

Building a Practical Framework for Consumer Protection



CIDIP VII: Proposals

- States considering 3 proposals on consumer protection for CIDIP VII:
 - **Brazil:** Convention on Jurisdiction and Applicable Law
 - **Canada:** Model Law on Jurisdiction and Applicable Law
 - **United States:** Legislative Guide and Model Laws on Dispute Resolution and Redress

Building A Practical Framework for Consumer Protection U.S. Proposal

1. Alternative Dispute Resolution
2. Small Claims Procedures
3. Collective Complaints
4. Government Obtained Redress for Deceptive Practices.

Building A Practical Framework: Principles and Practical Guidance

- The *United Nations Guidelines for Consumer Protection* (“UN Guidelines”), developed by “UNCTAD”, call on governments to “establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible” (UN, 1999).
- The Inter-American Juridical Committee, after reviewing proposals last year, stressed that for CIDIP VII “to be successful, it should be guided by the need to ensure consumers engaging in cross-border commercial transactions a protection that is effective and affordable in relation to the value of claims and that leads to quickly enforceable remedies.”
 - CJI/RES. 144 (LXXII-O/08), SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP-VII), para. 3 (March 12, 2008).

Building A Practical Framework: Principles and Practical Guidance

- Porto Alegre experts agreed that clear, consistent, predictable and fair legal framework essential to
 - generate consumer and business confidence,
 - provide economic benefits to consumers by increasing availability, competition and choice, and decreasing product costs,
 - facilitate the free movement of goods, services and capital among OAS member States.
- New laws or mechanisms must not discriminate, from a competition and trade perspective, between businesses in different countries.
- Available at http://www.oas.org/DIL/experts_meeting_porto_alegre_2-4_2006.pdf

Challenges to the Existing Legal Framework

- Traditionally consumer complaints were addressed by national courts.
- 21st century witnessed explosive growth in a new avenue for trade: business to consumer e-commerce (B2C).
- Throughout Americas consumers are no longer restricted to purchasing products in one store, one city, or even one country because Internet transcends borders.
- Traditional judicial mechanisms no longer provide an effective means of resolving individual B2C cross border disputes given small value of the transactions, high costs of litigation, and difficulty enforcing foreign judgments.

Challenges to the Existing Legal Framework

- B2C e-commerce has increased more than 6 fold in Americas since CIDIP VII was initiated.
- Consumers are a major part of international commercial transactions for first time.
- U.S. B2C e-commerce generated \$225.2 billion in sales in 2008, while B2B generated \$3.1 trillion.
- Americas are one of fastest growing markets in world for B2C e-commerce.
- *Available at*
http://www.oecd.org/dataoecd/44/13/44047583.pdf?bcsi_scan_DA3493EE5FC9D524=0&bcsi_scan_filename=44047583.pdf

B2C E-Commerce Sales in Latin America (in millions)

	2003	2004	2005	2006	2007
Argentina	\$83	\$162	\$281	\$619	\$739
Brazil	\$757	\$1,289	\$2,270	\$3,541	\$4,899
Caribbean	\$127	\$232	\$387	\$565	\$818
Central America	\$64	\$90	\$189	\$360	\$499
Chile	\$79	\$104	\$243	\$472	\$687
Colombia	\$60	\$105	\$150	\$175	\$201
Mexico	\$296	\$504	\$567	\$868	\$1,377
Peru	\$65	\$91	\$109	\$145	\$218
Puerto Rico	\$174	\$248	\$344	\$384	\$445
Venezuela	\$85	\$140	\$253	\$490	\$821
Other	\$76	\$101	\$131	\$165	\$203
Total	\$1,866	\$3,066	\$4,925	\$7,783	\$10,908

Source: Visa and AméricaEconomía Intelligence, "Informe Sobre Comercio Electrónico (B2C) en América Latina: Rompiendo los pronósticos," June

Internet Growth – Americas

- Number of individuals connected to web is one of the main drivers of e-commerce growth.
- 79% of internet users in Latin America have purchased online.
 - E Marketer Mexico Online 2009, available at <http://www.slideshare.net/Engelnator/e-marketer-mexico-online-2009-presentation>
- Over 330 million internet users in OAS member states today.
- Represent over one third of the world internet users.
- U.S., Brazil, Mexico, Canada, and Argentina are among world leaders for number of internet users.
- Number is expected to continue to grow exponentially as Latin American consumers access internet more frequently from mobile devices rather than PCs (i.e. m-commerce).

Internet Use in the Americas

Country	<i>Internet users</i>	Country	<i>Internet users</i>	Country	<i>Internet users</i>
Antigua / Barbuda	60,000	Dominica	26,500	Panama	525,200
Argentina	9,309,000	Dom. Rep.	1,677,00	Paraguay	280,000
Bahamas	120,000	Ecuador	1,549,000	Peru	7,636,000
Barbados	160,000	El Salvador	700,000	St Kitts & Nevis (*)	10,000
Belize	32,000	Grenada	23,000	Saint Lucia	110,000
Bolivia	1,000,000	Guatemala	1,320,000	St Vincent Grenadine	57,000
Brazil	50,000,000	Guyana	190,000	Suriname	44,000
Canada	28,000,000	Haiti	1,000,000	Trinidad / Tobago	430,000
Chile	5,570,000	Honduras	434,200	USA	223,000,000
Colombia	12,100,000	Jamaica	1,500,000	Uruguay	968,000
Costa Rica	1,500,000	Mexico	22,812,000	Venezuela	5,720,000
Cuba *	1,310,000	Nicaragua	155,000	Americas	330,000,000

OAS Countries Rank in Top 10 for Internet Users

Top 10 Countries, Ranked by Internet Users*, 2007-2012 (millions)

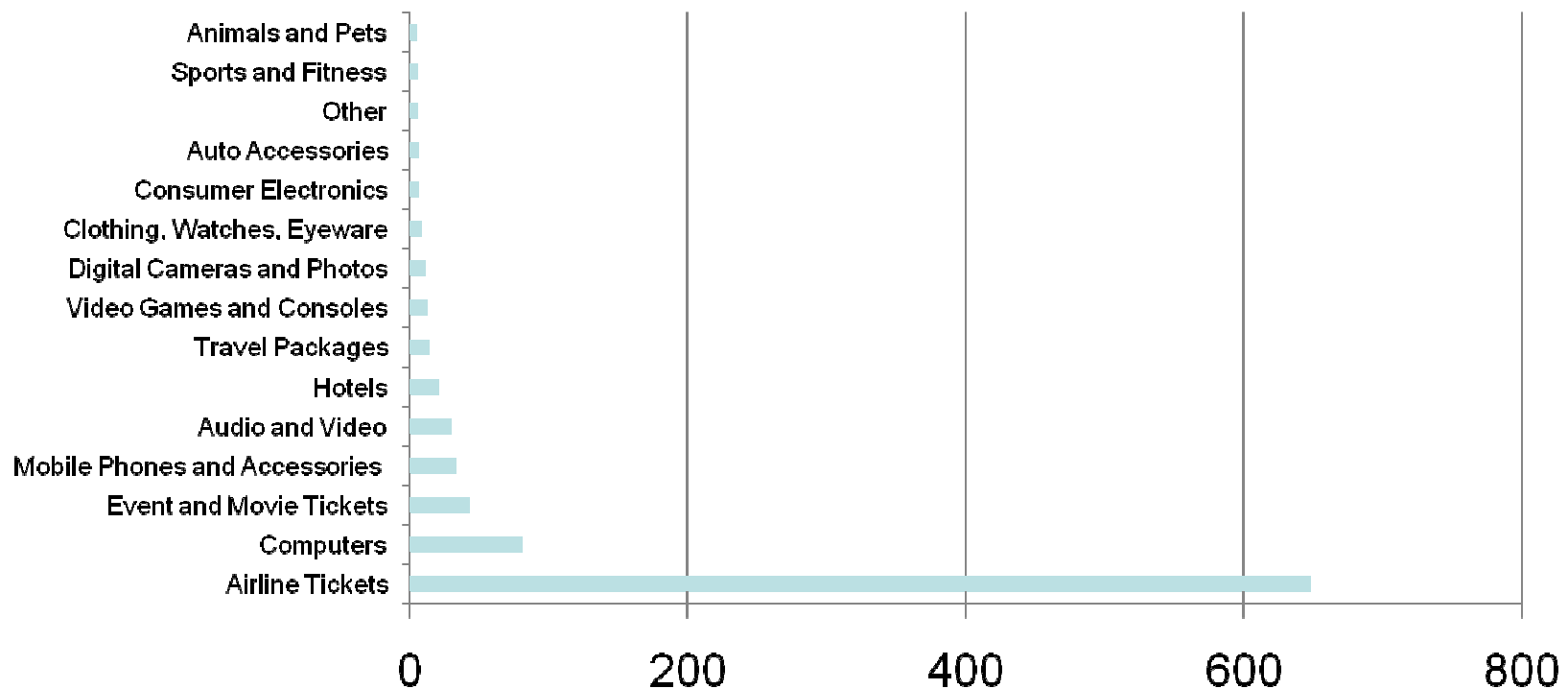
	2007	2008	2009	2010	2011	2012
1. US	188.1	193.9	200.1	206.2	211.9	216.9
2. China	176.5	216.0	254.9	294.4	334.4	372.9
3. Japan	89.1	90.9	92.5	94.0	95.4	96.5
4. Germany	48.1	50.4	52.5	54.5	56.3	57.9
5. UK	36.8	38.1	39.4	40.6	41.7	42.8
6. Russia	35.0	40.3	45.4	50.4	54.9	59.0
7. Brazil	33.6	38.8	43.7	48.7	52.9	56.7
8. France	33.3	36.1	38.8	41.2	43.3	45.1
9. India	32.6	40.7	49.7	59.6	70.3	81.3
10. Mexico	23.6	27.4	31.5	35.6	39.5	43.0

