

***SHOPPING FOR CONSUMER PROTECTION: CURRENT
JURISDICTIONAL ISSUES***



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April 2014

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Canadian Cataloguing and Publication Data

SHOPPING FOR CONSUMER PROTECTION: CURRENT JURISDICTIONAL ISSUES

Acknowledgement

Public Interest Advocacy Centre has received funding from Industry Canada's Contributions Program for Non-profit Consumer and Voluntary Organizations. The views expressed in this report are not necessarily those of Industry Canada or of the Government of Canada.

PIAC greatly appreciates those stakeholders who provided input in response to requests for consultation in association with this project. The insights provided were instrumental in the completion of this study.

Shopping for Consumer Protection: Current Jurisdictional Issues

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Executive Summary

As consumers continue to pursue online activities, these ever-increasing pursuits expand the potential to encounter difficulties, problems and disputes. Few areas of online engagement like ecommerce offer a greater potential arena for consumer disputes – especially where transactions take place across borders and in various jurisdictions.

As consumer engagement with online shopping has grown so too has the potential for online disputes. Currently consumers purchasing goods for jurisdictions outside of Canada have a limited number of avenues available to them should a dispute arise with an online retailer. The murky world of trans-border consumer disputes remains an unclear path for consumers to tread with methods to legally resolve disputes even less clear. While some models exist (UNCITRAL), still other online retailers may choose to use their own system of online dispute resolution (ODR) or may partner with third party ODR vendors (as eBay does).

While some provincial laws attempt to exert control over disputes, conflicting jurisdictional issues cause consumer confusion and require an alternative approach. Moreover, industry and governments remain unclear in the guidance that can be provided to consumers about how disputes may be resolved in a manner consistent with legal principles. Even though UNCITRAL and WG III are recognized alternative venues to generate resolutions for ecommerce disputes, they fail to provide a clear solution for consumers universally. As a result, despite relatively high levels of consumer engagement with ecommerce, there remains a great degree of uncertainty how future disputes involving international jurisdictions might be resolved.

1.0 Introduction

Canadian consumers are purchasing products and services over the internet more than ever. Such transactions often reach beyond traditional provincial and national borders and can implicate foreign nationals and the laws of foreign states. The increased inter-jurisdictional transactions have created issues with consumer protection laws and the applicability of these for purchasers. As a result, questions of jurisdiction are repeatedly raised in the context of consumer protection. These issues primarily pertain to the following jurisdictional issues: the applicable law and jurisdiction in the context of online contracts, extraterritoriality and the criminal provisions of consumer protection laws.

This study examined these jurisdictional issues as they relate to consumer protection for internet commerce and use in Canada. The study collected information from relevant stakeholders, including provincial consumer ministries and federally regulated industries. In addition, PIAC conducted an online survey seeking consumer views and experiences with respect to online transactions and respondent understanding of how disputes may be resolved. PIAC also developed research considering the international perspective on dispute resolution, and its ability to adequately protect individual consumer interests where disputes happen across jurisdictions.

2.0 The Problem

As growth of the Internet use among Canadians continues, so too has the exposure of consumers to internet commerce experiences beyond Canada's borders. The online engagement of Canadians continues to grow. Consider that in 2012 83% of Canadians aged 16 years or over engaged with online resources and the Internet for personal use from any location or device, compared with 80% of Canadians in 2010, 73% in 2008 and 68% in 2005.¹ Internet engagement includes a variety of interactions, naturally including making online purchases.

According to Statistics Canada, Canadians spent \$18.9 billion online engaging in ecommerce in 2012, representing an increase of 24% from 2010.² The same study found that of those Canadians ordering goods online in 2012, shoppers made an average of 13 separate orders each year totaling \$1,450.³ Among the top purchases included travel arrangements (e.g., airline tickets), and event tickets.⁴ Both the Statistics Canada study and our findings reveal that Canadians are not just shopping from Canadian retailers online, but also US-based and international retailers. Inevitably as overall use of internet-based technologies grew, especially in the ecommerce domain where online purchases grew from hundreds to thousands of dollars annually, disputes over how individuals should engage online also expanded.⁵

A recent study conducted by Federal Express, looking at the 2013 holiday season in Canada, revealed 6 out of 10 Canadian respondents intended to shop online for gifts.⁶ This is somewhat surprising given 58% consumers surveyed for this examination noted that online purchases most frequently occur on a less than monthly basis.⁷ This is also a significant increase from the 2012 holiday season where a similar study by Federal Express where 48% of respondents indicated they plan to shop online during the

¹ Statistics Canada, *Individual Internet use and e-commerce*, online: Statistics Canada, 28 October 2012, <<http://www.statcan.gc.ca/daily-quotidien/131028/dq131028a-eng.htm> >

² Statistics Canada, *Individual Internet use and e-commerce*, online: Statistics Canada, 28 October 2012, <<http://www.statcan.gc.ca/daily-quotidien/131028/dq131028a-eng.htm> >

³ *Ibid*, Stats Can.

⁴ *Ibid*, Stats Can.

⁵ Ethan Katsh, "ODR: A Look at History," *Online Dispute Resolution: Theory and Practice*, eds Mohamed S. Abdel Wahab, Ethan Katch, Daniel Rainey, Eleven International Publishing, January 2012, p. 21.

⁶ FedEx Express Canada, "2013 Holiday Season: 60 Percent of Canadians Will Shop Online," online: Market Wire, press release, 14 November, 2013, <<http://www.marketwatch.com/story/2013-holiday-season-60-percent-of-canadians-will-shop-online-2013-11-14-4173053> >.

⁷ PIAC engaged survey firm Environics Research Group to conduct a telephone survey. The telephone survey was conducted from November 13-20, 2013, among a national random sample of 1,001 adults aged 18 years of age or older, living in Canada. The margin of error for a sample of this size in +/- 3.10%, 19 times out of 20. Quality Control and Sample Selection followed the standard practices of Environics Research Group while conducting their Environics National Omnibus studies. The study included participants from across Canada (the 10 provinces) and was conducted in English and French (in Quebec).

holidays.⁸ Among the age categories, although the youngest age bracket of respondents from 18 years of age to 34 are the most likely to intend to make purchases online (76%), still a significant proportion of those ages 55 and over also intend on shopping online (41%). Among those 35 to 55 years of age, 62% of respondents stated their intention to purchase goods online.⁹

The increase in inter-jurisdictional transactions, and the resulting rise in disputes based on transnational online engagement, has opened up issues with consumer protection laws. As a result, questions of jurisdiction are repeatedly raised in the context of consumer protection. This is particularly important where interactions occur online where land-based legal systems may not be relevant to either party.¹⁰ This has led to two veins of legal development: the growth of formalistic legal methods for jurisdictions to exert control over disputes to protect consumers; and the enhancement of dispute resolution methods for online disputes internationally.

Although some discussion will take place of Canadian legal jurisdiction in online disputes, particularly in the exertion of jurisdiction internationally, this study will spend significant time exploring consumer understanding of online ecommerce and the resolution of disputes, as well as dispute resolution systems. The survey research conducted for this examination suggests the importance of this issue, since 28% of Canadian consumers surveyed state they have had a problem with an online purchase.¹¹

In an effort to assist Canadian online shoppers, consumer protection agencies post tips sheets on their websites to advise consumers on what to do before deciding to purchase goods online. Consumer Protection BC, for example posts the following message on their website:¹²

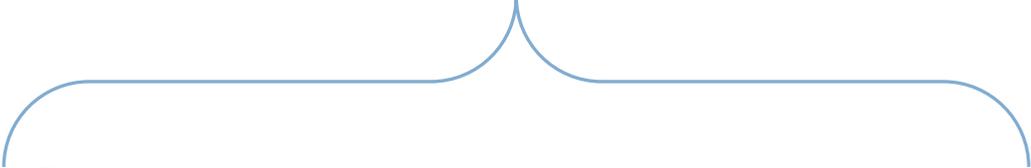
⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, Katsh, p. 24.

¹¹ Environics Survey conducted for PIAC (November 2012).

¹² Consumer Protection BC, *Buying online or over the phone? Tips around Distances Sales Contracts*. Last accessed December 19, 2013, at <http://www.consumerprotectionbc.ca/consumers-alias/help-for-consumer-tips/298-consumercontracts/997-distancesalescontractstips>



Before making this type of purchase please consider the following tips:

- Check legitimacy of business with Consumer Protection BC and your local Better Business Bureau.
 - Conduct web searches for any consumer feedback.
 - Always read your contract or terms and conditions in full, even the fine print paying particular attention to cancellation rights. This can sometimes be challenging but it will help you make an informed decision.
 - Make sure you have the physical address and a contact telephone number of the business.
 - Always verify the cost of the product or service, type of currency (USA \$\$ or Canadian), shipping and handling charges, what the delivery time frame is, if a warranty or guarantee is offered, the seller's privacy policy, cancellation and return policy.
 - Check your account, credit card or bank statements online rather than waiting for a statement.
 - Pay with a credit card if possible as you may be able to get a credit card chargeback if any of the goods were undelivered, unauthorized transactions were made, incorrect amounts were charged to your credit charge or any of the goods were defective.
- 

2.1 The Applicability of Formal Legal Jurisdiction

Formally, a number of the provinces have attempted to exert control over consumer interests in online disputes. For example, in Ontario, the *Consumer Protection Act*, claims jurisdiction over “all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.”¹³ While this appears encouraging for consumers, those surveyed for this examination did not necessarily share the optimism expressed in the Ontario *Consumer Protection Act*. In fact, only 18% of respondents felt the law in their province applies when they encounter an issue with an online purchase with a retailer located outside of Canada.¹⁴ Although this law applies to consumers, such as an individual, family or household acting for a non-business purpose,¹⁵ the law does not cover business-to-business (B2B) transactions. However, a survey of the information available to consumers through the Ontario Ministry of Consumer Services website shows that many of the online shopping tips provided by the government shy away from jurisdictional issues and instead focus on consumer interests in protecting their privacy online.¹⁶

This is perhaps because the assertion of jurisdiction by Ontario is somewhat haphazard in light of judicial decisions made by the courts on these issues. In essence, the application of jurisdiction can be much more contestable as the consumer must prove a closer connection between the operating business, transaction and parties before jurisdiction may be exerted.¹⁷ This has most recently been discussed in the *Club Resorts Ltd. v. Van Breda* case where the Supreme Court of Canada ruled on the necessary requirements to fulfill the “real and substantial connection test” requirement to establish the jurisdiction of a Canadian court in international matters.¹⁸ While the court made it clear that some factors would necessarily suggest that the matter should be handled in Canada, such as the residence of the defendant or if the action was carried out in a province, a more holistic assessment of other related factors should take place. These include considering relevant case law, statute law, private international law (including comity), and various connecting factors.¹⁹ Further should a party raise issues that the forum of a Canadian-based court is not convenient (*forum non conveniens*), the court must consider if the party raising the issue can show that a Canadian-based court is not in fact the appropriate venue in which to resolve the dispute based on a number

¹³ *Consumer Protection Act*, RSO 2002, c 30, s 2 (1).

¹⁴ Environics Survey conducted for PIAC (November 2012).

¹⁵ *Ibid*, Consumer Act, s 1 “consumer”.

¹⁶ Ontario Ministry of Consumer Services, “Shopping Online,” online: Ontario, <
http://www.sse.gov.on.ca/mcs/en/Pages/Online_Shopping_Intro.aspx >.

¹⁷ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572

¹⁸ *Ibid*, Van Breda, at paras. 67-70.

¹⁹ *Ibid*, Van Breda, at para. 91.

of factors.²⁰ While the courts' declarations in the case added greater clarity to the law as to the significant factors to be considered in establishing a real and substantial connection in order for a Canadian court to exert jurisdiction, consumer clarity on the issue, especially for low-value purchases, seemed less firm.

In developing their assessment in *Van Breda*, the Supreme Court has attempted to deal with the problem of the exertion of jurisdiction by various states. Hence, while Ontario law may claim jurisdiction over consumer issues, disputes that happen while engaging in international commerce may be subject to similar laws in other jurisdictions that claim to exert control over the dispute processes in the jurisdiction of the retailer. This naturally causes the question of where the dispute should be best resolved because of the conflicting laws. Dispute claims are also subject to any contractual clauses which may limit the jurisdiction in which a dispute may be resolved, or where a particular process for dispute resolution is required (e.g., required arbitration or mediation). Such contractual terms, an exertion of jurisdiction by multiple states and the limited applicability of laws for consumers, led to interest in establishing alternative means for assessing and resolving disputes.

