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ANNUAL CONFERENCE

JURISDICTION II

GLOBAL NETWORKS/LOCAL RULES

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INTRODUCTION AND WELCOME

RUTH DAY

I would like to thank you all for attending. We're proud to have representatives from 16 countries here in a most beautiful city that somehow has managed to be both entrepreneurial and human in scale all at the same time.

There have been remarks that while computers get twice as smart and half as expensive every two years, the same cannot be said of lawyers. However that may be, I actually agree with the first part, I think we get twice as smart.

However that may be, our program today is a combination of global or cross border law and the Internet. And that program is unusual and to some extent unique. It's a special opportunity and a rare one to examine specific events over the last year in a larger context to frame questions and perhaps even to develop some insights on issues which are of enormous importance.

There is a phenomenal concentration of brain, power, experience and vision in this room today. If you will

allow us to take advantage of it by assuming an active role in these proceedings, we will leave, I think, with a sense of considerable accomplishment. We thank you again for being here.

We're welcomed to California this morning by California Assembly member Marco Firebaugh. Assemblyman Firebaugh represents East L.A., he's Chair of the Budget sub-committee on Information, Technology and Transportation and, in that position, commands a seat in which he can see the development of the Internet and technology in California. Thank you for joining us.

MARCO FIREBAUGH
Thank you and good morning. It is truly my pleasure to welcome you to California on behalf of our state and on behalf of our state legislature. You have important work to do over these next couple of days. In some ways, I envy you. Now, you're here in San Francisco, which is not only host of a wonderful environment but is a world-class city with an eclectic, dynamic economy, information-based economy.

On the other hand, you have an enormous task. You know, on this eve of the new century, in a time when information, commerce, intelligence is transmitted in milliseconds, we do have to devise ways to cope with the inherent challenges of a globalized world.

As you know, the Internet can bridge the gap between information rich and information poor and it can put that information in the hand... in the (...) and power that that holds within the reach of the powerless. We think that it can help us, help us address many of the ills that afflict our modern often disconnected society.

As it was mentioned, I'm privileged to service as

Chairman of the Legislature Budget sub-committee with jurisdiction over technology investments in California. I represent a district in Southern California with about 450,000 people.

I recently visited a state-of-the-art hospital just outside my district and there I learned a little more about the use of Internet technology in making medicine more effective, more efficient and more humane. I visited this hospital that had a state-of-the-art technology, as I mentioned, it boosted of a Neonatal Acute Care Centre, one of few in the Southern California area.

You know, in that ward, I saw infants receiving the most advanced care anywhere in the world. Doctors were communicating with colleagues across the globe via the Internet, nurses were placing medicinal orders, transferring data across the Internet. Really, I thought what was the most important thing was that mothers who were located in hospitals, sometimes many many miles away, used remote cameras, Internet technology, to look in on their babies, to communicate with nurses, to perhaps make the delivery of medicine a little more humane.

And so, in a lot of ways, Internet can help us, can help us be more efficient, we can be more effective and, in fact, we can be more humane. But as you know, the advance of technology presents enormous challenges, challenges that I think we have responsibility to develop policy solutions for.

And so, in a globalized world many of the rules before us, many of the rules of the past and present continue to be very local, sometimes very parochial. And the rules are constantly being tested by new technologies, by new applications, by the fluidity of capital across borders, across nations. And while the Internet is borderless, law and policy often is not. So, we remain in many ways in a compartmentalized world, compartmentalized by national identities, by regional and local laws and norms. We've got to find our way out of that conundrum.

And so, the work before you is essential. The task of identifying ways to ensure the continued vibrancy of technological advancement must create an environment that fosters confidence in an Internet economy, that invites traditional economies to participate intelligently and aggressively in electronic commerce,

that entices small and medium-sized businesses to help us grow our electronic economy.

And so, I'd like to suggest to you that you are uniquely positioned to help us solve these problems. You are learned thinkers and capable practitioners from around the globe and in many ways this body presents a unique opportunity to solve these global issues. You've recognized that the development of international policy requires international thinking.

And so, as Californians, we are very proud of what we've achieved here, we're proud of our thriving economy, our information-based economy, our technological advancement, but we realize that we don't have a monopoly on brilliant minds. And we look to all of you from around the globe to help us devise policy that will help us reach the future strong and healthy and ever-growing.

I welcome you to California, I thank you for your involvement and I wish you godspeed.

RUTH DAY
Thank you. I particularly want to thank Assemblyman Firebaugh for reminding us that, while we talk about B2C, B2B, economic efficiencies, abstract concepts that what is at base here are people and their lives and making them better everywhere. So, thank you for that reminder.

Next, I'd like to introduce two people that have been extremely important in this conference. The first, Denis Henry is the Chairman of the Working Group on Jurisdiction for the Internet Law and Policy Forum. He has been instrumental in putting this together and we'd like to recognize and thank him. He is the Vice-President for Regulatory Law at Bell Canada. Thank you, Denis.

And it is also my distinct pleasure to introduce the Chairman of the Internet Law and Policy Forum, Masanobu Katoh. Mr. Katoh is the General Manager of the Washington Office of Fujitsu Ltd. That is his title, that does not begin to describe who he is and what he does. He's candidate for the ICANN Board and a respected authority around the globe on Internet law and policy. Mr. Katoh.

Common themes from Jurisdiction I: Building Conference in a Borderless Medium

MASANOBU KATOH
Thank you very much, Ruth, and thank you very much Honourable Marco Firebaugh who has to catch up another plane right now and again I thank you for, you all taking time with us.

Good morning, Ladies and Gentlemen, and welcome to ILPF Annual Conference. As you all know, our topic over the next two days is jurisdiction, global networks/local rules. In many ways, this conference is a continuation of last year's ILPF Conference in Montreal, which was entitled "Jurisdiction: Building Confidence in A Borderless Medium".

We'll be exploring many of the similar themes as last year, sometimes with the same speakers. However, there have been many important developments in the field of jurisdiction this year, particularly as jurisdiction relates to e-Commerce.

I'd like to take just a few minutes to review the past year's developments and link them to some of the issues

that we will focus on over the next two days.

I will start with last year's conference in Montreal. The goal of the Montreal Conference was to explore basic legal concepts of cross border jurisdiction and to create a common level of understanding of the series of legal issues and policy considerations.

The program included a comparative analysis of the rules for jurisdiction in different substantive legal areas, and examined approaches for both business to business transactions and for business to consumer electronic commerce. Although there were differences of opinion on many particular issues, consensus could be detected on a number of broader themes identified by the experts at the meeting.

Not surprisingly, many of these themes touch on consumer protection issues. These themes included:

First, the importance of effective cross border enforcement mechanisms. A cross border jurisdiction analysis includes not one but three distinct legal questions. Does the court have the legal authority to hear a case involving a party outside its physical boundaries? What rule of law would apply? And third,

will a judgement be enforced in the home court of a remote party?

Of these three legal questions, the third, enforcement in a party or vendor's home jurisdiction is probably the most important one. The cost-effective cooperation of the remote case is essential, not only for enforcement of the ultimate judgment, but often for building the case against the remote party through discovery of relevant documentation.

The second theme was the importance of the harmonization of substantive laws. Conference participants spent a significant amount of time defining and exploring the potential for "harmonization" of substantive provisions. Legal experts and other participants observed that the concerns over which law applied diminished to the extent that the choices were similar.

Conference participants were realistic about the challenges and the difficulties of achieving broad international harmonization. Conference participants also noted that the basic consumer protection law of a number of trading partners included prohibition against

fraud and suggested that such laws offered an useful first target for harmonization efforts.

The third theme was the usefulness of a sectoral approach to the jurisdiction in questions. Each of the laws involves different players with different degrees of power relative to the players including consumers. The choice of law and the choice of forum rules appropriate for one sector may not be appropriate for other sectors. Accordingly, it might be more useful to seek sectoral solutions, for instance: financial services, intellectual property rights and torts rather than a universal solution.

The fourth theme was the importance of recognizing the differences between good actors and bad actors in the business world and the usefulness of a code of conduct. Responsible businesses ask for relief from a multiplicity of conflicting regulatory systems, precisely because it is their practice to comply. Those businesses experience the cost burden of that compliance. Good actors seek to reduce the cost by complying with uniform code of conduct. At the same time, they join consumers in seeking a system in which bad actors, those which engage in fraud or

intentional deception or cause repeated harm will feel the full force of law.

The fifth theme was the importance of consumers' own actions. Consumer protection is very much a combination of legal protection and informal self-protection. In everyday life, consumers protect themselves in a variety of ways. They buy from stores and choose brands which have a reputation of quality and they contact the merchant directly to resolve matters if they receive defective merchandise or are billed incorrectly. The wise vendors will honour these informal means of self-protection or they face loss of customers.

The Internet offers consumers the means to engage in a similar self-protective measures online. The clear consensus was that proposals for choice of law in the forum, particularly for application of the rule of a consumer's domicile, must be understood in terms of its impact on the consumer's time-honored means of protecting themselves. To whatever extent that "domicile" choice of law and the forum rules place undue emphasis and reliance on the legal rather than informal protections, the rules do the consumer no favour.

The sixth theme was the importance of Alternative Dispute Resolution mechanisms. Conference participants uniformly agreed that the development of inexpensive effective remedies should be a fundamental goal for a consumer electronic commerce. Consumer protection agencies face significant territorial limitations on their investigative and the enforcement powers. The expense of court proceedings is likely to be prohibitive in many consumer disputes. At the same time, the power of the medium for fast, effective online dispute resolution was recognized.

The seventh and the last theme was the importance of a coordinated, multifaceted approach. Conference participants agreed that protecting the consumers and building confidence in the electronic medium would require a coordinated multifaceted approach, including harmonization of national laws on a sectoral basis, cooperation among governments to enforce shared rules and increased reliance on alternative mechanisms including the Code of Conduct, Alternative Dispute Resolution Mechanisms, seal programs and the like.

ILPF Executive Director, Ms. Day, presented this summary at a November 19, 1999 hearing of European

Commission on proposals for conflicts of law and a choice of forum. On the basis of these points of consensus, Ruth made the following recommendation to the Commission.

“In ILPF's view, a rush to decision for rules within the European Union may well leave consumers with an illusion of protection, even for electronic trade within the EU Member States. Consumer protection has traditionally relied both on active law enforcement and wise consumers acting on their own behalf using the tools available to them in local and alternative ways.

To whatever extent a choice of law rule overemphasizes national legal protections without concomitant recognition of the potential for effective and complementary means of online protection now being discussed in the broader international context, that choice may not be to consumers' ultimate benefit. The ILPF urges the Commission to choose a path which will provide consumers the optimum mix of legal rules, cooperative enforcement, and alternative protections which will work both within the EU and in a larger international context."

The next important development, relating to jurisdiction was the February 2000 Ottawa meeting on the draft convention of Jurisdiction and Foreign Judgments of The Hague Conference. As many of you know, a focus of the meeting was electronic commerce and international jurisdiction. For many members of the Hague Conference, this meeting was the first exposure to the jurisdiction issues posed by electronic commerce.

ILPF participated in the Ottawa meeting by submitting the following observations.

1) the rules for e-Commerce should not be carved out for separate consideration. Proceeding with one set of a convention marked "for traditional trade only," while carving out electronic commerce will leave the rules for e-Commerce in legal limbo and only increase legal uncertainty for e-Commerce.

2) The expert group will be an excellent venue in which to examine the implications of electronic networks as a medium for transborder trade. Understanding the implications of the new medium and in turn, the impact of traditional and proposed jurisdictional rules on the growth of e-Commerce is an extremely important inquiry,

but the answers are not yet clearly cut.

3) Finding workable, effective, and harmonized jurisdictional rules for transborder electronic commerce and communications is an extremely important task. Given the importance of the end result, the task should not be undertaken in haste or absence of a common understanding of the implications.

We will be hearing a lot about The Hague Conference over the next couple of days.

The next important development is the release of the report of the American Bar Associations Transnational Jurisdiction Project. This report considers the relevant issues in a thoughtful, comprehensive, and comprehendible way. I look forward to hearing from the participants in the project.

The final important development I'd like to mention is the Uniform Dispute Resolution Procedure adopted at the end of last year by the Internet Corporation for Assigned Names and Numbers, or using the acronym we know and love, ICANN's UDRP. As you all know, ICANN established the UDRP as a quick and inexpensive way to handle domain name disputes, a polite term for

cybersquatting. And with UDRP, the aggrieved party can initiate an arbitration proceeding before the World Intellectual Property Organization, WIPO, or one of the other recognized bodies.

I have extensive experience with both Japanese and the US court systems, as well as Alternative Dispute Resolution Proceedings. Never, and I mean never, have I seen a dispute resolution mechanism work so well. In less than a year, over 1,000 arbitrations have been initiated under the UDRP.

In more than two third of those cases, there already have been a disposition. The cases have been handled quickly, inexpensively, and most important of all, fairly. Without question, the UDRP is an important model for Dispute Resolution in other e-Commerce areas.

Let me spend just a few minutes connecting the last year's conference and the past year's developments to this conference.

The first theme from last year, the importance of a cross border enforcement mechanisms, is of course, what The Hague Convention is all about. Different aspects of

the Convention will be addressed by several different panels.

The second and the third themes were the importance of harmonization of substantive laws and the usefulness of a sectoral approach to choice of law questions. We will have panels dedicated to financial services and intellectual property, two of the most important sectors for e-Commerce.

The fourth theme was the importance of recognizing the difference between good actors and bad, and we have many panelists on Code of Conduct.

The fifth theme was the importance of consumers' own actions and we will hear from the experts on technological solutions and market choices.

The sixth theme was the importance of Alternative Dispute Resolution Mechanisms, and at least two panels will consider this topic, specifically addressing the applicability of ICANN's UDRP.

Finally, the seventh theme is the importance of a coordinated, multifaceted approach. This, of course,

ties all the other themes together, the Hague Convention, code of conduct, consumer actions, ADR and sectoral solutions.

I seriously doubt that we'll arrive at any solution by the end of the conference tomorrow afternoon. But I think we'll all have a better understanding of the questions, and hopefully a better sense of the directions in which we should be heading.

Thank you very much for your attention and it is now time for our keynote address. Ladies and Gentlemen, we are very honoured to have Mr. Francis Gurry who is the Assistant Director General and Legal Counsel of WIPO. We do not need any more introduction. We all know that he's the leader of many initiatives at WIPO, including the UDRP and the ADR I just mentioned a few minutes ago. Francis is going to talk about politicization of a jurisdiction. Francis.

KEYNOTE ADDRESS - THE POLITICIZATION OF JURISDICTION

FRANCIS GURRY

Mr. Katoh, Mr. Henry, Ruth Day, thank you very much and thank you, first of all, for the invitation to be present with you this morning.

I must say that I feel very humble to be described as a keynote speaker in this area because so much work has been done on the question of jurisdiction by, first of all by the ILPF, the Internet Law and Policy Forum, the American Bar Association together with Chicago-Kent University, the Federal Trade Commission, the OECD and the multitude of other organizations not to mention The Hague Conference.

We at WIPO have had today only little impact on the question of jurisdiction which is mainly in connection with the establishment of Uniform Dispute Resolution Procedure that Mr. Katoh mentioned and I will make a few comments on that at the end.

Let me start by saying that in the year 1268, a jurist died in England who was later described as the crown and flower of English medieval jurisprudence. He left

behind him a manuscript which later became very famous, at least for English law, and the jurist was of course Bracton. His manuscript contained just one passage on jurisdiction, which was that "Jurisdiction is nothing else than having the authority to declare the law or to adjudicate between parties in actions, touching persons or themes according as they are brought into court."

Bracton's simple description of adjudicatory jurisdiction remains valid today. It is the central concept for ordering the application of law in space. It is concerned with the application of law in space and how one determines which space the law shall apply to.

What has changed radically is not that definition, since Bracton's time, not that definition but in fact the organization of the space to which the law has to apply. In Bracton's time, in the medieval times, of course, there were competing potentates within the jurisdiction of England, if you like, and jurisdiction was a concept which was used to balance the civil authority, the civil jurisdiction, ecclesiastical jurisdiction and the various powers and, indeed, jurisdiction was the principal means by which the law

was used as the means of establishing the authority of the sovereign, eventually to become what we, of course, now know as the common law for common law countries.

We live now, of course, in a system in which ostensibly the international legal order is based on separate physical jurisdictions, each with the sovereign attributes of prescriptive jurisdiction, the ability to make the law; adjudicative jurisdiction, the ability to declare or decide the application of the law, and the power of enforcement.

Increasingly, however, we are confronted with an economic phenomenon of global markets and, of course, with the Internet, the technological means of global communication. In other words, what we are confronted with is a very radical disjunction between, on the one hand, economic and technological realities which are global and, on the other hand, legal realities which are national.

The major question is what is the significance of jurisdiction in that context in this world of disjunction. Is it merely a technical mechanism for determining the application of law or is it the

expression of political power. And what I would like to suggest to you is that jurisdiction is not a merely technical means of determining the application of the law, but really the expression of political power.

Just as the common law and jurisdiction were for medieval England the means of imposing the sovereign's authority, so I suggest that in the international and legal political framework at the moment, jurisdiction will be the means of imposing the power of particular countries.

And the context in which that is operating, I would like to suggest, is a context of very radical change. The international and political order is ostensibly, as I said, based on separate legal physical jurisdictions. Jurisdiction attributes authority between the actors, which are states, and according to rules which are enshrined in treaties. The context of the moment, however, is one which is subject to very radical change because, first, the identity of the actors and, secondly, the instruments that are used for enshrining rules, are subject to change.

Let me speak first about the identity of actors. In

1945, the British Foreign Secretary - and I'm sorry, I'm quoting a large number of British people today - the British Foreign Secretary, Sir Anthony Eden, said that every succeeding scientific discovery makes greater nonsense of old time conceptions of sovereignty. The Internet is, of course, driving what Jessica Matthews has described as a power shift in which governments are being forced to share power and the power actually of making law on the international basis.

And this is happening, first of all, because the Internet facilitates through its networking the organization of different groups, particularly non-state actors and it also facilitates the provision of information to those non-state actors.

It is leading to a situation in which, for example, if you look at the latest edition coming out in September and October of *Foreign Affairs*, an article is written by Anne-Marie Slaughter and David Bosco, described with the title of "Plaintiff's Diplomacy", and the article describes the use of civil actions, in fact, in the United States of America, as a means of enforcing foreign policy objectives.

One might also point to the litigation that is taking place in France concerning Yahoo! and the attempt in the French courts to establish a jurisdictional limitation on Yahoo!, so that it is required at least for the means of access by persons located on French territory, to adopt certain measures to prevent the display on its auction site of Nazi insignia.

Non-state actors have assumed then a very different position and one in which they're sharing powers with governments.

This is also a deliberate policy, of course, because, and let us be frank about it, there is very much a distrust of the power of individual governments in connection with the regulation of the Internet and this for three essential reasons.

First, the fear that any governmental regulation will lead to technological conditioning of this medium. Secondly, the fear that individual national laws will lead to a jurisdictional morass of different and conflicting laws and, thirdly, of course, the very real fear that governments may act to tax transactions on the Internet and destroy the fragile growth of

electronic commerce. Non-state actors, therefore, are an essential part of determining how jurisdiction will be determined in the future.

Let me turn then to the other element of instability or great radical change in the international legal order, as we've always known it, and that is the instrument by which rules are made. Traditionally, of course, this is the treaty which was described, and it's the third time I refer to Britain, in the yearbook of International Law in Britain in 1930 as the only and sadly overworked instrument with which international societies equipped for the purpose of carrying out its multifarious transactions.

The treaty, as an instrument for enshrining rules that may have application to the Internet in particular or to electronic commerce and the digital society more generally, suffers from two very radical defects. The first is the amount of time that it takes to conclude and bring into force a treaty.

Then, they give you the example of two treaties at the WIPO that were concluded at the end of 1996, the WIPO Copyright Treaty and the WIPO Performances and

Phonograms Treaty. Both are considered generally to be good treaties. They are not treaties that are subject to any political controversy whatsoever or legal controversy.

They took however five years to negotiate. Negotiations started in 1991, they were concluded in 1996 and they have still not entered into force some four years later or nearly four years later. They have been ratified now by 19 and 16 states respectively but they will not come into force until 30 states ratify them, which is likely to occur sometime next year.

In other words, a ten-year operation just to bring into force two treaties which are considered at least by the music industry to be essential for the treatment of the distribution of music on the Internet. And even when they do come into force, they will not apply to the whole world. And that is the second radical problem with the treaty as an instrument for making rules about jurisdiction or the Internet, more generally, and that is the scope of... the coverage of a treaty.

There is only one international institution that has solved the problem of the automatic application of a

treaty and that is the World Trade Organization and the fact that it can bring into force immediately, or at least 12 months after acceptance, a whole range of instruments is of course one of the reasons why the World Trade Organization is being loaded with other matters to deal with, such as intellectual property or the environment or labour standards.

The treaty, therefore, does have certain radical defects and this is something that we must remember in the consequence of The Hague Conference. If The Hague Conference comes to a successful conclusion about its draft convention, then we are going to have to wait an awfully long period of time before the convention is brought into force on a sufficiently widespread basis to be able to apply to the whole world and to apply therefore uniform rules of jurisdiction.

Let me then turn to consider some of the consequences of these changes in the international framework. The changes of the identity of the actors and the nature of the instrument. I think the first consequence that we should note is that the political nature of the question of jurisdiction as opposed to its merely legal technical nature, the political nature is something

that we need to recognize and treat with some care.

The risk of failing to deal with jurisdiction in a uniform manner is a resort to unilateralism and if there is one topic that needs, or one thing that needs a multilateral approach that is accepted on a widespread basis, it is, of course, jurisdiction which is about ordering the application of law across the globe.

There are examples of resort to unilateralism. One is the Anti Cybersquatting legislation that was adopted by the US congress where there is an in rem jurisdiction that applies to domain names, so that it will be possible to bring an action [inaudible] the Northern District of Virginia in respect to the domain name that is registered by someone located in Japan, which applies to activities that are being carried out essentially for the target of an audience in Japan and in the Japanese language, provided that that domain name has been registered with NSI.

A second consequence, I think, besides recognition or taking cognizance of the need to treat with care the topic of jurisdiction, is that we must recognize that

we can, in the changing context of the international order, that we can only deal with... we can only build or construct things with the materials that are available. And at the moment, the materials that are available are somewhat defective.

For this reason, the composite and hybrid approach that is being advocated by the Internet Law and Policy Forum, through its executive director that was referred to by Masanobu Katoh, as well as the composite and hybrid approach that is advocated by the Federal Trade Commission in the booklet that the report, it has just published on consumer protection in the globally electronic marketplace, as well as - I think you'll hear from Dean Perritt shortly - the composite and hybrid approach is obviously one which is the best approach to deal with matters of jurisdiction.

Composite .. meaning that we must use various instruments that are available, the Hague, the proposed Hague Convention is an instrument which will be of great utility when it is concluded, but it will, as I said, take a long time to come into force over a widespread geographical basis, we therefore need to deal with other approaches as well.

The FTC advises, therefore, not just working on the framework for the application of jurisdiction and applicable law, but also encouraging the use of Alternative Dispute Resolution, working on convergence or harmonization of substantive law and private sector initiatives such as those that were mentioned by Mr. Katoh.

What about the key question of the applicable law for sales over the Internet and whether the applicable law should be that of the country of the seller, or the country of origin, or that of the country of the purchaser, or the country of destination?

The arguments, I think, for each are well known. On the one hand, business clearly argues that the rule of the country of origin, the country of the seller, favours predictability and it lowers compliance costs. Businesses don't need to try to comply with all of the potential jurisdictions of the world.

On the other hand, it may be said that this rule, the rule of country of origin or country of seller, encourages the possibility of avoidance havens in which one could sell from a jurisdiction which has very

little consumer protection law. It disadvantages countries which have strong consumer protection regimes and it deprives, it might be said, consumers of meaningful access to judicial recourse and it may reduce informed decision-making on the part of consumers.

This is obviously an issue which is a very difficult one to solve. And one of the solutions to it might be the adoption of a voluntary Internet jurisdiction by using Alternative Dispute Resolution.

So let me just pause on that. I know that, as I said earlier, there is a session tomorrow on Uniform Dispute Resolution Procedure of ICANN and I won't deal in great detail with it. But I would like to say that I think that if the UDRP is to be considered a success, there are probably four elements that contributed or contribute to its success.

The first is that there is a law, a substantive law that is applied under the procedure and that is the policy, the Uniform Dispute Resolution Policy. Secondly, there is a compulsory jurisdiction and the compulsory nature of a jurisdiction arises from the

registration country. Thirdly, there is an enforcement mechanism. The registrars agree to implement the results of the procedure. And fourthly, it is a low-cost and high-speed procedure.

Replication of those four conditions in other areas of electronic commerce would be a difficult thing, having a substantive, an agreed substantive law, a compulsory jurisdiction, an enforcement mechanism and low cost and high speed. Lost cost and high speed perhaps are elements that can be replicated without too much difficulty. But as far as the substantive law is concerned, of course, in the area of trademarks, we had over 100 years of experience in internationalization of the trademark system. The Paris Convention was concluded in the nineteenth century. So, it was relatively, although still not, of course, uncontentious, but relatively easy to establish an applicable lowest common denominator substantive law in the area of the Uniform Dispute Resolution Procedure. And it will be much more difficult, of course, when dealing with the question of consumer protection.

That is why perhaps the hybrid approach whereby there might be a voluntary Internet jurisdiction with a law

that would apply, which would be a code that is developed by industry associations and endorsed, if necessary, by governments or operating through the OECD for consumer protection which could provide the initial substantive law to be applied rather than having to have recourse to ESA, the law of the country of seller or the law of the country of the purchaser. This could be the code.

That, of course, is a difficult enterprise and I know that the Federal Trade Commission in its recent report has suggested that this will be an extremely difficult exercise to do internationally.

Secondly, of course, an enforcement mechanism is difficult to contemplate in the context of an Alternative Dispute Resolution Procedure. Of course, if the Alternative Dispute Resolution Procedure is arbitration, there is an international treaty which is endorsed by over 100 countries, which applies in over 100 countries, for the simple recognition and enforcement of arbitration awards, the New York Convention.

A further method of enforcement to contemplate might be

the use of the Internet itself, which is the means of enforcement in the case of the UDRP. In the case of the UDRP, the registrars implement the results. In the case of a voluntary Internet jurisdiction for consumer disputes, results could be publicized on the Internet and the fact of that publicity is not to be underestimated as a deterrent in respect of fraudulent practices for, on the part of industry.

I do not think, let me say then in conclusion, that ADR is the total solution. The total solution must be a package of both measures in terms of traditional instruments, treaties, private sector initiatives as well as ADR, but it does have a role which might perhaps have an application if one can contemplate the adoption of a substantive law which would be commonly adopted as part of the policy.

Thank you, Ladies and Gentlemen.

RUTH DAY

Thank you, Francis. There will be a 15 minute break and then we'll continue with fundamental concepts and experts.

SUSPENSION FOR A BREAK

KATHRYN SABO
Okay, we can get going. I'm Kathryn Sabo. I am Senior Counsel with the Department of Justice of Canada in Ottawa and I am delighted and honoured to be here moderating this first panel of the conference. And I'm very honoured to be in the company of the members of this panel.

I'm not going to spend a great deal of time on introductions, you have the biographies of these speakers in your materials. We want to be able to take the time that we have to hear their ideas and their thoughts, but we have the Dean Perritt, Professor Dogauchi, Mariana Silveira and Frithjof Maennel and we're going to hear from them, I think, first, Dean Perritt then Mariana Silveira, followed by Professor Dogauchi and then Frithjof Maennel.

We'll take a few minutes for discussion at that point and then I'm very much looking forward to hearing from Catherine Kessedjian of the Hague Conference on Private International Law, perhaps with some more specifics on the Draft Convention.

I have a very particular practical interest in all of

this as head of the Canadian delegation to The Hague Conference on this project and I'm very much hoping that we will leave this with some very concrete suggestions for direction on how to deal with this issue in the project. So, I'll turn it over to Dean Perritt, please.

FUNDAMENTAL CONCEPTS II

HENRY H. PERRITT Jr.
Thank you, Kathy, and good morning. We've been thinking and talking about Internet jurisdiction for at least two years and, for some of us, three or four years.

That period of thinking and talking about jurisdiction owes a lot to the efforts of the ILPF. Ruth, I think that we are at least twice as smart as we were two years ago because of yours and Mr. Katoh's and the ILPF efforts.

The Chicago-Kent American Bar Association project on Internet jurisdiction also provided an opportunity for us to think more deeply about these issues that we're talking about today. Based on our efforts to think more deeply, I think we are reasonably well agreed on several propositions.

First of all, uncertainty with respect to remedies when things go wrong can stunt the growth of e-Commerce. That's true for business and, as Chairman Pitofsky reminded us at the ABA annual meeting in London, it's also true for consumers.

