ONLINE DISPUTE RESOLUTION DEVELOPMENTS—PROGRESS ON A SOFT LAW FOR CROSS-BORDER CONSUMER SALES AND THE DEVELOPMENT OF A GLOBAL CONSUMER LAW FORUM*

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I. PROTOTYPE ONLINE CONSUMER TRANSACTION

Maria Elena Cardoza, a student in Mexico City, purchases a computer online for $700 from PAPPLE, a company incorporated and producing computers in California for worldwide distribution. When the computer arrives by mail, Maria discovers that it is defective.

What procedures can be put in place in addition to PAPPLE’S Customer Service Department to facilitate an equitable, speedy, inexpensive and amicable resolution of the dispute which subsequently arises between Maria and PAPPLE over the alleged defect in the computer?

Maria’s purchase is a prototype of low cost-high volume online transactions. Thousands of similar transactions take place every day within and across domestic borders around the world. The recent proliferation of online purchases in the last decade has generated proposals for development of a global system of online dispute resolution (hereafter ODR) and soft law or set of principles to govern cross-border consumer transactions. Such a set of principles, called the Global Principles of International Consumer Contracts (hereafter GPICC), would be to consumer transactions what UNIDROIT's Uniform Principles of International Commercial Contracts (hereafter UPICC) is to commercial sales. A global soft law for international consumer transactions would benefit both consumers and businesses alike worldwide, facilitating resolution of disputes which inevitably arise. This article presents developments occurring in ODR and progress in developing a soft law for cross-border consumer sales and a global consumer law forum.

II. ODR PROPOSAL FOR ONLINE CONSUMER TRANSACTIONS

An aggrieved party to a low cost-high volume online consumer transaction is not likely to hire an attorney to seek relief in a court of law because doing so would be too expensive and time-consuming in the context of the amount of the dispute. Other difficulties would also discourage individuals from filing a lawsuit. What court has jurisdiction over both parties? How far will the parties have to travel to protect their interests? What substantive law will the forum apply? How familiar is the forum with applicable substantive law? Will the prevailing party be able to enforce a judgment in the losing party’s home jurisdiction? An inexpensive, simple online procedure is needed to

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2 See generally Louis F. Del Duca, Albert H. Kritzer and Daniel Nagel, Achieving Optimal Use of Harmonization Techniques In an Increasingly Interrelated Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane, 27 Penn St. Int’l L. Rev. 641 (2008). For a discussion of the policy considerations involved in the choice between hard-law instruments (such as treaties or conventions) and soft-law instruments (such as model laws that can be voluntarily utilized, such as the ICC Incoterms), see Louis F. Del Duca, Developing Global Transnational Harmonization Procedures For the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence, 42 Tex. Int’l L.J. 625 (2007).
resolve disputes such as Maria’s quickly and efficiently, without the involvement of lawyers or courts.

The United States has such an ODR proposal\(^3\) for cross-border contract disputes between businesses and consumers (hereafter B2C) where the amount in dispute is $10,000 or less.\(^4\) This procedure has three basic stages. At stage one, the parties voluntarily agree to talk to one another electronically. By voluntarily opting into this ODR procedure, the parties can avoid the difficulties listed above (e.g., uncertainties regarding venue, choice of law, recognition of judgments, personal jurisdiction, and the inconvenience of traveling to a distant forum).\(^5\) Moreover, by opting into this procedure, the parties would agree that this ODR procedure is the legal framework by which their dispute will be resolved.

Once the parties have agreed to consent to ODR, the buyer completes an online form which includes a checklist of types of claims,\(^6\) which could include:

- Non-delivery of goods or non-provision of services,
- Late delivery of goods or late provision of services,
- Vendor sent wrong quantity,
- Delivered goods were damaged,
- Delivered goods or provided services were improper,
- Vendor made misrepresentations about goods,
- Vendor did not honor express warranty, or
- Vendor improperly charged or debited buyer’s account.\(^7\)

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

For the ten or fifteen percent\(^8\) of parties who fail to resolve their dispute at stage one, the model law requires that an ODR provider selected from a list of competent providers be automatically brought into the picture. The ODR provider examines electronic

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\(^4\) See id. at 255.

\(^5\) See id. at 228.

\(^6\) See id. at 261.

\(^7\) See id.

