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OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace

BACKGROUND REPORT

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OECD WORKSHOP ON CONSUMER DISPUTE RESOLUTION AND REDRESS IN THE GLOBAL MARKETPLACE

19-20 April 2005
Washington, DC

BACKGROUND REPORT

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FOREWORD

This report was prepared by Sarah Andrews of the OECD Secretariat. The Committee on Consumer Policy agreed to declassify the report by written procedure completed on 1 April 2005. It is published under the responsibility of the Secretary-General of the OECD.

MAIN POINTS

This report presents an overview of OECD member country frameworks for consumer dispute resolution and redress. Part I focuses on the different mechanisms that have been put in place to respond to the varying nature and characteristics of consumer disputes including: internal complaints handling processes; payment cardholder protections; alternative dispute resolution; small claims courts; private collective action lawsuits; legal actions by consumer associations; and government obtained redress. Part II examines the impediments to ensuring that monetary judgments for consumers in cross-border cases ultimately result in compensation to consumers. The report aims to identify the elements of effective domestic frameworks for consumer dispute resolution and redress, examine how these frameworks can better address cross-border cases, and consider how increased international cooperation could improve the effectiveness of judicial remedies across-borders.

Internal complaints handling procedures

Internal complaints handling processes are an integral element of consumer dispute resolution and redress systems. The efficient and effective handling of consumer complaints at the earliest stage can bring benefits to businesses and consumers alike, alleviating the need for recourse to more costly and time-consuming external mechanisms in a large number of cases. Continued progress on the development and use of such mechanisms can be encouraged at the national and international level.

Payment cardholder protections

Payment cardholder protections can provide an important avenue for consumer redress in cases of fraudulent, unauthorized, or otherwise disputed charges on payment cards. These protections can enhance consumer confidence in the use of payment cards for online purchases and in the global marketplace more generally. At present, although consumers in most member countries are protected (through national laws or self-regulatory schemes) against unauthorised charges due to loss or theft, protections for non-conforming or non-delivery of goods and services vary greatly among member countries. These protections can be valuable to consumers when dealing with uncooperative businesses and play a particularly important role in distance and cross-border transactions where it may be difficult to communicate with or take legal action against the business.

Alternative dispute resolution

Alternative dispute resolution (ADR) is widely regarded as holding great promise for the low-cost and efficient resolution of consumer disputes, especially cross-border disputes. In the majority of member countries, policy initiatives recognising the potential benefits of ADR have been developed. These initiatives aim at increasing the availability of effective, timely and cheap mechanisms as an alternative to formal court-based dispute resolution. In some countries, state-run ADR mechanisms are very well developed, offering dispute resolution services for a wide range of consumer disputes. In many other countries, state-run ADR schemes are available only on a sector or industry wide basis. Despite efforts to encourage the development and use of private-sector ADR for business to consumer disputes, there is evidence that the provision of such services remains patchy. These findings suggest that there is still room for improvement in the development, promotion and use of fair and effective ADR services for business to consumer disputes, especially for cross-border disputes.

Small claims courts

Where informal methods outlined above are not successful, or in cases that are not conducive to informal resolution (*e.g.* cases involving fraudulent or illegitimate businesses), small claims court procedures can offer consumers access to the court system at a cost and burden not disproportionate to the amount of their claim. Twenty respondent countries reported to have some form of court procedures available for claims under a certain monetary threshold. These procedures vary significantly from country

to country in terms of type of procedure; type of dispute and claim that may be heard; monetary thresholds; financial costs to parties; and overall accessibility to consumers ("consumer friendliness").

Private collective action lawsuits

In some countries there are procedures available allowing collective action lawsuits to be filed by groups of private individuals who have suffered similar harm as a result of the wrongful actions of the defendant. These kinds of procedures are particularly useful where large numbers of consumers have each suffered small losses. In such cases, although the cost to each individual consumer may be small, the aggregate cost and the impact on consumer welfare is large. These procedures can play an important role in addressing such market failures and providing consumers with access to remedies in cases where they would not have an incentive to act individually. Procedures for private collective action are currently available in nine respondent countries and are under consideration in a further three countries.

Legal actions by consumer associations

In a large number of countries consumer organisations have the authority to file lawsuits on behalf of an individual consumer or, more frequently, a group of consumers. Like private collective action lawsuits, collective legal actions by consumer organisations are particularly useful in cases of widespread consumer harm, providing a mechanism to prevent or remedy wrongful conduct by a defendant that may otherwise go unchecked. The type of legal action which may be taken by consumer associations varies greatly from country to country. Very often, the remedies available in actions by consumer associations are limited to conduct, as opposed to monetary, remedies. Procedures for collective action by consumer associations are available in twenty respondent countries and are under consideration in one other country.

Government-obtained redress

The authority of government consumer protection agencies to recover monies wrongfully obtained by a trader for return directly to consumers can be an important means to alleviate consumer injury and to deter wrong-doing. Mechanisms for government-obtained redress can be particularly useful in cases of fraudulent or deceptive practices affecting large numbers of consumers, especially in cross-border situations. Due to the complexity of such cases, the costs to any individual consumer of taking private legal action will usually far outweigh the harm suffered. As government consumer protection agencies have at their disposal investigative and other enforcement powers that are not available to private litigants, they are often in a unique position to tackle such cases and secure compensation for consumer victims. At present, government consumer protection agencies in only nine respondent countries have the authority to secure monetary redress for consumers. Proposals to introduce such powers have been made in a further two countries.

Improving the effectiveness of judicial remedies in cross-border consumer cases

In order to be effective, judicial remedies obtained by a consumer from the courts of one country must be enforceable against the defendant, wherever located. At present, there are serious obstacles to ensuring that monetary judgments obtained in cross-border consumer cases ultimately result in compensation to consumers. It is only possible to obtain provisional pre-judgment measures, such as asset freezes, in a few countries. These measures can help ensure that there will be money left to fulfil any final monetary judgment awarded in a consumer case. In addition, in most member countries, it is very difficult or even impossible to enforce monetary judgments in the courts of another country without a treaty or other substantial arrangement in place. International and bi-lateral arrangements to facilitate judicial cooperation in these areas could increase the effectiveness of consumer remedies in cross-border cases.

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INTRODUCTION

Context

Fostering the development of effective, low cost ways for consumers to resolve their disputes and obtain monetary compensation for losses sustained is a key consumer policy objective. The particular features of consumer disputes require tailored mechanisms that can provide consumers with access to remedies that do not impose a cost, delay and burden disproportionate to the economic value at stake. This is particularly true in the cross-border context, where the obstacles to receiving swift and inexpensive resolution of low value disputes are even greater. The costs involved in pursuing a case against a business located in another country are often prohibitively high for the average consumer and are complicated by different languages and unfamiliar legal systems.[1] In addition to the financial and practical obstacles, there are often significant legal barriers to resorting to courts in disputes resulting from cross-border or online interactions. Of particular significance are the challenges of identifying which court has jurisdiction to hear the case; which law will be applied to decide the case; and whether the ultimate result will be enforceable in the country where the defendant is located. In most OECD countries, mechanisms for consumer dispute resolution and redress were developed to address domestic cases and are not always adequate to provide consumers with remedies across borders. While this report does not address empirical evidence of cross-border consumer complaints, there is reason to believe that these kinds of disputes will form a significant proportion of consumer complaints in coming years.[2] Ensuring that effective mechanisms are in place to resolve consumer disputes across borders will be a crucial factor in promoting consumer trust and confidence in the global marketplace.[3]

The OECD's Committee on Consumer Policy (CCP) has been working in the area of dispute resolution and redress for a number of years. The *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* ("OECD E-commerce Guidelines") developed by the CCP in 1999 stress the need for consumers to be provided with "meaningful access to fair and timely dispute resolution and redress without undue cost or burden" (OECD, 1999, principle VI). The guidelines call on businesses, consumer representatives, and governments to develop fair, effective and transparent procedures for resolving consumer disputes, with particular attention to cross-border transactions. Likewise, the 2003 *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice Across Borders* ("OECD Cross-Border Fraud Guidelines") recognise the importance of consumer redress in limiting the incidence of fraudulent and deceptive commercial practices against consumers, calling on member countries to include within their domestic frameworks "[e]ffective mechanisms that provide redress for consumer victims of fraudulent and deceptive commercial practice." Furthermore, the 2003 Guidelines recommend that member countries jointly study the role of consumer redress in combating fraudulent and deceptive practices, devoting special attention to the development of effective cross-border consumer redress systems (OECD, 2003, sections II and VI).

Other international instruments on consumer protection encourage the development of effective consumer dispute resolution and redress mechanisms. For example, the *United Nations Guidelines for Consumer Protection* ("UN Guidelines"), developed by the United Nations Conference on Trade and Development ("UNCTAD"), call on governments to "establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible" (UN, 1999).[4] In the cross-border

context, the International Consumer Protection and Enforcement Network (ICPEN)[5] aims to enhance the ability of consumer protection enforcement agencies to ensure effective consumer remedies. In a survey conducted in 2000, it studied the legal and practical limitations of consumer protection agencies in this area and recommended possible future options to address these limitations (ICPEN, 2000). In February 2005, the Organization of American States (OAS)'s Committee on Juridical and Political Affairs approved a draft resolution containing a proposal for the development of a model law on monetary redress for consumers.[6]

Purpose and scope

This report summarises responses to a CCP questionnaire on dispute resolution and redress, distributed to OECD member countries in July 2004 (see Annex A). Twenty-five responses to the questionnaire were received from the following member countries: Australia, Austria, Belgium, Canada, the Czech Republic, Demark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The responses to the questionnaire have been supplemented by existing CCP reports and independent Secretariat research.

The report is divided into two parts. The first presents an overview of the different mechanisms that exist for consumer dispute resolution and redress in member countries, and examines how these mechanisms operate in practice, with a particular focus on the cross-border context. This part includes discussion of mechanisms that may be available to consumers to resolve their individual complaints: from informal attempts to resolve complaints directly with the company; to protections provided by providers of payment instruments; to alternative dispute resolution services; to formal legal action in small claims courts. It also examines legal actions that consumers can take collectively, and actions that may be taken on behalf of consumers by private consumer organisations or government consumer protection agencies.

The second part of the report examines the impediments to pursuing monetary judgments for consumers in cross-border cases and to ensuring that such judgments ultimately result in the compensation to consumers. It examines the ability to obtain orders from a foreign court to freeze or repatriate overseas business assets; the ability of consumer protection agencies to gather and share information about assets with foreign agencies; and international agreements for the recognition and enforcement of monetary judgements. These issues were specifically highlighted by Section VI of the OECD Cross-Border Fraud Guidelines as areas for the future joint study.

In terms of scope, the report is limited to dispute resolution and redress in cases involving business to consumer transactions that result in economic harm. It examines mechanisms to resolve disputes and obtain monetary compensation for consumers in small value claims arising out of transactions for the sale of goods and services, especially when those transactions occur across borders. Although they may overlap, it does not specifically cover dispute resolution and redress in cases between private individuals (*e.g.* personal injury, landlord and tenant, family, or employment law cases) or for cases involving commercial practices that damage the health and safety of consumers (*e.g.* product liability, product safety, or environmental law cases).

The report has been prepared as background information for participants to the OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, to be held in Washington, DC on 19-20 April 2005. It is hoped that the report will provide a basis for further discussion and information exchange among workshop participants on issues surrounding the role of consumer dispute resolution and redress in the global marketplace.

PART I: MECHANISMS FOR DISPUTE RESOLUTION AND REDRESS

A. INTERNAL COMPLAINTS HANDLING

Overview

An effective process for businesses to handle consumer complaints internally can help alleviate the need for external resolution procedures, saving both consumers and businesses valuable time and money. A number of international consumer protection instruments have recognised the importance of effective processes for internal complaints handling. The OECD E-commerce Guidelines recommend that "[b]usinesses and consumer representatives should continue to establish fair, effective and transparent internal mechanisms to address and respond to consumer complaints and difficulties in a fair and timely manner and without undue cost or burden to the consumer. Consumers should be encouraged to take advantage of such mechanisms" (OECD, 1999). The *UN Guidelines* call on governments to "encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers" (UN, 1999). The Asia Pacific Economic Co-operation ("APEC") *Voluntary Online Consumer Protection Guidelines* also state that businesses should "provide consumers with fair and timely means to settle disputes and obtain redress without undue cost or burden" and encourage the use of "internal mechanisms to address consumer complaints" (APEC, 2002).

From a business perspective, ensuring that disputes can be handled internally offers many advantages, by enhancing consumer satisfaction and loyalty, and avoiding more costly and time-consuming external dispute resolution procedures. From a consumer perspective, direct recourse to the company is also usually the most advantageous way to solve a dispute. Consumers are generally more interested in concrete solutions to their problems, by obtaining delivery, repair, replacement, or refund of a product or service they have purchased, than in asserting their legal rights (Ramsey, 2003, p. 38). In terms of time, expense, and ease of use, obtaining such solutions through internal processes, where possible, is preferable to recourse to external mechanisms. In addition, attempting to resolve disputes directly with the business is often a pre-requisite to being able to use third party mechanisms for dispute resolution and redress including payment cardholder protection schemes, and alternative disputes resolution services.[7] As with other informal mechanisms, however, recourse to internal complaints handling processes will not be effective in cases where consumers have been the victims of illegitimate businesses or fraudsters.

Principles and practical guidance for businesses

There have been efforts at the international level to come up with principles and practical guidance for businesses to ensure that consumer complaints are resolved in a fair, prompt and effective manner. In July 2004, the International Standards Organisation (ISO) adopted an International Standard to provide guidance for the design and implementation of complaints handling processes for all commercial and non-commercial transactions including those relating to e-commerce (ISO, 2004). The standard sets out nine guiding principles for the effective handling of complaints. It also provides practical guidance on the planning, design, operation, maintenance and continual improvement of the complaints handling process. The standard is one of a trio of standards on customer satisfaction in the ISO 9000 Quality Management area. The other two standards, due to be completed in 2006, will set out guidelines for the development and implementation of codes of conduct and external dispute resolution.

Industry groups have also been active in developing principles and practical guidance in the complaints handling area. In 2003, the International Chamber of Commerce (ICC) issued best practices for customer redress in online businesses (ICC, 2003). The best practices are designed to give advice and practical assistance to businesses operating in the online environment to ensure the majority of consumer complaints can be resolved internally. They are also intended to provide consumers with information on what to expect from a business's internal customer redress system. The best practices include seven guiding principles for internal complaints handling, setting out that systems should be objective and clear; credible and supportive to customers; easily accessible; free; speedy and equitable; sufficiently resourced; and should not deprive the customer of any right he or she would otherwise have. The best practices also provide operational guidance to companies on how to implement these principles into day to day processes for consumer complaints handling and redress.

Facilitating complaints handling in cross-border cases

At the European level, there have been initiatives to facilitate and streamline the consumer complaints process, in particular in cross-border cases. In 1999, the European Commission introduced a standard consumer complaint form to assist businesses and consumers reach friendly settlements to disputes. The form is designed to help consumers communicate better with businesses, allowing them to describe their problems and propose solutions in a clear and simple manner. The form can be used for any kind of commercial consumer dispute regardless of the sum of money involved. In order to simplify communication in cross-border disputes where the consumer and business may speak different languages, the form is in a simple multiple-choice format and is available in eleven European languages. Where friendly settlement of the dispute cannot be reached, the form includes an option for the company to propose referral to an out of court settlement body. The European Consumer Centres Network (ECC-Net),[8] a network of national consumer centres established by the Member States and the European Commission, provides assistance to consumers in using the form and pursuing cross-border complaints.

Another recent innovation to facilitate complaints handling in cross-border transactions is the Consumer Complaints Form for Online Resolution Mechanisms (CCForm) developed by the Federation of European Direct and Interactive Marketing (FEDMA).[9] Although not yet in operation, the aim of CCForm is to provide an online platform where consumers can file complaints in their own language that will then be automatically translated (where necessary) and referred to the business. Where the business is registered, the complaint is automatically transmitted to it and the complainant is assured of receiving a response. If the business is unregistered, CCForm will attempt to contact it and request its participation in the complaints process but the complaint is not automatically referred. The platform is designed to be used for any consumer complaints arising from commercial transactions whether occurring online or offline. Consumers will be able to track the progress of their complaint online, and, where a settlement cannot be reached will have the option to refer the complaint to an ADR services provider. Although funded by the European Commission, the project is intended to be available for use by consumers and businesses anywhere in the world.

B. PAYMENT CARDHOLDER PROTECTIONS[10]

Overview

Payment cardholder protections, sometimes informally referred to as "chargebacks," are remedies provided by payment card issuers to consumers for unauthorised or disputed charges on their payment cards. The protections currently available to cardholders vary considerably among OECD member countries. They can include anything from a consumer's ability to have billing errors corrected; to liability limits for unauthorised charges; to redress for non-conforming or non-delivered goods and services. In

some instances these protections are required as a matter of national law or regulation, but in others they are provided voluntarily through industry codes or other programmes by card issuers. In either case, they are typically implemented through the payment card networks' chargeback mechanisms. These payment card networks have global reach, thereby considerably reducing redress challenges for consumers shopping across national borders. When provided in a transparent and effective manner, cardholder protections can increase consumer confidence in the use of payment cards for online purchases, and in the global marketplace more generally.

Protections set out in international and regional instruments

The OECD E-commerce Guidelines highlight the important role of payment cardholder protections and enhanced consumer education in the development of the online global marketplace. The Guidelines provide that "[L]imitations of liability for unauthorised or fraudulent use of payment systems, and chargeback mechanisms offer powerful tools to enhance consumer confidence and their development and use should be encouraged in the context of electronic commerce." The importance of protections for payment cardholders, especially for unauthorised and fraudulent payments in cross-border transactions is echoed in the OECD Cross-Border Fraud Guidelines, which call on member countries to jointly study "approaches to developing additional safeguards against the abuse of payment systems and redress for consumer victims of such abuse."

At the European Union level, although there is no specific instrument that deals directly with the issue of consumer protections for payment cardholders, some directives or other initiatives contain relevant provisions. For example, article 8 of the 1997 Distance Selling Directive[11] provides that a consumer should be reimbursed where fraudulent use has been made of his or her payment card in connection with distance contracts covered by the Directive. Similar protections are included in the 2002 Directive on the distance marketing of consumer financial services.[12] Article 11 of the 1987 Consumer Credit Directive[13] provides consumers with the legal right to pursue remedies from credit issuers in cases of disputes with the suppliers of goods and services (for non-delivery or non-conformance) that cannot be resolved amicably. In addition the 1997 Commission Recommendation on Electronic Payment Instruments[14] addresses a number of issues that are relevant in the context of the contractual relationship between the providers of electronic payment instruments, including payment cards, and consumers. It recommends limiting consumers liability for losses sustained due to the loss or theft, and providing consumers with full refunds in cases of processing errors. Although not legally binding, the Recommendation is supposed to be fully implemented in all EU member states.

In December 2003, the European Commission issued a communication paper concerning a new legal framework for payments in the Internal Market.[15] The communication addresses various issues to be included in a future legal framework establishing a "Single Payment Area," including adequate protections for users of payment services. It recommends that any future instrument set out a high level of consumer protection, including limited liability for unauthorised payments and the possibility to seek reimbursement from the payment provider in cases of non-delivered or non-conforming goods and services. The Communication stresses that any future instrument should be technically neutral, applying to all payment services including traditional forms, such as payment cards or credit transfers, and forthcoming methods, such as internet and mobile payment schemes.

