

PERMANENT COUNCIL OF THE
ORGANIZATION OF AMERICAN STATES
COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

OEA/Ser.G
CP/CAJP-2424/06
2 November 2006
Original: English

SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE
INTERNATIONAL LAW (CIDIP-VII)

[AG/RES. 2217 (XXXVI-O/06)]

DRAFT OF PROPOSAL FOR A MODEL INTER-AMERICAN LAW
ON AVAILABILITY OF CONSUMER DISPUTE RESOLUTION
AND REDRESS FOR CONSUMERS

(Submitted by the United States of America for CIDIP-VII ¹)

1. This proposal is drafted as a “conceptual” model law for the purposes of discussion by the Working Group. It includes certain provisions that could be used as statutory language and other guiding principles that OAS members could adapt for use in national legislation. The United States invites comments on whether more detailed language in particular areas would be useful to OAS members.

October 24, 2006

His Excellency Ambassador Osmar Chohfi
Ambassador, Permanent Representative of Brazil to the OAS
Chair, Committee on Juridical and Political Affairs

Dear Ambassador Chohfi,

The United States Permanent Mission to the OAS (USOAS) is pleased to submit to the Committee on Juridical and Political Affairs and the OAS Department of International Legal Affairs the U.S. preliminary proposal for a model law on the availability of consumer dispute resolution and redress. We will submit a more formal model law text after we receive initial comments on this preliminary proposal.

The United States believes that strong and effective consumer protection laws and institutions can contribute to consumer welfare and economic development in OAS member states. We recognize that there is a need to develop mechanisms to protect and compensate consumers who have suffered economic injuries from businesses, particularly for injuries that have a relatively small monetary value. Therefore, the U.S. proposal for CIDIP-VII focuses on encouraging the adoption of effective mechanisms for consumers to obtain monetary consumer redress in business-to-consumer transactions.

Currently, OAS member states have varying legal and cultural approaches to consumer dispute resolution and redress issues. OAS member states have adopted various types of dispute resolution and redress mechanisms, including alternative dispute resolution, judicial mechanisms such as small claims tribunal and courts, administrative adjudication of small claims, and private, associational, and governmental (or *parens patriae*) collective court actions. Some have less developed systems. Given differing national systems, and different substantive laws on the protection of consumers, a flexible common framework would enable OAS members to improve access to redress for consumers. Accordingly, a model law that establishes dispute resolution and redress mechanisms but provides some flexibility in specific methods of implementation could promote harmonization on this topic throughout the OAS. In addition, an appropriate level of harmonization would facilitate cross-border cooperation between relevant authorities. Lack of such authority has been the basis in a number of instances for denial of effective relief. The objective of the model law, in other words, should be to establish common principles and an agreed framework that actually benefit consumers, rather than to compel the adoption of strictly identical statutes.

CIDIP-VII presents an excellent opportunity for the member States to develop this type of model law. The topic of redress mechanisms already has attracted the attention of OAS member states and the Forum of Latin American Consumer Protection Agencies. It has recently drawn a great deal of attention in other countries as well. The Committee on Consumer Policy of the Organization for Economic Co-operation and Development (OECD), for example, held a workshop on dispute resolution and redress mechanisms in April 2005, in which representatives from several OAS countries participated, including Argentina, Brazil, Canada, Chile, Mexico, and the United States. The Committee on Consumer Policy currently is drafting guidelines on this topic for adoption by the 30 member countries of the OECD. Information about the OECD consumer dispute resolution and redress project is available on its website at www.oecd.org/sti/consumer-policy.

The United States believes that a key objective of an OAS instrument on consumer dispute resolution and redress is to provide national consumer protection enforcement authorities with the authority to obtain and distribute monetary redress to consumers, either through direct applications to the courts or through appointment as a representative party. Governmental redress authority is a critical component of an effective system to protect consumers from the consequences of economic injury, including from fraud and other misconduct. Although injunctive relief protects the public from future harm, it does not directly remedy the injury to consumers caused by a defendant's past actions or deprive a defendant of monetary gains from illegal conduct. By depriving wrongdoers of their wrongful gains and distributing them to injured consumers, monetary consumer redress serves a compensatory function as well as a deterrent one. This can strengthen the economies of the OAS countries.