\(^8\)
records of the transaction between the parties and tries to help the parties resolve their dispute. If the parties cannot agree to abide by the proposal of the ODR provider, then, as a last resort, the parties proceed to arbitration.

Exciting progress has been made subsequent to the previously mentioned United States Department of State proposal made in cooperation with business and consumer experts for development of an ODR framework for low cost-high volume online consumer transactions.9 More recently, at its July meeting, The Commission approved the formation of a working group to consider a possible instrument on the topic of online dispute resolution (ODR) relating to cross-border electronic commercial transactions, including business-to-business and business-to-consumer transactions. This is real progress. The resolution of disputes within the legal framework set up by ODR systems could lead to equitable, best-practices, lex mercatoria type approaches for resolving disputes in low cost-high volume consumer transactions. This in turn could provide norms for future development of solutions for high cost-low volume transactions and a soft-law set of norms for consumer transactions.

III. ONLINE DISPUTE RESOLUTION DEVELOPMENTS

A. ADVANTAGES OF ONLINE DISPUTE RESOLUTION

ODR is an extremely useful way to resolve disputes that inevitably arise out of online consumer sales, as shown by the success of several extant or erstwhile ODR providers.10 Unlike other alternative dispute resolution (hereafter ADR) methods, ODR is fast, efficient, flexible and inexpensive. It is especially useful for parties to low cost-high volume transactions who wish to avoid the expense of hiring an attorney and pursuing litigation to solve disputes over the online purchase of low-cost items. In addition, ODR is a simple process, even for people who do not regularly use the Internet. The purpose of ODR is to provide an easy, efficient, and safe dispute resolution method to consumers doing business with online and/or offline sellers.

B. INCREASES IN ONLINE COMMERCIAL TRANSACTIONS

The number of commercial transactions that consumers complete online continues to increase. For example, consumers in the United States spent $131.8 billion on online commercial transactions in 2010.

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commercial transactions in 2009.\textsuperscript{11} This amount is expected only to increase, with a projection of consumers spending $182.6 billion on online commercial transactions by 2012.\textsuperscript{12}

Consumers throughout the world increasingly use online commercial transactions to make their purchases. For example, online retail sales increased thirty-one percent in France, Germany, Italy, the Netherlands, and the United Kingdom in 2007.\textsuperscript{13} Worldwide, consumers annually spend about $470 billion online.\textsuperscript{14} This number is expected to exceed $1 trillion by 2012.\textsuperscript{15} Because the number of online commercial transactions is expected to increase, the importance of ODR will also simultaneously increase. In addition, both consumers and businesses prefer to use ODR because it is simple and inexpensive.

\textbf{C. Business to Business, Business to Consumer, and Consumer to Consumer Transactions}

Business to business (B2B), business to consumer (hereafter B2C) and consumer to consumer (hereafter C2C) ODR can provide efficient, cost-effective ways to resolve disputes arising from online business transactions.\textsuperscript{16} The types of B2B and C2C ODR services vary.\textsuperscript{17} For example, the ODR services may be non-binding or binding, or involve mediation or arbitration.\textsuperscript{18} Because many consumers today are unaware of what ODR services are available to them, ODR service providers must make information available to consumers about mechanisms that can be used to resolve online disputes.\textsuperscript{19}

The International Chamber of Commerce (hereafter ICC) has developed \textit{ICC Best Practices for ODR in Online B2C and C2C Transactions}, a source of guidance for ODR service providers.\textsuperscript{20} \textit{Best Practices} can be used to increase consumer confidence in doing business online.\textsuperscript{21} The ICC formulated the best-practice guidelines in consultation with the ICC Court of Arbitration.\textsuperscript{22} The guidelines focus on specific issues raised by conducting ADR online, and they follow the recommendations that are emerging from the industry and concerned organizations.\textsuperscript{23} In addition, the guidelines encourage companies engaged in

\begin{footnotesize}
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  \item Id.
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online transactions with consumers to use ODR wherever practicable.\textsuperscript{24} Because ODR is an effective mechanism to resolve online disputes, ICC encourages companies to clearly communicate the ODR option to consumers.\textsuperscript{25}

The ICC’s \textit{Best Practices} guidelines give information to online B2C companies about how to use ODR systems to resolve customer complaints that cannot be resolved by companies’ own internal customer-redress system.\textsuperscript{26} The ICC’s best practice B2C guidelines emphasize that companies engaged in online transactions with consumers should provide consumers with readily and easily accessible ODR systems.\textsuperscript{27} To reduce the number of disputes requiring ODR, companies should establish viable consumer-redress systems.\textsuperscript{28}

