

**DEVELOPING A PRACTICAL AGENDA FOR CONSUMER  
PROTECTION IN THE AMERICAS**

**MICHAEL J. DENNIS\***

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\* Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State. The author serves as head of the U.S. delegation for the CIDIP VII negotiations. The views expressed are solely those of the author and do not necessarily reflect those of the Department of State.



## I. Introduction

### A. Challenges to Existing Legal Framework

The growth of internet use in the Americas has resulted in a significant increase in business to consumer (B2C) cross-border e-commerce. At present there are some 360 million internet users in OAS member states, representing nearly one-third of the world internet use. The United States ranks first in the world with more than 215 million internet users, Brazil sixth with 42.6 million users, Mexico twelfth with 23.7 million users, and Canada thirteenth with 22 million users.<sup>1</sup> One internet survey concluded that 85% of North American and 63% of Latin American internet users have made on-line purchases.<sup>2</sup> It also estimated that the average number of online purchases made in the April-May 2005 time frame was 4.3 in North America and 3.1 in Latin America.<sup>3</sup> Typically, consumers in the Americas make small purchases over the internet for items such as books, DVDs, clothing and shoes, and airline tickets.<sup>4</sup>

Resolving consumer complaints relating to e-commerce cross-border transactions poses challenges for the existing legal framework in OAS member states. Traditionally, consumer disputes have been resolved through national courts. However, judicial mechanisms do not provide an effective means of resolving most B2C cross-border e-commerce disputes, given the small value of the most common transactions, the high costs of litigation and the difficulty of enforcing foreign judgments. The failure to develop a practical framework for consumer protection in the Americas may limit future growth in B2C cross-border e-commerce. According to one survey, significant barriers to B2C cross-border e-commerce in Latin America include consumer distrust in the delivery, quality of the product and the means of payment.<sup>5</sup>

At the same time, it would appear that businesses are also not taking full advantage of the opportunities afforded by e-commerce. In a 2003 study, the American Bar Association and International Chamber of Commerce examined the practical effects of internet jurisdiction and choice of law risks on companies

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<sup>1</sup> Internet World Stats, World Internet Usage and Population Statistics, *available at*: <http://www.internetworldstats.com/stats.htm>.

<sup>2</sup> eMarketer, *Latin America Online*, August 2006, at 13, *available at* <http://www.ims corporate.com/site/docs/laonline.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 11. In another study, AMIPCI found that 33% of the online purchases in Mexico were for around \$50 (400-1000 pesos), another 23% were between \$90-\$270, and only 12% of purchases were for more than that amount. eMarketer concluded that this was a typical spread of purchase amounts, reflecting in part, a general distrust by Latin American buyers of making large purchases remotely. *Id.* at 13.

<sup>5</sup> *Id.* at 11.

worldwide.<sup>6</sup> The survey concluded that the main internet risks included liability in the target jurisdiction (45 percent) and user fraud (32 percent). For companies that had adjusted their business in response to risk (36 percent), the most common approaches were to either eliminate or reduce business activities in the higher risk jurisdictions or to target specific jurisdictions that are perceived to be lower risk alternatives.<sup>7</sup> Similarly, according to a recent European Union study, EU businesses reported that important obstacles to cross-border sales include: a higher risk of fraud and non-payment (47%); a greater difficulty in resolving complaints and conflicts (44%); and extra compliance costs with different national laws regulating consumer transactions (42%). As a result, some 66% of European businesses do not engage in cross-border retail sales.<sup>8</sup>

The failure to develop a practical framework for the resolution of consumer disputes could have a particularly negative effect on emerging entrepreneurial ventures in developing economies. As an example, one of Argentina's renowned silversmiths has a small business with less than 10 employees in San Antonio de Areco. His business markets the products through an interactive website in Spanish and English that targets, *inter alia*, U.S. consumers. For the most part, his transactions take place without incident, but occasionally he has problems with goods that are damaged in transit. According to the merchant, on one recent occasion he had to get assistance to intervene in order to secure partial payment (\$3,000) from a U.S. consumer. In a letter to him, the customer stated that "it is apparent that we will remain in disagreement about the box" and that if the \$3,000 partial payment "is not satisfactory, send us back our check and we will have to let the courts decide."<sup>9</sup> The merchant asks "but what court"? According to him, Argentinean courts are too slow and he couldn't possibly afford to litigate disputes in U.S. courts.

One U.S. law firm answers the question posed by the merchant in an internet article as follows:

[B]usiness owners face a conundrum. ... [U]sing the Internet for business may empower a court in a distant place to acquire jurisdiction over you. You also risk violating laws that you could not easily know even exist. ... [I]f you take some or all of the following steps you might avoid a court's jurisdictional power at least in certain instances:

- Use a passive rather than an interactive Web site.

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<sup>6</sup> Michael Geist, *Global Internet Jurisdiction: The ABA/ICC Survey*, A.B.A. SEC. BUS. LAW (2004), available at:

<http://www.abanet.org/buslaw/newsletter/0023/materials/js.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> Eurobarometer, *Business attitudes towards cross-border sales and consumer protection*, December 2006, at 5, 8, available at:

[http://ec.europa.eu/consumers/topics/FL186ConsProt\\_CBS\\_Summary\\_en.pdf](http://ec.europa.eu/consumers/topics/FL186ConsProt_CBS_Summary_en.pdf).

