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## FROM LEX MERCATORIA TO ONLINE DISPUTE RESOLUTION: LESSONS FROM HISTORY IN BUILDING CROSS-BORDER REDRESS SYSTEMS

Scott Cooper

Colin Rule

Louis Del Duca

PENNSTATE



The Dickinson  
School of Law

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# FROM LEX MERCATORIA TO ONLINE DISPUTE RESOLUTION: LESSONS FROM HISTORY IN BUILDING CROSS-BORDER REDRESS SYSTEMS

By Scott Cooper<sup>1</sup>, Colin Rule<sup>2</sup> and Louis Del Duca<sup>3</sup>

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### *Abstract:*

*Resolving disputes across borders has never been a straightforward proposition. Nation-states (and before them duchies, bishoprics and city-states) are jealous of their judicial authority and resist ceding jurisdiction to dispute resolution mechanisms not of their making. But cross-border trade is by definition cross-jurisdictional trade; either someone acquiesces (either to the hegemony of a 1<sup>st</sup> century Rome or 19<sup>th</sup> century England), or a non-territorial solution must be found. With the resurgence of 'global' trade in the 12<sup>th</sup> century, merchant traders developed a merchant court system of adjudication (*Lex Mercatoria*), that was based on centuries-old codes of conduct. This system of customary law served the needs of merchants for quick and fair resolutions of disputes and served the needs of dukes and kings because it created a trusted system that induced trade (and thus taxes) that would not exist otherwise. Much like the expansion of cross-border trade in the 12<sup>th</sup> century, the current growth of electronic and mobile commerce has created millions of cross-border disputes that require reliable resolution systems. The continued growth of e-commerce requires trust – from consumers, merchants and government – that cross-border transactions in electronic and mobile commerce will be adjudicated quickly, fairly and cheaply. The lessons learned throughout history can provide helpful guidance in determining how best to build the global resolution systems of tomorrow.*

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<sup>1</sup> Vice President for Policy, American National Standards Institute (ANSI). (Views expressed are views of the authors and not necessarily endorsed by ANSI).

<sup>2</sup> CEO of Modria.com and former Director of Online Dispute Resolution, eBay/PayPal (2003 to 2011).

<sup>3</sup> Louis F. Del Duca is Edward N. Polisher Distinguished Faculty Scholar, Penn State Dickinson School of Law.

## Questions Raised by Commerce and Technology

Human societies have always engaged in cross-border trade but the advent of the computer has expanded the reach of that trade to every corner of the globe on a real-time (24/7) basis. When early computers were first joined together under the Advanced Research Projects Agency (ARPA) Net (which later evolved into the Internet) the architects of the system banned commercial activity, instead insisting that the new system be devoted only to knowledge creation and dissemination. But by the mid-1990s those prohibitions were removed when the U.S. government ceded control of the Internet to a global organization, and as a result, commerce became the engine driving the expansion of the Internet for the next ten years.

Today online sales are an ever-increasing slice of global commerce. In spite of the recession, in 2009 e-Commerce sales in the US grew by 11% to reach \$155.2 billion, versus a 2.5% growth rate for the rest of the economy. E-Commerce accounted for 7% of all retail transactions in 2010, and almost 42% of retail transactions that year were influenced by the internet in some way.<sup>3</sup> This rate of growth is unprecedented, and it is showing no sign of slowing down. The next wave of this growth will likely be powered by mobile devices, which are becoming more capable and more ubiquitous every year, even in developing economies. A significant percentage of the purchases now made online aren't even for tangible goods – many are for virtual items like apps, music, movies, and software. Not only can these purchases occur almost instantly from one side of the world to the other, delivery of these digital items can also occur in an instant. Factor in sophisticated Global Positioning System (GPS) technology, Radio Frequency Identification (RFID) readers, and secure personal identifiers (and no doubt other as yet unannounced innovations), it appears that mobile devices will likely be as transformational and disruptive as credit cards in driving the growth and direction of a new wave of e-commerce.

However, even as these new technologies are changing global commerce, many key questions they pose remain unanswered. For instance, if cyberspace is not to be subject to the rules of the physical world, then what new rules does cyberspace require? Who has the authority to make these new rules and decide how they should be implemented? In addition, who will enforce those rules, and how will the rule breakers be punished?

There are no easy answers to these questions. In fact, they've been debated for decades by scholars and international organizations, and in many respects, we're no closer to definitive answers than we were twenty years ago. Indeed, the pace of technological change has made the need for the answers to these questions more pressing as it has made the problems far more complex.

But we don't need to craft our solutions to these challenges entirely from scratch. While internet and mobile technology may be new, the need for cross-jurisdictional redress

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<sup>3</sup> See Geoffrey A. Fowler, *E-Commerce Growth Slows, But Still Out-Paces Retail*, THE WALL STREET JOURNAL DIGITAL NETWORK, WSJ.com (March 8, 2010), <http://blogs.wsj.com/digits/2010/03/08/e-commerce-growth-slows-but-still-out-paces-retail/>.

mechanisms is as old as recorded history, and as such, there are lessons to be drawn from the systems constructed in prior eras. First let us look at the way these problems were solved in earlier centuries, and then we can apply some of those lessons to the design of a new system appropriate to the Internet age.

