



Summer
Public Workshops
2019

Bureau of Consumer Protection

TABLE OF CONTENTS

INTRODUCTION	1
FAIR BUSINESS PRACTICES	3
Information Disclosures	3
Fair Contract Terms	5
Merchandise Delivery Practices	6
Transaction Confirmation Process	6
Cancellation Policies	6
Authentication	7
PRIVATE SECTOR INITIATIVES	8
Rating Programs	8
Seal Programs	8
Other Online Initiatives That Implement Fair Business Practices	9
Relationship to Government Regulation	10
DISPUTE RESOLUTION	12
Dispute Resolution Through The Courts:	
Applicable Law and Jurisdiction	12
Alternative Dispute Resolution	18
INTERNATIONAL COOPERATION	21
Building Consensus on Core Protections for Consumers	21
Agreements on Judgment Recognition and Enforcement	22
Facilitating Law Enforcement Cooperation and Information Sharing	23
ENDNOTES	25

APPENDIX - Workshop Program

INTRODUCTION

Global online commerce promises to grow at a stunning rate.¹ Consumers have an unprecedented opportunity to buy goods and services around the clock, from around the world. But until consumers are confident they have effective protections online, and until businesses have a stable and predictable commercial environment, e-commerce cannot reach its full potential. The present challenge, then, is to foster the development of a global consumer marketplace that offers safety, stability, and legal certainty.² The Federal Trade Commission (“FTC” or “Commission”) sought to facilitate an ongoing dialogue on how government, industry, and consumers can work together to meet this important challenge.

The Commission launched this effort by issuing a *Federal Register* notice on December 16, 1998, which sought public comment about, and announced that it would hold a public workshop on, “U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace.”³ The request generated sixty-nine comments.⁴

The Workshop, held at the FTC on June 8-9, 1999, brought together all the stakeholders-- industry members, consumer advocates, academics, government officials, and international representatives. Workshop participants⁵ grappled with challenging questions: What types of information do online consumers need to make informed decisions? What constitute fair business practices online? What are the appropriate roles for government and the private sector in securing effective consumer protection? For cross-border business-to-consumer transactions, which countries’ laws should govern and which courts have jurisdiction? How can all stakeholders best work together internationally to address these issues?⁶

Over the course of Workshop, broad support emerged for several key general principles:

- Online consumers should be afforded the same level of protection as offline consumers.
- Stakeholders should work toward international consensus as to core protections for consumers in e-commerce.
- Everyone benefits from business practices and initiatives that foster informed decision-making and build consumer confidence in e-commerce.
- Stakeholders should strive to facilitate cooperation and information sharing among consumer protection law enforcement agencies and the private sector internationally; and

- Achieving effective protection for consumers in the global electronic marketplace will require a combination of government law enforcement, private sector initiatives, and international cooperation.

With respect to the jurisdiction issue, participants were not able to reach agreement on a uniform approach for handling applicable law, jurisdiction, and judgment recognition in cross-border e-commerce. They agreed that further study will be required to find a workable solution. However, broad support did emerge for certain discrete points related to jurisdiction:

- A company that is engaged in Internet fraud is not entitled to any special deference and should be subject to prohibitions on fraud, regardless of its location.
- Stakeholders should educate the public on the consumer protections available in different jurisdictions around the world; and
- Stakeholders should strive to develop effective, alternative, out-of-court mechanisms to resolve consumer disputes.

This report summarizes the views expressed by Workshop participants about fair business practices online, private sector initiatives, dispute resolution, and global cooperation.

FAIR BUSINESS PRACTICES

Effective consumer protection, including fair business practices, is necessary for building consumer confidence in international electronic commerce. While Workshop participants had differing ideas about how to achieve effective consumer protection in global e-commerce, they agreed on certain basic points. General consensus emerged that online consumers should receive the same level of protection as offline consumers.⁷ Accordingly, everyone agreed that consumers need to be assured that goods and services purchased online will be as represented,⁸ and that laws should continue to prohibit deceptive and fraudulent practices online.⁹

same general disclosure rules apply to all commercial businesses, regardless of company size.¹⁸

According to two Web surveys, many online companies seem to be disclosing this type of information about themselves. In connection with the Workshop, FTC staff conducted an informal survey of 100 U.S. Web sites and 100 non-U.S. sites regarding the types of information companies disclose online.¹⁹ Consumers International (CI) also conducted a survey in which researchers in eleven countries collected data by buying specified products from a total of 152 international Web sites.²⁰ The FTC survey found that most Web sites provide general business information to consumers, such as information about a company's physical address (almost 80 percent of surveyed sites disclosed a physical address), phone number (88 percent) and e-mail address (90 percent).²¹ Similarly, the CI study found that 72 percent of Web sites gave a physical location, 74 percent gave a phone number, and 83 percent gave an email address.²²

Contract-Related Disclosures

In addition to general disclosures about the business, participants generally favored the disclosure of the terms and conditions of proposed transactions. They agreed that complete disclosures help consumers make informed decisions²³ and may benefit companies by reassuring consumers that they are dealing with reputable businesses.²⁴ Participants noted that the type of information consumers will need to know varies with the transactions.²⁵ As a general matter, there was not precise agreement on what, how and when information should be disclosed.

Consumer advocates recommended that contract-related disclosures include the following types of information: a full description of the offered goods or services; any geographic restrictions on the offer; price and currency of the purchase including itemized costs of delivery, postage and handling, insurance, taxes and duties; terms of payment and delivery, including time period for delivery; description of applicable warranties; details of any cancellation policies or cooling-off period; information about return and refund policies; instructions regarding complaint procedures; identification of the applicable law and jurisdiction; and description of the company's privacy policy.²⁶ Others recommended that the commercial content of Web sites should be clearly disclosed as such.²⁷ One panelist urged that all disclosures should be written in plain language that consumers can understand.²⁸

Certain online businesses are already providing many of the disclosures described above,²⁹ but many other companies are not. The chart below summarizes contract-related disclosures made by sites involved in the FTC and the CI informal Web surveys.

Type of Disclosure	FTC Survey Results³⁰	CI Survey Results³¹
cancellation terms	9 %	n/a
refund policy	26 %	53 %
delivery terms (for sites offering offline delivery)	38 %	60 %
warranty terms	15 %	n/a
applicable law	8 %	10 %
total cost in advance	65 %	76 %
country of origin: U.S. sites / foreign sites	29 % / 79 %	n/a
geographic restrictions on sales	17 %	n/a

Fair Contract Terms

Participants also discussed the enforceability of terms in consumer contracts. Consumer advocates asserted that minimum consumer protection standards must include the non-enforceability of

Merchandise Delivery Practices

Consumer representatives also supported the application to online purchases of national laws requiring merchandise delivery within a specific time period.³⁵ These participants also agreed that sellers should be required to notify the buyer promptly of any shipping delays³⁶ and to deliver goods and services that conform to their advertised description.³⁷ Business representatives also appreciated the need for these types of practices. Indeed, industry-led self-regulatory initiatives already include a merchandise delivery component.³⁸

Transaction Confirmation Process

Consumer groups expressed the need to ensure that consumers are not held to the terms of an online contract to which they inadvertently “agree,” by e.g., accidentally clicking on an order button.³⁹ One group recommended that acceptance should be valid, for purchases over \$25, only when confirmed by a separate action by the consumer, such as a three-click test,⁴⁰ and for purchases over \$100, a written contract should be mailed to the consumer.⁴¹ Furthermore, certain consumer groups suggested that confirmation concerning the details of an order should be sent to the consumer,⁴² and should specify date and number of the order, shipping address, number of items, name of product and full price.⁴³

While industry members expressed concern about overly prescriptive requirements regarding order confirmation,⁴⁴ business representatives appreciated the need to take precautions with respect to transaction confirmation and are addressing this individually and through self-regulatory programs.⁴⁵ In the CI survey, 89 percent of sites overall (93 percent in the U.S.) gave consumers a chance to review the details of their purchases, and 92 percent (95 percent in the U.S.) then provided the consumer a last chance to clear the order. Forty-nine percent of sites also gave the consumer a chance to cancel an order before giving credit card information.⁴⁶

Cancellation Policies

Closely linked to rights regarding order confirmation are rights regarding order cancellation. Consumer advocates supported the consumer’s right to cancel online transactions under certain circumstances—also referred to as a “cooling-off period”—given that an inadvertent click might commit a consumer to an unintended purchase.⁴⁷ One consumer group recommended a three-day period in which consumers can cancel transactions for any purchase over \$100.⁴⁸ Consumer groups stated that consumers should not be permitted to waive their cancellation rights by contract.⁴⁹

Businesses urged caution against imposing standardized cancellation rights.⁵⁰ One

panelist suggested that a better way to ensure consumer protection is to allow companies to tailor policies to particular circumstances, making sure that the consumer always knows what the policy is.⁵¹ Certain industry representatives opposed any online cooling-off requirements as discriminatory against e-commerce, since cooling off conditions are not generally imposed on traditional commerce.⁵² Moreover, they were concerned that such a requirement could result in a lower standard, weakening policies currently offered by many sellers, such as a 30-day “no questions asked” period.⁵³