National legal or regulatory regimes for payment cardholders

Not all OECD member countries have legal or regulatory regimes covering consumer protections for payment cardholders. Furthermore, there are great differences among those that do have these regimes. While many member countries, for example, have specific provisions with regard to unauthorised charges and processing errors, not as many have specific provisions addressing non-delivery or non-conforming

goods and services. Even fewer member countries have specific provisions that discuss consumer satisfaction issues. There also are differences among nations with regard to the types of problems that are addressed by specific legal provisions, and those which are either left to guidelines, industry practice, or up to consumers to work out with merchants and issuers on their own. Among the differences of particular relevance to e-commerce are whether or not the regimes cover all payment cards and how the regimes treat domestic versus international transactions.

Unauthorised use. Several OECD member countries have specific legal or regulatory provisions dealing with unauthorised charges to payment cards. Those member countries with these provisions include Belgium, Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Korea, Mexico, Norway, Poland, Portugal, Sweden, the United Kingdom and the United States.

In some of these countries the levels of protection for consumers may vary according to the circumstances of the case. For example, a key determinant in countries such as Belgium, Denmark, Korea, Norway and Sweden appears to be whether there was negligence on the part of the consumer. In Belgium, there are different ceilings of liability that take into account such factors as whether negligence, or extreme negligence, played a role, and whether fraud was committed before and/or after notification. In Sweden, consumers are only liable if the card was given to a third party, if it was lost negligently, or if the cardholder fails to notify the issuer immediately. In Korea, an issuer can contract out of liability in the event of a "serious mistake" by a cardholder. However, a 2004 amendment to the Credit Finance Act exempts consumers from liability where they disclosed their password due to violence or threat of violence.

Non-delivery. Few OECD member countries report having specific legal or regulatory provisions protecting cardholders in cases of non-delivery of goods or non-performance of services. Among those that do are Finland, Greece, Japan, Korea, Norway, the United Kingdom, and the United States. The details of the provisions differ among the countries with specific provisions already in place, although the focus in all is providing consumers with some ability to avoid liability for charges incurred if goods are not delivered in a timely manner. In Japan, credit cardholders can raise claims against the issuer in some cases of non-delivery, and in the United States credit cardholders can delay payment of disputed amounts or have such funds provisionally restored while the dispute is being resolved. Meanwhile, in Korea, both credit and debit cardholders can refuse payment if goods are not delivered. Legal and regulatory provisions also often address issues of connected liability. In Finland, for example, the Consumer Credit Act includes provisions for connecting the liability of the merchant to the card issuer. In the United Kingdom, for items between GBP 100 and GBP 30 000, both the creditor and the supplier are liable in the event of breach of contract or misrepresentation. In Denmark, protections for non-delivery problems are provided in the Consumer Ombudsman Guidelines. However, there are no specific legal provisions because that issue is considered a part of the purchase commitment between a seller and buyer/cardholder. The same rationale holds true for the lack of specific legal protection in the case of defective goods or services considered below.

Non-conforming goods and services. Member countries with specific provisions on non-conforming goods and services include Finland, Greece, Japan, Korea, Norway, the United Kingdom, and the United States. For example, Finnish law in this area provides protections equal to those for non-delivery; that is, there is connected liability for the merchant and the credit issuer. Korean laws provide for rights of withdrawal in some circumstances, although, in practice, cardholders usually seek resolution of disputes through mediation by the card issuer. In Japan, the Instalment Sales Act enables credit cardholders engaging in purchases by instalment to raise the same claims relating to non-conforming goods or services against the card issuer as against the merchant itself, and have payment invoicing stopped temporarily. This Act has recently been expanded to cover a wider range of goods and services.

Consumer satisfaction Only Canada, Denmark, Italy and the United Kingdom report having specific provisions dealing with consumer satisfaction issues. For example, in May 2001 Canadian federal, provincial and territorial ministers responsible for consumer affairs agreed to an Internet Sales Contract Harmonisation Template (the "Template") which serves as a guide to amending provincial consumer protection legislation of general application as they pertain to Internet sales. The statute sets out a mandatory credit card chargeback right where a merchant fails to refund the consumer following a lawful cancellation and the Internet purchase was made by way of credit card. In the United Kingdom, for items between GBP 100 and GBP 30 000, both the merchant and the issuer are liable in the event of breach of contract or misrepresentation. This, however, only applies to credit cards. In Italy, the legal protection is afforded solely for non-face-to-face contracts.

Different protections for different payment schemes. One key question as new payment methods, such as prepaid cards, mobile and online payment schemes, evolve is whether current legal and regulatory regimes cover all payment mechanisms and not only the more traditional credit and debit cards. These new payment mechanisms may eventually be a major component of the online business-to-consumer marketplace. Consumers may wish to use other systems to avoid the disclosure of their credit card information. However, in doing so, they may relinquish consumer protections unless these laws and regulatory regimes apply to the new payment systems.

Currently a number of countries limit consumer protections to users of credit cards as opposed to other types of payment cards or emerging payment systems. For example, in the United States, long-standing legislation provides significant protections to cardholders of credit cards. However, the laws provide less protection for holders of debit cards and users of other emerging cards or payment schemes. This issue recently arose in relation to the online payment provider, PayPal. Following an investigation, tthe New York State Attorney General's office alleged that PayPal's User Agreement contained false statements advising its users that they enjoyed all "the rights and privileges expected of a credit card transaction." In reality, users were often denied reimbursement when goods and services ordered through PayPal were not delivered (New York Attorney General, 2004). Among other member countries that differentiate protection levels based on the type of payment mechanism used are Austria, Canada, Finland, Greece and the United Kingdom.[16] Legal and regulatory regimes in these countries grant less protection to users of debit cards than credit cards and it is unclear how they will apply to other payment systems once they come into more widespread use by consumers, especially in their online purchases.

In other countries, legal protections apply to a broader range of payment cards, if not all kinds of electronic payments. For example, in Denmark, legislation passed in July 2000 provides protections in such areas as processing errors, transparency, options of payment methods, fraudulent use, and confidentiality/data protection for all electronic payments that are offered or available for use. In Ireland, new regulations introduced in February 2005 to implement the 2002 European Directive on the distance marketing of consumer financial services include protections which apply equally to all payment cards. In Poland, a new law implementing the 1997 European Commission Recommendation on Electronic Payment Instruments came into force in October 2003. The law limits the liability of cardholders in cases of loss or theft and applies equally to credit, debit or charge cards. In Finland, pending legislation, expected to be adopted in the Spring 2005, will extend the protections for credit cardholders set out in the Consumer Protection Act to debit-card holders.

Protections mandated by industry practice

In addition to laws and regulations, important protections are also provided by industry practice through such means as industry codes, card network requirements and individual issuer initiatives.

Industry codes. In a number of countries the card industry has implemented self-regulatory codes that contain provisions relevant to card-related protections and the rights and responsibilities of the parties to the card system. They are developed by industry, often in partnership with governments and consumer representatives. Compliance with such codes can be voluntary or obligatory, either by an industry association or government body.

For example, the New Zealand Bankers' Association has issued a Code of Banking Practice for its member banks. The Code is a self-regulatory regime, and the Banking Ombudsman monitors compliance with it. The Code clarifies the obligations of bankers and consumers in respect of the loss or theft of cards. Similarly, the Australian Banking Industry Ombudsman is an industry-based scheme that provides individuals and small businesses with an external means of investigating and resolving their complaints about banking services. Australia also has an Electronic Funds Transfer Code of Conduct (EFT Code), developed by a working group of government, industry and consumer representatives that has been subscribed to by most financial institutions offering retail electronic funds transfer services in Australia. The EFT Code, which was revised in 2001 and again in April 2004, covers all forms of electronic funds transfers, including ATM and EFTPOS (electronic funds transfer at point of sale) transactions, telephone and internet banking, all credit card transactions (other than those intended to be authenticated by a manual signature), and stored value products such as smart cards, pre-paid telephone cards and digital cash. The British Bankers Association has also issued a voluntary banking code providing that card issuers bear full responsibility for loss occurred due to certain misuses of cards. In some countries, card-issuing banks have voluntarily established dispute resolution services. For example, in Italy, an ombudsman panel is available to settle low-value disputes. Consumers can apply to the ombudsman after dealing with a particular bank's own complaints department, but only if the consumers have not already filed a claim in court. Similarly, in Germany certain bank associations have set up conciliation services for consumers.

Card networks. The major card networks impose obligations on their issuers to provide protections that may exceed those required by national laws. Such measures can provide important benefits to cardholders. Reponses from the member countries focused primarily on the three largest card networks: Visa, MasterCard, and American Express. Each of these networks suggests that issuers of its cards abide by a number of policies aimed at protecting cardholders. For example, Visa USA advertises a "zero liability" policy for US cardholders, which promises protection against liability for certain unauthorised credit or debit charges. Visa International has a global policy that requires issuers to implement the chargeback process for certain kinds of complaints. Visa Canada has issued a voluntary "e-promise" initiative to provide consumers recourse in most situations covered by the official "Template" (see above) for all forms of distance sales (*e.g.* Internet, mail and telephone order). MasterCard also advertises a "zero liability" policy for certain unauthorised uses of US-issued credit and debit cards. American Express has implemented a programme through which US cardholder disputes regarding charges for electronically delivered goods or services will result in an immediate chargeback.

Individual card issuers. In some cases, individual issuers supplement the requirements imposed by the card networks to provide additional protections for consumers. For example, some US-based issuers opted to go to the zero-liability policy for Internet purchases prior to being required to do so by the payment card networks. Some of these protections are marketed specifically to allay fears of online shopping, providing protections like "purchase insurance" and "extended warranty" or "purchase replacement protection". Issuers in various other member countries provide similar reassurances. For example, in Australia some issuers provide protections like "online security guarantee" or "100% shopping guarantee".

Cross-border considerations

Some legal and regulatory regimes differentiate between domestic and cross-border transactions. In an era where cross-border transactions are breaking down barriers between national jurisdictions, this issue can be especially important. A lack of resolution could leave consumers either confused as to when protections apply in one case or over-confident in their protections in another.

The United Kingdom provides an example of a member country where there may be more comprehensive protections for domestic transactions than for cross-border transactions. A recent decision by the United Kingdom High Court held that Section 75 of the United Kingdom Consumer Credit Act 1975, which provides consumer protections for product related difficulties do not apply to overseas credit card transactions. The Office of Fair Trading is considering whether to appeal the decision (OFT, 2004). By contrast, in the United States cardholders doing business with merchants outside the United States are covered by the same federal legal protections as those afforded them when trading with merchants within the United States.

Due to the limitations of legal protections in some countries, policies instituted by the card networks can be particularly useful because they can standardise protective measures across national borders. However, where they are optional, their use is left to the discretion of the individual issuer.

C. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Overview

Where efforts to resolve disputes directly with businesses fail, alternative dispute resolution (ADR) can offer consumers a quick, effective and cheap way to obtain a remedy without the burden and expense of taking formal legal action. There are a wide variety of ADR mechanisms. Some of the most common forms are mediation, conciliation, assisted negotiation, and arbitration. Although there is not full consensus - in the academic or business fields - on the precise definitions of these terms, they can be broadly categorised into consensual versus adjudicative processes. Mediation, conciliation, and assisted negotiation are all consensual processes whereby a neutral third party facilitates communication between the parties to help them reach agreement. Arbitration is an adjudicative process whereby a neutral third party gathers information from both parties and makes a decision that is often intended to be legally binding and final. Arbitration is more formal or "court-like" than consensual ADR mechanisms, with parties agreeing (either before or after the dispute arises) to be bound by the final decision of the third-party arbitrator. In consensual ADR schemes, on the other hand, decisions are agreed upon by the parties themselves rather than imposed by the third party.

In recent years there has been an increasing use of information communications technology in alternative dispute resolution processes. In particular, the growth of the Internet during the 1990s provoked great interest in online ADR, or ODR as it is sometimes known.[17] There are different forms of online ADR mechanisms which may be suitable to business to consumer disputes, including fully automated mechanisms (where outcomes are generated without human intervention),[18] or assisted negotiation and mediation which involve active participation of a third party. While some online ADR services may only be used to resolve disputes arising from online or ecommerce transactions, more commonly they may be used for all forms of disputes, whether online or offline (Conley Tyler, 2004, p4). Online ADR services for business to consumer disputes exist in a variety of contexts, including within a particular online marketplace (*e.g.* online auction sites), as part of a trustmark or seal programme, or on an independent basis.[19] These differences may have an effect on consumer access to ADR and on business compliance with the outcome.

Principles for ADR procedural rules

To date there are no legally binding international principles setting out procedural safeguards governing the accessibility, independence, transparency, and cost, among other issues for ADR services in business to consumer cases.[20] On the other hand, there have been a number of initiatives to develop voluntary or "soft-law" principles.

At the international level, the OECD E-Commerce Guidelines set out that alternative dispute resolution mechanisms should provide "effective resolution of the dispute in a fair and timely manner and without undue cost or burden to the consumer." The International Standards Organisation (ISO) is also currently developing an international standard on external dispute resolution which is expected to be completed in 2006. Together with the already published standard on internal complaints handling (see section A above) and a forthcoming standard on codes of conduct, the standard will form one of a trio of standards on customer satisfaction in the ISO 9000 Quality Management area.

At the regional level, the European Commission has issued two recommendations to guide the implementation of ADR services for consumer disputes. The first, issued in 1998, governs standards for out of court dispute resolution procedures which lead to a settlement of the dispute through the active intervention of a third party (*i.e.* a proposed or imposed solution).[21] It includes seven principles including principles of independence; transparency; adversarial proceedings; effectiveness; legality; liberty and representation. The second, issued in 2001, governs out of court procedures which lead to a settlement between the parties by common consent, and includes four principles relating to the impartiality; transparency; effectiveness; and fairness of the procedure.[22] ADR schemes that are deemed to respect the principles set in the recommendations are notified to the Commission by Member States for inclusion in a centralised database.[23]

At the national level, some OECD member countries have also developed co-regulatory principles to govern industry-based ADR schemes. For example, in 1997 the Australian government released Benchmarks for Industry-Based Customer Dispute Resolution Schemes, which were developed with the assistance of dispute schemes, consumer groups, government and regulatory authorities. The Benchmarks set out six comprehensive principles - relating to accessibility; independence; fairness; accountability; efficiency; and effectiveness - that are intended to guide industry in developing and improving ADR schemes (Minister for Customs and Consumer Affairs, 1997). The Australian National Alternative Dispute Resolution Advisory Council (NADRAC) has also issued a framework for the ongoing development of ADR standards with recommendations for government and private sector ADR providers (NADRAC 2001). It is currently developing principles for the use of information technology in dispute resolution (NADRAC 2002). In many other member countries, there are legal provisions governing certain aspects of ADR procedures.[24] For example, it is common for countries to have laws setting out confidentiality rules for ADR proceedings or regulating the qualifications and neutrality of ADR practitioners. However, there are no overarching legal frameworks regulating all procedural aspects of ADR services in consumer cases.

In the last few years there have also been a number of private sector initiatives setting out principles for business to consumer ADR schemes operating in the global marketplace. For example, in November 2003 the Global Business Dialogue on Electronic Commerce (GBDe) adopted guidelines for ADR in business to consumer disputes arising from 'electronic' transactions. The guidelines were negotiated with the Consumers International and offer recommendations for ADR providers on impartiality and qualifications of personnel; accessibility and convenience; speed; cost; transparency; representation; applicable rules and consumer awareness. They also include recommendations for governments concerning the need to address international rules on jurisdiction and applicable law and to adopt different measures to promote increased use and development of ADR. The International Chamber of Commerce has also issued best practices for online dispute resolution (ODR) in business to consumer and consumer to consumer transactions (ICC, 2003). The best practices include guidance for businesses engaging in online

transactions with consumers and for online dispute resolution providers. They encourage businesses to use ODR wherever practicable when disputes with consumers cannot be resolved internally and set out recommendations for ODR providers relating to the accessibility, convenience, privacy and confidentiality, user information, representation, and choice and qualification of dispute resolution professionals. Finally, in 2002, the American Bar Association (ABA) Taskforce on Ecommerce and ADR issued recommended best practices for ODR providers (ABA Taskforce, 2002). Rather than set minimum substantive standards, the goal of the ABA best practices is to focus on the use, adequacy, content and means of disclosures by ODR providers of information about their services, policies and procedures.[25]

Consumer groups have also developed recommendations in this area. For example, a 2000 resolution of the Trans Atlantic Consumer Dialogue (TACD) called for ADR systems to be easily accessible and convenient; free or low-cost; independent; expeditious; fair and equitable; and staffed by personnel trained in both basic legal concepts and mediation skills. They also recommended that necessary frameworks and standards for ADR systems be set out in legislation (TACD, 2000). With respect to online ADR, Consumers International has recommended that to be "useful to consumers" mechanisms need to cover all types of B2C disputes; be free or low cost; be available for initiation by consumers; be visible, accessible and easy to use; and operate in a timely fashion. Furthermore, they state, in order to be "optimally effective," online ADR mechanism need to accommodate linguistic diversity; be scaleable and coordinated with each other; and offer appropriate levels of security (Consumers International, 2001, p.15).

Finally, procedural safeguards may also be introduced into ADR processes through professional codes of conduct to which mediators, conciliators and other third party neutrals are often required to adhere. For instance, where ADR is undertaken by lawyers, they will often be subject to the ethical requirements and disciplinary procedures of their national bar associations or law societies which may serve to introduce some procedural safeguards, particularly around independence, impartiality and transparency.

Principles governing recourse to ADR

Related to principles governing procedural rules are principles governing the issue of recourse to ADR, including whether consumers can be contractually required to resort to ADR procedures prior to traditional court mechanisms; and/or whether they can be required to submit to binding ADR, either before or after the dispute has arisen. Again there are no international rules in this area. At the regional level, the 1993 EU Directive on Unfair Terms in Consumer Contracts,[26] sets out that "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." In the annex to the directive, a list of example unfair clauses includes "clauses … to exclude or hinder the consumer's right to take legal action or exercise any other legal remedy." In addition, the 1998 and 2001 Recommendations of the European Commission on out-of -court settlements in consumer cases, provide that "[ADR] procedures may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised."

At the national level, member country laws vary greatly. With respect to contractual agreements to exhaust recourse through ADR prior to seeking redress through the courts, few member countries report having specific provisions that would affect the validity of such clauses. A number of European countries, however, interpret the EU Unfair Terms Directive as invalidating contracts that require prior resort to ADR.

With respect to binding ADR, in general member countries do not have specific provisions that prohibit contractual agreements between parties to be bound by ADR after a dispute has arisen, and, *a fortiori,* at the end of the ADR process. However, the general practice appears to be that contractual

provisions binding parties to ADR prior to a dispute having arisen may be regarded as an "unfair" contract term or contrary to public policy, notably if it deprives the consumer to the right to go to court. For example, legislation in Sweden and France mandates that consumer contracts entered into prior to a dispute that contain an arbitration clause are automatically invalid as unfair. Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount. In 2002, a court in Ontario (Canada) found that companies could in certain circumstances curtail consumer recourse to the courts and compel consumers to use arbitration.[27] In apparent response, the new Ontario Consumer Protection Act, 2002 (not yet in force), includes a statutory over-ride of any contractual restrictions on the ability of consumers to go to court to protect their rights under the Act.[28] Other countries which have adopted this approach include Australia, Austria, Denmark, Finland, Italy, Netherlands, and Spain. In Japan, a new arbitration law which entered into force in 2004, includes an interim provision allowing a consumer, in principle, to cancel pre-dispute arbitration agreements.[29] In New Zealand and the United States, consumers are generally free to consent to be bound by ADR, but a court may consider general contract law defenses such as fraud, undue influence or unconscionability to strike down such a contractual provision.

