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Online Small Claim Dispute Resolution Developments –
Progress On A Soft Law for Cross-Border Consumer Sales
and the Development of A Global Consumer Law Forum

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*Colin Rule, Louis F. Del Duca, and Daniel Nagel**

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I. PROTOTYPE ONLINE LOW-COST HIGH-VOLUME SMALL CLAIM BUSINESS TO CONSUMER AND BUSINESS TO BUSINESS DISPUTES

Maria Elena Cardoza, a student in Tegucigalpa, purchases a refurbished laptop online for \$700 from PAPPLE, a small computer company in California. When the computer arrives by mail, Maria discovers that the screen does not work. Her calls and emails to PAPPLE’s customer service department receive no responses. She complains to her local consumer protection agency, but they have no jurisdiction in California (and are not fluent in English) so are of little help. She learns that filing a small claims case in California against PAPPLE will require her to be represented by a local lawyer, who will charge more than the \$700 value of the item under dispute. What should she do?

Maria’s dilemma is unfortunately not uncommon in the area of low cost-high volume online transactions. Thousands of similar transaction issues arise every day within and across borders around the world. The proliferation of online purchases in the last decade has set this problem in even starker relief. In response, many scholars have proposed the development of a global system of online dispute resolution (hereafter ODR) to govern cross-border consumer transactions. Based on simple procedural rules and the granting of relief on an equitable basis this approach allows for a fast, easy and comparably cheap way to settle disputes.

Furthermore, the introduction of international principles for cross-border consumer contracts has been suggested to

provide a uniform basis for a subject-matter assessment of disputes. Thus, such a set of principles, called the Global Principles of International Consumer Contracts (hereafter GPICC), would be to consumer transactions what the Uniform Principles of International Commercial Contracts (hereafter UPICC) authored by the International Institute for the Unification of Private Law (hereinafter UNIDROIT)¹ is to commercial sales.² A global soft law³ for international consumer transactions would benefit both consumers and businesses alike worldwide, facilitating resolution of disputes which inevitably arise.⁴

This article discusses recent developments around this ODR proposal, details progress toward the development a soft law for cross-border consumer sales and a global

¹The international Institute for the Unification of Private Law (often referred to by its French acronym UNIDROIT) is an independent intergovernmental organization with its headquarters in Rome, Italy. It prepares conventions, model laws, guidelines, principles, and other types of instruments to modernize, harmonize, and coordinate transnational, private and commercial law transactions. For further information on the history, membership, structure, and work of UNIDROIT see www.unidroit.org.

²See Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, Achieving Optimal Use of Harmonization Techniques In an Increasingly Interrelated Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane, 27 Penn St. Int'l L. Rev. 641, 645–46 (2008).

³Hard laws are binding legal norms adopted by government. Soft laws are legal norms which become binding only if parties to a transaction voluntarily agree to incorporate them and make them applicable to their transaction or if they are made binding by their adoption by legislative, judicial or administrative action. Examples of soft law include The Restatements of Law in the United States, the UNIDROIT Uniform Principles of International Commercial Contracts (UPICC) and the International Chamber of Commerce Incoterms.

⁴See generally Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, Achieving Optimal Use of Harmonization Techniques In an Increasingly Interrelated Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane, 27 Penn St. Int'l L. Rev. 641 (2008). For a discussion of the policy considerations involved in the choice between hard-law instruments (such as treaties or conventions) and soft-law instruments (such as model laws that can be voluntarily utilized, such as the ICC Incoterms), see Louis F. Del Duca, Developing Global Transnational Harmonization Procedures For the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence, 42 Tex. Int'l L.J. 625 (2007).

consumer law forum, and explains how the two developments may compliment each other.

II. ONLINE DISPUTE RESOLUTION PROPOSAL (ODR) FOR SMALL CLAIM DISPUTES

An aggrieved party to a low value, cross-border online consumer transaction is faced with a litany of good reasons to give up. What court has jurisdiction over both parties? How far will the parties have to travel to protect their interests? What substantive law will the forum apply? How familiar is the forum with applicable substantive law? How long will it take until relief is granted? Will the prevailing party be able to enforce a judgment in the losing party's home jurisdiction? And the cost of hiring an attorney to answer these questions is probably more costly than the purchase itself. An inexpensive, simple online procedure is needed to resolve these types of issues (such as Maria's dispute in the example) quickly and efficiently, without the involvement of lawyers or courts.

The United States has advanced such an ODR proposal⁵ for cross-border contract disputes between businesses and consumers (hereafter B2C) where the amount in dispute is \$10,000 or less.⁶ This procedure has three basic stages. At stage one, the parties voluntarily agree to talk to one another electronically. By voluntarily opting into this ODR procedure, the parties can avoid the difficulties listed above (e.g., uncertainties regarding venue, choice of law, recognition of judgments, personal jurisdiction, and the inconvenience of traveling to a distant forum).⁷ Moreover, by opting into this procedure, the parties would agree that this ODR procedure is the legal framework by which their dispute will be resolved.