<sup>9</sup> A copy of the letter is on file with the author.

## CONSUMER PROTECTION IN THE AMERICAS

- Place a notice on your Web site stating that it is only for use by residents in certain identified states (such as the states in which you are willing to defend or prosecute a lawsuit).
- Place a notice on your Web site which states that by viewing or using your site, the user consents to the exclusive jurisdiction and venue of a court in your ... home state ... and to the exclusive use of the laws of your home state ...
- Limit your solicitation of business by traditional methods (such as advertising) to those states in which you are prepared to defend or prosecute a lawsuit.<sup>10</sup>

The U.S. law firm acknowledges that “these suggestions are contrary to the purpose of the Internet, which is to promote the easy flow of information and business through cyberspace.” But, it concludes “[u]nfortunately, like the Wild West in the 1800s, venturing onto the Internet is not without its hazards.”<sup>11</sup>

It seems clear that B2C cross-border e-commerce disputes will: (a) form a significant proportion of consumer complaints in coming years; and (b) require tailored practical mechanisms that can provide consumers with access to remedies that do not pose a cost, delay and burden disproportionate to the economic value at stake. At the same time, rules for resolving cross-border e-commerce disputes must provide sufficient certainty for a clear determination of the consequences under various situations and states must avoid legislative solutions that undermine such development.

### **B. CIDIP VII Negotiations**

One of the important goals of the Organization of American States is to harmonize private international law through Inter-American Specialized Conferences on Private International Law (the Spanish acronym is CIDIP). The OAS has hosted these conferences every four to six years. Currently states are drafting instruments for CIDIP VII, which will focus in part on consumer protection.<sup>12</sup>

#### **1. Proposals**

Three proposals have been put forward by states on consumer protection for CIDIP VII:

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<sup>10</sup> *Jurisdiction in Cyberspace*, available at: <http://www.poznaklaw.com/articles/cyberjuris.htm>.

<sup>11</sup> *Id.*

<sup>12</sup> Information concerning the CIDIP process, including CIDIP VII, is available at: [http://www.oas.org/cji/dil-cji-cd-may2005/dil/cidip-vii\\_home\\_topics\\_reports\\_cidipprocess.htm](http://www.oas.org/cji/dil-cji-cd-may2005/dil/cidip-vii_home_topics_reports_cidipprocess.htm).

- *United States.* The United States has proposed a draft legislative guide and model laws and rules on redress mechanisms designed to assist consumers recover monetary damages suffered in consumer transactions. The United States proposal includes: (1) a model law on government consumer protection authority to provide redress and cooperation across borders against fraudulent and deceptive commercial practices; (2) a draft model law on simplified tribunals for small consumer claims; (3) a draft legislative guide for collective and/or representational dispute resolution and redress for common injuries to consumers; and (4) model rules for electronic arbitration of small B2C cross-border claims.<sup>13</sup>
- *Brazil.* Brazil has introduced a draft convention on the law applicable to B2C cross-border transactions. The draft convention generally provides that consumer contracts will be governed by the law where the consumer resides (if there is no choice of law in the contract) or the law most favorable to the consumer (if there is a choice of law provision in the contract).<sup>14</sup>
- *Canada.* Canada has introduced a model law on jurisdiction and choice of law. The Canadian proposal focuses on electronic B2C cross-border transactions and would generally apply a country of destination approach to choice of court and choice of law.<sup>15</sup>

## 2. Porto Alegre Experts Meeting

In December of 2006, Brazil hosted a meeting of experts to review the various CIDIP VII proposals. The meeting was attended by experts from 11 countries. Delegates to the Porto Alegre meeting agreed that it was important for CIDIP VII “to provide legal protections for consumers in their relationship with

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<sup>13</sup> For documents relating to the proposal of the United States, including earlier versions of the draft legislative guide, see [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_consumerprotection\\_monetaryrestitution.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_monetaryrestitution.htm).

<sup>14</sup> For documents relating to the Brazilian proposal, including an earlier version of the draft convention, see:

[http://www.oas.org/dil/CIDIP-](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_consumerprotection_applicablelaw_brazil_17dec2004.htm)

[VII\\_topics\\_cidip\\_vii\\_proposal\\_consumerprotection\\_applicablelaw\\_brazil\\_17dec2004.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_consumerprotection_applicablelaw_brazil_17dec2004.htm)

See also Claudia Lima Marques, *Insufficient Consumer Protection in the Provisions of Private International Law, The Need for an Inter-American Convention (CIDIP) on the Law Applicable to Certain Contracts and Consumer Relations*, available at <http://www.oas.org/dil/AgreementsPDF/Inglesdocumento%20de%20apoyo%20a%20la%20convencion%20propuesta%20por%20br%E2%80%A6.pdf>, for a helpful discussion of the background of the Brazilian proposal.

