator will file a decision using the form attached as Addendum III within seven days after the Parties make their final submissions to the Arbitrator or within the extension of time authorized by the National Administrator pursuant to section 5.7. The decision will be automatically delivered electronically to the Parties. Failure to adhere to this time limit shall not constitute a basis for challenging the award.

6.3 The award of the online Arbitrator shall be final and binding upon the Parties and shall constitute a duly executed award for purposes of enforcement. Parties to arbitration under these rules shall be deemed to have consented that judgment upon the Arbitration award may be entered in any court having jurisdiction thereof.

6.4 Once the online Arbitrator has rendered a decision and the Parties have been notified, the Vendor will have seven (7) days to abide by the outcome, unless otherwise indicated by the Arbitration Award.

Comment: Seven days may not always be sufficient, for example, where a Vendor has to await return of a product before issuing a refund. The online Arbitrator is best situated to make this determination.

The parties should be able (short of an appeal to a jurisdictional court) to mutually seek to have the “performance issue(s)” re-examined by the arbitrator where extenuating circumstances arise.

6.5 The Buyer will be asked by the Central Clearinghouse to confirm that the Vendor has followed through with the terms of the online Arbitrator’s decision.

6.6 If the Buyer states that the Vendor has not complied with the obligations under the arbitral award within the time limits set forth in section 6.4, the Buyer, the National Administrator or Consumer Authority in the Vendor’s State may take steps in accordance with Section 9 of the Model Law/Cooperative Framework for enforcement of the Award.

7. Representation and Assistance

Parties may choose to be represented or assisted by another person. Representation by an attorney shall be permitted but not mandatory.

8. Language

The online mediation/arbitration shall be conducted in the language used in connection with the transaction in dispute, unless another language is agreed upon by the Parties after the dispute arises. In the event of any dispute about the language used in connection with the transaction, the language of the arbitration shall be determined by the online Arbitrator.

9. Cost of ODR

The Vendor will be charged a modest and reasonable fee for each case involving the appointment of an online Arbitrator. Payment will be made directly to the Central Clearinghouse/National Administrator]. See Article 8.4 of the Model Law/Cooperative Framework.

Addendum II. Electronic Initiation Form

Buyer Name

Physical Address

Email

DESIGNING A GLOBAL ODR SYSTEM

Vendor Name	Physical Address (if known)	Email
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Check whether the claim involves any of the following:

- ___ Vendor failed to deliver goods or services after the Buyer was charged;
- ___ Vendor failed to timely deliver the goods or services;
- ___ Vendor sent the wrong quantity;
- ___ Vendor sent damaged goods;
- ___ Vendor sent goods or provided services different from the goods or services contemplated in the transaction;
- ___ Vendor sent goods that were not suitable for the purpose for which goods of this nature are ordinarily used;
- ___ Vendor sent goods that were not customized as contemplated in the transaction;
- ___ Vendor made misrepresentations about the goods;
- ___ Vendor did not comply with its express warranty;
- ___ Vendor charged or debited the Buyer's financial, telephone or other account without authorization;
- ___ Vendor charged or debited the Buyer's financial, telephone or other account an amount for the transaction different from that agreed to;
- ___ Vendor failed to comply with the terms of a settlement agreement entered with the Buyer during the Negotiation Phase of these Rules

Amount Claimed/Solution Sought

The Buyer agrees to mediate and/or arbitrate in accordance with the OAS Model Rules for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes.

Electronic Signature of Buyer

NOTES TO FORM

Commentary

The procedure assumes that both the Buyer and the Vendor have entered into some form of agreement consenting to the arbitration. If the outcome is an Arbitration Award, enforcement processes almost uniformly require such consent in order that an agreement to arbitrate is valid and enforceable. The initiation form should also provide for

disclosures to inform the Buyer about the process, and might incorporate elements from the initiation form on www.econsumer.gov.