⁵See Colin Rule, Vikki Rogers and Louis F. Del Duca, *Designing a Global Consumer Online Dispute Resolution System for Cross-Border Small Value-High Volume Claims: OAS Developments*, 42 UCC L. J. 221, 234 (2010).

⁶See *id.* at 255.

⁷See *id.* at 228.

ONLINE SMALL CLAIM DISPUTE RESOLUTION DEVELOPMENTS

Once the parties have agreed to consent to ODR, the buyer completes an online form which includes a checklist of types of claims,⁸ which could include:

- Non-delivery of goods or non-provision of services,
- Late delivery of goods or late provision of services,
- Vendor sent wrong quantity,
- Delivered goods were damaged,
- Delivered goods or provided services were improper,
- Vendor made misrepresentations about goods,
- Vendor did not honor express warranty, or
- Vendor improperly charged or debited buyer's account.⁹

This type of checklist, though simple, is the legal basis for this type of ODR process for resolving a given dispute. It determines the legal framework in which a given dispute will be resolved. Thus, the checklist eliminates the need to decide whether the law of the seller's place of business or the law of the consumer's residence (a controversial issue indeed) will apply to the dispute. By incorporating the basis for asserting the claim into the electronic system, the creation of a best-practices approach, focused on equity, that effectively solves for the parties the problem of what substantive law should apply eliminates the need for any hard-law solution of the dispute. For low cost-high volume transactions, consumers and businesses alike will probably prefer to use these basic ODR procedures as a matter of efficiency and fairness.

For the twenty or so percent¹⁰ of parties who fail to resolve their dispute at stage one, the model law requires that an ODR provider selected from a list of competent providers be automatically brought into the picture. The ODR provider examines electronic records of the transaction between the parties and tries to help the parties resolve their dispute. If the parties cannot agree to abide by the proposal of the ODR provider, then, as a last resort, the parties proceed to arbitration.

Exciting progress has been made subsequent to the previ-

⁸See *id.* at 261.

⁹See *id.*

¹⁰See Graf-Peter Calliess, *Online Dispute Resolution: Consumer Redress in a Global Marketplace*, 7 *German L.J.* 647, 653 (2006) (available at http://www.germanlawjournal.com/pdfs/Vol07No08/PDF_Vol_07_No_08_647-660_Articles_Calliess.pdf).

ously mentioned United States Department of State proposal made in cooperation with business and consumer experts for development of an ODR framework for low cost-high volume online consumer transactions.¹¹ More recently, at its July meeting, The United Nations Commission on International Trade Law¹² (hereinafter UNCITRAL) approved the formation of a working group to consider a possible instrument on the topic of online dispute resolution (ODR) relating to cross-border electronic commercial transactions, including business-to-business and business-to-consumer transactions. This is real progress. The resolution of disputes within the legal framework set up by ODR systems could lead to equitable, best-practices, and *lex mercatoria*-type approaches and facilitate development of a soft law¹³ set of norms for general use in resolving disputes in business-to-business and business-to-consumer transactions.

III. ONLINE DISPUTE RESOLUTION DEVELOPMENTS

A. *THE EVOLUTION OF ONLINE DISPUTE RESOLUTION*

The field of ODR emerged in the late 1990s as a response to the growing volume of eCommerce worldwide. New online marketplaces were generating transaction issues that were undermining user trust, and traditional judicial redress channels were unable to respond effectively. Prof. Ethan Katsh and Prof. Janet Rifkin of the University of Massachusetts-Amherst wrote the first book on the subject in 1999, titled *Online Dispute Resolution*¹⁴ (which gave the field its name). International organizations and public institutions immediately understood the utility of applying commercial dispute resolution to these new low-value online

¹¹See Colin Rule, Vikki Rogers and Louis F. Del Duca, *Designing a Global Consumer Online Dispute Resolution System for Cross-Border Small Value-High Volume Claims: OAS Developments*, 42 UCC L. J. 221, 234 & 244 ff. (2010).

¹²UNCITRAL was established by the General Assembly in 1966. UNCITRAL is regarded as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. For further information please see www.uncitral.org.

¹³See *supra* note 3—

¹⁴Ethan Katsh and Janet Rifkin. *Online Dispute Resolution: Resolving Disputes in Cyberspace*. San Francisco: Jossey-Bass, 2001, 226 pp.

issues, but they were wary of the potential for abuse. That led in 1999 to the publication of “Guidelines for Consumer Protection in the Context of Electronic Commerce” by the OECD.¹⁵ The United States, not wanting to be left behind, convened a conference the following year jointly sponsored by the Federal Trade Commission and the Department of Commerce entitled “Alternative Dispute Resolution for Consumer Transactions and the Borderless Online Marketplace,” which brought together large companies engaged in eCommerce, ODR startups, payment providers, and consumer advocacy organizations.¹⁶ There was much discussion at that meeting around whether eCommerce merchants and marketplaces should be required to provide ODR services to their users, but the eventual outcome of the meeting was to go with a voluntary, self-regulation approach.