Second, much of the uncertainty that threatens to stunt e-Commerce results from the difficulty of localizing cyber conduct. Jurisdictional principles that we inherit from the past emphasize localization of conduct. It is precisely that localization that is difficult when transactions occur through the Internet.

Some of the uncertainty with respect to localization can be lessened by things like a good international convention on civil judgment enforcement. If we're able to agree on a good Hague Draft Convention and then get countries of the world to adopt it, that will reduce some of the problems with localization.

Uncertainty with respect to localization also is being reduced by the emerging case law, especially in the United States but elsewhere as well. The so-called *Zippo* Continuum, which denies jurisdiction merely based on the access to a passive Web site and instead reserves jurisdiction for interactive Web sites that also have additional indicia of contact, re-enforced by the idea of targeting are promising ways to reduce uncertainty with respect to localization.

But even if Jeff Kovar and others involved in the Hague negotiations are able to produce an attractive draft and even if the case law continues to converge around the concepts of the *Zippo* Continuum and targeting, that will not be enough. The reason it won't be enough is that the transaction costs still will be too high. The Hague Convention and the *Zippo* Continuum may make it clear that a merchant in Canada or in California must litigate in Romania, but litigating in Romania -- for small value transactions at least -- will still not be very attractive.

So, we have to figure out a way to reduce transaction costs of resolving disputes and figuring out what rules apply.

There is also increasing agreement that private regulation can be an attractive way of reducing costs and increasing certainty. That is so because private regulatory regimes easily can span national boundaries and private regulatory regimes are not subject to the traditional requirements of public and private international law with respect to jurisdiction.

But, as Francis Gurry told us this morning, jurisdiction is not simply a technical legal concept of interest to law professors. It is, more importantly, a

political concept. A pure embrace of private regulation would displace the political power of sovereign. That is not going to be acceptable as a political matter. The disadvantaged groups - and there's always someone who suffers some disadvantage with any regime - the disadvantaged groups from pure private regulation will turn to traditional political institutions -- state-based -- to seek enhancement of their interest.

And, therefore, there is increasing interest in what Mr. Gurry and I call “hybrid regulatory approaches;” a combination of the best features of private regulation and the political essentiality of public regulation, in which public law provides a general framework within which private regulation can address individual disputes and work out the details.

We have some encouraging prototypes of hybrid regulation already. Perhaps the clearest one is the so-called Privacy Safe Harbor Agreement worked out due to the heroic effort of Barbara Wellbery, her colleagues of the Department of Commerce and their counterparts at the European Commission. In this Transatlantic Agreement, public law in

the EC Privacy Directive provides a general framework setting minimum standards for the substantive rules for privacy protection, while allowing private self-regulatory regimes to work out more detailed rules. to be the first resort for enforcement, backed up by public enforcement regimes.

There are other examples as well. The ICANN mechanism represents a broad public law framework -- in the form of the contract from the United States Department of Commerce -- within which the details are being worked out by the private entity ICANN. Credit card charge-backs are another example -- a private dispute resolution regime with at least some implied rules worked out under the very general public law framework provided by Federal Reserve Regulation Z.

But now it's time for us to move beyond efforts to think about jurisdiction; it's time for us to act. We need focused effort to work out the content of the public law framework for private self-regulation or, to say it a different way, we need more focused effort to work out the ground rules for governmental deference to private regulatory regimes.

Now, we have begun to do that for private dispute resolution. We have, after all, the New York Convention as a model, that's a public law framework, and the private commercial arbitration that takes place under the New York Convention is an example of private institutions working out the details and handling individual disputes. We have also the European Commission efforts to establish some ground rules for extra-judicial dispute resolution, another public law framework that would allow private dispute resolution institutions to work out the details.

The hard work, I would submit to you, has to do with private rule-making. We've barely scratched the surface there and yet I think there are indications in the political arenas that concern existing private rule-making institutions for the Internet that suggest we get to work. For those of you that have followed the evolution of ICANN at all, you'll know that enormous controversy still surrounds the mechanism through which ICANN rules, such as the UDRP, can be made and modified in a sufficiently accountable way.

In other words, what are the hallmarks of the necessary representative democracy for ICANN as a rule-making

institution?

And there is another, much more recent, development that further suggests that we give attention to the public law framework for private rule-making.

Some of you have heard of the MAPS controversy. MAPS is a private organization that endeavours to assist Internet service providers and other participants in the Internet reduce spam. What MAPS has done is to adopt some rules that it represents as the best Internet practices for broadcast e-mail. Some of these rules are controversial. For example, one of the rules requires a so-called double opt-in in order to legitimate broadcast e-mail. A recipient must affirmatively signify a desire to receive the e-mail and then must again affirmatively signify that desire after having received a personal individual e-mail message confirming her desire.

For organizations that do not comply with MAPS rules, MAPS establishes a black list -- what's called the “Realtime Blackhole List”. And if an IP address appears on the Realtime Blackhole List, then some 20,000 subscribers to the MAPS service automatically block the sender of that email – or, more broadly, the sender’s ISP.

Now, some people applaud this arrangement. Obviously, the 20,000 people that subscribed to it think it's a good idea, but other people don't think it's such a good idea, including those whose broadcast email messages are blocked from the Internet. One of those who thinks it is not such a great idea is Harris Interactive. Harris filed a lawsuit in the United States District Court for the Western District of New York that challenges the MAPS arrangement on about a dozen different legal grounds, among the most interesting of which are violations of the antitrust laws on the grounds that MAPS plus its subscribers represent a concerted refusal to deal without honouring the standards that the United States Supreme Court has articulated for private standard setting organizations as to their rule-making that disadvantage competitors. Also, Harris alleges, placement of Harris on the black list constitutes defamation and commercial disparagement.

Now, this is a very interesting case because what the Court is being asked to do is to decide whether there should be a public law framework for this kind of private rule-making, and if there should be, what its contents should be.

Now, conceptually, to move away from that particular lawsuit, one can envision two different kinds of public law framework for private rule-making. One kind of framework would address the substance. The Privacy Safe Harbor Agreement is an example of that. The Privacy Safe Harbor Agreement substantive is a kind of substantive floor; and only those rules privately made that are above that substantive floor qualify for the safe harbor.

Another way that public law can provide a framework for private rule-making is to focus on procedure. That's what American antitrust law does under the Radiant Burners and Allied Tube decisions. It says that private standards with teeth can be legitimate under the antitrust laws only if they were made through due process and according to objective standards.

We have a number of opportunities, and a number of forums, in which we can work out attractive approaches for public law frameworks, not only for dispute resolution but also for rule-making. ILPF is surely one and I would hope that if we come together again about a year from now that we will have made some progress, at least on crystallizing alternatives for

public law frameworks for hybrid regulation.

The European Commission continues to provide another important opportunity. The movement that has occurred with respect to privacy regulation on the Internet has benefited surely from U.S. efforts but I would submit to you it's been driven from Europe.

The OECD provides another opportunity and forum. Some of the work the OECD did 18 months ago on consumer protection guidelines, was an initial draft, if you will, of a kind of code of conduct or set of private rules for consumer protection. They were sensible, promising and attracted broad support as did the OECD's white paper on credit card charge-backs as a good mechanism for dispute resolution. UNICITRAL, of course, continues to do good work and represents another forum

for harmonization.

And I hope we will not overlook the extraordinary opportunity that the Hague discussions provide us. Many of us, and our constituencies, say that we're concerned about reducing uncertainty with respect to jurisdiction and yet, when confronted with the opportunity to reduce uncertainty, too many people, at least in the United States, back away in horror. Whatever the problems are with the existing Hague Draft, the Hague discussions represent a present opportunity to move the ball forward. In particular, Article 7 of the current Draft eliminates from broad forum selection privilege certain consumer contracts and therefore is not attractive to many in the Internet community. It could be made more attractive to the Internet community while also appealing to emerging European consensus about dispute resolution by conditioning the consumers opportunity to sue in his home court on exhaustion of private dispute resolution mechanisms meeting certain criteria. This would link the public law framework represented by the Hague Convention to a private mechanism for speedy, inexpensive, and accessible dispute resolution.

I welcome the opportunity to continue to work with you on these issues. As Chairman Katoh said last night: we are at the centre of defining how the world's legal systems will adapt to this new phenomenon of world-wide markets and political arenas represented by the Internet.

KATHRYN SABO
Thank you very much, Dean Perritt, for those thought provoking comments. Mariana Silveira, please.

MARIANA SILVEIRA
What I wanted to do, first of all, is to thank ILPF for this invitation and this opportunity to be here.

The National Law Center for Inter-American Free Trade works with many countries in Latin America and we cannot say that we represent all of them but, at least, we hope that we can act as an intermediary and share these discussions with many countries and many experts in Latin America and also benefit from them.

What I am going to give you is a bit of a background, since we are dealing with fundamental concepts here, a background on what's going on in Latin America with respect to jurisdiction.

You will see that Latin American rules on jurisdiction are very general in nature and they many times do not

address specifically e-Commerce. As the Hague has done, we also think of viewing what is the possibility of using existing regulations to incorporate e-Commerce into those regulations.

So, the first question that needs to be asked today is whether the rules that we have right now are sufficient for jurisdiction in general, and then if they're sufficient for e-Commerce. With that question in mind, what we have in the Latin America: there are different levels of rules.

First, we have international rules and, within those, the main efforts have been carried out by the Organization of American States through specialized conferences on international private laws that have issued several inter-american conventions. These conferences are known for their acronym in Spanish as CIDIPs.

On regional rules, I am just going to mention MERCOSUR, because I am a citizen of one of the MERCOSUR countries. It doesn't mean that these are all the regional rules, I'm just using it basically as an example. And then I will refer to certain aspects of

domestic provisions although, today and tomorrow, you will also have participants from Brazil, Argentina and they will go into more detail on their specific rules and what they are doing in their countries.

So, for the inter-american conventions, the first convention that was issued that specifically dealt with jurisdiction was the 1979 Montevideo Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards. This convention is what is internationally known as a single convention. You are probably aware there are single conventions, double conventions and those as the Hague Conference Draft Convention that is a mixed convention.

The 1979 Montevideo Convention, as I said, is a single convention, so it only addresses issues of recognition and enforcement of judgments and arbitral awards. It does not specify rules on direct jurisdiction and tell you what to do when you have a conflict, if the law of the consumer applies, if the law of the defendant, there are no clear solutions in that respect, you are dealing only with already existing judgments and awards.

With that in mind, in 1984, in La Paz, another inter-american convention was issued that tried to address this problem to a certain extent. They thought that the 1979 Convention could raise several conflicts because it did not address direct rules on jurisdiction.

And what the 1984 Convention did was to establish some rules on indirect jurisdiction. It didn't say: this court has jurisdiction in such and such cases. It says that a court that is reviewing judgments from another court in order to determine if that court had jurisdiction, it could follow certain criteria.

In many instances, the results of these indirect rules could be very similar to direct rules but, in the case of this convention, the rules are not detailed enough. You have rules that refer to the domicile of the defendant, for instance; you have rules on contracts but specifically the rules on contracts are very limited because they accept the will of the parties established in an agreement to opt for a certain jurisdiction. In the lack of an agreement, this convention does not establish what criteria need to be followed in order to establish jurisdiction. So that's a shortcoming.

This convention also establishes as a general concept that jurisdiction must bear in mind the principles of exclusive jurisdiction of the countries. That is you cannot override the exclusive jurisdiction, however it does not define the cases of exclusive jurisdiction, it leaves that to domestic legislation within each country.

This convention is also relevant, sorry, let me go back for a minute. It does not establishes exclusive jurisdiction, as I've said, and then, when you refer to the domestic laws in different countries, these are many times not clear as to what extent they might have.

The other shortcoming in this convention is that it does not cover as wide a range of concepts as does the initial 1979 Convention. So, it leaves out many areas such as torts, for instance. So these are the two main inter-American conventions that apply exclusively to jurisdiction. And, as you can see, they are quite limited.

We have other inter-american conventions. The first four deal with arbitration, service of process through letters rogatory or letters rogatory that are sent from one country to another for the taking of evidence; the Inter-American Convention on Preventive Measures prior to a main trial. So, they don't deal specifically with jurisdiction, but they do establish that the admission of these types of procedures of letters rogatory or of preventive measures do not imply the acceptance of the jurisdiction of the country of the issuing court. So, in the event of a future trial, we'll still need to establish what the rules on jurisdiction are.

As for the last inter-american convention, the one on general rules on private international law, it's one of the most important inter-american conventions. It's a very short convention but it's one of the most widely ratified in Latin America. And specifically, again, it does not establish any rules on direct jurisdiction, but it does establish some cases when the courts must reject jurisdiction, and that is mainly the cases when the judgments go against the public policy of a country. This concept of public policy is restated in most of the inter-american conventions, it's also restated in domestic rules and in regional rules and

has been much defended and sometimes it has been applied in a very strict manner by Latin American countries and we'll talk a little more about that later.

Then, the General Rules Convention also provides for a mechanism that is know as "*fraude à la loi*", which is the fraudulent intent by the parties to establish a connection with specific jurisdiction in order to obtain that jurisdiction to be the competent one. And this, the reason why I bring it up is because the rejection of jurisdiction on the grounds of "*fraude à la loi*" many times could be connected to the principle that is applied in common law countries of *forum non conveniens* in trying to choose the most appropriate forum for a specific case.

The *forum non conveniens* relates to declining jurisdiction and this would be rejecting jurisdiction, but sometimes the objective that they reach is similar. And finally, also, in trying to reach the notion of the most appropriate forum, what the General Rules Convention does is it establishes that when applying or when determining jurisdiction, what needs to be done is to look at the features or the characteristics of the

specific case and try to reach the justice for the specific case.

If we move on to MERCOSUR, there are also a set of treaties, agreements and protocols that have been enacted by MERCOSUR countries. MERCOSUR is the common market of the South that encompasses Uruguay, Brazil, Argentina and Paraguay with Chile as a possible future member, full member. In MERCOSUR, one of the initial protocols that was enacted by MERCOSUR was the protocol of Brasilia for the Solution of Controversies. This specific protocol establishes that when there is a conflict between the parties, they will resort to direct negotiations, otherwise they will go through procedures before the Common Market Council, which is one of the bodies of MERCOSUR, and if that is still not useful, they will go to an arbitral tribunal.

So, as a matter of fact, this protocol also fails to establish direct rules of jurisdiction. What it establishes is a special jurisdiction by this arbitral tribunal. This tribunal will apply the rules that have been enacted by MERCOSUR, either the MERCOSUR Treaty or the protocols or the resolution or decisions that have been issued by their bodies.

So, and there are two shortcomings actually to this protocol. One of them is if you don't have a specific case that is solved by these rules, by the MERCOSUR rules, then the protocol does not establish what rules you apply. It just says that you go to rules of equity only if the parties have agreed to that, so there's a void there.

And the second problem is that this special jurisdiction is only applied when the parties are governments. It does not apply to conflicts between private parties. If you have a conflict between private parties, you will need to resort to one of the MERCOSUR bodies so that they act on behalf of the private parties.

The second protocol is the Las Leñas Protocol on Jurisdictional Assistance. And this protocol is a combination, I would say, of the nature of the rules that were issued, that I just mentioned as the Inter-American conventions, the 1979 Montevideo Convention that referred to recognition and enforcement. And it also has rules regarding the enforcement of letters

rogatory and the taking of evidence abroad. So, the same things that I mentioned regarding those Inter-American conventions could be said on this protocol: it doesn't have clear rules on jurisdiction.

I would like to mention, very briefly, two protocols because although they are very subject matter specific, one of them (San Luis Protocol) refers to traffic accidents, one of them (Protocol on International Jurisdiction Regarding Consumer Relations) refers to consumer relations. They are actually the protocols in MERCOSUR that have addressed specifically matters of jurisdiction and have established direct rules of jurisdiction and in what cases you resort to the codes of which country. So that, we consider, was a significant step as to rules on jurisdiction in the region considering what had been done previously by Inter-American Conventions.

And then, finally, there is also protocol on preventive measures which is also modelled after the Inter-American Convention on preventive measures.

As I mentioned, one of the main issues that has been addressed is not the rules of direct jurisdiction, but is the recognition and enforcement of foreign judgments where there is a review by the country addressed of the

grounds for jurisdiction that are basing a specific judgment or arbitral award. So, each country will conduct this review and again they have no specific rules on direct jurisdiction and you will find that many... that countries vary in the procedures and in the requirements they use for establishing this recognition and this enforcement and they vary in the kind of rules that they apply when there are conflicting judgments or when there is a pending action in one of the countries.

Also, as I mentioned, there are different domestic rules on when you have exclusive jurisdiction or when you can apply... some are more general than others, some just say you cannot apply a judgment in this country if it goes against our exclusive jurisdiction, without defining what that exclusive jurisdiction is.

And finally, we have different authorities before which you are going to be presenting those judgments, which can also make it a little uncertain on how long and how burdensome that procedure is going to be in different countries.

I have made a table of the different requirements that

we have analyzed and we used four Latin American countries: Argentina, Brazil, Guatemala and Mexico. Then we looked at the requirements in the 1979 Montevideo Convention, in the MERCOSUR Las Leñas Protocol and also in the Hague Convention. I don't want to go into them one by one, you have them in your materials but I just wanted to note a few things.

First, the initial first six requirements are more or less uniform, are uniform in a majority of these jurisdictions or these treaties with the exception of Guatemala and also with the exception that the Hague Convention doesn't require the judgment to have been issued by a competent court under the law of the country where it must be enforced, this is not a necessary requirement.

Where you do find a lot more differences is when you come to issues of conflicting judgments or pending actions between the countries, when you go to the grounds of exclusive jurisdiction or to the grounds of prohibitive jurisdiction.

To summarize, we have a very different scope of jurisdiction rules in the region, as you saw, some only

refer to recognition, some only refer to indirect jurisdiction. This has been a problem and uniformity has yet to be achieved when you... (RECORDING HAS BEEN SUSPENDED)... countries. Lis pendens although it is a usually used concept, it's not applied to the same extent in all countries.

You're telling me to hurry, so I'll try to hurry along and you can read the rest in the materials.

Domestic rules, as I said, are also quite varied and party autonomy is a problem because many South American countries, although in theory or in doctrine, you will see that many authors say that party autonomy is acceptable, in the rules you will not always find that and I come to Uruguay, my home country, is one of those cases. It has been very much argued but yet you cannot say that party autonomy is an accepted principle.

Territoriality, you many times find rules that say the applicable law is the law of such state and they don't refer to jurisdiction, they just say jurisdiction, the competent court will be the court whose law applies. So, in matters of the jurisdiction, they refer to the matters of applicable law and it's a very territorial

concept.

It doesn't mean that you don't see the option of a choice of law that may not be applied according to national rules. People still make contracts saying the law that will apply is the law of the United States, and this again, this is the matter of whether the contract is valid, it is valid, it will... you can do a contract such as this, the problem is: will you be able to enforce it in these jurisdictions?

On e-Commerce, as I said, there are no specific rules, all of the rules that we have seen do not refer specifically to e-Commerce and you will hear from other participants that there are very detailed rules on e-Commerce in the region but they have not dealt yet with jurisdiction. They have, however, the alternative is dispute resolution such as the UDRP, that have been mentioned here and that will be mentioned later, are being applied in Latin America.

Lack of specific rules and on international regulations, what we are trying to look is at the model of the Hague Conference. Unfortunately, what I have to say in this regard is that the Hague Conference

Conventions have not been widely applied so far in Latin America. If you look at the history of Hague Conference Conventions, they have been ratified maybe by one or two countries in the region and that's not a very good record for us.

So, we can either go... try to follow the model of the Hague Convention, which is very useful and I think a lot of study has been carried out in this forum and the Latin American countries could benefit by it either by playing a more active role in the Hague Conference deliberations or by going again through each Inter-American Convention and adopting a new convention on jurisdiction.

And, with that, I leave you. For any more information, you'll have a session of questions later or please feel free to contact us and I thank you for your attention.

KATHRYN SABO
Thank you very much, Mariana, for bringing the Latin American experience to the table. Professor Dogauchi.

MASATO DOGAUCHI
I thank you, it's my great honour to be one of the speakers here.

In some day, we will discuss extraterrestrial jurisdiction such as how to control activities on Mars. But today we are still talking the problems of extraterritorial jurisdiction on this divided planet.

Among many important topics to be discussed, I'd like to introduce and think about a recent Japanese judgment on the applicability of the United States Patent Law to the activities in Japan. Because this case relates to what was written in the provisional agenda of this conference , though it is not written in the final version of the program, that was: can the sovereign expect its laws to be recognized beyond its borders?

At the same time, I'd like to consider one provision in the Hague Preliminary Draft Convention on Jurisdiction and Foreign Judgment because this Japanese judgment

seems to relate to Article 12, Paragraph (4) of the Draft Convention, which is one of the most controversial provisions.

I will read some parts of my paper, which you can find in your conference material book. Let's start at Part II first, "A Japanese Case".

The Japanese plaintiff, Akira Fujimoto, is an owner of the patent registered in the United States with regard to a certain kind of electronic device. The defendant, a Japanese company, is producing card readers in Japan into which the electronic devices are incorporated. The plaintiff filed a lawsuit against the defendant for, among others, the prohibition of production in Japan and exportation of such products from Japan and also the destruction of them in Japan and for damages to compensate for the loss caused by the exportation of them to the United States in the past.

The plaintiff alleged that the defendant's activities were deemed to be active or contributory inducement of indirect infringement of the plaintiff's patent under certain sections of the United States Patent Law and

that such provisions were to be applied as if such activities were done in the United States, irrespective of where such activities were actually done. The defendant responded that the patent law of each country should be applied within its territory, or, in other words, the territorial principle should be observed in the field of patent law.

I skip the judgment of the first instance, which dismissed all claims. On appeal, the Tokyo High Court also dismissed all claims. Holding that, with regard to the plaintiff's claim for the prohibition of production and exportation and for destruction, it was not the United States Patent Law but Japanese Patent Law that should be applied to such claims arising from activities in Japan in accordance with the territorial principle. Since Japanese Patent Law has no provisions to prohibit activities that would result in violation of a foreign patent law, such claims should be dismissed. On the other hand, the Tokyo High Court also dismissed the plaintiff's claim for damages under Japanese law designated as applicable law by Article 11 of the *Horei*, the Japanese Code on Private International Law, according to which the law of the place of occurring of the fact causing tort claims.

There seem to be several points in this case that need to be discussed further.

The first point is that the Japanese courts admit their jurisdiction to adjudicate claims based upon foreign patent law. This problem relates to Article 12 of the Hague Draft Convention, which will be discussed later.

The second point is extraterritoriality. Insofar as the Japanese patent law system adopts the territorial principle, it seems natural to apply Japanese Patent Law to activities in Japan as the Tokyo High Court did. This means that, if the defendant's activities were done in the United States, then the Japanese Court should apply the United States Patent Law to such activities and order appropriate remedies under such law.

Then I skip the third point of my paper.

The fourth point is that the Tokyo High Court as well as the Tokyo District Court applied Japanese tort law to the claim for damages in this case. With regard to cross-border torts in which the alleged wrong-doer and

the victim are situated in different jurisdictions such as product liability or libel by mass media, the *lex loci delicti*, the law of the place where the tort was committed, designated by Article 11 of Horei is ordinarily interpreted to be the law of the place where the victim suffered the damage, because the torts occur when the damage happens and the central issue in torts is to enable the victim to recover his loss. Applying this normal interpretation to this case, contrary to the holdings of both courts, the law of the United States should be applied, I think, to the damages.

In any event, from the framework of extraterritorial jurisdiction, it is important to note that the extraterritoriality of the United States Patent Law is rejected in Japan.

Next is the Hague Convention. The Hague Draft Convention provides the exclusive jurisdiction of particular States' courts in certain kinds of proceedings. One of them is the Patent litigation. Article 12, Paragraphs (4) and (5) read as follows:

Paragraph (4): In proceedings which have as their

object the registration, validity, nullity, revocation or infringement of patents, trademarks, designs and other similar rights required to be deposited or registered, the courts of the contracting state in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction.

And paragraph (5): In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a contracting state.

Incidentally, the paragraph (6) expresses the same idea in more general terms.

In many points to be resolved in the Diplomatic Conference, this Article 12, paragraphs (4), (5) and (6) are considered to be the most controversial provisions. The problem is whether or not the courts of the contracting state in which the deposit or registration has been taking place have exclusive jurisdiction in the proceedings concerning infringement

of industrial property rights. Such proceedings often involve the question of the validity of the rights themselves as an incidental question. If one takes a position that such provision of exclusive jurisdiction should encompass infringement proceedings, then all proceedings concerning industrial property rights registered in one country should be filed to the courts of that country. One who wants to file lawsuits with regard to infringements of industrial property rights done in many countries by the same competitor should file an individual claim in each of the many countries. On the contrary, if one takes a view that such a provision on exclusive jurisdiction should not encompass the infringement proceedings, then the plaintiff could file a single lawsuit, for example in the court of the country where the defendant is habitually residing, claiming remedies with regard to every infringement done in many countries.

In general or generally speaking, the experts in Japan seem to support non-exclusive solutions. But, of course, the patent lawyers who fear that Japanese domestic cases would be litigated in the United States want to have exclusive jurisdiction rule for patent infringement cases.

Apart from such legal business consideration, one of the crucial points in the legal theory would be how the courts of the country should deal with the foreign patent as a matter of merits in such infringement proceedings.

In this respect, the act of state doctrine seems to play an important role to solve the problem. The act of state doctrine under the law of the United States is defined as follows in the Section 443 (1) of the Restatement Third on the Foreign Relations Law of the United States: "Courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its territory or from sitting in judgment on other acts of governmental character done by a foreign state within its own territory and applicable there."

As indicated, this doctrine has been predominantly applied to expropriation of private properties by a foreign government. However, this doctrine has also been applied to other types of cases where the validity or effect of a governmental act of foreign state in its territory was in question.

Similar theories as this doctrine can be found in many

countries including Japan. The Tokyo High Court applied in 1953 a very similar doctrine to the question of the validity of the Iranian Government's expropriation of crude oil in Iran. The plaintiff in this case was an English company, the Anglo-Iranian Oil Company, and the defendant was a Japanese oil-refining company. The defendant, the Japanese company, bought crude oil in Iran and brought it into Japan after the expropriation measure was taken by Iranian Government.

The plaintiff tried to attach the crude oil in Japan claiming that it belonged to the plaintiff. The court held that, with regard to such expropriation within its territory of Iran, "there is no established principle under international law for a court of a state to hold invalid the effect of the law legislated properly by a foreign state."

As patents are considered to be artificial fruits created by a public act of state, it seems to be possible for the Act of State Doctrine to apply to the question of the validity of a foreign patent. This idea could resolve the controversy over the exclusiveness or non-exclusiveness of the jurisdiction over the proceedings concerning patent infringements. it would

be hard for, let's say, the registering state to recognize effects of a foreign judgment, which holds invalid the effect of the patent by the registered in its own country, even between the parties to the foreign litigation. According to the Act of State Doctrine, foreign courts must decide the case of the infringement of the foreign patent on the condition that they cannot invalidate the patent registered, validly registered in the foreign state.

As far as this condition is met, the state where the patent is registered would find no difficulty to recognize such a foreign judgment. Thank you.

KATHRYN SABO
Thank you very much, Professor Dogauchi. Frithjof Maennel, please.

FRITHJOF MAENNEL
Again, thank you, Chair, and thank you to the ILPF for the invitation to be present here today.

Ladies and gentlemen, the title of our session is "Fundamental Concepts for Global Networks". Since I was lucky enough to be involved in the inception of the European Commission's e-Commerce Directive, I would like to raise the issue of whether the principles developed in this piece of legislation are only applicable in the European Forum or whether they could deliver a valuable feed into the global incubator of ideas.

One of the paramount fundamental pillars of the European Union is the creation of a single internal market. Due to the lack of legislative framework, the emerging case law in the EU Member States has threatened to fragment the internal market for e-Commerce services. We call them Information Society Services, ISS, by providing different solutions to the issues raised by the

emergence of the Internet.

Legal barriers to Information Society Services do exist. It was therefore no surprise that the European Commission took the initiative to ensure the proper functioning of the internal market for e-Commerce and only an instrument at community level could succeed in removing legal barriers to free movement of cross-border Information Society Services within the European Union, given the transnational nature of Internet and e-Commerce.

The Directive on Electronic Commerce, it has now the number 2000/31/EC, which was originally proposed by the Commission on 18th November, 1998, and which was strongly supported by the European Parliament from its early stages and entered into force on 17th of July, 2000.

Since that day, the clock is ticking for Member States. They have 18 months from that date to transpose the directive into national law. The directive addresses a number of different issues. What interests us today is the central issue: the internal market principle for electronic commerce or, in other words, the country of

origin approach which, I think, what has been traditionally at the heart of the European Union's approach.

This is the Core principle of the directive enshrined in Article 3. In summary: it obliges the country in which the provider is established to ensure that the provider's activities comply with that Member State's legislation. Furthermore, it establishes that, and I quote: *Member States may not, for reasons falling within this directive's coordinated field, restrict the freedom to provide Information Society Services from another Member State.*

This has to be seen in conjunction with the definition of the so-called "coordinated field" in Article 2 (h), which covers all requirements in national legislation that could be applied to Information Society Service or a provider of Information Society Service.

