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# Online Arbitration of Cross-Border, Business to Consumer Disputes

## I. INTRODUCTION

The Internet has made it possible for businesses and consumers to engage in transactions around the globe without regard to geographic limitations. As of February 2002, approximately 513 million people worldwide had access to the World Wide Web.<sup>1</sup> Increasingly, this large population is being tapped for commercial purposes. Last year \$600 billion was spent online, and estimates are that over \$1 trillion will be spent online this year.<sup>2</sup> Although consumers make up the majority of the online population, most of the money spent in international commerce online is generated by business-to-business (B2B) transactions.<sup>3</sup> Nevertheless, as more online connections are made, especially in areas with large consumer markets such as India where the number of people online is expected to reach fifty million by 2004, revenue generated by business-to-consumer (B2C) commerce will begin to approach that generated by B2B commerce.<sup>4</sup>

The continued growth of international online B2C commerce, however, cannot reach its full potential without the existence of a fair, effective, and predictable means of dispute resolution. Currently, there is no such uniform system in place for international online B2C disputes. Development of an independent, self-regulating, enforceable online arbitration process for B2C e-commerce can help provide the stable dispute resolution system needed for cross-border B2C commerce to flourish. This Comment advocates the development of such a forum and attempts to identify some of the most important characteristics it should possess. Part I discusses the problems facing international online commerce, Part II will offer online arbitration as a solution for many of those problems, and finally, Part III will address how online arbitration can be imple-

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1. *How Many Online*, at [http://www.nua.com/surveys/how\\_many\\_online/index.html](http://www.nua.com/surveys/how_many_online/index.html) (Feb. 21, 2002).

2. *E-Commerce Times: E-Commerce to Rake in over USD 1 Trillion*, at <http://www.nua.com/surveys> (Feb. 21, 2002).

3. *E-Commerce Forum: Announcing OECD Forum 2000 Paris, 11-13 October 1999*, Winter 1999, No. 219 OECD OBSERVER (Jan. 7, 2000), at [http://www.oecdobserver.org/news/archivestory.php/ard/69/E-commerce\\_Forum\\_html](http://www.oecdobserver.org/news/archivestory.php/ard/69/E-commerce_Forum_html).

4. *eMarketer: Fifty Million Indians Online by 2004*, at <http://www.nua.com/surveys> (Feb. 21, 2002) (estimating that there will be 7.7 million Internet subscribers in India in 2004, up from 1.5 million at the end of 2002, and from 1.1 million at the end of March 2001. Internet usage also continues to grow in Hungary, Australia, and Latin America. *Id.*

mented as an enforceable means of international B2C e-commerce dispute resolution.

### A. *Development of Online and Offline International B2B Commerce*

A highly developed framework of international substantive and procedural law governing B2B transactions in the physical world has been invaluable in helping its online B2B counterpart to develop quickly. This international framework did not always exist. Centuries ago, as global trade emerged, the need for international dispute resolution mechanisms separate from domestic legal systems became apparent. Early in the history of global trade, when parties to international business transactions experienced a dispute, at least one of them had to subject itself to the laws and jurisdiction of foreign courts.<sup>5</sup> As a result, a preference began to develop for arbitration of international disputes as a way to avoid concerns about the parochial nature of national courts.<sup>6</sup> To enforce the international preference for arbitration, a series of treaties and conventions were negotiated between nations and drafted to ensure that awards rendered would be enforced by domestic courts that possessed the “power” to make their judgments effective.<sup>7</sup>

Although the growth of arbitration allowed parties to international business transactions to “level the playing field,” those parties still

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5. Kenneth Randall & John Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 599, 603 (1993); see also ALBERT JAN VAN DEN BERG, *NEW YORK CONVENTION OF 1958* 6 (1981) (explaining that at the beginning of the 20th century international commercial arbitration had to rely solely on domestic law and that many of those laws were unfavorable towards arbitration, antiquated, and also differed amongst themselves).

6. RICHARD GARNETT ET AL., *A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* 1 (2000) (explaining that arbitration became the dominant method of resolving private disputes in international commerce for two reasons: (1) arbitration can respond to the potentially divergent needs of disputants who may come from different legal and cultural backgrounds by not requiring one of the parties to have to submit to foreign courts; and (2) arbitration can be conducted in an environment of confidentiality).

7. VAN DEN BERG, *supra* note 5, at 6-10. The first multinational treaty in response to the growing use of arbitration was the 1923 Geneva Protocol on Arbitration Clauses (the “Protocol”). Article 1 of the Protocol sought to compel the recognition of arbitration agreements for existing or future commercial disputes by developing a list of arbitration clauses which contracting members to the Protocol had to enforce. *Id.* The Protocol achieved unpredictable outcomes and widespread dissatisfaction that led to the 1927 drafting of the Geneva Convention on the Execution of Foreign Arbitral Awards (the “Geneva Convention”). *Id.* The Geneva Convention was the first attempt to guarantee the enforcement of international contracts for arbitration in a country other than the one in which the award was made. *Id.* In time, however, the heavy burden that the Convention placed on the party seeking enforcement of the award to prove the conditions necessary for enforcement also led to unpredictable results. *Id.* Finally, in 1958, the convention still most widely used today for the enforcement of foreign arbitral awards, the New York Convention, was drafted. *Id.* The continued goal of the drafters of the New York Convention is to have a uniform international system of enforcement of arbitral awards. *Id.* The New York Convention therefore diminishes the impact that national law plays in the enforcement of contracts to arbitrate. *Id.*

tended to depend upon the law of one of the nations to provide the substantive rules of decision for the issues in dispute.<sup>8</sup> This, too, changed gradually with the development of substantive international law, based primarily on trade usages and practices.<sup>9</sup> As time progressed, informal trade rules were codified into international conventions such as the Convention on the International Sale of Goods, which provides a uniform substantive international law.<sup>10</sup> In 1991, when the restrictions on the use of the Internet for commercial purposes were lifted,<sup>11</sup> international B2B commerce had evolved sufficiently to embrace this new medium and the productivity tools it provides, turning the Internet into the important medium for growth of international B2B trade that it is today.