<sup>15</sup> For documents relating to the Canadian proposal, including earlier versions of the draft model law, see:

[http://www.oas.org/dil/CIDIP-](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_jurisdiction.htm)

[VII\\_topics\\_cidip\\_vii\\_consumerprotection\\_jurisdiction.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_jurisdiction.htm).

suppliers, to provide economic benefits to consumers by increasing the availability and choice, and decreasing product costs; and provide consumer confidence in the marketplace.”<sup>16</sup>

### 3. Next Steps

Since the Porto Alegre meeting, the United States, Brazil, and Canada have submitted revised proposals to the Porto Alegre participants. After the Porto Alegre review process is complete the proposals will be circulated to all the OAS member states. The OAS will then determine next steps for the completion of the preparatory work.<sup>17</sup> The date for the CIDIP VII Conference will be established after the preparatory work is complete.<sup>18</sup>

The United States has considered it important that CIDIP VII focus on practical mechanisms designed to assist consumers recover monetary damages suffered in B2C e-commerce transactions both cross-border and domestically. It has also expressed skepticism about the viability of the Canadian and Brazilian proposals since they raise a number of complex choice of court and choice of law issues. What effect might these proposals have on emerging entrepreneurial ventures in developing economies? Would these proposals restrict consumer access to competitive products and prices through the online marketplace? Are consumers provided effective protections if they are entitled to use their own laws and courts, but from a practical standpoint, they still cannot enforce a judgment against a business located in a foreign jurisdiction?<sup>19</sup> The following considers each of the various CIDIP VII proposals in more detail.

## II. Consumer Remedies for Deceptive Practices

The United States has proposed that CIDIP VII adopt a model law that would assist OAS member states in establishing competent consumer protection authorities, and vest them with the power to obtain redress for consumers and enable them to cooperate with their foreign counterparts. The draft Model Law also aims to facilitate the enforcement of certain judgments for consumer redress across borders.

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<sup>16</sup> Report on the Porto Alegre Experts Meeting, available at:

[http://www.oas.org/dil/experts\\_meeting\\_porto\\_alegre\\_2-4\\_2006.pdf](http://www.oas.org/dil/experts_meeting_porto_alegre_2-4_2006.pdf).

<sup>17</sup> See Report of the January 7, 2007 meeting of the Permanent Council of the OAS and the Committee on Political and Juridical Affairs concerning CIDIP VII, available at [http://www.oas.org/dil/Report\\_Session\\_January\\_18\\_2007.pdf](http://www.oas.org/dil/Report_Session_January_18_2007.pdf).

<sup>18</sup> See Resolution on the Seventh Inter-American Specialized Conference on Private International Law, approved by the Permanent Council of the OAS, May 21, 2007.

<sup>19</sup> See ICC, *Jurisdiction and applicable law*, June 6, 2001, available at <http://www.iccwbo.org/collection4/folder165/id478/printpage.html?newsxsl=&articlexsl=>

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In the United States, the Federal Trade Commission (FTC) can obtain a court order for consumer redress for violations of unfair and deceptive practices under U.S. laws and regulations. In one year, for example, the FTC obtained 95 federal district court judgments ordering USD \$75 million in consumer redress. The FTC may also seek redress on behalf of foreign consumers provided the claim has a substantial connection to the harm occurring at the United States national level. In practice the FTC has obtained and distributed redress funds to consumers in more than 75 countries, in cases involving telemarketing fraud, pyramid schemes and lottery schemes among others. The FTC has also entered into enforcement cooperation arrangements with consumer protection agencies in Australia, Canada, Costa Rica, Ireland, Mexico, and the United Kingdom.

A number of OAS member states have established consumer protection authorities. However, many state laws do not vest the consumer protection entity with authority to obtain redress for consumers or enable them to cooperate with their foreign counterparts.

Consumers in cross-border transactions in the Americas need to be protected from fraudulent, deceptive, and unfair practices. The U.S. Federal Trade Commission received over 95,000 cross-border fraud complaints during calendar year 2006. Cross-border fraud complaints comprised 16% of all fraud complaints received during the calendar year 2004, 20% for 2005, and 22% for 2006. Internet-related complaints comprised 55% (52,656) of the total cross-border fraud complaints (95,249) received during calendar year 2006.<sup>20</sup>

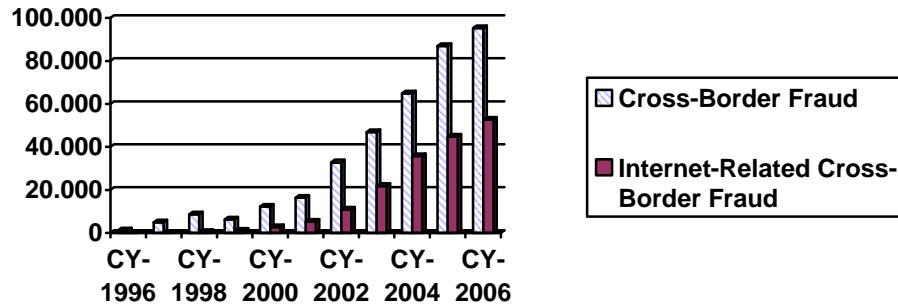
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<sup>20</sup> Federal Trade Commission, *Cross-Border Fraud Complaints, January - December 2006*, March 2007, available at:  
<http://www.consumer.gov/sentinel/pubs/pdfs/Cross-Border%20CY-2006%20FINAL.pdf>.

While this information does not give a systematic accounting of problems with cross-border consumer transactions, it does highlight the kinds of problems that consumers encounter with cross-border trade.



