Alternative Dispute Resolution Mechanisms
and
Global Electronic Commerce

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Electronic commerce has proven to be a powerful tool for expanding consumer empowerment. Competition in the electronic marketplace drives prices down, offers consumers greater choice, and provides them with the necessary material information they need to make informed purchasing decisions. However, the expansive growth of global electronic commerce, especially between consumers in one country who are buying goods or services from businesses based in other countries, will continue unabated only if consumers feel confident that they will have rights of redress if a dispute should arise. As well, governments must feel confident that their citizens will not suffer a falling-off of consumer protections when they transact business online. A central challenge to cross-border electronic commerce will therefore be the ability of consumers and businesses – especially small and medium sized enterprises (SMEs), to resolve complaints related to online transactions.

The jurisdiction under which cross-border complaints may be resolved presents a difficult choice. Consumers are unlikely to resort to the courts of other countries where merchants are resident. Merchants, conversely, will be unenthusiastic about international transactions that could subject them to the global reach of every country where their online customers may live. Alternative dispute resolution mechanisms (ADR) offer a way to avoid this jurisdictional dilemma.

ADR systems offer a timely and efficient approach for addressing consumer complaints that cannot be resolved through direct contact with a business. Through an established ADR mechanism, the involvement of an independent third party dispute resolver ensures that a consumer's concerns will be addressed fairly. At the same time, ADR offers businesses the advantages of timeliness, cost-effectiveness of dispute resolution, and continued consumer loyalty. ADR also lets both parties avoid the additional delays and the costs of appealing to either a government administrative agency or the courts.

By offering consumers a viable alternative to legal redress mechanisms, ADR also avoids overburdening both administrative and judicial systems; while at the same time protecting the consumers' right to seek legal redress should they be dissatisfied with the results of the ADR process. Finally, when cross-border, on-line transactions are involved, ADR provides a means of avoiding the jurisdictional issues that arise when the consumer resides in one country and the business is based in another country.

The 'Clean, Well-Lighted' Electronic Marketplace

In order for ADR systems to succeed, there must be a strong sense of shared trust among the stakeholders -- consumers, on-line businesses and government. Achieving that high level of trust will require a visible and sincere commitment from the business community in the global, electronic marketplace. First, voluntary business practice standards should be adopted by the business community to set a high standard of online business practice without reference to the specific laws of any particular jurisdiction. Second, a dispute resolution commitment from e-commerce businesses is needed, with adjudication based on the voluntary business practice standards and alternative legal remedies preserved for the few consumers who might consider going to court. Third, a seal or trustmark should be displayed by companies that meet these standards and dispute resolution obligations.

* Consumers must be confident that the purchase will be completed accurately; that they will receive the products that they ordered; that the products will be of the quality promised; that the warranty for those products will be honored;
and that disputes concerning such transactions will be quickly and fairly resolved.

* Businesses, whose on-line revenues are dependent on the growth of global electronic commerce, depend on the trust their customers place in the process; the receipt of payment for their goods and services; and a means of resolving disputes fairly which protects both businesses and consumers.

* Governments must look to the "public interest" and be confident that the rights of both the consumer and business are protected, while at the same time avoiding actions that could adversely impact the growth of global electronic commerce.

Consequently, trust will be a critical factor in the expansion of electronic commerce. Trust can be lost very quickly and, once lost, can be reestablished only very slowly. Therefore, there is a need to move rapidly to establish a process for resolving consumer complaints involving B2C transactions in the global electronic marketplace.

Consumer Confidence in Trans-Border Transactions

The challenges of building cross-border consumer confidence in global electronic commerce are considerably greater than those faced within a single country. In cross-border transactions, purchases are made "virtually" -- with consumers in one country and the companies in another. Many of these companies, especially the SMEs that are seeking to enter the global marketplace via the Internet, do not have the internationally recognized logos and brands or the worldwide reputations for quality and reliability of many large multinational companies. Hence consumers may lack confidence in doing business with SMEs lacking those attributes.

Differences in language, customs and business practices can quickly lead to misunderstandings and disputes. This is likely to be a source of frequent misunderstandings in cross-border on-line transactions.

Governments around the world have established different levels of protection of consumer rights and different methods for enforcement of those rights. No international agreement exists that would determine which country will have jurisdiction in a B2C dispute. Reaching such an agreement is likely to be a protracted and difficult negotiation. This is especially true since traditional approaches to resolving cross-border disputes based on "country of origin" or "country of destination" pose special problems for on-line cross-border transactions. For example, if the consumer's country has jurisdiction, many SMEs will be reluctant to offer their products internationally via the Internet. Conversely, if the country where the business is located has legal jurisdiction, many consumers may believe that there is no effective way to protect their rights. In both instances, the promise of global electronic commerce could be compromised.