Since the 1990s, it can be argued the law surrounding jurisdiction and the Internet have been in a constant state of flux. Unfair business practices have traditionally been kept in check by consumer protection laws. However these laws were designed in a different era of technology and to a large degree are now being adapted to address online business practices. As a result, the present jurisprudence on the matter of what jurisdiction applies to online transactions remains uncertain, at best.

For a contract to be valid, the terms of the agreement must be communicated from one party to the other, and the second party in the transaction can accept the offer, decline the offer, or modify the terms and make a new offer to the original offeror. Once there is agreement, there is acceptance of the offer, and one party has assented to the terms. The concern with online transactions is there is no opportunity to modify terms presented or respond with an offer of their own. Users must accept the terms of service on an "as-is" basis. When a contract allows one party to control essentially all of the bargaining power and uses it to write terms that are favourable to them, this is called an *adhesion contract*.

With open questions regarding the applicability of domestic consumer protection law, in addition to the use of adhesion contracts, it is little wonder consumers express a low level of confidence that they can successfully resolve a dispute with an internationally-based online retailer. Moreover, the fight for jurisdiction between states has pushed the parties involved in these transactions to seek out alternative methods for dispute

²⁰ *Ibid*, Van Breda, at para. 105.

resolution, away from the courts. While courts were viewed as consumer-friendly, they're cost prohibitive, while the alternatives enable cost-effective but legitimate resolutions. The difficulty for parties has been in finding a mutually agreeable system in which disputes may be resolved. The views of consumers surveyed reflect this reality, since it was discovered that 47% did not express confidence in resolving a dispute regarding an online transaction with a retailer based in the United States.²¹ This figure escalates to an alarming 78% when considering online retailers located outside of Canada and the U.S.²² It is contended this perceived lack of confidence is so pervasive that where a retailer is physically located is now a significant pre-purchase consideration for consumers. This is supported by the notion that 43% of consumers surveyed say they always check the location of the retailer before making an online purchase.²³

2.2 Forums for Dispute Resolution

Uncertainty in the formal legal processes that may be used to resolve disputes led retailers, governments and consumers to seek alternative means to reach resolutions between disputing parties engaged in international transactions through the internet. The method of dispute resolution, and which body is best to facilitate discussions, has been widely debated. Currently dispute resolution processes for online transactions are available through websites themselves, third party dispute resolution centres (such as the University of Massachusetts Amherst National Center for Information Technology and Dispute Resolution),²⁴ government agencies and internationally-led bodies (such as the United Nations Commission on International Trade Law).

In some cases ecommerce websites themselves created means to resolve disputes between consumers. As the development of ecommerce has grown, so too has the need for internet-based businesses themselves to invest in making transactions safe, enhancing consumer trust and developing forms of dispute resolution.²⁵ As one example, eBay not only developed an online ratings system for sellers to enhance the trust between buyers and vendors, but also initiated their own internal online dispute resolution systems to act as a conduit between individuals through eBay.²⁶ As web

²¹ Environics Survey conducted for PIAC (November 2012).

²² Environics Survey conducted for PIAC (November 2012).

²³ Environics Survey conducted for PIAC (November 2012).

²⁴ UMass Amherst, National Center for Information Technology and Dispute Resolution, <
<http://www.umass.edu/research/research-units-facilities/national-center-information-technology-dispute-resolution> >.

²⁵ Ibid, Katsh, p. 26-27.

²⁶ Ibid, Katsh, p. 27.

companies grow around consumer interactions, such as those focused on social interactions or user-generated content, the need for greater facilitation and mechanisms to resolve disputes is likely to grow online.²⁷

However, not all retailers offer these alternatives, nor do they engage with third party facilitators to create programs for dispute resolution, therefore other means must be found that provide predictable, recognizable and legitimate methods for businesses and customers to find a resolution to disagreements. Creating legitimization for these bodies can be challenging in the international sphere which is why recognizable bodies, such as the United Nations, lend their expertise in these areas so that some gravitas may be added to the system of dispute resolution for parties. We contend these efforts are required to counter the low levels of consumer confidence regarding the resolution of disputes stemming from online purchases with foreign-based retailers.

Understanding consumer concerns when engaging with these agencies, and their rights for protection in international disputes, is also key to building a legitimate and viable solution. As long as the process for international dispute resolution among businesses and consumers remains uncoordinated by a governmental or retail body, the total impact on the market remains difficult to assess in terms of its total impact and cost to consumers.

3.0 What Canadians Thought: Study Results

In order to assess the frequency of purchases online, as well as the understanding of consumers about issues related to jurisdiction for dispute resolution when problems with purchases arise, PIAC undertook a study of consumers to ask respondents about these issues. The goal of the study was to better understand the consumer perspective and comprehension of consumer rights when engaging with ecommerce. With this knowledge it is possible to expand the discussion of what information consumers need to be supplied with when making decisions about online purchases, and create greater understanding of how consumer understand their rights.

The results found by PIAC are similar to those found in the United States by the Pew Internet & American Life Project (Pew) in 2008, *Online Shopping*,²⁸ although that study did not directly consider issues related to the jurisdiction of disputes. Pew found that two-thirds (66%) of Americans shop online – a statistic that has likely risen substantially in the intervening years – and 81% used the internet to conduct research about a

²⁷ Ibid, Katsh, p 30.

²⁸ John Horrigan, Online Shopping, online: Pew Internet & American Life Project, 13 February 2008, <<http://www.pewinternet.org/Reports/2008/Online-Shopping.aspx> >.

product. Pew also found that most online Americans expressed frustrations about the amount of information they were given about their purchases. For example, 43% indicated that they had been frustrated by the lack of information encountered while making online purchases, and 32% indicated that they found information online confusing during their shopping or research. Confusion with internet shopping appears to be wide-spread and evident in a number of countries, making the issue of consumer disputes about commerce and the process for resolution all the more apt for consideration.

3.1 Methodology and Study Parameters

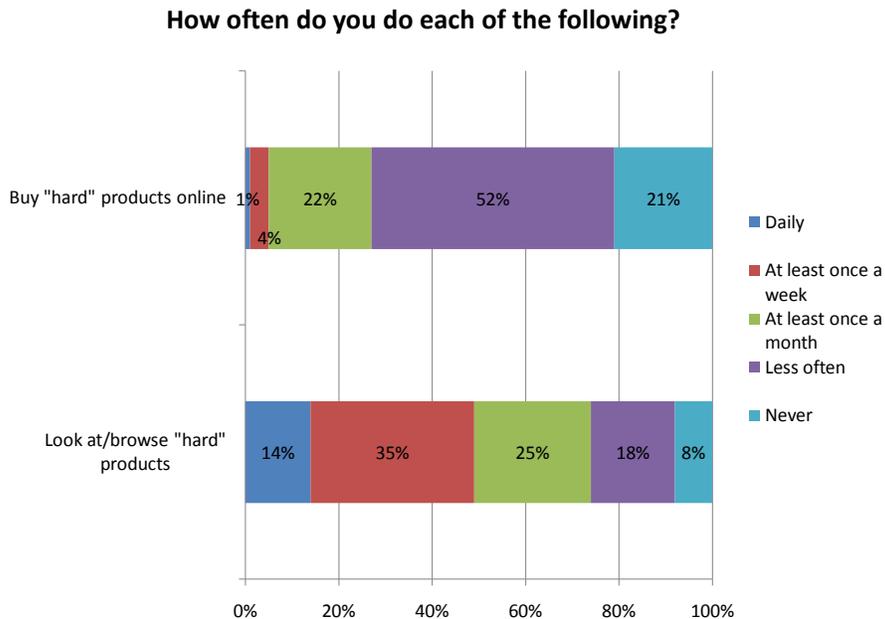
PIAC conducted a quantitative study along with Environics research from November 13-20, 2012 of 1,000 respondents by telephone. Interviews were completed by Environics Research Group. The telephone survey was conducted among a national random sample of 1,001 adults aged 18 years of age or older, living in Canada. The margin of error for a sample of this size is +/- 3.10%, 19 times out of 20. Quality Control and Sample Selection followed the standard practices of Environics Research Group while conducting their Environics National Omnibus studies. The study included participants from across Canada (the 10 provinces) and was conducted in English and French (in Quebec).

The study consisted of 7 questions, including questions asking respondents about their use of and familiarity with online ecommerce websites, their experience encountering disputes when engaging in ecommerce, and their understanding of how disputes might be resolved including issues related to jurisdiction. Although Likert scales were not formally used in responses to questions, respondents were asked to rate their understanding, frequency of actions or confidence on a scaled-basis (e.g., from “very confident” to “not at all confident”). Participants were made aware that the focus of the study was on the purchase of “hard” products including “books, clothes, furniture, sporting goods, appliances etc.” The intention of the study was to understand not only consumer engagement with ecommerce, but their experiences and familiarity with resolving disputes encountered engaging in these online interactions.

3.2 General Consumer Use of Ecommerce

The growth of consumer ecommerce purchases continues to develop. A significant proportion of Canadian consumers now engage with retailers online. Fully 74% look at, or browse, for tangible/“hard” products online at least monthly, with almost half (49%) of consumers do so on a daily or weekly basis. Age does play a role in a consumer’s engagement online with 57% of those ages 18 to 29 browsing online for hard products

at least weekly, compared to 38% of those age 50 and over engaging over the same time period. Those with familiarity of social media outlets showed a strong propensity to browse for products, with 80% of Pinterest users browsing at least monthly.



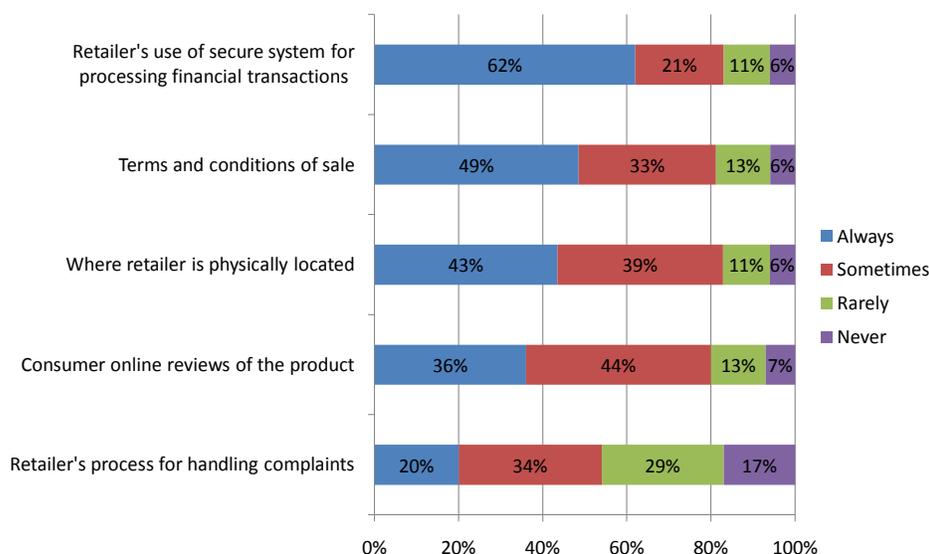
Source: Environics Research Group & PIAC, 2012
 n= 1,000 (All respondents) , Q1

In terms of tangible/"hard" product purchases, overall only 21% of consumers indicated that they had "Never" purchased a product online. Online purchases most frequently happen on a less-than-monthly basis (58%), indicating that online shopping is not yet a habitual activity among Canadians. Similar to the trends found in consumer's browsing for goods online, age does play a role in a respondent's interest in purchasing goods online. Younger consumers (ages 18-29) were less likely to indicate that they had "Never" made purchases online (12%) than consumers age 50 and over (29%).

3.3 Online Shopping Consumer Experience

Consumers use online resources to understand how in-person retail and ecommerce experiences compare when making purchases. In general, the greater the familiarity of consumers with online shopping, the more frequent that a consumer will check terms and conditions, complaint resolution mechanisms of online retailers, the security of online transaction and consumer reviews.

How often do you check each of the following before buying a product online?



Source: Environics Research Group & PIAC, 2012
 n= 922(Those who browse/bought hard products online) , Q2

Among consumers who browsed or purchased goods online, 82% “Always” or “Sometimes” checked where the retailer was physically located. This increased to 85% among those that had experienced a problem purchasing a product among any online retailer (Canadian, American, International) in the past. This indicates that prior purchasing difficulties may push consumers to consider in-person retail purchases more readily.