### Cross-Border Complaint Count by Calendar Year



U.S. consumers reported fraud losses of over \$93 million against companies located in Canada, and losses of over \$141 million against companies located in other foreign countries.<sup>21</sup>

The problem is not limited to the Americas. According to a recent European Commission study on consumer protection within the EU, 6% of citizens surveyed admitted that they had been deceived by fraudulent advertising. Moreover, 68% of EU citizens believed that there is a greater risk of falling victim to scams and fraud when purchasing from suppliers located in another EU country than from providers within their home country.<sup>22</sup>

The recently approved Organization for Economic Cooperation and Development (OECD) Recommendations on Consumer Dispute Resolution and Redress specifically recommend that national consumer protection agencies have legal authority to obtain and facilitate redress on behalf of consumer victims. They also recommend that the consumer protection authority be able to cooperate with similar entities in other states.<sup>23</sup> Representatives from the OAS itself, Argentina, Brazil, Canada, Chile, Mexico and the United States participated in the OECD conference on dispute resolution and redress that led up to development of the recommendations.<sup>24</sup>

<sup>21</sup> *Id.*

<sup>22</sup> Eurobarometer, *Consumer Protection in the Internal Market*, Sept. 2006, at 26, 57, available at [http://ec.europa.eu/consumers/topics/eurobarometer\\_09-2006\\_en.pdf](http://ec.europa.eu/consumers/topics/eurobarometer_09-2006_en.pdf).

<sup>23</sup> OECD Recommendation on Consumer Dispute Resolution and Redress, July 12, 2007, at 10-11, available at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>. Similar recommendations were contained in the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Practices Across Borders, June 2003, available at <http://www.oecd.org/dataoecd/24/33/2956464.pdf>.

<sup>24</sup> The report is available at <http://www.oecd.org/dataoecd/9/26/34431531.pdf>. OECD member states include the United States, Canada and Mexico. In 2007 the OECD

### III. Judicial Disposition of Consumer Disputes

Traditionally, consumer disputes have been addressed by national courts. However, as discussed above, B2C e-commerce poses challenges to the existing legal framework. Given the small value of most consumer complaints, it does not appear that resolving cross-border claims through traditional court mechanisms is practical.

The EU study on consumer protection highlights the problem with judicial disposition of consumer disputes. The study reports that a relative majority of European consumers do not perceive resolving arguments with sellers/providers in court to be easy. The EU study concludes that this is likely because of the long duration of procedures and the high costs of litigation. Moreover, according to the study, when consumers were asked about the best measures to protect them, their right to take sellers/providers to courts took the lowest position (17%), along with their right to join other consumers and take sellers/providers to court (13%).<sup>25</sup>

The issue is, of course, even more complicated in B2C cross-border e-commerce disputes. For example, from a practical standpoint, how would most consumers enforce a judgment against a vendor located in another country? The United States has taken the position that practical proposals that simplify and facilitate the judicial resolution of *domestic* consumer disputes have value.

#### A. Small Claims Tribunals

The United States has proposed that CIDIP VII adopt a model law for providing monetary consumer redress through low cost expedited small claims tribunals. The U.S. proposal, entitled Model Law on Small Claims, provides sample legislative language for implementing a small claims procedure. Member states, in particular those with no current small claims procedures or those with procedures that are less developed, could make appropriate use of such provisions in light of their particular needs and existing legal systems. The draft Model Law on Small Claims omits detailed sections regarding topics such as choice of court, venue, service of process, and motions to vacate judgments; member states can include such sections as best fit within their own overall legal frameworks.

The United States and some OAS member states already have in place viable low cost small claims tribunals for consumer claims.<sup>26</sup> These procedures vary

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initiated membership talks with Chile and decided to strengthen OECD cooperation with Brazil, through enhanced engagement or as a full member.

<sup>25</sup> *Consumer Protection in the EU Market*, supra note 22, at 98-99.

<sup>26</sup> By way of example, in Brazil, Article 5 of the Consumer Protection Code acknowledges that consumers must be assisted so that they can file all necessary claims in order to protect their rights, including by means of providing such consumers free access

significantly from country to country in terms of type of procedure; type of dispute and claim that may be heard; monetary thresholds; financial costs to parties; and overall accessibility to consumers. These low cost expedited small claims tribunals offer consumers access to monetary redress at a cost and burden not disproportionate to the amount of their claim. The new OECD Recommendations on Consumer Dispute Resolution and Redress also call for states to establish simplified court procedures for small claims, which offer consumers the opportunity to obtain a judicial determination of their disputes through less formal and expedited procedures rather than those used in traditional court proceedings.<sup>27</sup> Even more recently, the European Parliament adopted a regulation establishing common small claims procedures for simplified and accelerated cross-border litigation on consumer claims.<sup>28</sup>

### **B. Collective Actions**

The U.S. proposed legislative guide on redress and dispute resolution for CIDIP VII includes a section calling for states to provide for some form of collective or representational legal actions for common consumer injuries, that is fair to both consumers and business. The U.S. proposal provides general principles for collective dispute resolution. It contemplates that the specific laws providing for collective actions may vary substantially from state to state, depending on the overall legal framework.

Collective or class actions have not existed in most civil law countries, including in Latin America and Europe. On the other hand, class actions have long been recognized in common law countries, such as the United States. In the United States each state has procedures available allowing collective action lawsuits to be filed by groups of private consumers who have suffered similar harm as a result of the wrongful actions of the vendor or provider.

Collective actions provide consumers with access to remedies in cases where they could not afford to act individually. These procedures are particularly useful where large numbers of consumers have each suffered small losses. In such cases, although the cost to each individual consumer may be small, the aggregate cost and the impact on consumer welfare is large.