Authentication

Another area of concern for consumers is rules regarding authentication. Authentication technology allows consumers and merchants conducting business online to verify each other’s identity with some level of assurance.⁵⁴ Participants agreed that authentication technology is a key component in establishing trust between parties and reducing the risk of online fraud.⁵⁵

One significant issue relating to authentication is the allocation of the risk of loss in the event that authentication technology indicates that a consumer has authorized a transaction, when in fact the consumer has not authorized it.⁵⁶ Some participants asserted that the marketplace, not government, should address these issues.⁵⁷ They argued that regulatory requirements would be premature as authentication technology is still evolving.⁵⁸ Moreover, some argued, consumer harms due to authentication technology are still only hypothetical.⁵⁹ Non-regulatory solutions, such as VeriSign’s program to insure consumers against liability for unauthorized transactions, are already in place while other solutions, such as model disclosures for consumers, are emerging.⁶⁰

Consumer advocates disagreed, suggesting that unequal bargaining power with businesses, leave consumers unable to negotiate over the risks associated with authentication technology.⁶¹ U.S. law already addresses consumers’ concerns for certain transactions, such as online credit card payments, by limiting consumers’ liability for unauthorized credit card transactions.⁶² However, such laws do not apply to transactions involving smart cards, stored value cards, and other payment mechanisms.⁶³ Consumer advocates argued that only with broader application of laws like those that limit credit card liability would consumers feel comfortable engaging in global e-commerce.⁶⁴

PRIVATE SECTOR INITIATIVES

The private sector has made great strides toward addressing the concerns of online consumers.⁶⁵ Some emerging programs, such as seal and rating programs, are unique to the Internet and complement more traditional programs that implement fair business practices, like business' internal processes and industry-wide codes of conduct. Participants discussed the efficacy of these initiatives and their role *vis-a-vis* government regulation. Private sector initiatives that aim to resolve consumer disputes are discussed later in the section on Dispute Resolution.

Rating Programs

Proponents of consumer rating programs view them as helping online consumers make informed decisions about whom to shop with online.⁶⁶ One such program -- BizRate -- is a private online consumer rating service about domestic and international sellers.⁶⁷ It collects information from consumers about their experience with a participating online merchant (including price, customer support, and privacy issues at the point of sale and after delivery), and then shares aggregate information about that merchant with potential customers. About 1,100 merchants participated in the program at the time of the Workshop. BizRate noted that it provides current information to customers, while seal programs may provide out of date information because the seals are renewed only every 3 or 6 months.⁶⁸

Another rating program is run by eBay, an online auction site. eBay has a feedback forum that identifies people who have dealt with a seller and gives their impression of their transactions with that seller.⁶⁹ Consumers can check feedback received about particular a seller before deciding whether to bid on a product offered by that seller.⁷⁰

Seal Programs

Participants also identified seal programs as helping consumers make informed decisions. These programs certify that a company adheres to certain business practices by authorizing them to post a "seal" on their Web sites. At the time of the Workshop, the Council of Better Business Bureau's BBBOnline seal program operated only in the U.S., with between 3,000 and 3,500 participants. Its seal informs consumers that a firm has a good track record and has agreed to: adhere to standards for truthful advertising; cooperate in a voluntary self-regulation program; and abide by the program'

Netherlands and was expecting to expand into the United Kingdom and other countries. According to representatives of Webtrust, under its program, the AICPA independently verifies that Web sites: accurately identify themselves, both disclose business practices and adhere to those practices; employ processes to ensure transaction integrity; and adopt measures to protect consumer privacy. Firms must update their qualifying information every three months to continue in the program.⁷³

While a number of participants noted that seal programs can be effective,⁷⁴ others expressed various concerns. One panelist was concerned that seals are not used enough to provide effective protection.⁷⁵ For example, a review of about 4,000 Web sites by BBB Online revealed that about 88 percent neither qualified for nor were willing to make the investment to qualify for the BBBOnline seal.⁷⁶ Others were concerned about the content of policies adopted by a seal program, since a seal provides only as much consumer protection as the standards it incorporates.⁷⁷

One participant suggested that government seal programs would better ensure consumers a quick and easy refund from a foreign seller.⁷⁸ Under this proposal, a government seal would be granted to foreign sellers who agree to comply with certain standards and post a bond with the government to be used to pay off judgments. In the event of a dispute, the consumer could obtain a judgment in local court against the foreign seller which would be satisfied from the bond.⁷⁹ Other panelists believed that government involvement would sacrifice flexibility and easier international applicability.⁸⁰

Although participants identified areas of weakness with these programs, it was clear that ultimately they enhance consumers' ability to gather information about online merchants and, accordingly, their ability to make better informed purchasing decisions.

Other Online Initiatives That Implement Fair Business Practices

Numerous other private sector efforts, both at the individual company level and sector-wide, benefit online consumers. For example, AOL has implemented a program whereby it certifies that certain merchants will comply with specified fair business practices, such as information disclosures, 24-hour response to consumer inquiries, advertisement of only in-stock merchandise, shipment of advertised products at the advertised price with no substitutions.⁸¹ AOL assists in resolving disputes that arise between customers and those certified merchants.⁸² eBay is another company that employs innovative mechanisms to prevent disputes. It provides free insurance for transactions under \$200 (subject to a \$25 deductible) to cover merchandise that is not received or that does not conform to representations, and access to an online escrow program for consumers desiring additional protection.⁸³

Broader-based guidelines and codes have also been adopted. The Electronic

Retailing Association's "Online Marketing Guidelines" seek to address a variety of issues, including customer service, general and contract-related disclosures, claims substantiation, refund policy, and merchandise delivery.⁸⁴ The International Chamber of Commerce has issued Guidelines on Marketing and Advertising on the Internet, which call for ethical and truthful advertising generally and address issues such as data protection, advertising to children and unsolicited commercial messages.⁸⁵ The European Advertising Standards Alliance (EASA) is comprised of self-regulatory bodies from 25 countries who have promulgated national codes based on the International Chamber of Commerce Guidelines. The EASA posts on its Web site the names of firms for TD () Tthecla,2 7ASAgavac-1er {Hicl ageebZVô+tom} AASA hamv

Participants acknowledged that certain components need to be present for self-regulation to be effective. Some identified these as commitment to abide by self-regulatory decisions⁹⁷ and independent evaluation by a third party that an entity is in compliance with the self-regulatory requirements.

DISPUTE RESOLUTION

Workshop participants generally agreed that all online consumers should have access to effective redress and complaint and dispute resolution procedures.¹⁰⁷ Consumer redress and dispute resolution can be available through litigation in the courtroom or through alternative, out-of-court programs. Participants expressed different views about each in the context of the global electronic marketplace.

Dispute Resolution Through The Courts: Applicable Law and Jurisdiction

Framework for Discussion

Different jurisdictions around the world have different approaches to consumer protection, and, accordingly, have in place different consumer protection laws. When a dispute arises between a consumer and a foreign company, two critical yet complicated questions are triggered: which country's laws should govern the transaction ("applicable law" or "prescriptive jurisdiction") and which country's courts should have jurisdiction to adjudicate the dispute ("personal jurisdiction"). In other words: Should a U.S.-based, mom-and-pop online store be subject to Country X's prohibitions on advertising to children or on offering lifetime guarantees, simply because its Web site is accessible to consumers there? Should those consumers be able to hale the small business to court in Country X? Conversely, should a U.S. consumer doing business with a foreign online company from his or her living room be deprived of protections fundamental to U.S. consumer protection law, such as laws requiring that advertisers have substantiation for objective claims, that lenders disclose information critical to understand the terms of the loan, or even that sellers not deceive consumers in their representations? If a dispute arises, should this U.S. consumer be required to travel to the foreign location of the seller in order to sue?

Current U.S. rules on applicable law and jurisdiction are based on notions of "reasonableness" and "fundamental fairness" to both plaintiffs and defendants.¹⁰⁸ The fairness of subjecting a defendant to a particular country's jurisdiction and laws is determined by applying a variety of factors to the concrete facts of a particular case. Thus, in the U.S., jurisdiction and applicable law are determined on a flexible case-by-case basis rather than by applying black-and-white rules. This concept holds in both actions by private parties and government authorities. For this reason, there is no rigid set of rules for applicable law and jurisdiction in the U.S.; it cannot be said that the consumer can *always* sue in his or her home forum or that the defendant's laws *never* apply in a consumer transaction. As a general matter, however, for transactions consumers enter into from home, application of "reasonableness" and "fundamental fairness" factors has produced a body of case law that results in the following:

As a general matter, jurisdiction for cases brought by consumers is determined as follows: (1) In the absence of a choice-of-forum clause, businesses are subject to specific personal jurisdiction in places where they target and sell goods to consumers. (2) Many courts have refused to uphold choice-of-forum clauses in consumer contracts on the grounds that they are unfair and unreasonable. However, the Supreme Court has, on at least one occasion, upheld a choice-of-forum clause in a consumer contract in the domestic context, while suggesting that the choice of a “remote alien forum” that would effectively deny a consumer redress should not be upheld.¹⁰⁹ In addition, courts have generally held that consumer protection authorities can assert jurisdiction over foreign businesses harming U.S. consumers.¹¹⁰