The primary disagreements coming out of the FTC/DOC meeting were between the advocates for business and advocates for consumers. There was a longstanding mistrust between these two groups based on their supposedly opposed interests, and because understanding of how ODR would work was sketchy at best, both sides were inclined to resist it. Once details emerged over the next few year, however, the two sides came to understand how ODR can both protect consumers and bolster trust in transactions, which improves the bottom line for businesses. A key breakthrough was the international agreement between the Global Business Dialogue on eCommerce (now called the Global Business Dialogue on eSociety) and Consumers International in 2003, which both called for greater use of ODR and issued consensus standards that should govern ODR providers and systems.¹⁷

Another group that was initially resistant to ODR was the legal community, because they feared these new online mechanisms would take away cases. Again, once the operation of ODR mechanisms was clarified, the legal community came to understand that these processes would focus on low-

¹⁵http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1,00.html, last visited September 14, 2010.

¹⁶<http://www.ftc.gov/bcp/altdisresolution/comments/>, last visited September 14, 2010.

¹⁷http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution_Nov_03.pdf, last visited September 14, 2010.

value cases that were underserved or even ignored by existing judicial channels. In 2002 the American Bar Association released a set of standards for eCommerce ADR, which were drafted by a special task force that had convened meetings to discuss the document around the world.¹⁸

These agreements helped to build momentum behind ODR, but there was still little governmental action to build a comprehensive global system. Non-governmental organizations came together to fill the breach, and in 2004 a new group called the Global Trustmark Alliance was launched by prominent organizations around the world, including the Better Business Bureau, Eurochambres, TrustUK, the Asia Trustmark Alliance, and the Korea Institute for Electronic Commerce.¹⁹ This organization aimed to create a non-governmental trust-building network using web seals and online dispute resolution, and while all the key partners were on board, the system was not able to build critical mass.

At the end of the decade the consensus was clear that ODR was the best way to address low value cross-border disputes, but experiments aimed at broad-based adoption remained sporadic. In 2007 the OECD issued recommendations calling for states to establish mechanisms for the arbitration of consumer disputes, and in 2009 the European Committee for Standardization released best practices for ODR gleaned from a large sample of ODR providers, academics, and public entities.²⁰ The US government proposal to the OAS, and the subsequent launch of the UNCITRAL Working Group on ODR, represent the first real opportunity to build a global ODR system with the buy-in and support of public agencies in addition to non-governmental entities.

B. ADVANTAGES OF ONLINE DISPUTE RESOLUTION

ODR is an extremely useful way to resolve disputes that inevitably arise out of some portion of online transactions, as demonstrated by the success of erstwhile variety of ongoing

¹⁸<http://www.abanet.org/dispute/documents/FinalReport102802.pdf>, last visited September 14, 2010.

¹⁹<http://www.globaltrustmarkalliance.org/>, last visited September 14, 2010.

²⁰<ftp://ftp.cenorm.be/CEN/AboutUs/Publications/WorkshopODR.pdf>, last visited September 14, 2010.

ODR systems.²¹ Unlike other alternative dispute resolution (hereafter ADR) methods, ODR is fast, efficient, flexible and inexpensive. It is especially useful for parties to low cost-high volume transactions who wish to avoid the expense of hiring an attorney and pursuing litigation to solve disputes over low-cost items. In addition, ODR provides a sound basis for governing cross-border disputes as it is easily accessible at any time and from anywhere in the world. Finally, ODR can be a simple, streamlined process, even for people who do not regularly use the Internet. The purpose of ODR is to provide an easy, efficient, and safe dispute resolution method to consumers doing business with online and/or offline sellers.

C. INCREASES IN ONLINE COMMERCIAL TRANSACTIONS

The number of commercial transactions that consumers complete online continues to increase. For example, consumers in the United States spent \$131.8 billion on online commercial transactions in 2009.²² This amount is expected only to increase, with a projection of consumers spending \$182.6 billion on online commercial transactions by 2012.²³

Consumers throughout the world increasingly use online commercial transactions to make their purchases. For example, online retail sales increased thirty-one percent in France, Germany, Italy, the Netherlands, and the United

²¹Such as ECODIR, SquareTrade & EBay, the WIPO dispute resolution system, Smartsettle, The Claimroom, ODRWorld, ChinaODR, ODRbeijing, 123 Settle.Com, AllSettle.Com, ClickNsettle.com, Cybersettle, Intersettle, MARS, NewCourtCity, ResolveItNow.com, SettlementOnline, SettleOnline, SettleSmart, The Claim Room, U.S. Settle, WebMediate, WeCanSettle, The Claim Room, ClaimChoice, Claim Resolver & Claim Negotiator, ClickNSettle, e-Mediator, i-Courthouse, Internet Neutral, Internet Ombudsman, Mediation America, NovaForum, Online Ombuds Office, Resolution Forum, ResoveItNow, SettleOnline, Settlement Online, The Virtual Magistrate, WebAssured, WebMediate, Webtrade, WeCanSettle.