*Note: eMarketer defines an Internet user as any person who accesses the Internet from any location at least once per month; *ranked by 2007 figures*

Source: eMarketer, January 2008

Most Popular Items Purchased Online

B2C E-Commerce Sales in Mexico, by Product
(in millions)



Source: AMIPCI (Asociación Mexicana de Internet), "Estudio de Comercio Electrónico 2008" commissioned by Visa, September 2008

B2C Commerce Sales Involve Small Amounts of Money

Product Category	Average Sale – Mexico 2008
Travel packages	\$902
Computers	\$655
Airline tickets	\$186
Animals and pets	\$146
Hotels	\$121
Digital cameras and photos	\$115
Audio and video	\$98
Video games and consoles	\$87
Auto accessories	\$76
Consumer electronics	\$59
Sports and fitness	\$52
Event and movie tickets	\$37
Clothing, watches, eyewear	\$36
Other	\$94

Source: Average B2C E-Commerce Sale in Mexico, by Product Category, 2008 AMIPCI (Asociación Mexicana de Internet), "Estudio de Comercio Electrónico 2008" commissioned by Visa, September 2008097820

www.eMarketer.com

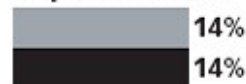
Credit Cards Are the Most Frequently Used Payment Method

Online Payment Methods Used in Mexico, 2006 & 2007 (% market share)

Credit card



Deposit/transfer



Cash (COD)



Affinity credit card



PayPal



Other

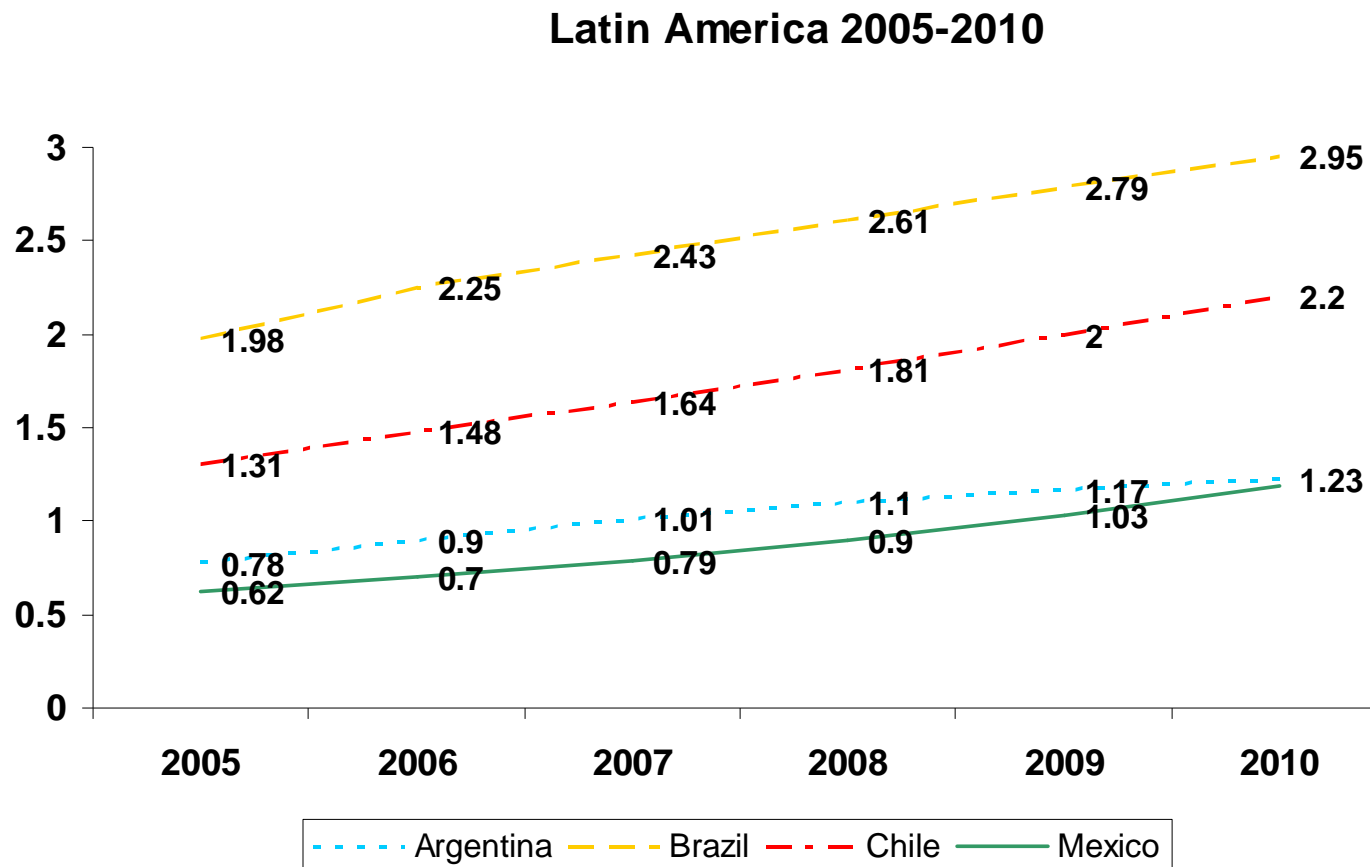


2006

2007

Note: numbers may not add up to 100% due to rounding
Source: AMIPCI (Asociación Mexicana de Internet), "Estudio de Comercio Electrónico 2008" commissioned by Visa, September 2008

Financial Card Penetration



Consumers Benefit From Cross-Border E-Commerce

- October 2009 European Commission conducts 11,000 cross border online searches for 100 popular products (e.g. CDs, computers, digital cameras, books, and clothes) :
- **Substantial Cost Savings** - For over half of product searches, consumers found offer in another EU country at least 10% cheaper (delivery and other costs included).
- **Increased Access to Products** – Consumers in 13 out of the 27 EU countries could not find domestic online offers for over 50% of products, but found them in another EU country.
- Available at http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf

Cross-Border Barriers

- Nonetheless, 60% of cross border online search orders were refused when EC consumers tried to purchase goods online in another Member state
- While 51% of the EU27 retailers sell via the internet, only 21% currently conduct cross-border transactions.
 - Available at http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf
- No similar statistics for OAS.

Cross-Border Barriers – Special Conflict of Law Rules for Consumers

The European Commission reports:

- “Businesses frequently mentioned the fragmented national consumer protection regulations in force in the EU Member States as a major obstacle to operating on a pan-EU basis and one that generates significant compliance costs.”
- “The effects of the fragmentation are felt by business because of the conflict-of law rules (in particular the Rome I Regulation that obliges traders not to go below the level of protection afforded to foreign consumers in their country of origin). As a result traders wishing to sell cross-border must incur legal and other due diligence costs to ascertain that contract terms respect the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States.”

•Available at http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf at 15.