To give you an example, this could be conditions on establishment and access to the activity legislation on contents such as illicit content, defamation language requirements, legislation on any type of commercial communications such as advertizing, direct marketing,

sales promotion, legislation on unfair competition, conflict law on consumer protection or liability of the providers, in particular extracontractual liability. But the coordinated field does not cover requirements as requirements applicable to goods as such or requirements applicable to the delivery of goods.

So, the effect of this internal market clause is that Member States cannot restrict Information Society Services provided from another Member State into their own, except in certain well-defined circumstances. And you can see the exceptions here on this slide in detail.

So, what does that mean in practice? To give you an example, in German Federal Law, you find a rule which is about 70 years old that bans promotional gifts and rebates higher than three percent. The purpose is to avoid distracting consumers from what they are really purchasing. If a French Web site offers, for example, three shirts for the price of two and this offer is directed to the German market, don't ask me how to judge that, the French company would have to comply with that rule. That was the situation before the Directive.

And now, after its implementation, the French Web site needs only to comply with the French law, the German web site with the German law regardless at which country they direct their Web site. The Germans could still burn the companies established in their own territory and I would like to say their consumers with their law if they wish to do so. But interestingly, what has happened in practice is that the Germans have already announced plans to scrap these particular laws. And I think that shows that the impact of the Directive is much wider than its mere content seems to suggest.

You have noticed that I didn't talk about the term "jurisdiction". It is important to know that the Directive does not deal with the separate question of jurisdiction of the courts. Consequently, the application of the Brussels Convention on jurisdiction is not affected but, as regard to the issue of applicable law, the e-Commerce Directive, and notably Article 3, apply to all areas of law including criminal law and civil law.

For example, in the view of private law, it identifies the applicable law for extracontractual obligations for service providers and would discard, if necessary, the

application of national provisions which could be applicable on the rules of private international law. That would be incompatible with the proper functioning of the internal market for e-Commerce. This is due to the fact that community legislation has different rules and different approaches to the national laws of the Member States.

This approach with its important consequences is justified for several reasons. There is already a considerable degree of harmonization of law at community level. This includes the area of consumer protection and even in areas where no or less harmonization exists, for example advertizing for professional services, discounts, promotional gifts, advertizing for certain products, the community principle of mutual recognition by Member States of each other's law can be applied.

In view of the existing degree of economic and legal integration in the European Union and of the particular nature of interactive services, it would be disproportionate to require online service providers to comply with the legislation of 15 Member States in areas where no community harmonization exists.

Furthermore, it's much better and realistic to control the activity of the provider at source, that means in the place where it is established, if the controls, and that means enforcement, were to be exercised in the country of residence of the consumer, the authorities of that country would have no direct means of sanctioning the illicit activity of the provider.

One of the advantages of this approach is that the directive awards problems arising from the extraterritorial application of national loss. Furthermore, the directive avoids the use of concepts like minimum contacts or active or passive Web sites. In the EU, we try to encourage cross border activities. Those concepts would reside and online activities being subject to different legislations and different legislations applied to one case is, for my view, is a stumbling block.

Furthermore, what is a minimum contact on the Internet? The Internet is all about contact, what is an active Web site, when is it passive? I don't know and I find it very difficult to decide that.

Let me get to the heart of the matter. What are the

implications of the Directive at international level? As far as the legal implications are concerned, the answer is quite simple: the Directive does not directly affect Information Society Services from countries outside the EU. The Directive is an internal market directive and based on those competencies. From a strictly legal point of view, the relationship between a Member State and a non-EU country will remain the same as it was before (RECORDING HAS BEEN SUSPENDED)... Union can present the Directive as a model for a light, flexible and internationally compatible framework. It does not create a thick rule for e-Commerce, but rather removes legal obstacles and, even more important, it avoids creating any obstacles to the international development of the Internet and e-Commerce.

I'm sure, for example, the transparency requirements, the so-called enabling approach for online contracting, the rules and liability do represent a well-balanced common denominator for global e-Commerce, at least in the parts of the world which really want to promote e-Commerce. And, as you can see, at least as far as the Directive is concerned, the Commission followed the recommendations of the last year's Conference.

Most of all, I think the directive guarantees the smooth functioning of the internal market. As you can see, the country of origin approach is at the heart of the Union's approach and it may seem strange, therefore, for someone who has worked getting this Directive implemented to say, at international level, the situation is more complex and we must be careful, but I think we must.

For the European Union, the country of origin rule is based on the fact that, within the Union, we have a degree of legal integration and we have harmonized legislation which therefore justifies the use of such an approach. In other words, we have a community sharing the same values which justifies mutual recognition. The country of origin approach has both result of existing European legal integration and a way to fostering integration. Therefore, it cannot be applied instrumentally across the globe.

I know that this consequence is not really satisfying, bearing in mind our goal which is an Internet as borderless as possible, both in practice and in legal terms. We need to do everything we can to avoid companies deciding either not to go online or not to

make available their services to consumers outside their own country, just because the legal situation is unclear. This would be absurd and stifle further development but, unfortunately, it happens and in turn it limits consumers choice.

So, to pave the way for a mutual recognition of jurisdiction at international level, the most important prerequisite seems to be to ensure that an equivalent, at least, similar level of protection exists across borders. But how to reach a state of equivalent or at least similar protection? Even if you know that international harmonization of legislation is a far-off idea, we have to work towards it. I think, for example, that WTO will play a more and more important role, but is this the immediate way out?

In the context of electronic commerce of which we are speaking, the role of self-regulation is essential. But self-regulation, sometimes, on globally agreed principles, that is deliverable, workable, effective, and equivalent in terms, and its delivery of levels of protection would serve this purpose. Of equal importance is the credible dispute settlement, especially for small claims.

If a certain level of protection is guaranteed, the question whether we have guarantees by law or by practice, then could lose its importance. I think this is achievable in a much shorter time and the ILPF is a very good example for the efforts we need to make in this direction.

So, thank you for your attention.

KATHRYN SABO
Thank you very much, Frithjof Maennel. I know that the lunch hour is approaching but I personally, very much, I'm interested in hearing from Catherine Kessedjian and I know you all are as well.

Now, Catherine, we've heard the ideas developed by Dean Perritt, the hybrid approach; we've heard Professor Dogauchi's comments on the patent's provisions and the application of the law in that regard; Mariana Silveira has very helpfully brought the Latin American context to us and Frithjof Maennel has provided the European experience.

You have the enviable task of, given the time that we have, or perhaps of trying to tie all this together, what is... what... impossible? We're very interested to hear what you have to say and perhaps you can give us an idea of what can this all bring to the Hague Conference and where can we go with our Draft Convention with all this information. Catherine.

CATHERINE KESSEDJIAN
Well, Ladies and Gentlemen, it's always a pleasure to be with you in such occasions and I do thank Ruth Day

and Mr. Katoh and ILPF for the invitation.

Whatever I'm going to say here does not represent the ideas of the Hague Conference or its Secretariat. That's the usual disclaimer. I thank you very much, Kathryn, for this introduction, which is a surprise to me. It's the second surprise of the morning because you said at the very beginning that you had a personal interest in what I was going to say and trying to lead the way. I'm going to do neither of those.

I'm in fact here to try to give you a few hints about what we have been doing in The Hague, why we are doing it and how it relates to e-Commerce. In no way am I going to synthesize any of the ideas that have come up here this morning.

May I start by saying that I'm a little bit disappointed that the music disappeared as I always dreamt to be able to sing a presentation, and particularly a law presentation, but I will have to wait another occasion. Ruth, next time, perhaps you can organize that.

Let me start by saying that we have, in my view, to

divide and distinguish applicable law and jurisdiction. This was said by Andy Pincus in London when we had the presentation of the ABA Report, the ABA Kent Report and I think that's a very important starting point. In fact, I was teasing Andy in London and I said to him that I will give him an honorary civil law degree because that's what, in civil law, we are learnt to do all the time, is to divide applicable law on one side and jurisdiction on the other. And I think for e-Commerce, that's particularly important.

It is particularly important to say that the Hague Project is only about jurisdiction, it is not about applicable law. I know applicable law must not be forgotten, I know it is very important, but right now we cannot be dealing with applicable law, we are only dealing with jurisdiction, of course.

I am not so worried about applicable law as I am about jurisdiction because mainly of two phenomena, and in fact Francis Gurry mentioned one of them this morning. The first phenomenon is the uniformity of rules and norms and principles that we are seeing growing in the field, and particularly in the field of e-Commerce.

It is fascinating to see - and you will see some of that later on in my presentation - it's fascinating to see that globalization of law is really getting more and more concrete these days, not only for traditional commerce and traditional transactions, but most rapidly for Internet and e-Commerce. And the *lex internatis*, which is going to replace the *lex mercatoria*, is growing every day and Francis mentioned one of the points this morning.

I may add, Francis, one other aspect of the ICANN procedure, which is the evidence aspect, which is very very important. Into the rules of ICANN, you have an in-built system of evidence, not only the type of evidence that you have to show in order to bring your suit against a domain name violator, I would say, to ICANN but also the burden of proof. And that's maybe this aspect of the rules that I would say to you and argue that maybe is also the obstacle and the ultimate limit in getting ICANN as a model for, for example, B2C dispute because it's going to be very difficult in the B2C disputes to have uniform evidence and uniform burden of proof because you have so many different disputes.

ICANN is very simple in a way because it's domain names and it's domain names violation. In the B2C or in the B2B, obviously, disputes are much different. And so, I'm a little bit questioning this ICANN model paradigm.

The second tendency, and I will finish for applicable law and turn to jurisdiction just after that. The second tendency, if we do not have uniform rules, substantive rules I mean, then we have this growing tendency of courts to apply *lex fori* and then, if that's true, I'm not saying that I like that, I personally don't like *lex fori* as a principle but if the tendency that I'm mentioning now is true and is concrete, then, by defining jurisdiction, you are automatically kind of defining the applicable law and therefore you have solved the problem.

Why are we doing in the Hague what we are doing? I guess I've said that many times, but I want to repeat it particularly at ILPF considering that you are all in this room very concerned about the practicalities of the rules and the legal norms.

For me, the main reason is that, as the situation presently stands in terms of court jurisdiction and

having been an attorney for 18 years, 17 and a few months, the most difficult process for an attorney or an in-house counsel these days is to actually make a sound appraisal of what I call the judicial risk. It is almost impossible on the international plane, unless you have provided for an arbitration clause, to actually say to your clients: if you have to go to court, this is going to cost you so much. And this must be done at a very early stage, it must be done when you negotiate the contract; it must be done then because this is an in-built cost in the price you want to charge your clients for the transaction. And if you are not able to do that, then, basically, you're budgeting and your price fixing in the transaction is wrong.

And what I think we should be able to do with the Hague Project is actually give the tools for in-house counsels, for attorneys towards their clients to appraise the judicial risk and put a dollar figure to that risk. And I think that's why I was very happy to hear Henry Perritt this morning speak about certainty and I would add previsibility which are the main two goals we have in The Hague.

Let me give you one example about this difficulty and again I'm very careful in giving this example, I will explain why in a minute. If you look at the situation of court jurisdiction challenges for the past four years in Internet-related disputes and e-Commerce; if you compare the situation between the European Union on one side and the United States on the other, there is a striking figure that I always reflect on - and I'm not so sure that I have found all the causes of that - in the same period, let's say from 1997 to today, in the United States, you have more than 150 cases where the challenge of jurisdiction was the centre of the dispute, when in the same period in Europe you have zero, zero case.

Now, why is that? Obviously, one of the reasons is that e-Commerce and Internet Dispute Resolution have been developing in the United States much more. I mean e-Commerce as such has been developing in the United States much more than it has been developing in Europe and the development in Europe is certainly more recent than it has been in the United States. So, I'm conscious that the figures are not entirely speaking for themselves at first.

But I would argue with you today that the main reason why we have a such difference of situation is that, in the EU, we are fortunate to have very clear previsible certain rules - whether or not they are good, whether or not they are to the best hope of every single dispute litigant, it's not the point - what I'm saying is that because we have precise rules, they have not been challenged, they have been applied to cases, they have not been challenged.

The situation in the United States is very different and my argument would be that, because of the very flexible way judges apply the rules in the United States, that may be one of the reasons why you have to continuously challenge the jurisdictional basis for the case. Again, I'm ready to, you know, discuss that with you whenever we have the time.

About e-Commerce and the Hague Project, I have alerted the delegates about the difficulties of e-Commerce and Internet into our negotiations, at a very early stage, probably even before 1997 when we organized the first colloquium on these issues, when one of our former deputy secretary general was retiring. And, by the way, I'm happy to see in the audience today Adair Dyer who

is one, another one of our former deputy secretary general.

It's interesting how many of you are interested in the Hague Project today. I was thinking when I was sitting there waiting for my turn that perhaps the ILPF should be very careful that we are not going to launch a take-over from the Hague Project because it's such, you know, such a prominent thing.

Well, in 1997, when we first, you know, alerted the delegates in the Hague about e-Commerce, there were almost blank eyes, you know, the delegates in the Hague were like "what is she talking about, all what she's portraying is not going to happen and she's fine, she's a law professor and law professors always like to think about weird things."

Now, obviously, history has come to say to the delegates, well, it's time to take care of these problems within the Hague Project and we have been very active doing so. First, we had the Geneva Round Table in September 1999. Then we have the Ottawa Meeting that was in fact organized at the invitation of the Canadian Government and I'm showing Kathryn because

Kathryn has been very very active in organizing this meeting in Ottawa, not to be confused with the OECD Ottawa Meeting, which had nothing to do with it.

Then we had, in fact, attended and participated actively in the March 2000 Meeting at the European Community in Brussels where ADR aspects and Online Dispute Resolution in e-Commerce were discussed and a report was presented and discussed there. Then, we also participated in the FTC/Department of Commerce meeting in June - I see Barbara in the audience - so, in June of this year, that was also very interesting, very successful. And then, obviously, we have the ABA Project that was released, the report was released both in New York and in London, and I was fortunate to participate in that also.

Now, why I am listing all that? The reason I am listing all that is that by reading each of those documents that have been issued after each of those meetings, one thing is striking to me: it is that you find basically exactly the same principles in all of those documents. In other words, what we are witnessing right now on the jurisdictional aspect of e-Commerce and Internet is a convergence, a very strong

convergence of the principles that are underlying, any potential rule that we should be drafting within the Hague or with the Hague and other fora.

And I think that's very important, that's very important to stress. I'm not going to give you all of those common principles but perhaps three of them, which I see as the most important, as helpful for our future work.

First of all, I think one of the major principles, and it was alluded to this morning, is that we should think about putting into place a global system, but not global in terms of geography, global in terms of completeness, and that ADR, courts resolution and any other means are not exclusive one from the other, but are complementary and that we should think about that when drafting those rules. It's very important to have that.

And I'm not going to talk specifically about B2C because this afternoon there is a panel about that. I don't know whether I will have a chance to say anything during the discussion, but let me tell you just one thing. If you look at one of the documents that I have

drafted after the Ottawa Meeting and after the Geneva Meeting of the Hague Conference, you will find that the proposal there is that to start any provision within the Hague Draft by saying, which is not a true rule, but just by saying, giving a signal, nothing in this Convention must be interpreted from preventing the use of ADR.

Obviously, the Convention itself cannot deal with ADR. It is not the place, it's not, you know, within jurisdiction convention that we can do that. But the Convention cannot be interpreted from preventing the use of ADR and I think that's very important. So, it's a complete system.

The second principle is that any rule must be based on party autonomy, identification of parties and declarations of parties about their localization. That's very important. And we should be able to rely on declaration of parties, and if there is a fraud, well, we'll take, you know, the consequences of any fraud that may have been done.

And the third principle is, well, there are two ways of looking at this principle, but the concept is basically

what I would prefer to call it jurisdictional avoidance. In other words, jurisdictional avoidance is the negative aspect of the same concept as targeting is the positive aspect. But I think in terms of burden of proof and the type of arguments that the defendant must have to put in front of the court, jurisdictional avoidance is better than targeting. Preliminary ideas about that.

Okay. As far as methodology - I still have a few minutes - as far as methodology is concerned, I think the Hague Project could be probably proposing - and I follow Hank Perritt's idea on this public law framework - could be proposing a general framework based on those principles and then leave for more precise rules to develop within the private sectors or other fora.

And let me finish with the problem of time and timing. Actually, do we have the time? I know, the ILPF is telling us: don't hurry. Other people have been telling us that. I'm not so sure I agree, and you know why? I'm afraid that if we wait too long, we will finish and end up like this wonderful picture we had yesterday night during the dinner time. I don't know how many of

you saw it, but there was on one of the medallions on the ceiling a magnificent skeleton with a big big case with gold in it.

Well, I prefer not to have gold and not to be a skeleton and I'm afraid that if we wait too much, all the problems won't go away, first; second, practices, you know, may be developing, that may not be of best interest of the parties involved; and third, most importantly, yes, the treaty-making process is a long one, yes, it is not the best that we have ever invented, but so far that's the only one.

And I don't see that we could avoid, on the public law framework again, this treaty-making process and therefore, because it is a long process, the more you wait, the more you are going to wait for having rules enforced. And therefore I would advocate that, within the time framework that we are left, which is our Diplomatic Conference is going to be held in two parts, one part in June 2001, and the second part some time by the end of 2001, probably at the beginning of 2002.

We have the necessary time to focalize on those common principles, on those convergences and draft whatever

necessary rules we have to draft within the Draft Convention. I thank you for your attention.

KATHRYN SABO
Thank you very much, Catherine, and I think that in spite of your protestations, you have brought out some synthesis of the comments that were made by the speakers on the panel.

Unfortunately, we don't really have time for questions. We do have a few minutes for questions? Okay. Perhaps, before we head to the questions, I'll make one announcement now and then we can carry on after that because the announcement is that lunch will be served in a few minutes in the California East Room, which is one level up and we'll begin the afternoon session at 1:30 here.

So, now that we've got the administrative stuff out of the way. In terms of questions, so I'll ask if there are any questions from the audience. Yes, please, go ahead. Could you come to the microphone please? There are microphones in the centre. Just to make everyone really comfortable.

QUESTION 1 - EMILY FRYE
Miss Kessedjian, I really enjoyed what you had to say, it's insightful and very helpful. However, the last two

principles that you focused on, I was unable to fully comprehend what the implications were. Could you speak a little bit more about the second and third principles and tell us what you believe the implications are?

CATHERINE KESSEDJIAN
Well, briefly I guess, because it would be too long to go into details but I would be happy to discuss that with you later on if what I'm going to say right now is still not clear enough.

The identification and party autonomy identification, localization, declaration of parties, this has been dealt with in Geneva and perhaps David Goddard this afternoon, in the B2C panel, will be elaborating a little more on that, I don't know.

But you find that everywhere by saying, well, in a transaction, in a contractual transaction, and that's perhaps not as useful in a tort case, but in contractual transactions whatever has been said by the parties within the contracts, meaning identification, place where they have their habitual residence or their establishment or branches and so on, is going to be the element that is going to be taken into consideration

for the jurisdictional rule, that's very important.

Party autonomy's choice of court clauses in contracts, we have a very important provision in the Draft Convention on choice of court clauses. As you all know, right now in the world, not every country obeys by the choice of forum clauses that you include in a contract. So, one of the goals of the Convention is obviously to clarify this and to make all the parties, the Member States clarify that, to obey by the choice of the parties.

Now, the jurisdictional avoidance thing, I think you would be better off reading some of the very thoughtful reports that have been prepared for the ABA Project, Kent Law Project. Particularly, there is one which is very enlightening in terms of this targeting dispute - still I always say dispute avoidance because that's the usual expression - jurisdictional avoidance thing. This is the report by Mr. Reise on securities. I know it's a very specialized report, it's on securities and the security area is somewhat special.

But, still, on the B2C dispute mechanisms, security

is one of the topical examples because it's where the consumer has to be protected very strongly. And, therefore, I think his report on this is very interesting.

What I call jurisdictional avoidance is... the company that is putting a Web site is basically asked to give warnings about what they want to achieve with their Web site and the type of jurisdictional avoidance they want to have, for example. I would argue - and I think somebody from Yahoo is in the room because there will be a presentation later on - but I would argue that if Yahoo.com - and I'm not speaking of Yahoo.fr - I'm speaking of Yahoo.com, would have been careful enough on their Web site to mention the countries in which there are laws preventing Nazi insignias and that type of thing from being not only advertized but presented, etc., etc. The French court would have been much different in getting at Yahoo...

(RECORDING HAS BEEN SUSPENDED)

... avoidance that you should think about.

KATHRYN SABO
Thank you, Catherine. If I might permit myself to perhaps pose one question. We're moving to Ottawa 2 and I think we stole the title from the second ILPF Conference on jurisdiction to Ottawa 2, which will be at the end of February 2001, so we have a lot of work to do before that.

Dean Perritt, if we accept the idea that the only possible solution to this, at least for the Hague Project, is some kind of hybrid approach, is it enough in the Draft Convention to simply make sure that we don't put any obstacles in the Convention that will allow the other parts of a hybrid approach to come into place or do we need something more? In concrete terms, what do we need in the draft of this Convention to make some kind of hybrid approach work?

HENRY H. PERRITT
Well, I would hope that we could go further than simply an expression of abstention with respect to Alternative Dispute Resolution. I understand that there is resistance from the people that have participated in this for a long time, in the drafting of the Hague Convention, to say anything about ADR in this

Convention. But I would hope that we might press that idea a little further because I think some sort of explicit linkage between the special treatment of consumer contracts in Article 6 and some appropriate form of ADR would be helpful.

And I would argue, Catherine, that that is the best way to extend your second principle of party autonomy because right now there's not much party autonomy in Article 6.

KATHRYN SABO
Thank you very much. Are there any other questions? In the back? We have about two minutes.

QUESTION 2
What protections exist against, for a multinational company under the Hague or other proposed treaties, against either bribery that might occur in a court in another jurisdiction or bias against international companies when that court that determines against a U.S. company is then, is under the Hague Treaty then sort of bound, U.S. courts that are bound to enforce what might be a corrupted or biased initial decision by a signatory country?

KATHRYN SABO
Perhaps, Catherine, you can add to this, but I suggest that at least in the Draft Hague Convention, there is a provision in chapter 3, in recognition and enforcement where a court is not obliged to recognize and enforce a decision where fraud was involved to a certain extent. Catherine.

CATHERINE KESSEDJIAN
And impartiality of the initial court if you can prove, that's the problem, it's very difficult to prove. But if you can prove that the initial court was impartial or unfair and that the fundamental rights have not been protected, or applied, or obeyed by the initial court, then that's the basis for non-recognition and non-enforcement of the foreign judgments.

Other than that, on the positive aspect, it's, as you probably know, it's very, very difficult. But that exists in all countries, I can tell you. Bias against foreign corporations in one court exists everywhere, unfortunately.

KATHRYN SABO
Thank you. I think I worry about our lunch getting cold

and keeping our luncheon speaker waiting, I don't want to do that. So, first, I'd like to invite you all to join me in thanking very much our panellists for their contribution.

And I would invite you to take advantage of their presence here to ask any questions you may have at other points during the Conference. Thank you.

SUSPENSION FOR THE LUNCHEON

RUTH DAY

Ladies and Gentlemen, let me invite you to take your seats. While everyone is doing that, I'll say just a word. All the presentations that we receive for this Conference will be up on the Web site just as soon as we can get them up. We are taking a transcript which will be written up and transcribed and, as with our custom last year, the transcript will be on the web site too. So, all these materials will be available to you.

I think we're ready to start our afternoon's panel.

CROSS BORDER B2C CONTRACTS

Enforcing Consumer Contracts in the European Union, Alternate Dispute Resolution Mechanisms

PETER MØLLER JENSEN
Good afternoon, Ladies and Gentlemen, my name is Peter Møller Jensen, I work for Visa International and I am based in Brussels. I'd like to thank the ILPF for inviting me to participate in this particular session and then also I'd like to thank the ILPF for spelling my name right, which doesn't happen very often.

The subject of this afternoon session, while you all quietly digest your lunches, is enforcing consumer contracts in the EU, Alternative Dispute Resolution Mechanisms. And the EU is of course this federal thing in Europe, which was referred to by the previous speaker from e-Music.

If I had been asked 16, 18 months ago, tell me something about ADR, I would have a vague idea that the European Commission had made a recommendation on ADR, had made a paper on consumer access to justice, that there was some sort of reference in the Draft E-Commerce

proposals to ADR, but apart from that, I wouldn't have a clue, to be honest.

Since the last ILPF Conference in Montreal, which I think it was late July last year, things, or the focus on ADR has increased especially in Europe with the proposal for the Brussels Regulation, the discussions on ADR have just increased and are almost increasing by the day and I have to say that, from the perspective of payment systems, we also found ourselves sort of caught in the fire because there's been a lot of focus on payment systems and charge-backs in the whole ADR discussions.

But I'm not here to talk about payment systems luckily because you have to listen to Ana Palacio and Christopher Kuner who are going to make presentations regarding ADR. Ana Palacio is a lawyer, she used to be in private practice in Madrid before she entered politics and, I think, Ana Palacio is the only politician who actually dared to turn up here today and we are all very grateful for that.

Ana Palacio is Chairman of the Legal Affairs and Internal Market Committee of the European Parliament,

which is one of the most interesting and powerful committees in the European Parliament, I think I can say that. And Ana Palacio has been instrumental in getting the Electronic Commerce Directive adopted, she was *Rapporteur* on that and she actually resisted the huge temptation of making amendments to the E-Commerce Directive and thereby hindering the Council of making further discussions and amendments to Directive and I think she's been instrumental in actually getting the E-Commerce Directive adopted in Europe.

Ana Palacio has also been heavily involved in the Safe Harbor Rules and is presently involved in the Brussels Regulation. And the most recent developments regarding the Brussels Regulation happened last Monday and I'm sure that Ana can give us an update here on what happened last Monday.

The next speaker after Ana Palacio will be Christopher Kuner. Christopher Kuner is very known to people who have attended ILPF meetings. Christopher Kuner is an American lawyer with a European flavour or maybe a European lawyer with an American flavour, I'll leave you to judge that.

Chris works for Morrison & Foerster in Brussels. He's dealing with a wide variety of electronic commerce, legal issues from jurisdiction to tax, I think he's dealt with everything. He runs a very interesting Web site, www.kuner.com, which I invite you to have a look at. He's got very interesting translations of German legal texts.

I suggest that we start off with Ana and then we pass on to Chris. Chris is going to focus on a study he did for the Global Business Dialogue on Electronic Commerce regarding ADR. And Ana is going to focus on what is happening with the Brussels Regulation on jurisdiction and on ADR.

So, we start off with Ana, then Chris and then, after that, I hope, there will be a lot of questions from the audience. Ana.

ANA PALACIO
Well, thank you, Peter. Let me begin by saying, and it's not rhetoric, that I'm really pleased to be here and to thank, really thank Mr. Katoh, Ruth Day and the ILPF for having invited me, and having given me the opportunity of already listening to very interesting presentations to which I will refer in my own presentation.

Then, may I just make a comment on your very nice presentation, Peter. If the Parliament resisted this temptation to perfect, to make a more perfect legal text on the Directive of e-Commerce, it's because the Directive was already very good.

Of course, you always can correct a legal text and make it look better, or that you like it better, but there is a reason, as you mentioned. But I think that we have to stress that the views of the Parliament were taken into account, duly taken into account by the Council after the first reading and in the second reading we could accept - and gladly so - the text.

Then, let me begin by a quotation. Mark Twain once said

that if a man in the street accosted him and demanded his watch, he would do his best to hold on to his property. But if that man came up to him and said that he intended to bring an action for his watch, he would then hand it over and think he had got off lightly.

Well, I think that the goal of the challenge that this Conference addresses is that the twenty-first century consumers - that means us - would agree, we agree deep inside our heart, we agree with Mark Twain, and this, in or outside the Internet, with reference to an exotic jurisdiction or to the judge next door. Because, in fact, the court, just the court, only the court is not the right solution and, as it has been mentioned during the morning panel, it is too expensive and too slow.

Let me add, however, and you won't be surprised that being a continental, a European continental lawyer, I think that going to court is a fundamental right, the last possibility. And that is how we have to play. We have to be able to go to court, but we have to have other possibilities before taking this last resource.

That's why there were, of course, many interesting

ideas in this morning's panel. But I will point out two approaches:

. this idea of "integrated global solutions" that Mrs. Kessedjian said;

. and the idea explained by Dean Perritt that "hybrid regulatory approach can go, has to go further than what Mrs. Kessedjian said, just to say that this legal framework does not interfere with the possibility of going previously to ADR"

And, if I may add some more preliminary remarks, this has to be so, regardless of the technology. I think that any good legal solution has to be neutral vis-à-vis technology. Because technology nowadays changes so much and so quickly that this is a must. By this, I fully subscribe to the perplexity that Frithjof Maennel expressed in his introduction about what a directed activity is and so on.