In addition to the B2C guidelines, the ICC gives information to ODR service providers about how to deliver effective and efficient service to businesses and consumers.\textsuperscript{29} For example, the ICC recommends that B2C and C2C ODR service providers ensure that their websites contain simple, comprehensive and accessible explanations for first-time users who may be unfamiliar with the ODR process.\textsuperscript{30} To enhance the quality of B2C and C2C ODR services, ODR service providers should take full advantage of new technologies to provide innovative and user-driven services.\textsuperscript{31} B2C and C2C ODR systems should be easily accessible from any country, and formal requirements for case submission should be kept to the necessary minimum.\textsuperscript{32} ODR systems should resolve disputes quickly, and costs of ODR services should be minimized so that all consumers can avail themselves of such services.\textsuperscript{33} In addition, dispute-resolution personnel should be impartial.\textsuperscript{34} Impartiality can be guaranteed by adequate auditing and procedural-review arrangements.\textsuperscript{35} ODR professionals should have sufficient skills and training to complete their function, but they are not required to be licensed legal practitioners.\textsuperscript{36}

The ICC provides recommendations to ODR service providers on the accessibility, convenience and privacy of ODR.\textsuperscript{37} For accessibility, the ICC guidelines provide that the B2C and C2C ODR system should be available to users twenty-four hours a day, seven days a week, fifty-two weeks a year, with the exception of maintenance downtimes.\textsuperscript{38} In addition, users should have access to the process and to their own case information.

\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{See id.}
\textsuperscript{26} \textit{Id. at 8.}
\textsuperscript{27} \textit{Id. at 9.}
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id. at 8.}
\textsuperscript{30} \textit{Id. at 11.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id. at 12.}
\textsuperscript{38} \textit{Id.}
twenty-four hours a day, with the exception of maintenance downtimes. For convenience purposes, the ICC recommends that ODR service providers include their contact information, such as e-mail addresses and telephone numbers, on their web sites. ODR service providers should also establish a network of trained technical-support staff. For privacy, the ICC recommends that ODR service providers maintain a high level of security and authentication with appropriate procedures for access to case files and other data. In addition, ODR service providers should keep confidential the communications between each party and the mediator or arbitrator. Finally, ODR service providers should conduct risk assessments and formulate, implement and regularly review an organization-wide information security policy.

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

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


The United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted in April 1980 at the conclusion of a diplomatic conference in Vienna. The origins of that historic accomplishment can be traced to 1929, when the International Institute for the Unification of Private Law set out to articulate black-letter law to govern
international sales contracts. World War II interrupted the Institute’s work, however, and by 1964 only seven countries had ratified what the Institute had promulgated.

In 1968, UNCITRAL started the project anew. However, although UNCITRAL’s efforts would ultimately be successful, the path to success was not always easy going. According to Professor Michael Bonell, sharp differences in the legal traditions and socioeconomic structures amongst the sixty-two countries that attended the diplomatic conference at which the original text of the CISG was approved for ratification by individual countries threatened to derail the entire ratification process. For example, about half the countries represented at the conference were civil-law countries, whereas the other half were common-law. Some of the countries represented had capitalist economies, while others had communist economies. Because of the delicate atmosphere in which the CISG was adopted, “some issues had to be excluded from the scope of the CISG at the outset,” lest the ratification process stagnate or fail completely. In particular, consumer contracts were expressly excluded from the scope of the CISG. The classification of the CISG as 100% hard law is subject to the adjustment that Article 6 permits the parties to a contract otherwise subject to the CISG to opt out of the CISG in its entirety, or a specific article or articles of the CISG. This opt-out provision in substance gives the CISG a very strong soft-law character.

Despite having a deliberately restricted scope, which inter alia excluded coverage of consumer contracts, the CISG has been a highly successful international agreement. By 1994, thirty-four countries had adopted it. Today, seventy-four countries are parties to

\[ \text{References:} \]

53 See id. at 28.
54 See id.
56 See id.
59 See id., (citing CISG art. II).
60 CISG Article 6 provides: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” United Nations Convention on Contracts for the International Sale of Goods art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3.
the CISG. It governs seventy-five percent of world trade, and about 2,500 cases litigated before courts or arbitration or mediation panels have been resolved under it.