Meeting Consumer Expectations in the Global Electronic Marketplace

In any commercial transaction, a consumer must have confidence that the business whose product they are about to purchase is reliable and that the product being offered is worth the price that is being paid. The importance in gaining and maintaining that confidence is especially true when the consumer and business to not share commonalities of geography, culture and/or legal framework. The best companies always understand this expectation and continually strive to exceed it. Other companies --including many newer online merchants--may have good intentions, but lack the skills or experience to turn the consumer's expectation into a reality. A few companies will intentionally seek to exploit this customer expectation.

But how to separate these companies in a virtual world is not always easy -- and has been the subject of intensive discussion by consumer groups, businesses and
governments. Moreover, policing bad companies in the virtual marketplace is perceived to be a daunting challenge. These discussions have generally focused on three key ideas.

* Codes of Conduct for Online Businesses: Individual corporations, business associations and/or governments around the world have worked to develop Codes of Conduct, Guidelines, Principles, or Best Practices, etc. for Online Businesses. These documents vary in their specifics, but the concept is the same. They describe the actions that a company should take to protect a customer's rights. They may be included on the company's web site and a consumer can review them before making a purchase.

* Trustmarks: To increase consumer confidence that a company will act in accordance with a code of conduct or best practices, a third party "trustmark" is often used. The concept is that by displaying the "trustmark", the company represents that it is subject to external oversight. The company would not be allowed to display the third party mark if the company's actions were inconsistent with what is contained in the "Code of Conduct" or similar document. Trustmarks are most useful when they have strong brand recognition and credibility among consumers.

* Dispute Resolution: In the end, consumer confidence relies on the belief that any disputes will be settled quickly and fairly either by the company directly or through some other means. In the brick and mortar world, a consumer usually has the ability to inspect a product before purchasing it and --if it is defective-- return it for a refund, repair or replacement. Most companies see this form of dispute resolution as in their own best interest and an extension of their customer relations programs. While the same holds true in the world of online transactions, the critical difference is that a consumer can't inspect the product before purchasing, and instead has to rely on the merchant's photos or descriptions of the product. In this situation, the consumer will have an even higher expectation that they can return a product for a refund or achieve some other form of redress. In both the traditional and online world, when disputes cannot be resolved directly between the consumer and the company, the merchant and consumer must resort to other means. These often include appeals to consumer protection agencies; recourse to the courts; or use of alternative dispute resolution systems.

Alternative Dispute Resolution and Global Electronic Commerce

When consumers are unable to resolve their dispute directly with a company concerning a cross-border purchase, consumers should have a way of seeking redress from third parties. However, while consumers are generally protected by laws of their home jurisdictions and vendors are subject to government and legal oversight in the countries in which they are located, the applicable laws in cross-border transactions are unclear. Hence appeals to consumer protection agencies and/or recourse to the courts are not always readily available and effective.

However, alternative dispute resolution mechanisms (ADR) involving an independent third party can provide neutral, extra-jurisdictional processes that permit both the consumer and the company to resolve complaints involving cross-border transactions.

Under such a system, if a consumer has a complaint about an electronic transaction that cannot be resolved through discussions with the company, the consumer could resort to an independent third party to resolve cross-border disputes. The third party would then discuss the dispute with both sides in an effort to resolve it before rendering a judgment. If the third party decides in favor of the consumer and the business refuses to implement the decision, the consumer may then seek redress through the appropriate judicial system.

Key Issues in Developing Cross-Border Consumer Dispute Resolution Mechanisms
The ultimate success of any trans-border ADR system will depend on whether it offers consumers a complaint resolution mechanism that has the benefits of existing consumer protection laws (fairness, enforceability, etc.) coupled with the flexibility of more non-traditional redress approaches (cost-effective, timely, etc.).

* Fairness: The ADR mechanism must be perceived as treating both parties at least as equitably and fairly as a formal government administrative or legal procedure. Consumer dispute mechanisms must have structure, rules and procedures that ensure that all parties' rights are protected, and that every aspect of the mechanism operates with regard to the parties' rights to due process.

* Visibility: Consumers must be fully knowledgeable of the existence of ADR mechanisms. While it is desirable that consumers have knowledge of these systems prior to purchase, it is critical that this information be available at the time that a dispute arises.

* Accessibility: The ADR mechanism must be readily accessible by consumers when a dispute arises. Accessibility not only means that the mechanism can be called upon when needed, but that there are no unreasonable barriers to access (such as unreasonable costs).

* Cost-Effectiveness: The cost of an ADR mechanism should be significantly less for both consumers and businesses than commensurate formal administrative or legal actions. This is particularly true where formal actions involve time-consuming dispositions, hearings, legal representation and cross-border logistics.