## **Cross-Border Resolution Systems of Old**

This issue of creating trust and confidence in an international marketplace through the development of practicable dispute resolution processes is not new. Traditional merchant practices used to resolve common disputes evolved into written codes of conduct for use in trans-Mediterranean trade as early as the third century BC (*Lex Rhodia*).<sup>4</sup> This ‘private law’ based on equity was accepted by the Greek city-states and then the Roman Empire, becoming an accepted part of the Roman law of nations (*jus gentium*).

Roman laws of commerce<sup>5</sup>, were written to describe merchant practices within an empire, and thus were out of date by the 11<sup>th</sup> century. In medieval Europe, merchants who engaged in revived cross-border trade had to deal not only with the many perils of sea transport, but also the jealous authority of hundreds of independent duchies, bishoprics, free cities and kingdoms, each with its own laws, codes and traditions. Early medieval attempts to codify traditional maritime practices on a regional basis in order to offer uniformity and certainly to merchants and traders included the Amalphitan Tables, (circa 1095), “whose authority came to be acknowledged by all the city republics of Italy”<sup>6</sup>, the Rolls of Oleron (circa 1150) that were used extensively in Atlantic trade, and the Laws of Wisby (circa 1350) used mainly for Baltic Sea trade.

## **The Ascent of *Lex Mercatoria***

While in local matters, medieval merchants would still be subject to laws imposed by their own town or prince, in maritime disputes or in cross-border commerce, medieval merchants took matters into their own hands, creating a system of private law that was universally recognized as having legal standing. Called merchant law (*lex mercatoria*), and based on traditional merchant customs, the inter-national acceptance of the rights of merchant courts to try cases based on the merchant customs applicable to the individual case rather than on local law, allowed cross-border commerce to revive and flourish. “The merchant judges presiding at these courts acted much like modern arbitrators; they relied on norms of commercial behavior and their familiarity with the needs of commerce

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<sup>4</sup> For example, if a ship were floundering and the captain threw cargo overboard to lessen the load, who absorbed the losses? Under *Lex Rhodia*, if an appointed merchant court (populated by knowledgeable and respected merchants), found that jettisoning cargo was necessary in order to save the ship, all merchants shipping cargo on that ship would share the loss based on their percentage of the total cargo. The captain would be absolved of liability.

<sup>5</sup> Culminating in the “Basilica” code of maritime rules under the auspices of Eastern Emperor Basil I in the ninth century.

<sup>6</sup> Harold Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT’L. L. J. 221, p. 224 (1978).

to resolve conflicts”.<sup>7</sup> The development and acceptance of such codes<sup>8</sup> were a prerequisite to the global reach and authority of the merchant city-states of Venice and Genoa by the 14-15<sup>th</sup> centuries, and in the Baltic in the 80 towns and cities of the Hansiatic League in the 15-16<sup>th</sup> centuries.

What made this system of self-regulation acceptable to both kings and princes was that it worked. Unless a king was willing to risk war, he could not successfully enforce his national “public law” over another state. And the disparities of local law from jurisdiction to jurisdiction made the development of a consensus universal “public law” unfeasible.

For merchants however, ‘good faith’ equity was the essence of all agreements, and the threat of business sanctions from other merchants compelled successful resolution of disputes. Merchant Law won its acceptance from merchants because it reflected consensus practices that were judged to be fair, coupled with a process of dispute resolution (merchant courts) that was judged to be timely, transparent and cost-effective. Admittedly this was ‘justice’ based on customary law, or a system without the full procedural protections of some judicial processes, but such a system is often seen as infinitely better than the uncertainties of local courts, which may pair those procedural protections with unacceptably long delays and high costs. Merchant law delivered equity, fairness, speed, informality, low transaction cost and transparency.

## The Era of National Law

Just as *Lex Rhodia* no longer served the needs of commerce when the Roman Empire disappeared and was replaced by kingdoms and city-states, so too *Lex Mercatoria* was seen as archaic with the growth of the autocratic nation-states and their zero-sum philosophy of mercantilism.<sup>9</sup> The customary law of *Lex Mercatoria* served the needs of the relatively small medieval merchants who must sail at the next tide, but the breakout of European exploration and trade in the 16<sup>th</sup> century led to the growth of sophisticated state-sponsored merchant-adventurer organizations in the 17th century with different needs and expectations. This conjoining of trade and flag forced dispute resolution from merchant tribunals into national courts, and the enforcement of decisions from merchant peer group pressure to the sovereign coercion of the Hobbesian State.

This sea change from trade law based on custom to one based on national law did not eliminate the need for references to the practical experiences of merchant custom to color judicial decision making. But where custom-based medieval merchant law could bend to

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<sup>7</sup> Bernardo Cremades & Steven Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. Int'l L. J. 317, 319 (1983-1984).

<sup>8</sup> Most notably the *Consulato del Mare* (Barcelona, circa 1340), which “ascended as an internationally recognized body of mercantile custom” LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 8 Rothman & Co. 1983.

<sup>9</sup> This sea-change from looking at trade as a global public good to becoming a tool (weapon) for national advantage was perhaps most notably asserted by England’s Chief Justice Coke in 1606 in his declaration that “..the Law Merchant is part of the law of this realm.” With that, merchant courts were abolished, and merchants were subject to the procedures of the common law courts. Trakman, *supra* note 8 at 26.

meet the justice needs of a particular case and moment, the national law demands more clarity and certainty

Thus the devolution of merchant disputes to national courts allowed justice to be dealt out with more exacting granularity, but at a cost, as the wheels of justice ground evidence and pleadings slowly and expensively.<sup>10</sup> What was gained was certainty of the law and its national enforcement. What was lost was the universal scope and user-friendliness of merchant law.