### B. *Lack of a Framework for International B2C Commerce*

Rather than being just another medium for international B2C commerce to utilize, the Internet itself has been largely responsible for the creation of this sector of commerce.<sup>12</sup> Before the Internet, B2C commerce between parties from different nations was extremely limited.<sup>13</sup> Internationally, online and offline consumer transactions continue to be governed by a patchwork of national laws, including domestic consumer protection laws of individual nations. Like the situation that existed centuries ago in the early development of B2B commerce, this non-uniform legal system makes it difficult for both consumers and businesses desiring to engage in online international B2C commerce to predict which law will govern their relationship.

As in all international marketplaces, the international B2C marketplace created by the Internet can give rise to its share of disputes.<sup>14</sup>

8. HANS SMIT & VRATISLAV PECHOTA, *INTERNATIONAL ARBITRATION TREATIES* 33 (2d ed. 2000).

9. Randall & Noriss, *supra* note 5, at 608.

10. *Id.* at 600.

11. Robert H'obbes Zakon, *Internet Timeline v5.6*, at <http://www.zakon.org/robert/internet/timeline/> (Mar. 1, 2002). In 1991, the National Science Foundation lifted the commercial restriction on use of the Internet. *Id.*

12. See Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 675 (explaining that the Internet's low economic barriers to entry and its global nature make cross-border transactions involving small entities and individuals more inviting).

13. See *id.* at 675-76.

14. Kate Scribbins, *Should I Buy? Shopping Online 2001: An International Comparative Study of Electronic Commerce* 6 (2001), available at [http://www.consumersinternational.org/CI\\_Should\\_I\\_buy.pdf](http://www.consumersinternational.org/CI_Should_I_buy.pdf) [hereinafter *Consumers International*]. In late 2000 and early 2001, this international team of researchers posed as ordinary internet shoppers and placed over 400 orders for goods and services with websites from around the world. *Id.* at 5. The researchers recorded the complete experience of using the site, ordering and receiving the goods, and then returning them for a refund. *Id.* They found that six percent of the items ordered did not arrive, that in thirty percent of the cases where items ordered did not arrive they were charged for those items

There remains, unfortunately, no fair, effective, and predictable forum available to resolve either the substantive or procedural aspects of these new international disputes. As a result, the vast majority of consumers do not exercise their rights to judicial redress for most problems they encounter in the online marketplace.<sup>15</sup> The ability of the Internet to support and expand international B2C commerce is curtailed by this lack of a framework for resolving disputes. This shortfall undoubtedly deters many consumers from purchasing luxury and other higher priced items online. Instead, those consumers choose to do business with “brick and mortar” stores located within their physical communities where effective means of resolving disputes are more likely to be available.

Consumers are not alone in their uncertainty about the international online B2C marketplace. Online sellers, the “B” in B2C commerce, are also concerned with the lack of a uniform, fair, effective, and predictable legal system governing online commerce.<sup>16</sup> Electronic businesses face enormous difficulties and inconsistencies when engaging in transactions directly with consumers located in different countries.<sup>17</sup> An E-Readiness Study conducted by the American Arbitration Association found that while most e-businesses are concerned about how disputes with international consumers will be resolved, the majority have not developed a plan for dealing with these inevitable disputes.<sup>18</sup> Many businesses concerned about having to resolve disputes in unfamiliar legal

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anyway, and that in nearly ten percent of the cases where goods were returned, the retailer failed to provide a refund. *Id.* at 5, 27-28. Researchers also found a variety of other problems that made the shopping experience less enjoyable. *Id.* at 26. For example, in seventeen percent of the cases where goods were returned, the refund took more than thirty days to arrive. *Id.* at 29. Moreover, nine percent of the items took more than thirty days to arrive, and difficulty in determining whether the order was actually placed the first time caused a few of the researchers to order the same item twice. *Id.* at 22-23.

15. Better Business Bureau, *A White Paper: Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution* 3 (2000), available at [http://www.ilpf.org/events/jurisdiction2/presentations/blumenfeld\\_pr/blumenfeld1.htm](http://www.ilpf.org/events/jurisdiction2/presentations/blumenfeld_pr/blumenfeld1.htm); see also European Commission, *The European Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes*, Doc. 98/257/CE, available at [http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/acce\\_just02\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html) (explaining that when things go wrong online most consumers do not pursue their right to legal redress).

16. See generally Philip M. Nichols, *Electronic Uncertainty Within the International Trade Regime*, 15 AM. U. INT'L L. REV. 1379 (2000).

17. *Id.* at 1380-40.

18. Clark, Martire, & Bartolomeo, *B2B E-Commerce Readiness Study*, available at <http://www.peeriq.com/aaahome/pressrels.htm> (July 12, 2001) (noting that in a survey of 100 senior executives of some of the largest companies in the United States, two-thirds expressed concern about a B2B e-commerce dispute with a major supplier and nearly half said such a dispute would impact their business). More than half of the respondents agreed that moving supply chains online would create new or different kinds of B2B disputes. Sixty-four percent of those respondents, however, said their company does not yet have a plan in place to deal with them. *Id.*

systems have simply chosen not to make their goods available to consumers located outside of their country.<sup>19</sup>

## 1. INCONSISTENT ATTEMPTS AT LEGISLATION GOVERNING ONLINE COMMERCE

There has been a growing international awareness by sovereigns of the need for the development of a predictable dispute resolution system to govern online B2C transactions.<sup>20</sup> Countries have generally tried to fill these needs via the following: (1) drafting legislation specifically designed to govern online commerce; (2) attempting to apply national laws to online activity; and (3) treaty negotiation. None of these methods have proven successful. Rather, they have produced a worldwide web of inconsistent legislation.

### a. National Legislation Governing Online Commerce

The European Union (EU) has been prolific in drafting laws designed to protect online consumers. The EU recently enacted an extensive Distance Buying Directive (the "Directive").<sup>21</sup> One of the rights contained in the Directive gives online consumers the ability to cancel any contract between parties at a distance within seven days after entering into the contract.<sup>22</sup> The Directive requires electronic businesses to prominently post a notice of this right on all areas of the site where consumers can finalize transactions.<sup>23</sup> The notice is often not displayed, however, and the right granted by it generally goes unenforced.<sup>24</sup> While seemingly a minor problem, this frequent disregard for EU law illustrates the general difficulty in drafting laws to govern electronic commerce. Further complicating matters, many of the commercial websites visited by consumers in the EU are based in the United States where the EU has little if any power to enforce its laws.