* Creative Problem-Solving: ADR mechanisms can be more flexible and creative in finding solutions that satisfy both parties. Consumer protection agencies and/or the courts may offer only limited remedies in resolving disputes, particularly where those remedies are prescribed by law or regulations. Also, resolving disputes through ADR mechanisms will almost certainly reduce the numbers of cases that would otherwise be brought to agencies and the courts.

* Timeliness: To be effective, third party ADR mechanisms must resolve disputes quickly if they are to meet the needs of consumers, businesses and governments. In contrast, courts and consumer protection agencies may not be as responsive. Quick resolution however, must take into account the need for the parties to provide (or the mechanism to collect), sufficient information upon which to base a resolution.

* Finality: The ADR mechanism should, to the greatest extent possible, ensure that resulting decisions fully and finally resolve individual consumer disputes.

* Enforceability: The ADR mechanism should ensure that decisions rendered and agreed-to by the parties are quickly and completely honored.

Resolving Disputes

In the end, the ultimate success of any ADR system will depend upon consumer satisfaction; did the ADR mechanism resolve a consumer's complaint in a fair, timely and effective manner? To achieve this necessary level of consumer confidence, ADR processes need to provide real remedies, which provide real results, and are practical to use.

* Online merchants should provide clear and conspicuous notice of how a customer can easily contact the business to expeditiously resolve complaints and disputes related to a transaction.

* Online merchants should have an effective and easy to use international mechanism for addressing complaints and correcting errors. Examples would include fair exchange policies, return policies, etc.
In the event that a consumer complaint cannot be resolved directly by the merchant, the complaint should be directed to a third-party ADR mechanism. Contact information for requesting ADR should be made easily-available to consumers (most likely a "trust mark" link on the merchant's website). The right to use of a third party's "trust-mark" will very likely require an obligation by the company to observe an agreed "code of conduct" in exchange for permission to display the "trust mark".

The existence of the ADR mechanism must be made visible to the consumer before they make a purchase. This can be done by posting the agreement and/or "code of conduct" on the sellers website or by linking the sellers web site and the independent third party's web site. Display of the third party "trust mark" is yet another way of making the agreement visible to the consumer but requires that the consumer is aware of its meaning. The rules and procedures that will be used in the ADR process must be established and available for inspection in advance.

The process for the consumer to use in contacting the independent third party for assistance in resolving a dispute must be highly visible and easily to use. An on-line complaint form provides one way to do this and can be made accessible either through the third party's or the seller's web site. By using the Internet, speed and efficiency in handling the dispute will be increased. But a consumer should not be limited to Internet access to the ADR system and they should be able to submit their complaint by letter, telephone or any other means of communication.

Educating the consumer on the ADR process and their rights under such a system is a critical step and must be accomplished before the purchase is made. One way to do this on-line is to make it a part of the actual purchase agreement where the consumer is required to acknowledge that they are aware of the ADR process before a transaction can be executed. (Such an acknowledgement should not however be considered to be a waiver of any consumer rights.)

The results of the ADR process should be visible to both parties and to the public at large. This will reinforce the company's self interest in acting responsibly and avoiding damage to its reputation. At the same time, posting of the ADR results should act as a deterrent to false and/or frivolous complaints.

While implementation of an ADR process requires careful planning and execution, care should be taken to ensure that it does not result in the creation of an additional legal system. For recourse to the judicial system should always be available to either party when a dispute cannot be resolved directly between them or through ADR.

Recommendations to Governments

Consumer dispute resolution mechanisms will only be seen as worthy of consumer confidence if they are operating in the context of a robust and viable industry self-regulatory environment. Consumers need access to fast, fair, effective methods of resolving disputes. Consumers also need quick, meaningful ways of identifying those companies that subscribe to high standards for electronic commerce, including participation in meaningful ADR programs. Thoughtful and enlightened government oversight and enforcement will provide the regulatory 'floor' which comprehensive self-regulatory ADR programs can flourish. Accordingly, the role of governments in the framework of cross-border consumer protection should be:

In coordination with consumer groups and businesses, agree upon a set of international guidelines for consumer dispute resolution programs.

Encourage businesses to adopt Codes of Conduct based on those guidelines for B2C trans-border e-commerce.

Educate and encourage consumers to make use of ADR mechanisms for resolving B2C disputes.
* Consider giving some formal "standing" or "certification" to Code programs that meet these agreed-upon international guidelines.

* Consider reciprocal uniform audit mechanisms to ensure citizens of their respective countries that Code programs live up to their commitments.

* To use the force of local laws and regulation to aggressively pursue those companies that fail to live up to their commitments, or engage in fraudulent or deceptive acts or practices.

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