Four out of five respondents consulted online consumer reviews of a product before purchasing online “Always” or “Sometimes.” Retirees were 7% less likely to consider online reviews of products than the general public. Those making \$25,000 to under \$60,000 annually were the least likely to consult online consumer reviews. While this indicates some segments of the population place less stock in consumer reviews, an excerpt from PIAC’s examination of customer loyalty programs in Canada provides evidence from a number of sources indicating their importance of in the decision to purchase a product:

“Why is providing this space for interaction so important? According to Nielsen, 70% of consumers trust online reviews, while 67% of consumers don’t buy after reading only one to three negative reviews, according to Lightspeed Research. An October 2012 survey by Ipsos OTX and Ipsos Global @dvisor supports Nielsen’s findings, stating 64% of Canadian

Internet users considered ratings and reviews influential when making buying decisions. Bazaarvoice, whose clients include Procter & Gamble and Wal-Mart, noted during the third quarter of 2012, site visitors who interacted with user generated content were 81% more likely to buy—and 27% more likely to return to the site again—than visitors who did not.²⁹

Although consumer reviews are influential, they have also become a contentious topic for consumers and businesses. These reviews can help boost consumer confidence in brands and internet commerce websites,³⁰ however, there is increasing evidence that such reviews may be generated by inauthentic users.³¹ Such inauthenticity of reviews may lead to greater consumer confusion and unwillingness to trust brands widely using these tools.

Among those who shop or browse online, 81% review the terms and conditions of sale for products, and 54% review the retailer's process for handling complaints. Those consumers whose incomes are under \$15,000 per year are the least likely to review the terms and conditions of sale with 27% indicating that they "Rarely" or "Never" do so, and 57% of consumers in this income group indicating that they "Rarely" or "Never" review a retailer's process for handling complaints.

When asked about whether they check to see whether a retailer uses a secure payment system before making purchases, 83% of consumers indicate that they "Always" or "Sometimes" do so, while only 17% indicate that this is done "Rarely" or "Never." Again, those making less than \$15,000 per year in income are 11% less likely to check the security of payment system among retailers than the general consumer.

²⁹ Jonathan Bishop, *Customer Loyalty Programs : Are Rules Needed?*, Public Interest Advocacy Centre, November 2013, p. 37-38. See also Rob Fuggetta, "Making the Most of Word-of-Mouth Advertising," *Wired*, May 30, 2013. Last accessed June 6, 2013, at <http://insights.wired.com/profiles/blogs/making-the-most-of-word-of-mouth-marketing#axzz2UnJn6dwY>. Nielsen figure is the 2012 *Global Trust in Advertising report*, which surveyed more than 28,000 Internet respondents in 56 countries. The figure, attributed to Lightspeed Research, 67%, is from a study in the United Kingdom that was released in April, 2011. Also Krista Garcia, "Online User Reviews: Building Trust and Boosting Sales," *E-Marketer*, February, 2013, p. 3. Last accessed June 6, 2013, at https://s3.amazonaws.com/readypulse/news/eMarketer-online-user-reviews-building-trust_and_boosting-sales.pdf

³⁰ Luca, Michael, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Working Paper, Harvard Business School, September 16, 2011, page 1. Presented by Kerry Munro, *Sustaining Loyalty in a Complex Digital Economy*, Canada Post Corporation, at *Brand Friends Forever*, Canadian Marketing Association Conference, Toronto, February 14, 2013. Also see : Jonathan Bishop, *Customer Loyalty Programs : Are Rules Needed?*, Public Interest Advocacy Centre, November 2013, p. 34-35.

³¹ Gartner Inc., *Gartner Says By 2014, 10-15 Percent of Social Media Reviews to Be Fake, Paid for By Companies*, Press Release, September 17, 2012. Presented by Kerry Munro, *Sustaining Loyalty in a Complex Digital Economy*, Canada Post Corporation, at *Brand Friends Forever*, Canadian Marketing Association Conference, Toronto, February 14, 2013. Also see : Jonathan Bishop, *Customer Loyalty Programs : Are Rules Needed?*, Public Interest Advocacy Centre, November 2013, p. 34-35.

It is contended here that in when consumers consult online reviews and the terms and conditions of a sale, they are in part looking for instances where a fellow consumers have encountered a problem with a purchase and how it was resolved. As a result, many retailers provide social media avenues where this interaction can take place, since, as one loyalty program executive recently commented, “the conversation is happening whether you’re with us or not.”³²

3.4 Problems with Online Purchases

Canadians are clearly engaged in ecommerce and are not immune from encountering problems through their engagement. Although most Canadians have not encountered problems with online purchases, those that do most often have issues with retailers outside of Canada. Our study reveals that 28% of respondents have encountered a problem with online purchases, and that 75% of those who encountered a problem did so with retailers outside Canada. Further, 11% of consumers surveyed encountered problems with Canadian retailers and 6% of respondents were unsure of where the online retailer was located. These results point to some of the key difficulties when Canadian consumers engage in online commerce. Due to difficulties understanding the exact location of online retailers outside of Canada, Canadian consumers are periodically left with limited options regarding the dispute resolution mechanisms available to them when disputes occur with retailers.

Canadians may be more confident purchasing online goods from domestic retailers due to the presence of consumer protection laws and other organizations assisting in the regulation of business conduct, such as the Financial Consumer Agency of Canada (FCAC). The FCAC is responsible for supervising federally regulated financial institutions (FRFIs) and payment card network operators. The Agency seeks to ensure that these entities comply with the federal consumer protection measures to which they are subject, and the voluntary codes of conduct and public commitments into which they have entered.³³ Moreover, many provinces have also enacted Internet agreement (or remote agreement) legislation for the purpose of protecting consumers online.³⁴ The

³² Jonathan Bishop, *Customer Loyalty Programs : Are Rules Needed?*, Public Interest Advocacy Centre, November 2013, p. 37. See also Bryan Pearson, *The Loyalty Leap: Turning Customer Information into Customer Intimacy*, Penguin Group, Toronto, 2012, P. 24.

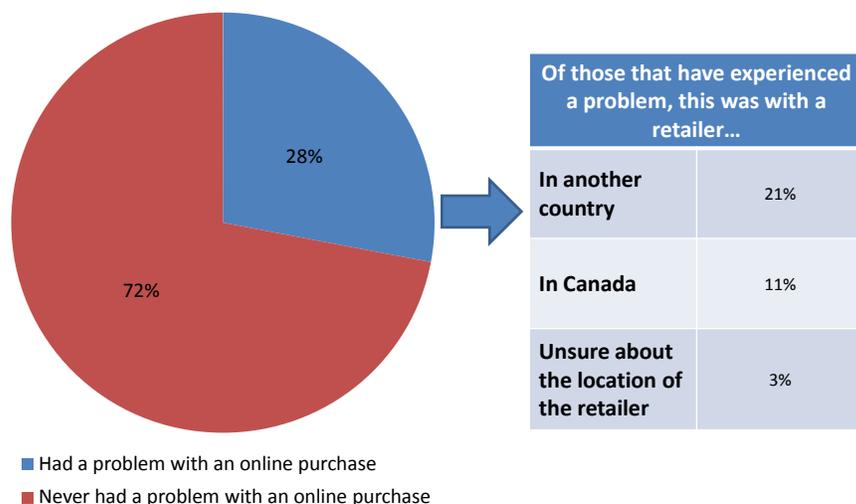
³³ Trites, Steve, Charles Gibney and Bruno Lévesque, *Mobile Payments and Consumer Protection in Canada*, Financial Consumer Agency of Canada, December 2013, p. 10.

³⁴ Trites, Steve, Charles Gibney and Bruno Lévesque, *Mobile Payments and Consumer Protection in Canada*, Financial Consumer Agency of Canada, December 2013, p. 35.

development of these laws has been guided by the Internet Sales Contract Harmonization Template, a common template endorsed in 2001 by the federal, provincial and territorial ministers responsible for consumer affairs. The template identified commonly agreed-upon principles for contract formation, cancellation rights, credit card chargebacks and information provision in online commerce.³⁵

The number of difficulties respondents encountered with online retailers increased where respondents purchased goods more frequently. For example, 44% of those making purchases online at least once a month reported problems with an online purchase. Of those having a problem with a domestic online retailer, 17% have undertaken formal legal action or used online dispute resolution. This compares to 23% of those that have had a problem with a foreign online retailer. According to Consumer Protection BC, it appears the most common inquiries brought forward by online consumers concern returns or refund policies.³⁶

Which of the following describes your experience with online purchases?



Source: Environics Research Group & PIAC, 2012
n= 1,000 (All respondents) , Q5

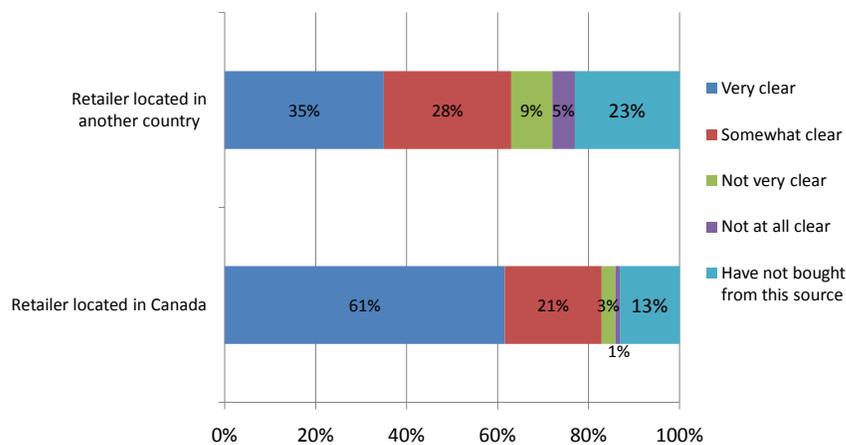
Although the Internet has provided consumers with an expanded set of options beyond Canadian borders in their purchases, not only have respondents experienced a greater number of difficulties in making these purchases, but respondents also indicate that there is a greater lack of clarity about the terms of purchases. While 61% of respondents indicated that purchases from Canadian retailers included “very clear”

³⁵ Trites, Steve, Charles Gibney and Bruno Lévesque, *Mobile Payments and Consumer Protection in Canada*, Financial Consumer Agency of Canada, December 2013, p. 35.

³⁶ Consumer Protection BC response to PIAC questionnaire (2013)

information about the total price charged, taxes, shipping costs and duty/customs, instead only 35% of respondents felt the same about retailers located in countries other than Canada. Among those who purchased goods from retailers outside of Canada, there seemed to be greater unease in general with the information provided, although fewer respondents have purchased from these sources.

Thinking about the last product you bought online from the following sources, how clear was the information the retailer provided about the total price you would be charged, including applicable taxes, shipping costs and duty/customs fees?

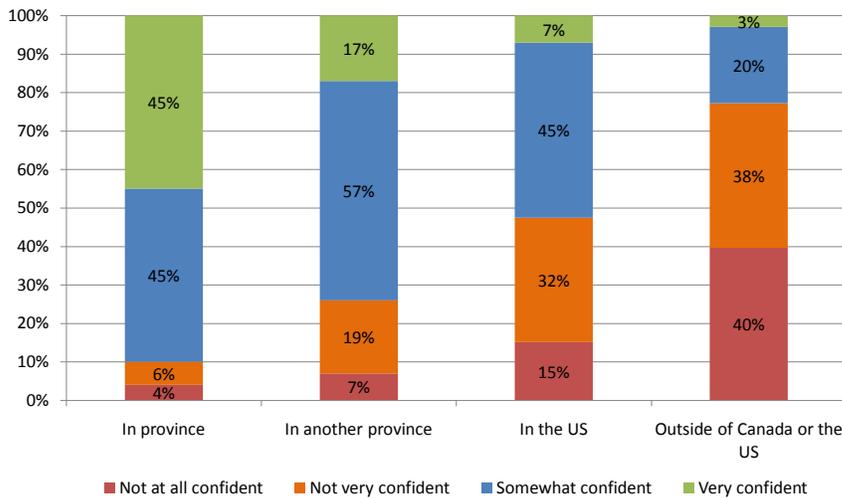


Source: Environics Research Group & PIAC, 2012
 n= 1,000 (All respondents) , Q8

3.5 Consumer Confidence in Resolving Disputes

In order to assess consumer confidence in resolving disputes, consumers were asked about their confidence to resolve disputes based on where the retailer is located. Ninety per cent (90%) of respondents indicated that they would feel confident (“Very” or “Somewhat” confident) that they would be able to resolve a problem when buying online from a retailer located closest to home, in their own province. This compares to 74% of respondents who feel confident that they would be able to resolve a problem when buying online from a retailer located outside their home province.