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19. Jennifer Schenker, *Europe Ponders Ways to Safeguard Online Customers*, WALL ST. J., Oct. 19, 1998, at A15 (explaining that when small and medium sized businesses are forced to comply with the law of every nation in which a possible consumer may be located, those business simply include a disclaimer on their web site that "[t]his service is not available outside of my home country," and that this type of solution is not in the consumer's interest); see also Scribbins, *supra* note 14, at 20 (explaining that many web sites simply choose not do business with consumers located outside of their country).

20. Stephen Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet*, 50 FED. COMM. L.J. 117, 119-20 (1997).

21. EUR. PARL. DOC. DIRECTIVE 97/7/EC Council of 20 May 1997, Protection of Consumers in Respect of Distance Contracts.

22. *Id.*

23. *Id.*

24. Scribbins, *supra* note 14, at 9.

b. Application of National Laws to Online B2C Commerce

Besides drafting legislation with the goal of regulating online activity, many European nations have also attempted to apply their domestic laws to online commerce.<sup>25</sup> For example, the EU has adopted a country of destination approach which makes the law of the consumer's domicile applicable as the law governing online B2C transactions.<sup>26</sup> Applying the country of destination policy online is often problematic because items available for sale online are available in all countries, at the same time. Any business that wants to engage in online commerce would have the impossible task of ensuring that its website conformed to the laws of all nations where consumers have access to the product.<sup>27</sup> Moreover, because the laws of different countries are often in conflict, obeying the laws of one nation can sometimes only be done at the risk of prosecution under the laws of another. The most recent case involving an attempt by European courts to apply the country of destination policy highlights the difficulties encountered.<sup>28</sup>

Yahoo!,<sup>29</sup> an Internet service provider and web portal organized under the laws of Delaware, allowed end users to post Nazi memorabilia on its online auction site in violation of a French law forbidding the posting of Nazi-related propaganda and memorabilia.<sup>30</sup> Upon learning of the offending content, La Ligue Contre le Racisme et l'Antisemitisme (LICRA), a French not-for-profit organization, sent a cease and desist letter to Yahoo!'s headquarters in California stating that "unless you cease presenting Nazi objects for sale [on the United States Auction Site] within 8 days, we shall seize [sic] the competent jurisdiction to force your company to abide by [French] law."<sup>31</sup> When Yahoo! refused to

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25. Ryan Morlatt, *The Cyberspace Showdown Jurisdictional Jurisprudence—The United States Versus the European Union*, 9 SUMMER CURRENTS: INT'L TRADE L.J. 89, 95-6 (2000).

26. See Annie Turner, Features, *E-Commerce: Faster than a Speeding Bullet?*, TIMES (London), Oct. 11, 2001, at 27.

27. Schenker, *supra* note 19, at A15. Remarks by an official in the European Commission's internal market about a study survey showing that "it is impossible to design Web Sites that comply with very distinct national laws in 15 countries." *Id.* That official was pushing a country of origin approach that was ultimately discarded because of consumer fear that the lack of harmonization of national law would encourage companies to set up shop in countries with the most lax consumer protections. *Id.*

28. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 145 F. Supp. 2d 1168 (N.D. Ca. 2001); Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Ca. 2001).

29. Yahoo!, 145 F. Supp. 2d at 1171 (finding that Yahoo! subsidiary corporations also operate Yahoo! sites and services in twenty other countries, including, for example, Yahoo! France, Yahoo! India, and Yahoo! Spain); Yahoo!, 169 F. Supp. 2d at 1183 (noting that Yahoo!'s regional sites use the local region's primary language, target the local citizenry, and operate under local laws).

30. Yahoo!, 145 F. Supp. 2d at 1171.

31. *Id.* at 1172.

remove the content, LICRA served process on Yahoo! in California and filed a civil complaint against Yahoo! in the Tribunal de Grande Instance de Paris (the “French Court”) for violation of the French statute forbidding the display of the Nazi-related materials.<sup>32</sup> Yahoo! answered the complaint, and the French Court issued an order directing Yahoo! to “dissuade and render impossible” any access by Internet users located in France to the Yahoo! Internet auction displaying Nazi artifacts via “yahoo.com.”<sup>33</sup> Yahoo! argued that it was technologically impossible for it to prevent the content from being viewed by citizens in France, and moreover, that removing the content would violate the right to free speech guaranteed by the United States Constitution.<sup>34</sup> The French Court, however, reaffirmed its original order and included an order that failure to comply within three months would result in a penalty of \$13,000 USD for each day of noncompliance.<sup>35</sup> LICRA then served Yahoo! with the reaffirmed French order via the United States Marshal office.<sup>36</sup>

In response to the order, Yahoo! brought an action in the United States District Court in California seeking a declaratory judgment that the French Order was not enforceable under United States law because the ban would infringe impermissibly upon its rights under the First Amendment of the United States Constitution.<sup>37</sup> The district court granted the declaratory judgment, explaining that although France has the right to pass laws for the benefit of its citizenry, the district court could not enforce a foreign order that violates the protections of the United States Constitution.<sup>38</sup>

Where laws of the consumer’s nation and the business’s nation conflict, and where there is difficulty enforcing laws designed to protect consumers, there will continue to be a lack of predictability in determining which law will govern the transaction, and other businesses will be left in the quandry Yahoo! faced. This problem, created by the EU’s country of destination policy, has the potential to recur because much of the online commerce today is between consumers and businesses located in the United States and the EU.<sup>39</sup> Rather than increasing the predict-

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32. *Id.*

33. *Id.*

34. Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

35. *Id.* at 1188.

36. *Id.* at 1185.

37. Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme, 145 F. Supp. 2d 1168, 1171 (N.D. Cal. 2001). LICRA unsuccessfully defended on the grounds that the United States district court lacked personal jurisdiction over it. *Id.* at 1173-75.

38. *Yahoo!*, 169 F. Supp. 2d at 1194.