The recognized architect of the transition of merchant law into national commercial law for common law countries was Lord Mansfield who became Chief Justice of the Kings Bench in England in 1756. While Mansfield was deferential to consensus merchant practices, once his court turned custom into law, it was not all that interested in examining the odd case, conflicting customs, or the evolution of merchant practices. As one scholar has observed, while Lord Mansfield is properly considered the founder of modern commercial law in the common law world, his world-view was a snapshot in time and, “it froze the practice of Georgian merchants as the permanent law of England.”<sup>11</sup>

## **Connections Between the Past and Future of Cross-Border Redress**

While much has changed since merchant courts dispensed timely justice based on custom so that litigants could sail on the next tide, the need for cost-effective, robust and practicable cross-border dispute resolution procedures remains a constant. As the philosopher Francis Fukuyama points out, in order for a marketplace to work effectively, it must demonstrate a “minimum degree of honesty”.<sup>12</sup> To engage in cross-border trade – whether around the Mediterranean in 1411 or across the Atlantic or Pacific in 2011-- requires reciprocal trust, practical methods for resolving disputes and practicable methods for enforcing judgments.

In 1411 merchants had to first trust themselves – and then they had to earn the trust of governments. While medieval merchants had problems with piracy (real, not cyber), the fickleness of local authorities, storms, plagues, etc, one advantage they did have was that they were a fairly cohesive group and thus could usually force resolution upon recalcitrant members of the merchant community.

Modern efforts at creating global e-commerce dispute resolution mechanisms also have the same issues of gaining trust and ensuring enforceability. However, there is not a

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<sup>10</sup> And –shockingly-- sometimes in a manner that ‘gamed’ the system to home field advantage. “...some merchants even refused to submit disputes to particular foreign courts on account of differences in treatment meted out within those jurisdictions...the Merchants of Antwerp refused to submit to the law of London, on the ground that the law of London discriminated against them.” Trakman, *supra* note 8 at 20.

<sup>11</sup> J. H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 Cambridge L.J. 295, 299 (1979).

<sup>12</sup> FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 36 Free Press Paperbacks 1996.

closed group of merchant vendors that can be cajoled or otherwise coerced into resolving differences. The world of e-commerce is an exponentially larger group of actors. And today, to an increasing extent, the global marketplace depends upon the trust of consumers, who must be able to shop with confidence no matter where they live or transact business.

The structure of the current e-commerce landscape resembles the patchwork of jurisdictions around the Mediterranean in 1411. Early commercial internet providers such as AOL and Prodigy created the concept of the “gated community” or “walled garden” that promised users that all businesses inside would be vetted and monitored for quality. Marketplaces like eBay and Amazon followed this same game plan, but took it to the next level with their reputation systems and protections coverage. As the internet grew into its adolescence, and search engines like Google solved the selection problem, more and more users ventured beyond the walls erected by internet providers to discover a very big world of commercial options. And while it was true that dragons could lurk in dark corners, the draw of global selection proved too enticing for many buyers to resist.

Thus, rather than one gated community, we now have multiple marketplaces – each with its own walls and watchtowers – where consumers can transact with an assumption of confidence. In between such havens however, the old problems remain: consumers venture at their peril, as the policing of cyberspace is a much more difficult proposition than placing a cop on the beat on Main street or High street.

This is especially true with e-commerce transactions undertaken across borders. While the nation-states have an infrastructure of consumer protection laws and enforcement mechanisms, cross-border transactions quickly run into jurisdictional issues. If there is a dispute, whose courts should you turn to? Consumers expect the right to seek justice in their courts, while businesses do not want to handle cases in multiple jurisdictions.<sup>13</sup> And should consumers win a judgment in their local court, getting it accepted and paid in a foreign jurisdiction can be costly and time-consuming, making it cost-ineffective for most cases under \$10,000. Thus it is perhaps understandable that cross-border e-commerce has stagnated, even as in-country e-commerce continues its rapid growth. Within the EU, with its advantages of the Euro and single market, cross-border e-commerce only accounts for 6% of all e-commerce transactions.<sup>14</sup> Glenbrook Partners has estimated that U.S. large e-commerce merchants have 15-20% of their sales volume come from cross-border web sites even though more than 55% of global e-commerce purchasing power is outside of North America.<sup>15</sup>

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<sup>13</sup> This is the “country of origin” vs. “country of destination” conundrum.

<sup>14</sup> *Report on Cross-Border e-commerce in the EU*, at 2, COM (2009) 283 final (March 5, 2009), available at [http://ec.europa.eu/consumers/strategy/docs/com\\_staff\\_wp2009\\_en.pdf](http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf).

<sup>15</sup> See Souheil Badran, *What Merchants Need to Know About Cross-Border eCommerce* (2008), available at [http://www.firstdata.com/downloads/thought-leadership/fd\\_crossborderecommerce\\_whitepaper.pdf](http://www.firstdata.com/downloads/thought-leadership/fd_crossborderecommerce_whitepaper.pdf).