How confident are you that you would be able to resolve such a problem when buying online from each of the following sources? Online retailers located...



Source: Environics Research Group & PIAC, 2012
n= 1000 (All respondents), Q3

As consumers made purchases farther afield, however, their confidence in dispute resolution processes decreases significantly. For example, while 53% of respondents indicated that they felt confident they could resolve a dispute when buying online from a retailer located in the U.S., this confidence level drops precipitously when considering a retailer located outside of the U.S. or Canada to only 23%.

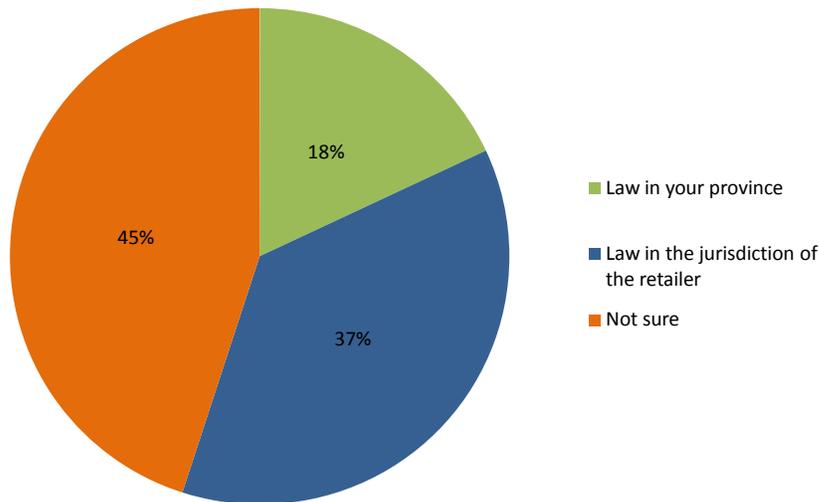
Among those who make purchases most frequently online, there is greater confidence in resolving disputes. Among those making purchases at least once a month, 91% feel they could resolve a dispute with a retailer outside their home province, and 70% of this group feel confident that they could resolve a dispute with a U.S.-based retailer. When it comes to the international, non-U.S. and non-Canadian retailers, only 32% of those making at least monthly purchases felt confident that they could resolve disputes. Those with annual incomes under \$25,000 generally were the least confident about their ability to resolve disputes with retailers in Canada, the U.S. or internationally.

3.6 Consumer Awareness of Jurisdiction

When asked about which laws they expected would apply if the encountered a problem with an online purchase from a retailer outside Canada, 18% of respondents believed Canadian law would apply, 37% believe the law of the retailers location would apply and 45% stated that they were unsure about which country had jurisdiction. The awareness of jurisdiction changes markedly when respondents are frequent online purchasers. Of

those who make purchases either daily or at least once a week, 25% were unsure about which jurisdiction would apply while 51% stated it was the law of their province or within Canada and 24% the law of the jurisdiction where the retailer is based.

If you encountered a problem with an online purchase from a retailer outside of Canada, which laws should apply?



Source: Environics Research Group & PIAC, 2012
n= 1,000 (All respondents) , Q4

3.7 Consumer Survey Conclusion

Consumers show a great degree of comfort with engaging with online retailers in terms of the research they perform and the transactions undertaken. However, consumers show less comfort and comprehension of their consumer rights when engaging with online retailers – particularly when the retailer is located outside of Canada. While fewer consumers, generally, engage with, and make purchases from, online retailers outside of Canada those that do indicate this activity involves greater personal risk since it remains unclear how disputes will be resolved. This might be the result of a lack of information being available from foreign retailers about the fees, customs and terms of purchases. Nevertheless, consumer confidence when dealing with foreign retailers is lower than retailers in either their own province or in Canada. Confidence could, again, be influenced by a lack of clarity about the jurisdiction in which any disputes should be resolved should a problem arise.

4.0 Dispute Resolution for Trans-boundary Ecommerce Transactions

As is evident from the survey results noted above, consumers show discomfort about their rights, and the procedural steps that must be taken to resolve disputes, when making online purchases. This general concern among consumers becomes exacerbated when dealing with online retailers outside of Canada. As consumers continue to engage with ecommerce retailers outside of their country of origin it will be necessary to consider the tools available to consumers in the international realm that may assist in resolving disputes. As online engagement continues to grow, and borders collapse, it appears likely that consumers will find a greater need for these international dispute resolution mechanisms. Further, consumer education must grow as to how they might engage with international bodies, and use the tools available, on issues related to commerce across boundaries.

While international law has generally assumed that cross-border trade disputes are likely to occur at the corporate level between organizations, fewer international bodies have considered how consumers may engage with international bodies to resolve disputes with foreign organizations. It seems relevant then to consider the current structure of international dispute resolution, and how consumers might engage with these bodies, as well as how these bodies might better educate consumers as to their existence and services rendered to assist individuals involved in disputes. It can be argued this would contribute to improving the number of Canadians who are confident they could resolve an issue with an online retailer based outside of Canada.

For instance, the *G20 High-Level Principles on Financial Consumer Protection* were endorsed by ministers and central bank governors in October 2011. Created by the Organisation for Economic Co-operation and Development (OECD), these principles are designed to assist G20 member countries in enhancing their domestic financial consumer protection regimes, as well as complement policy developed by the World Bank and other international organizations.³⁷ Part of these *High-Level Principles* address complaints handling and redress in the following manner:

“Complaints Handling and Redress—Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient.”³⁸

³⁷ Finance Canada, *Canada's Financial Consumer Protection Framework: Consultation Paper*, December 3, 2013. Last accessed December 19, 2013, at <http://www.fin.gc.ca/activty/consult/fcpf-cpcpsf-eng.asp>

³⁸ Trites, Steve, Charles Gibney and Bruno Lévesque, *Mobile Payments and Consumer Protection in Canada*, Financial Consumer Agency of Canada, December 2013, p. 26.

It is suggested that all jurisdictions should take this principle to heart when it pertains to international online transactions. It can be argued adherence to this principle is additionally important under these circumstances since consumers do not have the same level of access to traditional avenues of recourse, such as courts and arbitration tribunals.

4.1 The Challenges Facing Online Dispute Resolution and the Case of Chargebacks

In (practically) all markets there are incompetent or dishonest providers. There are also, occasionally, dishonest customers.³⁹ A well-functioning market is able to rid itself of such participants as others learn not deal with those who are untrustworthy.

From an economic analysis standpoint, most online markets fail because insuperable informational asymmetries, where consumers simply do not possess the information needed to make the best possible decisions based on their needs, prevent participants from identifying reliably counterparties that are incompetent or dishonest. The informational cost to obtain and maintain current the relevant information is simply too high.⁴⁰ Participants therefore run the risk of direct loss; in addition, the credibility and reputation of those markets ends up being tarnished, reducing the number of willing participants and the volume of business transacted.

When a market participant is a victim of dishonesty or fraud, or has an honest but intractable disagreement, and cannot solve the problem with the counterparty, an alternative is to ask a third party to review the transaction and pronounce on the rights and duties of each. Courts and arbitration tribunals are two of the best-known processes whereby such review can be accomplished.

Independent review of most online transactions through such “traditional” processes fails because costs are too high. There is a cost to adduce relevant evidence, and a cost to identify and retain a competent and independent reviewer. There is also an opportunity cost linked to the time required to settle the dispute.

³⁹ Of course, there are also numerous situations where parties acting in good faith honestly dispute whether either has effectively fulfilled its part of the bargain, which may also eventually require adjudication of some form. However, such situations can also be analyzed as a failure to convey or understand accurate information as to the whereabouts of a case.

⁴⁰ See e.g. Cotter, Thomas. *Some Observations on the Law and Economics of Intermediaries*, (2006) Mich. St. L. Rev. 67, at 72-74, and sources quoted therein. Among the issues facing consumers in that context are escalating search costs.

The inability to have defective transactions reviewed in turn reduces available information about untrustworthy participants and preserves markets where incompetent providers are not culled, dishonest participants are not deterred and no one is encouraged to improve his or her behavior.

We must therefore consider two different types of market failures: online markets fail *inter alia* because of informational asymmetries, and online dispute resolution markets fail due to excessive costs, thereby contributing to the ongoing failure of the markets for goods and services.

In a nutshell, this is the problem UNCITRAL's Working Group III ("WG III") is attempting to tackle: how can an efficient online dispute resolution mechanism be implemented, so that disputes can be resolved at an affordable cost and online markets can work more properly? UNCITRAL is the United Nations Commission on International Trade Law, which works with member countries to modernize and harmonize the rules of business when the flows of goods move across international boundaries.⁴¹ As it functions as part of the United Nations it has the ability to deal with a wider set of international transactions than might be covered through bilateral or multilateral trade agreements. WG III is considering a mechanism that would apply both to B2B and B2C transactions and that would likely involve arbitration. We argue here that this process is likely to fail and we concentrate on an assessment of chargeback processes as an alternative. First, however, we will briefly review some aspects of WG III's current work, consider some potential alternatives to the online dispute resolution proposed in WG III and finally return to the assessment of chargebacks.

4.2 WG III's work

Since it has begun to consider online dispute resolution ("ODR"), WG III has notionally examined both B2B and B2C contexts. It is obvious, however, that considerations reflecting the specificities of B2C transactions have dominated (and greatly complicated) discussions. Arguably, WG III would fare better if it uncoupled B2B from B2C.

Apparently spurred by some participating States, WG III has sought to define its ODR solution around an arbitration process. It has recently begun to consider the possibility of a two-track system whereby arbitration might not always be compulsory. From a

⁴¹ See: UNCITRAL, "About UNCITRAL," online: UNCITRAL, 2013, <
http://www.uncitral.org/uncitral/en/about_us.html >.

consumer standpoint, the usefulness of arbitration is highly debatable.⁴² The process is usually individual (precluding class actions or similar remedies), often confidential (so that no precedent is established), too frequently entrusted to arbiters with no consumer law expertise (and therefore specific rules aimed at protecting consumers are not applied) and occasionally quite costly. The costs of arbitration, as an inhibitor to greater consumer use of this form of resolution, have been noted by PIAC previously,⁴³ as well as by the legal community.⁴⁴ Although arbitration may be less costly than traditional litigation it is not clear whether small claims court, in those jurisdictions with these services, would not offer a cheaper alternative.⁴⁵

Aggregating litigation can be highly beneficial. It allows a number of similar disputes to be heard together, and thus benefits all potential claimants who, for various reasons, would not have sued individually.⁴⁶ It compensates for the economies of scale enjoyed by the defendant who could oppose the same defence to successive claimants who would each have to bear the full cost of asserting their claim.⁴⁷ It makes it possible to tailor appropriate and effective remedies to deter repeat offenders.⁴⁸ From a broader economic standpoint, it fosters a more economical use of resources to resolve disputes. It may also have a deterring, and therefore preventive, impact which also tends to improve the functioning of the market by inducing the provider to internalize the true costs of a harm it might cause. However, ODR as currently envisioned by UNCITRAL WG III would be a strictly individual, case-by-case process.

Confidentiality (total or partial) is often required in the context of arbitration-like processes, and indeed the argument was made to WG III that its ODR process should preserve party (and especially provider) confidentiality. Yet there is a public interest in ensuring that justice is public (especially in contexts where a process would be

⁴² For an analysis, see Public Interest Advocacy Centre and Option consommateurs. *Mandatory Arbitration and Consumer Contracts*. Ottawa, November 2004. 80 p. Available at www.piac.ca/files/mandatory_arbitration.pdf. (We acknowledge the typo in the website's address.) Hereinafter "PIAC/OC".

⁴³ Public Interest Advocacy Centre and Option des consommateurs, *Mandatory Arbitration and Consumer Contracts*, November 2004, pp. 25-28.

⁴⁴ For example see: Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006) 51 McGill L.J. 693, at pp. 722-723.

⁴⁵ *Ibid.*, at p 722.