The issue of recourse has been addressed in self-regulatory and other non-government developed principles for ADR. Principles developed by consumer groups have long recommended that consumers should not be deprived of rights to access the courts.[30] In addition, some business codes state that consumers should not be forced into ADR proceedings. For example, the GBDe guidelines state that "ADR should be presented as a voluntary option for consumers if a dispute arises, not as a contractual obligation." They also generally discourage the use of binding arbitration on the grounds that it "may impair consumer confidence in electronic commerce," and prohibit pre-dispute binding arbitration agreements, stating that "[c]onsumer decisions to engage in binding arbitration must be fully informed, voluntary, and made only after the dispute has arisen" (GBDe, 2003). Likewise, the ICC best practices state that "[g]enerally, companies should not obligate consumers to agree to use binding dispute resolution processes prior to the materialization of a dispute" (ICC, 2003).

Government established, funded or run ADR programmes

Many OECD countries offer some sort of government-established, funded or run programme to resolve business to consumer disputes. In a number of countries, there are consumer complaints bodies to deal generally with business to consumer disputes. For example, in Denmark, Finland, Norway and Sweden state-run consumer complaint boards have competence for most commercial consumer disputes. In Greece, there are public ADR committees operating in every prefecture. In Mexico, the federal consumer protection agency (Procuraduría Federal del Consumidor) administers a two-stage mediation and arbitration scheme. Consumers are required to first submit their disputes to mediation proceedings. If no agreement can be reached, the dispute is then referred to arbitration proceedings. In Poland, there exist Standing Conciliatory Consumer Courts which serve as an alternative to ordinary courts. In 2003, Turkey established arbitration committees for resolution of consumer disputes. Recourse to the arbitration committees is compulsory for disputes under a certain threshold and rulings are legally binding. Some countries also provide for court-annexed or court-referred ADR. For example, in France there is a judicial conciliation scheme by which a judge, with the agreement of the parties, may designate a conciliator to assist in amicable dispute resolution. In the Swiss canton of Geneva a new mediation law was adopted in October 2004 allowing judges to refer a dispute to mediation with the agreement of the parties. A variety of other government ADR mechanisms have been established in Australia, Germany, Hungary, Japan, Korea, New Zealand, and Spain.

A number of member countries also have established government-run business to consumer ADR schemes or bodies that deal only with consumer complaints from a particular industry or sector or particular kinds of disputes. For example, in Austria, an arbitration panel was established in October 2002

pursuant to the Energy Liberalisation Act to resolve disputes relating to energy services. In Canada, the Financial Services Commission of Ontario has been established with a mandate to resolve motor vehicle insurance disputes through mediation and arbitration. In Italy, there are arbitration and conciliation committees to resolve business to consumer (as well as business to business) disputes relating to tourism services. In Finland, a new Securities Complaint Board began operating in March 2002. In Korea, a March 2002 revision of the 'Door-to-Door Sales Act' and the 'Consumer Protection Act on E-Commerce' authorises the Korea Consumer Protection Board (KCPB) to refer disputes relating to door-to-door sales, telemarketing, pyramid sales and e-commerce, to the Consumer Dispute Settlement Commission (CDSC), before it issues corrective action. In Poland, an Ombudsman for Insured Persons, and an attached conciliatory court, to resolve disputes between insurance providers and consumers. There are currently also proposals to create conciliatory courts in the telecommunications sector. Australia, Austria, Italy, Mexico, Netherlands, Spain, and Sweden also have sector-specific government-run schemes in place.

Finally, in addition to government established or run schemes, in some countries certain businesses or industry sectors are required by law to establish or to belong to an ADR service to resolve disputes with consumers. For example, in Australia the *Corporations Act of 2001* requires that businesses providing financial services must be a member of one or more approved external dispute resolution schemes to deal with consumer complaints. In Germany several bank associations run conciliation services. The establishment of these services was recommended by several acts of the EU. In the United Kingdom, the Communications Act 2003 requires every public communications provider in the UK to provide consumers with access to a dispute procedure scheme which has been approved by the telecommunications regulator Ofcom.

Encouraging the use and development of ADR

Given the practical and legal limitations of traditional court-based dispute settlement mechanisms in cross-border cases, over the past ten years there have been significant efforts at the international, regional, and national level to encourage the use and development of ADR as a viable alternative to court action in consumer cases, in particular cases arising from Internet or cross-border transactions.

Fostering the development of effective ADR mechanisms for business to consumer transactions has been a central focus of the OECD's programme to build trust in the global marketplace. The OECD E-Commerce Guidelines stress the need for businesses, consumer representatives and governments to work together to continue to provide consumers with access to alternative dispute resolution mechanisms. They also call for the innovative use of information technologies to enhance consumer awareness and freedom of choice relating to alternative dispute resolution (OECD, 1999). In December 2000, the OECD together with the Hague Conference on Private International Law and the International Chamber of Commerce organised a conference on business to consumer dispute resolution in the online environment.[31] The primary objective of the workshop was to explore how existing and future online ADR mechanisms can help resolve B2C disputes arising from privacy and consumer protection issues and thus improve trust for global electronic commerce. More recently, the OECD has focused on the role ADR can play in promoting SMEs (small and medium sized enterprises) to engage in cross-border transactions with consumers and take full advantage of the expanded global economy. In June 2004, OECD Ministers adopted a *Declaration on Fostering the Growth of Innovative and Internationally Competitive SMEs*, which encouraged the development and use of ADR mechanisms, as a means to reduce barriers to SME access to global markets.[32]

The European Union also has a strong policy of promoting ADR in e-commerce and cross-border consumer disputes.[33] The European Commission has undertaken a number of practical initiatives to provide consumers with access to ADR services that meet adequate procedural standards. Most significantly in October 2001, the Commission launched the European Extra-Judicial Network (EEJ-Net) to facilitate consumers' access to ADR providers in cross-border cases. Each country participating in the

network is required to set up a central contact point, or "clearing house", to provide consumers with information and support in making a claim to an approved ADR scheme in the country where the business is located.[34] In January 2005, this network was merged with the European Consumer Centres "Euroguichet" to form one stop "European Consumer Centres Network" (ECC-Net), with the aim of providing European consumers a full range of services from information through to dispute resolution. To be included in the network, ADR schemes must be deemed to meet the standards set out in the 1998 and 2001 European Commission recommendations mentioned above. A complementary network, known as FIN-NET, is available for disputes relating to financial services. The Commission has also recently adopted a proposal for a directive on certain aspects of mediation in civil and commercial matters.[35] The proposed directive includes provisions that aim at ensuring a sound relationship between the mediation process and judicial proceedings, by establishing common rules in the Community on a number of key aspects of civil procedure. It also provides the necessary tool for the courts of the Member States to actively promote the use of mediation, without making mediation compulsory or subject to specific sanctions.

The European Commission was also a primary sponsor, together with the Irish Department of Enterprise, Trade and Employment, of the ECODIR (Electronic Consumer Dispute Resolution) project.[36] ECODIR is a three stage consumer conflict resolution service, managed by University College Dublin in Ireland. The first phase is the negotiation phase. Upon receiving a consumer complaint ECODIR sends an invitation to the respondent to enter negotiations and the parties are given a fixed time to negotiate a solution via the ECODIR platform. If no agreement is reached, the parties may initiate the mediation phase whereupon an independent mediator is appointed by ECODIR to facilitate the parties in reaching a solution. If, within 15 days, a solution is not found the mediator may issue a non-binding recommendation. The recommendation is not binding upon the parties, unless they agree to this in a separate agreement, and parties remain free at all times to refer the matter to the courts.

Other significant international initiatives to help consumers resolve cross-border disputes through ADR are the *econsumer.gov* and Global Trustmark Alliance projects. *Econsumer.gov* is a joint project of consumer protection agencies from twenty countries and the OECD, with the primary aim of gathering and sharing consumer cross-border complaints to facilitate enforcement action against cross-border fraud.[37] The project has also recently included an ADR element to link consumers to ADR providers. Upon filing complaints, consumers are provided with the option to choose from an international directory of ADR providers willing to undertake resolution of disputes in the country of the trader. Links between this initiation and the European Consumer Centres network (ECC-Net) is envisaged. The Global Trustmark Alliance is made up of self-regulatory organizations from eight nations in Asia, Europe and the Americas, an Asian coalition of e-commerce organizations, and three pan-European bodies. The alliance intends to promote safe electronic commerce within each of the participating jurisdictions, and a trustworthy system for cross border e-commerce. The GTA is an outgrowth of recommendations made by the GBDe in past years for close cooperation amongst trustmark programs and for the linking together of dispute settlement mechanisms. The GTA anticipates use of an online dispute resolution program developed by the Council of Better Business Bureaus, which will be launched at in April 2005.

At the national level, most OECD countries have adopted policies recognising the potential benefits of ADR for business to consumer cases. These policies aim at increasing the availability or consumer awareness of effective, timely and cheap mechanisms as an alternative to formal court-based dispute resolution. In addition to establishing state-run ADR schemes, as described in the section above, a number of countries have taken practical steps to facilitate privately-run schemes and/or to encourage awareness and use of these schemes by consumers.

For example, in Australia government bodies at the federal and state level have established clearing house facilities to assist consumers in identifying ADR schemes. The Commonwealth government has

established a new online consumer information and advice center (www.consumersonline.gov.au) which also serves as a sort of ADR clearinghouse by providing a directory of who to contact depending on the nature of the complaint. In France, a new online mediation service for consumers was established in September 2004 with support from the Ministry of Justice.[38] The service is run by the organisation, *Forum de Droits sur l'internet,* and provides an interactive online platform through which the parties, and independent third party mediator, communicate. It aims to resolve 500 internet-related disputes a year. In Japan, a new law aimed at promoting the development and use of ADR was enacted in December 2004 and will come into force no later than May 2007. In the United Kingdom, a July 2004 public consultation document issued by the UK Department of Trade and Industry (DTI) proposed the establishment of a scheme to refer consumers directly to accredited third party ADR providers. The referral scheme would be integrated into Consumer Direct, a new government telephone and online consumer advice service (UK DTI, 2004, pp. 42-43). Finally, all European countries belonging to ECC-Net (described below) have established national clearinghouses to provide consumers with assistance in locating and using ADR schemes.[39]

While there has been no comprehensive assessment of the availability, usage and suitability of ADR schemes (public and private) for business to consumer disputes in OECD member countries, a number of surveys of more limited scope have been conducted which indicate that ADR has not yet fulfilled its potential as a low cost and efficient mechanism for the resolution of business to consumer disputes. For example, in 2004 the UK National Consumer Council conducted a survey on the provision and use of ADR in business to consumer cases. The survey found that the provision of ADR services for consumer problems is "*ad hoc* and presents a lottery for the consumer...[depending] either on the type of problem faced or where the problem arises, and sometimes depending on the ability of the consumer to afford the fees" With regard to usage, the survey found that a "microscopically small fraction" of consumer complaints are referred to an ADR service (Doyle, Ritter and Brooker, 2004). In a 2004 report, the Irish European Consumer Centre found that a shortage of ADR bodies and a lack of business participation were creating barriers to ADR use in Ireland and preventing the Centre from operating to its full potential within the EEJ-Net system (Reilly, 2004). A 2003 review by the European Commission of the operation of the EEJ-Net identified "important gaps" in ADR services in member countries. The report found that in some countries certain key sectors were still not covered and that in all countries there was a need for development of ADR services with cross-border competence (EC, 2003a, p17). A recent Eurobarometer survey on access to justice found that 38% of respondents had never heard of bodies, such as arbitrators, ombudsmen, arbitration or conciliation bodies, that could offer an alternative to court action (EC, 2004, p. 13). In late 2001, Consumers International released a survey of twenty nine online ADR schemes for business to consumer disputes, of which only thirteen were deemed "useful to consumers" (Consumers International, 2001). Reviews of this kind indicate that there is still room for improvement in the development, promotion and use of fair and effective ADR services for business to consumer disputes.

D. SMALL CLAIMS PROCEDURES

Overview

Recognising that the court system is often beyond the reach of average consumers with low value claims, a significant number of OECD member countries have introduced simplified court procedures for small claims. These procedures are designed as informal alternatives to traditional civil court proceedings, allowing individuals to resolve disputes and obtain redress at a cost and burden not disproportionate to the amount of their claim. Being independent, binding and enforceable, small claims procedures offer consumers the main benefits of the judicial system without the high costs, delay and procedural complexities procedures associated with the regular courts.

The following twenty responding countries have simplified court procedures available claims under a certain monetary threshold: Australia, Austria, Canada, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, the United Kingdom and the United States. These procedures vary significantly between countries and even between regions in the same country. Variations can be seen in the type of procedure; the type of dispute and claim that may be heard; monetary thresholds; the financial costs to parties; and overall accessibility to consumers ("consumer friendliness").

Type of procedure

Member country responses indicated very different forms of court procedures to resolve small consumer claims. The procedures are broadly organised here into three different categories: separate courts or tribunals of limited jurisdiction; modified procedures in ordinary courts; and other types of simplified procedures. In countries with federal systems, the type of small claims court procedure often varies among the regions. For example, in the United States every state has established a small claims procedure which may be either a stand-alone court or a special division of state, county, municipal or other local courts. Similar variations exist in Canada where all provinces and most territories provide some form of small claims court procedure. In Switzerland, the cantons (federal entities) have a choice whether to provide consumers with conciliation or simplified court procedures to resolve their low value disputes. In the majority of cases, the cantons provide that the *juge de paix* should first attempt to resolve disputes amicably and if this is not successful, the matter is then referred to the court of first instance.

Separate courts or tribunals of limited jurisdiction. In some countries small consumer claims are resolved by separate courts or tribunals of very limited jurisdiction, designed to provide individuals with an accessible form of justice for day-to-day legal matters. In some countries, these tribunals or courts are specialised for consumer disputes, while in others they handle all minor legal matters both civil and criminal. The distinguishing characteristic of these courts and tribunals is that they only resolve minor legal matters, are usually not courts of record, and usually operate under less formal procedures than the higher courts irrespective of the type of case being heard. Examples of this category are the specialist consumer tribunals in the Australian states of New South Wales and Victoria;[40] the 'juridiction de proximité' in France, new form of local magistrates court established in 2002; the Justices of the Peace courts in Italy; the municipal courts in Korea; the minor tribunals and justices courts in Mexico; the sub-district courts in the Netherlands; and the Portuguese magistrates courts (Julgados de Paz) established in 2001.

Modified procedures for small claims in ordinary courts. In a number of responding member countries, small consumer claims are resolved by courts of first instance operating under simplified and/or accelerated procedures. Very often, these courts have a separate division or section to handle small claims. For example, in Australia, all states and territories have a small claims court or tribunal administered by the Magistrates court. In Japan, small claims fall under the jurisdiction of the summary courts, which have several informal procedures to resolve cases expeditiously. In Germany, the courts may resolve low value civil and commercial disputes by simplified procedure. In Greece, the county courts operate under simplified procedures when resolving small claims. In Ireland, there is a small claims procedure available in the district courts. In Norway, there is a special procedure available in the county court for the resolution of small claims, and discussion is under way about improving the system. In Poland, a new simplified procedure for small claims was introduced into the civil code in 2000. This procedure is mandatory for all disputes falling under the specified monetary threshold. In Sweden, there is a specific small claims procedure available in the civil courts. In the United Kingdom there is a special procedure, known as the small claims track, used within the county courts to resolve small claims.

Other types of simplified procedures. In a few countries there are special procedures provided by the regular courts, which may only be used for a particular type of claim. These procedures are not usually tailored towards consumer disputes. For example, in Austria, there are summary proceedings available for debt repayment orders for amounts not exceeding a certain threshold. Similarly in Hungary, there is a simplified payment order procedure, allowing a claimant to obtain a court order (for payment of monies and delivery of movable property) upon the filing of a unilateral petition. In France, a simplified procedure may be used at the *tribunal d'instance* and *juridiction de proximite* for claims for specific performance ("injonction de faire") (*i.e.* a court order requiring the defendant to fulfil his or her contractual obligations). In addition, there is a simplified procedure for filing claims at the tribunal d'instance ("déclaration au greffe").

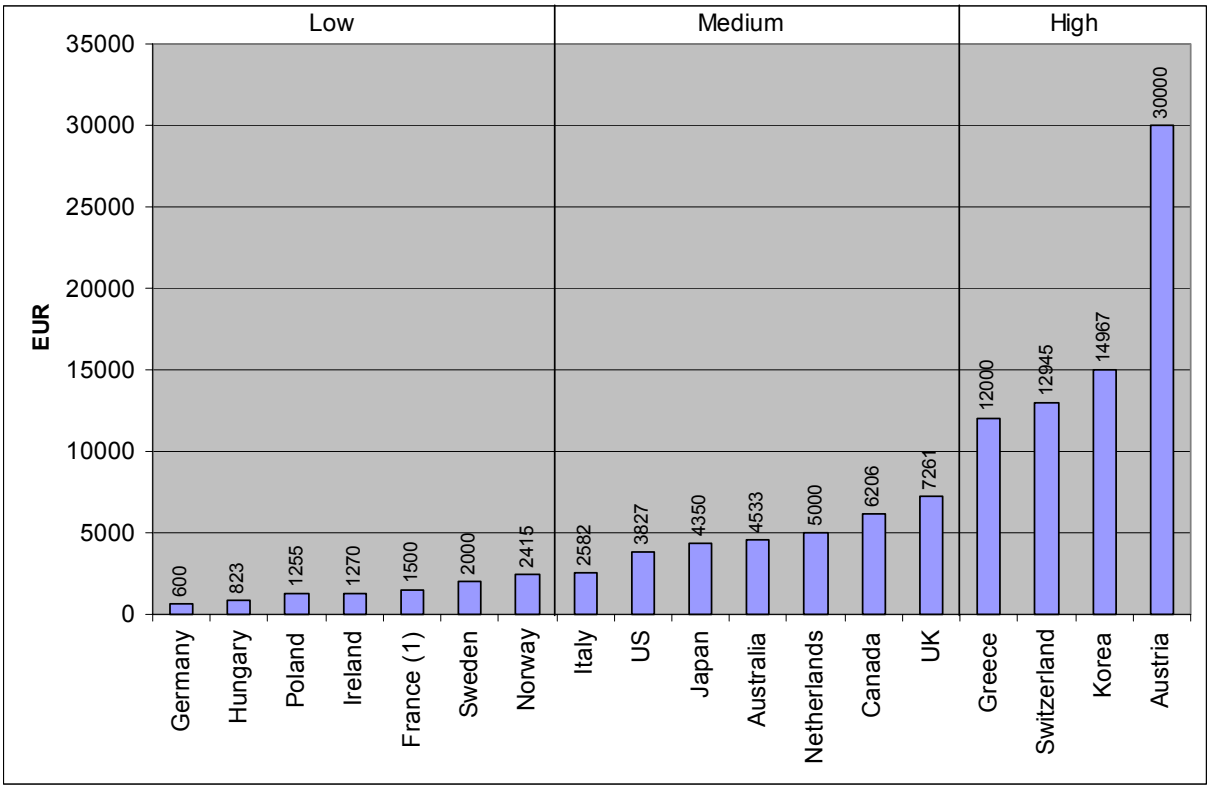
In some countries, as an alternative, or addition, to small claims procedures, there are state run alternative dispute resolution bodies (such as consumer complaints boards or ombudsman schemes) which operate outside the ordinary civil court system to serve the same function as judicial small claims procedures. For example, in Turkey there is no small claims procedure within the court system but there is compulsory recourse to an arbitration committee for disputes under a certain monetary limit. In Poland, Norway and Sweden there are quasi-judicial complaints bodies or consumers tribunals that can issue binding settlement recommendations. These types of bodies have been examined in the discussion on alternative dispute resolution in Section C above.