B. Development of Soft Law Uniform Principles of International Commercial Contracts

Inspired by the CISG’s success yet also by the shortcomings of its deliberately restricted scope, the International Institute for the Unification of Private Law (UNIDROIT) developed and promulgated the Uniform Principles of International Commercial Contracts (UPICC) over several years in the early 1990s. “It was precisely because the negotiations leading up to the CISG had so amply demonstrated that this Convention was the maximum that could be achieved on the legislative level, that UNIDROIT decided to abandon the idea of a binding instrument and instead proceeded merely to ‘restate’ (or whenever appropriate ‘pre-state’) international contract law and practice.” Not surprisingly, the UPICC is broader than the CISG. Whereas the latter applies only to sales transactions, the UPICC applies, potentially, to all kinds of international commercial transactions. Yet the UPICC, like the CISG, expressly does not apply to consumer transactions.

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

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65 See id.
67 Id.
72 See id.
C. INFLUENCE OF UNIFORM PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS ON HARD LAW

The UPICC is nonbinding; however, it has made “a significant contribution to the development of a veritable world contract law.”73 It has influenced the adoption of binding law in several countries. Estonia and Lithuania,74 for example, modeled their civil codes after the UPICC.75 In 1999, China enacted a contract law that was inspired by the CISG and the UPICC.76 And courts in Australia, New Zealand and England have looked to the UPICC in rendering decisions.77

The UPICC has also been influential in arbitration.78 Some 15079 arbitral awards refer to the UPICC.80 For example, a case decided by the China International Economic and Trade Arbitration Commission in 2005 illustrates the extent to which the UPICC has affected arbitral awards. The case involved a Chinese buyer and French seller who entered into two contracts for the sale of freezer facilities. The agreed upon price exceeded

78 According to research by Eleonora Finazzi Agrò and LLM student Giulia Principo, the International Chamber of Commerce (ICC) has applied UPICC to eight cases between 1996 and 2008 in which the parties did not include a choice-of-law clause in their contract. In four other cases that the ICC decided, the parties expressly chose UPICC to govern their contract, or arbitrators suggested the ICC apply UPICC to the case. Other tribunals that have applied UPICC to disputes before them include the Arbitral Tribunal of the Chamber of Commerce of Lausanne, the Milan International Chamber of Commerce, the Chamber of Commerce of the Russian Federation, and the Arbitral Centre of Mexico. The ICC also has applied UPICC to interpret and integrate applicable national and international law. Moreover, UPICC has been applied to or cited in cases by courts such as the Tribunal Supreme of Spain (May 16, 2007 n. 506/2007), the Federal Court of Australia (Alcatel Australia LTF v. Scarcella & Ors (1997)), the Supreme Court of Western Australia (Central exchange Ltd v. Anaconda Nickel Ltd (2002)), the Court of Appeal of New Zealand (Hideo Woshimoto v. Canterbury Golf International Ltd (2002)), the Court of Appeal of England (Chartbrook Ltd v. Persimmon Homes Ltd (2008)), and the European Court of Justice (Fonderie Officine Meccaniche Taconi, C-334/00 (2002)). Eleonora Finazzi Agrò has pointed out that both national and international tribunals have cited UPICC for various purposes, such as to interpret and supplement the CISG, to offer a synopsis of generally accepted principles of contract law and to restate international commercial contract law.
$600,000. Delivery of some of the equipment was delayed, and this led to a dispute over the contract price. Following unsuccessful negotiations, the seller filed an arbitration application. The parties failed to agree on what substantive or procedural law would apply to the contract. The arbitration panel noted that the UPICC was not an international convention, and that the parties had not included a choice-of-law clause in their contracts that chose the UPICC as applicable law. The arbitration panel nevertheless ruled that it would apply the UPICC. So ruling, the Arbitration Commission noted that both France and China are member states of the UPICC and concluded that the UPICC should be used to determine the proper interest rate to apply to the late payments that the buyer owed the seller. Accordingly, it calculated the interest rate pursuant to UPICC Article 7.4.9, even though the UPICC had not been enacted as positive law in France or China nor selected by the parties to govern their contract.81