⁴⁶ The point was made quite cogently in *Eisen v. Carlisle*, 417 U.S. 156, 161 (1974). As to the advantage of a single effort disrupting a number of infringing practices in the trademark context, see Lindenbaum, Jeffrey; Ewen, David. *Catch Me if You Can: An Analysis of New Enforcement Measures and Proposed Legislation to Combat the Sale of Counterfeit Products on the Internet*. (2012) 32 Pace L. Rev. 567.

⁴⁷ Jones, Craig. *Theory of Class Actions*. Toronto, Irwin Law, 2002. Pp. 22-23. Quoted in PIAC/OC, p. 11. For an in-depth analysis, see Sternlight, Jean R. *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* (2000) 42 Wm. & Mary L. Rev. 1.

⁴⁸ And such deterrence is useful not only to past and potential future victims, but to the maintenance of trust in the market as a whole and the preservation of a level playing field with law-abiding competitors, therefore significantly benefitting the latter.

mandatory). Confidentiality also prevents future disputants from relying on existing decisions, thus spurring the multiplication of potentially doomed cases, and increases the risk that decisions will be inconsistent. All in all, confidentiality is likely to increase global adjudicative costs and legal uncertainty, a result from which neither providers nor customers benefit in the long run.⁴⁹

Consumer law by its very nature generally modifies the usual common or civil law rules. It is a specialized body of law. Experience indicates that adjudicators do not always master that body of law and tend to revert to applying generic rules to disputes brought by consumers (to the latter's detriment), unless those adjudicators are provided an opportunity to gain expertise. This process could be observed for instance in the late 1990s, when the Canadian Banking Ombudsman (as that body was then known) started to examine consumer cases and had to familiarize itself with various aspects of consumer, banking and payments law.⁵⁰ A process whereby multiple, non-specialized adjudicators could be required to solve varied consumer issues would make it significantly more complicated and costly to ensure that all of them acquire a proper level of knowledge of the full suite of rules that should properly be applied to a given consumer dispute.

In addition, dispute resolution processes can prove unduly expensive to consumers, especially if they cannot recover their costs (as is apparently currently proposed by WGIII). Insofar as consumers are as risk-averse as other human beings, they may actually be prevented from engaging in legitimate grievances because they can reasonably expect to incur significant costs while facing uncertain success and cost recovery. In addition, arbitration or similar processes tend to be inherently more expensive than the traditional judicial process, if only because parties must support the costs related to paying the adjudicator and the process, which in the court system are publicly subsidized.⁵¹

While alternatives to the judicial process may hold some advantages with regard to B2C disputes, they can therefore also have significant drawbacks that negatively impact consumers, providers and markets as a whole. Quite a few jurisdictions have therefore banned compulsory arbitration⁵² and even where arbitration is allowed, it is

⁴⁹ See for instance Manne, Henry G. *The Judiciary and Free Markets*. (1997) 21 Harv. J. L. & Pub. Pol'y 11.

⁵⁰ At the time, some Canadian consumer groups engaged in dialogue with the Ombudsman in order to bring various aspects of consumer law to its attention, a process in which this writer participated.

⁵¹ Scarpino, Julia A. *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*. (2002) 10 Am. U.J. Gender Soc. Pol'y & L. 679. More generally, see PIAC/OC, pp. 26-27.

⁵² In Canada, Ontario and Québec stand out, while the European Union has also drastically limited the range of situations where consumers can opt for arbitration.

questionable whether it is beneficial, at least in a B2C setting (and even if an award was to be binding on the provider, but not the consumer).

In addition, arbitration or similar processes require the establishment of a procedural framework. The vexing question of the law (or other set of rules) applicable to the dispute to be arbitrated must also be solved.

WG III has concentrated up to now on outlining an ODR process, while deferring consideration of substantive rules that would apply to disputes. Even so, WG III is so overwhelmed by the complexity of the issues that it has stated repeatedly that its proposed process would only apply to the simplest of disputes, such as where a consumer has ordered (and paid) for a good and claims it was never delivered. More complex disputes would remain outside the remit of the process WG III envisions – which is to say, a large number of issues would remain practically unsolvable.

WG III may actually be underestimating the complexity of solving even “simple” disputes, both in terms of process and substantive issues, as the credit card networks’ experience with chargebacks abundantly shows.

4.3 The Liability of Intermediaries

The notion of “intermediaries” in the context we examine herein is broad and includes “any entity that enables the communication of information from one party to another.”⁵³ Intermediaries may also help in managing risk and balance conflicting interests; more generally, they contribute to reducing transaction costs.⁵⁴ They may include Internet service providers or other parties involved in transmitting data, search engines, auction sites and payment service providers (“PSPs”), which facilitate a transaction.⁵⁵ The notion might be extended to embrace intermediaries specializing in handling and resolving disputes, if only because some well-identified intermediaries, such as PSPs, also provide those services. The market for many of those intermediation services has in the past tended to be fairly concentrated, hence allowing intermediaries to act as “bottlenecks” and gatekeepers.⁵⁶

⁵³ Cotter, *op. cit.*, p. 68.

⁵⁴ Cotter, *op. cit.*, pp. 69-70.

⁵⁵ MacCarthy, Mark. *What Payment Intermediaries Are Doing About Online Liability and Why It Matters*. (2010) 25 Berkeley Tech. L.J. 1037, 1038. The author was formerly a senior vice president at Visa Inc. See also Mann, Ronald J.; Belzley, Seth R. *The Promise of Internet Intermediary Liability*. (2005-2006) 47 Wm. & Mary L. Rev. 239, 254-259.

⁵⁶ Mann *et al.*, *op. cit.*, pp. 258, 265.

Given a situation where there is a “bad actor”, a “victim” and a third party which is peripherally involved in the relationship as an intermediary, why would (partial or complete) responsibility for preventing a wrong or compensate the victim be assigned to the third party?⁵⁷ There may at first glance seem to be no rhyme or reason to assigning liability to the innocent bystander.

Yet there may be cases where liability cannot be sorted out efficiently between the parties. Such can be the case where the bad actor is impossible (or at least exceedingly difficult) to identify and bring to court, for instance.⁵⁸ It can then actually be in the intermediary’s interest to step in and protect victims, in order to maintain the integrity of a market upon which the intermediary depends (and from which it often profits)⁵⁹ as well as preserve its own brand and reputation as a “responsible business partner”⁶⁰ and corporate citizen. It certainly seems clear that regimes based on demonstrating the liability of the direct offender are difficult to implement in markets characterized by high volume of transactions, low value of individual transactions, or both⁶¹ – a description that clearly fits many (if not most) consumer online markets.

From an economic standpoint, there are various reasons which may explain why an intermediary should step in on these occasions. Some authors espouse the notion that the least cost avoider should simply be identified: where the intermediary can deter inappropriate activity or compensate victims at a smaller cost than any other stakeholder, it should do so⁶² and, for instance, it is easier for a PSP to monitor a merchant using its network than it would be for a governmental agency.⁶³ Others oppose that the enforcement cost so incurred might still be higher than the social benefits expected from the enforcement action, and that it is therefore necessary to go beyond identifying the least cost avoider and ensure through a cost-benefit analysis that there is in fact a benefit, and such an analysis should of course consider not only the costs and benefits to the parties directly involved in a transaction, but to society as a whole.⁶⁴ It is also argued by others that a strictly economic analysis is incomplete: fairness must also be taken into account, insofar as one who participates in a framework which produces unjust results or one who benefits (even if indirectly) from

⁵⁷ MacCarthy, *op. cit.*, p. 1043.

⁵⁸ MacCarthy, *op. cit.*, p. 1047; Mann *et al.*, *op. cit.*, p. 246.

⁵⁹ Mann *et al.*, *op. cit.*, pp. 246-247.

⁶⁰ MacCarthy, *op. cit.*, p. 1090; see also Lindenbaum *et al.*, *op. cit.*, p. 612.

⁶¹ Mann *et al.*, *op. cit.*, p. 259. The Internet worsens the problem by making it quite easy for a malfeasor to remain anonymous or relocate in order to remain a step ahead of regulators.

⁶² Lichtman, Douglas; Landes, William. *Indirect Liability for Copyright Infringement: An Economic Perspective*. (2003) 16 Harv. J.L. & Tech. 395; see also discussion in Mann *et al.*, *op. cit.*, pp. 249-250, and MacCarthy, *op. cit.*, pp. 1047-1048. While many of the papers quoted herein focus on trademark or copyright infringements, they deal with a broader range of issues and provide valid substantive analysis that is also applicable in other areas.

⁶³ MacCarthy, *op. cit.*, p. 1039.

⁶⁴ MacCarthy, *op. cit.*, pp. 1051-1055.

such results should contribute in some way to correct those injustices.⁶⁵ It may also be inequitable for an intermediary to provide services to someone “whom it knows or has reason to know is engaging” in illegal behaviour.⁶⁶

Even where one sets the bar highest and holds that intermediary liability should be predicated on both a cost-benefit analysis and considerations of fairness. It is clear that there will be cases where it will be both efficient and just to require an intermediary to help in deterring bad actors or indemnifying victims: some intermediaries, at least, can detect and prevent harm at a cost that is smaller than the harm, while having sufficient market power to prevent rogue providers from moving to a more tolerant substitute intermediary.⁶⁷ Sometimes, the gatekeeper can and should be held responsible in some way, because it can detect and prevent misconduct.⁶⁸ Payment service providers, in particular, may be better placed than most to step in,⁶⁹ and have done so over the last forty years or so, in particular through a process usually known as “chargebacks”.

4.4 Chargebacks

4.4.1 An Introduction

In the broad sense the term has gained, a “chargeback” is a process whereby a dissatisfied customer turns to a payment credential issuer to be indemnified, with that issuer in turn attempting to be reimbursed (directly, or more often indirectly through the acquirer institution) by a guilty provider.⁷⁰ The best-known example is provided by the two large U.S.-based card networks, Visa and MasterCard, whereby a cardholder can

⁶⁵ See discussion in *ibid.*, pp. 1055-1059. From the standpoint of the philosophy of law, the implication is that it is not only efficiency *per se* which matters, but also distribution.

⁶⁶ Yang, Kelly. *Paying for Infringement: Implicating Credit Card Networks in Secondary Trademark Liability*, (2011) 26 Berkeley Tech. L.J. 687. P. 692, in the specific context of U.S. trademark legislation; however, the principle arguably applies to a broader set of situations; see also Lindenbaum *et al.*, *op. cit.*, p. 605.

⁶⁷ Mann *et al.*, *op. cit.*, pp. 265-266.

⁶⁸ Mann *et al.*, *op. cit.*, pp. 265-267. Depending on the nature of the intermediary and of the type of misconduct, egregious behavior may be detected and prevented as it happens, or it can effectively be detected only after it has happened, so that a specific instance may then be signalled to the intermediary, who will then be in a position to prevent future harm. As we will note *infra*, payment service providers for the most part find themselves in the latter situation.

⁶⁹ Mann *et al.*, *op. cit.*, pp. 264.

⁷⁰ Strictly speaking, the “chargeback” is the internal process between the issuer and acquirer through which the issuer charges back a disputed transaction to the acquirer, but the meaning of the term has been commonly extended to designate the whole end-to-end process: see e.g. European Commission. *Payment card chargeback when paying over Internet – First Sub-group meeting of the PSTDG and PSULG held on 4 July 2000, July 12 2000*, document MARKT/173/2000, available at http://ec.europa.eu/internal_market/finances-retail/docs/onlineservices/chargeback_en.pdf (hereinafter “EC Sub-group”).

ask the card issuer to reverse a transaction, with the card issuer then addressing the issue with the provider through the network and the acquiring institution. Basically, the network (broadly speaking), which acts as a payment intermediary, acts as a third party in order to decide a dispute between customer and provider.

This apparent simplicity is belied by a number of factors, including the complexity of the regulatory framework surrounding (or not) chargebacks, the complexity of the process itself and the limitations flowing from that complexity. Yet there are advantages to chargebacks.

4.4.2 Origins and regulatory framework

Large card networks established in the United States established chargeback processes in large part as a reaction to legislative measures adopted in the 1970s and which required card issuers to promptly correct billing errors and protect consumers against unauthorized use.⁷¹ These networks have since broadened significantly the geographic scope of their chargeback policies, which usually apply worldwide to specific types of allegedly inappropriate transactions.⁷² This evolution was spurred by aforementioned laws and regulations as well as by notions of corporate responsibility⁷³ and by recognition that it was actually in PSPs' interest to maintain some order in markets where cardholders may wish to purchase goods or services.