Type of dispute, remedies, and monetary thresholds

In all responding countries, small claims courts have jurisdiction to adjudicate most types of commercial consumer disputes relating to goods and services.[41] However, in certain countries there are restrictions on the type of relief that may be sought. In Austria, Japan, Korea, Netherlands, Norway and select states in the United States only claims seeking monetary relief (as opposed to injunctive relief) may be filed through small claims procedures. In Austria and Hungary, the simplified procedures may only be used for the recovery of outstanding payments and movable property. In France, the simplified "injonction de faire" procedure only applies to claims for specific performance of a contractual provision.

All countries set threshold limits on the monetary value of the claim that may be filed under simplified proceedings. As can be seen from the figure below, these limits vary greatly by country. At the lower end of the scale are thresholds in Germany, Hungary; Ireland Poland; France; Sweden; Norway and Italy. At the mid range are thresholds in Japan; Australia (Queensland); the Netherlands; Canada (Ontario); and many states in the United States. Finally at the higher end, are thresholds in Greece, Switzerland; Korea and Austria.

Figure 1. Threshold limits in EUR



Note: Conversion of national currencies, where applicable, into EUR, according to the rate on 22 February 2005.

(1) This (EUR 1 500) figure is the threshold limit for proceedings before the "juridiction de proximité." The threshold for the simplified filing procedure ("declaration au greffe") is EUR 3 800 and the threshold for claims for specific performance ("injonction de faire") is EUR 7 600.

Source: OECD.

In some countries threshold limits vary according to the nature of the dispute. For example, in the United Kingdom the threshold limit for commercial disputes is approximately EUR 7 150, whereas claims for personal injuries or claims for housing repairs by residential tenants is approximately EUR 1 400. Similarly, in Greece the threshold limit is EUR 12 000 for most civil disputes except for product liability cases which are limited to EUR 500.

Financial costs to claimants: filing fees, liability for costs, and legal representation[*]

In all responding countries except France, Italy and Mexico, there is a fee for filing a claim. Flat fees are in place in Ireland (EUR 9), Korea, Norway (NOK 845/EUR 103); Portugal (EUR 70); and Sweden (SEK 450/EUR 49). In Portugal, however, the consumer is obliged to pay only 50% of the fee upon filing and the outstanding 50% if his or her claim is unsuccessful. In other countries, the fee is linked to the amount of the claim. For example, in Queensland, Australia filing fees range from AUD 12.50 (EUR 7.50) to AUD 70 (EUR 42); in Germany they range from EUR 75 to EUR 105; in the Netherlands they range from EUR 57 and EUR 190; and in the United Kingdom they range from GBP 30 (EUR 43) to GBP 120 (EUR 175). In Greece and Hungary filing fees are calculated as a set percentage of the claim. Finally, in

[*] Conversion of national currencies, where applicable, into EUR, according to the rate on 22 February 2005.

some countries, fees vary according to the number of claims that are filed by a plaintiff, increasing according to the frequency of filings. For example, in Ontario (Canada) the fee for "infrequent claimants" is CAD 50 (EUR 31), whereas for "frequent claimants" it is CAD 145 (EUR 91). In California, USA the filing fee is USD 12 (EUR 9.5) for the first 12 claims a year and USD 66 (EUR 53) thereafter.

In both the United Kingdom and many states in the United States, a waiver or reduction of the filing fee may be granted to persons unable to afford it. In all responding countries where a filing fee is in place, except some Australian states and territories, consumers are entitled to recover the fee from the other party if they are successful in their claim.

A major factor in assessing the financial burden to consumers of filing a claim through small claims procedures relates to legal representation. If consumers are required to be represented by a lawyer, or themselves feel that the system is too complex to appear in court without a lawyer, the costs of filing a claim increase significantly. The presence of lawyers also increases the formality of the procedure, which may be off-putting to consumers and deter recourse to the courts. Consequently, in most responding countries, small claims procedures are designed to be simple enough for individuals to represent themselves without incurring the cost of a lawyer. Often there will be some form of assistance provided by the court to the unrepresented parties, either in the form of printed information booklets and guides or assistance with filing out forms, submitting evidence etc. In addition, it is common for small claims judge to take more of an "interventionist" role where parties are not legally represented, explaining rules of procedure, evidence and other legal requirements to the parties.

Only one responding country, Portugal, requires an individual party to be legally represented or assisted and this only in cases where the party suffers from a specified physical handicap; does not speak Portuguese; or is otherwise at a manifest disadvantage. In certain states in the United States, although individual claimants are free to represent themselves or be represented by a lawyer, corporations and collection agents may not appear as claimants without a lawyer.

On the other hand, while legal representation is not required and may be actively discouraged in most other countries, only certain jurisdictions in Australia and the United States actually prohibit the use of lawyers. In Australia, legal representation is not permitted in the specialist consumer tribunals in New South Wales or Victoria. In the Queensland Small Claims Tribunal, legal representation requires agreement by both parties and approval by the tribunal. In the United States, many states, such as California, prohibit legal representation. In New York**,** legal representation is permitted but if both sides are represented, the case may be transferred from the small claims section to a regular part of the court. In all other countries legal representation is permitted. In some countries, such as France, Germany, Italy, Japan and the Netherlands, claimants may also choose to be represented by another (non-lawyer) appointee.

In most responding countries, except the United States and Mexico, consumers that are unsuccessful in their claim are liable to pay some or all of the costs the other party has incurred in responding to the claim. This potentially includes court fees; expert witness fees; loss of earnings (of the party or witness); travel and accommodation expenses; and lawyers' fees. In order to reduce the financial detriment to the average consumer of having to reimburse the winning party for costs, many countries place some sort of restriction on cost amounts, and lawyers' fees in particular.[42] In Ontario (Canada) and Sweden, fixed limits are placed on the amount in costs that may be ordered. In Korea, the Netherlands, and the United Kingdom, lawyers fees are either not included in cost awards or there are limits on the fee-amounts that may be recovered. In other countries, there is an element of judicial discretion in the award of costs. For example, in Poland, where parties are usually liable for the other side's costs the judge may exempt a party from liability if he or she can demonstrate an inability to pay.

Relationship with Alternative Dispute Resolution (ADR)

Small claims courts have been described as a "middle ground" between formal civil litigation and alternative dispute resolution (ADR)(World Bank, 2001). Indeed, in many responding countries different forms of ADR are incorporated before or during small claims court proceedings. For example, in Portugal and eight German Länder claimants are required to have prior resort to ADR before judicial proceedings may begin. Once a claim is filed it is automatically forwarded to a court-annexed mediation service. In Australia, the Consumer Trader and Tenancy Tribunal in New South Wales is required to use its "best endeavours" to mediate a settlement among the parties before proceeding to adjudication. Likewise, in the United Kingdom, the court has a duty to encourage the parties to use ADR to resolve the dispute, but it is not mandatory for the parties to do so. Upon filing a claim with the court, claimants are given the opportunity to request a stay for one month to attempt to settle the dispute by ADR. In other countries, such as Ireland, Germany and Sweden, the court will attempt to achieve a settlement among the parties even if not legally required to do so. In the United States, small claims courts increasingly offer ADR services. In some parts of the state of New York, small claims cases may be tried by an arbitrator instead of a judge if both sides agree. In Ontario (Canada) Rule 24.1 of the Ontario Rules of Civil Procedure, which came into effect in January 1999, established a regulatory regime for the Ontario Mandatory Mediation Program (OMMP). The program calls for the referral of all case-managed Toronto and Ottawa civil cases to mediation as soon as they are defended. Cases may also be referred to ADR by judges. In France and Korea judges have the discretion to refer the parties to some form of ADR. In Italy, either party is free to request the Justice of the Peace to resolve the cases using conciliation procedures. Similarly, in Germany and the Netherlands the court may transfer appropriate cases to ADR upon agreement of the parties. In Norway, there are no legal requirements to submit the case to ADR, however, due to the costs of filing a complaint in court, it is common for claimants to first attempt to resolve their dispute through ADR.

Cross-border considerations

Seeking to obtain information on how small claims courts may operate in cross-border cases, the questionnaire asked whether there were any specific legal restrictions on foreign claimants using the system. No responding country reported any such legal restrictions based on the residency of the claimant. Nonetheless, there are often significant practical and financial barriers to using the court procedures of another country to resolve low value disputes. Apart from the time and expense of travelling to another country to pursue a case against a defendant, unfamiliarity with foreign legal systems, and language differences also present practical obstacles to consumers.

The questionnaire asked whether there were options for fully written procedure or other alternatives to in-person hearings, that could help overcome these practical obstacles and facilitate the use of small claims proceedings across-borders. In a number of respondent countries, including Canada, France, Ireland, Japan, Portugal, and the United States, oral hearings are usually required and the claimant is expected to attend in person. In some countries, such as Germany, Norway and Sweden, it is possible to conducting the entire case by written procedure, however, oral hearings may still be required at the discretion of the judge or upon the request of one or both parties. A purely written procedure is also available in the United Kingdom for claims that are admitted or that are not defended.

Some countries have begun to make use of communications technologies to allow for remote attendance of parties or witnesses, or the submission of documents. For example, in Australia, the Victorian and Civil Administrative Tribunal parties may request a telephone hearing if they are unable to attend in person. In Germany, it is possible to receive witness testimony by telephone. In Sweden, witness testimony may be received via telephone-conferencing, and in some cases video-conferencing. In the United Kingdom, there is an online mechanism for money claims for fixed amounts with the County Court. The procedure may be used for foreign claimants, however, an address in England or Wales is required for receipt of documents.

Within the European Union, there have been proposals for new measures to facilitate cross border handling of low value consumer claims in member states. The Tampere European Council Conclusions of October 1999, which set out guidelines for implementing the provisions of Treaty of Amsterdam on improving access to justice and judicial cooperation in Europe, called for the introduction of "special common procedural rules for simplified and accelerated of cross-border litigation on small consumer and commercial claims."[43] In 2002, the European Commission adopted a green paper consulting on a possible future Community instrument that would establish common rules for small claims procedures in order to facilitate cross-border litigation among EU member states.[44]

It may also be possible for consumers to file a complaint through domestic small claims procedures against a business that is based overseas. However, whether the domestic court will be able to establish jurisdiction to subject the foreign defendant to legal process, will depend on the standard jurisdictional rules of country and the particular facts of the case. In addition, even assuming the consumer is able to overcome jurisdictional challenges and receives a favourable judgment, the ultimate enforceability of the judgment in the country where the defendant is based will depend on the laws of that country governing the recognition and enforcement of foreign judgment.

E. PRIVATE COLLECTIVE ACTION LAWSUITS

Overview

In some countries, there is a procedure available for legal action to be filed by groups of private individuals who have each suffered similar harm as a result of the actions of the same defendant. Typically associated with the class action lawsuit in the United States, in recent years this type of action has been gaining in popularity in other OECD member countries as a consumer protection mechanism (albeit often in a more limited form). Collective action can be particularly useful in cases where large numbers of consumers have each suffered small losses. It offers an avenue for redress to consumers who, due to the low value of the claim, would not be willing to undertake the burden and cost of legal action individually. The threat of collective action lawsuits can also play an important role in regulating the marketplace, depriving defendants of ill-gotten gains and deterring future wrongful or irresponsible commercial behaviour. In this respect they serve a useful supplement to action by government consumer protection bodies.

It should be noted that collective action lawsuits differ from country to country both in form and in name. In this report, the term 'private collective action' is used in its broadest sense, and is intended to incorporate any lawsuit – whether it be known as a class action, a group action, or a representative action – in which private individuals consolidate their claims into a single case against a defendant.

Procedures for some form of private collection action are available to consumers in the following responding member countries: Australia (at the federal level and in some states); Canada (in some provinces only); Germany; Japan; Portugal; Sweden; Turkey; the United Kingdom; and the United States (at federal level and in all but two states). The possibility of introducing procedures for private collection actions by consumers is under review in a number of other countries. For example, in Finland, the Ministry of Justice has appointed a working group to study the possibility of introducing a collective action procedure for commercial consumer claims (Finland Consumer Ombudsman, 2004). In Korea, a collective action procedure for shareholder actions came into effect in January 2005 and a proposal to introduce a similar procedure for consumer cases is under review. Finally, in Norway, a government proposal to introduce a private collective action procedure is under consideration.

In Austria, the Czech Republic, France, Greece, Italy, and the Netherlands there is a variant of the private collective action available, whereby a lawsuit may be filed by a third party consumer organisation on behalf of consumers. Such actions closely resemble the private collective action lawsuit. The crucial difference is that the representative party (*i.e.* the party filing the lawsuit) is an established organisation rather than a private individual or individual(s) having suffered harm. These procedures are examined in the section below on legal actions by consumer organisations.

Type of procedure (opt-in versus opt-out)

There are significant differences among responding countries in the procedural rules governing the filing of private collective actions. For simplicity, this report categories them into two broad models – the opt-out and the opt-in model. Both models begin with a lead plaintiff or plaintiffs who file a case on behalf of themselves and a group of other "similarly situated" individuals (*i.e.* those who have suffered the same loss in similar circumstances). The difference arises in determining who is included in the group. Under the opt-out model, all other similarly situated persons are automatically included, and will be bound by the final outcome (judicial decision or out-of–court settlement) of the case unless they take specific steps to exclude themselves. Under the opt-in model, only those similarly situated individuals who have expressly joined the group and agreed to be bound by the final outcome are included in the group.

The opt-out model is the traditional model for private collection action lawsuits. It is applied in Australia; some Canadian provinces (*e.g.* Ontario); Portugal; and in the United States. The threshold requirements (including numbers of affected persons) that have to be met in order to file a collective action vary among these countries. For example, in Australia, where collective action has been available at the federal level since 1992, seven or more persons having claims against the same person may file a lawsuit on behalf of all, or specifically named, other persons who have suffered similar loss. The claims of the group members must have arisen from similar circumstances and must have at least one substantial issue of law or fact in common. In Ontario (Canada), a collective action may be taken where two or more persons have claims raising common issues, and collective action is the preferable means to resolve these common issues. In the United States, one or more persons may file a collective action in federal court on behalf of all other similarly situated persons where the group is so numerous that joinder of all members is impracticable and where there are common questions of law or fact.

Adequate procedures for notification are of particular importance in the opt-out model, so that consumers who may potentially be included in the case and bound by its outcome are alerted to this fact and provided with an opportunity to request exclusion. In Australia, the court will issue an order specifying the methods by which potential plaintiffs should be notified of the pending case. This may include personal notice to identifiable group members or notice through the national media. The court will also set a date by which group members may opt-out of the case by providing written notification to the court. In Ontario (Canada), the court may order that notice be given personally or by mail to identifiable members of the group; that individual notice be given to a smaller sample of the group; or that notice be given by any other means such as publishing, advertising or leafleting. In Portugal, notification may be made by any media channel. It must identify the defendant; at least one of the main parties; the cause of action; and the remedy sought. In the United States, the type of notice depends on the circumstances of the case. Individual notice must be provided to members who can be identified without unreasonable effort. It must specify the nature of the action; the definition of the members of the group; and instructions on how to opt-out. It must advise members of the binding effect of the judgement and that they may enter an appearance in the case through legal counsel. In Australia and the United States, different rules may apply to notification and opt-out rights where the action does not request monetary damages. In Australia, the court may dispense with notification requirements where monetary damages are not sought. In the United States there is no right for members to request exclusion from final judicial decrees or settlement orders where the action seeks declaratory or injunctive relief only.

The opt-in model is applied in Germany; Japan and Sweden. In Germany, there is a procedure allowing a "community" of litigants to file a joint action if the central claim is based on similar factual and legal grounds. Only those who have expressly joined the action are bound by its outcome. In Japan, where several persons have a common claim they elect from among themselves an one or more "appointed" parties to conduct the litigation on behalf of the entire group. The judgment is binding only as to the specified members of the group on whose express behalf the appointed party(ies) acted. In Sweden, the Group Proceedings Act of 2002, introduced a new procedure by which private persons may take collective legal action on behalf of other persons, who are identified by name and address in the summons and individually registered with the court. The final outcome of the case is binding only upon such persons.

Type of dispute; remedies; and settlement orders

In all responding countries, the collective action proceeding may be used in respect of most types of commercial consumer disputes involving sales of goods and services. Similarly, in all countries a wide range of remedies is available from declaratory, to injunctive to monetary damages.

It is quite common, where a proposed settlement between the lead plaintiff and defendant is reached, for the court to have to approve that settlement before it will become binding on the group. This is the case in most responding countries with opt-out collective action models, including Australia, Canada (Ontario), and the United States, where members of the class will typically have less involvement in the case than in the opt-in model. In Australia, all settlement proposals require approval of the court and group members must be notified of any application for approval. In Ontario (Canada) settlements are not binding without the approval of the court. In the United States a separate court hearing is required to assess whether a proposed settlement is fair, reasonable and adequate. The court may also at its discretion refuse any settlement that does not provide members with a new opportunity to opt-out. Settlement proposals also require approval of the court in Sweden, a country with the opt-in model.

Cross- border considerations

No country reported any specific legal limitations on foreign claimants making use of the collective action procedure. Nonetheless, there may be still challenges to non-resident claimants in establishing jurisdiction of the court to adjudicate the claims arising from conduct that occurred overseas, as this may require an extraterritorial application of law. On the other hand, where these legal difficulties can be overcome, the possibility of non-resident foreign plaintiffs consolidating their claims or joining an ongoing case by resident plaintiffs, may provide consumers with a valuable remedy that would not have been otherwise available to them to the high costs and burden of taking legal action in a foreign country.

With respect to collective claims filed in the consumers' domestic court against a foreign based defendant, standard jurisdictional rules will require that an adequate link is demonstrated between the defendant and the country before the court will subject the defendant to legal process and application of its laws. In addition, there may also be legal difficulties in enforcing the judgment in the country were the defendant, or his assets or located here a claimants wish to file a collective case in domestic court against a foreign based defendant, regular jurisdictional requirements will have to be satisfied.

F. LEGAL ACTIONS BY CONSUMER ORGANISATIONS

Overview

In some countries, the rights of consumers to take private legal action are supplemented by rights provided to consumer organisations to file lawsuits on behalf of a consumer or, more frequently, a group of consumers. Like private collective action lawsuits, actions by consumer organisations are particularly useful in cases of widespread consumer harm, providing a mechanism to prevent or remedy wrongful conduct by a defendant that may otherwise go unchecked.

