



PACE LAW SCHOOL  
P A C E U N I V E R S I T Y



UNCITRAL

PENNSTATE



The Dickinson  
School of Law

## **A Fresh Look At Online Dispute Resolution**

Existing Dispute Resolution Mechanisms for Cross-Border B2B and B2C  
Transactions: Serving State, Business and Consumer Interests?

### **A BBB Perspective**

29 March 2010  
Vienna, Austria

#### **A Presentation by:**

Charles I. Underhill  
Senior Consultant | Special Projects  
Council of Better Business Bureaus, Inc.  
4200 Wilson Boulevard  
Arlington, Virginia 22203

I'd like to begin my remarks today with two quotes – the first is a quote from investor and philanthropist Warren Buffett, who once observed:

*"I don't look to jump over 7-foot bars: I look around for 1-foot bars that I can step over. "*

The second is from Voltaire. It is a caution that

*"The perfect is the enemy of the good."*

Hold those two thoughts in mind for a bit; I think they do really bear on our discussions this afternoon – and over the coming months.

As a preface, I should note here that all of my remarks today are focused on cross-border consumer issues, not commercial ones. Non-judicial, cross-border dispute resolution currently helps grease the wheels of commerce, as I believe our panelist from GE will discuss this afternoon.

Here's what I'd like to accomplish during my remarks. I'd like to:

- Give you a bit of background on the BBB;
- Make the point that there is a considerable amount of cross-border consumer dispute resolution actually going on right now;
- Express my long-standing doubt that the formal courts system will ever play a major role in the redress of individual cross-border consumer disputes;
- Emphasize that a "one size fits all" approach is not only unwise, but may be unworkable;
- Urge you to consider the role that NGO's – particularly self-regulatory organizations – can play in this cross-border consumer environment.

**First**, let me give you a very brief bit of background on BBB, the Better Business Bureau system in North America.

The Better Business Bureau movement will celebrate its 100<sup>th</sup> anniversary in 2012, and was born out of the advertising self-regulation movement. The BBBs are private, non-governmental agencies, and they pre-date the formation of the U.S. Federal Trade Commission by two years.

The BBB system is made up of 123 member local Better Business Bureaus throughout the United States and Canada. Those BBBs, in turn, represent some 400,000 local businesses that are BBB accredited. Finally, over 200 of the largest, leading-edge national and multi-national companies are CBBB corporate partners.

The BBB's mission is to be the leader in advancing marketplace trust.

In 2009, the BBB system handled nearly 1 million consumer disputes and provided over 65 million pre-purchase, BBB reports on business to consumers.

So, that's enough background about the BBB; let me turn to my **second** point – that there is a considerable amount of cross-border consumer dispute resolution going on right now.

First, we should all remember that the most effective dispute resolution – when it works properly – takes place at the lowest practicable level, and by that, I mean directly between the consumer and the merchant. Two examples may serve to illustrate this point.

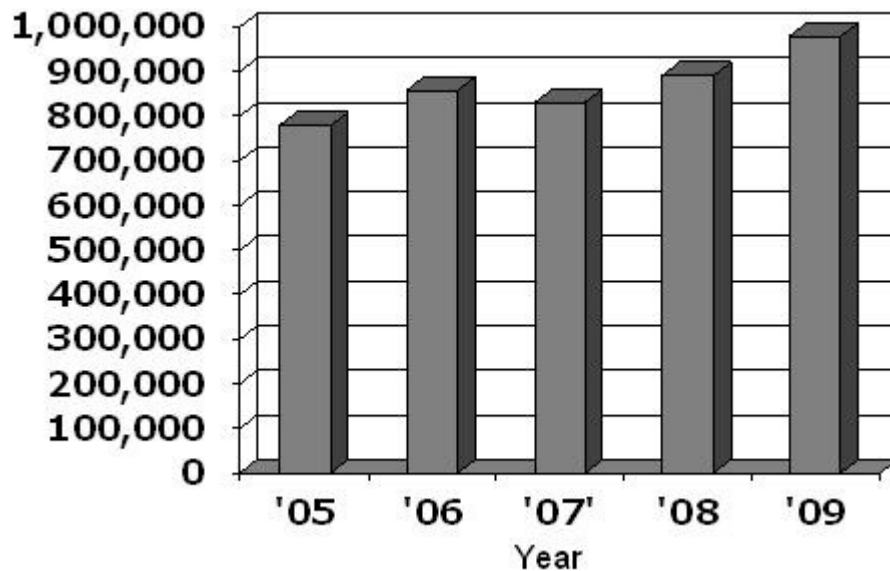
According to statistics released by The Nilson Report, a source of research on the payment card industry, in December 2009, there were 26.5 billion U.S. credit card transactions in 2008. That would translate into 72.6 million transactions per day throughout 2008. If one-one-hundredth of one percent of those transactions resulted in some type of problem, that would create the potential for roughly 7,260 disputes to arise, each and every day of the year. The cumulative number of cases – and that's in the U.S. alone – would be more than double the entire caseload of the BBB system in 2009. Colin Rule, here representing e-Bay and PayPal, can undoubtedly give you that organization's experience.