If you have any questions, please contact Counselor for Political Affairs Hugh M. Neighbour of the U.S. Permanent Mission at (202) 647-6375 or, alternatively, Andrew Stevenson at (202) 647-9916. We strongly encourage the Secretariat to post this response, as well as the enclosed draft model law, electronically on the CIDIP-VII website for the benefit of other member states. This letter, along with the translated version of the model law, have already been received electronically by the Secretariat.

Please accept renewed assurances of my highest consideration.

Sincerely,

J. Robert Manzanares
Deputy U.S. Permanent Representative

Enclosure:
Draft Model Law on Availability of Consumer Dispute Resolution and Redress for Consumers

cc: Mr. Jean Michel Arrighi, Director, Department of International Legal Affairs

DRAFT OF PROPOSAL FOR A MODEL INTER-AMERICAN LAW
ON AVAILABILITY OF CONSUMER DISPUTE RESOLUTION AND REDRESS
FOR CONSUMERS

(Submitted by the United States of America for CIDIP-VII²)

1. Scope and General Application

The Model Law should contain provisions on its scope and applicability based on those that follow:

- 1.1. The objective of the Model Inter-American Law on the Availability of Consumer Dispute Resolution and Redress for Consumers (hereinafter, “Law”) is to encourage the establishment of effective mechanisms and systems through which consumers can resolve disputes and obtain redress for economic harm resulting from business-to-consumer transactions involving goods or services, including transactions across borders.
- 1.2. This Law is not intended to address attempts by individual businesses and consumers to resolve disputes directly and informally. In the ordinary course, consumers and businesses should first attempt to resolve disputes directly and informally. Accordingly, businesses and industry groups should offer dispute resolution that initially attempts to resolve their disputes through more informal procedures.
- 1.3. This Law is not intended to provide businesses with mechanisms and systems to proceed with claims against consumers arising from business-to-consumer transactions for the sale of goods or services, including such transactions across borders.
- 1.4. This Law is intended to complement existing civil, administrative, and criminal laws as well as other rules regulating or affecting business-to-consumer transactions.

2. Definitions

The Model Law should contain defined terms such as those that follow:

- 2.1 “Consumer”: refers to an individual acting in the ordinary course of commercial arrangements or contracts, with persons or entities for individual, personal or family use, and not for resale or other commercial activity.

2. This proposal is drafted as a “conceptual” model law for the purposes of discussion by the Working Group. It includes certain provisions that could be used as statutory language and other guiding principles that OAS members could adapt for use in national legislation. The United States invites comments on whether more detailed language in particular areas would be useful to OAS members.

- 2.2 “Business-to-consumer transactions”: transactions for value between commercial entities and individuals acting in the ordinary course of commercial arrangements or contracts, with persons or entities for individual, personal or family use, and not for resale or other commercial activity. These can include, to the extent provided for in the law, cross-border transactions or services.
- 2.3 “Dispute Resolution”: refers to mechanisms designed to provide consumers with the opportunity to resolve their complaints against businesses and to obtain redress (which includes monetary and/or restorative relief as defined in section 2.4, below) who when those consumers have suffered economic harm resulting from transactions involving goods or services, including transactions across borders., the opportunity to resolve their complaints against businesses and obtain redress This term is inclusive and encompasses informal and formal mechanisms, online and offline mechanisms, and private sector, public sector, administrative, and judicial mechanisms. (Examples of such mechanisms include traditional judicial proceedings, simplified court proceedings, arbitration proceedings, and alternative dispute resolution proceedings such as conciliation or mediation.) It may include mechanisms or systems for obtaining monetary compensation or injunctive relief that contains a restorative element.
- 2.3(1) “Alternative Dispute Resolution”: *See 3.1(1), below.*
- 2.4 “Redress”: refers to (a) compensation for economic harm, whether in the form of a monetary remedy (e.g., a voluntary payment, damages, restitution, or other monetary relief) or (b) a conduct remedy with a restorative element (e.g., exchange of a good or service, specific performance or rescission of a contract), or both.
- 2.5 “Economic harm”: refers to actual monetary loss sustained by a consumer as a result of wrongful commercial activity.
- 2.6 “Consumer protection enforcement authority”: refers to any national public body that has a principal mission of implementing laws against fraudulent, misleading, or unfair commercial practices affecting consumers and has powers (a) to conduct investigations or (b) to pursue enforcement proceedings, or both.
- 2.7 “Disadvantaged or vulnerable consumers”: refers to particular consumers or categories of consumers who, because of personal characteristics or circumstances (e.g. age, mental or physical capacity, education, income, language, or remote location) may have special needs when accessing dispute resolution and redress.