## **The Emergence of Commercial Arbitration**

With the post-WW II consensus on free trade (Dumbarton Oaks, Breton Woods and GATT), the presumption is that impediments to cross-border trade should be eliminated wherever possible. A major step in that direction was the support by governments (once again) for ‘private law’ solutions, and in particular, business-to-business (B2B), arbitration and the commensurate New York Convention enforcement mechanism. Arbitration certainly has many of the same goals as merchant law. It is meant to settle disputes between businesses, and it has its own set of private law rules to do so. The nation-states have embraced this ‘private’ dispute resolution process by allowing cross-border arbitration awards to be enforced by national courts.<sup>16</sup>

The closed nature of the arbitration system also is similar to the merchant guild system of medieval merchant law. Businesses are agreeable to binding pre-dispute arbitration agreements because they avoid the conundrum of having to debate which national jurisdiction should have standing if a dispute should arise. Arbitration adjudicators are expected to be knowledgeable on the issues in dispute; and both sides agree to collaborate in designing and/or selecting the arbitration clause that best serves their collective needs (“party autonomy”).

Where classic arbitration and traditional merchant law differ however, is also important. Merchant law was expected to settle business disputes not only fairly, but quickly and with the minimum amount of fuss. This is not necessarily a clear priority for most B2B arbitration, where erudite lawyers are vigilant and assiduous in their stewardship obligations over disputes valued in multiples of millions of dollars. The commercial arbitration systems currently in place were designed for use by savvy merchants engaged in commercial transactions with other sophisticated businesses, each of whom is represented by able counsel. The procedural burdens imposed by the New York convention make it a somewhat awkward fit with the needs of low dollar value consumer disputes, where one party ( the consumer), is non-professional and is not likely to be represented by counsel. Perhaps a more streamlined, consumer-friendly arbitration process would be more in line with the justice values of merchant law.

## **Justice on the Internet**

### ***Global Business Dialog on Electronic Commerce (GBDEC) and Consumers International (CI) Agreement***

We believe that these justice values should provide the goal that cross-border business-to-consumer (“B2C”) electronic and mobile commerce should aspire to. Unlike cross-border B2B transactions where the value of disputes can justify the time and resource costs of arbitration, cross-border B2C transactions (mostly e-commerce, but increasingly

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<sup>16</sup> The New York Convention is widely recognized as the foundational instrument for successful international arbitration by requiring courts of contracting States to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959.



mobile commerce transactions as well), the value of individual transactions is usually under \$100 and almost always under \$1,000. eBay ODR systems resolve more than 60 million disputes every year, of which 30 million are consumer complaints which are resolved amicably through in-house adjudication. Although either buyer or seller in these cases has the right to look to legal remedies, in most cases that approach is neither practicable nor user-friendly.

While merchant in-house adjudication processes have undergone continuous improvement in the short (15 year) life of e-commerce, the issue that has still not been credibly addressed is how to handle cross-border B2C transactions. And as a result, that lack of trust by consumers in undertaking transactions with businesses based in other countries shows in the abysmal statistics on the take-up of cross-border B2C commerce.

A number of global companies worry about this issue, and efforts have been made to address the problem and give consumers reason to trust the global marketplace. An early milestone was in the gathering of the CEOs from 70 large multinational corporations from Europe, North America and Asia in 1998 to form the Global Business Dialogue on Electronic Commerce (GBDe). In those heady early days of the internet, there was a belief that digital technology was a forcing mechanism that would sweep the 'old world' aside; whether commercial 'bricks and mortar' physical infrastructure, or the global governance political infrastructure of the nation-state that could not seem to keep up with the global needs of businesses or consumers.<sup>17</sup>

Starting in 2000, GBDe undertook discussions on developing a global governance system for cross-border B2C e-commerce transactions with Consumers International (CI), the international consumer federation, which represents 250 consumer organizations in 115 countries. These discussions took place over the next three years, entailing 17 separate draft documents and formal face-to-face meetings in London, Tokyo, New York, Madrid, Paris and Washington DC. The resulting document was ratified by both organizations as "Alternative Dispute Resolution Guidelines" in November 2003.<sup>18</sup>

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<sup>17</sup> A classic call-to-arms for the believers in the New World Order of the Internet was given by John Perry Barlow at Davos in 1996...:

"Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders." <https://projects.eff.org/~barlow/Declaration-Final.html>; see also [http://en.wikipedia.org/wiki/A\\_Declaration\\_of\\_the\\_Independence\\_of\\_Cyberspace](http://en.wikipedia.org/wiki/A_Declaration_of_the_Independence_of_Cyberspace).

<sup>18</sup> <http://www.econsumer.gov> (under the auspices of the US Federal Trade Commission "Your site for cross-border consumer complaints"), has a list of ADR providers who have been certified for their compliance with the [ADR Guidelines](#) approved by the [Global Business Dialogue in E-Commerce](#) and negotiated with [Consumers International](#).

The GBDe-CI Guidelines (“Agreement”), was designed to offer recommendations (and give direction) to internet businesses, consumer organizations, dispute resolution providers and governments. The Agreement was not in any manner intended to supersede existing nation-state consumer protection laws; and CI was adamant that the Agreement should not alienate a consumer’s rights to go to their local court with a complaint should they so desire. But while preserving consumer rights, there was also a pragmatic acknowledgement in the Agreement that the impediments to resolving cross-border B2C complaints through local courts often made such rights more theoretic than practical.<sup>19</sup>

The Agreement is not meant to cover B2B disputes, where dispute settlement procedures have a long history, and both sides of such disputes are expected to be knowledgeable of the issues at hand and have entered freely into any agreement for resolving disputes.<sup>20</sup> Such party autonomy is not the case for B2C transactions, where consumers usually must accept ‘click-through’ language describing legal obligations they ‘agree’ to if they are to undertake a transaction. Thus the Agreement states that pre-dispute binding arbitration should be avoided.<sup>21</sup> The Agreement does recommend that consumers should attempt to resolve disputes directly with internet merchants, and recommends that merchants develop in-house customer satisfaction systems.<sup>22</sup>