In the European Union, consumer organisations have long been seen as playing an important role in consumer protection in the courts. Many European directives on consumer protection, including the 1984 and 1997 directives on misleading and comparative advertising;[45] the 1993 directive on unfair contract terms;[46] and the 1997 directive on distance selling,[47] leave open the possibility for Member States to provide consumer organisations with the right to take legal action to ensure compliance with the terms of the directives. In addition, the 1998 Injunctions Directive provides that EU member states must recognise the legal standing of "qualified" consumer organisations from fellow member states before their own domestic courts in certain cases.[48] The details and implications of this directive for cross-border action by consumer organisations are covered below.

The following seventeen responding countries reported that consumer organisations have standing to take some form of legal action before the courts on behalf of consumers: Austria; Belgium; the Czech Republic; Denmark; France; Germany; Greece; Hungary; Ireland; Italy; Netherlands; Norway[49]; Poland; Portugal; Sweden; Switzerland; Turkey; the United Kingdom; and in the United States (in more limited measure). In Korea there are proposals underway to amend the Consumer Protection Act to allow consumer groups, meeting certain requirements, to take legal action against businesses on behalf of consumers.

Different types of action (authority of consumer organisations)

The authority of consumer organisations to take legal action varies from country to country. Broadly speaking, member country responses indicated different types of legal action which may be taken by consumer associations, which are described here under the following headings: actions in the collective interest of consumers; representative or joint representative actions; "*partie civile*"; and other types of actions. In some responding countries, consumer organisations have authority to take only one of these types of action whereas in others two or more types are available.

Actions in the collective interest of consumers: In these types of actions, the consumer organisation takes the action in its own name on behalf of the "collective interests of consumers." This type of action is taken to vindicate the general consumer interest, without any showing of actual harm to individual consumers. It is regarded as an important mechanism to correct market failures, where the collective harm that is caused by defendant's action is more than the sum of the individual losses involved. This mechanism is available to consumer organisations in the following countries, and unless otherwise noted may be used in a broad range of cases relating to general breaches of consumer protection laws: Austria (for cases relating to unlawful or unconscionable terms in standard form contracts and business terms and conditions); Belgium; France (for cases relating to illegal clauses in standard form non-negotiable consumer contracts); Germany (for cases relating to unfair competition or to prevent a breach of certain consumer protection laws); Hungary; Ireland (for cases relating to unfair contract terms); Italy; the Netherlands; Norway; Poland; Switzerland (for cases relating to unfair and deceptive commercial practices); Turkey.

Representative or joint representative actions: In these kind of actions, the consumer organisation acts on behalf of a consumer or, more frequently, a group of consumers who have each suffered individual harm as a result of the same illegal action. Where the action may be taken on behalf of a single consumer it is referred to here as a representative action, and as a joint representative action where it may be taken on behalf of two or more consumers. The authority to file a representative or joint representative action is available to consumer organisations in Austria (joint representative action); Denmark (representative action);[50] France (joint representative action); Germany (joint representative action); Greece (joint representative action); Portugal (joint representative action); Sweden (joint representative action); the United Kingdom (joint representative action); and some states in the United States, such as California (joint representative action). The authority of consumer organisations to file such actions varies among

these member countries. In some, the consumer associations may initiate the representative action on their own initiative and the procedure operates very similarly to the private collective action procedure described above. In others, the right to initiate the action is more restricted and may only be filed on behalf of identified consumers who have expressly assigned their claims to the organisation. Likewise, in some countries the consumer organisation may file an action in respect of a broad range of cases whereas in other countries they may only be filed for breaches of specific legislation.

There have been proposals in both France and the United Kingdom to extend the rights of consumer organisations to file collective claims on behalf of consumers. In France, President Chirac announced on January 4, 2005 that he has asked his government to draft a proposal introducing a new collective action procedure in consumer cases (Maussion, 2005; Hollinger, 2005). It is likely that the draft law, rather than introducing a private collective action procedure, will extend the existing rights of consumer organisations to act on behalf of consumers, allowing them to independently initiate the action without having to individually identify each member of the plaintiff group. In the United Kingdom, in a July 2004 consultation document, the UK Department of Trade and Industry proposed the introduction of a broader right for consumer organisations to bring representative actions on behalf of consumers (DTI, 2004, pp. 44-45).

Partie civile: Under this procedure, which is common to a number of continental European countries, an individual or group of individuals may join (as a "*partie civile*" or civil party) a criminal prosecution of a defendant requesting civil remedies for the criminal act. If the judge returns a guilty verdict, the defendant may be ordered to pay compensation to the *partie civile*. In France and Portugal, consumer organisations may use the *partie civil*e procedure to file a complaint on behalf of the collective interest of consumers.

Other Finally two other types of action which do not fall into any of the above categories should be mentioned. Firstly, in France and Poland, consumer organisations may intervene in support of a case that has already been filed by a private party or parties. Secondly, in the United States, consumer organisations may have legal standing before the federal courts if they can show actual harm or threat of harm to themselves or their members. Such cases are usually filed to challenge government action or inaction.

Remedies available

In a number of responding countries, the only remedies that can be sought by a consumer organisation are conduct remedies, most commonly injunctions to restrain or compel certain action by the defendant. This is the case in the following countries: Austria; Belgium; the Czech Republic; Demark; Ireland; the Netherlands; Switzerland; and Turkey. In actions by consumer organisations in United States federal courts, the relief that is sought is usually injunctive or declaratory (judicial determination of the parties' legal rights).

In other countries, monetary relief may also be sought in addition to conduct remedies. In France, damages are available in joint representative actions. Damages may also be awarded under the *partie civile* procedure, but frequently will be a symbolic amount only, and are awarded directly to the organisation. In Greece, in addition to injunctive relief, monetary relief may be sought in cases where "moral damage" can be shown. In Poland, the usual remedy is an injunction to restrain prohibited practices. However, in cases relating to unfair competition the organisation may seek an order requiring the defendant to pay a certain sum to a charitable purpose where the defendant is shown to have acted with intent. In Germany (for collective interest claims); Norway, Portugal, Sweden, the United Kingdom and the United States (at the state level) both conduct and monetary remedies are available. In the Netherlands, the government has introduced a proposal to allow case settlements providing for damages to be approved and declared binding by a court.

Cross-border considerations:

The OECD questionnaire asked whether consumer organisations could take action on behalf of foreign consumers or against foreign businesses. The following countries responded that it is legally possible to take action both in protection of foreign consumers and against foreign businesses: Germany; Ireland; Italy; the Netherlands; Portugal; Sweden; Switzerland; Turkey; and the United States. In Switzerland, such cases may only be filed by the consumer organisations acting in its own name. In the Czech Republic and Hungary action may be taken on behalf of foreign consumers but only against businesses located within their country. In Belgium and France action can be taken against foreign businesses that target domestic consumers. However, even where a consumer organisation has the legal authority to take action against a foreign defendant in domestic court, standard jurisdictional rules will require that an adequate link is demonstrated between the defendant and the country before the court will subject the defendant to legal process and application of its laws. There may also be legal difficulties in enforcing the judgment in the country where the defendant is located. This is especially true with respect to judgments ordering conduct remedies.

One significant development, in the European context, to address the challenges of taking action in cross-border cases is the EU Injunctions Directive mentioned above.[51] It specifically aims at addressing how to control traders that undertake activities in one Member State, which harm the collective interests' of consumers in another Member State. It sets out a common injunction procedure whereby an action for an injunction can be brought by "qualified" entities,[52] which includes consumer organisations designated by Member States, for infringements of national provisions transposing certain EU consumer protection directives.[53] EU Member States must authorise their courts or administrative authorities to rule on actions for injunctions commenced by qualified entities of other Member States. The objective of the Directive is to ensure that collective actions to protect consumers can be brought where the business is located and therefore where the remedy is most likely to be effective.

G. GOVERNMENT-OBTAINED REDRESS

Overview

A variety of entities and mechanisms have been developed in OECD countries for governmental enforcement of consumer protection laws. The 1960s and 70s brought an expanded role for government in consumer affairs, one aspect of which involved the grant of statutory authority to government officials to bring legal actions to protect consumers.[54] The organisational forms for these government consumer protection bodies vary among member countries, from consumer ombudsman offices, to independent commissions, to directorates or divisions within a ministerial branch of the government.

Government consumer protection agencies have at their disposal – either directly or via the courts – a number of types of remedies with which to address marketing infractions. They can be broadly characterised as conduct remedies and monetary remedies. Conduct remedies can involve injunctions, cease-and-desist orders and related measures. Typically this type of remedy is aimed at directly preventing certain types of conduct that breach the law. In unusual circumstances, conduct remedies may impose affirmative conduct obligations, usually requiring a party to disclose information to clarify the products or services for the consumer.

Monetary remedies can take a variety of forms, including fines or civil penalties, which are intended to deter infractions of the law, and disgorgement orders, which deprive a wrongdoer of the profits of the unlawful activity. The proceeds of both of these remedies end up back in government treasuries. Another type of monetary remedy, and the sole focus of this section, is an order for monetary redress.

Orders for monetary redress aim to recover monies wrongfully obtained by a trader for return directly to injured consumers. In addition to alleviating consumer injury, redress orders serve a deterrent function by depriving the wrongdoer of the ill-gotten gains. The OECD Cross-Border Fraud Guidelines recognise the importance of consumer redress in limiting the incidence of fraudulent and deceptive commercial practices against consumers. The Guidelines call on member countries to include within their domestic frameworks "[e]ffective mechanisms that provide redress for consumer victims of fraudulent and deceptive commercial practice," while noting the other different roles played by government agencies (OECD, 2003).

Authority to obtain monetary redress orders

While most government consumer protection agencies in OECD countries have authority to obtain conduct remedies, and some forms of monetary remedies, many do not have the ability to secure monetary redress. The contrast among different OECD countries here is particularly striking, considering that agencies in some jurisdictions have the authority to award redress to foreign as well as domestic consumers.

In the following nine responding countries, government consumer protection agencies have some form of authority to obtain monetary compensation for consumers: Australia; Canada; Denmark; Finland; Ireland; Mexico; Portugal; Sweden; and the United States. In just two of these countries, Australia and the United States, can the consumer protection agency directly obtain orders for consumer redress. The Australian Competition and Consumer Commission (ACCC) may make an application to the courts, under the Trade Practices Act, seeking compensation of one or more persons who have suffered loss or damage as a result of infringement of certain provisions of the Act. Prior to making such an application, the ACCC must receive the express consent of each person on whose behalf it seeks to act. In the United States, the Federal Trade Commission (FTC) can obtain a court order for consumer redress for violations of the unfair and deceptive practices provisions of the FTC Act and other trade regulation rules promulgated by the Commission. In 2003, the most recent year for which statistics are available, the FTC obtained 95 federal district court judgments ordering USD 873 million in consumer redress. In Canada, a draft law to amend the Competition Act was introduced in parliament in November 2004 which would provide the federal Commissioner of Competition with the authority to directly obtain orders for monetary redress in certain cases of deceptive marketing.[55] Similar proposals have been made in the United Kingdom. In its July 2004 consultation paper, the UK Department of Trade and Industry (DTI) proposed providing certain government agencies with new powers to take action through the courts to recover and return directly to consumers the proceeds of trader's wrongful activities (DTI, 2004, p 45).

A more common mechanism for government consumer protection agencies to obtain consumer redress is to act as the representative party in lawsuits seeking damages (among other remedies) on behalf of one or more named or identifiable consumers. For example, in Australia, in addition to directly obtaining redress orders under the Trade Practices Act, the ACCC may file a collective action under the representative proceedings provisions of the 1976 Federal Court Act. As is the case for private collective actions in Australia, this procedure operates on an opt-out basis and the ACCC does not need to obtain the express consent of consumers on whose behalf it files the case. In Denmark, the Consumer Ombudsman may institute legal proceedings under the Danish Marketing Practices Act, on behalf of large numbers of consumers having "uniform claims for damages" against a defendant for breach of the Act. In Finland, the Consumer Ombudsman, may take action on behalf of an individual where a business has not followed the ruling of the Consumer Complaint Board, or where the case raises issues of importance to the collective consumer interest and the Ombudsman wishes to obtain a judicial precedent. In Mexico, Profeco, the federal consumer protection agency may file collective action lawsuits seeking damages for consumers who have suffered harm. In Portugal, the government consumer protection agency has the same authority as consumer organisations to file collective action lawsuits on behalf of injured consumers. In Sweden, the Consumer Ombudsman may file a "public group action" under the 2002 Group Proceedings Act. The

Ombudsman may also represent individual consumers before the courts in cases concerning financial services. The authority to initiate collective action lawsuits has also been proposed for the future government consumer protection agency in the Netherlands and is under consideration.

In some countries, consumer protection agencies can also seek compensation for consumers through consent agreements to settle allegations of illegal conduct. For example, in Canada, the federal Commissioner of Competition has sought redress for consumers as part of consent agreements with businesses to settle allegations of civil deceptive marketing practices. Upon registration with the court, consent agreements have the same effect as a court order. This kind of power has also been proposed for the future government consumer protection agency in the Netherlands and is currently being discussed in the national parliament.

In Mexico, under a new administrative remedy which came into effect in 2004, consumers who have suffered harm as a result of certain illegal conduct may submit petitions for monetary redress to Profeco, who investigates the complaint. Where a breach of the law is identified, Profeco notifies the affected consumers who may then rely on this finding to claim redress from the wrongdoer.

Another possible mechanism for consumer redress is through restitution orders in the context of criminal proceedings. Restitution orders require the defendant to compensate the victim for harm caused by his or her criminal conduct. Often they are issued as a condition of granting a defendant probation or a reduced sentence. In Canada, restitution orders are often ordered as a condition of probation at the provincial level. The federal Commissioner of Competition is also exploring the possible use of provisions of the Criminal Code to obtain restitution orders for all indictable offences under the Competition Act, including deceptive mail and telemarketing, and pyramid schemes. In Ireland, under the Consumer Information Act 1978, a court may order a defendant to pay compensation to any person who appeared on behalf of the prosecution in the proceedings and who suffered injury, loss or damage as a result of the offence.

Authority to act on behalf of foreign consumers

In most responding countries where government consumer protection agencies have the authority to seek consumer redress, this authority can be applied in respect of foreign consumers. The following seven responding countries reported that they had the legal authority (if not the practical ability or experience) to seek redress act on behalf of foreign consumers: Australia; Canada; Finland; Mexico; Portugal; Sweden; and the United States.

In Australia, the ACCC can seek redress on behalf of foreign consumers provided that (*i*) the conduct complained of occurred in Australia, or (*ii*) the conduct occurred outside of Australia, but was engaged in by a corporation incorporated in Australia; or a corporation carrying on business within Australia; or a person who is an Australia citizen or person ordinarily resident within Australia. In Canada, at the provincial level, restitution may be (and has in the past been) obtained in criminal proceedings on behalf of foreign consumers. At the Federal level, the Commissioner of Competition can pursue consent orders that include restitution as a remedy on behalf of foreign consumers. In the United States, the FTC may seek redress on behalf of foreign consumers provided there is a substantial connection to harm occurring at the national level. In practice, the US FTC has obtained and distributed redress funds to consumers in more than 75 countries, in cases involving telemarketing fraud, pyramid schemes, and lottery schemes among others.

Other cross-border considerations

Generally speaking, consumer protection entities were created to protect domestic consumers from the unlawful practices of local or national actors. The prospect of cross-border commercial activity between businesses and consumers was not likely a consideration for national legislatures in establishing the scope of authority and tools for these enforcement bodies. In the current, increasingly globalised marketplace, however, if consumer protection law enforcement agencies are not able to stop harmful practices originating abroad, they will be unable to fully protect their consumers at home.

In this respect, the adoption of OECD Cross-Border Fraud Guidelines was a significant development. The Guidelines set forth broad principles for international cooperation among consumer protection enforcement agencies in protecting consumers against cross-border fraudulent and deceptive practices. They also recommend that consumer protection enforcement agencies have sufficient authority for effective action in the cross-border context, including the authority to take action "against domestic businesses engaged in fraudulent and deceptive commercial practices against foreign consumers" and against "foreign businesses engaged in fraudulent and deceptive commercial practices against their own consumers" (OECD, 2003, section V). Although the guidelines do not explicitly call for consumer protection enforcement agencies to have authority to seek redress for consumer victims, they do set the stage for further developments in this area by calling on member countries to jointly study the "possible roles that consumer protection enforcement agencies can play in facilitating consumer redress, including the pursuit of redress on behalf of defrauded consumers" (OECD, 2003, section VI). The Guidelines have already had a demonstrated impact in this area, prompting some member countries to seek additional authority to take action on behalf of consumers. For example, in a speech before a standing committee of the House of Commons, commenting on the proposed amendments to the Canadian Competition Act, the Competition Commissioner specifically noted that the authority to seek redress on behalf of consumers is consistent with the OECD Guidelines and would bring Canada into line with other OECD countries where this remedy is already available (Scott, 2004).

Also of relevance in this area is the new EU Regulation on Consumer Protection Cooperation,[56] adopted in October 2004. The aim of the Regulation is to establish a network of national consumer protection enforcement agencies capable of taking co-ordinated action against rogue traders who target consumers living in other EU countries. The regulation provides for national enforcement agencies to be vested with common investigative and enforcement powers. The authority to seek consumer redress is authorised under the Regulation, although not required.[57] Thus enforcement agencies that have this authority under national law will benefit from the related information sharing and investigative assistance measures set out in the Regulation in seeking to exercise it and obtain remedies for consumers in cross-border cases.

Despite these developments a number of challenges remain to obtaining consumer redress in cross-border cases. As a practical matter, even where consumer protection agencies have the domestic legal authority to seek consumer redress in cross-border cases they may not be able to prioritise the expenditure of limited resources to protect consumers located abroad. In addition, where the case involves a large number of consumers it can be a cumbersome process to contact and obtain the necessary details from consumers for distribution purposes. These difficulties tend to increase where the consumer protection agency is seeking redress for consumers who are located in a foreign country. There may also be legal obstacles to obtaining provisional measures, such as asset freezes, in foreign courts or against overseas assets. Finally, where a domestic judgment is obtained awarding monetary compensation to consumer victims, it may not be possible obtain enforcement of that judgment in the country where the defendant or his or her assets are located. These issues are addressed in Part II below.

PART II: MAKING JUDICIAL REMEDIES EFFECTIVE ACROSS BORDERS

A. Overview

This section examines the legal impediments to ensuring that monetary judgments obtained in cross-border consumer cases ultimately result in compensation to consumers. It examines two issues. Firstly, it examines provisional pre-judgment measures that can be obtained to improve the effectiveness of final monetary judgments and ensure that there will be money left to provide compensation to consumers. Secondly, it examines the recognition and enforcement of foreign monetary judgments. While both issues are common to all types of court-ordered redress for disputes with a cross-border dimension, they raise particular issues for government actions to obtain monetary redress. Given the complexity and significant costs involved, it will often be impractical for an individual to seek judicial remedies in cross-border cases. Therefore, the ability of government consumer protection agencies to take legal action will often be crucial to ensuring that consumer victims of cross-border illegal activity are compensated for losses suffered.