39. *Out-of-Court Dispute Settlement Systems for E-Commerce: The Report from the*



ability of determining which law will apply, the EU's policy governing electronic commerce has created a rift between the two nations with the largest financial investment in online B2C commerce.<sup>40</sup>

### c. Treaty Negotiation

The conflicting European and United States views on how international consumer disputes should be resolved is also the reason for the current stalemate in attempts to draft a treaty that would decide which country has jurisdiction over electronic disputes between businesses and consumers.<sup>41</sup> On October 19, 1996, the countries represented at the Eighteenth Session of the Hague Conference on Private International Law (the "Conference") voted to include on the agenda for the next session the question of "jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters."<sup>42</sup> Then, on October 30, 1999, the Special Commission established at the Conference adopted the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the "Convention").<sup>43</sup>

Although various draft provisions of the Convention are in dispute, the most contentious provision is Article 7, which provides in part:

2. Subject to paragraphs [5-7], a consumer may bring [proceedings—an action in contract] in the courts of the State in which it is habitually resident, if: the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party concluded in that State, or directed to that State, [unless [that party establishes that:] (a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity; [and (b) the consumer has taken the steps necessary for the conclusion of the contract in that State.]<sup>44</sup>

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*Workshop Held in Brussels on 21st March 2000, April 17th, 2000 2, available at <http://ds-asis.jrc.it/ADR/ws-2103-report.pdf>.*

40. Morlatt, *supra* note 25, at 95-97 (explaining that the United States has consistently refused to develop hard and fast rules requiring disputes involving consumers to be settled in the nation where the consumer is domiciled, whereas the European Union has committed this policy to statute).

41. Paul Hofheinz, *Birth Pangs for Web Treaty Seem Endless*, WALL ST. J., Aug. 16, 2001, at A11.

42. Hague Conference on Private and International Law, *Final Act of the Eighteenth Session*, Eighteenth Session, 29, 47 (1999).

43. Hague Conference on Private International Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Oct. 30, 1999), available at <http://www.hcch.net/e/conventions/draft36e.htm>.

44. Hague Conference on Private International Law, *Summary of the Outcome & the Discussion on Commission II of the First Part of the Diplomatic Conference 6-20 June 2001*, Nineteenth Session, 7 (2001).

There are three alternative versions of paragraphs 5-7 under review. Alternative (a) would make paragraph 2 a default rule in which the parties could contractually select the forum in which the dispute would be resolved.<sup>45</sup> Alternative (b) would allow contracting states to take a type of reservation that would allow it to respect a jurisdiction agreement if it is entered into after the dispute arises.<sup>46</sup> Alternative (c) would simply include in the mandatory text of the Convention the statement that paragraph 2 applies unless the jurisdiction agreement was entered into after the dispute arose.<sup>47</sup>

Agreement on any of these alternates by both the United States and the EU is unlikely in the short term. Preventing agreement on a final version is the fact that the Convention adopted heavily from the Brussels Convention,<sup>48</sup> which is based upon the European view of how disputes should be settled.<sup>49</sup> During the revisions of the Brussels Convention, the European Parliament was emphatic that there would be no change in the rules of consumer protection, in which there is a policy in favor of customers having the ability to sue in courts of their habitual residence.<sup>50</sup> This European policy would eliminate alternative (a),<sup>51</sup> and delegates representing the interests of the United States are unwilling to accept either alternatives (b) or (c), arguing that provisions allowing online businesses to be sued wherever particular consumers are located would cripple the fledgling e-commerce sector.<sup>52</sup> On more than one occasion the United States has requested a break in discussions regarding the text of the Convention because of difficulty in reaching a consensus.<sup>53</sup> Consequently, this Convention may turn out to be merely an academic exercise rather than a means of determining the law governing future cross-border B2C disputes.<sup>54</sup>

The longer-term fallout from this type of national sovereignty conflict will be even more unfortunate. The Internet holds the promise of assisting citizens in many lesser-developed nations to compete more

45. *Id.*

46. *Id.*

47. *Id.*

48. Hague Conference on Private International Law, *Electronic Commerce and International Jurisdiction*, Prel. Doc. No. 12, 6-7 (Aug. 2000), available at <http://hcch.net/doc/jdgmpr12.doc> [hereinafter *Prel. Doc. No. 12*].

49. Christopher Kuner, *Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce* (Apr. 2000), at <http://ilpf.org>.

50. *Id.*

51. *Prel. Doc. No. 12*, *supra* note 48, at 1.

52. Hofheinz, *supra* note 41, at A11.

53. Arthur T. Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?* 49 AM. J. COMP. L. 191, 192-93 (2001).

54. *Id.*

effectively with businesses in developed nations. With a little bit of help from technology and the world community, it is not difficult to imagine a time in the near future when classic “single product” producers will be able to expand exponentially the consumer market for their products without the enormous costs associated with marketing and distribution. Certainly there will be huge hurdles to overcome in order for e-commerce to contribute significantly to raising the standards of living in underdeveloped nations. Nevertheless, the creation and development of a fair, efficient, and predictable system for resolving international B2C disputes, including those where the consumer is more sophisticated than the business, will help greatly when the other hurdles are overcome.

## II. A BETTER APPROACH: AN INTERNET BASED ARBITRATION FORUM

So far, countries’ attempts at governing electronic commerce have treated the Internet as another area within their jurisdiction to be regulated. Unfortunately for those countries, cyberspace does not recognize geographic borders and resists outside governance by its very nature.<sup>55</sup>

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55. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1375 (1996) (explaining that “the rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current territorially based sovereign”); see also LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999). Professor Lessig notes that:

In real space we recognize how laws regulate—through constitutions, statutes, and other legal codes. In cyberspace we must understand how code regulates—how the software and hardware that make cyberspace what it is *regulate* cyberspace as it is. As William Mitchell puts it, this code is cyberspace’s “law.”

*Id.* (citation omitted).