The recommendations for the development of dispute resolution systems are remarkably similar (though perhaps, not really that surprising) to the merchant court rules of 700 years previous. Cases should be decided on equity or codes of conduct rather than local law;<sup>23</sup> dispute systems must be easily accessible for consumers no matter where they live

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<sup>19</sup> “Recourse to courts in disputes resulting from international Internet transactions is often complicated by the difficult questions of which law applies, and which authorities have jurisdiction over such disputes. Furthermore, international court proceedings can be expensive, often exceeding the value of the goods or services in dispute. If this were the only means to settle disputes, it would certainly not enhance consumer confidence in international electronic commerce and would strongly induce merchants to restrict the geographic scope of their offers. This, in turn, would limit competition and consumer choice.” Alternative Dispute Resolution Guidelines: Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce, in GBDe Summit 2003, New York Recommendations, 54, 54 (Nov. 2003), available at [http://www.gbd-e.org/pubs/NYC\\_Recommendations\\_2003.pdf](http://www.gbd-e.org/pubs/NYC_Recommendations_2003.pdf).

<sup>20</sup> “These recommendations deal exclusively with business-to-consumer (B2C) disputes in electronic commerce, where ADR is still relatively little known and practiced. Settlements of disputes resulting from business-to-business (B2B) transactions, both offline and online, will follow their own rules with a very high degree of party autonomy, mostly in the form of binding arbitration. The issues of consumer protection and consumer confidence are of no relevance in this context. Hence, there is neither a need to develop new recommendations for B2B ADR, nor would it be appropriate to address any issues related to B2B under the same parameters as B2C dispute settlements.” *See id.* at 56.

<sup>21</sup> “Merchants should generally avoid using arbitration that is binding on consumers because it may impair consumer confidence in electronic commerce... Consumer decisions to engage in binding arbitration must be fully informed, voluntary, and made only after the dispute has arisen.” *See id.* at 57.

<sup>22</sup> “**Encourage the use of in-house customer satisfaction programs:** As a first and preferred remedy in any dispute, Internet customers should be offered access to in-house customer satisfaction systems. Depending on the type of transaction and the nature of the system, such approaches may serve as a valid alternative to ADR.” *See id.* at 56.

<sup>23</sup> “**ADR on the basis of equity or codes of conduct:** Allow ADR systems to function on the basis of equity, or codes of conduct. It should not be required that dispute resolution officers necessarily have formal lawyer qualification and license. In some countries, mediation/arbitration processes are legally

or transact business; resolution procedures should be offered to consumers at moderate (or no) cost, and the rules of the road must be clear and transparent. “ADR systems should function according to published rules of procedure that describe unambiguously all relevant elements necessary to enable customers seeking redress to take fully informed decisions on whether they wish to use the ADR offered or address themselves to a court of law.”<sup>24</sup>

Unlike medieval merchant law however, the GBDe-CI Agreement did not envision B2C dispute resolution as a closed system. Governments were expected to monitor the efforts of ADR providers,<sup>25</sup> and were urged to take “appropriate enforcement actions” if ADR providers failed to meet the dispute resolution standards that they had agreed to abide by.<sup>26</sup>

Just as the technology of the internet (and now, mobile commerce as well) have outrun the ability of the nation-states to monitor and oversee, so too have malign uses of these technologies outrun governments’ ability to enforce. The feedback loops of consumer complaints through the ‘private law’ resolution mechanisms of internet merchants often catch cases of fraud well before law enforcement authorities are aware of them. And as well, with internet malfeasance, it is often the tyranny of small numbers. Rather than steal \$1 million from one source, it is often easier (and much less obvious), to steal \$1 from a million customers. Thus one of the sources of frustration for consumers – and law enforcement officials – is the ‘nickel and diming’ (“patterns of abuse”), of consumers through small ‘errors’, short weights, deliberately vague or mis-information, late delivery and/or repayments, and other forms of abuse that are usually not worthwhile for a single consumer to fight to the finish.

The Agreement bridges this gap in global governance by committing ADR service providers to alert law enforcement officials when cases of fraud, deceit or patterns of abuse are discovered.<sup>27</sup> This tying of ‘private law’ with a ‘public goods’ obligation may be the direction that global governance will take in the future. While global private law will likely always be ‘in addition to’ rather than ‘in lieu of’ public obligations of the nation-states, it may be that in many cases –such as ADR—a consensus partnership of business and consumer interests will also meet the needs of governments as well.

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regulated to be conducted solely by licensed lawyers, but deregulation and an appropriate legal framework should be aimed for.” *See id.* at 60.

<sup>24</sup> *See id.* at 58.

<sup>25</sup> “The ADR provider should publish an annual report enabling a meaningful evaluation of all ADR cases and results, while respecting the confidential nature of specific case information and data. Such evaluation should include – at a minimum - an aggregated list of cases received, cases settled prior to ADR resolution, cases settled by ADR resolution and cases not resolved. To the degree possible, such report should include information on whether cases settled. prior to, and at settlement, were to the advantage of the consumer or the merchant.” *See id.*

<sup>26</sup> **“Enforcement Actions:** [Governments should] Take appropriate enforcement action when ADR services do not comply with their stated policies and procedures.” *See id.* at 61.