3. Dispute Resolution and Redress for Consumers Acting Individually

The Model Law should contain provisions on individual dispute resolution and redress. Because of the various mechanisms already in place in some OAS countries, and the existence of different legal traditions and frameworks within the region, the Model Law should focus on basic principles that can be adapted by all OAS members, rather than on mandating adoption of particular remedial mechanisms:

- 3.1 Dispute resolution and redress for consumers acting individually should be available to consumers through judicial or administrative tribunals and/or through a consumer protection enforcement agency. Such systems and mechanisms may include but are not limited to:
 - 3.1(1) Alternative dispute resolution services, including online dispute resolution, by which consumers and businesses engage in an out-of-court process to reach a settlement or by which consumers submit their complaint against a public agency for investigation and finding.
 - 3.1(2) Consumer complaints boards;
 - 3.1(3) Simplified procedures for small claims, which offer consumers the opportunity to obtain a judicial determination of their dispute through less formal and expedited procedures than those used in traditional court proceedings, including court-based small claims procedures, special tribunal, and agency-based mechanisms. This may include simplified proceedings in separate courts or tribunals of limited jurisdiction or simplified proceedings in the regular courts of first instance.
- 3.2 Such actions should provide for an appropriately wide range of legal and other remedies, including redress as defined in Section 2.4, above.
- 3.3 Businesses and industry groups should also make dispute resolution and redress available to consumers through private alternative dispute resolution mechanisms.
- 3.4 The mechanisms in this Section, whether offered by the public or private sector, should not impose a cost on the consumer that is disproportionate to the value of the claim at stake.
- 3.5 The special needs of disadvantaged or vulnerable consumers should be considered so that they, or their representatives, can access these mechanisms.
- 3.6 Consumers should be provided with clear, comprehensible, and accurate information on the procedure, including the process for initiating a complaint, the process for selecting a dispute resolution provider, expected costs of the procedure, expected duration of the procedure, the possible outcomes, and the enforceability of those outcomes, including but not limited to avenues for appeal of a decision, the enforcement of an injunctive order, and the collection of any monetary award.
- 3.7 These mechanisms should be designed to be widely accessible and easy to use to enable the consumer to conduct the procedure without a requirement for formal legal representation or assistance.
- 3.8 When possible, consumers should be provided with assistance or instruction in the completion and submission of necessary forms and documents.

4. Collective And/or Representational Dispute Resolution and Redress for Common Injuries to Consumers

The Model Law should contain provisions establishing collective or representational legal actions for consumer injuries with the following principles:

- 4.1 One or more types of collective or representational legal actions should be available in a formal judicial proceeding to consumers who are seeking redress and/or other relief for economic harm to consumers who have been similarly harmed by the same entity or related entities.
- 4.2 Such actions should provide for a wide range of legal and other remedies, including redress as defined in Section 2.4, above.
- 4.3 Such actions should be fair to consumers and businesses, transparent, and efficient. This should include establishing procedures that:
 - 4.3(1) provide redress for consumers and adequately protect the interests of consumers who have suffered harm including establishing procedures to ensure that settlements, particularly those involving non-monetary relief (i.e., discount coupons) provide adequate compensation to consumers;
 - 4.3(2) ensure that attorneys or others who represent consumers in such actions do not benefit disproportionately at the expense of harmed consumers (e.g., by receiving excessive attorneys' fees in light of the work performed or the result achieved);
 - 4.3(3) include prohibitions against abusive collective actions, particularly when economic harm to consumers is trivial, speculative, non-existent or non-proportional to the remedies sought; and
 - 4.3(4) include prohibitions against using collective adjudication mechanisms to protect domestic businesses from competition or applying such mechanisms unfairly against foreign businesses.
- 4.4 The following entities should be authorized to commence a legal action described in this Section:
 - 4.4(1) An individual consumer in his or her own name and on behalf of other consumers who are seeking redress for injuries to consumers who have been similarly harmed by the same entity or related entities;
 - 4.4(2) A representative party or parties, including a consumer association, on behalf of a group of consumers seeking redress for injuries to consumers who have been similarly harmed by the same entity or related entities;