B. Pre-judgment freezes of assets

In some cases, courts will issue provisional remedies before a case is decided in order to maintain the *status quo* pending the outcome of the case. One important type of provisional remedy is a temporary order that "freezes" a defendant's assets to ensure that there will be funds available at the conclusion of the case to satisfy the judgment. An asset freeze places a temporary hold on the assets of the defendant, pending the outcome of the case. This protective tool, where permitted, greatly increases the likelihood of collecting on any money judgement that is ultimately issued for return to consumers.

Many Commonwealth – and certain other common law – countries make available a form of asset-freeze, known as a *Mareva* injunction.[58] The *Mareva* injunction is an interim measure, granted at the discretion of the court, on *ex parte* basis.[59] Usually a *Mareva* injunction is filed in the country in which the defendant's assets are located and seeks to prevent the assets being removed from, or dissipated within, that country. Like other provisional measures, in most countries a *Mareva* injunction will only be granted where the requested court also has jurisdiction over the merits of the case. The exception to this rule is in European countries, where the 2001 Brussels Regulation and 1989 Lugano Convention[60] permit *Mareva* injunctions to be sought as stand alone actions by residents of state parties in the courts of other state parties.

Outside of Europe or for non-European applicants, however, in order to obtain provisional remedies, such as asset freezes, the primary action will also have to be filed in the overseas court. One important development in this respect, is the increased willingness of courts to grant "extra-territorial" *Mareva* injunctions and other provisional asset freeze orders, that extend to the defendant's assets on a world-wide basis. As a result, it may be possible in some countries to seek a provisional order in domestic court to freeze the assets of the defendant wherever located, without having to institute substantive proceedings in a foreign court.

Asset freezes in government actions for consumer redress

Often perpetrators of fraud will hide or dissipate assets once they learn that enforcement authorities have taken an interest in their activities. Where a national legal regime permits the pre-judgment freezing of assets, an enforcement body has a much better chance of collecting any final money judgment and returning the money to consumers. As examined in Section G above, not all government consumer protection agencies have powers to seek orders for consumer redress. Among those that do, even fewer have authority to seek preliminary measures designed to ensure the effectiveness of a final monetary judgment.

Only Australia, Canada, and the United States reported the ability for government consumer protection bodies to seek asset freezes in support of cases for consumer redress.[61] In Australia, it is possible to obtain a *Mareva* injunction to freeze the assets of residents and foreign nationals that are held within Australia, or the assets of Australian residents that are held overseas. It may also be possible for the ACCC to obtain an order

under the Trade Practices Act freezing some or all of the defendant's assets. It is unlikely, however, that such an order would extend to overseas assets. In Canada, there is statutory authority under provincial consumer protection law, to obtain asset freezes in consumer protection cases. At the federal level, proposed amendments to the Competition Act would also authorise the Commissioner to request asset freeze orders in certain civil cases of deceptive marketing practices.[62] In criminal cases under the Competition Act it may currently be possible to seek provisional freezes of the defendant's assets, from which restitution to victims may eventually be paid, upon a guilty verdict. In the United States, the FTC has authority under its constituent act to seek preliminary measures, including asset freezes covering the assets of the defendant wherever located. In practice, a US court's asset freeze would only be enforceable in US courts. However, the FTC has been able to obtain repatriation of assets following a final judgment.

As noted above, in many countries it is not possible to obtain provisional remedies from a court unless that court also has jurisdiction over the substantive action. Therefore, where a consumer protection agency seeks to obtain a freeze of a defendant's assets in the country where those assets are located, it will also have to file a parallel substantive action in that country. Only the United States reported to having had experience in filing such cases.

Information sharing about foreign assets

An important element of obtaining an order to freeze overseas assets is the ability to identify where those assets are located. In the context of actions by consumer protection enforcement agencies, the ability to request assistance from a foreign counterpart agency can be crucial to obtaining this information. At present, however, consumer protection agencies are typically subject to laws or procedures that may restrict their ability to request assistance from, or provide assistance to, foreign agencies in obtaining information in cross-border cases.

The following respondent countries reported that they currently have some ability to share information relating to assets with foreign agencies: Australia; Belgium; Canada; Italy; Korea; Mexico; Norway; Sweden; Switzerland; the United Kingdom; and the United States. However, in many countries, including Australia, Finland, Italy, Norway, Switzerland, Sweden, and the United States, this ability is limited to sharing information that is publicly available, and/or information that is obtained informally, or with consent of the subject, and/or non-confidential or non-personal information. Finland noted that it would encounter serious obstacles to sharing information but that it may be possible in respect of publicly available information.

In other countries, including Canada, Korea, and Mexico enforcement agencies may provide information sharing assistance provided there is some sort of bi-lateral agreement in place with the requesting country such as a memorandum of understanding or mutual legal assistance treaty. In addition, in Australia, a foreign consumer protection agency could make an application to a state or territory Supreme Court or a request to the Commonwealth Attorney General agency to seek to obtain non-public information, under the *Mutual Assistance in Business Regulation Act* 1992 or the Mutual Assistance in Criminal Matters Act 1987. In the United Kingdom, the Office of Fair Trading (OFT) can share with (but not officially gather on behalf of) foreign consumer protection agencies – in aid of civil or criminal proceedings – information that it has obtained for the exercise of its functions. As the OFT does not have the power to freeze or attach assets, it is unclear whether the gathering and sharing of information relating to assets would be deemed to be in the exercise of its functions.

There are proposals to increase information sharing powers in Korea and the United States. In Korea, there are proposals to revise the Consumer Protection Act to grant information sharing powers to the Korean Consumer Protection Board. Currently, only Fair Trade Commission has such powers provided a memorandum of understanding is in place. In the United States the proposed International Consumer Protection Act would grant the Federal Trade Commission power to share information obtained pursuant to compulsory process with foreign law enforcement agencies and would allow the FTC to issue compulsory process on behalf of a foreign law enforcement agency.

Consumer enforcement bodies from a number of member countries have put in place bi- and multi-lateral arrangements and memoranda of understanding to strengthen ties between signatory agencies and create a better environment for future enforcement co-ordination. These types of agreements are generally 'best efforts' type arrangements. They are not legally binding and do not require countries to amend existing laws. Thus, even where such agreements contain provisions on information gathering and sharing, signatory agencies remain subject to the kinds of domestic restrictions outlined above.

For example, in 1999 the Nordic Consumer Ombudsmen of Denmark, Finland, Norway, and Sweden established closer co-operation by agreeing to conduct lawsuits on behalf of each other and exchange information about marketing across national borders. The United States Federal Trade Commission has entered into cooperation arrangements with consumer protection agencies in the following countries: Canada (1995);[63] Australia; the United Kingdom (2000);[64] Ireland (2003);[65] and Mexico (2005).[66] Belgium has entered into cooperation and information sharing agreements with France, UK, Germany, Netherlands, Luxembourg, and Hungary. Trilateral arrangements covering both consumer protection and competition law have been concluded between government agencies in Australia, Canada and the New Zealand (2000)[67] and between agencies in Australia, New Zealand, and the United Kingdom (2003). In March 2004, Competition Bureau Canada entered into information sharing protocols with consumer protection agencies in the United Kingdom[68] and Australia. Consumer protection agencies in Australia and the United Kingdom are close to finalising an information sharing protocol. Enforcement agencies in OECD member countries also work on information sharing through participation in the International Consumer Protection and Enforcement Network (ICPEN).[69]

Two important developments on the international and regional level in this area are the OECD Cross-Border Fraud Guidelines and the 2004 EU Regulation on Consumer Protection Cooperation.[70] The OECD Cross-Border Fraud Guidelines include specific provisions on the authority of consumer protection enforcement agencies to share information. The Guidelines recommend that member countries strive to enhance the ability of enforcement agencies to "share information within timeframes that facilitate investigations in cross-border fraudulent and deceptive practices against consumers," including, publicly available and other non-confidential information; and documents and third party information, which could potentially include asset-related information. In an effort to address the practical difficulties that enforcement agencies sometimes face in knowing who to contact in other countries, the Guidelines also recommend each member country to designate either a consumer protection enforcement agency or a consumer protection policy agency to act as a national contact point for other agencies.[71]

The EU Regulation on Consumer Protection Cooperation, likewise includes specific provisions on information sharing. As a legally binding and directly applicable instrument, it will require EU member states to lift barriers to information exchange with consumer protection enforcement authorities from fellow European countries. It provides that upon request, a consumer protection agency shall "supply without delay any relevant information required to establish whether an intra-community infringement has occurred." Furthermore the requested agency is to undertake "the appropriate investigations or any other necessary or appropriate measures … to gather the required information."[72] Given the broad scope of the language, and given that consumer enforcement agencies are entitled under the Regulation to require the losing defendant "to make payments into the public purse or to any beneficiary," it is possible that these investigative and information sharing provisions extend to asset-related information.

C. Recognition and enforcement of monetary judgements

Even assuming that other legal difficulties relating to jurisdiction and applicable law have been overcome, in cases filed against overseas defendants the ability to enforce the judgment in the country where the defendant or his or her assets are located remains a significant challenge. This point was raised explicitly in a recent decision by the Federal Court of Australia in a consumer protection case. In ruling on a request by the ACCC to restrain conduct by a US-based defendant accused of misleading consumers, the Judge noted that there was little likelihood of extra-territorial enforcement of an injunction issued by an Australian court.[73] In spite of this obstacle the Court granted the injunction, citing evidence of international co-operation to curb cross-border fraud including the

OECD Cross-border Guidelines as an important factor. The question remains, however, whether further work is needed to improve international arrangements for the mutual recognition and enforcement of judgments of consumer protection orders in cross-border cases.

Considerations of sovereignty, among other issues, mean that without a treaty or other reciprocal arrangement, it often very difficult or even impossible, to enforce a judgment in the courts of another country. This particularly the case for judgments ordering conduct remedies. Monetary judgments are usually considered more suitable for enforcement, and are thus more likely to be effective in cross-border cases.

At present there are no global arrangements in place to ensure the mutual recognition and enforcement of judgments.[74] A long running negotiation at the Hague Conference on Private International Law during the 1990s to adopt a Convention that could have ensured a broad base for cross-border enforcement of civil judgments, including judgments obtained in consumer cases, has been abandoned and the draft convention scaled back to cover enforcement of judgments resulting from choice of court agreements in business to business contracts.[75]

At the European level, enforcement of judgments in civil and commercial cases is governed by the Brussels Regulation of 2001[76] and the Lugano Convention of 1988.[77] These instruments provide that any judgment, subject to certain exceptions, made in one of the contracting states will be recognised and enforced in other contracting states. Although under the Brussels Regulation procedures for obtaining a declaration of enforceability (exequatur) are more streamlined than under the Lugano Convention (or previous Brussels Convention), recognition and enforcement is still not automatic. In order to reduce the delays and additional costs associated with these procedures, there have been proposals for the abolition of all intermediate measures for the recognition of judicial decisions among member states.[78] In April 2004, a new regulation was adopted creating a European enforcement order for uncontested claims. The regulation abolishes the exequatur procedure for decisions on money claims that were not contested by the debtor.[79] On the longer term, there are plans to abolish exequatur in all areas covered by the Brussels Regulation.[80]

In addition to the Brussels and Lugano instruments, there is a bi-lateral agreement in place between Canada and the United Kingdom, and a multi-lateral convention among the Nordic countries providing for the recognition and enforcement of judgments in civil and commercial matters.

Where there is no treaty in place to govern the reciprocal enforcement of judgments, the decision of whether a foreign judgment will be enforced is made on the basis of the requested country's private international law rules (whether codified or common law rules). Common requirements for obtaining enforcement of a foreign judgment include: that the foreign judgment needs to be final and binding; that the rendering court must have had proper jurisdiction over the subject matter and the parties; that the party against whom enforcement is sought must have had proper notice of the proceedings. Of these requirements, particular difficulties can often arise in relation to the grounds of jurisdiction, which may be deemed "exorbitant" or 'improper' by the requested country (Danford, 2004, p.408). In some countries, including Japan, Korea, and the United States, enforcement will be refused if the judgment is deemed to offend the public policy of the requested state. Other countries, including Australia, Germany, Japan, Korea, and Sweden usually require reciprocity with the rendering jurisdiction before a judgement will be enforced. In Australia, the Foreign Judgements Act of 1991 allows for the registration and enforcement in Australia of judgments from certain countries. Those counties to which the Act applies are set out in the Foreign Judgments Regulations 1992. In order to be listed, there must be substantially reciprocal arrangements in place for the enforcement of judgments in that country. Foreign judgments not covered by the Act may still be enforced in Australia under common law principles provided that certain conditions are met.

Generally speaking, no country will enforce a foreign judgment that is deemed to be penal or revenue in nature. This raises a potential concern that government-obtained judgments providing monetary redress to consumers would be deemed unenforceable. However, some countries, such as Japan specifically noted that they would draw a distinction between government obtained judgments for fines and penalties (which would be deemed penal), and judgments providing monetary remedies to consumers. Likewise, the United States Federal Trade Commission would draw such a distinction and it has recommended as a matter of policy that United States

as well as foreign judicial authorities should enforce the restitutionary judgments of foreign governmental agencies to provide monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled. In addition, the Free Trade Agreement between the United States and Australia, which entered into force in January 2005, contains a provision stipulating that a monetary judgment obtained by certain government authorities, including the US FTC and the ACCC, for the purpose of providing monetary compensation to consumers should not generally be disqualified from recognition and enforcement on the grounds that it is penal or revenue in nature.[81]

D. Other legal issues

Although not within the scope of this report, there are other significant legal issues which may affect a consumer's ability to resolve disputes and obtain redress through the courts in cross-border cases. Of particular significance are challenges of identifying which court has jurisdiction to hear the case and which law will be applied to determine the outcome.

In disputes arising from cross-border transactions, unless the consumer is willing to institute legal proceedings in the country where the business is located, he or she will have to demonstrate that the courts of his or her country have jurisdiction to hear the case. Each country has different rules on when it will extend the jurisdiction of its courts to persons outside its territory. But it will usually require some sort of "link" between the defendant and/or the action or event in question and that country. However, there are significant differences among countries in the test that will be applied to establish whether such a link exists. For example, in some countries jurisdiction may be established solely on the basis that the defendant has assets in the forum state; or that the defendant was "doing business" in the forum state even if that business does not relate to the case; or that the defendant was temporarily present within the forum state at the time the case was filed against him or her. In other countries, these would be regarded as an "exorbitant" or "improper" bases of jurisdiction, and consequently any judgment arising from the exercise of such jurisdiction would not be recognised and enforced.

There are also divergent national rules with respect to applicable law in cross-border cases. Even assuming the consumer's domestic court is competent to hear the case, it will not necessarily apply domestic law in order to determine the outcome. In contract cases, where the parties have agreed as to what law will be applied in the case of an eventual dispute, the basic principle of "freedom to contract" is often applied and the parties' choice respected. In business to consumer cases, however, not all countries will apply these agreements if they are not favourable to the consumer, who is deemed to be the "weaker" bargaining party. In non-contractual cases, the most popular approach to resolving conflicts of laws issues is to apply the law of the place where the cause of action arose (*lex loci delicti*). Other approaches are to apply the law of the country where the damage was sustained or the law of the country with which the situation is most closely connected.

At the European level, harmonised rules on jurisdiction, containing special protections for consumers, are set out in the Brussels Regulation of 2001 and the Lugano Convention of 1988. These instruments provide that in certain cross-border contract cases the consumer may take legal action against defendants in their own courts (or in the courts of the defendant).[82] Harmonised rules for applicable law in contract cases, ensuring that any given legal dispute is resolved under the same law irrespective of what country it is adjudicated in, are set out in the Rome Convention of 1980.[83] The Convention, which is in force in all European Union member states, also provides special protections for consumers setting out that they may not be deprived of certain "mandatory" protections set out in national laws. In July 2003, the European Commission made a proposal to supplement the Rome Convention with a regulation on applicable law in non-contractual obligations.[84] With respect to non-European consumers, or European consumers engaged in transactions with non-European businesses, there are so far no harmonised rules in these areas,[85] which continue to be governed by divergent national rules.

CONCLUSIONS

Examination of member country responses indicates that domestic frameworks for consumer dispute resolution and redress provide for a combination of different mechanisms. Although not available in all countries, three clear categories of mechanism were identified in this report: mechanisms for consumers to resolve their individual complaints; mechanisms for consumers to resolve collective complaints; and mechanisms for government bodies to take legal action and obtain monetary redress on behalf of an individual consumer or group of consumers. These different categories serve distinct yet complementary functions, responding to the varying nature and characteristics of consumer complaints. For example, individual mechanisms, and in particular informal non-judicial mechanisms, are most suited to one-time disputes with legitimate businesses. Collective action procedures can be useful to address cases where large numbers of consumers each suffer small losses as a result of the wrongful actions of the same defendant. Mechanisms for government consumer protection agencies to seek monetary redress for consumers can be effective in cases of fraudulent or deceptive practices, where investigative and other enforcement powers not available to private litigants prove particularly valuable.

Increased mobility and the growth of the online marketplace have significantly increased the possibility for consumers and businesses to engage in transactions over great distances and without regard to geographic borders, local cultures and legal frameworks. Such benefits, however, raise challenges as to how potential disputes can be resolved in an accessible, effective, and fair way. In general, in most OECD countries mechanisms for consumer dispute resolution and redress were developed to address domestic cases and are not always adequate to provide consumers with remedies across borders. In particular, there are serious obstacles to pursuing court-based remedies in cross-border cases. Aside from legal challenges relating to jurisdiction and applicable law, the costs and practical difficulties associated with filing cross-border claims means that court procedures are beyond the reach of most consumers with low value disputes. Member country responses suggest that, for the most part, not much has been done to make court procedures more accessible to overseas claimants, for example, through the increased use of new information communications technologies. Going forward, therefore, domestic frameworks for dispute resolution and redress will need to further adapt to the challenges of cross-border disputes.

There are also major challenges to ensuring that court ordered monetary remedies ultimately result in compensation to consumers in cross-border cases. It is only possible to obtain provisional pre-judgment measures, such as asset freezes, in a few countries in cross-border cases. These measures can help ensure that there is money left to fulfil any final monetary judgment awarded. In addition, in most member countries, it is very difficult or even impossible to enforce monetary judgments in the courts of another state without a treaty or other substantial arrangement in place. At present, there are no global arrangements in place to ensure the recognition and enforcement of judgments, although there are bi-lateral and regional arrangements in place. If consumers are to be guaranteed adequate protections in the global marketplace, these legal and practical obstacles to accessing effective dispute resolution and redress procedures across borders will need to be addressed.

NOTES

1 A survey conducted for the European Commission in 1996, estimated the average cost of pursuing a cross-border consumer claim worth EUR 2 000 to be EUR 2 489 for proceedings in the country of the defendant's residence and only an average 3% lower for proceedings in the country of the plaintiff's residence. The average duration of a cross-border consumer claim was found to be almost two years at the defendant's residence and six months more at the plaintiff's residence, due to procedural requirements relating to overseas service of process and recognition and enforcement of the judgment (Von Freyhold et al, 1996). A follow-up survey conducted in 1998 affirmed these results, concluding that while the opportunities for participation in the single market had risen, the means for consumers to effectively defend and protect their legal rights remained limited, and that "no rational actor would pursue a cross-border consumer claim in court" (Von Freyhold et al, 1998). One could reasonably predict the costs and delay for consumers wishing to take cross-border cases in countries outside the internal market of the European Union to be even higher.