<sup>27</sup> **“Referrals to law enforcement:** ADR service providers should refer disputes to the relevant law enforcement authorities, with the consumer's permission, when they have reason to believe that there may be fraud, deceit or patterns of abuse on the part of the Internet merchant. In such cases, the merchant should be informed that such an action has been taken.” *See id.* at 59.

In the case of the GBDe – Consumers International Agreement, it was quickly endorsed by the US Federal Trade Commission, The European Commission, METI in Japan, and the Canadian government, as an important step in global marketplace governance. This is perhaps not so hard to understand, as an agreement reached between a global business association and the international consumers organization should also meet the needs for governments to protect their consumers in cross-border transactions.

### ***International Chamber of Commerce (ICC)***

Also in 2003, the International Chamber of Commerce (ICC) released two brochures for use by businesses in dealing with B2C dispute resolutions. In “Putting It Right”<sup>28</sup> it stated that if a business was unable to resolve a consumer dispute in-house, it should advise the consumer of the opportunity to seek alternative dispute resolution (ADR).<sup>29</sup> In a second brochure “Resolving Disputes Online”<sup>30</sup> the ICC approach is similar to that of the GBDe-Consumers International Agreement (which of course is itself similar to the procedures of medieval merchant courts...):

- “formal requirements for case submission should be kept to a necessary minimum
- ODR systems should resolve disputes quickly if they are to meet the needs of both consumers and businesses
- Costs of ODR services should be kept as low as possible to avoid creating a barrier to consumers
- Dispute resolution personnel should be impartial. Impartiality should be guaranteed by adequate auditing and procedural review arrangements”<sup>31</sup>

Interestingly, the ICC dealt with arbitration for B2C disputes in a nuanced manner. It first stated that as a general principle, businesses should not require consumers to commit to pre-dispute arbitration. It then goes on to state that where pre-dispute arbitration clauses are permissible under “local law” such clauses are “acceptable” if consumers are given the opportunity for making an informed choice. The language is vague as to whose “local law” should prevail, thus punting the question on jurisdiction that has bedeviled cross-border adjudication since the fall of the Roman Empire... It is intriguing however, that the ICC -- the premier international authority on arbitration -- should acknowledge that the cheap, fast, informal needs of B2C resolutions (i.e. ‘rough justice’) can often overwhelm the formal checks and balances of arbitration.<sup>32</sup>

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<sup>28</sup> Putting It Right: Best practices for Customer Redress in Online Business, International Chamber of Commerce, Paris, Nov. 2003, available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/pages/Puttingitright.pdf>.

<sup>29</sup> “Any rejection of a complaint should inform the customer of the possibility to submit his request to a competent dispute settlement body such as an ADR or ombudsman” *supra* note 29, at 13.

<sup>30</sup> *Resolving Disputes Online: Best practices for Online Dispute Resolution (ODR) in B2C and C2C transactions*, International Chamber of Commerce Paris Nov. 2003, available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf>.

<sup>31</sup> *Ibid* at 11.

<sup>32</sup> “Generally, companies should not obligate consumers to agree to use binding dispute resolution processes prior to the materialization of a dispute. However, where permissible under local law, pre-dispute commitments to binding dispute resolution are acceptable if they are clearly disclosed before the

## ***Organization for Economic Co-Operation and Development (OECD)***

In 2007 the Organization for Economic Co-Operation and Development (OECD), issued its recommendations for global consumer dispute resolution.<sup>33</sup> Where the ICC looked at B2C dispute resolution from the perspective of a business organization, the OECD – representing the 30 largest democracies – has the perspective of the nation-state. Thus, along with recommendations that OECD members should “encourage” voluntary (private law?) mechanisms for resolving disputes<sup>34</sup> the paper also recommends that members develop fast, cheap, informal court procedures for small claims.<sup>35</sup> Still unresolved however is the jurisdictional question of whose fast, cheap, informal court procedures are to be used in cross-border adjudication?

Private law arbitration has been able to thread that needle. By assuming that in a B2B transaction, knowledgeable parties can craft a mutually-agreeable binding pre-dispute arbitration clause (i.e. party autonomy), issues of jurisdiction have been dealt with, and the expert arbitrator will weave equity and commercial law into a cloth that will cover the facts of the transaction in arbitration. The resultant award can be taken to the proper court in the jurisdiction of the awardee, and under the New York Convention that court will recognize the award and enforce its payment.

Business-to-consumer dispute resolution mechanisms are –for the most part—still dependent on the kind of peer-group pressure that drove acceptance (reluctant or otherwise), by individual merchants for decisions from medieval merchant courts. Amazon and eBay (and others) have developed sophisticated systems of feedback loops and complaint handling that allows suspect vendors to be identified and ostracized. The GBDe-Consumers International Agreement recommended that those involved in B2C dispute resolution matters be ‘deputized’ into acting as the eyes and ears of law enforcement where there was reason to believe that there might be evidence of fraud, deceit or patterns of abuse in the transaction.<sup>36</sup>

The OECD paper makes a recommendation that may help to bridge this inter-jurisdictional gap. Similar to the “patterns of abuse” concept in the GBDe-Consumers International Agreement, the OECD discusses the idea of allowing consumers to collectively ‘find’ each other in the dispute process when they individually are victims of

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initial transaction is completed. This will allow consumers to take the dispute resolution provision into consideration and make an informed choice about doing business with the company.” *Ibid* at 10.

<sup>33</sup> *OECD Recommendation on Consumer Dispute Resolution and Redress* Paris July 2007, available at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.