All merchants are not the payment card industry, handling huge daily volumes of transactions . . . and my "one one-hundredth of one-percent" figure may be a gross over exaggeration. That said, why aren't our courts, regulatory agencies, NGOs and informal dispute mechanisms simply drowning in disputes? One major reason is that most of these cases are quickly resolved directly between the companies and their customers, at little or no cost to either those customers or the larger society.

Anything we do to try and improve cross-border consumer redress has to follow that old medical dictum – first, do no harm. We must do everything in our power to encourage these merchants to not only continue, but continually improve, these internal practices.

Let me turn now to the BBB's statistics as a fairly reliable indication of the level of cross-border consumer dispute resolution that is already taking place.

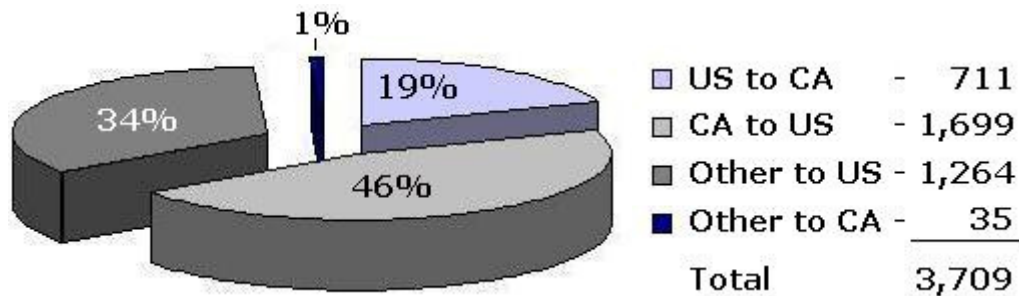
Here's the BBB's five-year North American complaint trend, including the recently-announced complaint numbers for 2009:



The precise 2009 figure is 978,519.

How many of those were "cross-border" complaints? Using a very conservative method, BBBs handled over 3,700 complaints from consumers in one country against businesses located within North America. While that number represents only .37% of all BBB consumer complaint cases, it represents a 38% increase over the 2,690 cross-border cases computed by the same method in 2008.

What makes up that 2009 number? Here's the breakdown:



If we look a bit closer at those 1,264 cases coming from outside North America filed against firms located in the United States – and compare those numbers with the cases filed through e-consumer.gov (a web site maintained by the U.S. Federal Trade Commission on behalf of the International Consumer Protection and Enforcement Network), there is strong alignment. Seven out of the BBB “top 9” home countries for consumer complainants appear on both lists.

Country	BBB	Country	e-consumer.gov *
UNITED KINGDOM	218	AUSTRALIA	638
AUSTRALIA	150	UNITED KINGDOM	426
GERMANY	57	FRANCE	286
JAPAN	50	INDIA	124
MEXICO	41	IRELAND	68
INDIA	37	GERMANY	66
FRANCE	37	BELGIUM	62
CHINA	36	NEW ZEALAND	56
IRELAND	25	SPAIN	56

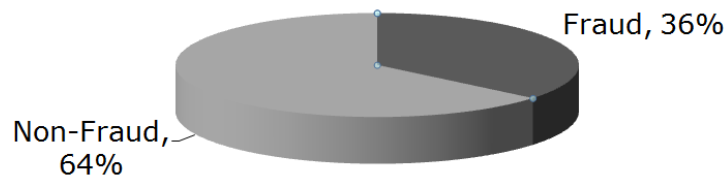
A final observation – reinforcing an earlier point I made – comes from an 18-month cross-border pilot agreement between BBB and a program administered by the Direct Marketing Association in the UK, TrustUK/WebtraderUK. That program is no longer in operation.

In 2006, reporting on the project to the Global Business Dialogue on e-Commerce (now the Global Business Dialogue on e-Society), we noted that,

of the complaints from UK consumers about U.S. or Canadian-based businesses:

- 36% involved some form of fraud.

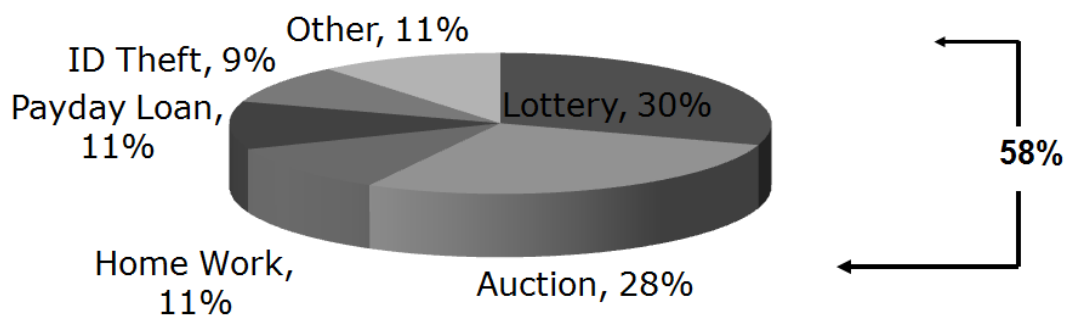
### Fraud – 36% of Total



- Average Value of All Cases – 963.04 USD
- Average Value of Fraud Cases – 1,357 USD
- Average Value of Auction Fraud Cases – 1,538 USD

- Looking deeper at the fraud, 58% involved either “lottery” fraud (30%) or “online auction” fraud (28%), and another 9% directly involving some form of identity theft. It is probably fair to say that identity fraud would eventually show up in the “lottery” or “auction” fraud at some point in the future.