Cross-Border Barriers – Special Conflict of Law Rule for Consumer Contracts

- “The cost of fragmentation is a heavy burden on business: the estimated administrative costs imposed by EU consumer law on distance sellers trading domestically (only in their own country) is € 5,526. This cost increases to € 9,276 for distance sellers wishing to trade in one or two other EU countries. The estimated administrative cost for a business wanting to sell in all 27 Member States is € 70,526.” *Id.*
- “Such compliance costs resulting from the legal fragmentation . . . were rated by [businesses] as being more important than additional costs arising from language differences, costs in ensuring an efficient cross-border after-sales service, delivery costs, or cross-border complaint-resolution.”
- “Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.”
- 2008 EC STAFF WORKING DOCUMENT, accompanying the proposal for a directive on consumer rights Impact Assessment Report , available at http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf

Rome I Regulation – EU Parliament Recital on special conflict of law rule for consumer contracts

- “With 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.”**
- “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”
- *Available at*
[http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj\(2007\)1119_romei_am_/juri_oj\(2007\)1119_romei_am_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj(2007)1119_romei_am_/juri_oj(2007)1119_romei_am_en.pdf)

Rome I Regulation -- Review Clause for special conflict of law rule for consumer contracts

- Article 27 of Rome I Regulations requires that by 2013 the EC provide special report to the European Parliament on inter alia application of the special Rome I rule for consumer contracts.
- In calling for special report, European Parliament cited need to promote inter alia “ADR in the field of electronic commerce and . . . to review to what extent on-line ADR schemes might be used . . . to increase consumer confidence in electronic commerce and obviate the need for court proceedings. . . .”
- If appropriate, special report will be accompanied by proposals to amend the special Rome I rule for consumer contracts.
 - EU Parliament Final Compromise Amendment 104 Article 23(b) (new), *available at* [http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj\(2007\)1119_romei_am_/juri_oj\(2007\)1119_romei_am_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj(2007)1119_romei_am_/juri_oj(2007)1119_romei_am_en.pdf)

U.S. Experience with Rome I Special Rule for Consumer Contracts

- U.S. conflicts law is primarily a matter of state rather than federal law (e.g. Uniform Commercial Code adopted by all 50 states).
- A 2001 amendment to Uniform Commercial Code proposed inter alia special conflict of laws rule for consumer contracts following European model now found in Rome I Regulations.
- 33 U.S. State Legislatures declined to adopt proposal. No state accepted proposal.
- Proposal opposed by business groups as well as some consumer advocates, in part because of harm to small business.
- In 2008 proposal was withdrawn and law reverted to the original rule permitting party autonomy in consumer contracts, provided choice had a reasonable connection to transaction.
- U.S. rule permitting party autonomy is subject to generally recognized public policy exception conflict rule that may prevent contractual waivers of fundamental or mandatory public policy consumer protection laws.
- Autonomy of contract does not hinder consumer protection authority enforcement of laws since they are not privy to contract.
- U.S. considering ratifying Inter-American Convention on the Law Applicable to International Contracts (adopted at CIDIP V).

ADR Guidelines

Agreement between Consumers International and the Global Business Dialogue on Electronic Commerce

- “Electronic commerce, especially between consumers in one country buying goods or services from businesses based in other countries, will grow unabatedly only if consumers feel confident that their interests are sufficiently protected in the case of disputes... .
[I]nternational court proceedings can be expensive, often exceeding the value of the goods or services in dispute.
- At the same time, there is also the concern that merchants - especially small and medium sized enterprises (SMEs) - might be faced with unmanageable problems due to difficulties related to consumer disputes resulting from Internet transactions.
- There are widely differing views held among governments on the right type and level of consumer protection, even at the regional level of the European Union or the U.S.
- Complete international harmonization of applicable laws and international agreements on competent jurisdictions might be the ideal solution in theory, but it is unlikely that this can be achieved satisfactorily in practice

ADR Guidelines

Agreement between Consumers International and the Global Business Dialogue

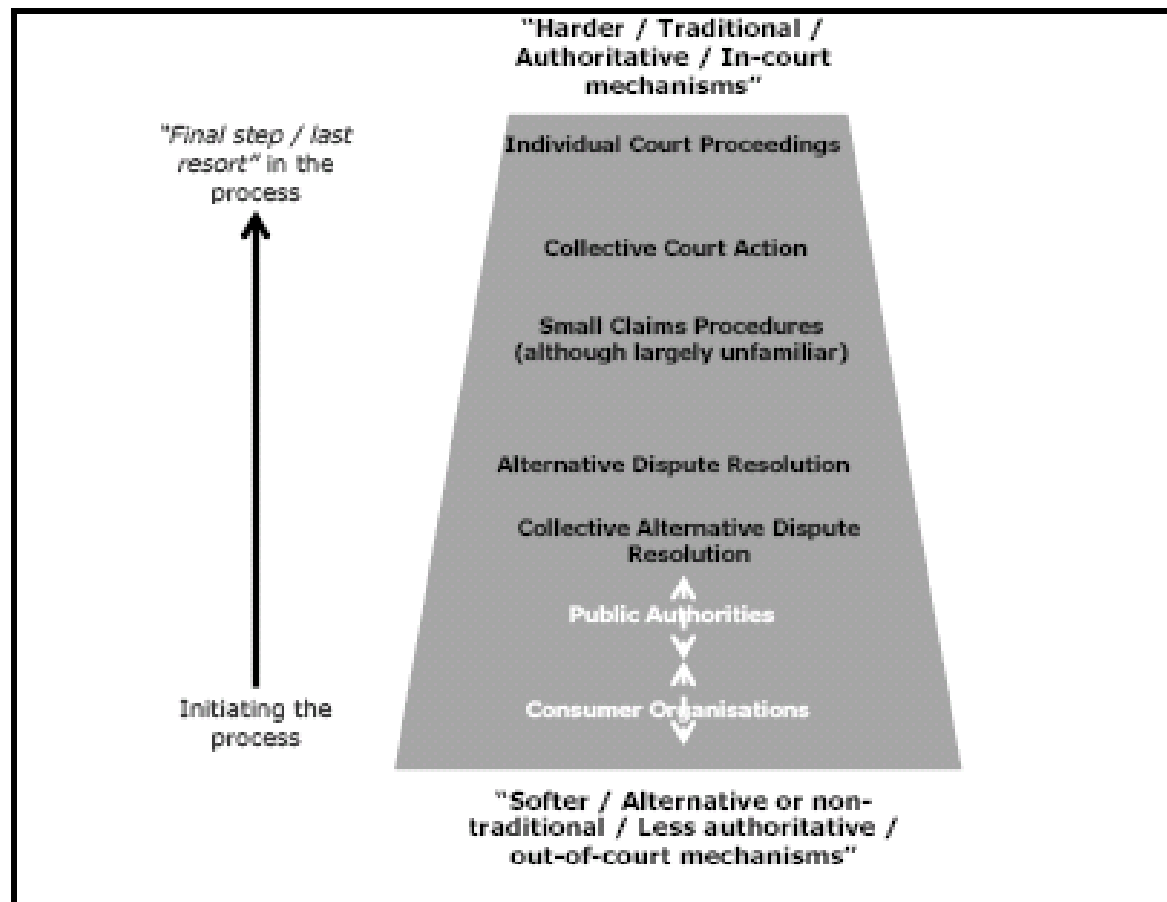
- “The application of the “country of destination” principle (the residence country of the customer) is not the right answer either, since merchants will be unenthusiastic about international transactions that could subject them to a variety of differing country laws, processes and legal reach of every country in which their online customers may live. . . . “
- “[i]t would strongly induce merchants to restrict the geographic scope of their offers. This, in turn, would limit competition and consumer choice”
- **“Moreover, for consumers this principle 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.”

Building A Practical Framework U.S. Proposals

- I. Alternative Dispute Resolution
- II. Small Claims Procedures
- III. Collective Complaints
- IV. Government Obtained Redress for Deceptive Practices

Building A Practical Framework

Diagram 3: Order in which consumers would consider using various Redress Mechanisms



http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf

Alternate Dispute Resolutions

U.S. Proposal

OAS-ODR Initiative

- One element, of the U.S. proposal is a OAS-ODR Initiative for electronic resolution of cross-border e-commerce consumer disputes.
- The ODR Initiative is intended to promote consumer confidence in e-commerce by providing quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions.
- The term “Online Arbitration” is used in the protocol as a general term covering online non-judicial dispute resolution procedures, and does not necessarily entail the applicability to these procedures of laws governing formal arbitration.