This is regardless, as I said, of the technology, but this has to be regardless as well as it is a transfrontier of conflict or not. Nevertheless, I can't explain, or I can't now reflect on all these problems and, in fact, my topic is to address this new, this

ongoing debate, parliamentary debate on the regulation, on jurisdiction and recognition and enforcement of judgment in civil and commercial matters, I mean the Brussels (1) Convention.

Especially, I insist especially on the world **communitarization** and why? Because, in fact, in Europe, the internal market is not international. The internal market is not the home market yet, but is internal market and the vocation - as Frithjof said this morning - the vocation of this internal market is to become the home market, that means that there is no difference if I, say, sell goods from Barcelona and I sell them to Madrid or to London.

Therefore, we, at the Legal Affairs Committee, we pay a lot of attention to the development of the Hague Conference that we follow and that we encourage and that are, for us, a source of thought and of consideration, but these principles are not the ones that should exactly apply automatically, to the conflicts, transnational conflicts within the EU because of this idea of the internal market.

As Frithjof has said rightly, in the Union we have a

degree of legal integration and harmonized legislation that justifies the use of a different or, maybe in some cases, different approach.

And now, let me explain to you some personal reflections - and I want to insist on this - these views do not compromise the approach of the Parliament, I'm just speaking on my own. For as you know, the issue of jurisdiction has been the subject of intense discussion in Europe.

The terms of reference of this debate are quite simple: what sort of rules do we need to establish at EU level in order to determine which court will be competent in the case of a cross-border dispute relating to consumer contracts concluded through the Internet? Do we need to apply the current regime applicable to certain consumers contract? Or do we need to design a new one?

Two contrasting solutions have been discussed. The first would adopt the existing regime in favour of certain consumer contracts enshrined in the proposed Brussels Regulation with the result that this regime would apply to electronic contracts concluded by a company as long as that company directed its activity

to the country of the consumer. Which is a bit contradictory with the aim of the internal market, because the aim of the internal market is that each consumer, each provider thinks of the internal market as his home market.

And then, the second solution would be to develop a specific regime applicable to all consumer contracts, concluded at a distance, that means technologically neutral. An additional principle would be that, in certain defined circumstances, the parties would be permitted to choose the jurisdiction of the court competent to resolve the dispute.

I am proud to say that the European Parliament and, in particular, the Legal Affairs Committee, that I have the honour to chair, is at the heart of this fundamental debate. It has already succeeded in launching a real discussion involving all interested parties on the substance of the issue at hand, whilst the Commission decided to elude all discussions of this issue by simply re-tabling a draft regulation which was previously elaborated in a non-transparent way and within the framework of the "fourth pillar".

For the ones of you that are not familiar with EU law, the "fourth pillar" is closer to international private law. The internal market is not. So, by communitarizing a legal act does not just mean where it says "convention put regulation". You have to scrutinize all principles that are in this legal act and seize the incompatible with the principles that underline the internal market.

The European Parliament Legal Affairs Committee has finally adopted, and, Peter, I refer to this, it was adopted last Monday, its opinion which seeks to re-balance the initial Commission proposal by facilitating cross-border activity at community level whilst ensuring an efficient level of consumer protection. And I refer specifically to the amendments to Section 4 of the Regulation, especially to articles 15, 16 and 17, and the new amendment 26 that includes a new article 17 (a).

My experience of these lengthy discussions leads me to four conclusions which may assist in finding a reasonable solution and a reasonable reflection on why and how ADRs are necessary and instrumental.

First idea
Consumers must have access to goods and services coming from other countries within the EU. Of course, I think that these principles can be - as Frithjof mentioned for the Directives on e-Commerce - seen as models for international reflection. But now, what I will be saying is just related to the territory of the European Union.

The key opportunity offered to consumers by the Internet is to have access to more goods and more services without having regard to national borders. Any regime relating to consumer contracts should not deprive the consumer of this opportunity. However, what would be the use of what appears to be a theory of a perfect legal regime in favour of consumers, but which has the perverse effect of deterring companies from offering their goods and services across borders?

We need to recognize that the ability of a legal regime to facilitate and encourage cross-border activities is a key part of that protection because, in the end, the consumer has a broader election.

Consequently, any regime relating to consumer contracts

should be cross-border friendly. It is very important to think cross-border, which means finding solutions which will convince companies to offer their products and so this means across borders to all consumers within the EU. It should be a clear objective of any applicable regime that companies are incited to sell to consumers in all the territory of the EU. And the consumers can buy from companies across the 15 Member States, wherever the most attractive offers and prices prevail.

I am convinced that the real risk which is posed for the electronic commerce in the next five years is that the physical borders dismantled by Internet technology are going to be replaced by legal and other virtual borders. There is a clear risk that the inappropriateness of a legal framework for setting disputes may lead companies to simply refuse to sell across borders and, therefore, result in a re-fragmentation of the internal market or re-territorialization of the Internet sales.

The Legal Affairs Committee has approved an amendment, the amendment is the number 26, to the Commission proposal, which would have the effect of limiting the

risk of enterprises getting embroiled in legal actions all over Europe by enabling parties to a contract to choose in advance the competent court. Naturally, it would be necessary to ensure that the choice to settle any dispute is subject to strict criteria, to ensure that the consumer is treated in a fair way.

That means that the obligation for the company to put a disclaimer alerting the consumer to the choice of a forum and/or commitment to submit the dispute at the consumer's request to an ADR mechanism of the choice of the consumer, which is specified on the company's Web site. This is indispensable to convince European SMEs to sell across border instead of deciding to limit their offers to domestic consumers with the result of re-fragmentation of the single market, as I said before.

Second Idea

The principle of freedom to contract and freedom of choice is particularly adapted to Internet contracts. This point leads me to my second key conclusion. One of the most appropriate solutions for finding a good balance between businesses and consumers interest is to reintroduce some possibility of contractual agreement

on which court will be competent.

This idea is sometimes seen as a sacrilege, even that for the past 20 years in Europe, regulatory conservatism and protection in Member States had led national authorities to design legislation whose main characteristic has been to deprive or limit the consumer's freedom to contract by protecting the consumer many times against himself.

Such a legal regime may be still justified in some areas. However, the Internet largely changes the situation of the consumers and requires a certain moderation of the traditional approach towards a balance of risk. We have to fight against long-standing stereotypes or clichés according to which a consumer is, by his very nature, badly informed, badly educated and defenseless. And a business, by contrast, is always powerful, rich and dominant.

The Internet economy challenges these over-simplistic views and requires the design of a truly innovative, flexible, efficient, and pragmatic response. In my view, this is a key challenge for the new regulatory approach included in the context of the Hague

Convention, but with the modification, I said.

In the discussion of the Brussels Regulation, the amendments of the Legal Affairs Committee proposed that the introduction, to a limited extent, of the possibility of choosing the competent court, this will be achieved by jurisdiction clause in a contract only for cases where the consumers are plaintiffs in a dispute. If the consumer were the defendant, he could still be sued only before his national court. In addition, any jurisdiction clause would need to comply with a number of conditions imposed on the business, in particular:

- transparency requirements;
- the need for specific prior acceptance by the consumer;
- a prior commitment by the company to accept the use of an ADR and to give effect to any sentence.

Given that the Internet increases the possibilities for informing consumers, transparency is the key. It will ensure that the consumer avoids accepting such a clause inadvertently without regard to its effect or, by default, without paying any attention. The above

proposed solution, which gives more room to contractual freedom, corresponds better to the reality of the Internet and the users of the Internet.

The interactive nature of the Internet and the multiplicity of services offered lead to a situation where Internet consumers always have the possibility to ask for more information to negotiate and possibly to decide not to contract.

Given that a clear, specific disclaimer will have to be used, the consumer will be fully informed of any such jurisdictional clauses. There will be no risk of consumers being accidentally bound by a small print contractual provision relating to jurisdiction. For those of you that would be interested in reading these amendments, I will ask the secretary to make some photocopies.

Third Idea
We should move towards the concept of Internet user instead of consumer because in line with the second conclusion, it appears to me that the Internet creates changes in the behaviour of the consumers, which is characteristic for the Internet User Community or the

netizen, and which is different from the behaviour of consumers in the off-line world.

An Internet user or *netizen* is more attached to civil liberties, such as freedom of expression, than to former consumer protection and more attached to the solidarity of the Internet users than to the protection by government regulations. In practice, this means that the consumer protection regime applicable to Internet users should take into account the particular characteristics of the Internet user such as the fact that an online consumer is someone who attaches great value to freedom of expression, freedom of choice, open access to the Internet, the absence of prior authorization or accreditation schemes, et cetera.

Internet users are not passive and have a real capacity of reaction and they do not, as in France, they say: *non seulement subissent*, but they are really active. Internet users have already shown proof of this new power of consumers through news groups, petition, harassment e-mail, et cetera. This ability of Internet users to react should be fully exploited and offers new opportunities for consumers protection and it should be fully taken into account by law makers.

Fourth Idea
Consumer confidence is just an argument, the key problem is the quality of the protection. All the discussions at the European level demonstrate how difficult it is to focus on the substance of the problems and the solutions. On most occasions, the debate is too superficial and formal. The concept of consumer confidence has been very often used in a dogmatic way for quashing any attempt to discuss the quality of the protection.

In the name of the consumer confidence, we would have to accept anything which is supposedly more protective for the consumer who, by his nature, is weak and incapable of making informed choices. The key point is the quality of the protection, how to ensure an effective protection.

The dogmatic discussion on the application of the EU Internal Market Principles of the country of origin is a very good example of how the consumer confidence argument has been used in the wrong way. Indeed, I am convinced that the application of the law of the country of origin is the most efficient way of protecting the interest of the consumer since it

lessens the risk of illegal activities over the Internet in Europe by establishing effective control by national authorities at the origin of the activity, the member state where the company is established.

If there is no control at the source of the activity based on the legislation of the country of origin, any other possibilities of control are mainly artificial and non-efficient. Therefore, contrary to what is very often said by those involved in the consumer confidence argument, at EU level, there is a common interest between those who seek to remove legal barriers between Member States and those who want to grant protection to the consumer.

This is also true for the issue of jurisdiction even if as set out in the proposed Brussels Regulation, you facilitate the recognition of court decisions taken by a court in the country where the consumer is based, nothing will prevent a company from going to court in its own country in order to contest the enforcement of the decision, and we could give some other examples. You will understand that I, personally, am not for this approach.

Another means to ensure an effective protection is encouraging - and this is the key of this intervention - is encouraging the development of ADR This idea, which has been launched by the E-Commerce Directive is now supported by virtually everybody, as Peter said. The problem is how to determine what to do in practice in this field. The E-Commerce Directive forces Member States to modify their legislation in order to enable the use of online ADR.

The amendment that the Legal Affairs Committee has passed will constitute a key incentive for companies to accept ADR given that if a company accepts in advance the submission of the dispute before an ADR, it will be able to introduce a jurisdiction clause on its contract. I think this is important, maybe we can discuss later.

Finally, another key instrument for ensuring an effective protection is to encourage and facilitate the development of critical communications as opposed to commercial communications. Indeed, in the new economy, the key challenge will be for the consumer to be able to differentiate good quality goods from lousy ones. Independent Web sites offering services such as the

comparison of products, comparative tests, analysis of the drawbacks and advantages of the product, et cetera, but also of codes of conduct, trustmarks, and ADR will become crucial for consumer protection and for a policy geared to quality instead of bureaucracy.

The development of this new type of communication will be certainly hindered by some legal obstacles such as the rule of defamation, rules of a fair competition but we cannot enter into this field.

So, let me conclude. Contrary to what is said, the Internet is not a challenge for the law. Law is always a reflection of life. Rather, the Internet is a challenge for lawyers and for law makers. Lawyers are necessarily confronted with questions and demands that they have to give responses to. They cannot stay silent or static vis-à-vis developments such as those resulting from the Internet.

Naturally, and as usual, once a new technology emerges, a split arises between, on the one side, a conservative defensive approach denying the novelty or demonstrating that existing legal thinking is still appropriate and,

on the other side, a modern view which considers that the creative ability of the law allows us to develop constantly better and more appropriate solutions.

The debate on the Consumer Protection court jurisdiction is no exception from this rule and I'm very proud to say that in contrast to the very conservative and static reactions, in particular from National Ministries of Justice and from the European Commission, the Legal Affairs Committee of the European Parliament has dared to take clearly position in favour of a modern legal European thinking.

As always, community law demonstrates its inherently modern nature. And I hope that the Plenary will back this position.

Thank you.

PETER MØLLER JENSEN
Thank you very much, Ana. And from the Brussels Regulation which will regulate the last resort taking matters to court, we turn to the ADR issue which is what everybody focuses on and Chris is going to focus on his study on legal obstacles for ADR in Europe. Chris.

CHRISTOPHER KUNER
Thank you very much, Peter. I have a very hard act to follow after this very interesting and provocative talk of Ms. Palacio and I'm afraid that what I'm going to discuss is a bit more detailed and more legalistic and, for that reason, perhaps a bit more boring than what... from what you did, from what you just heard.

But I think it does build well on Ms. Palacio's speech. Toward the end of her talk, she mentioned legal obstacles to ADR and this will be the subject of my talk.

The basis for my talk is a legal study which I performed on behalf of the Global Business Dialogue for Electronic Commerce, known, I think too almost all of you here, as the GDBe and in particular the EU Region

Consumer Confidence - ADR Working Group.

And I would just say that I'm going to take, for California, the radical step of not having even any PowerPoint presentation simply because the full text of the study was made available by the kind permission of the GBDe, I presented to the ILPF and it will be up on the Web site, so you can access the full text of what I'm going to say on the Web site.

Now, to put this a bit in context, this GBDe Working Group was faced earlier this year with the task of looking at the ADR issue in Europe and coming up with a sort of inventory of what were the real legal problems to using consumer ADR and e-Commerce. And as they did that, it quickly became clear that no one had a really clear idea of this subject.

When I started the study, I was actually quite scared because I was convinced that there were all sorts of materials out there and experts at different arbitral institutions who knew this subject cold and I was... a number of phone calls to people in The Hague and Paris and Geneva, et cetera, quickly and various arbitration lawyers quickly convinced me that I was in the lucky

position of having to write a study and probably knowing as much about this study or about the subject, as many others did.

There simply isn't much available on the subject of ADR in European law, in business-to-consumer electronic commerce. There are, if you look in journals, et cetera, there's a lot sort of vague and superficial but there isn't really a lot of detailed information.

So, in performing this study, and I should say before I really get into the details of it, the mandate of this study was limited very specifically to legal obstacles. It was not, for example, a study to design an ADR system. So, I'm really looking very specifically at legal obstacles and the question of if a company wanted to use ADR in their business-to-consumer electronic commerce in Europe, what would be in place in the law which might prevent them from doing so?

The first difficulty with the study was that of definition. You deal in a subject with terms like electronic commerce, consumer, even European, which are not entirely clear and it's very important to define them clearly from the beginning.

I will not go too much into the definitions here, but I will make one point with regard to the term ADR. After considering the matter a bit, I decided to limit the study very specifically to ADR systems which involve a third party who issues a decision. That means that the study does not cover things such as call centres, complaint handling procedures or other procedures which involve negotiation between the parties.

This does not mean that these procedures are unimportant. On the contrary, they're perhaps the most widely used ADR procedures at the moment, not only in Europe but around the world. However, the fact is there aren't that many legal issues involved in consumer negotiating with a company. It's not legally a very interesting topic. So, it was determined that the study would be limited to really sort of procedures involving an independent third party decision-maker.

The next thing we did with the study was to look at some of the legal instruments and legal basis for ADR in Europe. These are indeed myriad, there are a number of instruments that must be consulted. First of all, there are a number of international conventions and

legal instruments relevant to ADR which apply in Europe. The most, besides the Brussels and Rome Conventions, which were referred to, there is, in particular the New York Convention, that is the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is in force in all the EU Member States.

Community law is also quite important. The Commission has come out with a set of recommendations for out-of-court settlement of consumer disputes, and while these are only recommendations, they are quite persuasive and have really helped form the debate on what ADR systems should look like in Europe and have set some sort of minimum standards.

There are also a number of directives, in particular the Directive on Unfair Terms and Consumer Contracts and this directive, in particular, limits the ability of consumers to sort of opt out of their right to go to court in consumer disputes, and this is of obvious relevance to ADR.

And then, of course, there's the E-Commerce Directive. In Article 17 of the E-Commerce Directive, there are

provisions which are designed to eliminate legal barriers to the use of online ADR. These provisions, of course, now have to be implemented in the Member States now that the Directive is in force and it will be, I think, quite interesting to see how they are implemented.

To go into some of the details of the study, there are three basic sections of the study. The first section deals with formation of the ADR agreement and potential obstacles in that area. Now, we determine fairly early on that there is no per se hindrance to a consumer agreeing to submit a dispute in e-Commerce to ADR. Indeed, Article 2 of the New York Convention requires the contracting states to that Convention to recognize an arbitral agreement.

However, there are some very clear instances under European law in which it may be legally impossible for a consumer to agree to submit a dispute to ADR and examples are provided by the Brussels and Rome Conventions and the EU Directive which I referred to earlier.

Based on these different legal instruments, it seems

that any agreement by consumer to submit a dispute to ADR and waive the right to go to court would have to, at a minimum, fulfil at least three conditions.

First, the agreement would have to be entered into after the dispute has arisen. Secondly, the consumer would have to enter into such an agreement with full awareness of the consequences. And third, ADR would have to ensure at least the same degree of procedural fairness for the consumer as with litigation in court.

Now, I should say it's quite an open question whether this sort of binding ADR was even desired in consumer disputes. Many people feel that, in the end, it's really... it will be impossible, well, for legal reasons and for consumer relations reasons to foreclose the consumer from going to court as a last resort if he wants to. But I think it's an important issue to look into, nonetheless.

There are also a number of provisions in the law of various EU Member States which could affect the validity of dispute resolution clauses entered into electronically and, in particular, laws involving the general terms and conditions of contract. And I go into

these a bit in the study.

The study also discusses forum requirements. National laws and international conventions frequently require that forum selection or arbitration clauses be quoted in writing. And these clauses obviously could cause uncertainties or problems also for the validity of online ADR agreements. Some European countries are more liberal in this regard than others.

I think it's also worth mentioning, as I said, that Article 17.1 of the E-Commerce Directive should hopefully eliminate many of these formal hindrances to the conclusion of ADR agreements.

The second section of the paper dealt with the structure of ADR systems and the conduct of the proceedings and possible obstacles in that regard. There are certainly minimum standards for ADR proceedings as set forth in the Commission's recommendation which I referred to earlier. I won't go into them in detail here but they have to do with independence of a decision-making body and transparency of the process, et cetera.

I don't know if you can really regard these as hindrances or obstacles because most of them are factors which most ADR systems would want to have in place anyway. But there are a couple of factors in this Commission recommendation which, I think, are perhaps a little bit too restrictive as regard to e-Commerce.

For example, there's a principle stating that the decision-maker must not have worked for a professional association for three years before having taken on the dispute, to decide the dispute, which obviously would just foreclose a lot of very qualified decision-makers from being adjudicators. And I think that it's worth, hopefully, having the Commission revisit these recommendations and perhaps make them a bit more e-Commerce friendly.

Discussions with lawyers and some Member States also gave rise to some concerns about possible constitutional problems. In particular in Germany, the view was expressed that certain minimum standards, certain minimum procedural standards for court proceedings might not be able to be satisfied by proceedings online simply because, at the moment, there's too much uncertainty involving Internet

security. That, I think is a very much open question.

Finally, to go on to the last section which is Enforcement of the ADR Decision, one thing that was very clear was that there's a real tension between the view expressed sometimes on the one hand to have a binding decision and, on the other hand, that a consumer should not be finally bound by an ADR decision. In particular, if you look at some of the statements of consumer groups, some of their statements are a bit contradictory because they say, on the one hand, this ADR isn't worth much because it's not binding and, on the other hand, they say, well, we shouldn't bind consumers to the final decision and, of course, you can't have it both ways. It has to be one or the other.

There are two basic mechanisms for having a binding decision in Europe on an ADR proceeding: it can be enforceable as a contract; or it can be enforceable as a final judgment. In regard to enforceability as a contract, there are really no obstacles to consumers agreeing with businesses that the final decision shall be binding on them as a contract. However, then you have the problem of enforcing the contract outside the

national borders, which is the very reason that most people want to use ADR, so that sort of becomes circular and isn't very helpful.

With regard to the potential enforceability of ADR decisions as sort of arbitral awards under the New York Convention, this is a very difficult subject and it seems, to make a long story short, it seemed to us in doing the study that, with regard to truly foreign cross-border awards, it should be possible to do so under the New York Convention.

There are some Member States where some views were expressed that there might be problems with this, but I think that both court cases and academic commentary would support the potential enforceability. Whether this is something really realistic that consumers will want and that businesses will want to enter into is another question.

So, that's an overview of the study and, as I said, it's available on the Web site. Thank you very much for your attention.

PETER MØLLER JENSEN
Thanks very much, Chris. We're more or less running out of time but I think we can take some time for some questions from the audience. Mike.

MIKE PULLEN
Thanks, Peter. Mike Pullen from DLA in Brussels. A few of you in here will know me and will know that I've been very vocal on the issue of the Brussels Regulation of the past two years.

If I could just put a question to Mrs. Palacio, whom I've had the pleasure to work with very closely on her amendments. Just to clarify what the amendment, well, if I can give an example in clarification, which perhaps you can tell me whether I have understood the amendment correctly.

If I'm a consumer entering into my Web site in Belgium and I type into a search engine ´luxury goods´, it gives me an architect's link to. Say. the Galeries Lafayette in France and I go through to the French Web site from my domicile in Belgium and what I will get under your amendment, if I understand it correctly, is a prompt which says: we are the Galeries Lafayette, boulevard

Hausmann, Paris, France. We contract only on the terms of French jurisdiction if, you, the consumer, wish to sue us. These are your rights under French law. We will give you a choice of two separate ADR systems which we subscribe to, but in return for that, you will agree that if you are going to sue us, you will sue us in the French courts. Is that the correct interpretation of the amendments?

ANA PALACIO

Thank you, Mike. Yes, basically yes. It's not exactly that. In the beginning there will be a disclaimer saying that if you, consumer, want to sue me, Galeries Lafayette, it's not all the possibilities because when the consumer is defendant, I, Galeries Lafayette, will always have to go to the consumer domicile. So, if the consumer wants to sue me, he will have to come to France. But not in all cases, just the rest of the requisite, just if I fulfil all the requirements that are stipulated in the now proposed Article 17 (a) and that basically our requirements of transparency of the information and, in the end, of compliance with the result of this binding ADR, which would be, as we have just seen, an arbitral type of ADR.

MIKE PULLEN
Thank you very much, Mrs. Palacio. Please.

PHILIPPA LAWSON
Thanks. Pippa Lawson from the Public Interest Advocacy Centre. I think the lone consumer representatives here, I feel it incumbent on me just to make a clarification on your remarks, Christopher, about the consumer position on binding/non-binding ADR. My understanding of the consumer position is that it should, where it's a binding type of ADR, arbitration for example, it should be binding on the merchant only.

I don't think there's any contradiction in that position. The point is that we're all trying, we striving for a regime which improves consumer confidence and trust in e-Commerce. It's in the business interest to provide that kind of guarantee, the same way that businesses will often provide a 100% money back guarantee, no questions asked. Yes, the point is the business is saying, look, we subscribe to this, we will... the business chooses the ADR service that they offer. So, they say: we will subscribe and use this ADR service, you agree to use it too before you go to court. And we will be bound by the results of

it. You can still go to court but we agree to be bound.

I don't think there's anything wrong with that asymmetry, with it being binding on the merchant only. I think it makes all the sense in the world in the context of what we're trying to achieve here and I don't think there's anything contradictory in it. Thanks.

CHRISTOPHER KUNER
Just to respond, thanks for that clarification. I agree with you: I don't think there's anything per se wrong in that. My comment was actually directed to a couple of statements in some papers by European Consumer Groups in which, I think, there was some contradiction, but I take your point.

ANA PALACIO
And if I may add just a comment on this interesting intervention. This is the approach that we have taken at the Legal Affairs Committee, is that the merchant, the provider agrees to be bound by the result of the ADR, but there is not such an obligation on the consumer.

PETER MØLLER JENSEN
Please, yes, question.

MARK STECHBART
Mark Stechbart, I'm a resident of California and I buy a Mercedes out of Germany with my Visa card and because I'm married to a lawyer, I have a Visa card with an enormous limit on it. But the car is defective, now, although I go to the Mercedes site and sign the ADR probably without even looking at it because most people don't, can I avail myself of VISA membership services to adjudicate the dispute on quality with the car, or am I barred because of the ADR signature? And doesn't it that diminish my VISA membership or does it keep the European lawyers busy?

PETER MØLLER JENSEN
That's an interesting question. I don't know. I guess your question is: can you do the charge-back when the engine blows out? And I think the answer would be yes. You could probably do a charge-back because you didn't get what you ordered that there was something wrong with it. And I suppose if you made the transaction over the Internet, you bought the car over the Internet, so yes, I think you could do the charge-

back. Am I right? I'm right.

PHILIPPA LAWSON
Hi! It's Pippa Lawson again. In my haste to make that clarification, I forgot a question I had for Mrs. Palacio. You stated two conditions for the enforceability of contractual clauses regarding the choice of forum in consumer contracts. Correct me if I'm wrong, but one was the full transparency, so the consumer understands, sees it and understands what they're agreeing to. And two was, the second one was the business's agreement to engage in online ADR.

I'm wondering why not a third condition that there'd be some connection with the transaction, some kind of substantial connection so that you avoid the race to the bottom scenario where businesses are choosing, you know, Zimbabwe or whatever as their..., for the applicable law court.

ANA PALACIO
Well, I think this is a very interesting remark. Of course, as I mentioned, all my intervention relates to transactions within the European Union, within the European Union. That's what is sometimes difficult to

grasp from outside the European Union is that, for us, the internal market is our home market. Therefore, principles of International Private Law do not apply. Nevertheless, we, as European Union, as Internal Market, we have this International Private Law principles that apply in our transnational, no, trans-Europe, no, transactions between the European Union on the one side and a third country. And that's why we support and we are so interested by what is being done at the Hague Conference on this matter.

PETER MØLLER JENSEN
One moment. Okay.

GRAHAM SMITH
Graham Smith from Bird & Bird in London. I think this may be a question both for Mrs. Palacio and for Chris Kuner. Just to get back to Mike Pullen's scenario about the Galeries Lafayette, if you take that scenario, even if it is written into the Brussels Convention and that's allowed, would there still be any residual possibility of the consumer challenging that agreement under the Directive on Unfair Terms and Consumer Contracts?

ANA PALACIO
Well, there has been a clear debate on this, on how Unfair Consumer Contracts Directive could affect this. And, of course, I'm not the only one that can give the appropriate answer, it will be the Luxembourg Court if the question is before them. For the moment being, there are different positions. I belong to the camp of the ones that say that there are no contradictions. I have the arguments, of course. I respect but I do not share the arguments of the ones that say that this directive prevents disagreement. But the question is open until there is a definite ruling by the European Court because this is the only court, the last instance court to interpret the community law.

CHRISTOPHER KUNER
I would basically agree with Mrs. Palacio's interpretation and I would make another point which is, I think that this shows one of the problems in Europe which is that there is so many instruments dealing with the issue of consumer protection, applicable law and jurisdiction. And it becomes very difficult sometimes to sort out which one applies.

And another point is that this subject would be so much

easier if there was more uniformity in consumer law among the different... just as an example, the different EU Member States. I mean, I really, theoretically, there shouldn't be such, such great distinctions and I think there's more effort now to harmonize them, but there still is too much disharmony.

ANA PALACIO
Just a last word. That's why it's so important that the Amsterdam Treaty has communitorized all this frontier territory that was there with procedural law and some conventions as the Brussels Convention that now come under the EC Treaty, so under the Internal Market scope. And that there will be many more possibilities of harmonizing, which is a must.

PETER MØLLER JENSEN
Okay. Thank you very much. Thank you, Ana Palacio, for a wonderful insight on the Brussels Regulation. I must say, personally, I'm fascinated by your suggestion of making a new definition of consumers. I liked the idea of calling them "Internet users" instead of calling them consumers and then I look forward to see whether this takes root, if this idea takes root elsewhere. So, thank you very much.

And Chris, thanks very much. And I'm sure that a lot of you will find it helpful that Chris' study is available on the ILPF Web site. Thanks very much.

Codes: When Is Self Regulation a Viable Model?

COLIN BENNETT
Good afternoon, my name is Colin Bennett, I'm from the University of Victoria in British Columbia and I am the remnant of a panel that was to have existed on privacy protection in the international arena. And when I agreed to do this chairing, I was asked to first say something about privacy developments and, secondly, to answer the incredibly easy question: when is self-regulation a viable model?

And then to introduce Denis Henry, all of that in about ten minutes, so. But I just want to speak for about five minutes on those issues and then introduce Denis.