### Fraud – Type of Fraud<sup>1</sup>



Since nearly 40 percent of the cross-border complaints in this narrow sample involved outright fraud, concerted efforts to develop collaborative, cross-border dispute resolution models for individual consumer disputes must have a companion effort to develop strong, workable cross-border law enforcement and consumer education efforts. I suspect our representative

on the panel today from the U.S. Federal Trade Commission, Hugh Stevenson, will touch on this issue in his remarks.

This brings me to my **third** point – my continuing skepticism that the formal courts system will ever play a major role in the cross-border consumer redress. This skepticism is fueled by the BBB's real world experience that North American consumers' are reluctant to use the formal justice system – even though the U.S. is often described as one of the world's most litigious societies. Our experience in North America suggests that individual consumers do not utilize their rights to judicial redress for most problems they encounter in the consumer marketplace.

There are many reasons for this, including, among others, the cost in money, time and personal stress of litigation; the accessibility of counsel; the relatively small dollar value of the disputes; varying education levels; fear; and the weakness of strictly "legal" positions and remedies compared to the perceived harms or inconveniences suffered. Every one of these barriers is increased significantly with respect to disputes arising cross borders.

In short, while it is important to encourage businesses and consumers to participate in ecommerce through the development of governmental rules and procedures that provide predictability and fairness, it is equally important to recognize the specific limitations of these rules as effective redress mechanisms for most consumers.

We are more convinced than ever that alternative dispute resolution programs and processes of various types hold the greatest promise as tools – many of them self-regulatory tools – through which most cross-border, online consumer disputes will be efficiently and effectively resolved.

To make my fourth and fifth points, I ask you to recall the two quotations I cited at the beginning of this presentation:

- Warren Buffett's note that he doesn't look for 7-foot bars to leap over; he looks around for 1-foot bars that he can step over.
- Voltaire's admonition that "the perfect is the enemy of the good".

Over the past decade, we – and I mean all of us (the private sector, NGOs, and various governmental and quasi-governmental bodies) have collectively developed many different types of systems that appear to be working reasonably well (if sometimes modestly) in our own countries or regions – not only in resolving domestic consumer disputes, but cross-border disputes as well. These include, but certainly aren't limited to:

- the European Consumer Centers ECC-Net for cross-border disputes within the EU, which handles as many as 60,000 such cases a year;
- ICA-Net in Asia, which I believe you may be hearing more about from Mr. Enomoto from NTT, here today as Chair of GBDe;
- The BBB itself – and a host of other such programs.

These mechanisms work best when there is a reasonably common underlying framework of “best practice” standards against which disputes and the parties’ practices may be measured. A good deal of work has gone on in this arena, including model codes of conduct and standards from organizations such as OECD and GBDe, relatively new guidelines from the International Standards Organization and, of course, from various self-regulatory organizations and “trustmark” organizations around the globe.

Finally, since I mentioned “trustmarks”, I should note that trustmark programs – the best of which combine good “codes of practice”, effective dispute resolution programs and enforcement systems that may actually be as good or better than reciprocal court confirmation proceedings -- processes that include publicizing non-complying companies (what my U.K. colleagues have dubbed “name and shame”) and – of course – public revocation of trustmarks themselves.

Collaboration among trustmark programs – to help one another resolve cross-border disputes for their individual country’s consumers – has grown over the past 10 years. GBDe has been successful in encouraging such cooperation, and one such model is the Asian Trustmark Alliance – there are – and will be – others.

We remain as convinced today as we were in 2000 that thoughtful government oversight and enforcement provides a necessary fertile medium in which these kinds of public/private efforts can flourish. However, collaboration among governments is absolutely essential. Governments need to use the force of local laws and regulation to aggressively pursue

those companies within their jurisdictions that fail to live up to their public commitments, abuse the system or engage in fraudulent or deceptive acts or practices.

We have, I'd argue, a number of Warren Buffett's "one foot bars" in place – just waiting for some of us to step over them – to build on their already good work. What we do NOT need to do is avoid the one-foot bars in our efforts to find a really challenging 7-foot barrier that would be just perfect if we could get over the top.

As we set out on this road, let's keep in mind that right now – as we are meeting today, most consumer disputes – even cross-border ones – are getting resolved, either by companies or by various external third parties.

So, let's build on what already exists and is working.