With respect to applicable law, in the absence of a choice-of-law clause, U.S. courts generally appear to apply the law of the consumer’s jurisdiction, where the contract is made from the consumer’s home forum and goods are delivered into the consumer’s home forum.¹¹¹ Many U.S. courts refuse to uphold choice-of-law clauses in consumer contracts on the basis that upholding such clauses would be contrary to the fundamental public policy of the consumer’s home jurisdiction.¹¹²

Other countries have different frameworks for deciding applicable law and jurisdiction. For example, in Europe, jurisdiction and applicable law for consumer contracts are governed by the Brussels Convention¹¹³ and the Rome Convention,¹¹⁴ respectively. Under these conventions, jurisdiction and applicable law for consumer contracts are based on whether a consumer is active or passive. The consumer is considered passive if a contract was concluded by the consumer in the consumer’s home country, and that contract was preceded by a specific invitation or by advertising. A passive consumer can bring a lawsuit arising out of that contract in his or her country and the laws of the consumer’s country would apply. A choice-of-forum clause in a contract would not change this result.¹¹⁵ A choice-of-law clause in a contract could not override the mandatory protections afforded in a consumer’s country.¹¹⁶

The European framework for jurisdiction in *public actions* is governed by the recently enacted Electronic Commerce Directive. With respect to public actions, it provides that businesses will be subject to the laws and public authorities of their home country only – not the consumer’s home country. However, several safeguards are in place to ensure the protection of consumers. First, the Directive applies only within the European Union. It is based on the high level of harmonization of laws among member states of the EU. For example, in the area of consumer protection, all Member States have in place consumer protection laws pursuant to European directives, which ensures that all consumers are adequately protected by the legislation of the country of origin. Second, on a case-by-case basis, Member States will be allowed under the Directive to impose restrictions on businesses located in other Member States if necessary to protect the public interest on certain grounds, including consumer protection.¹¹⁷

Workshop participants examined these issues using a series of mock Web sites involving Mom&PopBooks.com (“Mom&Pop”), a small online bookstore located in Foreignland.¹¹⁸ The Web site fraudulently misrepresented that its Shakespeare plays were originals, signed by the author. Three versions of the Web site were discussed: (1) a Web site that targeted only Foreignland consumers (i.e., the Web site stated “offer available to Foreignland customers only”); (2) a Web site that targeted consumers worldwide (“We deliver everywhere.”); and (3) a Web site that targeted U.S. consumers specifically (“Special offer available to our U.S. customers.”).

Using this hypothetical, panelists discussed the appropriate approach for applicable law and jurisdiction for online, consumer transactions. They debated the appropriate framework both in terms of what rules should govern when a choice-of-law or forum clause was not included in the sales contract and what rules should govern when the seller prescribed the applicable law or exclusive forum in the sales contract (referred to herein as the “prescribed-by-seller approach”).

Default Rules

In the absence of a contractual agreement, certain participants favored a country-of-origin default rule, in which the law and forum of the business, in this case Foreignland, would apply even to transactions with consumers located elsewhere.¹¹⁹ Other participants favored some version of a country-of-destination default rule, under which consumers would not lose the core protections afforded by the consumers’ country and could bring a legal action against the business in the consumers’ country.¹²⁰

Country of Origin

According to the country-of-origin proponents, differences between electronic commerce and other forms of commerce justify changing the traditional approach for jurisdiction and applicable law. Some participants likened conducting a transaction with a foreign Web site to a consumer physically traveling to the foreign country to buy the product.¹²¹ Typically, under current law, when a consumer travels to another country and does business there, those transactions are governed by the laws and courts of that country. But even those industry representatives who did not adopt this analogy generally favored a country-of-origin approach to jurisdiction and applicable law. They generally based their position on two basic points: (1) it is too difficult to apply the current legal framework to the electronic marketplace, and (2) applying the current

textc-14.1ip
avonl

not be as clear in e-commerce as in other forms of commerce. A business that mails, faxes, or telephones a consumer in a particular jurisdiction can be said to be purposefully directing its activities to that jurisdiction. On the other hand, a business that posts a Web site on the World Wide Web does not necessarily purposefully *direct* its activities to a specific jurisdiction simply because it is accessible by consumers in that jurisdiction.¹²²

Furthermore, while there might be agreement that deliberate and explicit representations, such as “special offer to U.S. consumers,” constitute purposefully directing business to U.S. consumers, content on many Web sites could fall into a gray area. For example, to what extent should language of the site be a determining factor? Has a company purposefully directed its site to U.S. consumers if it is written in English?¹²³

Advocates of the country-of-origin approach further argued that even after an online business enters into a transaction with consumers, it might not know where the consumer is located. For example, a consumer could be making purchases online while traveling.¹²⁴ Similarly, a business could erroneously assume that a customer is located where he or she requests that the ordered goods be delivered, but the goods could have been purchased as a gift.¹²⁵ Moreover, with new technologies, an entire transaction can take place through computer networks, including payment and delivery of goods (like music or graphics).¹²⁶

Second, advocates of the country-of-origin approach argued that the current system will stifle the growth of e-commerce. Assuring companies they would be subject to the laws and courts of only one jurisdiction -- their own -- would have the advantage of predictability and uniformity.¹²⁷ For the first time, consumers have an unparalleled opportunity to buy goods and services from almost anywhere.¹²⁸ If governments applied their existing rules on applicable law and jurisdiction, country-of-origin proponents argued, businesses would be discouraged from offering their products online, or, at the very least, would place geographical limitations on their sales,¹²⁹ thus hindering the growth of the international online marketplace.¹³⁰ They noted that it would be even more onerous for small and medium sized enterprises to comply with the laws of multiple jurisdictions.¹³¹ Another potential problem identified with the country-of-destination approach is that it could necessitate one forum applying the unfamiliar law of a foreign jurisdiction, which would be complicated and inefficient.¹³²

Certain country-of-origin proponents argued that even if consumers are not protected by their own laws and courts, they will be afforded effective protection through self-regulatory efforts.¹³³ They argued that the Internet will empower consumers to educate themselves so as to avoid sites from countries that do not provide adequate consumer

Country of Destination

Proponents of a country-of-destination approach disagreed with these conclusions. They recognized the difficulties that a country-of-destination framework could pose for businesses, but argued that regulation of online commerce need not be any different from regulation of traditional commerce.¹³⁵

These participants opposed the country-of-origin approach for several reasons. First, they pointed out that it would force consumers to rely on unfamiliar consumer protections.¹³⁶ According to these participants, if it would be onerous for businesses to learn the laws of various jurisdictions, it would be even more burdensome for consumers.¹³⁷ Moreover, they noted that it is not always possible for consumers even to determine the country of origin of a particular online company, either because the company may not disclose this information or may not disclose it truthfully.¹³⁸ In addition, it may be difficult to even determine the country of origin for multi-national enterprises.

Second, country-of-destination advocates argued that a country-of-origin approach would create a “race to the bottom,” whereby unscrupulous merchants would have a significant financial incentive to relocate their operations to a country with the weakest protections.¹³⁹ Third, they argued that, if a consumer were expected to travel to a foreign court to litigate over small amounts, that consumer would in effect be denied an effective mechanism for redress.¹⁴⁰ Fourth, they argued that consumer confidence in e-commerce would be undermined with a country-of-origin approach, because consumers would not feel comfortable and safe in venturing online.¹⁴¹ Finally, they stated that, although self-regulatory efforts are laudable,¹⁴² consumers cannot rely on self regulation alone to ensure their protection, especially from fraud.¹⁴³

Several participants further noted the problematic effect a country-of-origin would have on the ability of government agencies to protect their citizens. Government representatives were concerned about any potential limitations on their ability to protect their residents from harmful extraterritorial conduct.¹⁴⁴

that “the laws of Foreignland shall apply to all transactions arising from this Web site, and all disputes shall be resolved by a court of competent jurisdiction in Foreignland.” Participants disagreed on the circumstances under which such a clause should be enforced. Three basic approaches were proposed.

At one end of the spectrum were participants who supported the wholesale enforcement of conspicuously disclosed choice-of-law and forum clauses. These participants suggested that allowing parties to contractually agree to conspicuously disclosed choice-of-law and choice-of-forum clauses would provide certainty for both business and consumers.¹⁴⁷ This certainty is particularly important to small and medium-sized businesses, which do not have the resources to monitor worldwide legal developments.¹⁴⁸ Moreover, proponents of this approach asserted that consumers have more bargaining power in the online environment, where they can easily shop around for the most advantageous contract terms and choose not to do business with those Web sites offering undesirable contract terms.¹⁴⁹ Such an approach, these participants argued, would preserve a consumer’s right to contract for lesser protections in exchange for lower prices or other benefits.¹⁵⁰

At the other end of the spectrum were participants, typically consumer advocates, who vehemently opposed an approach that would allow terms prescribed by the seller in a contract to override current laws protecting unwaivable rights. Much more so than in business-to-business contracts, consumer contracts traditionally have been subject to certain unwaivable rights and rules prohibiting certain conduct regardless of whether both parties agree to written terms.¹⁵¹ Opponents of a pure prescribed-by-the-seller approach suggested that such an approach would leave consumers without adequate protection and without access to redress. Several participants asserted that contract terms which limit the consumer’s right to seek redress for defective goods, or which make the transaction subject to laws outside the consumer’s jurisdiction, should not be enforced.¹⁵² Others thought the focus should be on whether the purpose of forum selection or choice-of-law clause was to thwart any effective redress.¹⁵³

Opponents of the prescribed-by-the-seller approach questioned how consumers could be expected to make meaningful choices about such provisions. They stated that it would be difficult to understand which protections they would give up by agreeing to have the laws of a foreign country govern the transaction.¹⁵⁴

Finally, a third approach was proposed that would defer to contractual terms prescribed by the seller for applicable law and forum, as long as the net impact was to not take away a consumer’s fundamental protections and not to render resolution of the dispute too inconvenient so as to be unfair. Under this approach, a clear and conspicuous choice-of-law or choice-of-forum clause that is specifically agreed to by the consumer would be enforced where the overall impact on consumers is to be “roughly as protective as most nations’ consumer protection laws.”¹⁵⁵

Areas of Consensus

Four areas of consensus emerged. First, everyone agreed that in cases where a legitimate foreign company does not market to, and does not do business with, U.S. consumers, U.S. law should not apply to the foreign company's practices and the foreign company should not be subject to the jurisdiction of the U.S. court, based on the mere availability of a Web site to U.S. consumers.