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to legal assistance and creating specialized entities and small claims courts to address consumer protection cases. In Chile, Article 50G of the Consumer Protection Law provides that small claims can be heard as a single-instance proceeding. In Costa Rica, Law No. 7472 (*Ley de Protección de la Competencia y de Defensa Efectiva del Consumidor*) provides for summary or abbreviated procedures for all consumer complaints (Arts. 17 and 43). Other countries have “justice of the peace” courts that handle small claims procedures, including procedures for claims initiated by consumers.

<sup>27</sup> OECD Recommendations, *supra* note 23, at 10.

<sup>28</sup> Regulation No. EC 861/2007, May 22, 2007, *available at*: <http://register.consilium.europa.eu/pdf/en/07/st03/st03604.en07.pdf>.

The key idea is to reduce the cost of litigation to the point that the total remedy, and administrative cost of distributing the remedy collected to all the individual claimants, is substantially greater than the cost of bringing the claim. The goal then is to reduce the cost of bringing all the claims by eliminating the redundancy of litigating each claim individually. When consumers can pool their claims together into one large case, it has the effect of reducing the per unit costs of bringing each individual claim to a much lower cost than if each claim were prosecuted separately.

The EU study on consumer protection reported that 74% of European citizens polled would be more willing to defend their rights in court, if they could join other consumers complaining about the same thing.<sup>29</sup> Additionally, the new OECD Recommendations on Consumer Dispute Resolution and Redress specifically call for states to establish mechanisms that provide for collective resolution of consumer disputes that are fair to both consumers and businesses.<sup>30</sup>

A number of European states have modified their laws to permit representative actions for consumers.<sup>31</sup> For example, in France, a non-profit government-authorized consumer organization may seek reparations for damages suffered by consumers before civil courts, i.e., *une action en représentation conjointe*. The damages must have been caused by the same vendor or supplier and have a common origin.<sup>32</sup>

A few Latin American countries have modified their laws to permit limited collective actions, including in consumer cases. The laws vary substantially from state by state. For example, Mexico does not have a separate judicial procedure for class action litigation. However, the Office of the Federal Attorney for Consumer Protection (PROFECO) may represent groups of consumers in actions brought before the courts.<sup>33</sup> If a judgment is issued, each person affected has to initiate a separate proceeding -as an ancillary claim to the initial claim submitted by PROFECO- and provide evidence of the extent to which she or he has been affected.<sup>34</sup>

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<sup>29</sup> Consumer Protection in the EU Market, *supra* note 22, at 100.

<sup>30</sup> OECD Recommendations, *supra* note 23, at 10.

<sup>31</sup> Laurel J. Harbour and Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World*, 2006, available at:

[http://209.85.135.104/search?q=cache:6G66D9IALYIJ:www.shb.com/FileUploads/the\\_emerging\\_european\\_class\\_action\\_\\_expanding\\_multi-party\\_litigation\\_to\\_a\\_shrinking\\_world\\_1496.pdf+Dutch+Civil+Code+allows+representative+action+under+article+3:305a.&hl=fr&ct=clnk&cd=5&gl=fr](http://209.85.135.104/search?q=cache:6G66D9IALYIJ:www.shb.com/FileUploads/the_emerging_european_class_action__expanding_multi-party_litigation_to_a_shrinking_world_1496.pdf+Dutch+Civil+Code+allows+representative+action+under+article+3:305a.&hl=fr&ct=clnk&cd=5&gl=fr).

<sup>32</sup> Consumer Code (France), Articles L. 422-1, available at:

[http://195.83.177.9/upl/pdf/code\\_29.pdf](http://195.83.177.9/upl/pdf/code_29.pdf).

<sup>33</sup> Ley Federal de Protección al Consumidor (as amended), Arts. 24 III and 26.

<sup>34</sup> *Id.*, Art. 26 I.

In Brazil there is a procedure for filing a class (collective) action regulated under the Consumer Protection Code.<sup>35</sup> Class actions can be initiated by the Attorney General, the Federal government, municipalities, the Federal District government, consumer protection administrative agencies, and private associations (non-governmental entities).<sup>36</sup> Brazilian class actions for damages are limited to a declaration of the defendant's liability. No monetary relief may be obtained as an immediate result of the class action. Subsequently, it is up to each individual class member to initiate a separate action to demonstrate that they are a member of the class, and the amount and extent of the damages suffered.<sup>37</sup>

In Chile, the procedure for filing a class action includes both collective interests (the rights of a determined or determinable group of consumers linked to a provider by virtue of a contract) and diffuse interests (the rights of an undetermined group of consumers).<sup>38</sup> A foreign consumer can recover as part of an awarded class, provided she or he submits a claim, either personally or through designated counsel.<sup>39</sup> However, if there is no traditional jurisdictional link to Chile (e.g., in the case of electronic transactions), a foreign consumer would not be entitled to file an action. From a practical standpoint, a foreign consumer may also have no way of knowing that a collective action has been initiated or completed because the relevant notices need only be published in national media.<sup>40</sup>

### C. Jurisdiction and Choice of Law

The Canadian and Brazilian proposals focus on cross-border resolution of consumer disputes and deal with the theory of jurisdiction and choice of law. As discussed above, the creation of the Internet has raised complex jurisdiction and choice of law issues. Traditionally, disputes are settled within the physical territory where the property or disputants are located, or where the performance takes place. With e-commerce, however, consumers and vendors may be located anywhere in the world. Moreover, the disputes raise challenging jurisdictional issues. For example, what is the place of performance where a vendor sells software to the consumer and the consumer downloads the software from the Internet? Legal systems vary widely in the resolution of this issue.