Professor Lessig uses America Online (AOL) as an example of just what he means. America Online is an online service provider—the largest in the world with some twelve million subscribers in 1998. With twice the population of Massachusetts (at least), AOL describes itself as a “community.” A large community perhaps, but a community nonetheless. . . . Within the limits of decency, and so long as you are in the proper place, you can say what you want on AOL. But beyond these limits, speech on AOL is constrained in a more interesting way. Not the constraint of rules. My point instead is about the range of permissible speech governed by the character of the potential audience. . . . There is no public space where you could address all members of AOL. There is no town hall or town meeting where people can complain in public and have their complaints heard by others. . . . The owners of AOL, however, can speak to all. Steve Case, the ‘town mayor,’ writes ‘chatty’ letters to the members. AOL advertises to all its members and can send everyone an e-mail. But only the owners and those they authorize can do so. The rest of the members of AOL can speak to crowds only where they notice a crowd. And never to a crowd greater than twenty-three.

This is another feature of the constitution of the space that AOL is, and it too is a feature defined by code. That only twenty-three people can be in a chat room at once is a choice of the code engineers. While their reasons could be many, the effect is clear. One can’t imagine easily exciting members of AOL into public

The better approach may be to view the Internet as an independent jurisdiction<sup>56</sup> that needs to be regulated by an interested international body rather than by any one nation or by treaties among nations. Application of traditional means of governance to online activity are often unsuccessful because the power of national sovereigns is derived from their ability to assert power over persons, and their jurisdiction is essentially defined by physical boundaries.<sup>57</sup> This is difficult to reconcile with the Internet's electronic state and lack of a physical presence.

From its beginning, the Internet has been an attempt at self regulation.<sup>58</sup> Prior to the Internet's emergence, local area networks run by private companies or universities developed their own internal sets of rules for use.<sup>59</sup> Communication was regulated and monitored by these closed, private forums. The rules set up by these entities were designed to facilitate their specific uses of the Internet.<sup>60</sup> Rules were based upon

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action. One can't imagine easily picketing the latest pricing policy. There are places to go to complain, but you have to take the trouble to go there yourself. There is no place where members can complain en masse.

[Another feature] of AOL's constitution also comes from its code. This is traceability. While members are within the exclusive AOL content area (in other words, when they're not using AOL as a gateway to the Internet), AOL can (and no doubt does) trace your activities and collect information about them. What files you download, what areas you frequent, who your 'buddies' are – all this is available to AOL. These data are extremely valuable; they help AOL structure its space to fit customer demand. But gaining the ability to collect these data required a design decision. This decision too was part of the constitution that is AOL – again, a part constituted by its code. It is a decision that gives some but not others the power to watch.

*Id.* at 66-69 (citations omitted).

As argued by Professor Lessig, it is the code writers that are defining the architecture within which we all function online. In fact, efforts by existing sovereign nations to "protect" their consuming citizens in the online world are simply doomed to failure. Enlightened governments will do far better to encourage their brightest consumer advocates to participate in the formulation of a fair, economical, effective, and predictable architecture for resolution of disputes in international B2C transactions.

In the meantime, existing non-profit providers of arbitration services need to open dialogues with technical standards organizations, such as the World Wide Web Consortium and the Institute of Electrical and Electronics Engineers. OASIS is a not-for-profit, global consortium that hopes to drive the development of e-business standards. It is currently forming a Legal XMLDR Technical Committee. The charter members of that committee may well be a good starting point for bringing together the Internet stakeholders required to make a global online arbitration forum a reality.

56. E-mail from John Perry Barlow, to John Perry Barlow (Feb. 9, 1996, 17:16:35), available at [http://www.eff.org/Publications/John\\_Perry\\_Barlow/barlow\\_0296.declaration](http://www.eff.org/Publications/John_Perry_Barlow/barlow_0296.declaration).

57. Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach, Potential Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 181 (1998).

58. Albert Gidori, *A Borderless World: Realizing the Potential for Global Electronic Commerce: Observations on the State of Self-Regulation of the Internet*, at <http://lpf.org/events/selfreg/> (last visited Dec. 31, 2001).

59. Bordone, *supra* note 57, at 182.

60. *Id.*

a community understanding of what was necessary for the most efficient functioning.

Self-regulation therefore, rather than signaling a lack of law, merely ensures that rules governing activity are tailored to the needs of those they will affect.<sup>61</sup> Government and industry alike have expressed a preference for allowing the private sector to lead the development of electronic commerce, with government involvement only where necessary to support this new environment.<sup>62</sup> Throughout history the most efficient systems for governing international conduct have employed a "needs based" approach.<sup>63</sup> For example, the "Law of the Merchant" was developed by merchants and based upon their own set of norms, customs, and rules that applied regardless of the physical jurisdiction in which they found themselves.<sup>64</sup> It addressed the specific concerns of merchants, their particular interests and needs given the nature of their trade, and the style of their nomadic lives.<sup>65</sup> The law worked because it combined respect for the law of the local territorial jurisdictions with merchant customs and practices.<sup>66</sup>

Similarly, the Internet has already developed a unique culture, where shorter response times are expected, and where basic principles of internet etiquette and other rules for communication have developed and are expected to be followed.<sup>67</sup> The means of resolving problems online must take these unique characteristics into account. A dispute resolution system that is responsive to the Internet's characteristics rather than one that seeks to impose non-familiar legal requirements and policies would be more effective in governing online activity, and could be useful in providing the predictable legal environment needed for international electronic commerce to flourish.

#### A. *Online Arbitration*

Online arbitration can provide the needed self-regulated medium for online, international B2C dispute resolution. A series of recent inter-

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61. David R. Johnson, *Industry and Governments Have Swapped Traditional Roles of Advocacy and Oversight in Shaping Internet Policy*, LEGAL TIMES, Oct. 12, 1998, at 28 (explaining that "in the world of the web, service providers are better than lawmakers at creating effective ways to resolve conflicts and regulate wrongdoing by users).

62. See generally A Framework For Global Electronic Commerce, a United States Initiative, at <http://www.uazone.org/gis/ecom.htm>; see also A European Initiative in Electronic Commerce, at [www.cordis.lu/espri/src/ecomcomc.htm](http://www.cordis.lu/espri/src/ecomcomc.htm).

63. Bordone, *supra* note 57, at 190.

64. See LEON E. TRILMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 101 (1983); see also Bordone, *supra* note 57, at 190.