Everyone also agreed that fraudulent Web sites are not entitled to any special deference.¹⁵⁶ Even businesses who supported the country-of-origin approach premised their support on the assumption that all countries outlaw fraud.¹⁵⁷ Also, having to avoid fraud imposes little burden on business. Therefore, participants seemed to agree that governments should be able to protect their citizens from fraud, even in cross-border contexts.¹⁵⁸

Third, participants agreed that governments, businesses and consumer advocates should work toward educating consumers on the consumer protections of various jurisdictions.¹⁵⁹ As part of this effort, governments should provide consumers and businesses with easy access to their consumer protection laws¹⁶⁰ as well as information about those countries that lack adequate consumer protection laws.¹⁶¹

Finally, everyone agreed that traditional approaches to remedies may become less relevant in an emerging era of small-value, transborder, Internet transactions.¹⁶² Consumers would face difficulties with either a country-of-origin or a country-of-destination approach. Even if consumers could obtain judgments against foreign businesses at home and under U.S. law, it would be difficult to get those judgments enforced. Unless the sued business were willing to voluntarily abide by a U.S. order or had assets in the U.S. that the consumer could attach, the consumer would have to take extra steps to get the judgment enforced, including possibly having to travel to the seller's country to have the judgment recognized.¹⁶³ The average consumer unlikely would go to such trouble or expense, especially for low-value transactions.¹⁶⁴ Thus, a strong consensus emerged that alternative dispute resolution (ADR) mechanisms should be explored in the short term.¹⁶⁵

Alternative Dispute Resolution

Regardless of which rules and whose courts are determined to govern consumer transactions, consumers will continue to have the same problems with litigating against foreign businesses that they have today -- the high costs of litigation, the small dollar value of most transactions, the amount of time required to pursue the formal process, consumer fear, and lack of education.¹⁶⁶ ADR programs, on the other hand, participants noted, have the potential to provide effective, quick, and affordable

solutions.¹⁶⁷

Several participants described efforts already underway to develop and implement effective dispute resolution procedures on a voluntary basis, and encouraged the development of others.¹⁶⁸ Panelists stated that, while they do not prevent fraud, these programs resolve many common consumer service problems.¹⁶⁹ The Council of Better Business Bureaus, for example, requires its member companies to demonstrate good faith resolution of consumer complaints and provides mediation and arbitration services, free of charge to the consumer.¹⁷⁰ As part of its certified merchants program, AOL will intervene to assist consumers in resolving disputes with a certified merchant.¹⁷¹ The AICPA's WebTrust program requires companies to correct billing errors promptly and to instruct consumers how to register complaints.¹⁷² Further, it makes available an ADR process with an internationally uniform set of criteria.¹⁷³ The DMA's Consumer Online Program helps consumers resolve disputes with distant sellers and is developing a similar program for international sales.¹⁷⁴ Dell computer also has implemented an online ADR program.¹⁷⁵ eBay developed a Safe Harbor initiative, which provides customer support to resolve complaints.

American Express offers similar protections. In addition to the chargeback practices required by U.S. law, American Express guarantees that its cardmembers will not be responsible for *any* unauthorized charges online. As a further benefit, the company will immediately charge back a merchant selling goods or services delivered electronically when the charge is disputed by the cardholder.¹⁸³ Then American Express will attempt to resolve the dispute and determine whether the temporary chargeback should be made permanent.

Nonetheless, concerns were expressed about the effectiveness of the chargeback system. One comment noted that chargeback rights are not universally available because not all merchants accept credit cards.¹⁸⁴ Another panelist was concerned that there is no record of consumer satisfaction; issuing banks within Visa are not *required* to push the merchant bank to resolve consumer dissatisfaction and the issuing bank's relationship with its consumers is determined by the bank, not Visa.¹⁸⁵

Although several laudable efforts are underway, participants suggested that more work is needed to ensure that ADR programs are effective and fair to consumers.¹⁸⁶ For example, one participant noted that it is difficult to get both parties to participate in a voluntary program. The eBay pilot program was described as effective because both sides participated in about 80% of the disputes. This high participation rate was attributed to concern about reputation. More typically, however, it was noted that only the side asking for dispute resolution willingly participates.¹⁸⁷

Moreover, participants pointed out that ADR programs are not automatically more affordable or convenient for consumers than in-court litigation. One identified self-regulatory program, for example, was described as imposing mandatory arbitration that required consumers to make filings in France and pay a non-refundable \$4,000 filing fee and arbitral costs.¹⁸⁸ One participant suggested that this hurdle could be overcome by limiting the circumstances under which an award was upheld in court. He suggested, for example, that a court could give little deference to ADR programs where the consumer automatically loses unless a high fee is paid, but grant greater deference to awards when there was certification that appropriate rules were followed.¹⁸⁹

Consumer advocates expressed concern about contract provisions requiring binding arbitration which would preclude the consumer's right to seek judicial recourse.¹⁹⁰ Certain consumer groups recommended that there should always be federal and state enforcement authority and a private right of action to guarantee consumer redress,¹⁹¹ as well as a practical means of correcting billing errors.¹⁹²

INTERNATIONAL COOPERATION

Issues arising in a global marketplace cannot be resolved on a purely domestic level. Participants agreed that businesses, consumers, and governments must work together on an international level to accomplish the inextricably linked policy goals of consumer protection and facilitation of the electronic marketplace.¹⁹³ They noted that informal and formal cooperation, and multilateral and bilateral collaboration each serve important functions. On the one hand, participants acknowledged that case-by-case, informal cooperation can be quick, efficient and adaptable to the circumstances. On the other hand, participants pointed out that more formal vehicles for cooperation, such as treaty negotiations, while typically painstakingly slow,¹⁹⁴ yield binding obligations and can ultimately change behavioral norms.¹⁹⁵ Likewise, participants saw roles for bilateral and multilateral cooperation. While participants viewed multilateral cooperation as having the potential for far-reaching effects geographically, it was acknowledged that such agreements might be difficult to reach, and might end up reflecting only the lowest common denominator.¹⁹⁶

Participants generally agreed on the areas that would benefit from international cooperation. One obvious area is jurisdiction and choice-of-law. While participants acknowledge that it is important to strive toward an international agreement as to which laws apply when and where cases can be heard, they also recognized that the inherent complexity and disagreement even at domestic levels makes a resolution in the short term highly unlikely.¹⁹⁷ Broad agreement emerged that simultaneous efforts toward international cooperation on a number of other fronts will be necessary. Workshop participants identified three areas for such international arrangements: (1) consensus on core consumer protections, (2) judgment recognition, and (3) law enforcement cooperation.

Building Consensus on Core Protections for Consumers

Everyone seemed to agree that international agreement on core protections or best practices online will make the e-commerce market more stable and predictable, and participants urged all stakeholders to pursue this goal.¹⁹⁸ Indeed, participants acknowledged that international agreement on consumer protection law would take pressure off the thorny choice-of-law issue.¹⁹⁹ If every country had the same consumer protection laws, business' compliance burdens would be substantially reduced. However, each country's consumer protection framework reflects its own unique history, culture, morals and values. Moreover, within each country, consumer protection laws often vary across local jurisdictions. Accordingly, complete, wholesale international consensus, participants agreed, would be unattainable in the near future.²⁰⁰ Notwithstanding this perception, many participants viewed efforts toward consensus as a worthwhile pursuit.²⁰¹ While one panelist remained optimistic that

detailed consensus was possible,²⁰² several others emphasized the value of beginning with higher level principles,²⁰³ and some encouraged work toward mutual recognition of consumer protection laws.²⁰⁴ Others suggested that we approach efforts toward consensus on a sectoral basis.²⁰⁵

Participants identified the Organisation for Economic Cooperation and Development (OECD), and in particular its Committee on Consumer Policy, as one already existing body that could help foster consensus.²⁰⁶ There was general support for the work of the OECD, and the OECD Privacy Guidelines were held up as a model to illustrate the usefulness of internationally agreed-upon, high level principles.²⁰⁷ Many supported the ongoing work of the Committee on Consumer Policy to develop Guidelines for Consumer Protection in the Context of Electronic Commerce, which have since been completed.²⁰⁸ These Guidelines embody consensus among 29 countries on, among other things, certain core consumer protections.