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<sup>35</sup> Consumer Protection Code (Brazil), Article 81.

<sup>36</sup> *Id.*, Art. 82.

<sup>37</sup> *Id.*, Art. 97. See generally Antonio Gidi, *The Class Action Code: A Model for Civil Law Countries*, 23 *Ariz.J.Int'l & Comp.L.*37 (2005).

<sup>38</sup> Consumer Protection Law (Chile), Art. 50.

<sup>39</sup> *Id.*, Art. 54C.

<sup>40</sup> *Id.*, Arts. 53-54.

## 1. Canada - Country of Destination

*World-wide Jurisdiction.* Canada has proposed a model law on jurisdiction and choice of law that would in theory establish world wide jurisdiction over vendors in B2C cross-border e-commerce transactions. The Canadian proposal would as a practical matter impose the assumption that all on-line businesses target the world at large. The Canadian proposed model law would allow the consumer to void a choice of court/law clause in a contract and sue in his/her home forum and apply the home forum choice of law “unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in [name of State].”

By not allowing the parties to choose their forum and applicable law, the Canadian proposal would decrease certainty for the vendor and increase product costs. The proposal would also as a practical matter encourage vendors to take affirmative action to avoid trade with foreign consumers. According to Canada, a vendor might demonstrate that it took reasonable steps to avoid concluding consumer contracts with consumers residing in a particular State, if it posts something on the web stating that they will not do business with consumers in that state.

Initially, the draft Hague Conference Convention on Choice of Court Agreements included a similar approach to that proposed by Canada concerning choice of court agreements in consumer cases. However, the provision proved to be extremely controversial in light of its likely negative impact on e-commerce transactions. Ultimately, the final text of the convention excluded agreements that include a consumer as a party.<sup>41</sup>

*Forum Non Conveniens.* The Canadian proposal on jurisdiction also would require that courts be given discretion in the exercise of jurisdiction (i.e., *forum non conveniens*). Under Canadian law, as well as the law of most common law countries like the United States, a court may decline to exercise its jurisdiction if it believes a court of another state also has jurisdiction to hear the claim and that this court can better render justice in the circumstances.

The proposal conflicts with the approach taken by civil law countries concerning jurisdiction, since the concept of *forum non conveniens* is not normally recognized in those countries. In a civil law jurisdiction, when the requirements of jurisdiction and venue are met, the court has to hear the case, although it may suspend the proceeding. However, a few civil law jurisdictions,

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<sup>41</sup> For the Hague Conference Convention on Choice of Court Agreements, June 30, 2005, see [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98). See also Ronald A Brand, *The New Hague Convention on Choice of Court Agreements*, ASIL Insights, 2005, available at: <http://www.asil.org/insights/2005/07/insights050726.html>.

notably Québec in Canada,<sup>42</sup> and Louisiana in the United States,<sup>43</sup> have adopted the principle of *forum non conveniens*.

## 2. Brazil - Law Most Favorable to Consumer

Brazil has proposed a convention on choice of law. The proposal would generally provide that consumer contracts will be governed by the law where the consumer resides (where there is no choice of law in the contract) or the law most favorable to the consumer (if the parties have made a choice of law in the contract).<sup>44</sup>

It is unclear how one would as a practical matter determine the “law most favorable to the consumer” as proposed in the draft convention. For example, how would one identify which part of a country’s laws are the most favorable to the consumer? Would the determination vary case by case and issue by issue? Would the determination vary depending on whether the issue concerned the validity of the contract, the burden of proof, the consequences of breach, the amount of any possible recovery, the probability of obtaining a recovery under the substantive law of the state (even if smaller than the amount potentially recoverable), the measure of damages, the statute of limitations, or some other standard? Would it be possible for more than one law to be applied with regard to any given dispute? Would applying the law “most favorable” to the consumers only in transnational cases discriminate in favor of domestic producers (which would only need to comply with national law)? Are laws considered “most favorable” to consumers even when the requirements they impose substantially increase the cost of a given good or service, or substantially inhibit competition?<sup>45</sup>

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<sup>42</sup> See Quebec Civ. Code 1994, art. 3135 (“Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”)

<sup>43</sup> See La. Code Civ. Proc. Ann. Art. 123(B) (West Supp. 1993) (“Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice...”).

<sup>44</sup> The Brazilian draft also contains provisions regarding time sharing contracts and travel and tourism contracts and which are not necessarily relevant to this discussion at this time.

<sup>45</sup> Similar concerns with regard to the Brazilian proposal have been raised with the Inter-American Juridical Committee. See Antonio Fidel Perez, *Informe Sobre la Séptima Conferencia Especializada Interamericana Sobre Derecho Internacional Privado* (CIDIP-VII), CJI/doc.227/06, Rio de Janeiro, Brazil, August 9, 2006.

Even assuming these questions could be answered, the process of determining the law most favorable to the consumer requires proof of foreign law, which may as a practical matter be particularly difficult in common law jurisdictions. In common law jurisdictions, proof of foreign law is often more adversarial than in civil law jurisdictions. In civil law countries, foreign law may be proven by the production of a certificate, prepared by a foreign official of the relevant state or an expert in the foreign law concerned. In common law, foreign law may be proved by the testimony of qualified expert witnesses, who may be subject to cross examination, as to both their expert qualifications and their interpretation of the foreign law.