2 A 2004 report on complaints received by European Consumer Centers in 12 EU member states found increasing numbers of consumer complaints arising from cross-border ecommerce transactions (Leonard, Lenox-Conynham, and Nordquist, 2004). The findings of the survey confirmed the negative findings of a 2003 report into the problems consumers face when shopping online (Appmann and Nordquist, 2003). The most recent available statistics from the econsumer.gov database, reported 3 502 complaints relating to ecommerce from 1 January to 30 June 2004 (FTC, 2004).

3 Again, some recent European statistics provide some insight into current levels of consumer trust and confidence and the impact this may have on decisions to engage in cross-border transactions. A November 2003 Special Eurobarometer on Consumer Protection reported that 51% of European citizens feel they have access to means of dispute resolution settlement when they buy products in their own countries. This figure drops to 17.8% with respect to access to dispute resolution mechanisms for products purchased in other European countries (EC, 2003b, p36-37). A 2004 survey on access to justice in the EU reports that a high percentage of respondents (25%) said that they had never purchased anything from another country (EC, 2004, p55).

4 The UN Guidelines were first developed in 1985 and expanded in 1999 to include sustainable consumption.

5 ICPEN was formerly known as the International Marketing Supervision Network (IMSN).

6 Permanent Council of the Organization of American States Committee on Juridical and Political Affairs, Draft Resolution, Seventh Inter-American Specialized Conference on Private International Law, CP/CAJP-2239/05 Rev.1, 18 February 2005.

7 The OECD educational instrument on ADR, *Resolving E-Commerce Disputes Online: Asking the Right Questions about ADR*, recommends that consumers should first try and resolve disputes directly with the organisation or merchant before having recourse to third party dispute resolution services (OECD, 2002c).

8 The European Consumer centres network (ECC-Net) is the results of the merger of two existing EU networks (the European Consumer Centres "Euroguichet" and the European Extrajudicial network (EEJ-Net). The ECC-Net mission is to increase consumer confidence in the Internal Market by providing consumers with information about their rights in the EU and assisting them with their cross-border disputes.

9 Further details and a demonstration of the CCForm project are available at http://ccform.interbyte.be/, accessed 20 January 2004.

[10] For a fuller examination of payment cardholders protections, including a description of the payment card system and "chargeback" procedure, see the *OECD Report on Consumer Protection for Payment Cardholders* (OECD, 2002a).

[11] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *Official Journal L 144*, pp.19-27, http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/dist01_en.pdf.

[12] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2003 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC, *Official Journal L 271*, pp. 16-24, http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_271/l_27120021009en00160024.pdf.

[13] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit, *Official Journal L 042*, pp. 4–53 (with corrigendum in Official Journal L 278, 11 October 1988, p. 0033), http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/index_en.htm.

[14] Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, *Official Journal L 208*, pp. 52–58, http://europa.eu.int/comm/internal_market/payments/paymentcards/index_en.htm#legislation.

[15] Communication from the Commission to the Council and the European Parliament concerning a new legal framework for payments in the internal market, COM(2003)718, 2 December 2003, http://europa.eu.int/comm/internal_market/payments/framework/communication_en.htm.

[16] In the United Kingdom, new regulations implementing the EU Distance Selling Directive, came into force in October 2004. The new regulations limit the liability of cardholders (including credit, debit and charge cards) in cases of fraudulent use. However, the broader consumer protections set out in the Consumer Credit Act only apply to payment by credit card.

[17] While the most common forms of ODR involve alternative dispute resolution mechanisms (including negotiation, mediation, and arbitration), in its broadest sense the term ODR incorporates all forms of dispute resolution mechanisms, including judicial dispute resolution, that are facilitated by the Internet.

[18] Automated negotiation is a computerised process, mostly designed to settle disputes over monetary amounts. It is often based on a system of blind bidding, through which the parties enter successive bids in an attempt to reach agreement, but without knowing what the other party has offered. The process concludes when the bids become sufficiently close to one another and the computer programme can propose a solution.

[19] There have been a number of inventories and surveys of online ADR schemes for business to consumer disputes. In late 2000, Consumers International released a survey of twenty nine ODR schemes (Consumers International, 2001). In September 2000, the International Chamber of Commerce released an inventory of forty ODR initiatives, which was later updated in 2002 in co-operation with the OECD (ICC, 2002). In 2003, the Department of Justice in Victoria, Australia, commissioned a study of worldwide ODR schemes, including online ADR schemes for business to consumer disputes (Conley Tyler and Bretherton, 2003). This survey was updated and expanded in 2004 (Conley Tyler, 2004).

[20] Recent surveys of online ADR services have found widely diverging practices among providers in terms of policies and procedures for handling disputes (Consumers International, 2001; Conley Tyler, 2004).

[21] Commission Recommendation of 30 March 1998 on the principles applicable to the bodies for out-of-court settlement of consumer disputes, 98/257/EC, *Official Journal* L 115, pp.31-34, http://europa.eu.int/comm/consumers/redress/out_of_court/adr/index_en.htm.

[22] Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, 2001/310/EC, *Official Journal* L 109/56, pp.56-61, http://europa.eu.int/comm/consumers/redress/out_of_court/adr/index_en.htm.

[23] The database currently includes nearly 400 ADR schemes and is available on www.eejnet.org.

[24] OECD member country rules on procedural safeguards for ADR services are examined in detail in a 2002 report on Legal Provisions Related to Business to Consumer Alternative Dispute Resolution in Relation to Privacy and Consumer Protection (OECD, 2002b).

[25] Interestingly, a recent survey of 115 ODR providers found that, although almost all providers disclosed policies and procedures, the form of these disclosures varied greatly from the most formal procedures manuals to simple flow charts (Conley Tyler, 2004).

[26] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal L* 95, pp. 29-34, http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm.

[27] *Kanitz v. Rogers Cable Inc* [2002] O.J. No. 665

[28] Specifically, the legislation states that any provision in a consumer agreement that purports to require that disputes must be resolved by arbitration is invalid insofar as it prevents a consumer from commencing a Superior Court of Justice action provided for under the new Act (s. 7).

[29] Japanese Arbitration Law (Law No. 138 of 2003), entry into force 1 March 2004, supplemental provisions, article 3. English translation available at www.kantei.go.jp/foreign/policy/sihou/law032004_e.html.

[30] The TACD resolution on ADR, for example, states that "ADR systems should be designed and presented as a voluntary option for consumers, not as a legal or contractual requirement" and continues that "[c]onsumers who submit disputes to ADR systems should not be asked to waive their legal rights, nor should they be restricted or blocked from resorting to other avenues of recourse that would normally be available if they are not satisfied with the outcome" (TACD, 2000).

[31] The report of the conference, *Building Trust in the Online Environment: Business to Consumer Dispute Resolution*, and other conference materials are available on the OECD website at www.olis.oecd.org/olis/2001doc.nsf/LinkTo/dsti-iccp-reg-cp(2001)2.

[32] The Declaration was adopted at the close of an OECD Ministerial Conference on Promoting Entrepreneurship and Innovative SMEs in a Global Economy, held in Turkey in June 2004. Conference materials, including a report on *Alternative Dispute Resolution (ADR) On-line Mechanisms for SME Cross-border Disputes*, are available on the OECD website at www.oecd.org/document/23/0,2340,en_2649_33956792_31919319_1_1_1_1,00.html.

[33] The EU Ecommerce Directive of 2000 provides that Member States should ensure their legislation does not hamper the use of out-of-court schemes available under national law, for dispute settlement. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the internet market, *Official Journal* C 155, p. 1, Article 17, http://europa.eu.int/scadplus/leg/en/lvb/l24204.htm

[34] For access to EEJ-Net visit http://www.eejnet.org.

[35] Proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM (2004) 718 final, 22 October 2004.

[36] See http://www.ecodir.org.

[37] See http://www.econsumer.gov.

[38] See http://mediateurdunet.fr/fo/index.php

[39] Currently 21 European countries (Austria, Belgium, Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugual, Sweden and the United Kingdom) are members of ECC-Net. Cyprus, Malta and Spain will likely join in 2005.

[40] The Consumer Trader and Tenancy Tribunal in New South Wales and the Victorian and Civil Administrative Tribunal in Victoria.

[41] In some countries there are restrictions on certain non-commercial disputes. For example, Mexico excludes family, inheritance, and real estate disputes; Portugal excludes family, inheritance, and labour law disputes; and Sweden excludes family law disputes.

[42] Prohibiting or limiting the reimbursement of lawyers' fees to the winning party is also regarded as a potential means to discourage the use of lawyers (Whelan, 1990, p221).

[43] Tampere European Council 15 and 16 October 1999, Presidency Conclusions, point 30, http://www.europarl.eu.int/summits/tam_en.htm.

[44] Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, Com (2002) 746 final, http://europa.eu.int/scadplus/leg/en/lvb/l33212.htm.

[45] Article 4 of the 1984 Misleading Advertising Directive (as amended by Article 1 of the 1997 directive) provides that "Member States shall ensure that adequate and effective means exist to combat misleading advertising and for the compliance with the provisions on comparative advertising" including "legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising or regulating comparative advertising may (a) take legal action against such advertising." Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, *Official Journal* L 250, pp. 17–20; Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending directive 84/450/eec concerning misleading advertising so as to include comparative advertising, *Official Journal* L 290, pp.18- 23, http://europa.eu.int/comm/consumers/cons_int/safe_shop/mis_adv/index_en.htm.

[46] Article 7 of the 1993 Directive on Unfair Terms in Consumer Contracts provides that "Member States shall ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers," including "provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms." Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal* L 95, pp. 29-34, http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm.

[47] Article 11 of the 1997 Directive on Consumer Protection in Respect of Distance Contracts provides that "Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive" including "provisions whereby [consumer organizations having a legitimate interest in protecting consumers] … may take action under national law before the courts." Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *Official Journal* L 144, pp.19-27, http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/dist01_en.pdf.

[48] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *Official Journal* L 166, pp.51-55, http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398L0027.html.

[49] In Norway, the legal standing of consumer organisations is based on judicial pronouncements rather than positive law. In a 2002 government report, it was proposed to establish this right in law.

[50] In Denmark the representative action is currently operating on the basis of a publicly funded pilot scheme. Under the pilot project, the private Consumer Council may take legal action to force a trader to abide by a prior decision of the Consumer Complaint Board (a public ADR body) or one of the approved private consumer complaint boards.

[51] EU Injunctions Directive 1998, above note 48. For an analysis of the Injunctions Directive and its impact on consumer protection, see Rott, 2001.

[52] The list of qualified entities under the Injunctions Directive is published in the EU Official Journal. Commission Communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under article 2 of this directive, Official Journal C 321, pp. 26-38, http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_321/c_32120031231en00260038.pdf.

[53] The directives include those on misleading and comparative advertisements, consumer credit, package travel, unfair contract terms, distance selling contracts, sale of consumer goods and guarantees.

[54] For example, the Consumer Ombudsman posts common in Nordic countries were mostly created in the 1970s. In the UK, the post of Director General of Fair Trading was created in 1973. In Ireland, the Office of the Director of Consumer Affairs was established in 1978. Although the establishment of the US FTC dates to 1914, in 1975 the consumer movement helped push Congress to authorise new enforcement remedies for FTC use, including consumer redress and civil penalties. See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975.

[55] *Bill C-19, An Act to Amend the Competition Act and to Make Consequential Amendments to Other Acts*, clause 5(3), submitted to the House of Commons on 2 November 2004, legislative summary available at www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=C19.

[56] Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *Official Journal* L364/1, pp.1-11 http://europa.eu.int/comm/consumers/prot_rules/admin_coop/index_en.htm.

[57] Article 4 (6)(g) of the Regulation provides that enforcement agencies are to have the ability to "require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation."

[58] There are related types of procedure available in a number of other countries. A survey conducted by the Hague Conference on Private International Law in 1998 examines the details of provisional and protective measures in Commonwealth countries, the United States, Germany, France, Netherlands, and Switzerland (Kessedjian, 1998). At the European Union level, there have been proposals for harmonized procedural rules on ancillary measures to provide for the improved enforcement of decisions, including protective measures such as the attachment of bank accounts." European Council, Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, section II B 2, *Official Journal*, C12/1, 15 January 2001, pp.1-9, http://europa.eu.int/eurlex/pri/en/oj/dat/2001/c_012/c_01220010115en00010009.pdf.

[59] The Mareva injunction takes its name from the English case of Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyd's Rep 509, in which its availability as a preliminary protective measure was confirmed.

[60] Article 31 of the Brussels Regulation provides that "Application may be made to the courts of a member state for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." Article 24 of the Brussels and Lugano Conventions includes the same wording.

[61] Finland reported that this power may be available in theory but has never been tested.

[62] Bill C19, above note 55, clause 6.

[63] Agreement Between the Government of The United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, 3 August 1995, text available at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02007e.html.

[64] *United States and United Kingdom Sign Agreement to Enhance Cooperation on Consumer Protection Matters at First U.S. Meeting of International Marketing Supervision Network*, Press Release, 31 October 2000, www.ftc.gov/opa/2000/10/ukimsn.htm.

[65] *FTC and the Irish Director of Consumer Affairs Agree To Enhance Cooperation on Consumer Protection Matters*, Press Release, 9 October 2003, http://www.ftc.gov/opa/2003/10/irelandcb.htm

[66] *FTC Signs Memorandum of Understanding with Mexican Consumer Protection Body*, Press Release, 27 January 2005, http://www.ftc.gov/opa/2005/01/memunderstanding.htm.

[67] Cooperation Arrangement between the Commissioner of Competition (Canada), the Australian Competition and Consumer Commission and the New Zealand Commerce Commission regarding the Application of their Competition and Consumer Laws, October 2000, http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02030e.html

[68] *International Pact to Crack Down on Cross-Border Scams*, Press Release, 29 April, www.oft.gov.uk/News/Press+releases/2004/77-04.htm.

[69] The mandate of the Network is to share information about cross-border commercial activities that may affect consumer interests, and to encourage international cooperation among law enforcement agencies. See, www.icpen.org.

[70] Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *Official Journal* L364/1, 9/12/2004, pp.1-11 http://europa.eu.int/comm/consumers/prot_rules/admin_coop/index_en.htm.

[71] The public list of national contact points is available at www.oecd.org/sti/crossborderfraud.

[72] Article 6, EU Consumer Protection Regulation, *above* note 70.

[73] See, Australian Competition and Consumer Commission v. Chen [2003] FCA 897 (Sackville J.).

[74] In 1971, the Hague Conference on Private international Law adopted a Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, adopted, 1 February, 1971; entry into force, 20 August 1979, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=78. However,

to date there are only four parties to this Convention Cyprus; Netherlands; Portugal and Kuwait) and it is largely regarded to have been unsuccessful (Kessedjian, 1997) (accession date: XII-2002, 2002).

75 For background and current status of the draft Convention visit www.hcch.net/index_en.php?act=progress.listing&cat=4.

76 The Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which entered into force in March 2002, revised and replaced the 1968 Brussels Convention of the same name in respect of all EU Member States except Denmark. The Brussels Convention therefore remains in force in relations between Denmark and other EU Member States. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal* L 12/1, 16/01/2001, pp. 1-23; Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded 27 September 1968, *Official Journal* C 027, 26 January 1998, pp.1-27 (consolidated version), http://europa.eu.int/comm/justice_home/ejn/enforce_judgement/enforce_judgement_int_en.htm.

77 The Lugano Convention is a parallel convention to the Brussels Convention, applying between member states of the European Union and the European Free Trade Association (EFTA) *i.e.* Iceland, Liechtenstein, Norway and Switzerland. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded 16 September 1988, *Official Journal* L 319, 25 November 1988, pp. 9-33, http://europa.eu.int/comm/justice_home/ejn/enforce_judgement/enforce_judgement_int_en.htm.

78 These proposals build on the Tampere European Council Conclusions of 1999 called for the "further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision." See Tampere European Council Conclusions, above note 43, at point 34.

79 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims, *Official Journal* L143, 30 April 2004, pp.15-39, http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_143/l_14320040430en00150039.pdf.

80 European Council, Draft Programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, above note 58, at section II A 2.

81 Article 14.7, The Australia-United States Free Trade Agreement (AUSFTA), http://www.dfat.gov.au/trade/negotiations/us.html.

82 Article 15- 16 Brussels Regulation, above note76; Articles 13-14 Lugano Convention, above note 77.

83 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), entry into force 1 April 1991, *Official Journal* C 027, 26 January 1998, pp. 34-46, http://europa.eu.int/comm/justice_home/fsj/civil/applicable_law/fsj_civil_applicable_law_en.htm.

84 Proposal for a Regulation of the European parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM (2003) 427(01), 22 July 2003, http://europa.eu.int/comm/justice_home/fsj/civil/applicable_law/fsj_civil_applicable_law_en.htm.

85 The previous negotiations at the Hague Conference on Private International Law to draft an international treaty on recognition and enforcement of judgments in civil and commercial cases would have set out agreed rules of jurisdiction, including specific rules for consumer cases. However, the scope has been restricted to enforcement of judgments in business to business cases arising from exclusive choice of court agreements. See above note 75 and accompanying text.

BIBLIOGRAPHY

ABA (American Bar Association) E-Commerce and ADR Task Force (2002), *Best Practices for Online Dispute Resolution Providers*, October, www.law.washington.edu/ABA-eADR/documentation/2002.09.05doc.html.

APEC (Asia Pacific Economic Co-operation) (2002), *Voluntary Online Consumer Protection Guidelines*, www.export.gov/apececommerce/cp/guidelines.htm.

Appmann, M. and Nordquist, F. (2003), *The Realities of the European Online Marketplace: A Cross-Border Ecommerce Project by the European Consumer Centre's Network*, www.konsumenteuropa.se/Documents/Engelska/EEC_e-commerce_report.pdf.

Barnett, J. (2004), "Arbitration: Playing Catch-Up," *Legal IT,* January, www.legalit.net/ViewItem.asp?id=22571.

Bygrave, L. and D. Svantesson (2001) "Jurisdictional Issues and Consumer Protection in Cyberspace: The View from 'Down Under'", paper presented at conference on Cyberspace Regulation: eCommerce and Content, Sydney, 24 May, http://folk.uio.no/lee/oldpage/articles/CLE_paper.pdf .

Bygrave, L. (2002), "Online dispute resolution – what it means for consumers", paper presented at conference on Domain Name Systems and Internet Governance, University of New South Wales, Sydney, 7 May, http://folk.uio.no/lee/oldpage/articles/Bygrave_ODR.pdf.

Cappelletti, M. (ed.) (1979), *Access to Justice*, A. Giuffrè, Milan.

Cappelletti, M. (1989), *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford and New York.

Campbell, D. (1999), *International Judicial Assistance in Civil Matters*, Transnational Publishers, New York.

D. Clarke and K. Webb (2002), *Market-driven Consumer Redress Case Studies and Legal Issues*, Industry Canada, Office of Consumer Affairs, http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01643e.html.

Conley Tyler, M. and D. Bretherton (2003), *Research into Online Alternative Dispute Resolution: Exploration Report*, prepared for the Department of Justice, Victoria, Australia, 13 March, www.psych.unimelb.edu.au/icrc/exploration.pdf.

Conley Tyler, M. (2003), "Seventy-six and Counting: An Analysis of ODR Sites," in Katsh, E.and D. Choi (Eds), *Proceedings of the UNECE Second Forum on Online Dispute Resolution*, Center for Information Technology and Dispute Resolution, University of Massachusetts, www.odr.info/unece2003/pdf/Tyler.pdf.