- 4.4(3) A government enforcement authority, including a consumer protection enforcement authority or other competent authority as more fully described in Section 5 of this Law;
- 4.5 An entity set forth in Section 4.4 of this Law may proceed with such a suit only when there is a judicial determination that:
 - 4.5(1) a significant number of consumers have alleged that they have suffered harm as a result of the practices of the same entity or related entities; and
 - 4.5(2) questions of law or fact common to the members of the group of consumers predominate over any questions affecting individual consumers; and
 - 4.5(3) it appears that the representative party or parties will fairly and adequately protect the interests of the group of consumers during litigation and/or settlement of the collective action.
- 4.6 These mechanisms may be provided on an “opt-in” basis, whereby consumers must take specific steps to join themselves to the collective action, or on an “opt-out” basis, whereby consumers are joined to the collective action unless they take steps to exclude themselves.
 - 4.6(1) When collective action is available on an “opt-in” basis, consumers should be adequately notified of the initiation of such cases so that they can take steps to include themselves within the group and benefit from the outcome.
 - 4.6(2) When collective action is available on an “opt-out” basis, consumers should be adequately notified of the initiation of such cases so that they can take steps to exclude themselves if so desired.
- 4.7 Consumers should not be compelled to take part in, or be bound by the outcome, of a collective action proceeding of which they have not been adequately notified.
- 4.8 Issues of both liability and damages should be adjudicated in a collective or representational action authorized by this Law.

5. Governmental Dispute Resolution and Redress for Economic Harm to Consumers

- 5.1 Each OAS member state should enable one or more governmental entities, including a consumer protection enforcement authority or other competent authority at the national, state, provincial, municipal, or local level charged with protected similar consumer interests, to take action and obtain remedies, including redress, for or on behalf of consumers who have suffered economic harm as a result of being deceived, defrauded, or misled.

- 5.1.1 Such governmental entities should retain discretion over whether to take action and obtain remedies, including redress, on behalf of consumers, and over the nature and form of any such proceedings, which may be in addition to remedies provided elsewhere in this Law.
- 5.2 A governmental enforcement authority's dispute resolution and redress powers may include;
 - 5.2(1) The authority to seek a court order for redress in civil or administrative proceedings;
 - 5.2(2) The authority to seek a court order for redress in criminal proceedings;
 - 5.2(3) The authority to commence a collective or representational action as set forth in Section 4, above.
- 5.3 A governmental entity described in Section 5 should be permitted to pursue actions for redress against: (a) domestic businesses who have caused consumers to suffer economic harm as result of being deceived, defrauded, or misled in business-to-consumer transactions; and (b) foreign businesses as result of being deceived, defrauded, or misled in business-to-consumer transactions. *[N.B. - this is derived from Section 5 from the 2003 OECD Cross-Border Fraud Guidelines]*
- 5.4 Nothing in this Model Law obligates a State adopting this law to require its judicial authorities to recognize or enforce a judgment for redress obtained by a governmental entity of another OAS state. Provided, that when a governmental entity, as described in Section 5.1, obtains a civil monetary judgment for redress to consumers who have suffered economic harm as a result of being deceived, defrauded, or misled in a business-to-consumer transaction, and seeks to have that judgment or order recognized and enforced in another OAS member state, the judicial authorities of the state that is considering recognition and enforcement, generally should not disqualify such a monetary judgment from recognition or enforcement as penal or revenue in nature, or based on other public law, due solely to the governmental status of the plaintiff pursuing the redress claim.