In that context, it is highly relevant to underline that both MasterCard and Visa formally prohibit participating merchants from submitting for payments transactions that they know (or should know) are illegal⁷⁴ – which should include transactions that are illegal under any applicable consumer protection law.

As a result of these network policies, consumers may enjoy chargeback rights even as they reside in jurisdictions where legislation does not provide for such a remedy. Examples include Australia and New Zealand.⁷⁵ Limited chargeback rights are afforded

⁷¹ In particular the *Truth in Lending Act* as amended in 1974 by the *Fair Credit Billing Act*, codified at 15 U.S.C. §1666, as well as the *Electronic Fund Transfer Act*, Pub. L. No. 95-630, codified at 15 U.S.C. §1693, adopted in 1978. Provisions in Regulations Z and E help to implement those legislative requirements (see especially 12 CFR 205.11 and 226.13).

⁷² Although perusal of Visa's and MasterCard's guidelines and policies quickly leads to the conclusion that there are still significant variations between the rights and processes applicable to consumer requests, depending on their geographic origin.

⁷³ MacCarthy, *op. cit.*, p. 1039.

⁷⁴ MacCarthy, *op. cit.*, p. 1041.

⁷⁵ See e.g. *Credit card chargebacks*, at www.consumer.org.nz/reports/credit-card-chargebacks, noting that most New Zealand banks will charge the consumer a small fee when a chargeback is unsuccessful.

consumers in some jurisdictions, such as France.⁷⁶ In other jurisdictions, however, legislation actually goes further than networks' policies, a cogent example being section 75 of the United Kingdom's *Consumer Protection Act*, which makes the credit card issuer jointly and severally liable with the merchant for any breach of contract or misrepresentation.⁷⁷ In Canada, chargeback rights beyond those provided by networks also accrue credit cardholders under Ontario and Québec law, as noted *infra*.

MasterCard, Visa and other PSP policies therefore tend to act as a floor when one seeks to determine whether consumers can make a chargeback request – assuming of course that those consumers have used a payment instrument associated with one of those PSPs. Since many still estimate that such PSPs process more than 75% of payments associated with online transactions, their policies are clearly of relevance. They may not exhaust, however, consumer recourses, and determination of their rights in a specific situation requires the analysis of applicable national law.

4.4.3 The Complexities of the Process

Visa and MasterCard have both drafted (and published) lengthy documents detailing their chargeback process, and dealing for instance with issues such as the identification of relevant evidence and of the ways to adduce it.⁷⁸ Contemplation of these documents, and the details the networks have found necessary to provide regarding process, shows abundantly that WG III has only begun to scratch the surface of the procedural issues involved in designing an ODR mechanism.

Under those policies and when a cardholder disputes a transaction, the card issuer reverses the charge on the consumer's account and inquires (and requests a refund) from the acquirer which sponsors the merchant. Depending on circumstances, the dispute may be quickly settled between issuer and acquirer, or the merchant and acquirer can contest the consumer's assertions. If issuer and acquirer cannot agree, the network itself steps in to settle the issue.⁷⁹

⁷⁶ Under sections L133-18 to L133-25 of the *Code monétaire et financier*, a consumer is not responsible for unauthorized or inaccurate payment transactions (subject to a 150 euro franchise in some cases).

⁷⁷ S. 75 applies when the value of the goods or services obtained is between £100 and £30 000; some other exceptions may apply.

⁷⁸ See in particular MasterCard Worldwide. *Chargeback Guide*. 9 November 2012. 634 p. Available at www.mastercard.com/us/merchant/pdf/TB_CB_Manual.pdf. See also Visa. *Visa International Operating Regulations*, 16 October 2012, 1287 p., available at <http://corporate.visa.com/media/visa-international-operating-regulations-oct-2012.pdf>, especially pp. 831-992, although there are other relevant sections dispersed all across the document.

⁷⁹ In the case of Visa, see e.g. March 25, 1999 letter from Visa to Federal Trade Commission, at <http://www.ftc.gov/bcp/icpw/comments/visa.htm>.

The process can therefore be fairly lengthy and complicated, especially insofar as network rules distinguish between the types of businesses involved and, in some cases, the countries involved in a dispute.

Despite this level of complexity, the networks' chargeback processes are designed to deal only with fairly simple claims, which are most likely similar to those WG III's ODR system would address. This may provide some insight regarding the stakes surrounding the design of an efficient ODR process.

More specifically and under Visa and MasterCard rules, a dissatisfied consumer can complain to the financial institution which issued her card (or, increasingly, other instrument) and require a reimbursement within a well-defined, but fairly narrow, range of comparatively simple situations.⁸⁰ While the specific definitions vary somewhat, such cases include situations where

- merchandise is defective or not as described;
- goods or services were not provided, despite being paid;
- duplicate processing of a transaction occurs;
- recurring transactions have not been properly cancelled; and
- disputed transaction was not authorized by consumer.

Interestingly and according to 1999 data obtained by European authorities and concerning cross-border MasterCard transactions, 47% of chargebacks requests claimed that there had been no cardholder authorization for the transaction (suggesting fraud); 8% claimed that a recurring payment had not been properly cancelled; 5% (approximately) claimed that merchandise was defective or not as described and 4% involved non-delivery of the purchased product; however, practically 40% of claims did not fit within usual chargeback authorization codes.⁸¹

Issues at stake in the chargeback context are therefore reasonably easy to ascertain. The merchandise works, or does not; the merchant can prove the good was delivered, or cannot. There are no complex problems in the list, such as liability for personal injury resulting from the use of the merchandise, for instance, because deciding such

⁸⁰ Other cases where chargebacks are required may be established by legislation: see for example Québec's *Consumer Protection Act*, R.S.Q., c. P-40.1, ss. 54.1-54.16, which *inter alia* require chargebacks where specific information requirements have not been met by the merchant. See also Ontario's *Consumer Protection Act*, S.O. 2002, c. 30, ss. 40 and 99.

⁸¹ EC Sub-group, *op. cit.*, p. 4.

questions would largely exceed the capabilities (and willingness) of acquirers and networks.

Large PSPs, such as Visa and MasterCard, monitor chargeback activity related to each participating merchant on an ongoing basis, and can do so in a way that is reasonably cost effective.⁸² That is not to say however that chargeback management is easy, or inexpensive. There are costs involved for instance for the monitoring itself and the assessment of complaints as well as risks related to backcharging payments that were actually legitimate, over-blocking legal transactions or facing legal challenges to enforcement actions.⁸³ Issuers shoulder a part of that cost.⁸⁴

A further complication is introduced by the fact that it is not the network association which does most of the merchant vetting and monitoring, but the acquirer, which finds itself in a conflict of interest because it must monitor the behavior of its own clients and incur costs in so doing.⁸⁵ Yet acquirers may not always have the required expertise to assess legal compliance; merchants may also do business with multiple acquirers, increasing the risk of inefficient redundancy – or oversight gap. Improving acquirer monitoring may generate additional costs which could deter merchants (who already find them prohibitive) from participating in payment networks,⁸⁶ hence reducing acquirer revenues.

It must also be underlined that PSP chargeback processes (as opposed to legislative requirements, where they exist) provide no direct right of action to the consumer and are exercised at the sole discretion of the issuer.

Finally, and in cases where the network must act as final arbitrator and therefore has to ascertain the validity of a transaction under both provider's and customer's law, it is trite to say that it would benefit (if only in terms of search costs) from further harmonization of consumer law across the world, which national governments should foster if they wish to benefit from the contribution of intermediaries,⁸⁷ and assuming of course that

⁸² As to cost effectiveness, Mann *et al.*, *op. cit.*, pp. 268. The cost of chargebacks varies between 1.5 and 2.5 basis points, or 0.015 to 0.025%, of transacted volume: Yang, *op. cit.*, p. 703, fn. 110, quoting a 2007 discussion paper published by the Payment Cards Center of the Federal Reserve Bank of Philadelphia available at www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2007/D2007OctoberMerchantAcquiring.pdf, p. 11.

⁸³ MacCarthy, *op. cit.*, p. 1060. Legal challenges can raise complex issues, such as when Visa and its acquiring member were required by a Russian court to re-enable a merchant specializing in music downloading, Allofmp3.com, to process transactions within Russia, while still barring it from cross-border transactions: *ibid.*, pp. 1092-1095.

⁸⁴ See, for Europe in 2000, data in EC Sub-Group, *op. cit.*, p. 12: costs varied by country and according to whether a transaction was domestic or cross-border, but tended to be in the 20 to 40 euro or 11 £.

⁸⁵ See e.g. Yang, *op. cit.*, pp. 716-719.

⁸⁶ *Ibid.*

⁸⁷ MacCarthy, *op. cit.*, pp. 1042, 1074, 1106.

national regimes would tend to converge towards solutions that are the most beneficial to consumers and that harmonization does not entail uniformity.

4.4.4 The Advantages of the process

While the chargeback process is limited, it does offer significant advantages to a consumer who faces one of the issues covered by these regimes.

First, chargebacks are usually processed at no cost to the consumer, who is also quickly refunded (or has the charge waived), without having to wait for a final adjudication.

Visa's position is that a transaction is legally compliant only if it is fully compliant under both the provider's and the customer's legal systems,⁸⁸ and it is in a position to determine legality reasonably easily (or at least more so than the consumer), as it has participants in both jurisdictions (we assume, but have not as yet established, that MasterCard's position would be similar). If the chargeback process is unsuccessful, a consumer remains free to consider other means of redress.

In addition, a consumer does not need to provide an address to serve legal (or ODR) proceedings on a rogue merchant, as the network will itself be able to identify – and find – the merchant through its acquirer.⁸⁹

Therefore and both from a process and from a substantive standpoint, chargebacks may be reasonably effective and easy to use, provided of course that a dispute falls within the range of issues that can be so processed and that the issuer is willing to do the chargeback.

4.4.5 The Disadvantages of the Process

As noted, the range of disputes covered by chargeback mechanisms is narrow, and claims are subject to the determination of the issuer, who decides whether it will agree to a chargeback, while the consumer has no direct right of action (except, of course, where legislation makes it mandatory).

⁸⁸ MacCarthy, *op. cit.*, p. 1092.

⁸⁹ For issues regarding service see Lindenbaum *et al.*, *op. cit.*, pp. 580-585.

In addition, networks and acquirers find themselves with a conflict of interest, where they are required to discipline network participants that are their most significant source of revenue.

Market evolution is also complicating matters. Visa, MasterCard and AMEX certainly have detailed chargeback processes in place; so does PayPal (albeit in a somewhat different form).⁹⁰ China's UnionPay is now the second largest card network in the world (by volume) and is increasingly expanding beyond China.⁹¹ UnionPay, because of its support for ISO 20022 (a universal financial transaction message scheme used by credit and financial companies internationally), appears at least in theory to support chargebacks for consumers.⁹²

More broadly, online payment intermediaries are diversifying and many offer no chargeback process, and are currently not compelled to do so in many jurisdictions. In fact, a number of payment methods (such as ACH transactions in the United States) might technically not be reversed, singularly complicating the implementation of a chargeback mechanism.⁹³ A growing number of transactions are therefore not covered by anything resembling a chargeback mechanism.

For an aggrieved consumer, a chargeback is purely curative: it has no preventive impact. It is usually not possible for the acquirer or the PSP to establish that a given transaction is illegal while it happens. PSPs and acquirers find themselves in a position where they must reasonably expect that some market participants will cheat,⁹⁴ but they cannot identify them pre-emptively. Once complaints are processed against a given provider, however, and as their number increases beyond acceptable limits, the PSP and the acquirer come in possession of data that will enable them to react, and to prevent further harm to consumers in the future.

Another outstanding issue is growing P2P liability.⁹⁵ Not only on websites such as eBay.com but on a much broader basis, individuals – who may not know each other and may live in various jurisdictions – are likely to transact with each other to purchase, say, accessories that one creates as hobby for online role-playing games, or original music and other works of art. Eventually, hobbyists may well sell product blueprints for 3D

⁹⁰ As to PayPal's diligence on expelling "illegal merchants", Yang, *op. cit.*, p. 710.

⁹¹ See e.g. Wu Zijing. *UnionPay: Visa and MasterCard's Tough Chinese Rival*. Bloomberg Businessweek, December 20, 2012, available at <http://www.businessweek.com/articles/2012-12-20/unionpay-visa-and-mastercards-tough-chinese-rival>

⁹² ISO 20022, "The ISO 20022 Standard," online: ISO 20022, <http://www.iso20022.org/the_iso20022_standard.page >.