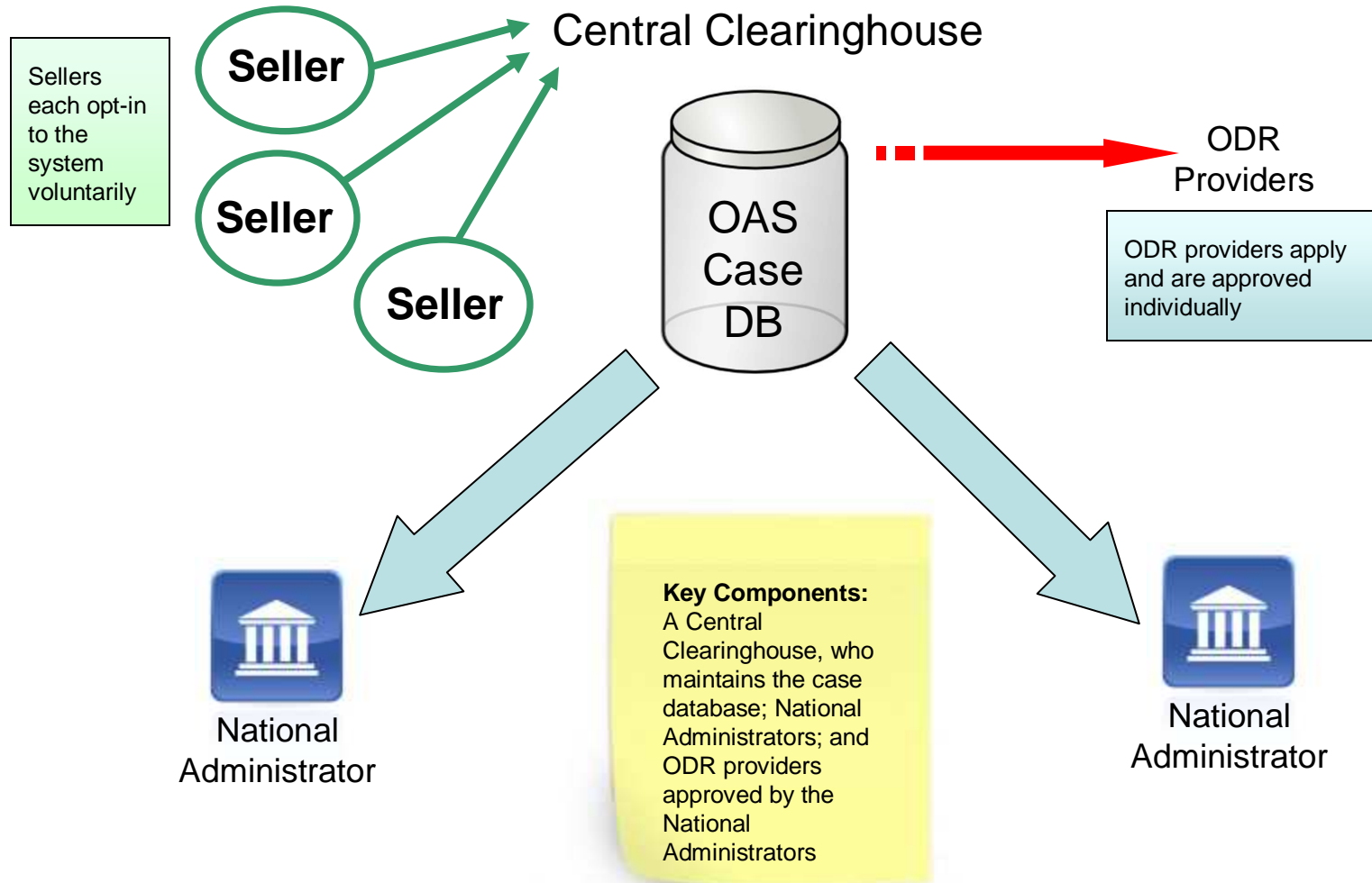
OAS-ODR Overall Design

- Merchants first step for redress
- System must scale to thousands of claims
- Courts not useful for 99% of consumer problems
- Majority of reported issues resolvable
- ODR process must quickly identify bad actors
- Redress process must be
 - Simple
 - Transparent
 - Affordable
 - Swift
- Enforcement (e.g. refunds) must be fast and effective

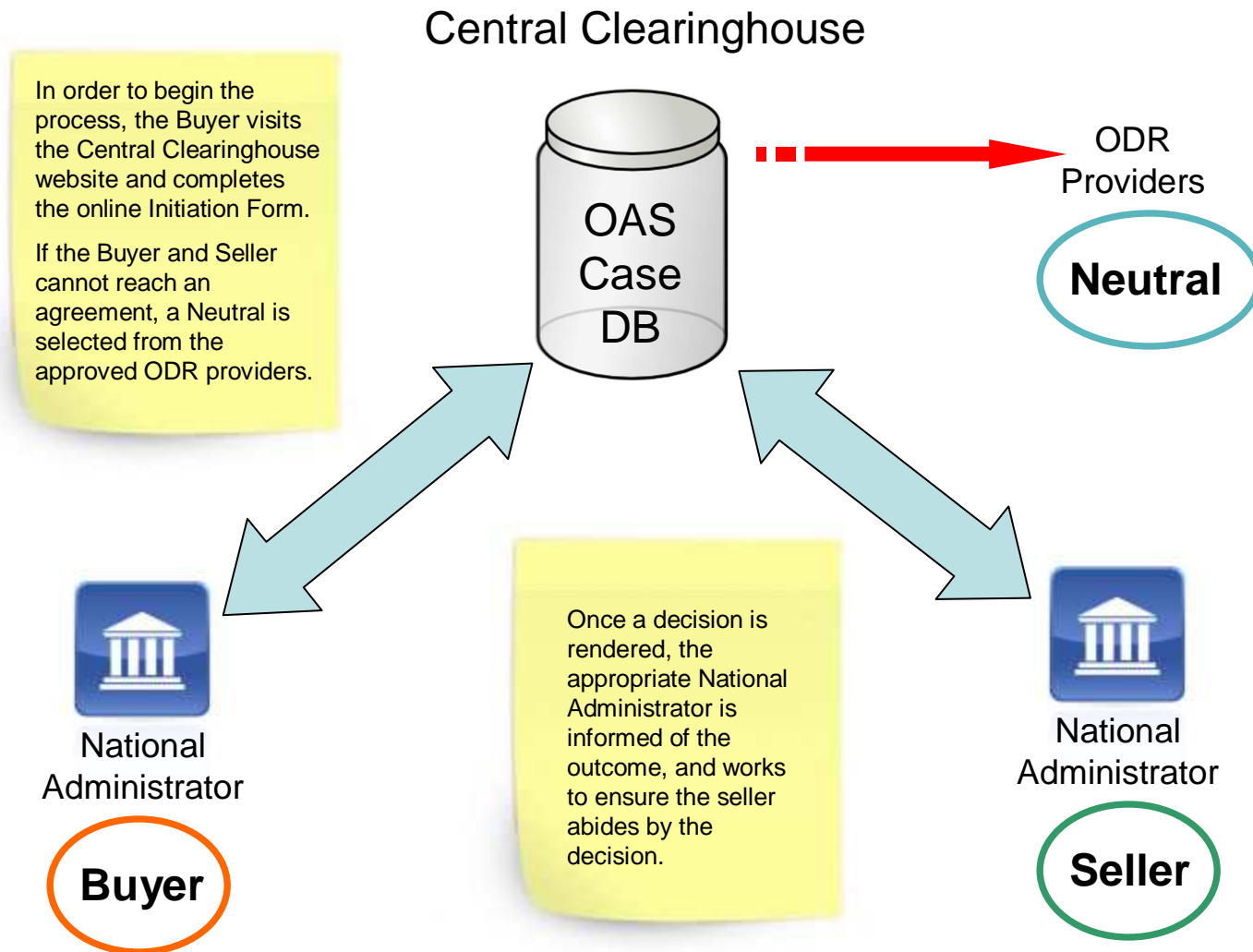
OAS-ODR Overall Design

- Model OAS law/cooperative framework and rules govern OAS-ODR Initiative
- E-commerce Merchants agree to be listed on the Central Clearinghouse home page and have claims processed
- Administrator or state designated authority or payment processors enforce outcome where Merchant located