²²Plunkett Research, Ltd., E-Commerce & Internet Industry Overview, <http://www.plunkettresearch.com/Industries/ECommerceInternet/ECommerceInternetStatistics/tabid/167/Default.aspx> (last visited May 30, 2010).

²³*Id.*

Kingdom in 2007.²⁴ Worldwide, consumers annually spend about \$470 billion online.²⁵ This number is expected to exceed \$1 trillion by 2012.²⁶ Because the number of online commercial transactions is expected to increase, the importance of ODR will also simultaneously increase.

D. Business to Business, Business to Consumer, and Consumer to Consumer Transactions

Business to business (B2B), business to consumer (hereafter B2C) and consumer to consumer (hereafter C2C) ODR can provide efficient, cost-effective ways to resolve disputes arising from online business transactions.²⁷ The types of ODR systems vary widely based on the needs of the disputants.²⁸ For example, ODR services may be automated or human facilitates, involve synchronous or asynchronous communication channels, or be non-binding or binding.²⁹ Because many consumers today are unaware of what ODR services are available to them, ODR service providers work hard to make their processes easy to find, procedurally transparent, and user friendly.³⁰

The International Chamber of Commerce (hereafter ICC) has developed *ICC Best Practices for ODR in Online B2C and C2C Transactions*, a source of guidance for ODR service providers.³¹ These *Best Practices* are intended to increase consumer confidence in doing business online.³² The ICC has formulated the best-practice guidelines in consultation with

²⁴WhosOn, European Consumer Views of E-Commerce Buying Behaviour and Trends, <http://www.whoson.com/newsdetail.aspx?article=ATG+Survey.txt> (last visited May 30, 2010).

²⁵Id.

²⁶Id.

²⁷Int'l Chamber of Commerce, Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions 7 (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

²⁸Id.

²⁹Id.

³⁰Id.

³¹Id.

³²Int'l Chamber of Commerce, Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions 7 (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

the ICC Court of Arbitration.³³ They focus on specific issues raised by conducting ADR online, and they follow the recommendations that are emerging from the industry and concerned organizations.³⁴ In addition, the guidelines encourage companies engaged in online transactions with consumers to use ODR wherever practicable.³⁵ Because ODR has been shown to effectively resolve online disputes and improve consumer confidence, ICC encourages companies to clearly communicate the ODR option to consumers.³⁶

The ICC's *Best Practices* guidelines focus on educating businesses as to how ODR systems can resolve customer complaints that cannot be resolved by companies' own internal customer-redress system.³⁷ The ICC's best practice B2C guidelines emphasize that companies engaged in online transactions should provide consumers with readily and easily accessible ODR systems.³⁸ These systems are not intended to replace customer service departments, however. To reduce the number of disputes requiring ODR, companies should establish front-end consumer-redress systems as a first line of defense.³⁹

In addition to the B2C guidelines, the ICC gives information to ODR service providers about how to deliver effective and efficient service to businesses and consumers.⁴⁰ For example, the ICC recommends that B2C and C2C ODR service providers ensure that their websites contain simple, comprehensive and accessible explanations for first-time users who may be unfamiliar with how the ODR process operates and what information is required from participants.⁴¹ To enhance the quality of B2C and C2C ODR services, ODR

³³Id.

³⁴Id.

³⁵Id.

³⁶See id.

³⁷Id. at 8.

³⁸Int'l Chamber of Commerce, *Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions* 9 (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

³⁹Id.

⁴⁰Id. at 8.

⁴¹Id. at 11.

service providers should take full advantage of new technologies to provide innovative and user-driven services.⁴² B2C and C2C ODR systems should be easily accessible from any country, and formal requirements for case submission should be kept to the necessary minimum.⁴³ ODR systems should resolve disputes quickly, and costs of ODR services should be minimized so that all consumers can avail themselves of such services.⁴⁴ In addition, dispute-resolution personnel should be impartial.⁴⁵ Impartiality can be guaranteed by adequate auditing and procedural-review arrangements.⁴⁶ ODR professionals should have sufficient skills and training to complete their function, but they are not required to be licensed legal practitioners.⁴⁷

The ICC provides recommendations to ODR service providers on the accessibility, convenience and privacy of ODR.⁴⁸ For accessibility, the ICC guidelines provide that the B2C and C2C ODR system should be available to users twenty-four hours a day, seven days a week, fifty-two weeks a year, with the exception of maintenance downtimes.⁴⁹ In addition, users should have access to the process and to their own case information twenty-four hours a day, with the exception of maintenance downtimes.⁵⁰ For convenience purposes, the ICC recommends that ODR service providers include their contact information, such as e-mail addresses and telephone numbers, on their web sites.⁵¹ ODR service providers should

⁴²Id.

⁴³Int'l Chamber of Commerce, Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions 7 (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

⁴⁴Id.

⁴⁵Id.

⁴⁶Id.

⁴⁷Id.