I think it was sort of alleged tongue in cheek at lunch time, that consumers are not really that interested in privacy, I certainly took that as tongue in cheek and Paul suggested that privacy is probably the most important barrier to participation in electronic commerce. It’s become a huge

political issue. I've been studying it for nigh on 20 years now and I can't think of a time when it has had more political and economic international implications.

Over the years, there's been a convergence, that word was used a couple time this morning on the set of principles that are embodied in law, but also in international instruments such as the European Union Privacy Directive, which was passed in 1995. But that convergence really happened before the Internet came along. It happened as a result of cross-national fertilization of ideas and also because there are just a finite number of ways that you can solve these problems. Over the years, a consensus emerged as to how best to set in law a set of principles for the protection of personal information.

Also, however, and this gets to the subject matter a good deal of the rest of the afternoon, for some reason privacy has motivated many different instruments of self-regulation. If you name some kind of a tool for self-regulation, it exists in the privacy world. I'm currently writing a book on this with a colleague and we've classified five different instruments. One is a set of privacy commitments where the company or the

organization concerned simply gives a basic commitment about what they do. Those were quite common in the early years of this issue. Secondly, a set of privacy codes which are more codified obviously but they may be on an organizational level, a company level. They may be on a sectoral level, through a trade association, such as banking, insurance. They may be on a functional level such as marketing, direct marketing, there are direct marketing codes in a number of countries. They may be on a technological level, they may have to do with a specific technological application such as the use of smart cards. And they might be on a professional level, in other words they might cover particular professional activities. All of those types of instrument exist to try to self-regulate for personal privacy.

A third instrument is the standard. Denis is going to talk a little bit about this, I think - a certifiable standard for the protection of personal information which allows companies if they so wish, to

actually have their practices audited to that standard. Since that time, there's been attempts to the international level firstly through ISO, and more recently through the CEN/ISSS process in Brussels to develop an international certifiable standard for privacy. I've written a paper on that subject, which I didn't see it in the materials here, but I think it might be on the Web site.

A fourth set of instruments are privacy seals. We have all seen those and they're of variable quality. They have come along very recently through Trust-e, through BBB Online. And, finally, we heard a little bit about the Safe Harbor Agreement which combines regulatory force with the voluntary adoption of principles which combines the self-declaration by an organization that we will abide by these principles, and once that self-declaration occurs, then that company opens itself up to regulatory challenge if it does not abide by those principles.

So, to answer this incredibly easy question: does self-regulation work? The answer is sometimes. Like all

interesting questions, that tends to be the answer, isn't it? Sometimes, under certain conditions, in my own studies of this, I've reached a number of conclusion about self-regulation which I've written about, I don't think it's the opposite of regulation, I think that's clearly a kind of continuum and a continuum on a number of different dimensions.

I don't think self-regulation entails a lack of compulsion of any kind. I don't think it is the equivalent, in other words, of "voluntary". I think it entails compulsion and the question is where does that compulsion come from?

I think also that serious self-regulation, at any rate, requires a great deal of effort. In the privacy area, for example, it requires internal analysis by an organization of what information it collects, how it uses it, *et cetera*. It certainly requires external reality checks, perhaps public opinion surveys, perhaps external consultancy. It requires very serious codification, so that the organization is absolutely clear about what it's doing and it requires continuous communication and review. It requires an organization to say what it does and to do what it says.

And both of those elements of self-regulation, it seems to me, are difficult and require an enormous amount of effort. Often, I think self-regulation works best when there's the presence of regulation or, at least, the eminence of regulation, or threat of regulation. I think it also works best when there's a certain publicity surrounding an organization's affairs; not necessarily bad publicity, but at least an external spotlight on what that organization is. And I think, thirdly, I would say that self-regulation probably works best when there's internationalization. When an organization is exposed to a variety of different international pressures which will produce that incentive to self-regulate.

Denis Henry, here, has written a very interesting paper on self-regulation in electronic commerce. He is the Vice-President of Regulatory Law of Bell Canada. I don't know whether he agrees with those points I just made. I'm sure he'll tell you if he doesn't but he certainly makes some of them in his paper.

You'll see, however, that he says a great deal more, not only about privacy, but also about consumer protection, more generally. So, Denis.

DENIS HENRY
Thank you. If you don't mind I'm going to do this sitting down so I can look at my notes and if I can work with this computer at the same time and it falls to me to try to set the stage for the next panel that follows on the potential for self-regulation to build across national differences.

Now, I should say the paper that I've written is in your materials and I found it rather a fascinating project when I started out as a representative of business, I guess I took it for granted that most business writers and observers would share the view that self-regulation is both workable in this area and a far better alternative to government regulation.

So, I was somewhat taken aback when a few months ago I picked up a copy of a prominent business publication in the U.S., *Business Week*, and found the following quote: "Self-regulation is a sham." This comes from *Business Week*, as recent as March 20th.

I should qualify though. The article, as I went on to read it, was really talking about privacy and the need for legislation, and for some other reasons I'll talk

about later, I didn't really disagree with the conclusions in the end. But they really did serve to remind me of the dangers or limits of self-regulation and, in particular, the dangers in not delivering on promises of self-regulation.

Okay, the paper, I'm not going to spend a lot of time on this, this is just how it's organized, trying to define self-regulation, why adopted, where should it be adopted for e-Commerce and where do we go from here. And I should point out, this is written with a particular emphasis on the Canadian perspective, which I hope will be instructive.

So, what is self-regulation? Well, I found in researching the topic that there's absolutely no unifying global theory of self-regulation, much less, generally but much less in relation to the Internet. Self-regulation means many different things in many different contexts. It raises question who is the self, for example, what conduct is covered, what means are used to regulate, what degree, if any, of government participation is involved. I think the answer is: it depends.

Okay. The self, obviously, is usually thought of as

referring to industry players but sometimes the customer, customer empowerment tools and so on, and sometimes a degree of government participation. I think - and I think this is clear as what Colin just said - that self-regulation, as it's loosely used, really is a continuum ranging from a pure self-regulatory model, and by that I mean something that has no legislative framework backing it up, to a model with government and industry rules, perhaps, and each with an essential role.

And then, there's perhaps a middle ground where government might have some participation but no legislative framework. Recently, I've noticed a lot of people using the term co-regulation which I think the Transatlantic Consumer Dialogue has basically defined as a scheme where there's a broad legislative framework and then codes developed by industry but with the fallback when they fail to government. I think that may be something close to the hybrid regulation that we heard Dean Perritt talk about this morning.

In the paper, and I won't spend any time on this here, I started by looking at, in Canada at least, some practical examples in the traditional world and they're

all in the paper to read. But I did find it fascinating as I delved into them, they really do illustrate this continuum. Some of them, like the Advertizing Council, have absolutely no legislative mandate, and yet the very formal have appeal procedures, the whole works just like an administrative tribunal.

Others have some kind of backup legislative scheme, but in practice it's almost never resorted to and so, in practice, it really becomes self-regulation. And then, at the other end of the spectrum, there are some where government is at the table and has a regulatory function and when agreement is not reached, then government can step in.

So, why adopt self-regulation? Well, I think in the Internet world, there's a growing consensus that some governance is needed for certain Internet activities and I think the motivation is the same as for regulatory schemes, and that’s to increase consumer confidence and trust, obviously. The borderless nature of the Internet and the pace of change, I think, mean that mechanisms must be flexible and try to operate across jurisdictions.

Well, governments certainly have a role to play, there's also, I think, a risk of premature or unnecessary government regulation, which we've heard about from time to time today. One point I address is - and this is quite a lively debate I have with colleagues from time to time - but will self-regulation actually encourage premature or unnecessary government regulation or stave it off. I think there are probably examples of both, but I think my own view is on balance, it should have the opposite effect. If industry can get it out in front and do it properly, and I stress "do it properly", then I think we should be able to prevent government regulation. And I have an example in the traditional world, in Canada, where the broadcast regulator actually stepped out of the field once there is a Broadcasting Standards Council to administer violence and gender portrayal codes.

And in those cases where government has stepped in, people say to me: well, our privacy bill, if you hadn't developed your own CSA standard, maybe government, you just encourage government to step in. Well, I take the opposite view. I think by having developed the code, we were able at least to influence a government legislation and I think we have that much

more flexible and preferable piece of legislation that might otherwise have been the case.

So where and when should self-regulation be adopted for e-Commerce? Well, there's certain direct government regulation already in various areas: digital signatures, software export, et cetera. But I think the self-regulatory approach is particularly suitable, and I think Colin touched on this, where jurisdictional issues present practical problems and where market incentives and self-regulatory objectives coincide. And I think that's a key.

So, content, let's look at content. Three basic approaches around the world. The extreme one is government blocking, which a few countries still do, I believe. At the other end of the spectrum, there's a self-regulatory approach which Canada and the U.S. and perhaps others have adopted, and then there's the Australian type model with Internet-specific legislation which restricts content to a certain extent and it's been somewhat controversial.

The Canadian approach, our Broadcast and Telecom regulator looked at this last year in detail and came

to the conclusion that customer empowerment tools and customer education and industry self-regulation, a couple I might add with laws of general application were really the best approach.

Internet-specific legislation? I put a question mark here but certainly there are many observers who oppose it and suggest that it will likely prove impractical and certainly costly.

So, there are a number of international self-regulatory efforts underway, the Internet Content Rating Association, and I have unfortunately no time to delve into it but I encourage you to read the paper and find out what it's doing. It was formed, I think, last year, it's a number of the major companies in the world really aiming to develop a rating, labelling and filter system that sites will self-rate and you program your browse to potentially not go to unrated sites or to go to the various rated sites.

The unusual thing about ICRA is trying to do this across cultures and to try to develop an international system, quite a challenging system but efforts are really proceeding and then they'd be subject to audit

by ICRA.

I shouldn't forget customer education and awareness, which is another important element. A couple of examples in Canada, I won't dwell on them, but we really have some sites that are devoted really just to educating parents about media awareness and dangers with children and so on. The Canadian Association of Internet Providers will be launching their site. It's going to be a very good site in this regard and I think it fulfils the need for customer tools.

I'll just mention the study in the U.K., which I found fascinating. It's, albeit limited, and I think it was back in January but the Independent Television Commission did a study and they found that, at the beginning of the study, before they educated the study participants on the various empowerment tools, there was quite a sentiment for government regulation. By the end of the study, after they educated them, and what tools were available and how they worked, that completely flipped around and the study participants felt quite differently that self-regulation was probably the way to go. Now again on limited results but...

Okay. Privacy. I think privacy maybe needs a different approach. I don't know if it's because the objectives don't coincide or because business miscalculated or quite possibly because business failed. I've seen many surveys saying that nobody is complying with their privacy policy, so there's quite a concern here. Consumers are quite sceptical of self-regulation.

There's no single international approach here. There's the European approach, many of you are aware of. It's quite an encompassing and detailed legislation. The U.S. approach, I would characterize at the other end of the spectrum, a kind of market forces with this optional safe harbor to satisfy EU, but very much optional.

But there is growing discontent as *Business Week* called for Federal legislation. I saw in June, the CEO of Intel, said the same thing, and Hewlett Packard just last month saying the same thing.

The Canadian approach, we have legislation and I think it sort of falls somewhere between the U.S. approach and the European approach. It's a flexible legislation

based on Canadian Standards Association principles that were developed by business and other groups ahead of the legislation. And I think it's not self-regulation, it may be regarded as co-regulation, I don't know, but I think the CSA standard probably influenced the shape of the legislation and the legislation anticipates further industry-developed practices and procedures.

Okay. Consumer protection. We all know this, the consumer protection issues are magnified in online transactions, I think we all agree that patchwork quilt of national laws is probably not the answer. Focusing on the jurisdiction issue, it's great for lawyers but I think consumers want effective, practical solutions and the industry-developed codes of conduct and Alternative Dispute Resolution may, in fact, be the best solution.

So, what's going on? A number of self-regulatory initiatives. Before I get into those, we shouldn't forget things, apart from the collective efforts, just the number of self-regulatory practices that people like eBay, for example, have instituted. eBay started out, I think, in a business that would generate a lot of consumer fears dealing with anonymous bidders and so on, but through feedback from their customers, they

went on to develop a feedback form where you rate your experience with buyers and sellers and then they added in insurance and a credit rating service and really made the site and the business into a viable proposition.

GBDe, the Global Business Dialogue on E-Commerce and they're meeting in another week or two in Miami and I hope they will unveil some progress there. That's an international business-led forum which is encouraging the development of self-regulatory models to deal with Internet issues and I think they've developed voluntary guidelines for online business conduct for various consumer issues.

In Canada, we have, through a group of businesses, associations, consumers groups and government representatives, actually developed and published principles for consumer protection in electronic commerce, just last November. I should stress this has no legislative mandate whatsoever, they're voluntary but developed on a consensus basis amongst these various groups.

We have a Canadian E-Business Roundtable and this

working group is now working on developing, it's quite an ambitious project to develop what I'll call a "seal-of-seals" program. Rather than trying to develop one seal, we want to encourage a multiplicity of seals, competition among seal programs but have an overarching trustmark that would identify those seal programs that meet minimum standards and meet these consumer protection guidelines, similar to the TrustUK initiative, which some of you may be familiar with in the UK.

ADR. I don't think I'll say too much about this at this time because we've got a whole panel coming on that. I encourage you to read some of the examples in the paper. I have quoted from Professor Ethan Katsh who is a director, I think of the Centre for Information Technology and Dispute Resolution at the University of Massachusetts. He outlines a number of different types of online ADR and it really is interesting to see the various approaches, some totally automated with no human intervention, and others using technology to all sorts of varying degrees.

I agree with Dean Perritt that the credit card companies are probably the simplest most and very

prevalent ADR mechanism out there that we all tend to forget but probably the one that's used frequently and holds a lot of promise. And, as I say, the market place rules, eBAY law, as Professor Katsh refers to it.

Professor Katsh also found that there was a consumer appetite for online dispute resolution. He did a study, and I think he found quite a large percentage of consumers who were willing to engage in online mediation. So, I think demand is likely to grow for that and the techniques will adapt and maximize technology use.

So, where do we go from here? Well, I think government initiatives on various fronts remain important. International harmonization efforts, national laws for some issues like electronic signatures, intellectual property issues. The governments must be selective in their approaches and live with some uncertainty, but they should nevertheless encourage self-regulatory initiatives, and at the same time business should encourage government and consumer group input to self-regulatory initiatives.

Legal issues associated with self-regulatory mechanisms

are interesting and Dean Perritt gave the example of the MAPS situation this morning where somebody is suing MAPS for being on the black list and I think these trustmark schemes present the same issues. What if you shut somebody or kick somebody out of your seal for not complying with the seal or not certifying another seal program as meeting the seal, seal programs. I think there is a potential there for the needs to be looked at. But I think business must really act and deliver.

So, in conclusion, there is no single all-encompassing solution to the myriad of issues, I think self-regulatory initiatives can be an important piece of the puzzle and work best when incentives and objectives of self-regulation coincide and jurisdictional problems arise. The issues I've talked about, I think, are well suited, but again I stress there's a real need for business to deliver. It's quite a dilemma, if we don't deliver then we won't realize the full potential of the Internet economy.

On the other hand, if we embark on these efforts and fail, we could be in even a worse position and again I think the privacy situation where it's been shown so many companies, apparently, from the surveys I've

heard, not complying with their policies. It's just an example of that and whether so much groundswell, now, for privacy laws and, as I understand it, in the U.S., quite a number of people now are talking about that.

So, government initiatives and self-regulation can work together and, for example, governments can target fraudulent vendors and rely on self-regulation for the majority. That's it. Thank you very much.

COLIN BENNETT

If there are any questions, we have a couple of minutes? I guess not. So, coffee and tea is now served. Thank you.

BREAK

Can Cross Border Codes and ADR Mechanisms Bridge National Differences?

ROGER COCHETTI
Thank you, Ruth. My name is Roger Cochetti and I'm Senior Vice-President of Network Solutions VeriSign and I'm pleased to welcome you to our next panel discussion. Before I begin the program, let me confirm that our colleagues from the OECD in Paris are online with us. So, if I can ask them to join us from Paris. Are you there?

DAWN FRIEDKIN
Good morning, Roger.

ROGER COCHETTI
Thank you. I'm just confirming that the sound system is working. For the benefit of the audience, this is going to be your first full multimedia presentation in the program. We've got two of our panel participants calling in from Paris and we're going to begin with a video presentation of them and then we'll go through the panel itself. But before we do, let me say a few, make a few opening remarks.

First, for those who have not had a chance to read Denis' paper, that he referred to in the presentation that just finished a few moments ago, I would recommend it to all of you. It is a very informative and thorough survey of practices and one of the few that I've seen that cover just about all of the waterfronts, I would say. It's a useful document, I think, for every one.

As you know, the subject of this afternoon's panel is "Can cross border codes and ADR bridge national mechanism?" And while that subject could apply to quite a large number of subjects ranging from professional standards to B2B relationships, the principal focus of this panel is going to be on B2C or Business-to-Consumer transactions for the obvious reason that this issue is the one that has attracted the most attention, the most controversy and, in many respects, is a formative one for the future of electronic commerce.

The issue of the jurisdiction that applies when a transborder consumer transaction takes place is not a new one. In fact, you could argue that the issue has in some way or another been around for over 10,000 years,

since the first villager crossed the border from his village to a neighbouring village and went to the neighbouring village to sell his seashells and the tribal chief of the village he was visiting said: you can sell your seashells here but you do it under our rules. And he said: that's fine, I'll sell my seashells in your village and I'll do it under your rules. The chief's cousin that, you could imagine, wasn't able to buy the shells before the peddler left, chased the peddler back to his village and his village went to try to buy seashells from the peddler, only to find the chief telling him: you can buy your seashells here, but you do it by our rules.

Neither these chiefs had ever heard the phrase, the phrases that we're familiar with today, like "purposeful availment", but they understood the concept perfectly. And I think it's fair to say that the concept "if you come to my village, you play by my rules or you leave my village", is one that's been with us for about 10,000 years.

In fact, it doesn't really change very much at all until about 100 years ago when telegraph lines are widely connected and, by now, these are no longer

villages, they're called republics and they're no longer called chiefs, they're prime ministers or some such thing. And, for the first time, you can buy your seashells from the peddler without leaving your village by placing an order over the telegraph line and presumably the peddler would say something like: I know that people can place orders by the telegraph line and I've heard that happened but I've never seen anybody do it.

Maybe 50 years ago, the villages, which are now fully developed and economically advanced republics, are equipped with telephone lines and the concept of being able to place your order for seashells over the telephone line is now possible and the peddler says: yeah, I get a telephone order about once a year. And asked about the jurisdiction that applies to it, his answer is: I really don't know and don't care, it's so rare that it's not something that I think very much about.

About three years ago, the villagers get wired and all of sudden things start to change rapidly. Orders are being placed for seashells between the villages and, often times, the buyers don't even know where the

peddler is at the time that the seashell order is being placed and the peddler may know where the seashells are being shipped, but he's taking orders so rapidly, he's not noticing where they're coming from. He's certainly not travelling to the other village to sell his seashells, nor is the villager travelling to the village of the peddler in order to buy the seashells.

At this point, much begins to change and what's changing is not just the character of the transaction, but I think more importantly the volume. As long as transborder consumer transactions were a relatively rare phenomenon, the ambiguity of the jurisdiction that applied to them was tolerable.

Today, about 25% of all consumer transactions, which amounts to, depending upon how you define them, something in the order of about 5,000,000 transactions a year occur across sovereign borders. We've now gone beyond the stage of the peddler who visits his neighbouring village once a year for the rare event of exposing himself for purposely availing himself to their jurisdiction and created a new environment that challenges rules that have been with us for 10,000 years.

I would suggest that the panel today consists of some of the people who are principally involved in re-examining the practice that has evolved over the last 50,000 generations of transborder consumer trading. What they are looking at and what they are talking about is the potential for a new set of rules to apply, a new concept to evolve in the middle of something that's been around for as long as people have been around trading between villages and that is, perhaps it's not exactly the rules of the peddler's village or the rules of the village that the peddler is visiting that are the ones that apply. Maybe there's a different set of rules that can apply and the different set of rules, of course, would be something that we're calling a Code of Conduct or an Alternate Dispute Resolution Mechanism.

Today's panel is going to talk about events that have taken place recently in the development of these two concepts and there have been a lot of events that have taken place recently. In fact, I would argue that there's probably been more that has happened in the area of intertribal trading, consumer trading in the last three years than there was in the entire preceding 10,000 years, and I would suggest that there's probably

been more thinking about legal implications of that in the last year than there has been in all of human history combined before that. And the reason, again, is that you didn't have to think much about it up until very recently.

Certainly, just looking at the highlights of what's happened since the ILPF Conference last year, the European Union, as we've learned, has issued and is moving forward on a major directive that addresses the subject. The OECD has issued a major set of guidelines. The Federal Trade Commission in the United States has recently held a workshop and issued a measure report. A number of groups, including the Global Business Dialogue, the Consumer Protection Electronic Commerce Group, the Better Business Bureau Online and many others have issued major guidelines or proposed codes.

So, there's an enormous amount of intellectual activity that's now following the dramatic shifts that have begun to take place in consumer buying habits. And in order to learn how those effect the question of national sovereignty or national practices, we've got a very impressive panel and I won't spend your time going to their credentials, but take my word for it, they are an impressive group.

Let me introduce them now so I don't have to during the course of the program and explain that we've divided the presentation into two segments. The first group will focus primarily, although not exclusively, on the subject of codes or standards of practice. The second group will focus primarily, although not exclusively, on the subject of Alternate Dispute Resolution Mechanisms.

Leading the first group, and if you go back to my metaphor about the tribes and the tribal chiefs, I guess you could say that in that metaphor the OECD would be a council of chiefs because it is, after all, a council of governments and the OECD is among the intergovernmental bodies of the world taking a lead and looking at this area.

We have the two principal officials from the OECD who are working on this online with us from Paris, but we'll see a video presentation of theirs and they'll be available for questions and discussions afterwards. These are Taizo Nakatomi and Dawn Friedkin.

Following the OECD presentation, the video presentation, Lisa Rosenthal who is the principal author of the FTC's recent report, and I guess also a chief in my metaphor, will talk to us a little bit about what the U.S. Federal Trade Commission has been doing in this area.

Following these two, we'll then hear from a variety of peddlers and consumers, and these are led by Stuart Ingis of the law firm of Piper Marbury. But, more relevant to this panel, one of the attorneys who helped organized and put together the report of the Electronic Commerce and Consumer Protection Group. Elizabeth Blumenfeld is the author and chief architect with the Better Business Bureau Online Project on Consumer Protection.

And Katsuhiro Iseki from the E-Commerce Promotional Council of Japan will talk to us about developments that have taken place in Japan in the area of setting new standards in this area.

We'll then turn to three speakers who will focus primarily on Alternate Dispute Resolution, although not exclusively, Philippa Lawson of the Canadian Public Interest Advocacy Centre will review a survey that they

have completed on ADR and what's happening in the real world.

Ronaldo Lemos of the Suchodolski firm in Brazil will talk to us about the practices of ADR as they apply to domain names in Brazil.

And Barbara Wellbery, another chief, will talk to us about from the perspective of the U.S. Commerce Department, the evolution of ADR and its import in the context of both private and public sector cooperation.

So, without any further delay and interruptions, let me ask the technicians, if you would, to give us the benefit of the video presentation from our friends in Paris.

DAWN FRIEDKIN
Good afternoon and thank you for inviting us to participate in this year's Internet Law and Policy Forum. I'm Dawn Friedkin and this is my colleague.

TAIZO NAKATOMI
Taizo Nakatomi.

DAWN FRIEDKIN and TAIZO NAKATOMI
We're here today representing the organization for Economic Cooperation and Development. Thank you again for inviting us. Your topic of our panel today "Cross Border Codes and ADR Mechanisms - Can They Bridge National Differences?" is a very important subject and one in which the OECD spends a lot of time. But before we begin to talk specifically about the OECD's work in this area, we would like to give you a brief overview of the OECD and its work on electronic commerce.

The OECD in general terms is what many call a Paris-based think-tank. It's an intergovernmental organization comprised of 29 Member countries which include the most developed countries of the world. Page 1, excuse me, page 4 of our slide gives you a list of these Member countries.

The OECD was created to deal with economic development of its Member countries including economic growth, job creation, promotion of trade and development. Electronic commerce gives the OECD an opportunity to go all of these roads at the same time. In other words, on a macro-economic level, e-Commerce is contributing towards economic growth, job creation, low inflation and increasing trade.

The OECD's work on electronic commerce began in 1997 at its Conference in Turku, Findand, where we defined barriers to global electronic commerce. In 1998, in Ottawa, we hosted a Ministerial Conference to develop an action plan for electronic commerce.

The blueprint, as defined by the Ottawa Ministerial, includes work on a climate of soundly-based user and consumer trust; a stable predictable regulatory framework; enhancement of information infrastructure and access to markets and services, and pragmatic guidance on maximizing the benefits.

Last fall, in Paris, we had a conference as a follow-up to Ottawa to examine implementation of the action plan. Interestingly enough, we found one very

important new trend, which is that there was no longer a dichotomy between self-regulation and regulation. But rather, we are now seeing a much more integrated approach that is complementary to both. There was also a strong recognition that stakeholders, that all stakeholders must be involved, that there was an understanding that "digital divide" means more than just "haves" and "have nots" and that our attention really needed to shift on the implementation of the action plan as it was defined.

This winter will be the fourth in the series of e-Commerce conferences hosted by the OECD, which will be the Emerging Market Economy Forum on Electronic Commerce. It will be held from the 15th to the 17th of January in Dubai, UAE. The EMEF will broaden our work on e-Commerce and increase the dialogue by including non-member countries, or the emerging market economies, as we call them.

More specifically, the OECD's work on electronic commerce has focused in 12 main areas which are listed in our PowerPoint slide, and you can find them on your own. But in all of these areas, you will note the OECD's work really keeps in mind the four principles of

the action plan and we tend to really stress a multilateral-multicultural approach. We work to develop guidelines and policy approaches that allow countries to develop their own policies and practices in an effort to bridge cultural differences.

But we also work to ensure that there's enough flexibility for national approaches to complement and reinforce one another. We emphasize the need to share information on all the work that we do from countries to countries and between civil society, both good and bad and work that does not... things that are going well and things that are not working.

The Committee for which I work mostly is the Committee on Consumer Policy. Many of you are aware that last year we adopted guidelines for consumer protection in electronic commerce. This was a significant step for the OECD in all of these areas that we've talked about, using a multicultural-multilateral approach and paying significant focus to the action plan as defined in Ottawa.

Many of you on this panel I must recognize for your tireless work in making sure that these guidelines were

completed and I thank you for that work. The guidelines were developed to ensure consumers are afforded transparent and effective protection, whatever the medium of commerce. The guidelines are now available in eight languages on our Web site here at the OECD and we hope we'll have many more.

Later this winter, we'll hold a workshop with the Private Sector in Berlin, probably at the end of March, to examine these implementation efforts and talk about national efforts, other national efforts that might be necessary.

Another area where the OECD is active is in the area of Codes of Conduct to which I will now turn to my colleague Taizo.

TAIZO NAKATOMI
Thank you, Dawn. Now, let me briefly explain another OECD work on the Codes of Conduct mainly carried out by its Committee on Information Computer Communication Policy. Self-regulatory approaches based upon Codes of Conduct that give full scope to innovation and the competition could be built upon a basic stable and a predictable legal framework.

Following initiatives of the Netherlands Delegation, the ICCP Committee had a special session on Codes of Conduct for the electronic commerce in October last year. Among the questions raised was in view of the inherently global borderless nature of electronic commerce, self-regulatory approach using Codes of Conduct could be made most effective by applying it on a broader basis internationally.

After discussion, the ICCP Committee supported further work noting that it was well placed to undertake a comparative overview of Codes of Conduct initiatives and also that there was a need for review of the options available to achieve effective enforcement.

The first phase of such work is to compile an inventory of existing private public sector and mixed initiatives supplemented by a factual analysis of the common characteristics and content. The inventory requires a survey in the form of a questionnaire of Codes of Conduct for electronic commerce in Member countries and comparative factual analysis of their common characteristics and the content such as scope, dispute resolution and enforcement transparencies, respect of privacy.

Currently, a questionnaire is circulated among the Member Governments with due date for collection of the information on 30 September. The inventory and the progress report on the comparative analysis would have been presented at the ICCP Meeting in February next year. This will mark the completion of the first phase of the work. The decision on whether or not to undertake a second phase which will include assessment of the effectiveness of the Codes of Conduct would need to be taken by the Committee after the results of the first phase have been discussed.

At this point, let me pass the camera back to Dawn.

DAWN FRIEDKIN
Thank you, Taizo. And lastly, I'd like to add to our conversation today, the OECD's work on Alternative Dispute Resolution. This December, the 11th and 12th, we'll hold a Conference in The Hague in collaboration with the International Chamber of Commerce and the Hague Conference on Private International Law.