Overall System Design



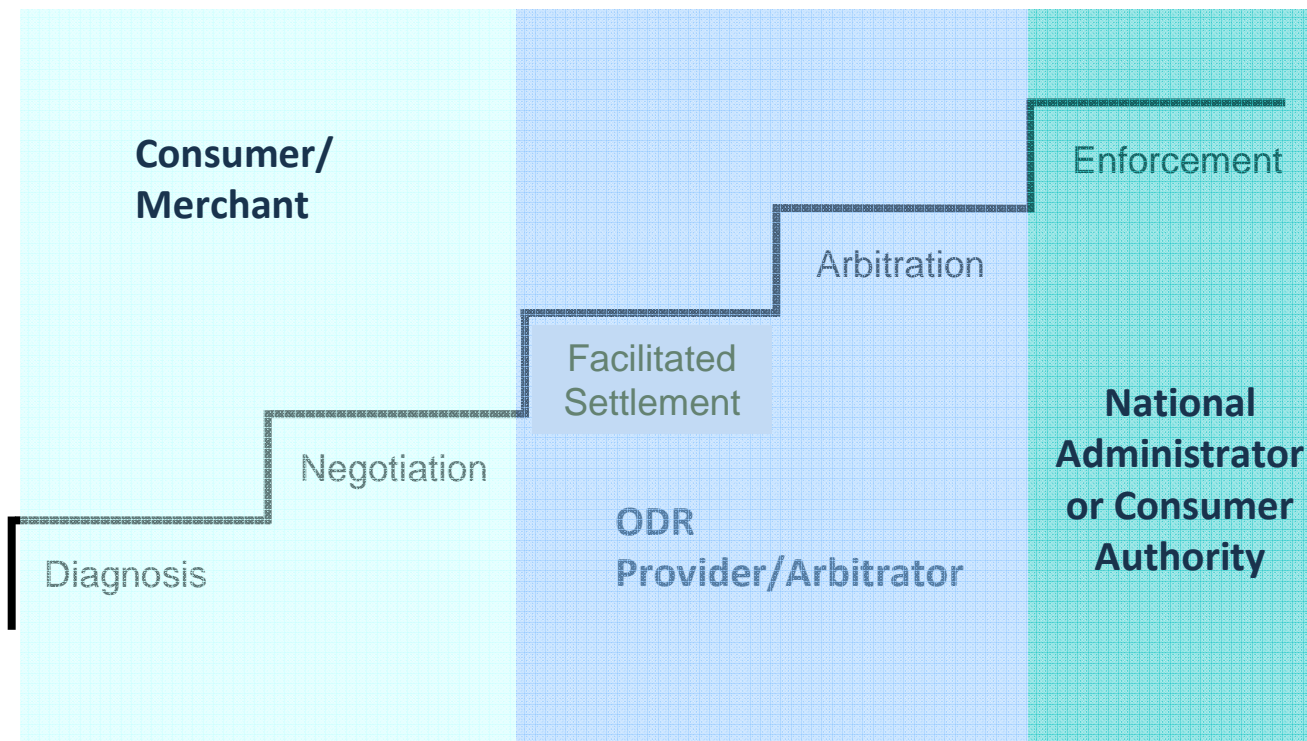
Overall System Design (2)



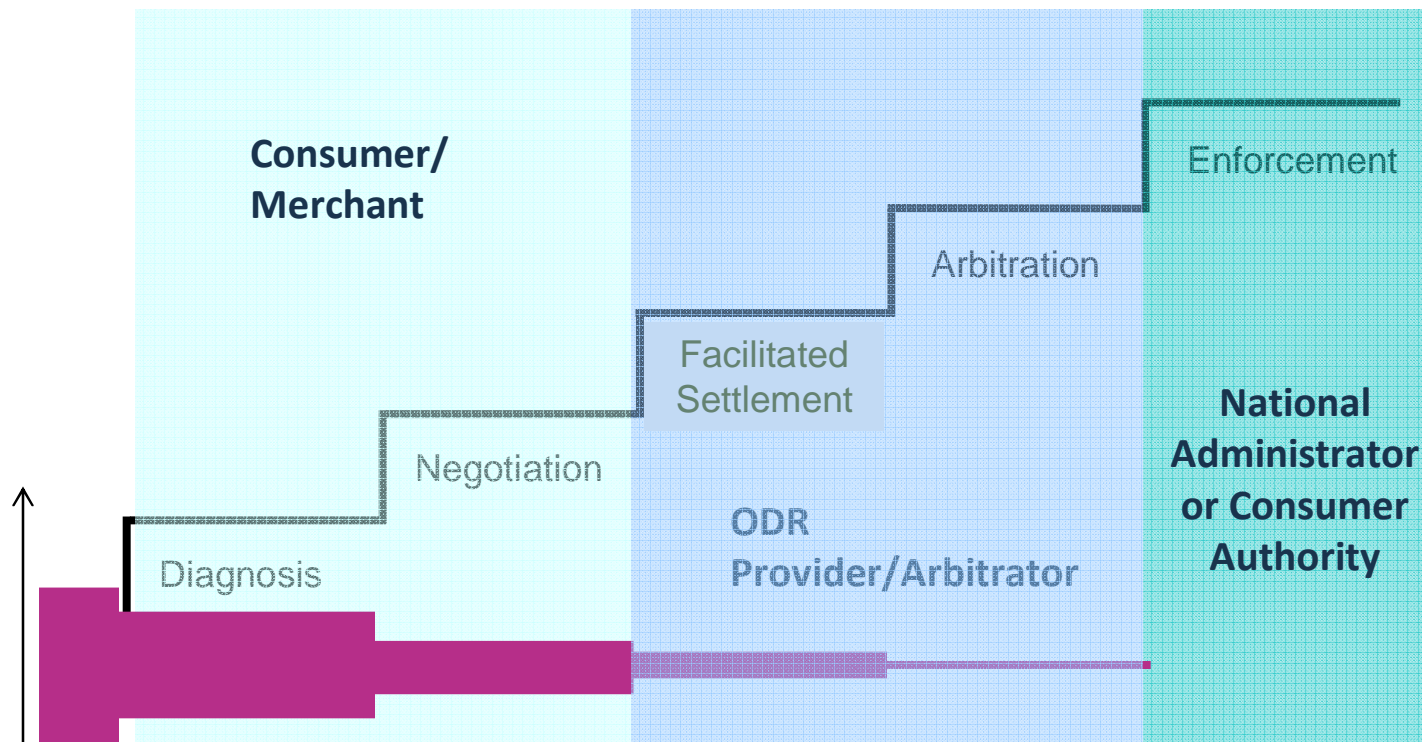
OAS-ODR Initiative Process

- Model rules govern OAS-ODR Initiative process
- Consumer initiates process on the Central Clearinghouse website by completing Initiation Form
- First phase: Parties given 20 days to negotiate settlement
- Second phase: If no settlement, case may escalate to 3rd party resolution
- National Administrator selects ODR provider from list of approved ODR providers
- ODR provider achieves resolution
 - via online facilitated settlement (mutual agreement)
 - via online arbitration (evaluation)
- Administrator or state designated authority or payment processors enforce outcome where Merchant located

OAS-ODR Protocol Phases



Each phase acts like filter resolving percentage of disputes



OAS-ODR Initiative Enforcement

- The Rules contemplate that if the Merchant does not follow through with its obligations under the award and agreement to arbitrate, the case will be referred by the Administrator to the relevant organization(s) in the State for enforcement.
- The relevant organizations may then take various steps to ensure the Merchant complies with the award and agreement, including taking direct action, referring the case to collection agencies and/or requesting assistance from payment networks,
- In addition to direct interactions with Merchants, 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.

Electronic Arbitration of B2C Cross Border Disputes

- Experts at Porto Alegre supported consideration of a role for central authorities in international alternate dispute resolution, including whether to provide draft model provisions reflecting possible frameworks.
- The July 2007 OECD Recommendations similarly call for states to establish mechanisms for alternate dispute resolution of consumer disputes.

OAS-ODR Initiative

State Models

- In some OAS member states, state-run alternate dispute resolution (ADR) mechanisms for business to consumer disputes are very well developed, offering dispute resolution services for a wide range of consumer disputes.
- In Mexico, *Concilianet*, has been established to provide a government run online dispute resolution platform. The Federal Consumer Protection Law promotes and protects the rights of consumers without distinction based on nationality or other considerations.

Available at: <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>.

- In Chile, a similar online platform has been established by the National Consumer Service (SERNAC).