Addendum III. Electronic Award Form

The award form shall specify the nature of the contract at issue, the amounts in dispute, the arbitrator's determination on the merits [and provide a brief description of the reasons therefore].

Addendum IV. Sample Online Questionnaire to Consumers About ODR Providers

1. Did you have any reason to question the impartiality of your ODR provider?

If so, please explain:

2. Was your ODR provider well-qualified to handle your dispute:

- 1 Unqualified
- 2
- 3 Reasonably qualified
- 4
- 5 Very qualified

3. Was your experience with this ODR provider accessible/convenient?

- 1 Very inaccessible/inconvenient
- 2
- 3 Reasonably accessible/convenient
- 4
- 5 Very accessible/convenient

4. How quickly did your ODR provider handle your dispute?

- 1 Slowly
- 2
- 3 Reasonably fast
- 4
- 5 Quickly

Appendix B Overall System Design for the OAS Clearinghouse*

Overall System Design

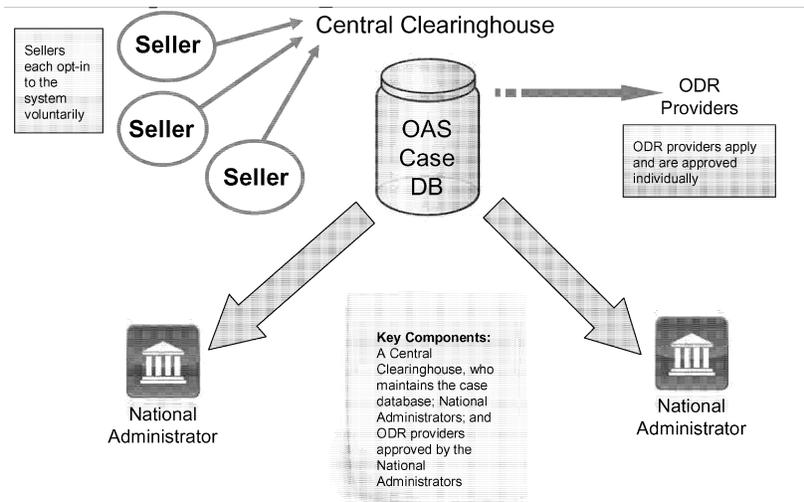


Figure 1: The overall system design for the OAS clearinghouse

*This slide was drawn from the presentation made by the Office of the Legal Advisor, US Department of State to the OAS CIDIP VII Working Group on Consumer Protection on February 25, 2010 (on file with the authors).

Appendix C *

Overall System Design (2)

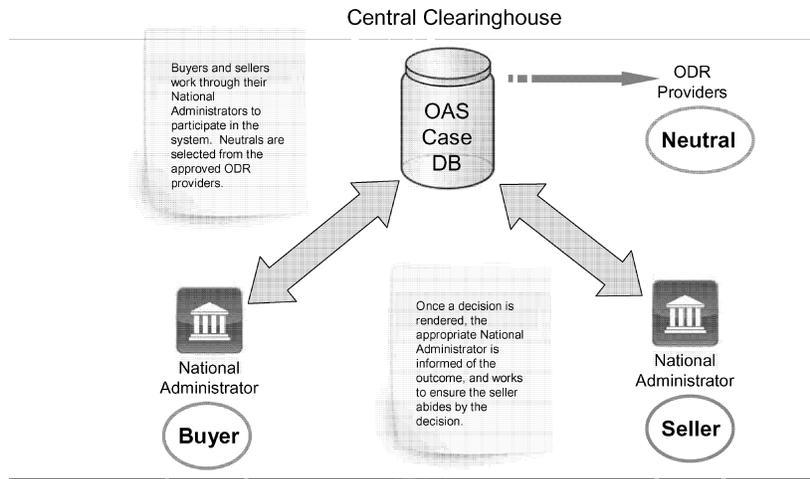


Figure 2: How disputing parties and neutrals will interact with the central repository

*Id.