The revised Brazilian proposal includes a provision whereby states would “designate a Central Authority to facilitate the information about foreign and national law for the protection of consumers and changes thereto.”<sup>46</sup> Nonetheless, this article would seemingly require that the United States designate 50 central authorities, since under the U.S. federal system, each of the 50 states has its own substantive commercial laws and court systems. Moreover, common law in each state may vary significantly concerning choice of law.

There is as a practical matter a cost to imposing restrictive rules that sometimes outweigh the benefits. Applying the law most favorable to a particular consumer in a particular case (or the most detrimental to a particular business), may very well not result in the creation of an environment that provides the greatest overall economic benefit to consumers as a group. The Brazilian proposal in its current form would likely deny consumers access to competitive products and prices through the online marketplace by injecting uncertainty into the legal process for vendors and thereby increasing cost and limiting supply. Applying the law most favorable to the consumer may also have a particularly negative impact on emerging entrepreneurial ventures in OAS member states. In sum, it does not appear to be a practical standard which parties and courts can use effectively.

### 3. CIDIP V - Mexico City Convention

The Brazilian and Canadian approaches also conflict with the approach taken by OAS member states when they earlier addressed choice of law issues during CIDIP V in Mexico City in 1994. CIDIP V produced the Inter-American Convention on the Law Applicable to International Contracts,<sup>47</sup> which is

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<sup>46</sup> Art. 10 of the revised draft convention.

<sup>47</sup> The Convention entered into force on December 15, 1996 and it has been ratified by Mexico and Venezuela and signed by Bolivia, Brazil, and Uruguay. It is likely that other OAS member states, including the United States, will consider ratification of the treaty concerning its application in cross-border transactions. *See* Articles 22-23 of the Convention providing that states are not obliged to apply the Convention to conflicts between the legal systems in force in its territorial units. The Convention is *available at*:



applicable *inter alia* to consumer contracts. Article 7 of that Convention provides that the contract is governed by the law chosen by the parties. Article 11 of the Convention further provides that the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. Article 11 also grants the forum court discretion to apply the mandatory provisions of the law of another state with which the contract has close ties.

The CIDIP V Mexico City Convention approach to autonomy of contract in consumer matters is comparable to the approach taken by the European Union in its Rome Convention on the Law Applicable to Contractual Obligations.<sup>48</sup> Article 3 of the Rome Convention recognizes that the contract is governed by the law chosen by the parties. Moreover, the Rome Convention also provides for the application of mandatory rules in certain cases involving transactions with consumers.<sup>49</sup> The CIDIP V Mexico City Convention approach to autonomy of contract is also generally consistent with the approach taken in the United States. While U.S. state law varies from jurisdiction to jurisdiction, it generally supports autonomy of contract in consumer transactions, subject to some limitations.

In short, a serious question exists as to whether CIDIP VII will actually harmonize the approach of states to choice of law/choice of court in cross-border consumer transactions in the Americas. Indeed, if CIDIP VII were to consider the proposals in their current form, it would likely result in three different approaches to choice of law/choice of court in consumer transactions: (1) the CIDIP V Mexico City Convention requirement recognizing autonomy of contract; (2) the Canadian country of destination option, and (3) the Brazilian law most favorable to the consumer alternative. The direct conflict between the policies of the Mexico City Convention and the Canadian and Brazilian proposals should be addressed and resolved first in the CIDIP VII negotiations. The most useful form for any new instrument might be a protocol to the Mexico City Convention addressing specific concerns relating to consumers.<sup>50</sup>

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[http://www.oas.org/dil/CIDIPV\\_convention\\_internationalcontracts.htm](http://www.oas.org/dil/CIDIPV_convention_internationalcontracts.htm).

<sup>48</sup> The text of the Rome Convention is *available at*:

[http://www.rome-convention.org/instruments/i\\_conv\\_orig\\_en.htm](http://www.rome-convention.org/instruments/i_conv_orig_en.htm).

<sup>49</sup> Article 5 of the Rome Convention stipulates that: "Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or if the other party or his agent received the consumer's order in that country, or if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy".

<sup>50</sup> The protocol might, for example, consistent with U.S. law, permit the parties to select the law of a domestic or foreign jurisdiction to govern their rights and duties with

In all events, it does not appear that resolving cross-border consumer claims through traditional court mechanisms is practical. A dispute over a few hundred dollars is not, as a practical matter, the stuff of international litigation.

#### **IV. Arbitration of Cross-border B2C eCommerce Disputes**

The United States proposal also includes Draft Model Rules for Electronic Arbitration of Small Cross-Border Consumer Claims. The rules are intended to provide practical procedures for resolution of certain common types of small consumer disputes that are simple, economical, effective, fast, and fair. The term “arbitration” is used in the model rules and this paper as a general term covering non-judicial dispute procedures, and does not necessarily entail the applicability to these procedures of laws governing formal arbitration.