Since 1994, more than 220 cases or arbitral proceedings have been resolved according to the UPICC.82 Twelve cases have been handed down by courts in Australia, including one case by the High Court of Australia;83 seven cases have been handed down by Chinese courts;84 three cases have been decided by French courts;85 seven cases have been decided by Italian courts;86 six cases have been decided by courts in the Netherlands;87 thirteen cases have been handed down by Spanish courts;88 seven cases have been decided by United Kingdom courts;89 and two cases have been decided by United States courts.90

In 2004, UNIDROIT's Governing Council adopted a new edition of the UPICC.91 Few substantive amendments were made to the 1994 edition's provisions because courts had applied them so easily and successfully.92 However, the 2004 edition significantly expanded the scope of the 1994 edition. The 2004 edition contained five new chapters (covering authority of agents, third-party rights, setoff, assignment of rights and contracts, and

81 Article 7.4.9 provides that “The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.”
82 See UNILEX UNIDROIT Principles, Select Cases by Date, http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&x=1 (last visited June 1, 2010).
83 See id.
84 See id.
85 See id.
86 See id.
87 See UNILEX UNIDROIT Principles, Select Cases by Date, http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&x=1 (last visited June 1, 2010).
88 See id.
89 See id.
90 See id.
92 See id. at vii.
limitation periods\textsuperscript{93}) and sixty-five new articles (increasing the total number of articles from 120 in the 1994 edition to 185 in the 2004 edition).\textsuperscript{94}

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

The Global Principles of International Consumer Contracts ("GPICC") would be a response to the growing need for voluntary soft-law global principles of international consumer contracts. It would create a voluntary set of global principles of international consumer contracts which could develop into best practices, lex mercatoria and a global law that regulates sales to consumers in a uniform manner. The GPICC could serve as a model with reference to which national and international legislators could enact hard law to govern consumer contracts, would apply to a consumer contract if chosen by the parties as the applicable law, and could be applied in dispute resolution.\textsuperscript{95} For just as UPIICC has been a valuable aid to the global harmonization of commercial contract law, so too a comparable aid would be valuable to the global harmonization of consumer contract law.\textsuperscript{96} Academics, members of the judiciary, business- and consumer-group representatives will serve as interest groups of the GPICC initiative.

A major strength of the GPICC would be that opting in to its provisions would be voluntary and would depend on the intent of the parties.\textsuperscript{97} In other words, parties would be free to contract over whether the GPICC would govern their agreements.\textsuperscript{98} The GPICC would be initially developed as soft law because a global uniform hard law of consumer sales is not presently realistic.\textsuperscript{99} It is impossible to regulate everything with hard law, as the Internet amply demonstrates.\textsuperscript{100} As best practices develop in applying the soft law, they could be translated into hard-law instruments (international treaty or model law) and eventually an international treaty or global law.\textsuperscript{101}

\textsuperscript{93} See id. at viii.
\textsuperscript{94} See id.
\textsuperscript{95} See id.
\textsuperscript{97} See id. at 646-47.
\textsuperscript{101} See id. at 649 n.26.
VI. CONCLUSION

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

An adequately comprehensive GPICC must reckon with the realities of e-commerce, the recent proliferation of which has demonstrated the need for an effective ODR mechanism. Governments, commercial entities, industries and consumer advocates from around the world can directly benefit from an effective, global ODR system.

To be effective, an ODR system must be fair and cost-effective for both vendors and customers. It must transparently, fairly, economically and quickly resolve disputes that inevitably accompany commercial transactions. An effective ODR system must also differentiate between B2B [high-cost, low volume], B2C [low-value, high volume], and C2C [low-value, high volume] transactions. Both vendors and consumers could benefit from a properly constructed ODR system.

Identifying areas of consensus is the beginning step of implementing a global ODR system that effectively resolves e-commerce-based disputes. A significant step in this direction will be the Global Consumer Law Forum, which will serve as a website and database for the international-consumer-law community. It will organize international-consumer-law cases, articles, news and other legal developments. We also aim to publish an Internet source called the International Consumer Law Commentary through the Institute of International Commercial Law of the Pace University School of Law in collaboration with the Penn State Dickinson School of Law. Once the Forum is fully operational, working groups from around the world will be formed to cooperate in developing the GPICC.102 An Oversight Committee will then be formed to propose GPICC revisions as they become needed.103 Though much progress remains to be made, we have made great progress in two short years, and hope to continue this progress going forward.

103 See id.