This Conference will give us an opportunity to present, understand, discuss and disseminate information on the diverse range of Alternative Dispute Resolution

Mechanisms that are available online today as well as those starting to be developed.

The Conference will also work to explore how we can improve trust in a global electronic world by providing appropriate and effective mechanisms for business and consumers disputes, mostly focusing on privacy and consumer protection issues.

The Conference, as I've said, will be held in The Hague in December and the reason we chose to move it towards the end of the year was to give time for the other fora's work to be developed: the U.S., the European Commission, the Global Business Dialogue and Consumers International among others working in this area; we hope to learn a lot from their experiences.

But what's very important we think about our Conference is that our hope is not to repeat the work of these other conferences, but yet move forward, move it a little bit further forward learning from the experiences from these other four.

With that, I'd like to thank again all the other panelists and especially Roger for his chairing and let

you know that we'll be participating live by telephone in the panel later today. If any, if you would like more information about the OECD's other work on the electronic commerce or on the areas that we discussed today, contact information for both Taizo and for me is available at the end of our PowerPoint slides including our phone numbers, fax numbers and email address. Thank you very much.

TAIZO NAKITOMI
Thank you.

ROGER COCHETTI
Thank you. Thank you, Taizo and Dawn, and just two quick points. First, I plan to nominate both of you for the best data, an Emmy Award for the best daytime news documentary, it's very well done, we appreciate it and they did mention that their PowerPoint slides, a hard copy of their presentation is available, it along with copies of presentation from other panelists or accompanying material are available on the tables in the hallway in the back. So, you'll have copies of documents from several panelists.

If I can ask Lisa now to...

LISA ROSENTHAL
I know, we're all set up to speak from the podium?

ROGER COCHETTI
Yes. This is a podium.

LISA ROSENTHAL
Okay. I'll just read Liz's presentation. BBB Online, yes.

LISA ROSENTHAL

Good afternoon, I really appreciate the opportunity to participate in this Conference. Over the course of the afternoon, I find myself having a little bit of allergies, which is rare coming from Washington D.C. and having allergies, but I think it might be a reaction to the lunchtime speaker's views on consumer protection.

I speak today on my own behalf. My views do not necessarily reflect those of the Federal Trade Commission or any one commissioner and it may or may not reflect my own views on these issues tomorrow.

I was hoping to use my time to give you an overview of a report issued last week by the FTC's Bureau of Consumer Protection. It's called "Consumer Protection in a Global Electronic Market Place - Looking Ahead". By way of background, FTC has been an active participant in this ongoing dialogue on consumer protection in a global electronic market place.

In June of 1999, we've had a public workshop that took an in-depth look at this issue and many of you participated in that workshop. We led the negotiations

on behalf of the U.S. for the OECD guidelines on consumer protection in e-commerce, working closely with Barbara Wellbery and her colleagues of the Department of Commerce, other government agencies, industry and consumer groups. And this past June, we co-hosted a workshop with the Department of Commerce on ADR for consumer transactions online.

The report sets out important consumer policy concerns that we should consider as we continue to think about the issue of Internet jurisdiction. And we also set out recommendations for governments, industry and consumers as we work together to create a global market place that's safe for consumers and fair to businesses.

One important next step will be to develop a workable framework for jurisdiction and applicable law without moving to adopt a "rule of origin" approach or what we call a "prescribed by seller" or a contractual approach. And I think most of you are familiar with the "rule of origin" approach. The "prescribed by seller approach" is where a seller is subject only to the laws and courts and, as some have suggested, law enforcers in the country that the seller elects in the seller's own contract.

We recognize that the issue of Internet jurisdiction is just one piece of this puzzle. Also important to securing effective consumer protection globally will be Alternative Dispute Resolution, private sector initiatives, market place competition, increased convergence of consumer protection laws and cross border cooperation.

But the issue of Internet jurisdiction and applicable law is important and will have an effect on all of these other areas, so I'd like to take a few minutes to talk about that.

So, the report recommends not departing from our current system, which generally ensures that consumers can benefit from the court protection available in the countries where they live. And we set out several reasons why we think that's the best approach at this time and I'd like to talk about four of them.

First, we're concerned about a race to the bottom. We don't want to create incentives for businesses to move to places that have lax or non existent consumer protection laws; and we don't want to provide incentives for companies to elect to be governed by

such places in their contracts. It risks reducing consumer protection on a global scale.

Second, if this approach were applied to public laws, the type of laws that the FTC enforces, it would frustrate the ability of law enforcers to protect their citizens. It's unrealistic and irresponsible to expect government agencies like the FTC to sit on their hands while their citizens are being harmed by wrong-doers from abroad.

And third, it doesn't make sense to expect consumers to be able to make complicated decisions about choice of law and choice of forum in an international context. This is true even if these contractual clauses were clearly and conspicuously disclosed on a Web site. Let's say a Web site had in flashing hot pink letters the laws of - pick a country - Venezuela, applied to this transaction, who here knows what the consumer protection laws of Venezuela are? Okay, no one.

So, first, we have to research what the consumer protection laws in Venezuela are and we're going to have to look at those laws at a federal level and then we should probably look into how they vary at the local

level because, often times, there's a difference. And then we're going to have to research to see whether there are their procedural rules in place to ensure that consumers can actually benefit from these substantive protections.

Maybe there are some of us here in this room who are capable of engaging in this sort of complicated analysis, but the typical consumer isn't. And even if we came across consumers who were capable of doing this, it's just not efficient on the Internet. Consumers shouldn't have to go through these hoops and conduct this type of analysis just to buy a pair of shoes or a book online.

And, fourth, we're concerned about consumers' access to courts. If companies could require consumers to have to travel to the company's own country or to any country that's far away from the consumer in order to sue the company, it would undermine the consumer's access to judicial recourse. And this is true, you know, under the current system. Now, there are all sorts of creative solutions being proposed. We heard Ana Palacio talking about one in the Brussels Regulation, so setting that aside, this is under our current framework now,

this raises concerns.

But the current approach isn't perfect and in the report we recommend working to fix the problems inherent in the current system, working with businesses to provide them with more clear guidance about the circumstances when they can expect to be subject to jurisdiction in another country. And part of that effort will be more clearly refining what we mean by targeting online and/or by jurisdiction avoidance online, as Catherine Kessedjian mentioned earlier.

And in addition to jurisdiction, we need to pursue efforts on a lot of other fronts at once. We encourage the continued development of Alternative Dispute Resolution and the types of private sector initiatives that we're going to be talking about on this panel. The key to those initiatives is that they're effective and that they can work across borders. But it's important to distinguish the area of consumer protection generally from the area of online privacy because in area of consumer protection we already have laws on the books and there are government agencies, again like the FTC, who are charged with enforcing those laws. And we're not going to be able to defer to industry to do

our job for us until industry can establish that their programs are effective and actually do benefit consumers over the long term.

We also need to work to increase convergence of consumer protection laws internationally. The more similar consumer protection laws are, the easier it will be for businesses to comply with those laws; the easier it will be for consumers to understand what the rights are; and the easier it will be for governments to cooperate across borders.

We need to continue to pursue arrangements for the effective enforcement and recognition of judgments across borders. We talked a lot about the Hague Convention and that's one arena, but we need to find an arena to make this happen, both for private cases between consumers and businesses, and also for public cases where governments act on behalf of consumers in cross border cases.

And, finally, we need to make it easier for governments to cooperate in enforcing their laws across borders, cooperation and information sharing. And the FTC is hard at work in all these areas, but we have been

particularly active in that last category. We recently entered into an agreement with Australia to make it easier to share information, cooperate on law enforcement cases and we have had several other negotiations under way.

So, that's just a thumbnail sketch of what we say in the report and I encourage all of you to grab a copy, I think they're outside in the hallway or you can access it from our Web site. And I encourage you to actually read it and be mindful of the recommendations we set out because the global electronic market place is a profoundly pro-consumer development, but it can't reach its full potential until consumers are confident in doing business with foreign Web sites. And ensuring effective consumer protection on a global scale will be key to building that confidence. And we look forward to working with all of you in creating a system that's viable and fair. Thank you.

ROGER COCHETTI
Thank you, Lisa. Stuart Ingis.

STUART P. INGIS
Thank you, Roger, and I recommend to you also Lisa's work and the work of the FTC. I read it on the flight out here yesterday and, while, I don't agree with all of it, I told Lisa that it does really lay out all the issues and it's very thoughtful.

I work at Piper Marbury Rudnick & Wolfe in Washington and my colleague, Ron Plesser, and I have been working with a group of seven companies over the past, over about a year and a half, and the name of the group is The Electronic Commerce and Consumer Protection Group, on these issues of consumer protection, jurisdiction and we've been involved in a lot of the FTC workshops and the Hague Discussions, the OECD Discussions and it's nice to see a lot of the same faces at the discussions here again today in San Francisco.

The group that we worked with at the FTC Workshop this June released a draft set of guidelines and a statement on jurisdiction and it's a draft, not a final product but draft. But the draft was released after about a

year of discussion globally with industry, governments of all different levels and various private sector individual discussions and we went through several drafts. It became clear to us, once we started the project, that the issues that we were addressing in jurisdiction were very broad and probably need to be defined and put into smaller pieces in scope so we can tackle it and apply the proms and, Ron, last year at the ILPF Conference, set forth these challenges in applying the traditional concepts of jurisdiction which we had all sort of set out to address as the group got together.

The main problem, as we've heard today and we heard last year, is that the traditional legal regimes are all based on physical location and, of course, the global Internet changes all of that. And it's impossible for merchants to comply with the laws of all the jurisdictions throughout the world and the cost is a barrier to entry and it also is just not even possible because, a lot of times, they are conflicting laws.

And there is another challenge in that consumers need to be guaranteed, as Lisa discussed, effective consumer

protections that are predictable and consistent and also enforceable.

So, Ron showed this slide last year and we kind of like to show it around because we think it really makes the point about what we don't want when we're thinking about a global Internet and a global medium and a global legal system that should exist for that. And this is the IBM Web site and they have sites developed for various countries and you can click on any of the countries, depending on where you're from, and it will essentially show you your rights and give you the global situation.

The problem with this slide and with this set-up is that it cost a million dollars to develop each site according to some of the folks at IBM. And I think it also, even more over than the financial burden, I think it results in a medium which is really not the global type of medium that we're looking for in sort of an ideal situation and it may be, it provides sort of a sectoral or very specific country-based framework, global framework and really that is not at all what this global medium should have.

And if you think about it a little bit from a consumer perspective, this is kind of a business perspective taken to its extreme at an absurdity though is if you develop a system where everybody - it's essentially like you're mapping the geographical world back onto the Internet - it would be like requiring everybody on a computer to go run through customs on their computer before then being able to enter the store on the Internet on a various jurisdiction, which is absolutely not the result that we want.

So, what the group set out to do in breaking off a small piece and something that we thought was manageable and a good place to start and really has been the subject of the international discussions at the Trade Commission and the European Commission and at the OECD is to deal with transactional standards. And this is the area that includes marketing online, contract terms, disclosures, terms of agreement and we also address dispute resolution.

The guidelines cover - and there are copies of the guidelines and the statement on jurisdiction just outside the door, you can pick up after today's talks - but we did address accuracy and accessibility of

information, merchant contact, information marketing practices, information about goods and services, and so on, all the way through customer service warranty and privacy. We think that these guidelines map in part the OECD guidelines. They weren't drafted essentially based on them but we think it's important that the discussions that are happening globally are consistent and that consistent standards develop.

With respect to dispute resolution, we had sort of various drafts that we discussed, and many of you had seen them, that had different levels of deference and contractual theories and we realize that at this point, and as Lisa said, what really needs to happen is we need to build a system and have the system working before we can ask and request governments to defer from enforcing their laws and until we have a global, essentially, system in place.

And so, with that, we began to consider dispute resolution and where the guidelines stand in their current draft form is that we encourage participation and third-party Dispute Resolution Mechanisms. Interestingly, after we released our paper, the draft in June, I received almost probably a dozen different

calls from commercial ADR mechanisms that were being iesdeveloped in sort of various capacity, so I think you see a market that's developing and different models that can evolve.

And one of the things that we require in the current draft guidelines is that consumers would be required to exhaust the internal mechanisms and the ADR mechanism and we think that it's very important if we want these ADR systems and dispute mechanisms to work, that it's important that consumers have to go there at a first instance and, of course, whether this is effective, will really be based on experience.

And, finally, we think seal programs, which Liz is going to tell you about, are one effective way, maybe not the only way, but an effective way of helping a lot of some of the smaller companies that don't have otherwise large brand recognition.

In conclusion, I think that there are really five continuing themes that have come out of about the last year or two worth of discussion as sort of intellectual capital and I think that our group of companies is going to continue to work and think about these as we

develop our guidelines and receive input from others, contractual deference where parties can agree by a

- contract and there may be a greater role for this than there is in the off-line world on a global basis,

- the concept of targeting, which you've heard about,

- harmonization, which we've seen in the OECD and I think we are seeing elsewhere,

- the type of hybrid regulation and safe harbor stuff that I think you'll hear more from Barbara Wellbery and that Hank Perritt alluded to earlier, and

- also third-party assessment which we think is another way of effective enforcement and, not in all instances, but is another theme that we'll receive continued discussion in the coming years.

Thank you.

ROGER COCHETTI
Thank you, Stuart. The next presentation is Elizabeth Blumenfeld.

ELIZABETH BLUMENFELD
You all can take a nap for a few minutes, while we get ready.

ROGER COCHETTI
Yes, as you probably also surmise we're getting a good view of the presentation from the laptop up here, it says... "you don't see anything".

ELIZABETH BLUMENFELD
(recording missing) ...If you got just standards that merchants say they're going to adhere to and they violate those standards, then how in the world can a consumer have confidence unless there is a way for the resolution of the dispute? That's where Dispute Resolution comes in. Finally, you need a trustmark. A trustmark is essential because to the extent a merchant commits to adhere to a set of standards and to Dispute Resolution, a consumer is not going to know about that unless there's some way for that consumer to know it and that's where the trustmarks come in.

The BBB System is a working model of this three-tiered approach or three-legged stool approach. It's one of the largest and most experienced providers of informal consumer dispute settlement services in North America and there's some statistics up there on the slide, a little... I will throw out a few more current ones.

In 1999 we dealt with nearly a half a million formal complaints through our DR system and this year we are averaging over 13,000 complaints filed using only our online complaint form. We obviously get a lot of complaints through telephone, letter, et cetera, but right now, with our online complaint form, we are getting over 13,000 a month.

We also have a long and distinguished tradition of standards setting. Many of you are familiar with our Code of Advertising, which has become a sort of a Bible of advertising in North America in terms of what is appropriate and inappropriate advertising. We have childrens advertising guidelines and charitable solicitation guidelines.

All of these standards have been effective in part because we didn't just come up with them in an abstract

way and impose them on businesses. We solicited businesses' input as well as consumer and governmental input in order to come up with standards that would be agreeable and meet all of the three interested group's needs.

And then, finally, our most widely recognised function, at least from a consumer's perspective, is identifying trustworthy companies. And you can see our torch, the torch mark-up there, companies that display this seal are members of the BBB and so consumers know that they can contact the BBB if they have any concerns about the company.

That's our off-line BBB. We also have an online subsidiary, BBB Online. We have two programs. Information about the two programs is available on the table outside the doors. There's the Privacy Program and the Reliability Program; both of these programs are based on the three-legged stool concept of Trustmark, Dispute Resolution, and Standards.

In the Privacy Program, you can see the two trustmarks that we have up there. All members within the program are required to adhere to and agree to Dispute

Resolution should any conflicts arise; and the standards, of course, are the Privacy Program requirements. But those can be boiled down to: “Say what you do, do what you say and verify it.”

With regard to the Reliability Program, the trustmark is also up there with the yellow BBB torch. All participants within Reliability have to agree to Dispute Resolution and there's actually an option of three. I won't get into those details because of lack of time.

And then, finally, the Reliability Program has a set of standards. Once the Code of Online Business Practices has been approved by the internal system, which should happen momentarily, those participants in the Reliability Program will have to adhere to this Code. And I'll just go through a couple of specifics on the Code.

And I'll just go through a couple of specifics on the Code.

Well, first, I'm going to outline what the general principles are. I'm not going to go into the details; a copy of it is available outside for those who are interested. But I will highlight some of the details that address specifically how we intended to bridge

national differences through some of the provisions within the Code.

The five principles that the Code is based on are: truthful and accurate communications; disclosure; information practices and security; customer satisfaction; and protecting children. The philosophical underpinnings on some of these are again designed to help bridge national differences. Number one, e-Commerce is global. We chose to be affirmatively silent on the issue of jurisdiction. We don't address it in this Code; it's not our place to make that decision.

We also are affirmatively silent on referring to any kind of specific regulations or laws. We did not want to refer to any of the FTC's regulations, for example, because we were concerned that to the extent that this Code is going to be useful as a global framework, doing so would make it seem U.S-centric and our goal is not to do that. We want this to be useful around the world.

We also believe very firmly that telling the truth is a cross border concept and we decided that we're going to take advertising head-on. Our Code does apply to

advertisers on the Internet and basically it boils down to: “tell the truth and be accurate in your advertising.” That's an important thing because advertising really is a huge problem on the Internet to the extent that folks who do advertise may not be familiar with what is necessary to make sure that disclosures are there.

Thirdly, with familiarity, comes trust and confidence. For example, we require advertisers who adhere to the Code to participate in any bona fide self-regulatory programs for advertising disputes. Those are local self-regulatory programs, so that to the extent that there is an ad dispute in Europe, if that advertiser is participating in our Code, they need to be a member of the European advertising dispute agency… I'm sorry, I'm forgetting the name off-hand.

Then, lastly, consumer satisfaction is key to the extent you're going to have consumers around the world be willing to engage in e-Commerce. They have to be satisfied with the transaction. So, during the transaction, we require our merchants to be clear and accurate and also to provide the consumer with the ability to review and confirm the transaction. That's very important when you've got folks all around the

world who are entering into transactions and they may be a little unsure of what it is they're actually doing. You want to give them that opportunity to confirm it.

And, finally, after the transaction, to the extent that there are questions, you've been hearing all day today about "how do you deal with issues and problems that may occur through transactions". Well, the merchants need to commit, just as Stuart was talking about, need to commit to have an internal problem-solving mechanism and to the extent that doesn't work they need to... our Code requires them to have either some form of ADR or an unconditional money back guarantee.

Now that I've gone over the operational requirements, I'm going to quickly go over the strategic requirements, which are only two bullet points. Roger, so don't worry, I'll finish off soon.

In order to think about what strategically is needed for this to work, we need to step back and think about

what it is that we're really asking when we say we need to bridge national differences. Well, BBB believes we're really talking about is self-regulation and it defines self-regulation as a "process driven by the enlightened self-interest of industry, supported in limited, but critical ways by government and to the ultimate benefit of consumers."

And it's important to see who the players are here. We're talking about industry and industry players or industry organizations like BBB; government involvement, just as Lisa was talking about, and cooperation and facilitation of industry self-regulation. But then, the bottom line on all of this is really benefiting consumers because, to the extent consumers are satisfied with their e-Commerce experience, they're going to keep coming back . And, if they keep coming back, then industry is going to do what it wants to do, which is to have successful e-Commerce. And, government is going to be happy because their people are being protected. And that's what is really important.

The way to do this is for all the interested groups to build alliances and relationships to foster the goal of

global online commerce that will benefit consumers. And to take a phrase from an American movie: “if you build it, consumers will come.” If you build the three-legged stool of self-regulation and do it in partnership with all of the interested parties, the consumers will come.

My conclusion is that BBB and BBB Online can help here to bridge some of the national differences. We're organized operationally in the most effective way for self-regulatory success. We have the three-legged stool approach of codes, trustmarks and ADR. And, strategically, BBB and BBB Online are working with organizations in Europe and Asia to develop partnerships for consumer protection.

Some of you may be familiar with our JIPDEC joint venture where we set up a joint venture with the Japan Information Processing Development Center, which is a privacy organization in Japan, where we are developing reciprocal seals and harmonizing our privacy standards and Dispute Resolution Mechanisms, so that consumers in both the US and Japan can rest assured that their privacy is being protected on the Web sites that share the seal.

As I said, we are actively involved in developing similar such models and our ultimate goal is to ensure that consumers around the globe are comfortable with e-Commerce so that they can shop with trust and confidence. Thank you.

ROGER COCHETTI
Katsuhiro Iseki. Bear with us, we have another computer connection we're making and hopefully it's going to go smoothly.

KATSUHIRO ISEKI
Thank you, Roger. I'm Katsuhiro Iseki of Electronic Commerce Promotion Council of Japan (ECOM).

ECOM is a private organization supported by MITI consisting of 260 companies from the private sector whose aim is the promotion of electronic commerce. ECOM makes guidelines and recommendations to the government to realize secure electronic commerce.

As the market size of B2C electronic commerce has been expanding, gaining the consumer confidence becomes an important issue. Therefore, we have studied about securing the trust of consumers.

One particular study was a research on a system of online mark. Based on the result of this study, in May of this year, the Japan Direct Marketing Association

and the Japan Chamber of Commerce and Industry launched commercial operations for online mark system called Online Shopping Trust Mark.

In another effort, we made the " ECOM Guidelines for 0nline Business" in 1998, which were Code of Conduct for B2C companies and, in March of this year, we revised them. The study was conducted by experts from industries, consumers groups, academics and MITI in order to achieve well-balanced guidelines. The revisions reflect the content of the "OECD Guidelines for Consumer Protection". ECOM guidelines consist of following items. The highlight of the revision are as follows.

First, some measures are encouraged to be taken in order to reduce chance of consumers errors or mistakes. Second, a proper and swift settlement in a sincere manner should be taken in a dispute with a customer. Thirdly, careful consideration for advertisement to children. And as one special characteristic, consideration was given to cross border transactions. For example, when cross border transactions are expected, B2C companies should be encouraged to display their policies on language,

currency, tax and tariffs, considerations on the legal regulations in the targeted consumer's country and applicable rules and jurisdiction.

Specifying applicable rules is based on the following ideas. The ECOM guidelines provide that online businesses are recommended to show their own rules for applicable laws and jurisdiction in their advertisement. Currently, an international agreement about rules for applicable laws and jurisdiction is not attained. However, providing businesses' own rules prior to transaction is expected to reduce confusion and possibility of disputes with consumers, since consumers could carefully conduct their transaction.

ECOM is firmly convinced that promotion of self-regulatory rules is the best way to develop consumer's confidence on B2C e-Commerce, since such voluntary initiative can overcome differences in laws among various countries. For this, the development of cross border ADR system plays a crucial role. In the future, the number of troubles will increase for cross border transactions because business practices and consumer's expectations are different country by country.

In this case, instead of spending much money and time in the court trying to clarify who is right or wrong, I believe the ADR system is more appropriate to achieve a harmonious solution considering cultural differences. The urgent need for fair and effective ADR for B2C transactions is also mentioned in the ECOM guidelines.

Presently, we're making an effort to establish an effective ADR system. In order to establish fair and effective ADR system for cross border transactions, immediate study is necessary for clarifying legal programs and the variety of business models.

For the time being, the international cooperation among the online mark system organization in each country is a realistic step towards solving the problem. The entire text to guideline can be downloaded, please visit ECOM's home page. Thank you for your time.

ROGER COCHETTI
Thank you. Philippa Lawson is going to give us a presentation of their survey on ADR.

PHILIPPA LAWSON
Thanks. While we're getting the screen set up, I'll just make some introductory comments. I'm going to be providing you with the preliminary results of a survey that I'm just in the process of completing on Online Dispute Resolution for consumers in disputes with merchants.

I apologize for the lack of a paper, getting anything in advance to the ILPF on this. It is a work in progress, that's part of the problem, I was making changes up to this morning and I'm still confirming and analyzing the results. I'm doing this work for Consumers International who will be publishing the full report once it is complete. Their Web site is, for your information, www.consumersinternational.org. And I will, with the cooperation of the ILPF staff, make copies of this presentation for you. So those will be available tomorrow.

This survey that we did was a follow-up to an earlier CI report, which some of you may be familiar with. It was a 1999 survey that Consumers International did on online e-Commerce for consumers and it found a lot of problems. I won't go into those details, but the conclusion was that we really need Dispute Resolution Mechanisms.

The purpose of this study was really two-fold: one was to conduct an inventory, as comprehensive as possible, on what's out there right now, a snapshot and an analysis of the options that are there right now; as well, to identify and to analyze issues that arise out of online ADR for consumers.

We conducted this research over the past three months. We were looking for services that met the following three criteria: that's it's available online, that's it's available to consumers in disputes with merchants over sales transactions, and that's it's available regardless of the location of the consumer and the merchant.

We found all five types of Online Dispute Resolution, offered by 29 service providers, five of which are not

yet operational but have Web sites and say they will be shortly. 22, I think it may be 24 actually, were U.S.-based, only two were Canadian, three European, and they offered a variety of services.

There were 34 distinct services offered, some which were restricted to financial or Online or commercial transaction, and a few of which just focused on consumer disputes.

English was the predominant language. All of the services were offered in English, 17 were English only.

Funding sources: 22 were private business ventures, investor-funded; six of them relied on a business subscriber or member model; whereas 18 relied more on user fees.

Did they charge the consumer any fee? 16 did, 11 were free to consumers.

Did they publish the case results? Only six gave any kind of information on the results of cases and for two of those providers, the whole point of the service is publicity. Interestingly, only four of the 11 arbitration providers disclosed their case results.

Okay. An analysis of the results: I think it's very

important to recognize the very first limitation here. Only five of the services we looked at are even potentially useful with respect to recalcitrant merchants.

What we're talking about here is Alternative Dispute Resolution, an alternative to the court system. In the court system you can get redress, even when the other party doesn't cooperate. Yet, the majority, the vast majority, of online ADR services require the cooperation of both parties. That's not a criticism, it's a statement of fact.

Three are available only with respect to their business subscribers. Eight, largely the automated negotiation models, are available only with respect to financial disputes, and, as I pointed out already, most have very limited linguistic capacities. Only one of the services, it's Margo's Nova Forum - I see Margo in the room, could be characterized as multilingual at this point in time.

Affordability: As I pointed out earlier, only a third of the services were free to consumers. Of the remaining ones, six did have scaled fees as an attempt to be affordable in small disputes. But I would say

that only one of those (SquareTrade), which charged fees of less than $50.00 U.S. for the basic service, is truly affordable. So most services are not really useful or available to consumers with small disputes.

On the question of independence and impartiality, most appear to be independent, but a number of the services rely upon business funding, funding by the very businesses whose disputes are being adjudicated or mediated or whatever. And that clearly raises issues of independence which need to be addressed and were addressed to varying degrees by the various providers.

Virtually, all of the providers asserted that their ADR officials were impartial, but in most cases, it was not clear, there was no evidence of how that impartiality was insured.

Transparen: well, the second bullet I just pointed out, they were mainly deficient in respect of the transparency of their independence and impartiality. Most were pretty good with respect to the transparency of the process, the procedural rules to be applied. The one general exception to this rule, across

the board, was the issue of applicable law.

Clearly, online ADR resolves the problem of applicable forum, but it doesn't necessarily resolve the issue of applicable law. However, I think in most cases, mediation, ombuds services, negotiation services, the point is really to try to avoid having to make this determination, to try to resolve the dispute without reference to any particular law.

And in the case of arbitration, in most cases, it's expected that the parties will have agreed beforehand on applicable law. However, I still think this is an area that needs to be addressed.

Finally, transparency of the case results: most were clearly deficient here, as I said already only four of the 11 arbitration providers disclosed their case results. In the case of mediation and other types of services, general statistics would be very useful so that third parties could have some sense of the track record, for example, of the service provider.

Cultural, national differences:

None of the services we found paid explicit heed to the problem of linguistic and cultural differences between disputants. If we're talking about a truly global cross border service here, I think we have to recognize that it's just not linguistic differences. Parties, may have fundamentally different expectations of the process, of how much give-and-take there is, or where you should start in terms of a bargaining position, or whatever. This could result in ultimate results which are not perceived as fair, or in the inability to come to an agreement.

It's been pointed out already that one size does not fit all and that, therefore, the usefulness of the service will, to some extent, depend on the extent to which it can fit the service to the particular dispute. In only six of the services that we found, did the providers offer a suite of services so that they can say, okay, look, you guys should start with just negotiating yourself. And here's the way we'll facilitate that process. And if that doesn't work, then we'll move you to mediation. If that doesn't work, then we'll refer you off to this arbitrator.

In terms of compliance incentives, and Liz raised this

point, there are ways in which online ADR providers can improve compliance with their results or enhance the incentives for compliance. One is to publish the results. But as I pointed out already, very few do that. The other one is to offer ODR within a larger trustmark program, and I'm not talking like a trustmark for the ADR provider, I mean a trustmark like the BBB one that includes a general Code of Practice and if you don't comply with that or you don't comply with the ADR results, you're kicked out, you can't use the trustmark any more.