Available at: <http://www.sernac.cl/tramites/index.php>

OAS-ODR Initiative

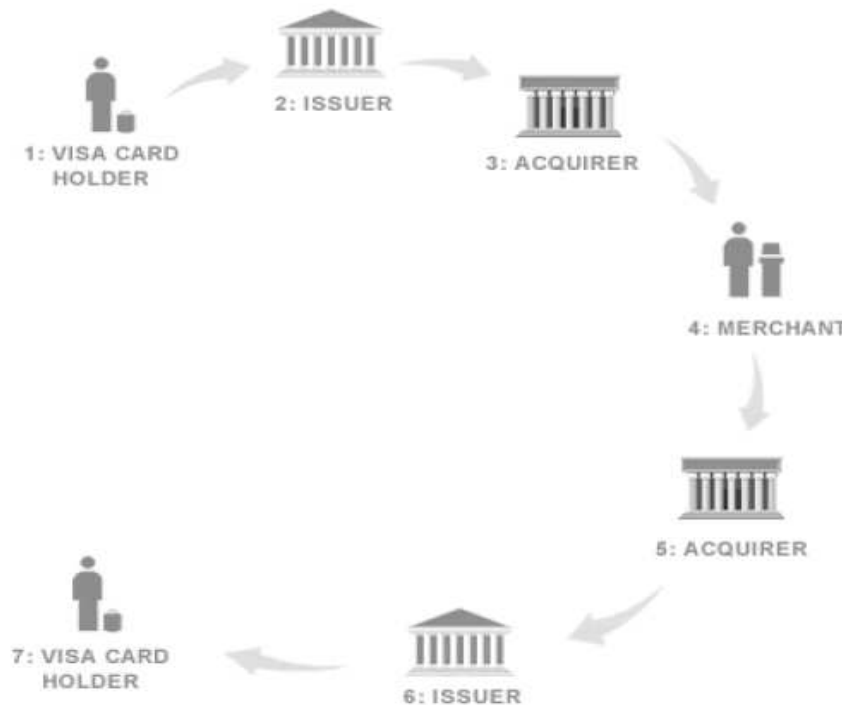
List of ODR Providers

- The U.S. Federal Trade Commission and consumer protection agencies in Argentina, Mexico, Canada and other countries contribute to an International ADR directory containing contact information of dispute resolution service providers that can help consumers resolve problems with cross-border sellers.
 - Available at <http://www.econsumer.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.

Model Law: ADR for Cross Border Consumer Disputes – Payment Protection

- U.S. proposal also includes 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 merchant for unauthorized use, non-delivery or non-conforming goods and services.
- The U.S. proposal is based upon the U.S. Fair Credit Billing Act and the Electronic Fund Transfer Act, which have provided much benefit to U.S. consumers.
- These ADR/payment protections enhance consumer confidence in the use of payment cards for online purchases and in the global marketplace more generally.
- This alternate dispute resolution mechanism can be particularly valuable to consumers in cross-border transactions where it may be difficult to communicate with or take legal action against the merchant.

ADR for B2C Cross Border Disputes: Example of Chargeback Process



1: VISA CARD HOLDER

Cardholder disputes the transaction

2: ISSUER

Issuer sends the transaction back electronically to the acquirer

3: ACQUIRER (*)

Acquirer receives chargeback, resolves the issue or forwards it to the merchant

4: MERCHANT

Merchant either accepts the chargeback item or addresses the chargeback issue and resubmits the item to the acquirer

5: ACQUIRER

Acquirer reviews the information received from merchant

If acquirer agrees that the merchant information addresses the chargeback, the acquirer represents the chargeback electronically to issuer

6: ISSUER

Issuer receives the represented item

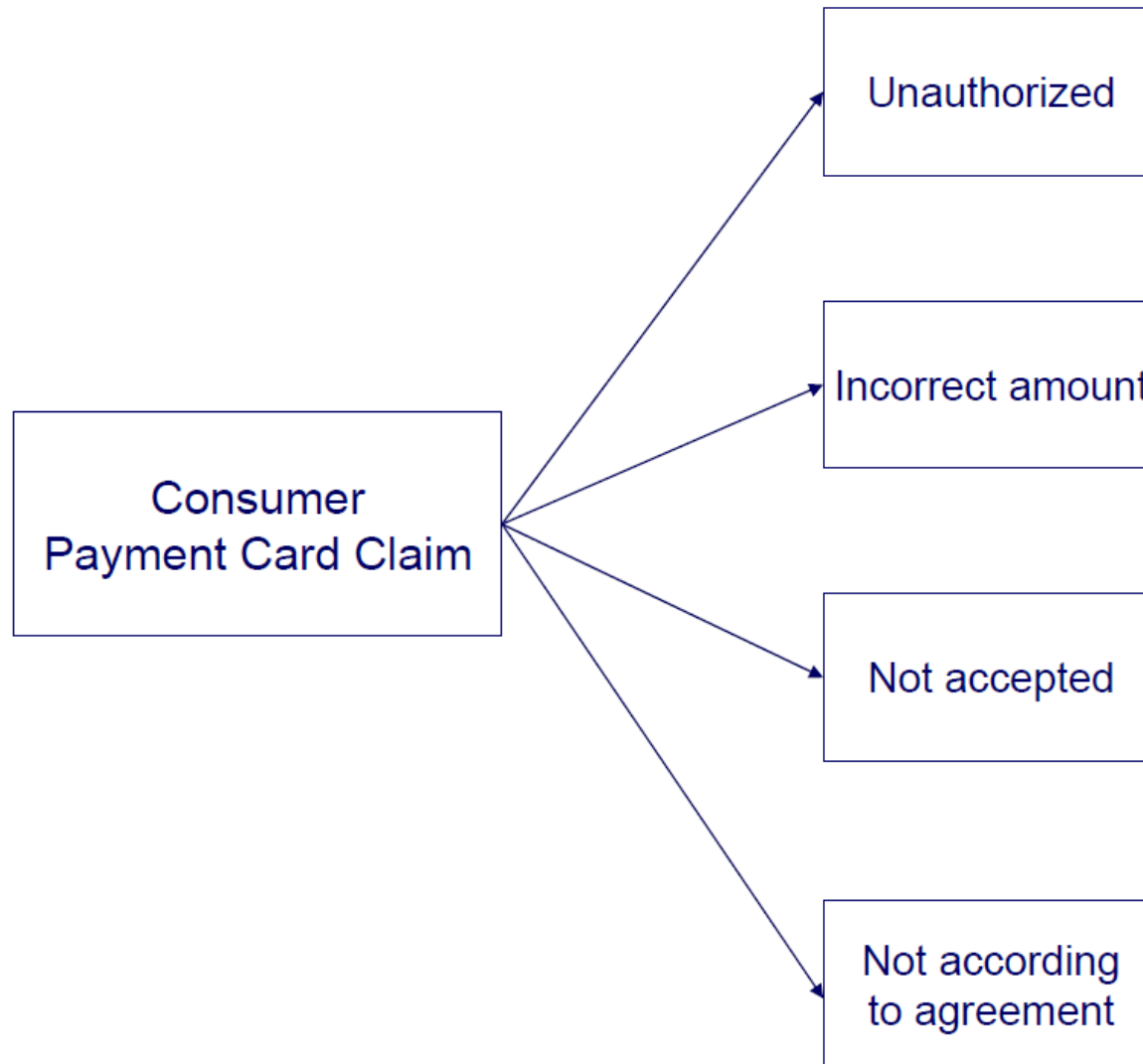
- If appropriate, the issuer re-posts it to the cardholders account
- If the chargeback issue is not appropriately addressed, the issuer may submit the items to Visa for a financial liability decision

7: VISA CARD HOLDER

Cardholder receives the dispute resolution information and may be re-billed or credited for the item

(*) Note: "Acquirer" refers to the "merchant bank" or merchant's financial institution.

ADR for B2C Cross Border Disputes: Example of Chargeback Process



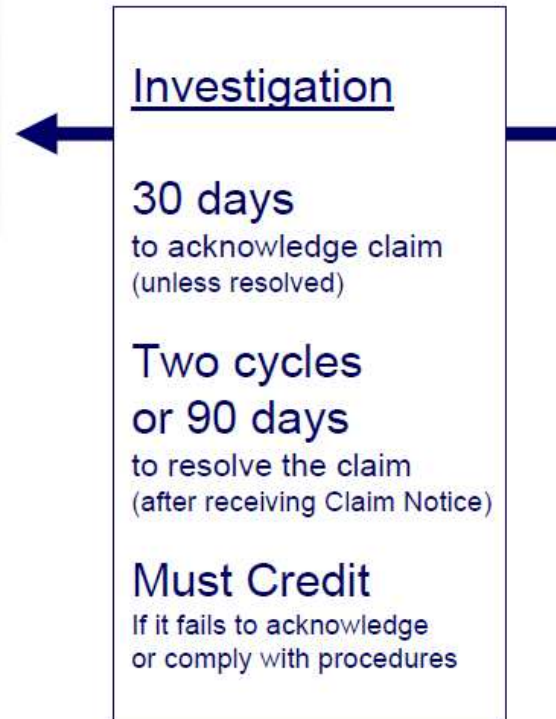
ADR for B2C Cross Border Disputes: Example of Chargeback Process



Consumer



Card Issuer



ADR for B2C Cross Border Disputes: Example of Chargeback Process



ADR for B2C Cross Border Disputes: Example of Chargeback Process

Consumer Claim Deemed Correct

- Correct and credit consumer's account
Disputed amount + finance charge + related charges
- Send correction notice to consumer



Consumer Claim Deemed Incorrect

- Send explanation to consumer
- If consumer requests, provide copies of documents
- If claim is correct, but for other reasons, correct and credit consumer's account
Disputed amount + finance + related charges

If the consumer still owes all/part of the disputed amount:

- Notify amount due and due date for payment
- No finance or other charges until new due date



ADR for B2C Cross Border Disputes: Payment Systems

- At present, although consumers in many OAS member states are protected (through national laws or self-regulatory schemes) against unauthorized charges due to loss or theft, protections for non-conforming or non-delivery of goods and services vary greatly among member countries.
 - See <http://www.oecd.org/dataoecd/26/61/36456184.pdf>.
- The 1999 OECD Guidelines on E-Commerce recommend “the use of limitations of liability for unauthorized or fraudulent use of payment systems, and chargeback mechanisms [as] powerful tools to enhance consumer confidence.”
 - Available at <http://www.oecd.org/dataoecd/18/13/34023235.pdf>
- Experts at Porto Alegre recommended that states consider the role of card companies in consumer protection and dispute resolution.