In addition to the OECD, participants discussed other international fora that are addressing consumer protection in e-commerce. The Justice Department is working with the G-8 countries toward consensus on what should be criminalized in cyberspace.²⁰⁹ Others included the Free Trade Area of the Americas, the Transatlantic Consumer Dialogue, the Transatlantic Business Dialogue, the Asian Pacific Economic Cooperation forum, and the Global Business Dialogue on E-Commerce.²¹⁰ One consumer advocate proposed the establishment of a new forum: the “World Consumer Protection Organization,” which could function like the World Intellectual Property Organization to assist in the harmonization of national consumer protection laws and to resolve individual disputes.²¹¹

Agreements on Judgment Recognition and Enforcement

Participants also identified the need to work toward developing an international system for recognition and enforcement of judgments.²¹² With respect to *private* actions, participants noted that even if the consumer could bring an action against a foreign business in the consumer’s home forum, the consumer would have to have the judgment enforced in the business’ forum.²¹³ They further noted that in many jurisdictions outside the U.S. it is difficult to obtain recognition and enforcement of foreign judgments.²¹⁴ Even where mechanisms are in place for cross-border judgment enforcement, participants pointed out that the process is costly for consumers in terms of time and money--often more costly than the value of the judgment itself-- and is not widely used.²¹⁵

International recognition of *public* law judgments was viewed as just as necessary but potentially even more problematic.²¹⁶ Participants noted that unlike private law judgments, some countries do not readily recognize judgments obtained by public agencies, such as consumer protection law enforcement agencies, because of issues

of sovereignty.²¹⁷ The U.S. is not currently a party to any judgment recognition treaties.²¹⁸

Some participants identified the ongoing negotiations at the Hague toward a treaty on jurisdiction and judgment recognition as offering potential to resolve these issues.²¹⁹ Other participants, however, were not optimistic, noting the difficulty of tying the overwhelmingly ambitious task of reconciling divergent jurisdiction approaches to the judgment recognition issue.²²⁰ Other noted problems with the draft treaty included its failure to take into account e-commerce, a premature determination regarding complicated issues of choice of forum and jurisdiction, and ambiguity regarding whether the scope covers judgments obtained by consumer protection law enforcement agencies.²²¹

Facilitating Law Enforcement Cooperation and Information Sharing

Participants made it clear that cooperation among law enforcers internationally on several fronts will be necessary to effectively address cross-border fraud and deception on the Internet.²²² Even in areas where the law among jurisdictions is similar, such as with prohibitions against fraud, effectively enforcing the law in a cross-border context without law enforcement cooperation can be problematic.

Law enforcement representatives acknowledged that the Internet poses new challenges for them: it offers high-speed transactions that enable fraud perpetrators to victimize alarming numbers of e-victims almost instantaneously, and a technological shield that hides their identity. Just as challenging is the borderless nature of the new medium, because it weakens law enforcers' ability to obtain effective remedies.²²³ Unless a defendant has assets to attach in the U.S. or otherwise has a presence here, they noted, a judgment obtained in a U.S. court could remain empty and unenforceable.²²⁴

One tool identified by law enforcement to overcome this hurdle is to sue in foreign courts for *Mareva* injunctions, temporary court orders that keep the proceeds of fraud out of the hands of wrongdoers.²²⁵ The FTC and the SEC, for example, have been successful in obtaining *Mareva* injunctions in recent cross-border fraud cases.²²⁶

Another tool in the arsenal of law enforcers around the world has been to enter into various types of cooperative arrangements, ranging from formal agreements to share information to informal understandings to cooperate on an ad hoc basis.²²⁷ Some examples of formal cooperative efforts discussed at the Workshop include: efforts among consumer protection agencies in 29 countries through the International Marketing Supervision Network,²²⁸ as well as efforts to combat high-tech crimes by the Department of Justice with the G-8 countries, Canada, France, Germany, Italy, Japan,

Russia, the United Kingdom and the United States, and with 41 European countries at the Council of Europe.²²⁹ Examples of informal cooperative efforts include task forces, such as the US- Canada Telemarketing Fraud Task Force and the Mexico-US-Canada Health Fraud Task Force;²³⁰ and case-by-case cooperation to combat Internet fraud, such as between Washington State and Canada,²³¹ between the Australian Competition and Consumer Commission and the FTC;²³² and among securities regulators in the U.S., Philippines and Canada.²³³

While the Internet creates a great need for enhanced cooperation, it also makes cooperation easier. One example discussed at the Workshop is Consumer Sentinel, a binational, comprehensive database that offers over 200 law enforcement agencies in the U.S. and Canada fast access to over 200,000 consumer fraud complaints through a secure, searchable Web site. A joint project of the FTC and the National Association of Attorneys General (NAAG), in cooperation with Canadian entities Canshare and Phonebusters, this automated system enables coordinated and comprehensive law enforcement efforts aimed at the most prevalent frauds.²³⁴

Workshop participants also noted that better cooperation among governments and the private sector internationally would also help stop cross-border fraud.²³⁵ In one example regarding an international case brought by the FTC, it was noted that substantial consumer injury could have been avoided if international telephone companies had notified each other and law enforcement of obvious problems they encountered with the perpetrators of the fraud at issue.²³⁶

In short, the participants agreed that law enforcers worldwide, in conjunction with the private sector, need to continue to enhance their cooperative efforts, and to work to ensure that they have the necessary weapons to combat fraud in the international marketplace.²³⁷

1. Transcript of the June 9, 1999 main session of the FTC's Public Workshop on "U.S. Perspectives on

12. June 8, Silbergeld at 64-66.
13. *E.g.*, June 8, Golodner at 206, Lesser at 212.
14. *See* June 8, Silbergeld at 65-66; TACD Comment at 3; NCL Comment at 2.
15. *See* June 8, Golodner at 206.
16. June 8, Halligan at 212.
17. June 8, Caldwell at 214-16.
18. June 8, Golodner at 251-52.
19. *See* June 8, Rosenthal at 197-98. More detailed information about the survey can be found at <http://www.ftc.gov/bcp/icpw/index.htm>.
20. June 8, Mayer at 75-76, 82. Purchases were made from 45 Web sites in the U.S., 23 in the U.K., 42 in other E.U. nations, and 42 in other non-E.U. nations. The market basket contained eight consumer items in the \$25 to \$50 price range, including a book, software, computer RAM, a toy, a travel hair dryer, jeans, Champagne, and chocolate. Almost every purchase was returned, to find out how merchants conduct refunds. *Id.* The final survey results are discussed at: <http://www.consumersinternational.org/campaigns/electronic/e-comm.html>.
21. *See* June 8, Rosenthal at 197-98; <http://www.ftc.gov/bcp/icpw/index.htm>.
22. Preliminary results of the Consumers International Survey were discussed by Robert Mayer at the Workshop. *See* June 8, Mayer at 82-101. The final survey results are discussed at: <http://www.consumersinternational.org/campaigns/electronic/e-comm.html>.
23. June 8, Anderson at 228-30, Fox at 231-32; NCL Comment at 2-3.
24. American Institute of Certified Public Accountants (AICPA) Comment at 1; June 8, Fox at 210.
25. *E.g.*, June 8, Clausen at 235.
26. *See, e.g.*, June 8, Silbergeld at 62-70, Golodner at 251; TACD Comment at 3-4; Consumer Federation of America and National Consumer Law Center (CFA/NCLC) Comment at 4-5.
27. CFA/NCLC Comment at 3.
28. June 8, Gray at 236-37.
29. *See, e.g.*, June 8, Lesser at 247-48; America Online (AOL) Comment at 5-6 (discussing AOL's certified merchant program).
30. June 8, Rosenthal at 200. In conducting the FTC survey, staff searched each Web site only up to the point at which payment information was required to be entered to continue with the transaction.

Some Web sites may disclose additional information about the terms of sale after the consumer has entered his or her payment information. See *id.* at 198-99.

31. Preliminary results of the Consumers International Survey were discussed by Robert Mayer, see June 8, Mayer at 82-101. The final survey results are discussed at:
<<http://www.consumersinternational.org/campaigns/electronic/e-comm.html>>.