65. Bordone, *supra* note 57, at 198.

66. *Id.* at 190-91.

67. *Id.*

national meetings discussing topics such as “Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution,”<sup>68</sup> “Out of Court Dispute Settlement Systems for E-Commerce,”<sup>69</sup> and “Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace,”<sup>70</sup> all include online arbitration as one means of resolving international B2C disputes. The prospects for the future of online arbitration are appealing because even groups unable to agree on other matters related to electronic commerce agree that a properly managed, out of court dispute resolution system could effectively handle the vast majority of the disputes generated in cross-border B2C commerce.<sup>71</sup> Although discussed in varying terms, the theme emerging from these conventions encourages the use of online arbitration as a means of providing consumer protection online where no mechanisms currently exist. Such encouragement suggests that online arbitration could achieve the required level of trust to be deemed a fair method of resolving online B2C disputes.

#### 1. HISTORY OF ONLINE DISPUTE RESOLUTION ATTEMPTS TO DATE

The first notable attempt at online arbitration was in 1996 with the Virtual Magistrate (VMAG).<sup>72</sup> The project was largely an academic exercise and was hosted by the Villanova Center for Information Law and Practice and funded by the National Center for Automated Information Research.<sup>73</sup> The goal of its developers was to provide a forum in which system operators could resolve disputes when third parties brought to their attention allegations of tortious communications appearing on their systems.<sup>74</sup> The VMAG attempted to accomplish this goal by providing a forum in which allegations related to the nature of alleged infringing material could be heard, and the question of whether

68. Better Business Bureau, *supra* note 15.

69. European Commission, *Out-of-Court Dispute Settlement Systems for E-Commerce: The Report from the Workshop Held in Brussels on 21st March 2000*, available at <http://dsa-isis.jrc.it/ADR/presentations.html>.

70. Federal Trade Commission, *Summary of Public Workshop, Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions, June 6-7, 2000*, at <http://www.ftc.gov/bcp/altdisresolution/index/transcripts.htm>.

71. Hague Conference on Private International Law, *Report of the Experts Meeting on the Intellectual Property Aspects of the Future Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Preliminary Doc. No. 13 (Apr. 2001) at <http://www.hcch.net/el/workprog/jdgm.html>. Interestingly, although the nations involved in the drafting of the Treaty could not agree on many basic provisions, they all were in consensus that international online dispute resolution systems should be developed. *Id.*

72. See generally Robert Gellman, *A Brief History of the Virtual Magistrate Project: The Early Months*, at <http://www.umass.edu/dispute/ncair/gellman.htm> (May 22, 1996).

73. *Id.*

74. *Id.*

the communication should be removed, decided.<sup>75</sup> The project designers envisioned a process in which a person with a dispute related to online activity would contact the project managers via e-mail with a complaint describing the problem.<sup>76</sup> The would-be defendant would then be contacted by the Virtual Magistrate via e-mail and asked to participate in the proceedings.<sup>77</sup> The project would then select an arbitrator to preside and the entire proceeding would occur online, with all documents and questions to the parties being submitted by e-mail.<sup>78</sup> The arbitrator would then render a decision via e-mail to the parties within three business days.<sup>79</sup> The project, however, did not have the success likely envisioned by its creators. The main reason may be that the process was voluntary and project managers had no coercive means of enforcing decisions. They had to rely on the parties to abide by the decision of the arbitrators.

Since the VMAG, a variety of commercial online dispute resolution systems have sprung up offering services ranging from online mediation to online arbitration.<sup>80</sup> The projects also range from completely non-binding on the parties to binding in the sense that although appeal may be taken to a court, without an appeal, the decision of the arbitrators is enforced.<sup>81</sup>

Online arbitration is also the only means of resolving domain name disputes.<sup>82</sup> The Internet Company for Assigned Names and Numbers (ICANN) was formed in 1998<sup>83</sup> in response to the problem of cybersquatting.<sup>84</sup> It is a non-profit corporation that operates under a series of understandings with the United States Department of Commerce.<sup>85</sup> A complaint is filed with any ICANN approved provider<sup>86</sup> when the holder of a trademark believes that someone is infringing upon the trademark by using the name or one confusingly similar to it in a top level domain

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. International Chamber of Commerce, *Out-of-Court Settlement of Disputes Concerning E-commerce Consumer Transactions: An Inventory of Current Approaches*, at <http://www.iccwbo.org> (Feb. 21, 2002).

81. *Id.*

82. See *Approved Providers for Uniform Domain Name Dispute Resolution Policy*, at <http://www.icann.org/udrp/approved-providers.htm>. (Mar. 1, 2002).

83. ICANN Fact Sheet, at <http://www.icann.org/general/fact-sheet.htm> (Feb. 21, 2002).

84. See, e.g., Philip G. Hampton, II, *Legal Issues in Cyberspace*, PLI/Pat 585 (2001) (defining cybersquatting as registering, trafficking in, or using domain names that are identical or confusingly similar to trademarks with the bad faith intent to profit from the goodwill of the trademarks).

85. ICANN Fact sheet, *supra* note 83.

86. ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy, Rule 3(a)*, at <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (Feb. 21, 2002).

name.<sup>87</sup> As of February 2002, ICANN currently has five providers worldwide that oversee the arbitration process.<sup>88</sup> When a trademark holder has a dispute, he may choose to file a complaint with any of the service providers.<sup>89</sup> After the complaint is filed, the soon-to-be defendant is contacted via e-mail and given twenty days to respond by filing an answer in hard copy and in electronic form.<sup>90</sup> ICANN rules of procedure do not allow for in-person hearings except in the most exceptional circumstances.<sup>91</sup> The arbitrators deliberate and the decision is transmitted to the parties within fourteen days.<sup>92</sup> The whole process occurs online, and all disputes are typically resolved with none of the parties having to travel.

The United States hosts at least twenty commercial providers of online dispute resolution<sup>93</sup> and at least two major international providers of arbitration, the American Arbitration Association<sup>94</sup> and the National Arbitration Forum,<sup>95</sup> now provide rules for online arbitration.