⁴⁸Int'l Chamber of Commerce, Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions 12 (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

⁴⁹Id.

⁵⁰Id.

⁵¹Id.

also establish a network of trained technical-support staff.⁵² For privacy, the ICC recommends that ODR service providers maintain a high level of security and authentication with appropriate procedures for access to case files and other data.⁵³ In addition, ODR service providers should keep confidential the communications between each party and the mediator or arbitrator.⁵⁴ Finally, ODR service providers should conduct risk assessments and formulate, implement and regularly review an organization-wide information security policy.⁵⁵

The ICC emphasizes that consumers should know what to expect from the ODR process.⁵⁶ To ensure that consumers receive adequate information, the ICC recommends that B2C and C2C service providers clearly and conspicuously make available to users all pertinent information about the ODR process prior to their agreement to participate.⁵⁷ For example, ODR service providers should explain whether the process is exclusively online or both offline and online.⁵⁸ A definitions section of what is a neutral mediator, arbitrator, and third party should be included.⁵⁹ In addition, ODR service providers should give simple information to users about the differences between mediation and arbitration.⁶⁰ Finally, ODR service providers should indicate time limitations, fees and costs, whether the service provides binding or non-

⁵²Id.

⁵³Int'l Chamber of Commerce, Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions 7 (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

⁵⁴Id.

⁵⁵Id. at 13.

⁵⁶Id. at 8.

⁵⁷Id. at 13.

⁵⁸Int'l Chamber of Commerce, Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions 7 (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

⁵⁹Id.

⁶⁰Id.

binding outcomes, and whether decisions are published online.⁶¹

IV. SOFT LAW OR HARD LAW? DEVELOPMENT OF UNIDROIT'S SOFT LAW UNIFORM PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

A. Development of Convention on the International Sale of Goods— Predecessor to Uniform Principles of International Commercial Contracts

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted in April 1980 at the conclusion of a diplomatic conference in Vienna.⁶² The origins of that historic accomplishment can be traced to 1929, when the International Institute for the Unification of Private Law set out to articulate black-letter law to govern international sales contracts.⁶³

In 1968, UNCITRAL started the project anew.⁶⁴ However, although UNCITRAL's efforts would ultimately be successful, the path to success was not always easy going. According to Professor Michael Bonell, sharp differences in the legal traditions and socioeconomic structures amongst the sixty-two countries that attended the diplomatic conference at which the original text of the CISG was approved for ratification by individual countries threatened to derail the entire ratification process.⁶⁵ Because of the delicate atmosphere in which the CISG was adopted, "some issues had to

⁶¹Id.

⁶²See Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 1 (2008).

⁶³See Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG — Alternatives or Complementary Instruments?* 1 *Unif. L. Rev.* 26, 27 (1996).

⁶⁴See *id.*

⁶⁵Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 1 (2008) at 1–3. For example, about half the countries represented at the conference were civil-law countries, whereas the other half were common-law. In addition, some of the countries represented had capitalist economies, while others had communist economies. See also Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG — Alternatives or Complementary Instruments?* 1 *Unif. L. Rev.* 26, 28 (1996)

be excluded from the scope of the CISG at the outset,⁶⁶ lest the ratification process stagnate or fail completely. In particular, consumer contracts were expressly excluded from the scope of the CISG.⁶⁷ The classification of the CISG as 100% hard law is subject to the adjustment that Article 6 permits the parties to a contract otherwise subject to the CISG to opt out of the CISG in its entirety, or a specific article or articles of the CISG.⁶⁸ This opt-out provision in substance gives the CISG an additional soft-law character.

Despite having a deliberately restricted scope, which *inter alia* excluded coverage of consumer contracts, the CISG has been a highly successful international agreement.⁶⁹ By 1994, thirty-four countries had adopted it.⁷⁰ Today, seventy-four countries are parties to the CISG.⁷¹ It governs seventy-five percent of world trade,⁷² and about 2,500 cases litigated

⁶⁶Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 3 (2008).

⁶⁷See *id.*, (citing CISG art. II).

⁶⁸CISG Article 6 provides: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” United Nations Convention on Contracts for the International Sale of Goods art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3.

⁶⁹See, e.g., Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 9 *Unif. L. Rev.* 758 (2004), available at <http://www.uncitral.org/pdf/english/CISG25/Kronke.pdf>. See also Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, *Achieving Optimal Use of Harmonization Techniques In an Increasingly Interrelated Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane*, 27 *Penn St. Int’l L. Rev.* 641, 650 (2008).

⁷⁰See Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 *J.L. & Com.* 451, 452 (2005–2006), available at <http://www.uncitral.org/pdf/english/CISG25/Kronke.pdf>.

⁷¹See United Nations Commission on International Trade Law, *Status: 1980 — United Nations Convention on Contracts for the International Sale of Goods*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited May 28, 2010).