<sup>34</sup> “Member countries should encourage businesses and industry groups to provide consumers with voluntary mechanisms to informally and at the earliest stages, resolve their disputes and obtain redress as appropriate.” *Ibid* at 12.

<sup>35</sup> “Simplified court procedures for small claims which offer consumers the opportunity to obtain a judicial determination of their dispute through less formal and expedited procedures that those used in traditional court proceedings.” *Ibid* at 10.

<sup>36</sup> See *Alternative Dispute Resolution Guidelines: Agreement between Consumers International and the Global Business Dialogue on Electronic Commerce* (Nov. 2003), at 59, available at [http://www.gbd-e.org/ig/cc/Alternative\\_Dispute\\_Resolution\\_Nov03.pdf](http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution_Nov03.pdf).

a similar harm by the same business. Where individually such cases may be cost-ineffective to pursue, collectively the resolution would benefit both individual consumers and national consumer protecting authorities by identifying and forcing disgorgement on bad actor online merchants.<sup>37</sup>

### ***eBay Online Dispute Resolution and the Lessons of History***

eBay is the largest online marketplace in the world, with more than \$45 billion dollars of merchandise sold on the site each year between more than 90 million active buyers and sellers around the globe.<sup>38</sup> eBay's sites are localized in 16 languages around the world, and the site houses more than four billion feedback ratings left by transaction partners for each other. When one speaks of the meteoric expansion of e-Commerce, eBay stands as the pre-eminent example of the phenomenon. It was the first truly global marketplace to empower individuals to buy and sell goods seamlessly around the world, and hundreds of thousands of online merchants got their start selling on eBay before they created their own storefronts.

Because eBay was such a pioneer in e-Commerce it discovered the need for and importance of ODR long before other large internet companies. eBay launched its first ODR pilot in 1999, which grew into a relationship with a third party ODR provider, and eventually to the integration of ODR directly into the eBay code base. eBay's ODR systems now resolve more than 60 million disputes a year, with that number increasing steadily as transaction volume on the site increases. Because eBay handles such significant caseloads it has been able to learn (or re-learn) many lessons about how online redress systems can most effectively be designed. The parallels with the historical approaches to cross-jurisdictional redress are uncanny.

For example, as eBay has expanded globally, it has had to find ways to deal with the overlapping national jurisdictions its users reside within, much like the merchants who had to sell across the duchies, bishoprics, free cities, and kingdoms of Medieval Europe. In response, eBay crafted a single User Agreement that (much like the Amalphantan Tables, the Rolls of Oleron, and the Laws of Wisby) creating a standard set of rules that governed all buyers and sellers regardless of their home jurisdictions.

As true today as in 1411, the problem of gaining trust in the marketplace is complex and difficult. Who can you trust online, when you are interacting with strangers in every corner of the world, who you have never met and will likely never meet? eBay solved that problem by implementing the Feedback system, which ensured seller reputations

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<sup>37</sup> “When a number of consumers allege that they have suffered economic harm as the result of the similar conduct of the same entity or related entities, and it is not practicable or efficient for them to act individually to resolve their disputes, those consumers should have access to mechanisms that provide for the collective resolution of those disputes. *Supra* note 33 at 10.

<sup>38</sup> See eBay Inc. Corporate Fact Sheet: Q4 2010, available at [http://news.ebay.com/content/fact\\_sheet/ebay\\_inc\\_corporate\\_fact\\_sheet\\_q4\\_2010](http://news.ebay.com/content/fact_sheet/ebay_inc_corporate_fact_sheet_q4_2010) (last visited March 1, 2011).

were made public so that future buyers could assess the likelihood that transactions would take place without incident.

As dispute volume increased due to eBay's expanding transaction volume it was clear that redress systems needed to be put in place to deliver efficient and effective redress. eBay ended up crafting its own *Lex Mercatoria* through more than a hundred policies that governed acceptable behavior in the marketplace, setting appropriate incentives, punishing rule breakers, and ensuring fairness. eBay created its own Merchant Courts by empowering customer service representatives to decide cases that could not be resolved by mutual agreement, and empowering third parties (such as NetNeutrals.com) to decide cases that eBay could not easily resolve, due either to complexity or legal constraints. These decisions were accepted by buyers and sellers, even though they were theoretically appealable in traditional courts, because they were based on transparent rules and consensus practices perceived to be fair and just. They also were designed to operate entirely online, so the resolution process could take place through the same venues that the original transaction utilized. The systems were fair, quick, informal, and (most importantly) very cheap or free. eBay's resolution systems shared almost all of these characteristics with the *Lex Mercatoria* developed five hundred years earlier.

Much like in the 15<sup>th</sup> century, nation states accepted eBay's incursion into their traditional areas of jurisdiction because they had an interest in seeing e-Commerce take root within their boundaries. No government wanted to put up any rules restraining e-Commerce, because the fluidity of the online marketplace made it easy for the transaction volume to immediately flow to more favorable (and less regulated) environments.

In many respects, the salience of *Lex Mercatoria* coincided with the rise of the nation state; as nations became more powerful and were able to consolidate their National Law systems the need for merchant law waned. The nation states reigned supreme for centuries until the expansion of the Internet, which has again blurred national boundaries and empowered non-state actors. This development has led to a resurgent focus on cross-jurisdictional systems and highlighted the inadequacy of state-by-state legal structures. eBay's rapid growth has accelerated that sense that national jurisdiction is a poor fit with the needs of our new networked world.