⁹³ In Canada, an Interac debit transaction at the point-of-sale or Interac online transaction processed through the Canadian Payments Association's clearing system cannot be reversed after approval, under s. 24 of both CPA Rules E1 and E2.

⁹⁴ See by analogy Lichtman *et al.*, *op. cit.*, p. 397.

⁹⁵ Mann *et al.*, *op. cit.*, p. 292.

printers, thus raising significant liability concerns if the product turns out to be defective. At what point do these sellers become a “business”? And thus, when can chargebacks be used against them?

4.4.6 Is ODR the right path?

That there should exist efficient mechanisms to resolve online consumer disputes is not questioned. Whether the ODR process currently contemplated by WG III is a promising path, worthy of further exploration, seems far less clear.

An ODR process is an intermediary specialized in obtaining information and making decisions. As envisioned by WG III, this process might involve a broad range of adjudicators applying a narrow range of rules to a limited amount of cases. In these cases, the onus of complaining and adducing most information would lie on consumers (in the B2C context), disputes would be individualized, and costs would be shared between the parties.

In other words, serial offenders may not be identified and stopped if adjudicators, who might not specialize in consumer law, preside in these cases. Further, many complaints would fall outside the scheme’s purview, while consumers would face an onerous burden both in terms of efforts and money required to pursue their case. Needless to say, this new process is not yet fully designed, much less ready to be implemented.

Seen through that lens, WG III’s concept can be compared to PSPs’ existing chargeback mechanisms. The latter apply to a similar range of complaints, take into consideration applicable national law (to some extent at least), are managed by PSPs at little or no direct cost to consumers, provide the latter quick resolution while conserving their legal remedies, and are able to detect and stop repeat offenders. In addition, chargeback mechanisms are already functional on a worldwide basis.

It is therefore a valid question whether it is opportune for WG III to try and reinvent a less efficient wheel than the ones already in place. This is especially true as perusal of current PSPs’ processes and policies shows by comparison the complexities of creating an ODR scheme, many of which WG III has not even explored.

4.5 European Commission - Directive on consumer ADR and Regulation on consumer ODR

Aside from WG III's own deliberations, the complexity of implementing a new ODR regime is perhaps best exemplified by current European Union efforts. The European Commission tabled a draft directive regarding alternative consumer dispute resolution in 2011.⁹⁶ In addition, the European Parliament has recently published a position on the adoption of a EU regulation regarding the creation of an ODR platform.⁹⁷ The thirty-odd page document (not counting "whereas" provisions) focuses solely on the broad framework allowing for the creation of a service, or platform, which would enable communications between ODR intermediaries and disputants, which would be provided under the aegis (and with the budgetary resources) of the European Commission. Discussions about these issues have been going on for years, numerous details still need to be hashed out and costs will be significant. Yet this work is done within the fairly limited and dynamic context of EU institutions.

4.6 Conclusion on WG III Proposals for ODR

In short, it seems difficult at this point to identify what WG III's proposals might add in terms of consumer recourse in situations where consumers can claim a chargeback from a PSP. Creating a new intermediary to duplicate what others are already doing may not be consistent with the most efficient allocation of resources.

In order to justify its efforts, WG III would have to demonstrate that its ODR scheme would be significantly more beneficial than chargebacks to consumers who can use the latter. As noted above, this demonstration has not been conclusively done at this point.

WG III's ODR scheme does have an obvious advantage in cases where chargebacks are not available and no other intermediary offers a comparably easy solution to consumers. At the moment, these conditions apply to less than a third of online consumer transactions. However, with the unrelenting growth of alternative payment

⁹⁶ European Commission. *Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)*, November 29 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0793:FIN:EN:PDF> .

⁹⁷ European Parliament. *Position of the European Parliament adopted at first reading on 12 March 2013 with a view to the adoption of Regulation (EU) No .../2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR*, doc. EP-PE_TC1-COD (2011)0374, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TC+P7-TC1-COD-2011-0374+0+DOC+PDF+V0//EN> .

methods, this figure is expected to grow. WG III's ODR scheme might hold an advantage if it applied to a broader set of issues, or if it enforced a set of substantive rules which were globally more advantageous to consumers than their national law. Unfortunately, the WG III is not expected to be applicable in this manner. In fact, the WG III has not yet examined in any significant way the set of rules that its ODR scheme would eventually apply.

It is therefore open to question at this point whether WG III is on the right path, from a consumer perspective. Of course, this raises the question of alternatives.

4.7 Are there alternatives?

There is likely no conceivable mechanism that would solve adequately all online consumer disputes. Alternatives therefore range from creating new – but imperfect – schemes to improving on imperfect, but existing ones.

WG III and EU processes indicate that creating a new scheme is a very lengthy and complex process. As noted, there is no obvious indication that WG III's proposed mechanism would be significantly more effective than existing remedies. Improving on existing schemes therefore seems to be an attractive path.

Insofar as an ODR scheme, an arbitrator or a tribunal is an intermediary that is called upon to improve information flows and decisional processes involved in the settlement of a transaction, alternatives can be sought among existing intermediaries. As noted above, PSPs already have relevant expertise.

PSPs manage chargebacks. They are also involved in other forms of risk prevention and mitigation. For instance, they have established the so-called Payment Card Industry Data Security Standard (PCI DSS) suite,⁹⁸ which imposes on merchants and intermediaries onerous duties relating to data security. While the efficiency of the standards and, especially, the costs incurred by merchants in order to implement them remain quite controversial, the notion that networks are well-placed to manage such issues (especially if they do so in consultation and cooperation with other stakeholders) has not been fundamentally questioned.

In the United States, PSPs also play a part in controlling online gambling, child pornography, sale of pharmaceutical products by unlicensed providers or sale of tobacco online (generally or to minors), either under legislative requirements or through

⁹⁸ MacCarthy, *op. cit.*, p. 1044.

more or less voluntary arrangements struck with government agencies.⁹⁹ In many cases, they agree to expel merchants from their network when they receive a “take-down” notice from authorities, through a process that is not so different from receiving an excessive number of chargeback requests from aggrieved customers and therefore disciplining that merchant.

By monitoring chargebacks (as they currently do) and being sometimes a little more willing to discipline or expel unruly merchants, PSPs could significantly help to identify “bad” providers and, when necessary, put a stop to their egregious behavior. From an economic perspective, it is relevant to notice that the “degree of control exercised by payment intermediaries in these cases is no greater than in their provision of services to any merchant”,¹⁰⁰ hence it induces no additional compliance cost, while providing a social good. Some credit card providers already undertake regular compliance validation; a process often completed in partnership with merchant banks.¹⁰¹ VISA, for example, requires that merchants comply with its PCI Data Security Standard requirements by all merchants using its cards including those who operate businesses primarily online.¹⁰² VISA also monitors chargeback activity on a monthly basis and alerts acquirers if merchants have excessive chargebacks.¹⁰³ Acquirers then are expected to take appropriate steps with merchants to reduce this rate, which may include providing additional training to staff or the creation of a chargeback reduction plan.¹⁰⁴

As noted above, it is also beneficial to PSPs themselves, especially from a reputational standpoint to monitor this activity. The motivation to monitor chargebacks, really, is twofold: as a consumer and merchant protection. Further, as some merchant programs offered by PSPs also insure merchants against fraudulent transactions or chargebacks,

⁹⁹ See e.g. Mann *et al.*, *op. cit.*, pp. 290, 297; MacCarthy, *op. cit.*, pp. 1045, 1059, 1062-1069, 1074-1087 as well as the *Unlawful Internet Gambling Enforcement Act of 2006*, Pub. L. No 109-347, codified at 31 U.S.C. §§ 5361-5367 (2006) (and see in particular §5364) and the *Ryan Haight Online Pharmacy Consumer Protection Act of 2008*, Pub. L. No. 110-425, codified at 21 U.S.C. §801 ss. Under U.S. copyright and trademark law, intermediaries may also incur a level of responsibility for abetting infringement, although the threshold is still controversial: see in particular *Perfect 10 v. Visa International Service Association*, 494 F3d 788 (9th Circ. 2007) and *Gucci America, Inc. v. Frontline Processing Corp.*, 721 F. Supp 2d 228 (S.D.N.Y. 2010), discussed *inter alia* in MacCarthy, *op. cit.*, pp. 1088-1089 and Yang, *op. cit.* The International Trademark Association (INTA) has specifically called upon PSPs to help in fighting counterfeiters: see *Addressing the Sale of Counterfeits on the Internet*. New York, September 2009. 7 p. Pp. 5-6. Available at <http://www.inta.org/Advocacy/Documents/INTA%20Best%20Practices%20for%20Addressing%20the%20Sale%20of%20Counterfeits%20on%20the%20Internet.pdf> .

¹⁰⁰ MacCarthy, *op. cit.*, p. 1084.

¹⁰¹ VISA, “Merchant PCI DSS Compliance & What is PCI Compliance?” online: VISA (USA) < http://usa.visa.com/merchants/risk_management/cisp_merchants.html >

¹⁰² *Ibid.*

¹⁰³ See : VISA, “Visa E-Commerce Merchants’ Guide to Risk Management,” online: VISA (USA), p 66. < http://usa.visa.com/download/merchants/visa_risk_management_guide_ecommerce.pdf >.

¹⁰⁴ *Ibid.*, p 66.

it is in the best interests of PSPs to ensure that neither the merchant nor consumer encounter problems with transactions that might result in a chargeback as the PSP may ultimately bear the cost.¹⁰⁵ As studies indicate that fraud costs online retailers about \$3.10 for every \$1 lost in fraudulent transactions including fraudulent chargebacks,¹⁰⁶ motivation to limit processes that may trigger chargeback disputes between customers and retailers will be essential to reducing these costs to parties.

Other intermediaries, such as auction sites or search engines, also discipline providers, if only by not accepting some forms of advertisement.¹⁰⁷ Of course, processes vary. PSPs are able to apply due diligence verifications to new merchants and monitor indicators such as chargeback volume,¹⁰⁸ but are not in a position to control each and every transaction. Provided notification of an apparent anomaly, they may investigate and discipline (or expel if need be) a problematic merchant. Intermediaries such as Internet service providers may be able in some cases to take pre-emptive action by blocking IP addresses or specific TCP ports.¹⁰⁹

Relying on intermediaries is therefore a proven strategy and, as noted above, intermediaries such as PSPs do not object to playing that role – up to a point. The framework under which they currently do so is not as clear and certain as may be desirable; its range is often too narrow; they must balance conflicting interests; and they increasingly find themselves in a position where they compete with other intermediaries that are under no requirement, whether legislative or self-imposed, to provide anything resembling a chargeback recourse.

In addition, their responsibility, and potential liability, should not have a chilling effect on the provision of their services¹¹⁰ by keeping away competent and honest market participants. It should not impose undue costs to participants – although, arguably, better control over market participants would in particular limit in the long run the number of chargebacks or similar processes, and thus reduce merchant costs.

It may thus be that efforts could be more usefully concentrated on improving the framework supporting the contribution of PSPs and other intermediaries to online dispute resolution and prevention.

¹⁰⁵ This is true of the Verified by VISA program. See : VISA, *Ibid*, p 64.

¹⁰⁶ Lexis Nexis, *2013 LexisNexis True Cost of Fraud Study : Merchants Struggle Against an Onslaught of High Cost Identity Fraud and Online Fraud*, Online : LexisNexis, September 2013, < <http://www.lexisnexis.com/risk/downloads/assets/true-cost-fraud-2013.pdf> >.

¹⁰⁷ For instance, Google does not accept ads for tobacco products: MacCarthy, *op. cit.*, p. 1081, fn. 194.

¹⁰⁸ Mann *et al.*, *op. cit.*, pp. 297; MacCarthy, p. 1076.

¹⁰⁹ See e.g. Mann *et al.*, *op. cit.*, p. 287.

¹¹⁰ Mann *et al.*, *op. cit.*, pp. 273-274.