32. See TACD Comment at 1,4. June 8, Halligan at 286, Silbergeld at 63-64.

Although U.S. law generally upholds contract terms that are freely chosen by the parties, “unconscionable” contract terms might not be enforced. See, *e.g.*

41. *Id.*
42. June 8, Golodner at 251.
43. June 8, Silbergeld at 52-70; TACD Comment at 4.
44. June 8, Prescott at 139-40, Singleton at 233.
45. The AICPA's WebTrust program requires companies to check each transaction request for accuracy and to receive positive acknowledgment from the customer (such as an e-mail confirming the order, or the customer's clicking "yes" after all customer-provided information is displayed) before processing the transaction. AICPA Comment, WebTrust Principles and Criteria (attachment) at 20. AOL requires members of its "certified merchants program" to provide consumers with an order confirmation within one business day of receipt. AOL Comment at 6.
46. Preliminary results of the Consumers International Survey were discussed by Robert Mayer; see June 8, Mayer at 82-101. The final survey results are discussed at: <http://www.consumersinternational.org/campaigns/electronic/e-comm.html>.
47. See June 8, Fox at 277-78. See also NCL Comment at 3 (consumers should have method of canceling purchases they did not mean to make).
48. CFA/NCLC Comment at 5. European law provides a seven-day right of withdrawal for distance contracts, subject to several exceptions. European Commission Comment at 14. Exceptions to the seven-day right to cancel may apply, for example, where goods are made to the consumer's specifications; where the provision of services has already begun, with the consumer's consent; where computer software has been unsealed by the consumer; or where the transaction involves the sale of newspapers or other periodicals. *Id.*
49. See CFA/NCLC Comment at 5.
50. See June 8, Lesser at 281, Torrence at 284, Caldwell at 276.
51. See June 8, Lesser 281.
52. CommerceNet Comment at 4. The federal cooling off rule establishes the right to cancel, within three days, transactions arising from door-to-door, in-home sales. 16 C.F.R. 429.1(a). The federal rule does not cover phone or mail transactions. In addition, states have cooling off rules for certain kinds of transactions, including telemarketing sales. *E.g.*, MD. Code Ann. Com. Law 14-302 (1) (ii) (1999); MO. Rev. Stat. § 407.701 (1999) (Door-to-Door); AZ. Rev. Stat. Ann. § 44-1276 (c) (1999) (Telemarketing).
53. CommerceNet Comment at 4.
54. June 8 Breakout, Torres 76, Baum 19-22, Schrader 5-10; CIX Comment at 9; Internet Consumers Organization Comment (ICO) at 4 (attachment).
55. CSI Comment at 2; SIIA Comment at 2; ITAA; ICO Comment at 4 (attachment); CIX Comment at 9; June 8 Breakout, Torres at 76, Baum 76-77. Authentication technology also provides certainty that online communications will remain confidential and have integrity. June 8 Breakout, Baum 17, Schrader

9-11; ICO Comment at 4 (attachment).

56. Several comments addressed whether the use of digital signature technology should result in a presumption that a digital signature is attributable to the private key holder. There was support for such a presumption. Electronic Frontier Foundation Comment (EFF). Another viewpoint was that the burden of proof should remain on merchants, with consumers held accountable for their negligent acts. Bank One Comment at 2. Others asserted that courts should determine the validity of a digital signature on a case-by-case basis relying on evolving business practices. Cato Institute Comment at 4. One comment viewed such presumptions as an incentive for online fraud. Kaner Comment.

57. CommerceNet Comment at 3; EFF Comment; PMA Comment; CSI Comment at 2.

58. June 8 Breakout, Baum at 96, 99; Cato Institute Comment at 4.

59. June 8 Breakout, Baum at 96, 98-99.

60. *Id.* at 30-31, 96.

61. June 8 Breakout, Saunders at 89-90. According to Carl Ellison and Professor Jane Winn, due to consumers' limited understanding of digital signature technology, risk-shifting provisions require clear disclosures and affirmative consent from consumers. Winn/Ellison Comment at 7. They believed that even if these requirements were met, liability limitations, similar to those in Regulation Z, should be imposed. *Id.*

62. Under the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq., and Regulation Z, 12 C.F.R. 226, among other things: 1) cardholder liability for unauthorized use of a credit card is limited to the lesser of \$50 or the amount of the unauthorized purchase (notice provisions apply); and 2) the card holder may assert all state claims and defenses against the card issuer that would be available against the merchant, including the withholding of payment for the goods or services that gave rise to the dispute. *See also*, June 8 Breakout, Ellison at 39, Saunders at 66-69, Baum at 96. Some disagreement existed as to whether the Electronic Fund Transfer Act and Regulation E, along with credit card industry standards, provide adequate protection for online purchases made with ATM cards. June 8 Breakout, Saunders at 69, Schrader at 69.

63. Consumers Union Comment at 2 ; CFA/NCLC Comment at 6; NCL Comment at 6 .

64. June 8 Breakout, Saunders at 66-68, Torres at 93. Furthermore, some argued that allocating risk to technology providers and online vendors could also result in the further improvement of technology and risk management techniques. Winn/Ellison Comment at 8, 10.

65. This report refers only to those private sector initiatives that were discussed in connection with the Workshop. There are likely numerous other initiatives (many of which were launched after the

68. June 9, Mohit at 199. BizRate sells the information collected from consumers to firms as market research, leading to one panelist's concern about the reliability of the consumer information. June 9, Pollack at 202.
69. June 8, Handler at 112-15.
70. *Id.* at 112.
71. June 9, Cole at 182-83. The program is sponsored by the Council of Better Business Bureaus, Inc. (BBB). This entity is currently in the process of drafting a code of conduct for fair business practices. More information about these efforts can be found at <<http://www.bbbonline.org/businesses/code/draft>>.
72. June 9, Johnson 184-87 and AICPA Comment.
73. *Id.*
74. *See, e.g.*, DOJ Comment at 11-12 (seals of approval can reduce information search costs to consumers) and ICO Comment at 4.
75. June 9, Pollack at 189-90 (seal programs are too costly for many firms). *See also* Avrahami Comment at 2.
76. June 9, Cole at 182-83.
77. June 9, Torres at 192-94. *See also* AT&T Labs Research Comment at 15 (consumers may not understand what seals mean, in that they may not know when seals are authentic or when firms are following the conditions under which seals were granted).
- 78.

88. June 9, Fox at 139, 168-69, Fares at 16, Manfredi at 302, Pearce at 270, Glatz at 305-06; Dell Comment at 2; NCL Comment at 6; BBB Online Comment at 1; ICO Comment at 4; FEDMA Comment at 3; DMA Comment at 4; TRUSTe Comment at 1; Mars Comment at 8; United States for International Business (USCIB) Comment at 1; Casie Comment; eBay Comment at 2; Consumer Alert Comment at 3; Cato Institute Comment at 6; ERA Comment at 2; Australian Competition and Consumer Commission (ACCC) Comment at 21-25. See also <<http://www.ftc.gov/os/1999/9912/fiveyearreport.pdf>>.

89. See June 9, Clausen at 280-82, Burr at 212, Varney 231-33, 238-39; June 8, Torrence at 258-59. See also June 9, Pincus at 343-44 (discussing the value of segregating core protections, such as prohibitions on fraud, from disclosure obligations, where technology and private sector initiative have a real role to play).

90. See, e.g., June 9, Burr at 239; ACCC Comment at 25; CommerceNet Comment at 2, 5; Cato Institute Comment at 14; BankOne Comment at 3; AOL Comment at 2-3; ITAA Comment at 3; Information Technology Industry Council Comment at 2; Bell Atlantic Comment at 2; and Dell Comment at 2-3.

91. June 8, Singleton at 265, Clausen at 280; June 9, Glatz at 280, Torres at 346.

92. See June 8, Turner at 249-50, Singleton at 233, Clausen at 255-57. See also USCIB Comment at 1 (Consumer protection policies "should be market-driven and industry-led."); Competitive Enterprise Institute Comment at 6.

93. June 8, Lesser at 263, Singleton at 266-67, Anderson at 267-68. See also June 9, Cochetti at 208, Michelotti at 130; Cato Institute Comment at 6-14; eBay Comment at 2; SIIA Comment at 1, 3; and ESRB Privacy Online Comment at 2-3 (government should facilitate self-regulation).

94. See June 8, Lesser at 213, 244, Turner 249-50, Smith 216-17. See also Comment of DoubleClick Inc., GeoCities, Inktomi Corp., Lycos, Inc., theglobe.com, inc. and Yahoo! Inc. at 4 (Online companies have an enormous stake in consumer protection because "if consumers do not trust the Internet, these companies will fail."); PMA Comment at 2 (Companies who wish to do business with consumers will implement the necessary protections because consumers will demand that electronic commerce meet their needs.).

95. See June 8, Clausen at 223-25, Smith 216-17.

96. E.g., June 8, Turner at 249-50, Torrence at 220.

97. June 9, Cole at 240-41.

98. June 9, Crawford at 224, Torres at 350.

99. June 9, Cole at 240-41.

100. June 9, Michelotti at 130.

101. The European Advertising Standards Alliance has found that consumers do in fact look to see whether companies are in compliance with their standards -- about 15% of visitors to its Web site directly access this type of information. June 9, Crawford at 224-27 Further, lawsuits brought by non-compliant firms against the Alliance for damages for loss of business indicate that consumers avoid doing business

with non-compliant firms. *Id.*

102. See June 8, Fox 253-55, Mierzwinski 261-62; June 9, Torres, 350-51; Perritt, 333; NCL Comment at 6-7; CFA/NCLC Comment at 2-3; June 9, Wenger at 204, 242, Cole at 180, 240-41.

103. NCL Comment at 7; June 8, Silbergeld at 59-62; June 9, Wenger at 205.

104. June 9, Wenger 242-43.

105. June 9, Cole at 179, Wenger at 204, Burr at 212, Crawford at 224. See also NCL Comment at 6-7; CFA/NCLC Comment at 2 (self-regulation is not sufficient to provide consumers with confidence and protection); National Association of Consumer Agency Administrators (NACAA) Comment; DOJ Comment at 4-5; BBB Comment at 2 (an effective legal framework requires a significant self-regulation component); Ethan Katsh Comment; and EFF Comment at 3.

106. June 9, Torres at 237.

107. See Consumers International Comment at 2; TACD Comment at 1; NCL Comment at 3; CommerceNet Comment at 5; June 8, Turner at 285.