So, finally, in conclusion here, (I have three more slides), the issues: Issues for ADR providers themselves. Some are addressing this whole question of availability and affordability to consumers. How to accommodate these linguistic and cultural differences? Ensuring impartiality when the service itself is not fully independent and finding the right balance between confidentiality and publicity.

Issues for policy-makers: We've been talking about mandatory ADR-first clauses in consumer contracts. I think we need to look at that and what kind of standards should the ADR service meet in order for these clauses to be enforceable.

So, finally, in conclusion, this is a very rapidly developing market place, it's in tremendous flux,changes were occurring all the time as we were doing the research. One conclusion though, I think that is clear from this is that the business-to-consumer context is very different from the business-to-business context and it requires a different approach to ADR, a different type of ADR. There's a need for ADR standards for the business-to-consumer context, if only to deal with this question of mandatory ADR-first clauses. If these are enforceable, well, then clearly, we need standards for the ADR service to meet.

And, finally, we need to develop, or ADR providers need to develop - sustainable business models. This is a real challenge. Sustainable business models that still meet the affordability criterion, essentially that are free to consumers, while still meeting the criteria of impartiality and competence. Thank you.

ROGER COCHETTI
Thank you, Philippa. Ronaldo Lemos.

RONALDO LEMOS
Thank you, Roger. I'd like to thank the ILPF for the opportunity of being here and I will speak a little bit about the Internet environment in Brazil.

Well, first of all, Internet in Brazil is growing exponentially, we can say. The projections are very good for the next few years and nowadays we have around 6 to 7 million users. There are plenty of services that are being rendered online and also the government has implemented lots of public services that are also being rendered online. For instance, last year, 90% of the taxpayers in Brazil delivered their tax returns online by the Internet.

Despite this increasing growth, we have some legal problems related to the regulatory environment there. The first of these problems, I will call them assumptions or world views by the lawyers and policy-makers in Brazil, is that Internet cannot be regulated or, in other words, we should not regulate Internet because it's growing.

This assumption has prevented the enactment of any sort of statute in Brazil up to now. We are in the year 2000 and we don't have any sort of statute dealing with Internet, digital signatures, electronic signatures and this is clearly a deficit, because if you consider that Brazilian judiciary institutions are merely formalistic, we have the problem of the burden of proof and if that is not statutorily provided, it will be very hard to convince a judge that he has to consider the legal effect of digital signatures mainly based only in technical features. Sometimes, the judges are a little bit resistant to agree with technical peculiarities and to hear technical explanations.

The second of these assumptions that I made reference or world views, you can choose, is that the current Brazilian institutions are sufficient to encompass any sort of conflicts that may arise in connection with the Internet. And this second assumption, I think, brings more problems than the first one because we are preventing the country to put in practice institutional imagination exercises in order to bridge all these problems that the growth of Internet help to spot.

The lack of preparation for Internet conflicts regarding Brazilian institutions was made absolutely clear with the AOL case in Brazil, regarding a domain name dispute. The case before the First Instance Court was that the AOL domain name was registered by a small Brazilian ISP and then AOL filed a complaint before a Brazilian Court demanding for the transference of the domain name to itself, when it was starting its operations in Brazil.

The First Instance Court delivered a very odd decision, I can say, inasmuch as the judge seemed to confuse both the concepts of domain names and trademarks, specially because AOL had its trademark registered in Brazil. Well, the case is still pending and the decisions have been tending each time to one side, but it seems that the final decision will maintain AOL operating under another domain name in Brazil.

So, here comes the role of the ADR mechanism. The fact is the UDRP is playing a very important role in Brazil because it's been able to absorb a certain part of litigation arising out of domain name conflicts between Brazilian residents. It's not a rare fact that some Brazilian residents have registered famous

trademarks of Brazilian companies in the United States under the TLD.com.br. And the UDRP has been very effective in delivering expedited decisions, transferring the domain names back to their legitimate owners, according to the UDRP provision and before, for instance, the WIPO.

So, that is clear evidence that ADR mechanisms can play a very important role in fostering the growth of Internet in Brazil and influence Brazilian institutions. Responding to such influence, the Brazilian Registry and Registrar has unofficially stated that they would not accept the UDRP on a transnational level. But there have been other significant efforts right now in Brazil in order to implement similar policies to bridge such kinds of domain name conflicts that will definitely continue to arise in Brazil in the future.

Just a piece of information. Each day, in Brazil, around 3,000 new domain names are registered. So, the potential for litigation in regard of trademark rights violagion is very high and will definitely increase along the years.

And, finally, the AOL case showed that the courts themselves are not entirely prepared to properly hear all the cases involving technical issues, trademarks and domain

names. Therefore, initiatives like ADR mechanisms will significantly play an important role in Brazil in order to provide at least a certain level of inspiration for the creation of new mechanisms that can reshape the lack of adaptation sometimes found in Brazilian courts.

Just to finish and to give some other useful information about connected conflicts. Nowadays, the Brazilian legal system deals like follows with consumer law jurisdiction. As pointed out today, in Civil law systems such as Brazil, the distinction between applicable law and jurisdiction becomes very clear and that is exactly the case in Brazil.

In cases of consumer relations online, the applicable law is that from which the offer has emanated but the jurisdiction shall remain being the Brazilian jurisdiction, because before Brazilian law, consumers have the prerogative to bring lawsuits in the place of their domiciles. That leads to the fact that a consumer would have to sue or would have the right to sue in Brazil, but the applicable law would mandatorily be the law from the place the order had emanated. For instance, the law of the United States in case of an international purchase from Amazon.com.

That brings confusion specifically because

courts in Brazil already are burdened to apply and interpret our own law. Imagine the courts trying to interpret American law. It would be for sure a very inconsistent application of the American law in Brazil. And, therefore, I do think ADR mechanisms shall also be important in trying to address these kinds of problems that will for sure continue to increase in the near future. That's all. Thank you very much.

BREAK

BARBARA WELLBERY

Last but I hope not least, I want to thank the ILPF for inviting me and particularly thank Ruth Day for not insisting that I speak about the safe harbour yet again.

Roger posed a question for this panel on whether cross-border codes and ADR mechanisms can bridge the national differences that exist. I think that's the easy question, and the easy answer is that, yes, of course they can, and I think in fact they have to. I think the harder question is how do we accomplish this, and I'd like to spend a little of time talking about that today, how do we develop these codes and mechanisms.

I think building on what people said earlier and certainly building on the work that I did on the safe harbour, the hybrid approach seems to be gaining the high ground here. And by that I mean a public law framework with private self-regulation. How this works and how it evolves is the big question, and I think there's a couple of prerequisites that need to be developed.

I think it's essential that we develop these codes and

alternative approaches in ADR because I don't find the current debate jurisdiction very satisfying, nor do I think it's likely to go anywhere. I think it's become extremely polarized and quite formalistic. And here I have to differ with my colleague from the FTC because the views that she expressed about country of destination are not the views of the Administration. The Administration remains of the view that neither country of origin or country of destination provide very viable alternatives here. I won't talk about why we think that's the case for the country of origin because I think that's been belaboured enough, but I will talk a little bit about why we think country of destination doesn't work.

Most importantly it provides no real protection for consumers. Even if consumers can bring the case in their home jurisdiction and have their own law apply, in many if not most instances, they're going to have to go to a foreign jurisdiction to have that judgment enforced, and that just makes it an untenable exercise.

And perhaps more importantly, to touch on a point that Stewart and others have made, I think if we focus on a country of destination approach, we wind up with a balkanized Internet and electronic commerce. That defeats or undermines the very beauty and the very promise of what we see in the Internet and electronic commerce. So we'd be better off avoiding a country of destination approach for those reasons.

I also find the jurisdictional debate to be fairly formalistic. The case law has developed so that we have the Zippo doctrine now which looks to whether a website is passive or whether it's interactive, or you can contract using it. I don't find this a particularly satisfying analysis or approach. The goal is for websites to be as functional as they possibly can be, and the incentive should be for them to be as functional as they can be. Yet, we're coming up with a jurisdictional approach that creates disincentives for websites being functional. In addition, this is a global medium and the whole concept of purpose availment in a particular jurisdiction doesn't fit.

I would also like to talk about the alternative of deference, and how viable the whole approach of deference is. I think, certainly the approach that has been discussed is not a very viable one. The concept as it's been discussed in the last year or so is that governments would defer to laws that would be selected by business. Governments would defer to those laws as long as they provide an adequate overall level of protection.

I think this is an extremely complicated cumbersome and abstract process that you're asking governments to engage in. Frankly in my view it's asking too much of governments. First, if we are chiefs, as Roger said, chiefs don't like to defer, there's just a basic fact. And then I think there's also the difficulty of how do we know what we're deferring to? We take our responsibilities seriously, and how do we know what the public wants, how do we know what the law is that we're being asked to defer to and whether it will protect our citizens. The deference discussion, at least as it's been held so far, is really much too complicated a scenario.

I think governments will defer under certain

certain circumstances, but I think they're fairly limited circumstances. I think in order for governments to defer, there's got to be some sort of international consensus or bench mark that has evolved, and I think here of the OECD principles on privacy, or the OECD principles on consumer protection. But those are fairly high level principles and I don't think they, by themselves, will be enough, because I don't think they're operational.

The other model is the safe harbour model where you have governments negotiating agreements over a more operational code and more operational principles, and we know that that's certainly something that at least agreement can be reached on. We don't know yet whether that will actually work because it hasn't, nobody has started to implement it yet.

But there's a couple of things I think we need to note about that. First, it's very slow, maybe not slow against the greater evolution of time and history, but certainly slow in Internet time. It's also very difficult. It's very hard to ask another government to forego enforcing certain aspects of that government's law. Having sat through two and a half years of negotiations I can see how hard it was for the European Union to agree that

certain aspects of their laws were not as important as other aspects of their laws. And that was a situation where you have two governments negotiating, not a government and the private sector negotiating.

I also think that one of the essential prerequisites for that kind of hybrid situation to work is a fairly well developed self-regulatory framework. I don't think the safe harbour would have been successfully negotiated if the privacy debate in the U.S. had not accelerated and evolved as quickly as it did in the last three years. I know certainly as one of the people who were sitting there trying to negotiate for the U.S., it was much easier as the U.S. debate evolved, and there were actual codes of conduct that had been adopted by the private sector that were out there that we could point to, to look at as our benchmarks. Otherwise, you're asking a government to operate in a vacuum, and that I think is an untenable situation, certainly for the U.S. government which generally thinks of itself as requiring a fair amount of input from its citizens.

So I think it's really essential that the private

sector self-regulate, not only for all the other reasons that have been discussed today, but because I don't think we really can get to the point of having a hybrid approach unless there is a self-regulatory framework that has evolved, that has been tried, and that we can see where the pluses are and where the minuses are, and where we can we determine where we need to be. That needs to be the underpendings of any kind of hybrid approach. Thank you.

ROGER COCHETTTI

Thank you, Barbara, we are obviously over our time limit, I do want to leave time for maybe one or two questions, and if I could begin by asking any members of the panel, including those of you who are in Paris, hopefully you're still on the line, and the sun may be rising pretty soon in Paris right now, but those of you in Paris, if you have questions, or if any of the other members of the panel have questions they'd like to pose to others on the panel.

I will take the prerogative of the Chair and pose a question to our three figurative chiefs, the three people who've spoken from a government perspective, and ask any of them if they'd like to comment on the

question of the core proposition from the point of view, using my metaphor of the peddler or the merchants, and the question is, what is the proposition that would incentivize merchants to participate in a private sector based program, self-regulatory programs if not the benefits of deference; in other words, from the point of view of a merchant, compliance represents cost and compliance with multiple jurisdictional regulations, multiplies the compliance cost, so complying with one country's regulations is less expensive than two, and less expensive than 200 if the -- And then, but adding the cost of compliance with the self-regulatory program adds further cost and further liability. Presumably, if you say you're going to do it and then don't do it, then you're in trouble by those terms too.

So that the economic proposition for merchants is compliance with a self-regulatory program adds costs but those costs are offset by the relief the merchant enjoys from some measure of government, foregoing its -- or all governments foregoing every bit of their regulations. If the concept of deference is not a viable concept then what the merchant is left with is participation in the self-regulatory program and the

Net winds up adding cost because instead of 200 jurisdictions they have 201 compliance costs to absorb.

So what's the, the question then is what's the core proposition, and I'd ask any of the government people to comment on that.

BARBARA WELLBERY
If I could take a crack at that. First, let me just clarify that I didn't mean to suggest that deference is not viable at all. I think a limited form of deference under limited circumstances is viable.

As to what the incentives are, I'm glad you asked the question. That's one of the things I cut out in my efforts to speak within my allotted time. I think the incentives are that this market will not reach its full potential without there being some provision for resolving disputes. The incentive is, that businesses will do far better if they can make consumers feel confident and comfortable shopping online by providing these codes of conduct and these ADR mechanisms.

When catalogs first came along, I think there was a reluctance to shop through catalogs because you couldn't feel the goods, you couldn't try them on, certainly for clothing, you couldn't see them, you couldn't touch them and returning them was a hassle, and you didn't know whether you'd be able to return them. And eventually catalog companies caught on to that and they made their return policies extremely liberal, and they even started providing labels so you could send the things back easily, and then many of them also paid for shipping when you want to return something. I see the same kind of evolution as being a necessary evolution in the Electronic Commerce market. So that's where I think the incentives will come.

LISA ROSENTHAL

Yes, I agree with Barbara, and I think there's also the other incentive. Governments have prosecutorial discretion, and it's very unlikely that we're going to bring a case against a company that's satisfying its consumers. One of the main ways we determine whether or not to bring a case is whether or not we have consumer complaints. So if businesses are keeping

their customers happy through effective codes of conduct by providing the types of services the consumers expect and by resolving disputes, there's really no role for governments there, and I think businesses can enjoy, in a practical sense, the deference of governments.

ROGER COCHETTI
Dawn and Taizo, did you want to comment in response to that question?

TAIZO NAKATOMI
Yes. OECD did a survey on Codes of Conduct last year in ordinary commerce not for the e-Commerce, but among the questions asked was what do companies expect to gain from codes and here are some examples of their responses. One company responded they wanted to show good precedent for others, and another responded that integrity gained from codes is an advantage to company’s employees and shareholders, also, a company responded that they have found the standards resulted in higher quality work environment and in higher quality products.

Though these are not for electronic commerce, I think this can give some suggestions.

ROGER COCHETTI
Thank you. Are there other, or would other members of the panel have questions they'd like to pose?

ELIZABETH BLUMENFELD
I don't want to ask a question, I actually want to ask permission, even though I'm not a chief, I'm just a peddler --

ROGER COCHETTI
Absolutely feel free.

ELIZABETH BLUMENFELD
-- if I could comment.

ROGER COCHETTI
Yes, of course.

ELIZABETH BLUMENFELD
I think the way you phrased your question was interesting, the concept of 200 laws plus one more law or set of codes to, or code to adhere to, so that there's actually an increase in amounts, there's 201 things to worry about.

I would sort of flip it around and say to the extent that there is a code or set of practices or standards that are minimally acceptable and hopefully more than minimally acceptable from a consumer and from a governmental point of view as acceptable e-Commerce practices, that you don't ever have to get to the question of what laws applies because to the extent the code is followed, there's not going to be complaints; to the extent the code isn't followed but there is, as I said earlier, the second part of the three-legged stool, there is dispute resolution mechanisms in place to assure that the standards are followed, then you, again you don't get to the question of the 200 laws that are at issue.

So I would suggest that a merchant has a huge incentive to get involved with self-regulatory programs as a way to avoid dealing with the jurisdictional morass until that is resolved, at some point they may be resolved and therefore here you can have the two in tandem, but until that point happens, the self-regulatory option is what's available and I think very useful and helpful for merchants.

ROGER COCHETTI
Thank you, let me open up to the audience, if anyone has questions at this point. Yes, if you would come to the microphone and introduce yourself and speak clearly so our friends in Paris can hear you.

CARA CHERRY LISCO
My name in Cara Cherry Lisco, and I'm the Director of Online Dispute Resolution Services at Square Trade. We currently provide dispute resolutions to five online market places, including eBay. So we have a user base of over 16,000,000 users. We've handled dispute resolution in 43 countries internationally. So I was just wanted to inject to reinforce what Barbara and, I think, Elizabeth was getting at, from our experience of having an online system, and a seal program that -- two big points.

Number one, we're finding that 80% of users who use our online dispute resolution service are more likely to go back to the marketplace and buy again and spend more money. And that's a very clear message that online marketplaces hear and respond to. So irrespective of whether it's an additional regulatory scheme that they now have to turn to, their eyes are lighting up and

they're very happy about that additional layer, if you want to call it a layer.

The second piece of it is the Square Trade seal holder experience, and right now I'd say we mostly have very loud anecdotal experience which is that people are finding with very clear positioning of a Square Trade seal their business is increasing. And you see that in, you know, small consumer items like antiques, and we're seeing it in large computer equipment consistently when people use a seal.

So that is what's going to make the commerce grow and the consumers happy. So it's working is the message. Thank you.

ROGER COCHETTI
Thank you. Any other questions or comments? Yes. Kaye, why don't you go first, and please introduce yourself and then it's her next. Speak clearly, please.

KAY CALDWELL
Kay Caldwell, I'm the California Policy Director for the Internet Alliance, and I have a question for Ms.

Lawson. I'm curious as to what kind of an ADR system you would envision that would be free to consumers but also free from the bias of being funded by businesses?

PHILIPPA LAWSON
I haven't figured that one out yet. I think, it looks to me like the only business model, viable business model is going to involve business funding. So you've got to figure out how to deal with that. I think Margo Langford may have some useful comments on that, how her service, Nova Forum is dealing with that issue.

I think clearly it's going to require very specific efforts by the provider to ensure impartiality of the ADR officials. You could set up some kind of governing body that has, say, relatively equal representation from various stakeholders to try to balance things that way. I think there are a number of measures that can be taken to try to create not only an actual impartiality but also the perception of independence and impartiality because it's not going to be independent if it's funded by business. So you've just got to do the best you can through all other means to ensure impartiality.

ROGER COCHETTI
Thank you, let's do one last question if we can, and if you would introduce yourself and speak clearly, please.

ADAIR DYER
Thank you, Adair Dyer, I'm a practising attorney and former Deputy Secretary General of The Hague Conference on Private International Law. I was interested in the point raised by Philippa Lawson that the, that I guess, I think you said that none of the ADR providers was paying particular attention to cultural differences, and I'm, I simply pose the question, aren't they going to have to do this if this process is going to go global? Thank you.

ROGER COCHETTI
I guess that is a question for Philippa or any member of the panel, are they going to have to be more multicultural? Philippa?

PHILIPPA LAWSON
Yes.

ROGER COCHETTI
Lisa, do you want to --

LISA ROSENTHAL
Yes, I could just say something that there's a white paper outside on the table that BBB has put out talking about the issues facing global ADR and one of the elements that we address is the need to absolutely figure out how to deal with these cultural sensitivities. I mean for, just as a simple example, if you have, if you're not dealing with online ADR but you're having ADR in a room like this, in some cultures, looking eye to eye with somebody is an expression that you are telling the truth, in other cultures it is not, that you should be looking down when you speak. So I mean, just that kind of a cultural difference, obviously that doesn't exist in the online world, but there are a set of cultural differences that do need to be addressed, and it's very very important to get that so it works correctly.

DAWN FRIEDKIN
Roger, if I can pipe in from Paris, it's Dawn.

ROGER COCHETTI
Yes, Dawn.

DAWN FRIEDKIN
I just wanted to add that that's essentially an issue that I think we're going to undertake pretty heavily in our ADR conference, dealing with socio-economic issues and cultural issues, I think it's been touched under most of the other four in talking about ADR. But I think being the OECD, and drawing a particularly international crowd, we expect that to be a good topic of debate, and I think the answer to the gentleman's question is definitely yes. I don't think anyone on the panel would disagree with that. I think in fact that is one of the main reasons we're looking at this topic. It is to reach across borders, which obviously means multicultural issues that will come up and need to be addressed.

ROGER COCHETTI
Thank you. In deference, in real deference to the following panel, I'm going to ask you to keep the comment very quick. Please introduce yourself, and a quick comment.

MARGO LANGFORD
Yes, thank, I just wanted to respond to Pippa's invitation to just give one maybe model out there. My

name is Margo Langford, and I'm Chief Operating Officer of Novaforum.com which is an online dispute resolution company, and we are working with industry associations, so that is another model that the Association or the industry group as a whole looks at the confidence issue and perhaps subsidizes some of the smaller players who can't afford it by creating a model. And we're looking only right now at pilots, so you know, this is basically -- stay tuned, maybe next year we'll know whether or not the pilots get off the ground, but there are certainly, are many industrial barriers to accepting online ADR, period, and technology is one of them, and fear of technology and how, even in the cultural context they use the technology when they're used to being in the room together.

So definitely these services are evolving and thank you for the opportunity to speak about them.

ROGER COCHETTI

Thank you. Please join with me in thanking our panel, in particular our panellists from Paris for staying up this late and providing so much information to us. Thank you, and I think -- are we going right to the next panel, ask the next panel to come up. Thank you.

The Draft Hague Convention: Cross Border Enforcement on Consumer Contracts

STEWART BAKER
Why don't we begin, we don't have too much time, let me introduce our panel. We're going to be talking about the consumer protection, consumer lawsuit issue and Article 7 of the proposed Hague Convention.

To discuss that, we have, moving from your left to right, David Goddard, a distinguished private practitioner from New Zealand, who has participated in the discussions about this provision and other aspects of the Convention for a considerable period of time, probably more time than any one else that you've heard from.

Next to him is Mark Bohannon, recently Chief Counsel for Technology at the Commerce Department and now General Counsel of the Software and Information Industry Association in Washington.

And, finally, Greg Wrenn who is the Associate General Counsel for International, for Yahoo! and who will be able to talk about actual practical cases involving

consumer claims.

I'm Stewart Baker from Steptoe and Johnson and I'm here to provide humour. I gave a speech that was actually quite prescient on this issue in Turku. Did anybody here go to Turku for the OECD Conference on Electronic Commerce? Yes, there's been a complete turn-over in generations. Actually, I think many people didn't survive the dinner speeches in Turku.

But in the course of that, I said, you know, if you're going to have truly international commerce and you're going to deal with consumers and understand and apply the consumer laws of every jurisdiction, at least the Europeans ought to be familiar with the rules that apply in the United States. And the best way to come to a familiarity with that is to review some of the product warnings that we have on our products. Because most of these warnings were put there because somebody lost a lawsuit. They lost a lawsuit because the consumer said you didn't warn me appropriately of the risks associated with this product and some reasonable things that I might do, or that I thought I could do, that turned out to be unwise using your product.

So, there's a quiz. You're the last one down, so you're going to have to help them answer these questions. And I particularly like participation from outside the United States because this is too easy for American lawyers in many cases. So, I'm going to give you a warning and ask you to identify the product that it applies to.

Warning: hot while in use. Hot while in use. What do you need to warn people about, what products? You have to guess now. Yes, you. What product do you think you could loose a lawsuit for not telling people, consumers, that this product was hot when it was in use? Yes, in the back.

UNIDENTIFIED PERSON
(inaudible)

STEWART BAKER
Pretty good. That's right. No, that one actually says allow to cool before applying to groin. This is a wood stove, a wood stove that actually contains that warning. All right, now you're getting the spirit of this. How about: Warning: may cause drowsiness. Sleeping pills, that's right. Nytol actually puts that

on their product.

Warning: contains nuts. Contains nuts. Now, where would you need that information? On a package of American Airlines nuts, yes. I think the directions on that say: 1) open package; 2) eat nuts.

How about this one, now, you guys, you're getting good so I'll give you a harder one. Warning: do not use while sleeping. This is an actual warning on a Rowenta hair dryer.

Warning: do not use on food. This is too hard too. Palmolive dish washing liquid says that.

All right. Two more and then we'll be done. But I hope there's a serious point here. Obviously, it wouldn't be immediately clear to a Swedish hair dryer manufacturers that they could be sued for failing to tell people not to use the hair dryer while sleeping.

At least in the United States, it's very common on hot days, sunny days to put sun screens in the front windshield of your car. Now, what warning, if you were the lawyer for the manufacturer, would you insist go on

the back of that product? Exactly. Remove before driving.

And the last, what warning would you feel obliged to put on a Superman costume? Yes. "Cape does not enable user to fly."

Well, that's an introduction to American consumer law, for those of you who weren't familiar with it. Now, I think we'll try to talk and I'll move down to sit in among the panel, in a structured dialogue about Article 7, what it means, what kinds of issues are likely to arise, what the practical problems are and the final decision that many of us have to make, what position should we take with the United States Government with respect to negotiating further with respect to this clause?

Let me just ask David, if he would, to give us a little overview of the history and the content of Article 7, so that we can follow along. It's in the materials, says Ruth, so we got the text already in the materials, this will be an overview. Thank you.

DAVID GODDARD
I think, in the time available, it's not worth spending a lot of time explaining Article 7. It's fair to assume that most people in the room are at least as familiar with this as I am, since far from having a long history in relation to this Convention, I simply have a short but vociferous one.

The basic structure of the Convention is important to bear in mind though and, in particular, the decision that was finally confirmed last year that it was to be a mixed Convention with approved or required jurisdiction, a white zone, prohibited jurisdiction, or a black zone, and in an area of grounds of jurisdiction that fit in what has been called the grey zone, and I prefer to think of it as the *status quo* zone where national law continues to decide whether or not national courts will exercise jurisdiction and it is left to the national law in each of the contracting states to decide whether or not to enforce the resulting judgments.

Against that backdrop, the two articles that are critical when thinking about consumers are Article 4 and Article 7, and they're in the materials, as has

been pointed out.

Article 4 is the basic provision on choice of forum and that says that, subject to article 7 and a few other exclusive jurisdiction provisions, a choice of forum by parties will be respected. The courts of the chosen forum have jurisdiction and, as it becomes clear when you read further into the text, no one else ought to exercise jurisdiction.

Perhaps another thing that's worth flagging is one of the provisions in Article 18, the list of prohibited jurisdictions, which says, normally, you can't exercise jurisdiction based on the plaintiff's habitual residence or nationality, or various other criteria.

Into that general framework comes a special provision for consumers, Article 7. And what it does is that it says: as an exception to what is otherwise a prohibited jurisdiction, habitual residence of the plaintiff, consumers can sue at home, it's very much the European, Brussels Convention model, of course, very familiar to many people in the room.

And a choice of forum clause will be ineffective

against a consumer, unless it's entered into after the dispute has arisen. The key conditions, first, you must have someone who is dealing in the course of their trade or business activity, professional or trade activities, the non-consumer and someone who isn't, your consumer.

A lot of discussion in the context of electronic commerce is focused on those two paragraphs, (a) and (b) in Article 7.1. The conclusion of the contract must be related to activities the defendant has engaged in in the State. I think it was a preposition missing, or directed to that state in particular, soliciting business through means of publicity.

And secondly, the consumer must have taken the steps necessary for the conclusion of the contract in that state. We can spend a lot of time trying to work out what those mean and whether they are helpful criteria or tools, but perhaps someone else should have a go at that first.

STEWART BAKER

Mark, do you want to offer your views on this?

MARK BOHANNON
Well, with regards to my views on the... is there a particular aspect you want me to focus on?

STEWART BAKER
Yes, well, let's talk a little bit about what the scope of this is, the meaning of "consumer", the definition I'm giving to "consumers", the predictability of knowing when you're covered and when you're not by Article 7.

MARK BOHANNON
Well, I actually think that is a very good question, I'm not sure we know entirely what is and what is not covered and I'll be very careful in saying that because one of the, I think, issues that we have to all be comfortable with in moving forward is whether in fact the Draft Proposal represents a consensus among the stakeholders, that this is in fact the best solution both in the online and the off-line world.

Let me just take one example of where, I think, there may be potential confusion in which in order to move forward there needs to be a consensus. And Mrs. Palacio raised the question early this morning, "What

is a consumer?". Assuming that none of us in this room wants to use Justice Potter Stewart's measurement that, of course, we all know one when we see one, we, I think, are put in an interesting position about what it means, at an international level, to know what a consumer is.

This is a difficult concept, even in national laws. It's important to point out, as David said, that in fact, I think the Draft Hague Provision has made a choice about a particular way in which to define a consumer. And as David said, in the context of the Draft, a consumer is a plaintiff who concluded a contract outside his or her trade or profession.

I will point out, if only because, I think, there are different definitions that there are other definitions that are out there, which point to, I think, the complexity of resolving this issue. For example, the Vienna Sales Convention which, if you're not familiar with it, excludes consumer contracts for the sale of goods. It defines a consumer contract as one in which an individual bought for personal, family or household use.

It is not surprising that perhaps the Hague Draft Convention more closely resembles definitions used in the '68 Brussels Convention and the Vienna Sales Convention on the sale of goods, reflects the definition that is found in the United States Uniform Commercial Code.

I think even though the two definitions suggest that there's a different emphasis on what is trying to be dealt with here, are we trying to, in fact, deal with rules that affect a particular person, who may have a consistent definition him or herself over time? Or are we trying to develop rules about a particular kind of transaction?