⁷²See Schwentzer/Hachem, *The CISG — Successes and Pitfalls*, 57 *American Journal of Comparative Law* (Spring 2009) 457–478; VietNam-Net / Viet Nam News, *Nation Urged to Ratify UN Convention on Sale of Goods*, <http://english.vietnamnet.vn/biz/201005/Nation-urged-to-ratify-UN-convention-on-sale-of-goods-909495/> (last visited May 28, 2010).

before courts or arbitration or mediation panels have been resolved under it

B. DEVELOPMENT OF SOFT LAW UNIFORM PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Inspired by the CISG's success yet also by the shortcomings of its deliberately restricted scope, the UNIDROIT developed and promulgated the Uniform Principles of International Commercial Contracts (UPICC) over several years in the early 1990s.⁷³

[I]t was precisely because the negotiations leading up to the CISG had so amply demonstrated that this Convention was the maximum that could be achieved on the legislative level, that UNIDROIT decided to abandon the idea of a binding instrument and instead proceeded merely to 'restate' (or whenever appropriate 'pre-state') international contract law and practice.⁷⁴

Not surprisingly, the UPICC is broader than the CISG.⁷⁵ Whereas the latter applies only to sales transactions, the UPICC applies, potentially, to all kinds of international commercial transactions.⁷⁶ Yet the UPICC, like the CISG, expressly does not apply to consumer transactions.⁷⁷

⁷³See Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 16 (2008).

⁷⁴*Id.*

⁷⁵See, e.g., Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 *J.L. & Com.* 451, 453 (2005–2006), available at <http://www.uncitral.org/pdf/english/CISG25/Kronke.pdf>.

⁷⁶See Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 17 (2008). See also Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?* 1 *Unif. L. Rev.* 229, 244 (1996), available at <http://www.cisg.law.pace.edu/cisg/biblio/bonell96.html>.

⁷⁷See Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, *Achieving Optimal Use of Harmonization Techniques in an Increasingly Inter-related Twenty-First Century World of Consumer Sales: Move the EU Harmonization Process to a Global Plane*, 27 *Penn St. Int'l L. Rev.* 641, 642 (2009). See also UPICC Preamble Comment 2.

The UPICC's drafters did not endeavor to utilize as a comparative reference base the laws of every country.⁷⁸ Instead, they devoted special attention to the CISG, the United States' Uniform Commercial Code and the Restatement (Second) of Contracts, other UNCITRAL instruments, and non-legislative instruments, such as INCOTERMS, amongst other sources.⁷⁹

C. INFLUENCE OF UNIFORM PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS ON HARD LAW

The UPICC is nonbinding; however, it has made "a significant contribution to the development of a veritable world contract law."⁸⁰ It has influenced the adoption of binding law in several countries. Estonia and Lithuania,⁸¹ for example, modeled their civil codes after the UPICC.⁸² In 1999, China enacted a contract law that was inspired by the CISG and the UPICC.⁸³ And courts in Australia, New Zealand and England have looked to the UPICC in rendering decisions.⁸⁴

⁷⁸See Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?* 1 *Unif. L. Rev.* 229, 231 (1996), available at <http://www.cisg.law.pace.edu/cisg/biblio/bonell96.html>.

⁷⁹See *id.*

⁸⁰See Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 18 (2008).

⁸¹The parts of Lithuania's draft Civil Code that deals with contracts closely tracks UPICC. See Valentinas Mikelenas, *Unification and Harmonisation of Law at the Turn of the Millennium: The Lithuanian Experience*, 5 *Unif. L. Rev.* 243, 251–52 (2000) (citing Michael Joachim Bonell, *The Unidroit Principles in Practice: The Experience of the First Two Years*, 2 *Unif. L. Rev.* 37 (1997)).

⁸²Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 19 (2008).

⁸³*Id.* at 19 (citing Huang Danhan, *The UNIDROIT Principles and their Influence in the Modernisation of Contract Law in the People's Republic of China*, *Unif. L. Rev.* 107 (2003); Xi Jing, *The Impact of the UNIDROIT Principles on Chinese Legislation*, in *The UNIDROIT Principles 2004. Their Impact on Contract Practice, Jurisprudence and Codification* 119 (Eleanor Cashin Ritaine and Eva Lein eds., 2007)).

⁸⁴Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 *Amer. J. Comp. L.* 1, 21

The UPICC has also been influential in arbitration.⁸⁵ Some 150⁸⁶ arbitral awards refer to the UPICC.⁸⁷

(2008) (citing Michael Joachim Bonell, *The UNIDROIT Principles and CISG — Sources of Inspiration For English Courts?* 11 *Unif. L. Rev.* 305 (2006)).