2. CONTINUED GROWTH IN INTERNATIONAL B2C COMMERCE REQUIRES THE ESTABLISHMENT OF A FAIR, EFFECTIVE, AND PREDICTABLE FORUM FOR RESOLVING B2C DISPUTES IN THE VIRTUAL WORLD, INDEPENDENT OF NATIONAL INTERESTS.

Online arbitration involving consumers should be procedurally fair, effective, and predictable. Various international providers of arbitration have drafted Due Process Consumer Protocols for arbitration setting forth certain basic requirements to ensure that the process meets these three important standards.<sup>96</sup> There remains, however, no interna-

87. *Id.* at Rule 3(b)(ix)(1).

88. *Approved Providers for Uniform Domain Name Dispute Resolution Policy*, *supra* note 82 (listing the following approved providers: Asian Domain Name Dispute Resolution Center, approved February 28, 2002; CPR Institute for Dispute Resolution, approved May 22, 2000; e-Resolution, approved January 1, 2000; The National Arbitration Forum, approved December 23, 1999; World Intellectual Property Organization, Approved December 1, 1999).

89. *Id.*

90. *Rules for Uniform Domain Name Dispute Resolution Policy*, *supra* note 86 at Rules 2(a)(ii) & 5(a).

91. *Id.* at Rule 13. ("There shall be no in-person hearings (including hearings by teleconference, video conference, and web conference), unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint.").

92. *Id.* at Rule 15(b). ("In the absence of exceptional circumstances, the Panel shall forward its decision on the complaint to the Provider within fourteen (14) days of its appointment pursuant to Paragraph 6.").

93. International Chamber of Commerce, *supra* note 80.

94. *American Arbitration Association Supplementary Procedures for Online Arbitration*, at <http://www.adr.org>.

95. *National Arbitration Forum Code of Procedure*, at <http://www.arb-forum.com>.

96. *See supra* text accompanying notes 94-95.



tional standard defining these principles for online arbitration. Nevertheless, there are some clearly understood basic principles that must exist. First, in order to be fair, the system must provide reasonably equal access to any participant, regardless of wealth. Second, to be effective, the system must provide a cost effective means of compelling parties to comply with decisions. Third, in order to be predictable, the system must be transparent, and decisions must strive for sufficient consistency so that parties feel safe in believing that their dispute will not be treated differently than similar preceding disputes.

a. Fairness

Even if there were an immediate harmonization of substantive international law governing online B2C disputes, international private litigation over these disputes would not make practical or economic sense.<sup>97</sup> Although the total value of B2C disputes ranges in the hundreds of millions of dollars, the average value of individual disputes to consumers is only a few hundred dollars.<sup>98</sup> Therefore, requiring consumers to travel to a foreign and oftentimes remote forum to seek redress in an unfamiliar legal system, either through a country-of-origin approach for jurisdiction, or by allowing companies to impose an exclusive forum by contract, would in many cases effectively deny consumers access to judicial redress.<sup>99</sup> For example, a United States consumer who buys but does not receive \$500 worth of pottery from an Italian web site is unlikely to buy a \$700 plane ticket to travel to Italy to pursue relief through a foreign judicial system.<sup>100</sup>

Online arbitration offers the parties the ability to resolve their dispute without having to travel. In one recent online arbitration case, the plaintiff was based in India, the respondent was based in the United States, the arbitrator was in Europe, and the complaint was filed via e-mail in Geneva.<sup>101</sup> None of the parties had to leave their respective

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97. Bureau of Consumer Protection, Federal Trade Commission, *Consumer Protection in the Global Electronic Marketplace: Looking Ahead* (Sept. 2000), available at <http://www.ftc.gov/bcp/icpw/lookingahead/global.htm> (Mar. 1, 2002); see also Perritt, Jr., *supra* note 12, at 675. (explaining that three characteristics of the Internet make traditional dispute resolution through judicial procedures unsatisfactory for many controversies that arise in Internet based commerce: (1) the Internet's low economic barriers to entry; (2) the geographic openness of electronic commerce; and (3) the fact the Internet is inherently global.

98. *Consumers Lost \$4.3 Million to Internet Fraud in First Ten Months of 2001*, NCL's Internet Fraud Watch Reports (Nov. 7, 2001), at <http://www.natlconsumersleague.org/shoppr1101.htm> (explaining that consumers lost \$4.3 million to Internet fraud during the first ten months of 2001, but that this only equals about \$636 per person).

99. Bureau of Consumer Protection, *supra* note 97.

100. *Id.*

101. V. Rishi Kumar, *India: Satyam Evicts Squatters with Online Mechanism*, BUSINESS LINE (THE HINDU), Aug. 11, 2001, at 2001 WL 25585296. The arbitration was filed before the World

country to become embroiled in the online dispute, and online arbitration offered the parties a means of resolving the dispute without travel.<sup>102</sup> In cases where the low value of the transaction would effectively bar the consumer from seeking redress, online arbitration can offer the parties a forum for the resolution of their dispute where none exists.

Particularly with respect to B2C disputes, the conduct of dispute resolution by the same means employed by the parties to consummate their transaction is likely to produce a level playing field for the resolution of the dispute as well. While current technological tools are limited, even the most rudimentary B2C international transaction cannot occur without both parties having access to the World Wide Web and, in some form, access to an e-mail service. Initially, online dispute resolution cannot aspire to the quality of fact finding and truth testing tools in real world legal systems. As technological tools improve, however, they can and will offer significant improvement in the conduct of online dispute resolution. The rules of procedure, in turn, would develop accordingly to reflect the fairness of using each new tool as it becomes available.<sup>103</sup>

#### b. Effective

To be effective, the process must be more than just a step towards the courtroom door. Once the arbitral process has started, any decision of the arbitrator should be binding on both parties. A non-binding arbitration award would be no different from having an arbitral award that lacked an efficient enforcement mechanism and, therefore, gave the parties a choice regarding whether to comply with the decision.