108. This section is intended to provide a brief overview of the U.S. framework on jurisdiction and applicable law. For a more detailed discussion, see Goldsmith at 73-92; 31 A.L.R. 4th 404, and cases cited therein; Restatement (Second) of Conflict of Laws §§ 6 80, 188; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); ABA Project on Internet Jurisdiction Web site at <<http://www.kentlaw.edu/cyberlaw>>; Restatement (Third) of Foreign Relations § 402; John Rothchild, *Protecting the Digital Consumer: The Limits of CyberspaceUtopianism*, 74 Ind. L.J.893, 911-42 (1999).

109. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Some federal courts have followed this ruling and upheld choice-of-forum clauses in domestic consumer contracts. See *Generale Bank v. Choudhury*, 779 F. Supp. 303 (S.D.N.Y. 1991); *Duffy v. Camelback Ski Corp.*, 1992 U.S. Dist. LEXIS 8988 (E.D. Pa. 1992). Other federal courts have distinguished *Carnival Cruise* and invalidated choice-of-forum clauses in consumer contracts despite *Carnival Cruise*'s holding. See, e.g., *Carnival Cruise v. Superior Court*, 234 Cal. App. 3d 1019 (2d Dist. 1991) (stating that any plaintiff that did not have notice of the forum-selection clause was not bound by it); *Corna v. American Hawaii Cruises, Inc.*, 794 F. Supp. 1005 (D. Hawaii 1992) (forum selection clause unreasonable because plaintiff had no opportunity to reject it without forfeiting entire purchase price of the contract). Many U.S. state courts do not follow *Carnival Cruise*, which was decided under federal admiralty law. See, e.g., *Oxman v. Amoroso*, 659 N.Y.S.2d 963 (N.Y. 1997) (refusing to uphold choice-of-forum clause contained in small print). In any event, the specific legal principle of *Carnival Cruise* was subsequently nullified by statute. See 46 U.S.C. § 183c (outlawing forum-selection clauses depriving passengers traveling on ships of right to trial in negligence cases). Therefore, even after *Carnival Cruise*, many courts continue to invalidate choice-of-forum clauses in consumer contracts.

110. See, e.g., *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944); *FTC v. Magui*, 1993 U.S. App. Lexis 28684 (9th Cir. 1993).

111. See *Dopp v. Yari*, 927 F. Supp. 814, 818 (D.N.J. 1996); *Sanders v. Lincoln Service Corporation*, 1993 U.S. Dist. LEXIS 4454 (N.D. Ill. Apr. 5, 1993); *In re Masonite Corp. Hardboard Siding Products Liability Litigation*, 21 F. Supp. 2d 593 (E.D. La. 1998); *Prousi v. Cruisers Division of KCS Int'l*, 975 F. Supp. 768 (E.D. Pa. 1997), *vacated on other grounds*, 32 F. Supp. 396 (E.D. Pa. June 29, 1999).

112. Although this body of case law has been developed largely in the domestic context (because most business-to-consumer commerce has traditionally taken place domestically), the same basic principles would likely to apply to international business-to-consumer transactions.

113. Official Journal, C027, 26/01/1998, pp. 1 - 27.

114. Official Journal, C027, 26/01/1998, pp. 34-46.

115. See European Commission Comment at 21.

116. *Id.* at 22. The rules governing private international contract law in Europe could change, as the European Commission has proposed new legislation in this area.

117. The E-Commerce Directive can be found at, http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/442|0|RAPID&lg=EN. See also, June 9, Manfredi at 257-58. The restrictions imposed by one member state on a business located in another state will have to be proportionate to their stated objective. Moreover, such restrictions can only be imposed (except in cases of urgency and in cases of court actions) after the Member State where the business is established has been asked to take adequate measures and failed to do so, and the intention to impose restrictions has been notified in advance to the Commission and to the Member State where the business is established. http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/442|0|RAPID&lg=EN.

118. Copies of the mock Web pages are included in the Appendix.

119.

129. June 9, Fares at 101; DMA Comment at 7.
130. June 9, Harter at 155, Halligan at 164-65, Michelotti at 164; Norwegian Research Center for Computer and Law (NRCCL) Comment at 7-8; Leo Burnett Comment at 3.
131. FEDMA Comment at 5; CSI Comment at 3-4; AAF Comment at 2; June 9, Glatz at 282; Leo Burnett Comment at 3.
132. June 9, Glatz at 284.
133. June 9, Michelotti at 130, Fares at 163, Glatz at 298 (citing to seal programs); Leo Burnett Comment at 3.
134. June 9, Johnson at 124 (discussing new technology that allows subscribers to see public comments left by others while looking at a Web site), 164, Glatz at 283, 295-96, 299; Cato Comment at 3; Bell Atlantic Comment at 3; Dell Comment at 2.
135. June 9, Fox at 96, Halligan at 128, Sylvan at 296; CI Comment at 2; NCL Comment at 4.
136. CI Comment at 2; CFA/NCLC Comment at 2.
137. CFA Comment; CI Comment at 2; June 9, Sylvan at 296.
138. See, e.g., June 9, Fox at 138.
139. June 9, Fox at 139; Love Comment at 2.
140. June 9, Sylvan at 288; CI Comment at 2.
141. June 9, Fox at 139, Sylvan at 288; CI Comment at 2.
142. CFA/NCLC Comment at 2-3; NCL Comment at 6; June 9, Sylvan at 288.
143. June 9, Fox at 169; DOJ Comment at 2-3, 10-11; June 9, Rusch at 15, Halligan at 165; Pollack Comment at 4.
144. DOJ Comment at 1; NAAG Comment at 2; NACAA Comment at 4-.; See also June 9, Philips at 111-13.
145. See, e.g., NAAG Comment at 3.
146. NACAA Comment at 4-5; DOJ Comment at 8.
147. See CSI Comment at 3, 4; Mars Comment at 1, 6; USCIB Comment at 2; EFF Comment at 1-2; Casie Comment; June 8, Torrence at 294. See also Consumer Alert Comment at 2.
148. See CommerceNet Comment at 2; June 8, Lesser at 295.

149. June 9, Fares at 140. *See also* CSI Comment at 3; Mars, Inc. Comment at 1; Cato Comment at 3; CommerceNet Comment at 2. Some participants suggested that a choice-of-law or forum clause have a reasonable nexus to the transaction. Mars Comment at 6; June 9, Glatz at 281, 283.
150. June 9, Glatz at 283.
151. June 9, Goldsmith at 91-92, Halligan at 151, Silbergeld at 108, Pearce at 303 (explaining why it is beneficial to consumers that the Australian Trade Practices Act is a mandatory law that cannot be “contracted out”); June 9 Breakout, Perritt at 10.
152. *See* TACD Comment at 4; NCL Comment at 4; CFA/NCLC Comment at 5-6.
153. June 8, Halligan at 296.
154. June 9, Pearce at 287-89.
155. June 9, Johnson at 98.
156. June 9, Johnson at 122, Burr at 125, Halligan at 127; Dell Comment at 3 (“FTC should dedicate its existing, formidable resources to protecting consumers against bad actors. . .”)
157. June 9, Michelotti at 132; AOL Comment at 10.
158. June 9, Goldsmith at 170, Michelotti at 150, Glatz at 282, Phillips at 112-13, Rusch at 102-03, 111.
159. June 9, Michelotti at 166, Bond at 310, Glatz at 299, Cochetti at 329; ITAA Comment at 3; CSI Comment at 4; DMA Comment at 6; Mars Comment at 2, 6, 7; Gray and Saenz Comment at 3; ICO Comment at 5; Consumers International Comment at 3; CommerceNet Comment at 2, 4; EFF Comment at 3; ACCC Comment at 19-20; Bell Atlantic Comment at 3; DOJ Comment at 11-12; NCL Comment at 7; Lycos Comment at 3; Truste Comment at 1.
160. June 9, Bond at 310; DMA Comment at 3-4.
161. Mars Comment at 7; June 8, Pearce at 304, Bond at 310.
162. *E.g.*, June 9, Cole at 180
163. *See generally* June 9, Goldsmith at 86-91 (discussing generally the difficulty of having domestic orders recognized abroad).
164. *E.g.*, June 9, Cole at 180.
165. June 8, Singleton at 290-91; June 9, Bond at 310, Johnson at 144, Burr at 147, 213-24, Manfredi at 290-91, Cochetti at 328, Gustafson at 342; Gibbons Comment at 1; CI Comment at 2; BBB Comment at 2; ACCC Comment at 15; NRCCL Comment at 8; Dell Comment at 4; NCL Comment at 6.
166. *See* June 9, Johnson at 144, Phillips at 145-46, Burr at 147, Michelotti at 150; June 8, Clausen at 288; FEDMA Comment at 3; BBB Comment at 2; ERA at 2; DOJ Comment at 8.