II. Draft Model Law: Small Claims Procedures

U.S. Proposal

Small Claims Tribunals Model Law

- The U.S. proposal offers draft legislative language for implementing a small claims procedure.
- The small values of most consumer claims make access to justice very difficult given the high costs of litigation.
- Where informal resolution methods are not successful, 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.

Small Claims Tribunals – OAS State Experience

- The U.S. and a number of OAS member states already have in place viable low cost small claims tribunals for consumer claims.
- These procedures vary 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.

U.S. Proposal is Consistent with Work in Other Bodies

- The 2007 OECD Recommendations on Consumer Dispute Resolution and Redress call for states to establish simplified court procedures for small claims that utilize expedited and less formal procedures.
 - Available at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.
- The 2007 EU Regulations establish common small claims procedures for simplified and accelerated cross-border litigation on consumer claims under € 2,000.
 - Regulation No. EC 861/2007, May 22, 2007, available at <http://register.consilium.europa.eu/pdf/en/07/st03/st03604.en07.pdf>.

III Legislative Guide: Collective Actions

U.S. Proposal

Collective Actions – Legislative Guide

- The U.S. draft legislative guide for CIDIP VII on redress and dispute resolution includes provisions that would recommend states permit collective or representational legal actions for common consumer injuries.
- The U.S. proposal has been revised to take into account recommendations from experts at Porto Alegre.
- Experts at Porto Alegre recommended reworking the language in light of existing class action remedies in other countries and existing model laws; analyzing the section on procedures to insure an appropriate balance between access to justice and discouraging abusive practices; and the application and implementation of opt-in and opt-out notices.

Collective Actions – Legislative Guide

- The revised U.S. proposal provides general principles for collective dispute resolution.
- It contemplates that specific laws providing for collective action may vary substantially from state to state, depending on the overall legal framework.

Collective Actions – Legislative Guide

- These procedures provide consumers with access to remedies in cases where they would not have an incentive 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.

Collective Actions – Comparative Experience

- 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 vender or provider.
- Several Latin American countries have modified their laws to permit collective actions, including in consumer cases.
- Over the last 15 years, 13 EU states have modified their laws to permit representative actions for consumers.

Collective Actions – OECD Recommendations

- A 2009 EU Study estimated the average benefits to consumers who have defended their rights through a judicial collective redress mechanism to be € 910 per year while the total annual consumer benefit in the 13 Member States which have a collective redress system is € 523 million.
 - Available at http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf
- The 2007 OECD Recommendations call for states to establish mechanisms that provide for collective resolution of consumer disputes that are fair to both consumers and business.

IV. Model Law: Government Obtained Redress for Deceptive Practices

U.S. Proposal

Consumer Remedies For Deceptive Practices – Model Law

The U.S. has proposed that states adopt a model law that would:

- assist OAS member states in establishing competent consumer protection authorities,
- vest them with the authority to obtain redress for consumers,
- enable them to cooperate with their foreign counterparts, and
- facilitate the enforcement of certain judgments for consumer redress across borders.

Consumer Remedies for Deceptive Practices – U.S. Experience

- 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 2008, the FTC obtained 78 federal district court judgments ordering an estimated USD \$343 million in consumer redress.

Consumer Remedies for Deceptive Practices – U.S. Experience

- The FTC may also seek redress on behalf of foreign consumers provided the claim has a substantial connection to the harm occurring at the U.S. 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 Canada, Costa Rica, Mexico, the United Kingdom, Ireland, and Australia

Consumer Remedies for Deceptive Practices – OAS State Laws

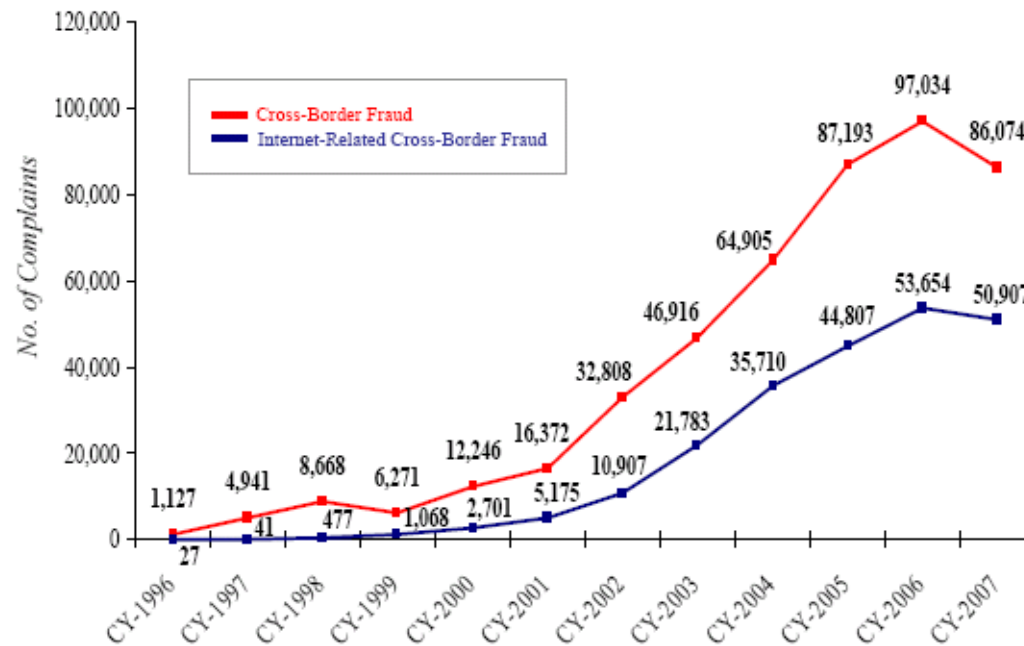
- A number of OAS member states have established consumer protection authorities.
- However, many state laws do not vest the consumer protection entity with authority to obtain redress for consumers or enable them to cooperate with their foreign counterparts.

Enforcement Challenges

- U.S. FTC cross-border fraud complaints comprised 12% of all fraud complaints received during 2008.
- Internet-related complaints comprised 59% of the total cross-border fraud complaints received during calendar year 2007.
- 30% of all cross-border fraud complaints were from U.S. consumers complaining about Canadian companies and 50% were from U.S. consumers complaining about other foreign companies.
- U.S. consumers reported fraud losses of over \$46 million against companies located in Canada, and over \$167 million against companies located in other foreign countries.