Electronic arbitration of B2C e-commerce disputes is widely regarded as holding great promise for the low-cost and efficient resolution of consumer disputes, especially cross-border disputes. The new OECD Guidelines on Consumer Dispute Resolution and Redress call on states to establish online dispute resolution by which consumers and businesses engage in an out of court process utilizing the active intervention of a neutral third party who imposes solutions or alternatively, agency-based mechanisms, by which consumers submit their claim to a public agency for investigation and finding.<sup>51</sup>

In some OAS member states, state-run alternative dispute resolution (ADR) mechanisms are very well developed, offering dispute resolution services for a wide range of consumer disputes. For example, in Mexico arbitration has been established as an alternative procedure under the Federal Consumer Protection Law to resolve consumer disputes, especially those not resolved by conciliation.<sup>52</sup> PROFECO may receive consumer protection claims verbally, in writing, by telephone, electronically or by any other suitable means (including email, fax and certified mail communications). Hearings can also take place telephonically or through other means. The Federal Consumer Protection Law promotes and protects the rights of consumers without distinctions based on nationality or other considerations.<sup>53</sup>

It is also contemplated that the CIDIP VII process may produce a model implementation arrangement for electronic arbitration of cross-border disputes. The U.S. proposal notes that consideration might be given to including mechanisms such as maintaining a list of arbitrators to handle claims and

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respect to an issue in the contract if the transaction bears a reasonable relationship to the selected jurisdiction.

<sup>51</sup> OECD Recommendations, *supra* note 23 at 10.

<sup>52</sup> *Ley Federal de Protección al Consumidor* (as amended), Arts. 116, 117.

<sup>53</sup> *Id.*, Chapter 1, Art. 1.

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arranging to refer such claims to arbitrators. The Model Rules could also be used in conjunction with any model implementation agreement.

States may also wish to separately consider how to establish practical incentives for compliance with such arbitral awards. Possibilities include:

- promoting a voluntary seal program that vendors can join only on condition that they satisfy all resulting arbitral awards;
- arranging for vendors joining the program to post a bond or other guarantee for amounts in dispute; and,
- developing an arrangement whereby vendors would consent to the reversal of charges on their merchant bank accounts to reflect arbitral awards involving a credit card transaction.

Payment cardholder protections sometimes referred to as charge backs can play an important role for consumer redress in cases of fraudulent, unauthorized, or otherwise disputed charges on payment cards. However, protections for non-conforming or non-delivery of goods and services vary greatly and these protections may not be available at all for cross-border transactions.

Consideration could be given to whether or not the award is enforceable under the OAS Panama Convention on Commercial Arbitration or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, given the small size of most consumer claims, use of these treaties would not be cost-effective in the typical case.

Another issue is whether consumers can be required to submit to binding ADR, either before or after the dispute has arisen. OAS member states have a mixed approach as to whether to permit pre-dispute binding arbitration in consumer contracts. In the United States, consumers are generally free to consent to be bound by ADR, but a court may consider general contract law defenses such as fraud, undue influence or unconscionability to strike down such a contractual clause. These differences in theoretical approach would not preclude developing practical rules for arbitration of B2C cross-border disputes, at least for post-dispute agreements to such arbitration.<sup>54</sup>

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<sup>54</sup> A 2003 joint statement of Consumers International and Global Business Dialogue on Electronic Commerce (GBDe) on alternate dispute resolution guidelines provides as follows concerning binding arbitration: "Merchants should generally avoid using arbitration that is binding on consumers because it may impair consumer confidence in electronic commerce. Arbitration that is binding on merchants as an obligation of membership in a trustmark program, on the other hand, serves to promote consumer confidence in electronic commerce. Arbitration that is binding on consumers should only be used in limited circumstances, and where it clearly meets the criteria of impartiality,

## V. Conclusion

In conclusion, strong, measured, and effective consumer protection laws and institutions can contribute to consumer welfare and economic development. Since most consumer claims are of a relatively small monetary value, it is important for CIDIP VII to focus on practical mechanisms for enhancing monetary consumer redress, particularly in cross-border situations. For B2C cross-border e-commerce transactions these mechanisms should include establishing viable consumer protection authorities to fight against fraudulent and deceptive commercial practices. Online arbitration of B2C cross-border disputes also has the potential to provide a viable alternative to court resolution of B2C cross-border disputes. Creating low cost expedited small claims tribunals and permitting collective and representational actions for common consumer claims would enhance judicial disposition of B2C domestic disputes.

On the other hand, the CIDIP proposals concerning jurisdiction and choice of law raise a number of complex issues. The proposals in their current form would likely restrict consumer access to competitive products and prices through the online marketplace by injecting uncertainty into the legal process for vendors, thereby increasing cost and limiting supply. The proposals could also have a negative impact on emerging entrepreneurial ventures in the Americas. In all events, it does not appear that use of traditional court mechanisms is practical for the resolution of B2C e-commerce cross-border disputes, given the small value of most claims and high cost of litigation, as well as the practical difficulty in enforcing foreign judgments. And a practical approach to moving forward in this area is what the consumers of the Americas really need.

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transparency and public accountability. Consumer decisions to engage in binding arbitration must be fully informed, voluntary, and made only after the dispute has arisen”.

*Available at:*

[http://www.gbde.org/IG/CC/Consumers\\_Internationa\\_GBDeJoint\\_Statement\\_Nov03.pdf](http://www.gbde.org/IG/CC/Consumers_Internationa_GBDeJoint_Statement_Nov03.pdf).

Thus, the differing approaches do not preclude post dispute binding arbitration.