167. See June 8, Clausen 288, Singleton at 290-91.
168. See June 9, Turner at 285, Smith at 290, Phillips at 145, Michelotti at 150, Goldsmith at 171. See also June 9, Burr at 214 (ADR programs are available and easy to use); Mars Comment at 3-4, 9; European Commission Comment at 17-19 (ADR programs are available and more should be developed); and CommerceNet Comment at 5 (suggesting that the FTC should ensure the availability of ADR procedures).
169. June 8, Prescott at 137-39.
170. BBB Comment at 4.
171. See AOL Comment at 7.
172. AICPA Comment, WebTrust Principles and Criteria.
173. June 9, Johnson at 203.
174. June 8, Prescott at 130-31.
175. June 8, Turner at 285. This program appears to be different from the others cited in that the decisions rendered by the arbiter is binding on the consumers. See http://www.dell.com/us/en/gen/misc/policy_008_policy.htm at ¶ 13 (“Any award of the arbitrator(s) shall be final and binding on each of the parties...”)
176. June 8, Handler at 113-14.
177. June 9, Katsh at 215-19. A new entity, Squaretrade has since contracted with eBay to mediate disputes. See <http://pages.ebay.com/services/buyandsell/disputeres.html>.
178. See, e.g., June 8, Smith at 289-90; DMA Comment at 4; Mars Comment at 3; Visa Comment at 5; American Express Comment at 2.
179. Credit card transactions are governed by the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, and its implementing regulation, Regulation Z, 12 C.F.R. part 226. Debit cards fall within the coverage of the Electronic Funds Transfer Act, 15 U.S.C. § 1691, *et seq.*, and its implementing regulation, Regulation E, 12 C.F.R. part 205.
180. See 12 C.F.R. § 226.13.
181. *Id.*
182. See Visa Comment at 5. Visa defines a chargeback as “the return of a transaction from the issuer of a card used by a consumer to the financial institution that ‘purchased’ the transaction from the merchant.” *Id.*
183. See American Express Comment at 3.

184. See NCL Comment at 5.
185. June 9, Pollack at 234-35.
186. See, e.g. June 9 Breakout, Perritt at 12 (discussing the need to identify the attributes of an effective arbitration system for consumers, and potentially build on the New York Convention on the Recognition of Arbitration Awards, which involves business-to-business disputes).
187. June 9, Katsh at 218.
188. June 9, Gibbons at 229-30. See also Heiskanen Comment at 6, 23 (there now is no effective international arbitration process for consumers).
189. June 9, Gibbons at 229-30.
190. See June 8, Fox at 286; CFA/NCLC Comment at 4.
191. CFA/NCLC Comment at 6. See also NACAA Comment at 4 (advocating state and local enforcement authority, as well as a private right of action, against foreign merchants engaging in unfair and deceptive practices).
192. NCL Comment at 3.
193. June 9, Cerf at 45, Manfredi at 292, Valentine at 308, Perritt at 331, Jenkin at 267, Stevenson at 314, Glatz at 296, Sylvan, at 296, Barshefsky at 15, 17; June 9 Breakout, Perritt at 5; CSI Comment at 2; Leo Burnett Comment at 2; James Love Comment at 1; Henry H. Perritt Jr., *Role and Efficacy of International Bodies and Agreements*, at 24 (June 9, 1999) (unpublished work, presented at Workshop) (Perritt Paper).
194. June 9 Breakout, Love at 28; June 9, Cole at 179; Swindle at 135.
195. June 9 Breakout, Love at 28, Rotenberg 21-22.
196. June 9 Breakout, Perritt at 13-14. See also June 9, Sylvan at 306, Valentine at 308-09 (Bilaterals are relatively easy to reach between like-minded countries.).
197. E.g., June 9, Pincus at 345.
198. June 8, Aaron at 310-12; June 9 Breakout, Rotenberg 24, Miller at 41-42; June 9, Manfredi at 290; Love at 323, Pincus at 343-44, Torres at 350; ACCC Comment at 15; NRCCL Comment at 9; DMA Comment at 9. See generally June 9 Breakout, McHale at 30-32.
199. June 9 Breakout, Perritt at 330, Love at 15-16, Rotenberg at 23-24; June 9, Johnson at 164, Goldsmith at 170, 89, Sylvan at 296, Valentine at 279, Fox at 138; CFA/NCLC Comment at 2; BBB Comment at 3; DMA Comment at 9; NRCCL Comment at 9; Winn Comment at 1; ACCC Comment at 14; NCL Comment at 4.
200. June 9 Breakout, Kramer at 33, Perritt at 13; June 9, Bond at 294; DMA Comment at 3.

201. June 9, Johnson at 164, Goldsmith at 170, 89, Fox at 137-39, Sylvan at 290, Manfredi at 251, 291, Valentine at 279; June 9 Breakout, Rotenberg at 23, Love at 15, 28, Wellbery at 25; CFA/NCLC Comment at 2; BBB Comment at 3-4; DMA Comment at 9; NRCCL Comment at 9; Winn Comment at 1; ACCC Comment at 14, 17; NCL Comment at 4.
202. June 9 Breakout, Love at 28.
203. See June 9 Breakout, Rotenberg at 21-23, Perritt at 36, 38, Wellbery at 24-26, McHale at 30-32.
204. CSI Comment at 4; DMA Comment at 9.
205. June 9 Breakout, Perritt at 7, Kramer at 33-34.
206. June 9 Breakout, Miller at 43, Stevenson 49, Sussman at 22-24; June 9, Manfredi at 291, Sylvan at 306.
207. June 9 Breakout, Wellbery at 26; June 8, Aaron at 312-15, Perritt at 38; June 9, Perritt at 331. *But* see June 9 Breakout, Miller at 43 (offering industry perspective that OECD may not be the ideal forum to discuss consumer protection).
208. *E.g.*, June 8, Fox at 263-63, Aaron at 312-15; June 9, Sylvan at 306, Jenkin at 311. The OECD Consumer Protection Guidelines are available at the FTC's Web site, <<http://www.ftc.gov/opa/1999/9912/oecdguide.htm>>.
209. June 9 Breakout, Sussman at 18.
210. June 8, Aaron at 312-15; June 9, Barshefsky at 17; June 9 Breakout, Wellbery at 5.
211. Consumer Project on Technology Comment; CFA/NCLC Comment at 2, 6.
212. *E.g.*, June 9, Goldsmith at 88-90, 170-71, Glatz at 305, Sylvan at 306; CSI Comment at 4; Mars Comment at 2; ECLIP Comment at 9; ACC Comment at 1-2, 6-7, 17-18; DOJ Comment at 6; NCL Comment at 4-5. *See also*, June 9, Jenkin at 266-67 (Canadian perspective); June 9 Breakout, Ristau at 44, 47; June 9, Manfredi at 251, 261, 29, Bond at 293 (European perspective); June 9, Pearce at 304 (Australian perspective).
213. See June 8, Gustafson at 149; ACCC Comment at 17.
214. See *e.g.* June 9, Manfredi at 251 (EU countries do not yet fully recognize each other's laws).
215. June 9, Jenkin at 266; DMA Comment at 7; the Australian Competition and Consumer Commission (ACCC) Comment at 17; Perritt at 5; Henry H. Perritt, Jr., *Role and Efficacy of International Bodies and Agreements* at 8 (June 9, 1999) (unpublished work, submitted during Federal Trade Commission Public Workshop: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace).
216. June 9, Goldsmith at 87-88, Foss, at 273. *See also* June 9 Breakout, Ristau at 47, 49.

217. June 9, Goldsmith at 88. See also June 9, Kramer at 35 (discussing difficulty of involving government regulators in a dialogue about sharing jurisdiction and authority with other countries); Miller at 41 (consumer protection regulation is highly politicized).
218. June 9 Breakout, Ristau at 44.
219. June 9, Ristau at 44.
220. *Id.*
221. *E.g.*, June 9, Goldsmith at 88-89. The preliminary draft convention adopted by the Special Commission on October 30, 1999, is available at: <<http://www.hcch.net/e/workprog/jdgm.html>>.
222. June 9 Breakout, Sussman at 17, Ristau 47; June 9, Perritt at 332-32, Pincus at 345, Manfredi at 292, Goldsmith at 90-91. See also June 8, Halligan at 287, Jacobs at 179-80, Clausen at 288; ACCC Comment at 14.
223. June 8, Harrington at 161-78, Jacobs 179-89, Gustafson 148-60.
224. June 8, Gustafson at 149-50.
225. June 8, Jacobs at 187.
226. See *e.g.*, *FTC v. Fortuna Alliance*, Civ. No. C96-199 M (W.D. Wash. 1996); *FTC. v. Online Communications*, CV-S-96-00055-LDG (D. Nev. 1996). The FTC works with the Department of Justice to obtain this type of relief. See also June 8, Jacobs at 187 for a discussion of SEC actions.
227. See, *e.g.*, June 9 Breakout, Sussman at 18, Ristau at 47; June 9, Manfredi at 292, Gustafson at 341, Pearce at 272.
228. June 9, Harrington at 162; Manfredi at 292.
229. June 9 Breakout, Sussman at 18.
230. *Id.*
231. June 9, Gustafson at 341; June 8, Gustafson at 148-60.
232. June 9, Pearce at 272.
233. June 8, Jacobs 184.
234. June 8, Stevenson at 102.
235. See June 8, Harrington at 170-71, Clausen at 288; June 9, Lesser at 355, Rusch at 368.
236. June 8, Harrington at 170-71.

237. For a more complete discussion of the consumer protection enforcement challenges posed by the online medium, see John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 Ind. L.J.893, 911-42 (1999).