We note in this context that OECD has sought to promote intermediary involvement, including the implementation of chargebacks, since 1995 at least.¹¹¹ Its 2007 Recommendation on Consumer Dispute Resolution and Redress recommends that the private sector develop chargeback mechanisms.¹¹² The OECD referred to the 2007 Recommendation (and chargebacks) in its 2008 Guidance concerning mobile commerce.¹¹³ More recently, OECD has specifically focused on the role of Internet intermediaries and increasing demands put upon them.¹¹⁴ Considering that the OECD has therefore explored both process and substantive issues, it may be advisable for WG III or national delegations contributing to its work to coordinate efforts with the OECD or national representatives to the latter organisation.

4.8 A provisional conclusion

Insofar as the issue is the implementation of competent and efficient intermediaries in order to resolve disputes between providers and consumers, it is possible to frame the question currently explored by WG III somewhat differently. In effect, should this undeniable need be fulfilled by a network of new and largely untested organisations, as WG III is contemplating, or should it be fulfilled by existing intermediaries, some of which, such as PSPs, already have significant experience in this area?

Should the latter alternative be found to be worthy of exploration, more attention should probably be given to the OECD efforts. Work should concentrate on broadening the range of intermediaries which can contribute and clarifying the rules they should apply. None of that, however, will likely immediately lessen the plight of consumers who experience complex problems in the context of online transactions.

Beyond the fact that it is apparently striving to reinvent the wheel, WG III's efforts also raise broader policy questions, and indeed raise an apparent paradox. Sovereign States have consistently fought the notion of "Internet exceptionalism"¹¹⁵ over the past

¹¹¹ EC Sub-group, *op. cit.*, p. 7.

¹¹² Organisation for Economic Co-operation and Development. *OECD Recommendation of the Council on Consumer Dispute Resolution and Redress*. Paris, July 2007. Annex, subsection IV 2 c). The Recommendation also provides for collective redress mechanisms (subsection II B). Available at <http://www.oecd.org/sti/consumer/38960101.pdf>.

¹¹³ Organisation for Economic Co-operation and Development. *OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce*. OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, June 2008. See in particular p. 8. Available at <http://www.oecd.org/sti/consumer/40879177.pdf>.

¹¹⁴ Organisation for Economic Co-operation and Development. *Workshop 105: "The Role of Internet Intermediaries in Advancing Public Policy Objectives"*. IGF background paper. Paris, 2010 (?). Available at <http://www.oecd.org/internet/ieconomy/46013181.pdf>.

¹¹⁵ See e.g. MacCarthy, *op. cit.*, pp. 1038-1042.

fifteen years or more. While states have insisted they retain jurisdiction over commercial transactions and other activities even when they involved the Internet, we now see WG III (and UNCITRAL) striving to develop potentially private bodies dedicated to online rule keeping. Relying on existing intermediaries may be a better way to maintain online transactions within the range of national law applying to such intermediaries. In fact, current WG III efforts run the risk of carving out consumer online transactions from the safeguards provided by national legislation and leaving consumers in a barely policed Wild West, governed by weak and inconsistent rules, a result that surely can be in no stakeholder's, and no nation's, interest.

5.0 Using Disputes to Improve Processes: Insights for Business

A natural corollary which flows from a focus on the consumer dispute resolution process, is the manner in which businesses deal with many of the problems and issues that are the basis of consumer complaints. Further, one might ask, what are the best practices that exist for businesses to deal with consumer disputes?

This paper has largely provided consideration into the consumer concerns in resolving disputes, as the consumer experience is the primary focus of this study. However, consumer considerations in online shopping can assist businesses in improving their current practices and drive greater sales where mechanisms to address consumer complaints, or anticipate and address consumer issues, are taken into account by online retailers. Generally a number of insights flow from the literature and from industry guidelines into best consumer practices.

Three Considerations for Dealing with and Avoiding Future Disputes

- Consider a method for dispute resolution prior to launching an ecommerce venture. This can be formal (e.g., choosing a dispute resolution provider) or providing the path the consumer should take with customer service representatives to escalate their concerns.
- Consider whether your online shop will sell to consumers outside of your primary region (international orders). Selling to consumers outside of your region is more complex in terms of your own operations (e.g., delivery) as well as in resolving consumer disputes (e.g., venue for dispute resolution, language issues, etc).
- Use any data generated from disputes, feedback or complaints to improve individual processes (e.g., delivery, payment methods, etc.) and the entirety of the online shopping experience for consumers. Dispute processes should feedback into your operations practices to enhance the consumer experience.

Having a “plan of attack” in order to deal with any disputes before these are encountered with consumers can greatly ease the process of dealing with customer

concerns as these arise. In particular, knowing the risks involved in ecommerce can be essential to planning in advance for customer care. As just one example, the *Visa E-Commerce for Merchants' Guide to Risk Management*¹¹⁶ outlines the typical issues faced by online retailers and potential ways that these can be addressed through the proper training of employees and creation of business policies.¹¹⁷ As a credit card company Visa is a notable intermediary between consumers and merchants, which has insights into customer disputes through its own system of checks and policies such as chargebacks. Visa notes that among the typical risks for merchants are consumer disputes and chargebacks for reasons such as:

- Goods or services are not as described on a website
- Customer billing prior to the shipping or receipt of goods
- Confusion related to the merchant's return and refund policy
- Billing issues related to an order (e.g., multiple billings for the same goods)
- Customer complaints due to the name of the organization sending the goods, which is different than that of the organization the goods were purchased from (where the merchant uses a service provider to handle billing, for example)¹¹⁸

Visa recommends full disclosure of all billing, returns, refunds, shipping and other policies on ecommerce websites, written in plain language, in order to reduce consumer disputes as this assists the consumer in understanding the transaction.¹¹⁹ Ensuring staff are also aware of and understand these policies is essential for better customer service so that either prior to, or following a transaction, customer concerns can be dealt with in an accurate and complete manner. Proper training can also help customer service representative recognize problems such as online fraud, and reduce the potential of their liability in completing fraudulent transactions.¹²⁰

Individual industries or organizations have also created best practice advice for creating methods to resolve customer issues. Guidelines such as the Travel Industry Council of Ontario's (TICO) *Code of Practice for Electronic Commerce*,¹²¹ outline the importance of creating methods to resolve disputes in advance of consumer complaints. "Section 7: Complaint Handling and Dispute Resolution" outlines TICO's policy that consumers are first to try to resolve disputes with merchants, and that TICO members must provide

¹¹⁶ Visa, *Visa E-Commerce for Merchants' Guide to Risk Management*, 2008, <
http://usa.visa.com/download/merchants/visa_risk_management_guide_ecommerce.pdf >.

¹¹⁷ *Ibid*, p. 21-22.

¹¹⁸ *Ibid*, p. 22.

¹¹⁹ *Ibid*, p. 26.

¹²⁰ *Ibid*, p. 80.

¹²¹ TICO, *TICO Code of Practice for Electronic Commerce*, May 2013, <
<http://www.tico.ca/files/TICO%20Code%20of%20Practice-June%2013%202013-FINAL.pdf> >.

consumers with “fair, timely and effective means” to resolve problems.¹²² This inherently suggests the importance of creating methods of dispute resolution by registered travel companies in advance of any actual consumer complaints or concerns.

If an online merchant decides to engage in international transactions, beyond the national boundaries of their organization, it may be necessary to tailor policies and practices to meet standards and regulation in other countries. As a basic step the language of websites would likely need to be tailored to meet the needs of those in another foreign location, so that these international customers can understand the merchant’s procedures as well as a local customer might. Providing international consumers with tools and information for dispute resolution can also be beneficial should an issue arise.¹²³

Yet, creating a method to resolve disputes cannot be the only lesson for online businesses to effectively deal with customer disputes. Instead, analyzing data related to consumer complaints and disputes can inform a merchant’s operational policies and help build a stronger, more trusted business. While some businesses are hesitant to use these negative consumer complaints as a source of data about their operations, such complaints can be a valuable source of information. As discussed above, eBay learned early in their development the importance of building trust with consumers so that creating its own dispute resolution system was of strategic importance to the organization. Likewise, systems and policies set up for online shopping should be continually improved in order to build online retailers’ reputation among consumers. Consumer complaints and feedback, especially in areas of the online shopping experience which are repeatedly noted as concerns to consumers, can be used to address real issues consumers are experiencing with a website. Addressing these areas of consumer complaints can not only enhance consumer satisfaction and reputation, but can improve sales by making a retailer’s online presence easier to use and understand by future customers. Online dispute resolution, litigation and chargebacks are expensive endeavors for a business. Where practices and operations can be improved to avoid these, appropriate measures should be taken by the online retailer.

¹²² Ibid, s 7.1.

¹²³ For example pointing the consumer to “econsumer.gov” in order to report a complaint about a merchant involved in an international transaction can provide transparency into the process, and the potential solutions, to a consumer complaint. The organization econsumer.gov allows consumers to register their complaints with an international body which then informs local (national or state) authorities about the difficulties the consumer has experienced in an international transaction.

6.0 Conclusions and Recommendations

This report considered the difficulty of resolving disputes when these arise among online retailers and consumers across international borders. While some provincial laws attempt to exert control over disputes, conflicting jurisdictional issues cause consumer confusion and require an alternative approach. Consumers show a great deal of confusion about their rights when engaging with internationally-based retailers – a fact proven by the consistently declining levels of consumer confidence in dealing with retailers the farther they are located outside of Canadian borders. Among the key findings of this report is that consumers' uncertainty about dispute resolution remains genuine: industry and governments themselves remain unclear in the guidance that can be provided to consumers about how disputes may be resolved in a manner consistent with legal principles. Although UNCITRAL and WG III are strong and recognized alternative venues to generate resolutions for ecommerce disputes, these fail to provide a clear solution for consumers universally.

From a formal legal perspective it is clear that Canadian online consumers have no clear recourse of action when encountering a problem involving international retailers. Although attempts have been made to exert jurisdiction over such consumer interactions, conflicting laws with other states and uncertainty proving jurisdiction between consumers and out-of-state retailers have led to less than certain results for consumers. Moreover, use of formalistic legal mechanisms to resolve disputes may be time consuming and costly for consumers involved in relatively small transactions.

Consumers have expressed concern about resolving disputes which arise from online shopping. Our survey shows that despite relatively high levels of consumer engagement with ecommerce, there remains a great degree of uncertainty and lack of clarity about how disputes might be resolved.

While international organizations provide forums in which disputes may be resolved, the best method of dispute resolution for consumers still remains less than clear. This is particularly true as UNCITRAL and WG III work to build private bodies to handle ODR. The legitimacy of these private groups remains uncertain, especially as some of these new private ODR organizations create such a niche expertise that some international standards and safeguards fail to be fully observed.

Based on the findings enumerated here, it is recommended:

- Consumer protection agencies and organizations should work to make consumers aware of the difficulties and hazards of purchasing from online retailers outside of Canada. The information provided should not scare consumers away from conducting these transactions online but provide consumers with greater clarity as to the varying routes of resolution processes should a dispute arise from an ecommerce purchase, before they actually buy the goods. Current government awareness programs dealing with online privacy should not be rejected in creating this information but, instead, appear alongside this information.
- Government-led consumer protection agencies at the provincial and federal levels of government work with industry partners to provide greater guidance to consumers. This may include websites, or general literature, about the venues for resolving disputes among consumers and online retailers that are recognized and legitimate. Such recommendations enhance the certainty of ODR for consumers.
- Governmental bodies should consider providing recommended venues for ODR as disputes arise between consumers and businesses. Such an endorsement of a body, or a selection of bodies, essentially produces a form of legitimization of these ODR organizations, and provides predictability in the marketplace as to the venues in which resolution may take place. Most consumers are unaware of the options available to them in choosing an organization to conduct dispute resolution, and often side with vendors more experienced in these forums. Hence recommending bodies for ODR works to create greater balance between the parties in disputes, and provides assurances as to the neutrality of those engaged in the processes.
- Organizations (in Canada's case the Competition Bureau) charged with collecting and investigating consumer complaints at the national-level, should provide consumers with resources in order to assist consumers in lodging official complaints against foreign organizations. This can be as simple as providing consumers with information about international bureaus and websites such as econsumer.gov, particularly where partnerships already exist.
- Online retailers must both anticipate and prepare for the eventuality of consumer disputes, but also use complaint, feedback and dispute information to update and enhance their own operations. Considering whether and how international consumers disputes should be reconciled is particularly important for those engaging in trans-border commerce. Clearly setting out policies and practices, as well as creating an internal and external system for dispute resolution is essential prior to

taking a first order from a consumer. Information gathered on customer issues can also be used as a strategic feedback mechanism to improve the online shopping experience.

Appendix A – Survey Results