⁸⁵According to research by Eleonora Finazzi Agrò and LLM student Giulia Principe, the International Chamber of Commerce (ICC) has applied UPICC to eight cases between 1996 and 2008 in which the parties did not include a choice-of-law clause in their contract. In four other cases that the ICC decided, the parties expressly chose UPICC to govern their contract, or arbitrators suggested the ICC apply UPICC to the case. Other tribunals that have applied UPICC to disputes before them include the Arbitral Tribunal of the Chamber of Commerce of Lausanne, the Milan International Chamber of Commerce, the Chamber of Commerce of the Russian Federation, and the Arbitral Centre of Mexico. The ICC also has applied UPICC to interpret and integrate applicable national and international law. Moreover, UPICC has been applied to or cited in cases by courts such as the Tribunal Supreme of Spain (May 16, 2007 n. 506/2007), the Federal Court of Australia (*Alcatel Australia LTF v. Scarcella & Ors* (1997)), the Supreme Court of Western Australia (*Central xchange Ltd v. Anaconda Nickel Ltd* (2002)), the Court of Appeal of New Zealand (*Hideo Woshimoto v. Canterbury Golf International Ltd* (2000)), the Court of Appeal of England (*Chartbrook Ltd v. Persimmon Homes Ltd* (2008)), and the European Court of Justice (*Fonderie Officine Meccaniche Tacconi, C-334/00* (2002)). Eleonora Finazzi Agrò has pointed out that both national and international tribunals have cited UPICC for various purposes, such as to interpret and supplement the CISG, to offer a synopsis of generally accepted principles of contract law and to restate international commercial contract law.

⁸⁶See Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 *J.L. & Com.* 451, 455 (2005–2006), available at <http://www.uncitral.org/pdf/english/CISG25/Kronke.pdf>.

⁸⁷See *Unilex UNIDROIT Principles, Selected Cases By Arbitral Tribunal*, <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13620&x=1> (last visited May 29, 2010). For example, a case decided by the China International Economic and Trade Arbitration Commission in 2005 illustrates the extent to which the UPICC has affected arbitral awards. The case involved a Chinese buyer and French seller who entered into two contracts for the sale of freezer facilities. The agreed upon price exceeded \$600,000. Delivery of some of the equipment was delayed, and this led to a dispute over the contract price. Following unsuccessful negotiations, the seller filed an arbitration application. The parties failed to agree on what substantive or procedural law would apply to the contract. The arbitration panel noted that the UPICC was not an international convention, and that the parties had not included a choice-of-law clause in their contracts that chose the UPICC as applicable law. The arbitration panel nevertheless ruled that it would apply the UPICC. So ruling, the Arbitration Com-

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Since 1994, more than 220 cases or arbitral proceedings have been resolved according to the UPICC.⁸⁸ Twelve cases have been handed down by courts in Australia, including one case by the High Court of Australia;⁸⁹ seven cases have been handed down by Chinese courts;⁹⁰ three cases have been decided by French courts;⁹¹ seven cases have been decided by Italian courts;⁹² six cases have been decided by courts in the Netherlands;⁹³ thirteen cases have been handed down by Spanish courts;⁹⁴ seven cases have been decided by United Kingdom courts;⁹⁵ and two cases have been decided by United States courts.⁹⁶

In 2004, UNIDROIT's Governing Council adopted a new edition of the UPICC.⁹⁷ Few substantive amendments were made to the 1994 edition's provisions because courts had ap-

mission noted that both France and China are member states of the UPICC and concluded that the UPICC should be used to determine the proper interest rate to apply to the late payments that the buyer owed the seller. Accordingly, it calculated the interest rate pursuant to UPICC Article 7.4.9, even though the UPICC had not been enacted as positive law in France or China nor selected by the parties to govern their contract (Article 7.4.9 provides that "The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment")

⁸⁸See UNILEX Unidroit Principles, Select Cases by Date, <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&x=1> (last visited June 1, 2010).

⁸⁹See id.

⁹⁰See id.

⁹¹See id.

⁹²See id.

⁹³See UNILEX Unidroit Principles, Select Cases by Date, <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&x=1> (last visited June 1, 2010).

⁹⁴See id.

⁹⁵See id.

⁹⁶See id.

⁹⁷See Unidroit Principles 2004, available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

plied them so easily and successfully.⁹⁸ However, the 2004 edition significantly expanded the scope of the 1994 edition. Five new chapters covering authority of agents, third-party rights, setoff, assignment of rights and contracts, and limitation periods were added⁹⁹

V. DEVELOPING SOFT LAW GENERAL PRINCIPLES OF INTERNATIONAL CONSUMER CONTRACTS — GLOBAL CONSUMER LAW FORUM

The Global Principles of International Consumer Contracts (“GPICC”) would be a response to the growing need for voluntary soft-law global principles of international consumer contracts. It would create a voluntary set of global principles of international consumer contracts which could develop into best practices, *lex mercatoria* and a global law that regulates sales to consumers in a uniform manner thus moving European consumer protection initiatives to a global plane.¹⁰⁰ The GPICC could serve as a model with reference to which national and international legislators could enact hard law to govern consumer contracts, would apply to a consumer contract if chosen by the parties as the applicable law, and could be applied in dispute resolution.¹⁰¹ For just as UPICC has been a valuable aid to the global harmonization of commercial contract law, so too a comparable aid would be valuable to the global harmonization of consumer contract law.¹⁰² Academics, members of the judiciary, business- and consumer-group representatives will serve as interest groups of the GPICC initiative.