Commercial arbitration networks cropped up in the middle of the 20<sup>th</sup> century when business entities began transacting across borders. Information technology (realized by systems like eBay's) has empowered consumers to engage in the same types of activity, for low dollar value transactions. These arbitration systems provide a helpful model for how global ODR might take root, but as was observed earlier in this article, they were not designed to be easy enough for consumers to utilize on a consistent basis. As a result, eBay's system has moved toward a much more streamlined process that is more appropriate for consumers, and more in line with their expectations.

## The New York Convention

One “mechanism” under consideration is to possibly tie such collective resolutions to the New York Convention. As suggested by the OECD paper discussed above, allowing similar consumer complaints – no matter where the consumer is located-- to combine as a post-dispute arbitration proceeding could go far in ensuring trust in B2C cross-border transactions.

Understandably, some businesses may be reluctant to agree (either pre- or post-dispute), to a mechanism that would join separate consumer disputes into a single dispute that might entail a more significant award. While this concept of consumer arbitration is one requiring further discussion, a few preliminary thoughts may help to mitigate concerns:

1. This would not be a class action. Only actual transaction payments would be eligible for compensation.
2. Gated communities such as Amazon and eBay that host other merchants could require that hosted merchants agree to accept combined consumer complaint arbitration as part of their contractual obligations.
3. Merchants could create competitive advantage by ‘branding’ on the fact that they agree to such consumer arbitration.
4. National consumer protection agencies in order to protect their consumers (*parens patriae*), could develop bi-lateral or multi-lateral agreements that cross-border B2C transactions must have an equivalency of rights of consumer protection as is found in national law. Since access to local courts does not currently have an equivalent in cross-border situations, consumer arbitration could serve to help meet that need.

## The United Nations Commission on International Trade Law (UNCITRAL)

The United Nations Commission on International Trade Law (UNCITRAL) has formed Working Group III on Online Dispute Resolution (ODR) that is currently looking at cross-border e-commerce transactions.<sup>39</sup> This group met most recently in Vienna on Dec 13-17 2010. One of the open questions to the Working Group was on applicable law. The Working Group is tasked that: “Consideration should also be given to whether and how mandatory laws and public policy considerations, for instance, regarding consumers, may apply in online arbitrations.”<sup>40</sup>

The UNCITRAL document also acknowledges that, “Currently, there are few legal standards on ODR”<sup>41</sup> And as well, the joint statement at the signing of the Consumers

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<sup>39</sup> *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions*, United Nations General Assembly, 13 October 2010, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/574/10/PDF/V1057410.pdf?OpenElement>.

<sup>40</sup> *Ibid* at 21.

<sup>41</sup> *Ibid* at 6.



International – GBDe Agreement urged a continuing effort by business, consumer organizations and governments to develop –and implement—the programs that will bring trust to the global marketplace. Until such programs are in place, “these are still just words on paper...”<sup>42</sup>

The philosopher Francis Fukuyama looks for a “minimum degree of honesty” for a marketplace to work effectively, which may be another way of describing rough justice as our goal in the global marketplace.<sup>43</sup> To GBDe and Consumers International, “Consumers must feel confident that they will have rights of redress if a cross-border dispute should arise. As well, governments must feel confident that their citizens will not suffer a falling-off of consumer protections when they transact business online.”<sup>44</sup>

Governments, businesses and consumer groups all have the same need to bring trust to the global marketplace. What is needed is developing a global governance system that all three groups can help design, develop and enforce. Such program must be able to incentivize both private and public sector actors, as there is no ‘higher authority’ to turn to in order to police the global marketplace. The programs must be self-enforcing. Working together, hopefully that can be achieved, with commensurate rights and responsibilities shared by all.

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**“Joint Statement of Consumers International and the GBDe on Alternative Dispute Resolution Guidelines**

Nov. 6, 2003

We are pleased to announce an agreement between our two organizations on the Alternative Dispute Resolution guidelines (or ‘rules of the road’ regarding Alternative Dispute Resolution) that should be followed by merchants who want to sell in the global electronic marketplace. Global electronic commerce will only grow and flourish if consumers feel confident that their interests are sufficiently protected in the case of disputes.

The “Guidelines” make a number of specific recommendations to merchants, encouraging them to set up in-house customer satisfaction systems, to utilize Trustmark programs, and to offer their customers the right (not the obligation) to utilize ADR.

The “ADR Guidelines” also offer recommendations to ADR providers, on the need for speed, accessibility, impartiality and transparency of the ADR process. ADR providers, when they discover potential cases of fraud, deceit or patterns of abuse, should also have the obligation of reporting such cases to legal authorities.

We recommend that governments play an important and constructive role to promote and facilitate the development of high quality ADR services that are independent, transparent, cost effective, flexible and accountable to the public.

While we believe that this global agreement between representatives of consumers and businesses is an historic milestone in the growth of the global electronic marketplace, these are still just words on paper unless actual ADR programs are developed that resolve real disputes for consumers seeking resolution. Consumers must feel confident that they will have rights of redress if a cross-border dispute should arise. As well, governments must feel confident that their citizens will not suffer a falling-off of consumer protections when they transact business online.

Therefore, CI and GBDe will continue to work together to ensure the creation of ADR programs that will meet the obligations described in these “Guidelines”. We welcome the constructive support of global policymakers, businesses and consumers in realizing this goal.

<sup>43</sup> *Supra* note 12, at 36.

<sup>44</sup> “Joint Statement”.