Enforcement Challenges

Cross-Border Complaint Count by Calendar Year¹

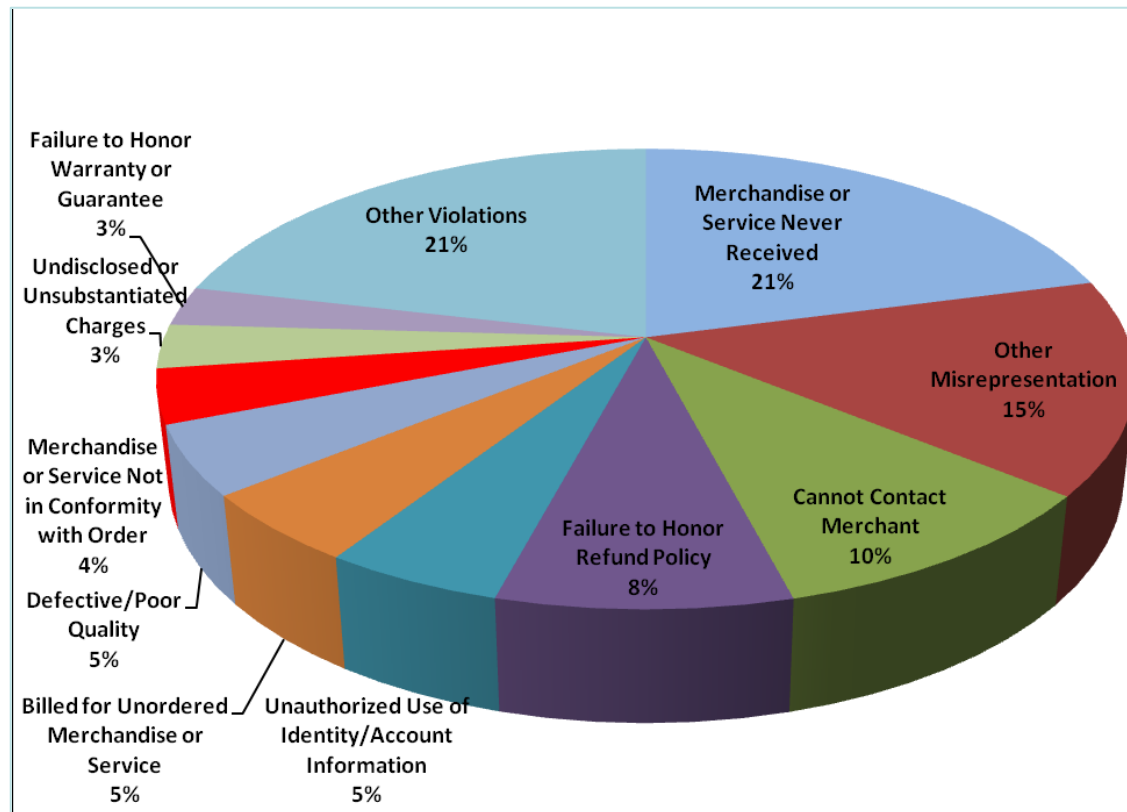


¹For the purposes of this report, a fraud complaint is "cross-border" if: (1) a U.S. consumer complained about a company located in Canada or another foreign country; (2) a Canadian consumer complained about a company located in the U.S. or another foreign country; or (3) a consumer from a foreign country complained about a company located in the U.S. or Canada. Excludes identity theft and Do Not Call registry complaints.

<http://www.ftc.gov/sentinel/reports/annual-crossborder-reports/crossborder-cy2007.pdf>

Enforcement Challenges

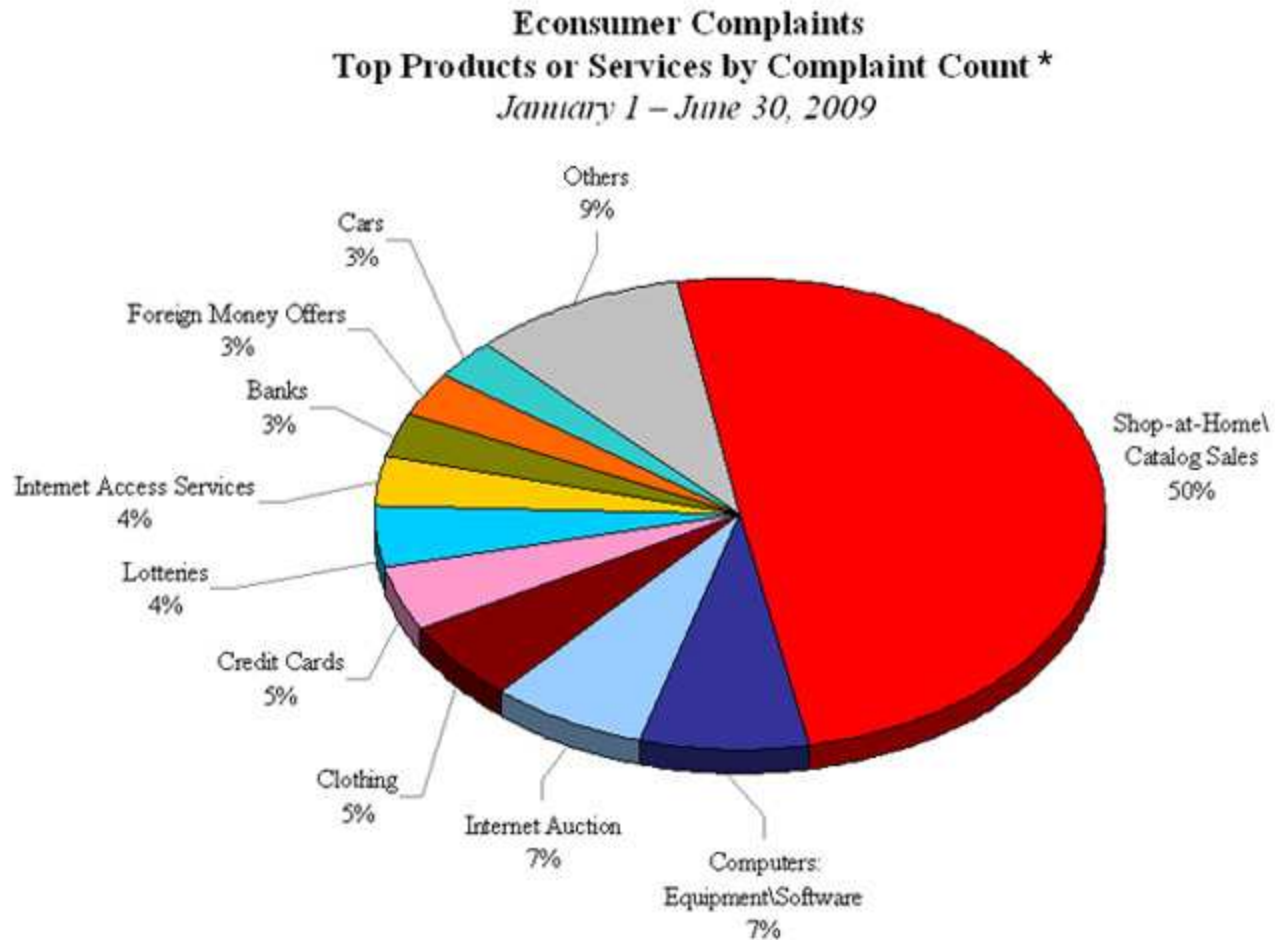
Top Law Violations for E-consumer Complaints (1 January – 31 December 2008)



Percentages are based on the 14 214 e-consumer law violations reported from 1 January to 31 December 2008. One complaint may have multiple law violations.

Source: US FTC, 2009a, p. 13.

Typical E-Commerce Complaints



Percentages are based on the 7,496 e-consumer law violations reported from January 1 to June 30, 2009. One complaint may have multiple law violations.
<http://www.econsumer.gov/english/resources/trends.shtml>

Enforcement Challenges

- 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.

Enforcement Challenges

- The 2007 OECD Recommendations on Consumer Dispute Resolution and Redress recommend that national consumer protection agencies have legal authority to obtain and facilitate redress on behalf of consumer victims.
- The 2003 OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders also recommend that the consumer protection authority be able to cooperate with similar entities in other states.

Building A Practical Framework: Conclusion

- E-commerce cross border disputes:
 - will form a significant proportion of consumer complaints in coming years;
 - require tailored mechanisms that can provide consumers with access to remedies that do not impose a cost, delay and burden that is disproportionate to the economic value at stake.

Building A Practical Framework: Conclusion

- As the Inter-American Juridical Committee stressed in order for CIDIP VII to be successful, “it should be guided by the need to ensure consumers engaging in cross-border commercial transactions a protection that is effective and affordable in relation to the value of claims and that leads to quickly enforceable remedies.”
- We remain skeptical about the practicality of relying on exceptional complex conflicts of law and jurisdiction rules for enhancing protection of consumers in cross-border situations given their expense, uncertainty in application, and doubts about enforceability.
- ADR has the potential to provide a practical, effective, and affordable alternative to court resolution of B2C cross border disputes and one that leads to quickly enforceable remedies.

Building A Practical Framework: Conclusion

- The rejection in the United States of an exceptional provision for consumer contracts in conflict of laws rules does not necessarily equate with a failure to address consumer protection generally.
- The U.S. experience (\$225 billion in B2C e-commerce sales in 2008) has shown that the opportunity to receive direct recourse through a simple and efficient alternative dispute resolution system may be more efficient and more effective than exceptional conflict of law and jurisdiction rules for litigation that is not likely to occur.
 - See Ronald A. Brand, **The Rome I Regulation Rules on Party Autonomy for Choice of Law: A U.S. Perspective**

Building A Practical Framework: Conclusion

- National consumer protection authorities should also have legal authority to obtain and facilitate redress on behalf of consumer victims for fraudulent and deceptive commercial practices in B2C cross border transactions.
- Creating low cost expedited small claims tribunals and permitting collective and representational actions for common consumer claims has the potential to enhance judicial disposition of B2C domestic disputes.

Building a Practical Framework for Consumer Protection