Conley Tyler, M. (2004), '115 and Counting: the State of ODR 2004,' in Conley Tyler, M., E. Katsh, and D. Choi (Eds.), *Proceedings of the Third Annual Forum on Online Dispute Resolution*, International Conflict Resolution Centre, University of Melbourne.

Consumers International (2001), *Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-Border Disputes,* Consumers International, London, www.consumersinternational.org/document_store/Doc517.pdf.

Danford, B. (2004), "The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?," *The University of Texas Review of Litigation, Vol. 23,* pp. 383-434.

Doyle, M., K. Ritters and S. Brooker (2004), *Seeking Resolution: The Availability and Usage of Consumer-to-Business Alternative Dispute Resolution in the United Kingdom*, National Consumer Council, London, January, www.ncc.org.uk/protectingconsumers/seeking_resolution.pdf.

DTI (Department of Trade and Industry) (UK) (2003), *Comparative Report on Consumer Policy Regimes,* October, www.dti.gov.uk/ccp/publications.htm.

DTI (UK) (2004), *Extending Competitive Markets: Empowered Consumers, Successful Business*, Consultation Paper, July, www.dti.gov.uk/ccp/topics1/consumer_strategy.htm.

EC (European Commission) (2003a), *Report on the Review of the European-Judicial Network and Future Perspectives for Improved European Union Consumer Assistance*, http://europa.eu.int/comm/consumers/redress/out_of_court/eej_net/report_25022004.pdf.

EC (2003b), *Consumer Protection in the EU*, Special Eurobarometer 193, November, http://europa.eu.int/comm/public_opinion/archives/eb_special_en.htm.

EC (2004), *Europeans and Access to Justice*, Special Eurobarometer 195, October, http://europa.eu.int/comm/consumers/redress/reports_studies/eurobarometer_11-04_en.pdf.

ECLG (European Consumer Law Group) (1998), Jurisdiction and Applicable Law in Cross Border Consumer Complaints, Journal of Consumer Policy, Vol. 21, No. 3, pp. 315-337.

Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Official Journal L 12/1, http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf

FTC (Federal Trade Commission) (US) (2000), *Consumer Protection in the Global Electronic Marketplace: Looking Ahead*, US FTC, Bureau of Consumer Protection, Staff Report, Washington, DC, September, www.ftc.gov/bcp/icpw/lookingahead/electronicmkpl.pdf.

FTC (US)(2004), *Econsumer Complaints: January 1 – June 30, 2004*, http://www.econsumer.gov/english/index.html (visited 20 January 2005).

Finland Consumer Ombudsman (2002), "Consumer Protection", Vol. 2, English summary, www.kuluttajavirasto.fi/user/loadFile.asp?id=5543.

Foss, M. and L.A. Bygrave (2000), "International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law", International Journal of Law and Information Technology, Vol. 8, pp. 99-138, http://folk.uio.no/lee/oldpage/articles/Consumer_purchases_jurisdiction.pdf.

GBDe (Global Business Dialogue on Electronic Commerce) (2003), Alternative Dispute Resolution Guidelines, www.gbde.org/agreements/adragreement03.pdf.

Halfmeier, A. (2003), "Waving Goodbye to Conflicts of Laws? Recent Developments in European Union Consumer Law," in Rickett, C. and T. Telfer (eds.) (2003), *International Perspectives on Consumers Access to Justice,* Cambridge University Press, Cambridge.

Hodges, C. (2001), "Multi-Party Actions: A European Approach," *Duke Journal of Comparative and International Law*, Vol. 11, pp. 321-354.

Hollinger, P. (2005), "France Mulls Allowing Class-Action Suits", Financial Times, 6 January, p.1.

Howells, G. (2002), "Litigation in the Consumer Interest", ILSA Journal of International & Comparative Law, Vol. 9, pp.1-56.

ICC (International Chamber of Commerce) (2002), Business-to-Consumer and Consumer-to-Consumer Alternative Dispute Resolution (ADR) Inventory Project, Summary Report, 18 July, www.iccwbo.org/home/ADR/ADR%20PROJECT%20REPORT%20final.pdf.

ICC (2003), "Putting it Right: Best Practices for Customer Redress in Online Business," www.iccwbo.org/home/e_business/word_documents/PUTTING-rev.pdf.

ICPEN (International Consumer Protection and Enforcement Network) (2000), *Findings on Cross-Border Remedies*, http://www.icpen.org/imsn/cross%20border%20findings.htm.

ISO (International Standards Organisation) (2004), *Guidelines for Complaints Handling in Organizations*, 10002: 2004, http://www.iso.ch/iso/en/commcentre/pressreleases/archives/2004/Ref925.html.

Kessedjian, C. (1997), *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Preliminary Document No. 8, Hague Conference on Private International Law, the Hague, http://hcch.e-vision.nl/upload/wop/jdgm_pd7.pdf.

Kessedjian, C. (1998), *Note on Provisional and Protective Measures in Private International Law and Comparative Law*, Preliminary Document No. 10, Hague Conference on Private International Law, the Hague, http://www.hcch.net/upload/wop/jdgmpd10.pdf.

Leonard, T., L. Lenox-Conynham, and F. Nordquist (2004), *The European Online Marketplace: Consumer Complaints,* European Consumer Centre Network, http://www.ecic.ie/resources/publications/european_online_with_cover_2.pdf.

Lenox-Conynham, L. (2004), *The Small Claims Court and its Use in Cross-Border Dispute Resolution*, ECC Dublin (European Consumer Centre), www.ecic.ie/resources/publications/Small_Claims_Court_Report_June_2004.pdf.

Maussion, C. (2005), "Clients Mecontents Unis au Tribunal", *Libération*, 7 January, p. 6-7.

Michell, P. (1997), "The *Mareva* Injunction in Aid of Foreign Proceedings," *Osgoode Hall Law Journal*, Vol. 34 No. 4, pp. 741-806, www.yorku.ca/ohlj/PDFs/34.4/michell.pdf.

Minister for Customs and Consumer Affairs (Australia) (1997), *Benchmarks for Industry-Based Consumer Dispute Resolution Schemes*, Commonwealth of Australia, August, www.consumersonline.gov.au/content/SelfRegulation/benchmark/.

NADRAC (National Alternative Dispute Resolution Advisory Council) (Australia) (2001), *A Framework for ADR Standards,* Commonwealth of Australia, April, www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Standards.

NADRAC (Australia) (2002), *Dispute Resolution and Information Technology: Principles for Good Practice (Draft)*, March, www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Technology_and_ADR.

NCAC (National Consumer Affairs Center) (Japan) (2004), *NCAC News*, Vol. 16. No.4, November, p.1.

New York Attorney General (2004), "PayPal to Clarify Disclosures Related to Rights for Undelivered Goods," Press Release, 8 March, www.oag.state.ny.us/press/2004/mar/mar08a_04.html.

OECD (Organisation for Economic Co-operation and Development) (1999), *Guidelines for Consumer Protection in the Context of Electronic Commerce,* OECD, Paris, www.oecd.org/sti/consumer-policy.

OECD (2002a), *Report on Consumer Protections for Payment Cardholders*, OECD, Paris, www.olis.oecd.org/olis/2001doc.nsf/linkto/dsti-cp(2001)3-final.

OECD (2002b) *Report on Legal Provisions Related to Business to Consumer Alternative Dispute Resolution in Relation to Privacy and Consumer Protection*, OECD, Paris, www.olis.oecd.org/olis/2002doc.nsf/linkto/dsti-iccp-reg-cp(2002)1-final.

OECD (2002c), *Resolving E-Commerce Disputes Online: Asking the Right Questions about ADR*, OECD, Paris, www.olis.oecd.org/olis/2002doc.nsf/linkto/dsti-iccp-reg-cp(2002)2-FINAL.

OECD (2003), *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice Across Borders,* OECD, Paris, www.oecd.org/sti/crossborderfraud.

OECD (2004), The Istanbul Ministerial Declaration on Fostering the Growth of Innovative and Internationally Competitive SMEs, OECD, Paris, June, www.oecd.org/document/16/0,2340,en_2649_33956792_32020176_1_1_1_1,00.html.

OFT (Office of Fair Trading) (UK) (2004), *fair trading*, Issue 39, November, p. 2.

Perrit, H. (2000), "The Internet is Changing the Public International Legal System," *Kentucky Law Review*, Vol. 88, p.885 (2000), www.kentlaw.edu/cyberlaw/perrittnetchg.html.

Pryles, M. (2002), *Dispute Resolution in Asia*, Aspen.

Ramsay, I. (2003), "Consumer Redress and Access to Justice", in Rickett, C. and T. Telfer (eds.) *International Perspectives on Consumers Access to Justice,* Cambridge University Press, Cambridge, pp. 35-45.

Reilly, S. (2004), *The Need to Develop ADR in Ireland*, European Consumer Centre Dublin, http://www.ecic.ie/resources/publications/ADR_development_in_Ireland.pdf.

Rickett, C. and T. Telfer (eds.) (2003), *International Perspectives on Consumers Access to Justice,* Cambridge University Press, Cambridge.

Rott, P. (2001), "The Protection of Consumers' Interests after the Implementation of the EC Injunctions Directive into German and English Law", *Journal of Consumer Policy*, Vol. 24, pp. 401-442.

Schultz, T. (2003) "Connecting Complaint Filing Processes to Online Resolution Systems", *Commercial Law Practitioner,* Vol. 10, No. 11, Thomson Round Hall, Dublin, pp. 307-314.

Scott, S. (2004), Speaking notes for Sheridan Scott Commissioner of Competition, Competition Bureau to the Standing Committee on Industry, Natural Resources, Science and Technology, 18 November, http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02993e.html.

TACD (Transatlantic Consumer Dialogue) (2000), *Alternative Dispute Resolution in the Context of Electronic Commerce*, Doc No. Ecom 12-00, February, www.tacd.org/db_files/files/files-82-filetag.pdf.

UN (United Nations) (1999), *United Nations Guidelines for Consumer Protection*, UN Doc. No. A/C.2/54/L.24, Principle E.

Von Freyhold, H. et al (1996), *Cost of Judicial Barriers for Consumers in the Single Market*, Report for the European Commission.

Von Freyhold, H. et al (1998), *The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market*, Report for the European Commission, http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub03.pdf.

Whelan, C. J. (ed.) (1990), *Small Claims Courts, A Comparative Study*, Clarendon Press, Oxford.

World Bank (2000), Access to Justice: the English Experience with Small Claims, PREM Notes, No. 40, www1.worldbank.org/prem/PREMNotes/premnote40.pdf.

World Bank (2001), *Improving Access to Justice*, www1.worldbank.org/publicsector/legal/access.htm.

World Federation of Direct Selling Associations (WFDSA), *Code of Conduct Towards Consumers,* www.wfdsa.org/world_codes/toconsumers.asp.

ANNEX A: QUESTIONNAIRE ON CONSUMER DISPUTE RESOLUTION AND REDRESS

Introduction

This questionnaire is designed to assist the Working Group on Consumer Dispute Resolution and Redress in preparing the following documents: a background paper on mechanisms for consumer dispute resolution and redress; and an issues paper on making redress effective in cross-border cases. The responses to the questionnaire will be supplemented by existing Committee on Consumer Policy (CCP) reports and independent research.

Section I of the questionnaire focuses on mechanisms for dispute resolution and redress. It includes questions on small claims courts; class action lawsuits; legal actions by consumer associations; and government-obtained redress. The final two questions request updates (if any) and more detailed information to supplement existing CCP surveys on payment cardholder protections and alternative dispute resolution.

Section II focuses on areas relevant to the issues paper on making redress effective in cross-border cases. It includes questions on the ability of consumer protection agencies to gather and share information about assets with foreign agencies; international agreements for asset freezes; and international agreements for the mutual recognition and enforcement of judgements.

Instructions for completing the questionnaire

The scope of the questionnaire is restricted to dispute resolution and redress in cases involving business to consumer transactions that result in economic harm. The purpose is to assess available mechanisms to resolve disputes and obtain monetary compensation for consumers in small value claims arising out of transactions for the sale of good and services, especially when those transactions occur across borders. The questionnaire is not intended to cover dispute resolution and redress in cases between private individuals (*e.g.* personal injury, landlord and tenant, family, or employment law cases) or for cases involving commercial practices that damage the health and safety of consumers (*e.g.* product liability, product safety, or environmental law cases). When completing the questionnaire, respondents are requested to limit their answers accordingly.

In order to minimise the burden on respondents, questions have been framed as simply as possible, in many cases requiring only a yes or no answer. Nevertheless, respondents are welcome to supplement answers with additional information wherever they see fit. Additionally, for countries with legal systems with diverse regional or local systems for dispute resolution and redress, respondents may wish to focus their responses on those systems operating on a national level, or to provide select examples from the regional or local systems, rather than aiming for a comprehensive response. For each dispute resolution and redress mechanism, please indicate at what level of government their response is focused (*i.e.* whether it relates to national, regional, and/or local government procedures).

Member country responses to the Questionnaire are requested by **17 September 2004**.

QUESTIONS

Country:

Section I: Mechanisms for consumer dispute resolution and redress

A. Small claims courts

Is there a small claims procedure available within the court system for low value consumer complaints?

Please provide the following information:

1. The type of dispute and claim that may be heard.
2. The threshold limits on the monetary value of the claim.
3. The rules regarding legal representation and assistance.
4. Whether there is the possibility of a purely written procedure, or other alternatives to in-person hearings.
5. Whether there are other relevant limitations (*e.g.* fixed time limits or restrictions on foreign consumers filing complaints).

Please provide the following information regarding financial costs to consumers:

1. The fees for filing a complaint.
2. Whether consumers can recover the filing fee if their claim is successful.
3. Whether consumers are liable to pay the costs of the other party if their claim is unsuccessful and, if so, whether there are any limits on costs.

Are the parties required or encouraged to resort to some form of ADR either before or after the complaint is filed? If yes, please elaborate.

Please provide a brief assessment of the effectiveness of this mechanism for resolving consumer disputes and obtaining redress, in particular for cases with a cross-border dimension. Where possible, please illustrate your answer with examples. In evaluating effectiveness, please consider the following factors (a) accessibility; (b) cost; and (c) timeliness.

B. Class (group/collective) action litigation

Is there a procedure for filing a class (group/collective) action lawsuit?

If so, please provide the following information:

1. The type of dispute and claim that may be heard.
2. The remedies that may be obtained.
3. Whether there are other relevant limitations (e.g. fixed time limits or restrictions on foreign consumers filing such lawsuits).

Please briefly describe the procedure for determining the plaintiffs or claimants (*e.g.* on an *opt-out* consent basis whereby similarly situated persons are automatically included in the lawsuit unless they take action otherwise or on an *opt-in* consent basis whereby similarly situated persons are only included if they expressly join the lawsuit). Please also note:

1. The procedure for notifying potential plaintiffs or claimants of the pending case.
2. Whether proposed settlement orders require approval of the court and/ or notice to the plaintiffs or claimants.
3. Whether the final court decision or settlement order is binding on all plaintiffs or claimants (including non-participating plaintiffs or claimants).

Are the plaintiffs or claimants liable to pay the costs of the other party (including legal fees) if their case is unsuccessful?

Please provide a brief assessment of the effectiveness of this mechanism for resolving consumer disputes and obtaining redress, in particular for cases with a cross-border dimension. Where possible, please illustrate your answer with examples. In evaluating effectiveness, please consider the following factors (a) accessibility; (b) cost; and (c) timeliness.

C. Legal actions by consumer associations

Do independent consumer associations have standing to take legal action on behalf of consumers? If so, in what kinds of cases?

What type of remedies may be obtained? Please note in particular whether monetary remedies may be obtained.

Can consumer associations bring cases on behalf of foreign consumers or against foreign businesses?

Please provide a brief assessment of the effectiveness of this mechanism for resolving consumer disputes and obtaining redress, in particular for cases with a cross-border dimension. Where possible, please illustrate your answer with examples. In evaluating effectiveness, please consider the following factors (a) accessibility; (b) cost; and (c) timeliness.

D. Government-obtained redress

Can a government consumer protection agency obtain monetary redress for injured consumers? If so, in what kinds of cases?

Can redress be obtained on behalf of foreign as well as domestic consumers?

Can a provisional order be obtained to freeze the defendant's assets, including assets located abroad, pending the outcome of the case?

Please provide a brief assessment of the effectiveness of this mechanism for resolving consumer disputes and obtaining redress, in particular for cases with a cross-border dimension. Where possible, please illustrate your answer with examples. In evaluating effectiveness, please consider the following factors (a) accessibility; (b) cost; and (c) timeliness.

E. Payment cardholder protections

Have there been any significant updates to the laws relating to protections for payment cardholders since the March 2000 questionnaire on this subject, which you would like to see reflected in the background report?

Please provide a brief assessment of the effectiveness of this mechanism for resolving consumer disputes and obtaining redress, in particular for cases with a cross-border dimension. Where possible,

please illustrate your answer with examples. In evaluating effectiveness, please consider the following factors (a) accessibility; (b) cost; and (c) timeliness.

F. Alternative dispute resolution

Have there been any significant updates to the laws relating to business to consumer ADR, since the June 2001 questionnaire on this subject, which you would like to see reflected in the background report?

In addition to updates to the above survey on legal provisions, please provide available information on current private sector ADR developments (online and offline) in your country. You may wish to supplement your response with copies of any inventories, reports or assessments of ADR initiatives in your country that you may have conducted or of which you are aware.

Please provide a brief assessment of the effectiveness of this mechanism for resolving consumer disputes and obtaining redress, in particular for cases with a cross-border dimension. Where possible, please illustrate your answer with examples. In evaluating effectiveness, please consider the following factors (a) accessibility; (b) cost; and (c) timeliness.

Section II: Making redress effective in cross-border cases

For each activity outlined below, please indicate the source of your authority (*e.g.* domestic law or international arrangement) and, where possible, provide examples of cases where the authority has been exercised. Where appropriate, please also indicate whether your response depends on the type of authority of the requesting government consumer protection agency (civil, criminal, or administrative or a combination thereof).

Can a government consumer protection agency gather and share information about property, corporations, trusts, or assets with foreign consumer protection agencies?

Can a government consumer protection agency seek asset freeze orders and/or other provisional measures from a foreign court in aid of a domestic consumer protection case?

Can a foreign government consumer protection agency seek asset freeze orders and/or other provisional measures in your courts in aid of a foreign consumer protection case?

Can a foreign government consumer protection agency obtain an order in your courts for the transfer or repatriation of assets, in satisfaction of a judgment obtained by that agency?

Can a government consumer protection agency obtain (or assist in obtaining) asset freeze orders, other provisional measures, or orders for the transfer or repatriation of assets in your courts on behalf of a foreign government consumer protection agency?

Please describe the existing legal principles and judicial framework in your country for the recognition and enforcement of foreign monetary judgments, including judgments obtained by foreign government consumer protection agencies. Do different principles apply when the foreign judgment is for monetary restitution to consumers rather than a penalty or fine?

Please provide a brief assessment of the strengths and weaknesses of existing systems to provide consumers with monetary redress across borders, in particular systems for the cross-border recognition and enforcement of monetary redress orders. Please illustrate your answer with examples of successful cases and/or particular difficulties you have encountered.