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New applications for ADR

E-commerce and ADR: some suggestions

Michael Park

Traditionally the purchase of goods has presented few practical problems. A consumer selects the goods, orders them in person, pays for them and then comes away with them. However, the increasing amount of commerce conducted over the internet has created unique difficulties for consumers.

A consumer may now purchase goods of relatively small value from a supplier with no interaction other than through the computer. The supplier may not have a retail outlet where the consumer could make contact in person, to exchange defective goods for instance. Of further concern is the fact that such everyday transactions may involve contracts that have an international flavour and are not amenable to the jurisdiction of the consumer's courts.

Problems arising

Where contractual disputes arise, the complainant often elects not to pursue the matter rather than take appropriate legal action. The cost of commencing proceedings is likely to outweigh any benefit to be gained. As a result, the complainant may simply avoid further online purchases in the future.

There is the notable case of the Chicago based lawyer Loundy who pursued his relatively small claim well beyond the confines of any economic justification.¹ Loundy ordered a CD from a British based supplier over the internet. The advertised price of the CD was incorrect: it was actually much lower than the correct price. After ordering the CD at the advertised price, Loundy was informed by the supplier that the advertisement was a mere 'invitation to treat' rather than an offer for him to purchase at the advertised price. Loundy had therefore made an offer to purchase the CD that could be either accepted or rejected by the supplier. His offer was rejected. The supplier was, however, prepared to sell him the CD at the higher price which had not been advertised.

Rather than declining to pursue the matter due to the tyranny of distance, Loundy took the view that he had entered into a valid contract to purchase the CD at the advertised price and Illinois law should apply to that contract. He was ultimately successful. Of course, it is unlikely that many consumers would follow his lead in similar circumstances.

Obviously, where the value of the disputed goods is significant the parties are more likely to pursue the issue. There remains the problem, however, of ensuring that the cost of court proceedings does not outweigh the quantum of the potential judgment. Enforcement of a foreign judgment may also be practically difficult.

From a legal standpoint complex issues relating to choice of law and choice of forum arise where the consumer and supplier in an internet based transaction reside in different countries. A consumer with a dispute in a relatively low value internet transaction seeks redress that is inexpensive, efficient and results in the refund or receipt of the goods ordered. It is also in the interests of suppliers legitimately conducting business over the internet to increase consumer confidence in internet transactions.

Responses to the problems

Both the Australian Treasury and the US Federal Trade Commission have considered the best approach for consumer protection in relation to e-commerce.²

The OECD has also issued guidelines on the matter.³ The OECD guidelines do provide a lowest common denominator: that consumers should be afforded transparent and effective protection and that 'businesses should pay due regard to the interests of consumers and act in accordance with fair business, advertising and marketing practices'.

ADR can provide a time efficient and cost effective method of redress in smaller consumer transactions — whether domestic or international in nature — for everyday internet transactions involving CDs, books and like products. For such transactions, dispute resolution by ADR is preferable to resolution in the courts.

Court procedures and generally accepted ADR procedures differ from jurisdiction to jurisdiction. Moreover, the choice of venue for resolving a dispute often causes significant practical difficulties for the party not residing in the jurisdiction where the dispute is to be resolved. Indeed, it may well discourage a complainant from proceeding if, for instance, an arbitration is to be conducted in another state or country.

What is needed is a radically different form of ADR which cuts across jurisdictional borders and is specifically tailored to e-commerce and the internet. Disputes could be resolved online. All submissions could be made online. The expert, mediator or arbitrator could manage the proceedings online and deliver the final judgment or award online. This would significantly reduce costs and the time taken to resolve disputes between parties across great distances. It would also encourage the efficient resolution of such disputes.

Developing ADR programs

Parties are free to agree upon a private procedure for the resolution of disputes. However, in order to encourage consumer confidence in internet transactions it would be preferable to establish a public ADR program that could become widely accepted. In that case, who would fund such an ADR program and what would be the substantive law governing the dispute?

There are two alternatives regarding ADR programs. A dispute resolution policy administered by an international body could be established to resolve disputes in internet transactions in a



similar manner to the Internet Corporation for Assigned Names and Numbers and the Uniform Dispute Resolution Policy relevant to domain name disputes. Alternatively, industry funded dispute resolution procedures could be established. There are already a number of private organisations that provide online dispute resolution, including SquareTrade and Cybersettle. They provide certification for websites that make use of them.

SquareTrade provides online dispute resolution between suppliers conducting business online and consumers. A supplier registers with SquareTrade. A consumer in dispute with a registered supplier completes an online dispute form detailing the transaction and the nature of the dispute. The supplier responds to the claim. The parties attempt to reach an agreement online using SquareTrade's online communication tool or with a mediator involved at the parties' request.

Cybersettle is used largely by lawyers and insurance companies to settle claims using a more formal procedure. Essentially it operates as a tool for online bargaining regarding the settlement figure to be agreed upon.

In respect of the choice of law, it was suggested in submissions to the Federal Trade Commission that there are three possibilities: the law of the consumer, the law of the supplier or the development of an international consumer protection law, which could be based on the very broad principles enunciated by the OECD. However, it may be possible that a consumer is afforded less protection under any international consumer protection law than under the laws of its own country. It is questionable whether such an outcome should be encouraged.

Consumer confidence in online transactions remains relatively low in

Australia, particularly compared with the US, where the long-time popularity of mail order transactions has assisted in creating confidence in online transactions. In order to encourage online e-commerce it is suggested that a public ADR program be implemented. The body or bodies administering the program could endorse suppliers adopting the program (that is, those suppliers incorporating an appropriate ADR clause in their terms of supply), thereby increasing consumer confidence in respect of commerce with those suppliers.

It would be in the interests of suppliers to adopt such a program as consumer awareness of the program increases. Such a program would then be beneficial to both consumers and suppliers. ●

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Endnotes

1. See Kaplan C S 'On the web, it's buyer beware. But where?' *Cyberlaw Journal* 26 March 1999 available at <www.nytimes.com/library/tech/99/03/cyber/cyberlaw/26law.html>.

2. For Australian considerations see *Dispute Resolution in Electronic Commerce Discussion Paper* Consumer Affairs Division, The Treasury, October 2001 available at <www.ecommerce.treasury.gov.au>; and *Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions* Federal Trade Commission and Department of Commerce 6-7 June 2000 available at <www.ftc.gov/bcp/altdisresolution/>.

3. *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* 1999 available at <www.oecd.org>.

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