This may be a somewhat, depending on your cultural orientation, a Talmudic or Jesuitical discussion, but at some level it does reflect different historical legal systems and how they are trying to deal with this. I think, though, it is a useful example of some of the challenges we're going to face in trying to reach consensus and I suspect it will be a subject that will be further discussed in the next year or so.

STEWART BAKER
David, let me ask you a question about the scope of Article 7. You read the provisions and they seem to be distinguishing between consumer's habitual residence and a test that's more elaborate but, I guess my question is: if you're selling products on the Internet, will the consumer ever fail to meet this test in their habitual residence or, at least, fail in a way that is provable on the part of the merchants?

Of course, the consumer has to take steps necessary for the conclusion of the contract in the statement which he or she sues, but if he says he was at home when he did it, it's a little hard to prove he wasn't. And then this question of concluding the contract is based on... as related to trade or professional activities the defendant has engaged in, that is to say you are a merchant, and directed to that state in particular, soliciting business through means of publicity.

It means the publicity would presumably include a Web site, so if you have a Web site, it's accessible by the consumer, can they always sue in their habitual residence?

DAVID GODDARD
I don't like to spend too much time trying to conduct a fine-grained analysis of these provisions because I think the consensus that's emerged from discussions is that they definitely need to be worked on in their application to electronic commerce.

But I think it's fair to say that a number of people have suggested that Article 7(a) certainly will always be satisfied where someone buys online. And that article (b) normally will be, I mean if you exclude situations like my buying books from Blackwell's Bookshop, in the evening while staying in a hotel in San Francisco, I guess you could check my airline tickets at the moment I'm deprived of a protection I would have shopping on the Internet that I have when I shop at home.

It's not immediately apparent to me, the relevance, I should say, of the distinction why I deserve more protection when I'm in Wellington than when I'm in San Francisco, when I deal with a merchant in Oxford, England. But I think it will normally be satisfied, it's not much of a restriction.

STEWART BAKER
What about the definition of consumer, I think Mark has raised some interesting questions about that, have some of those been resolved by case law under the Brussels Convention, by systems of law that an American may be less familiar with?

DAVID GODDARD
I'm also less familiar with many of them and there are people who are far better placed than I to answer that in the audience.

I think the question of what is the most appropriate definition of a consumer for policy-making purposes is going to depend partly on the particular policy purpose, but is never going to be a simple task. A lot depends on what you're doing with the definition.

And one of the sharp issues here, I think, about Article 7, is that basically consumer cases will always be somewhere in the white zone. There's always an approved or required jurisdiction and you've got this borderline which is quite difficult, which moves and in particular you've got a choice of forum clause which moves things from the "choice is effective", part of the white zone to the “habitual residence prevails” part of the white zone.

There is no situation where we can say: oh! we've got a conflict between two different approaches and two different legal traditions and it may be that we can't resolve it in our Convention at all. I think that's one of the reason this is so contested, why it matters so much.

If you're using the definition, for example, to move things into the *status quo* zone to say: this is too hard, we haven't got a solution yet, we're not going to touch it here. It may be that a broader definition is more acceptable and that the boundary line will be less contested.

STEWART BAKER
Do you think it's fair to say that, as currently drafted, if a merchant is selling on the Net, he really can't be... he has to assume that when he sells to someone that they're going to have the protection of whatever their habitual residence is. He can't be sure they're not a consumer; he can't be sure that they're not in their habitual residence; he can't, certainly

can't be sure that he's going to be able to say that he wasn't really soliciting business in that jurisdiction.

DAVID GODDARD
We do get back to the points that Catherine Kessedjian made this morning about, was it negative selection? Catherine, the obverse of targeting, the idea that you can explicitly say that there are some jurisdictions you don't want to deal with, coupled with the idea that you can rely on disclosures by the consumer. They are not present in the text at the moment but it was an idea that has enjoyed a lot of support, for example, in the meeting in Ottawa.

Now, there were also reservations expressed at the Geneva Round Table about that; concerns that people would simply say they came from somewhere which enables them to deal at the site, and particularly if you're selling services online, you can't, in general, know whether that disclosure is accurate or not.

Many present were comfortable with consumers or people who made an inaccurate disclosure living with the consequences of that. But there were some people, I think particularly representatives of some national

regulators who wanted to leap to the defense of their own consumers, even if they have been a little careless about where precisely they lived in the course of the transaction, if they were harmed.

Subject to that level of commitment to protection of consumers who are happy to make deliberately incorrect statements, I think that merchants get some comfort from an ability to rely on disclosures of habitual residence, but you're driven back to what was referred to, I thought, very helpfully by Barbara Wellbery about the balkanisation of the Net at that point because you really will get sites that won't deal with all sorts of countries.

You will find that, I suspect, many merchants who will consider it's just too much trouble to find out what the laws in relation to consumer protection are of small distant countries like New Zealand, let alone Samoa, where it will be extremely inconvenient to have to defend oneself.

And the risk is that having suddenly obtained much better access to books and music and all sorts of other services than I have enjoyed in the first 35 years of

my life in New Zealand, I'll be reduced once again to combing bookshops and music shops with desperate frenzy in every spare hour when on trips to San Francisco and other better-served cities.

STEWART BAKER
It's true and I won't be able to get copies of "Footrot Flats". That's a New Zealand joke, you have to be there.

DAVID GODDARD
Or maybe not.

STEWART BAKER
Let me turn to Greg and ask if you could give us sort of a view, a practical view of the kinds of cases that actually arise in which consumers have claims either against companies like Yahoo! or in the course of auctions against other consumers. What sort of cases are we actually talking about here online?

GREG WRENN
It's quite interesting. I used to think back to the days where I had a practice at a firm and then an in-house practice with a software company and I had, my form files were trademark, copyright, licensing, preliminary injunctions and now they're sex, alcohol, gambling, sedition, you know, so it's...

STEWART BAKER
That's a step up.

GREG WRENN
I don't know if it's a step up, but at least it's a broader focus. So, we've seen just about everything. I hate to say that because you're just tempting faith.

But what's very interesting, obviously, Yahoo!, as a portal, is more of a platform for people to come and communicate, and engage in commerce and things like that. We have over 20 international properties, so there's a Yahoo France, a Yahoo Singapore, a Yahoo China as well as Yahoo.com, which is really focused on the U.S. market.

Disputes and issues that really fall in the e-Commerce, what you would consider e-Commerce, are pretty small. We have tons of people upset with defamation, defamatory statements as they say have been posted by them and particularly the UK, UK claimants who keep wanting to go after dot.com and nobody understands the statutory stuff here, so. But it's a whole range of this kind of content issues.

And those are particularly troubling in a jurisdiction context where it falls into what some North American cases have made a distinction into active and passive sites. Where it's just information posted and that constitutes a violation on its own, what's the right jurisdiction to ask.

On truly commerce, like you say, auction disputes and things like that, it is relatively small. Again,

because Yahoo! does not engage in a lot of the commerce directly. We are the platform. It's usually between the buyer and the seller, and there are lots of fraud disputes and things like that. We've not been drawn into the fray on things like product warranty claims that are different in Germany than they are in the United States.

But, certainly, sellers who are engaging in that kind of commerce need to understand that when they start shipping things, it's another more difficult question than when you're talking merely about services. And, again, for Yahoo! directly, the things that we would be concerned about and that we take a lot of efforts to try and address for consumers understanding that with different properties, Yahoo Germany, for example, we got to look at German law.

You know, you worry about limits of liability, if the site goes down for three hours and somebody can't get their e-mail or some business can't engage in their auctions. We've seen very very little along those lines.

But what is becoming a much more troubling problem is

when there are attempts to assert jurisdiction beyond the market that's targeted by the particular property. And that, we got a lot of. It isn't necessarily everybody coming to Yahoo.com and complaining about what's on the U.S. site. We really have it potentially for all of our properties.

STEWART BAKER

I want to come back toward the end and talk about ways in which you can actually enforce some of these restrictions and how well that works.

STEWART BAKER
But let me ask Mark, do you thing that these rules are fit with existing international norms and U.S. law on, you know, when you're covered and when you're not by a particular consumer law.

MARK BOHANNON
That's an important question and it's an important question because, obviously, we need rules that work on the Internet as well as off-line, so that we are not being too schizophrenic in our daily business lives.

Let me actually answer your question as a two-part question because, although I am a North American, I do not necessarily assume that U.S. rules are or should be inherently the international norms. So, let me try to respect the view that we are, in fact, trying to come together to reach a more global perspective on all this.

With regard to U.S. framework, when it comes to the specific issue dealt with in the Draft about the choice of forum in consumer contract clauses, I would say that it is not consistent with at least the model in which the U.S. law deals with this. The simplest way, in my

view, to explain U.S. law in this area is that the choice of forum in a consumer contract is respected, subject to certain important public policy considerations. There are a number of different cases that come up with a formulation; for purposes of this discussion, let me just say that I think there is a general coalescing around a standard that the choice of forum cannot be unjust, nor unreasonable.

The important thing to understand about the way U.S. law works is that it is not a mandatory rule in the United States, that there is still a choice of forum, as I said, subject to certain public policy considerations. So that I would speculate that in a situation, if we were to take the cases where the choice of forum is in fact challenged if there's a dispute or other issue arising in a consumer contract with business, my guess is that the consumer location is probably respected eight out of ten times. That's a personal view, not based on any scientific evidence but just an instinct on my part based on the standard of not being unjust and unreasonable.

The important thing is that even if the outcome comes close to what a mandatory rule would be, it is still

flexible and the facts of the situation are very important and it all depends on whether in fact there's an actual challenge to the choice of forum clause and does not operate in terms of an overarching judicial requirement here.

With regard to other countries, much like David, I feel like I'm on thin ice though, so I do feel it was interesting that Doctor Silveira's report this morning suggested that in the context of international jurisdictional consumer, that there seems to be some recognition that so long as consumers consent, and clearly I'm not in a position to talk about what the nature of that consent is, that at least in that Latin American context, there may be more flexibility about choice in consumer contracts.

I guess, to round out the answer to your question, in terms of understanding international norms, I guess the really hard question is with regard to Article 7. Does it even comport with the current EU law because I think certainly, if one understands the history of this proposal that is currently discussed, it comes out of a European tradition and the European norm in this instance.

At the risk, as we were taught in law school, of slicing the baloney way too thin, let me actually be a bit provocative and suggest that in fact the Hague Draft does not comport with existing EU text and perhaps not even EU operation. Let me give you a couple of examples.

As David said, the Hague Draft says that a consumer may choose or a consumer may be sued only in his or her home nation, which is his or her habitual residence. The existing law under the '68 Brussels Convention doesn't say that. What it says is that a consumer may bring an action in the domicile state, either of himself or of the business.

Now, in U.S. law, there is a difference between domiciliaries and habitual residences. I am not in a position to say whether that distinction is, in fact, the same in a continental civil law or general European notion, though I do believe that there are other developments to suggest that they are very different. But, even under existing EU law, the consumer can sue either in the business' home state or in his or her home state as a consumer.

The Hague Draft says that a consumer can only sue the business in the business' home state only after dispute has risen. Again, maybe not a significant difference, but I do want to point out that even the Draft suggests a difference comparing the EU law.

There's some other examples, but I think it's important, again at the risk of being too provocative, I actually think it's important to see the Hague Draft and the '68 Brussels Convention as non-identical twins. They are the same general thrust but they are not the same. And I think, in my humble opinion, that what we are seeing in the current Hague Draft is more closely aligned with what we are seeing in the Draft Regulation on the Brussels Convention, which was more thoroughly discussed this morning.

So it doesn't meet international norms. The question is that there may not be a pre-existing international norm in this area. Whether it reflects even existing norms, I think is an open question and that then has implications for whether, on a consensus basis, moving forward on this represents a step forward or perhaps there needs to be a little more clarity and thought given on this.

DAVID GODDARD
As a matter of fact, if I could just make one short point there and I suggest that the problem may be the accessibility of our text rather than the content of it, but certainly consumers do, under this Draft, have the option of suing either in the defendant's habitual residence, under Article 3, or the ability to exercise the right to sue in their habitual residence, under Article 7. Article 7 doesn't override that option and one could imagine other fora some of the contractual ones also being available in some situations to a consumer.

That's less plausible, less likely, but critically, Article 7 is cumulative with the right to sue the defendant, the business in its habitual residence as well.

MARK BOHANNON
[recording suspended] ... understand if in fact, and we will get to this later, that the Brussels Convention and the Rome Convention continue to exist in confluence with the Hague Convention, whether there is a significant difference between domiciliaries and habitual residences, there is in the United States and so this

may not be an entirely academic question.

DAVID GODDARD
My understanding is that to some extent the concept of domicile falls to be determined under national law for the purposes of the Brussels Convention, but there's no significant difference, it's not the common law concept of domicile by any stretch of imagination and that's why in England, for example, in the legislation, giving effect to the Brussels Convention there, they have a special purpose definition of domicile, which is nothing like our traditional common law concept and much closer to the idea of habitual residence.

STEWART BAKER
We've got a fairly short period of time left, so I'd like to move to the question of what we ought to be doing, what potential solutions to some of the problems that have been identified with the Draft in its current form can be implemented. I'm struck by one point that I didn't, I haven't heard maybe at... which Peter Swayer once described as the elephant versus the mouse provision.

He was making the point that by and large, elephants

doing business on the Internet are subject to the laws of all of the jurisdictions that traditionally would assert authority over them. Ford Motor Company and Yahoo! and America Online are not going to be able to say: we're not going to pay attention to the law of a country in which we're doing business, they're going to have to comply.

If you're just selling jewellery on a Web site and you employ yourself alone, there's a good chance that authorities of countries other than the one in which you live are going to have trouble reaching you and imposing their jurisdiction on you. There's been a lot of talk about how this adds to the plight of the small seller. But maybe the small seller currently has a significant advantage in that, under current rules, where there's so much doubt about the ability of, say, Germany to assert, to enforce its consumer protection law against a small Oakland seller of jewellery that, in fact, that Oakland seller doesn't really have to worry very much about what German Consumer Protection Law is, even though Ford Motor Company does.

Enacting this in the United States though, would make it automatic that German Consumer Protection judgments

would be enforced against Oakland sellers of jewellery on the Internet and would change that balance. So, it may be that one of the options is to say: let's leave the situation as it is, let's not try to write new rules, let's just let them sort of hobble along as they currently are. Reactions?

DAVID GODDARD
Reactions to that would take not only the time left to us but also the time used by the prior panel and probably the one before that as well and everyone would have left long before we finished.

But a few core observations. On paper, maybe it redresses the balance but again you've got to look at what these small businesses are selling and how often consumers are going to go to the trouble of taking steps in their home jurisdiction, one lot of court proceedings, and then enforcement steps in a second jurisdiction.

It's the sheer unreality of that and I speak as someone who sends out bills that no consumer would want to receive and as someone whose house redesign was recently mixed up by a surveyor and had the even worse

experience of receiving bills from lawyers, which gave me a completely new perspective on litigation, I'm much less keen on it now.

And there was quite a large dispute, the surveyor had made a huge mistake and even so it was marginal whether or not to sue. You don't simply because you've received some jewellery that has, you know, really high-grade red plastic rather than a ruby in it, unless you're dealing in stones of enormous worth. It's just like when you buy a gemstone on holiday in Sri Lanka and get home and find out it's red plastic. You're not going to chase that either, you'll just put it down to experience, and don't do it next time you go back. You buy things at home or for a small amount.

So I think ADR is the key from a practical perspective. More and more I think that ADR is the key and whatever provisions we have in here, functions as a backdrop of some relevance but not critical relevance in relation to consumers.

So, I actually become less exercised in one sense about the content of this clause as we move on, but not completely unexercised by it. We still need to pay

intelligent attention to it because it will matter in some cases. At that point, we have the trade-off between predictability on the one hand, a virtue which Catherine emphasized this morning and, on the other hand, the ability to pursue appropriate risk allocations in particular cases, the virtue of flexibility, the virtue of not answering too soon and too firmly a question that we don't yet understand completely, let alone being confident that we have the answers to at this stage.

So, I, myself, think we need to search for something which tries to balance predictability but not at the price of flexibility, not at the price of being able to learn as we go forward. And I am very attracted to some of the options that have been put forward in the context of the Hague Discussions about this, there was some... and we haven't got time to get through these in detail, but they're in some of the papers that have been produced, that are on the Hague Conference Web site, Catherine's paper, one of the primary documents for a meeting earlier this year, summarizes them. There's now a report specifically on the Ottawa Meeting.

There was a proposal in Geneva, which suggested that countries could say: our consumers, consumers habitually resident here can sign effective jurisdiction clauses and there might be conditions on certain things like disclosure, like ADR options. One could imagine conditions of that kind.

Another possibility is to say: well, we will keep Article 7 as a default rule, but if there's a conflicting and inconsistent choice of forum, we'll move that whole dispute into the grey zone and we'll say: we don't want to impose answers for now because it's so hotly contested, because we're not sure of the answer. It's better to preserve the *status quo*: to say - well, let's leave all that to national law.

And, finally, and I certainly haven't got time to go into this in any depth at all, there's been a suggestion that a more limited convention might be the most reasonably achievable at this time, one which reflects a high degree of consensus on the approved zone, the white zone; a high degree of consensus on the black, and leaves much more in the grey.

I think, at that point, we'd find that a lot of these

consumer issues should remain in the grey. We didn't solve the issues, we didn't create any more predictability, neither did we make anything worse. We left it to the practical answer of ADR in most cases and to the wisdom of the next generation, to address this issue, Stewart.

STEWART BAKER
Let me summarize the choices that you've put before us. ADR, the provision allowing some jurisdictions to say "we allow consumers to make their own choice", I think that could be characterized as allowing countries to say: we'd like to screw our own consumers, but not help our own businesses at all.

DAVID GODDARD
That's not how I would put it.

STEWART BAKER
The third is to allow people by choice of forum to move into the grey zone, out of the white, out of the consumer choice, white. And the fourth would be to vastly expand the grey zone in the entire Convention.

DAVID GODDARD
The *status quo* zone.

STEWART BAKER
The *status quo* zone, yes. Mark, a thought on those options?

MARK BOHANNON
At the risk of avoiding your question, I actually think that there's a more basic issue that, I think, we need to be aware of when we look at Article 7. And whether it's any of David's alternatives or even to follow on to the prior panel, which Roger led, I think we need to be aware that there is not a consensus yet about how Article 7 really treats and here I actually want to use the term that the Europeans are using "Out-of-court dispute settlement" because I think that really frames the issue. Are we going to have, as a first resort, governmental judicial responses or are we going to allow those out-of-court mechanisms that provide confidence to everyone to operate?

In saying that, I actually think that David and I agree on one thing, which is that the out-of-court dispute settlements are reality. I even go so far as to say

that, in my preview, the question is not "if" but "when" and "how" they develop. My own personal view is that it's no longer a question about whether they are going to be done. I think the real debate and the real effort needs to be in ensuring that those get going, that everyone has confidence in them because I think, regardless of what we do, they will be there. And I think that that is the more important way to spend our time.

I think it's important to understand that the Hague Convention, and particularly Article 7, and here our discussion really is about the consumer contracts, it was written, I think, without benefit of what has been a very intense, very quickly evolving discussion at the international level. I think it was almost beyond the capacity of any group to really factor in, in looking at a text like this, what have been some just tremendous developments in this area.

It's important to walk through how the Hague Convention Draft deals with this question of out-of-court. In Article 1, arbitration and its proceedings, and that's literally the phrase that is used, are excluded from the scope. The context of this is that,

of course, the drafters of the proposal were quite knowledgeable that in fact arbitration is a vehicle used under the New York Convention. It's also important to understand that it's a very unique term of art. It generally does not affect, in fact, I think the consensus generally is the New York Convention and the arbitration model that it prescribes or provides is not a consumer-oriented one, it is really a valid commercial practice. It is generally a framework that says that the parties in an international transaction have agreed to use arbitration under the New York Convention and the procedures and rules thereof, that it is binding, non reviewable, subject to very serious public policy or fraud or other cases.

So, that the drafters really had that orientation. And so, the only word that is mentioned in this context is really arbitration. As we all know in the discussion today is that there are a variety of out-of-court mechanisms that are being explored. Everything from mediation to ombudsman, codes of conduct, there are an infinite variety, I think, that we will see emerging on the global market place.

Again, at the risk of being provocative, I think that

there is not consensus yet, let me put it this way. That there is not consensus yet that Article 7 is drafted in a way that is facilitating of these out-of-court mechanisms. And I would actually go so far as to say that I think the current draft of Article 7 will not inherently preclude them, but I think that it will impede their development and I want to emphasize those two words very carefully.

There's nothing about Article 7 that bans out-of-court dispute settlement, although, I think, there is some uncertainty about what excluding arbitration and its proceedings really means, I'll leave that for another day.

But as Dean Perritt said this morning, and I wish I had talked to him before I did my presentation, which I will give to the ILPF to put up on their Web site, I think we're in a time where one has to be cognisant of these things and that the language that one comes up with, particularly one in which mandatory rules prescribe where a consumer can be sued or sue a business, actually need to take into account these non-judicial out-of-court redress mechanisms.

In my humble opinion, I think Article 7, because of its mandatory law nature, impedes in fact that alternative, whether before or after the dispute has arisen. I think the very nature of the way Article 7 is framed is that it only sees judicial options.

And remember, and this is a very important point, that in the Brussels Convention context, the similar provision that is found in the Brussels Convention is read in the context of the relevant Rome Convention provision which says that no consumer can be denied the rights of his home state.

I would posit that if the Hague Draft were adopted, that we would find a very important irony, which is that, under the existing European system, as Chris Kuner said this morning, some Member States allow arbitration as a first resort prior to going to court. Without dealing with that texture in the context of the Hague Draft, we may in fact be presented with a situation where if a consumer agrees consistent with its national law to participate in an out-of-court dispute settlement, that because the texture is missing in the current draft, that would be precluded.

I appreciate there might be a controversial or provocative statement but I think we need to appreciate that this is not insignificant in terms of incorporating these provisions of the Draft Convention into national law. And if they are drafted in such a way as to be exclusively mandatory, I think there's a distinct possibility that out-of-court..., the discussions that are going on at the very global level including incorporation into the Electronic Commerce Directive by the EU to explore these and the work of the United States Government and others will in fact be impeded, although I don't think they will actually be precluded.

STEWART BAKER

Thanks. I'm going to give the last work to Greg and I'm going to ask him to address some of the practical issues assuming we do have a rule like this but we allow for the possibility that merchants can refuse to do business with particular jurisdictions that they don't understand. How practical is that solution, what issues are likely to arise? Feel free to draw on your experiences in France and recent litigation, if you could give us some guidance on that, we would appreciate it.

GREG WRENN
Yes, we'll still be able to use Yahoo in New Zealand?

DAVID GODDARD
Well, yes, just don't put anything that offends the French on the site. That's my only suggestion.

STEWART BAKER
Rainbow Warrior is in deep trouble.

GREG WRENN
Well, there's obviously a host of issues going on here. Let me give you again from the trenches, practical perspective, issues you got to deal with. I thought the question earlier, I think it was Miss Rosenthal on the previous panel raised about Venezuela, it was entertaining because, of course, consumers in the U.S., for the most part, aren't going to know protection laws there, neither are most of the vendors that you would find.

And I think that just ultimately begs the question of, you know, is a party in a better position to know when it's an international transaction? And are we going to treat these things like door-to-door sales where

somebody is coming to your house or is this travelling in cyberspace. A lot of these things, I mean, obviously, there's going to be a lot of policies that need to come into play and that it's not always going to be clean lines. But I think there really needs to be a lot of room for just making analogies to historical practices, historical principles from the physical world.

When you come to San Francisco and you buy the book here, yes, we kind of joked about it but really, should you really have more rights if instead you travel in cyberspace to a U.S. site, you know it's a U.S. merchant and you acquire the products there. The problems that come in with that, before you answer it, because I'm sure you have, but let me just interpose a couple of problems around that.

As we've learned and some of you may have heard about the case we have in France, which is, really, raises a lot of issues and some very difficult ones too because it involves a subject matter that's not popular with anyone including Yahoo, but what we have there is a situation where on a U.S. site, run by a U.S. company, there's matters that are, you know, items that are

opposed to by third parties in a World War II collectable category, that display Nazi Insignia. You look at most of these things, they're not there, you would not think they're necessarily by pro-nazi supporters.

In any event, in the U.S., that's constitutionally protected speech and Yahoo! with some broad outside limits does not interpose and play censor. We don't assume consumers want us deciding what can and can't be posted, it's otherwise legal content. Despite the fact that it's a site targeted at the United States and it's in English, a French court has held that the mere fact that those items can be viewed by French consumers sitting at their terminals in France makes him, you know, gives him competence, gives him the jurisdiction, in French terms, to hear the case and apply French law and issue orders holding Yahoo! liable.

Now, part of what the case is focusing on now, which is what we told them in the first hearing, is that's technically impossible on the Internet to know with certainty where someone is coming from.

The only information that you have that's not provided

by the user - and therefore easily falsified by the user - is the Internet protocol address, a number that indicates where they are. That may be something that can be traced to an ISP that may be in a particular country, but not only is that easily avoided or faked by users, you find out things like, in France, some users of global networks like AOL France look to us like they're coming from Virginia when they come to our site.

So, not only do you have to look at some level and consider what realistically can merchants do, you know, they may not know the person's coming from Venezuela either, so there's real problems here that have to be sorted out. And it's going to be in the granularity, it's going to be in the details that any sort of solution is going to fly or not fly.

And while obviously consumer protection is a critical, a critical aspect and feature that has to be dealt with in all of these discussions, you also don't want to make the burdens on merchants so oppressive that you really take away the potential of the Internet whether it's the balkanisation issue or whatever.

And people need to keep in mind, I think the great potential for the Internet is not for the IBMs and the Yahoos and the large companies that have multinational presence and that sort of thing. It's for the little guy. It's for the smaller and medium size businesses that now have a way to be available and accessible to much broader markets, whether it's domestically or internationally, than they ever could before and that's the great potential for Internet commerce, that is the great potential for developing economies, existing economies and those are not necessarily people who are going to be sophisticated. And so, it's not necessarily correct, I think, to assume that they're always in a better position to know how these things work.

So, again, if you're going to say to them, you're going to hold them to all the laws of the two hundred some countries with Internet access, I think you will find them cutting off, limiting availability and things like that. And, ultimately, that result is necessarily good.

STEWART BAKER
30 seconds from Mark and from David.

DAVID GODDARD

I'd just like, I guess in my 30 seconds, to endorse what Greg said about paying attention to the detail, paying attention to the complexity of these issues, moving beyond the easy rhetoric of freedom on the one side, and promoting confidence and protecting consumers on the other. These are difficult issues, there are very different approaches and I suspect that, in a year or two, none of us are going to persuade people from other cultures that theirs actually was completely wrong all the time and ours is right. We have to work at how to accommodate that sort of difference and we have to work at how to accommodate the possibility that we might not be right, that our assumptions may be refined over time by experience. And we need to pay attention to the transaction costs of some of the fine edifices we're building and ask how important those edifices are in the light of the costs in invoking them.

In the light of all that, I guess I emerge with a plea that we make progress where we can. I think the Hague Project is enormously important, enormously valuable. It would be very sad if the things that we can't reach agreement about were to frustrate our making a substantial contribution to greater certainty, greater

predictability, lower costs in the future of the Internet.

So, let's achieve what we can, it's enormously important, it's enormously valuable, let's recognize what we can't achieve or what we can't yet answer coherently or comprehensively and park that. That would be my suggestion.

MARK BOHANNON
I actually somewhat want to agree but caution following David's proposal. The proposal, the Hague Proposal is incredibly complicated and I mean in this sense that the provisions of the Hague Draft cover a wide, wide range of transactions. We are obviously talking exclusively about the consumer context here. My relatively late participation in this process suggests that in fact the discussion and the exchange there is incredibly valuable.

I think, however, that if a final proposal is put forward that does not, in fact, reflect the consensus of governments, stakeholders including both consumers, private sector and others, I actually think that a lot of work will go into something that will be politically

impossible to pass in Member States, including the United States and other states. And we're already seeing things like provisions that suggest that members of the EU that currently are governed by Brussels and Rome may in fact opt out of the Hague.

I think it's important that we not set the stakes too high because if, in fact, we do this only because it is of value to the process that is going on, the dynamic and the international dialogue both between business, consumers and governments is very intense right now. There is not consensus on key issues about choice of forum, much less choice of law questions.

So, I think we need to value the discussion that has gone on there and the work that has gone on, but I think we need to be realistic that there is not yet an international consensus about some of these very, very sensitive issues and that if it goes forward for ratification by Member States, and that's of course the ultimate step, but even before that, trying to come up with a consensus document for the diplomatic conference, I think there would be some of the consequences that would not necessarily inure to the benefit of the global community, but that is one

perspective.

STEWART BAKER

Thanks. I'll just close with a word of warning from the manufacturer of the Sears steam iron: please remove clothes before applying iron. Thanks to this panel, it's been terrific.