A major strength of the GPICC would be that opting in to its provisions would be voluntary and would depend on the

⁹⁸See *id.* at vii.

⁹⁹See *id.* at viii.

¹⁰⁰Cf. *Inter alia* the “Blue Button”-approach as an optional instrument to choose the application of European Consumer Law (see Schulte-Nölke, Options for a less complex and more coherent European consumer and e-commerce contract law, Notes for the Vienna ODR Conference 2010)

¹⁰¹See *id.*

¹⁰²See Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, Achieving Optimal Use of Harmonization Techniques In an Increasingly Inter-related Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane, 27 *Penn St. Int’l L. Rev.* 641, 642 (2008–2009); 41 *UCC L.J.* 51, 52 (2008); 41 *UCC L.J.* 51, 52 (2008).

intent of the parties.¹⁰³ In other words, parties would be free to contract over whether the GPICC would govern their agreements.¹⁰⁴ The GPICC would be initially developed as soft law because a global uniform hard law of consumer sales is not presently realistic.¹⁰⁵ It is impossible to regulate everything with hard law, as the Internet amply demonstrates.¹⁰⁶ As best practices develop in applying the soft law, they could be translated into hard-law instruments (international treaty or model law) and eventually an international treaty or global law.¹⁰⁷ Finally, the GPICC could be added as an option to the ODR system in order to enable the assessment of more complicated disputes where a mere use of a check-list is considered as insufficient by the parties thus extending both the scope of applicability and application.

VI. CONCLUSION

To be effective, an ODR system must be fair and cost-effective for both vendors and customers. It must transparently, fairly, economically and quickly resolve disputes that inevitably accompany commercial transactions. Both vendors and consumers could benefit from a properly constructed ODR system.

Identifying areas of consensus is the beginning step of implementing a global ODR system that effectively resolves e-commerce-based disputes. A significant step in this direction will be the Global Consumer Law Forum, which will

¹⁰³See *id.* at 646–47; at 56, 57.

¹⁰⁴See Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, *Achieving Optimal Use of Harmonization Techniques In an Increasingly Inter-related Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane*, 27 *Penn St. Int'l L. Rev.* 641, 648 (2008–2009); 41 *UCC L.J.* 51, 58 (2008).

¹⁰⁵See *id.* at 645–46; at 55, 56. See also Luisa Antoniolli, *Consumer Law As an Instance Of the Law Of Diversity*, 30 *Vt. L. Rev.* 855, 860–61 (2006); For a discussion of the feasibility of transnational consumer hard law, see Norbert Reich, *Transnational Consumer Law—Reality or Fiction?* 27 *Penn St. Int'l L. Rev.* 859 (2009).

¹⁰⁶See Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, *Achieving Optimal Use of Harmonization Techniques In an Increasingly Inter-related Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane*, 27 *Penn St. Int'l L. Rev.* 641, 649 (2008–2009); 41 *UCC L.J.* 51, 59 (2008).

¹⁰⁷See *id.* at 649 n.26; at 59 m.26.

serve as a website and database for the international-consumer-law community. It will organize international-consumer-law cases, articles, news and other legal developments. We also aim to publish an Internet source called the *International Consumer Law Commentary* through the Institute of International Commercial Law of the Pace University School of Law in collaboration with the Penn State Dickinson School of Law.

The widespread success of UNIDROIT's Uniform Principles of International Commercial Contracts (or the UPICC) shows that soft-law solutions to commercial issues can be effective. But the UPICC's success is not unlimited. The UPICC does not apply to international consumer contracts. Neither does the CISG. Establishing a soft-law instrument that can govern international consumer transactions would benefit businesses and consumers around the globe. Presently, the initial phase of establishing the GPICC entails the establishment of a soft-law regime because of difficulties inherent in creating hard law to cover all geographical regions (despite jurisdictional boundaries) and legal systems. An effective soft-law solution now could usher in a hard-law solution in the future and if necessary.

An adequately comprehensive GPICC must reckon with the realities of the recent proliferation of e-commerce both in respect to the subject-matter of modern consumer sales and in respect to a fair, efficient and accessible basis for resolving disputes. Though the GPICC could be applied by any national court or other competent authority, there is also the possibility to combine the advantages of the GPICC with existing ODR mechanisms. This could lead to a significant increase in the use of ODR mechanisms in complicated cases as the assessment would be based on uniform legal principles. Governments, commercial entities, industries and consumer advocates from around the world would directly benefit from such a global ODR system.

Creation of a Global Consumer Law Forum will facilitate the operation of working groups from around the world in cooperating in developing the GPICC.¹⁰⁸ An Oversight Committee can then be formed to propose GPICC revisions as

¹⁰⁸See Int'l Chamber of Commerce, *Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C Transactions 13* (2003), <http://www.iccadr.com/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>

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they become needed.¹⁰⁹ Though much progress remains to be made, much has been accomplished in two short years. We hope to continue this progress going forward.

¹⁰⁹See *id.*