The more difficult issue is whether the consumer should have the opportunity to opt out of online arbitration during contract formation. There are valid considerations to both the position that a consumer should have the ability to opt out and the position that it should be mandatory. If the process were mandatory, electronic businesses would be sure that the only legal system with which they would have to comply regarding consumer disputes would be the one provided by a system of online arbitration. This would reduce the cost of compliance and ideally the savings would be passed on to the consumer. Nevertheless, a process that is both binding and mandatory has the potential of being

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Intellectual Property Organization (WIPO), pursuant to Uniform Domain Name Resolution Policy adopted by Internet Corporation for Assigned Names and Numbers (ICANN) to evict cybersquatters. *Id.*

102. *Id.*

103. For example, Instant Messenger, or "Chat" technology will someday provide a very inexpensive, fair, and powerful tool permitting the conduct of limited forms of "discovery" even where the parties are on opposite sides of the globe.

attacked in domestic courts. The ultimate success of online arbitration of B2C disputes will depend on the development of procedural and substantive fairness, as well as effectiveness. If procedural and substantive fairness are present, then the process should be mandatory.

c. Predictable

Important for predictability is the transparency of the arbitral process. Whenever the benefits of arbitration over litigation are listed, the confidentiality present in arbitration generally finds its way onto the list.<sup>104</sup> Nonetheless, for online arbitration to become an accepted means of international dispute resolution between businesses and consumers the process must be an open one. This is because many persons engaged in online commerce are unsophisticated consumers,<sup>105</sup> which makes it important to avoid the appearance that providers are attempting to hold secret proceedings. An important means of achieving this is by allowing the process to be observed. It is equally important for sophisticated parties to be able to predict a dispute's outcome. Predictability in a fair system requires transparency.

The fact that courtroom doors in the United States are open to anyone interested in observing the process and that most decisions are published is a significant check on our legal system. Admittedly, many other countries do not publish decisions. They do recognize, however, the value that publishing decisions has on obtaining the trust of persons under the jurisdiction of the legal system.<sup>106</sup> The Commission of the European Communities has included transparency as a principle that must be included in any out-of-court dispute settlement process, noting that one of the appropriate measures to ensure transparency includes publication of an annual report setting out the decisions taken, thereby enabling assessment of the results obtained, and identification of the nature of the disputes.<sup>107</sup> Publishing decisions from online arbitration would go a long way toward showing that the process is an attempt to fairly resolve international online disputes. Allowing the decisions to be public would not be a burden on the process because proceedings that occur online automatically generate a record. Also, the reasons for keeping arbitral proceedings confidential are not as powerful when the dispute is between a consumer and a business as when the dispute is between businesses. This is because disputes with consumers will rarely

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104. See generally GARNETT ET AL., *supra* note 6.

105. See Perritt, Jr., *supra* note 12, at 675.

106. Morrison & Foerster, LLP, *Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*, at <http://www.Kuner.com/data/pay/adr.pdf> (Mar. 1, 2002).

107. *Id.*

involve private trade secrets or other material for which there is a compelling need for privacy.<sup>108</sup> Some countries have already appropriately recognized public policy exceptions to the general principle that arbitral awards should remain confidential even in offline arbitration between businesses.<sup>109</sup> At a minimum, providers of online arbitration should provide statistical information about the decisions of the arbitrators.

### B. *Internet History of Self-Regulation Bodes Well for the Future of Online Arbitration*

If history is any indication of the future, online arbitration, although in the strictest sense only a procedural mechanism for resolution of cross-border disputes, can lead to the development of a uniform body of substantive law. By definition, arbitration merely provides the medium for dispute resolution. Arbitral bodies, however, have developed to oversee the process. Many of them, such as the United Nations Commission on International Trade Law (UNCITRAL)<sup>110</sup> and the International Chamber of Commerce (ICC),<sup>111</sup> have developed extensive rules to govern the arbitration process. These rules perform some of the same functions as national substantive laws governing contracts. Both the UNCITRAL and the ICC rules not only require the arbitrators to rule in accordance with the terms of the contract, but also allow them to take into account trade usage applicable to the transaction.<sup>112</sup>

Taking trade practices and customs into consideration for online arbitration decisions would allow for fair resolution of disputes without resort to national law, thereby removing some impediments to the development of a uniform substantive law governing electronic commerce. One example of such impasse is the one occurring between the EU and the United States in the attempt to draft the above discussed treaty.<sup>113</sup> A long-lived process of online arbitration will likely develop its own set of precedents to which arbitrators can refer when deciding future cases. This has already begun in the online domain name context.<sup>114</sup> The

108. See GARNETT ET AL., *supra* note 6, at 14.

109. *Id.* at 14 n.32.

110. United Nations Commission on International Trade Law, at <http://www.uncitral.org>.

111. International Chamber of Commerce, at <http://www.iccwbo.org>.

112. International Court of Arbitration Rules of Arbitration, art. 17, para. 2 (1998); UNCITRAL art. 28, para. 4.

113. *Prel. Doc. No. 12*, *supra* note 48, at 7.

114. Michael Geist, *Domain Name Wars Heat Up*, GLOBE AND MAIL, May 4, 2000, at <http://www.globetechnology.com/archie/gam/E-Business/20000504/TWGEIS.html> (explaining that early cases are forming the basis for new global cyberlaw, with standards and legal tests divorced from traditional intellectual property law); *see also* Canada v. eResolution.com, Case No. D2000-0110 (WIPO Apr. 10, 2000), at <http://www.arbiter.wipo.int/domains/decisions/html/d2000-0110.html> (explaining that "although entitled to consider principles of law deemed applicable, the

ICANN process has already developed precedent cited by other ICANN arbitrators.<sup>115</sup> Online arbitration providers for ICANN have thus far decided hundreds of cases, with new cases relying on this body of precedent.<sup>116</sup>

### III. ENFORCEMENT PROBLEMS AS AN IMPEDIMENT TO ONLINE ARBITRATION

Although online arbitration has the potential to provide the essential legal framework needed for the continued development of cross-border B2C commerce, it is unlikely that Internet stakeholders will be willing to invest the time and capital in developing practical online arbitration systems unless they can be sure that awards will be enforced.<sup>117</sup> Despite the conclusions of many international meetings that online arbitration should be a primary means of resolving cross-border disputes, besides the ICANN process there are no other successful international ventures at online arbitration.<sup>118</sup> The main reason for this is the lack of a reliable means for enforcing online arbitration awards.

#### A. *United Nations Convention on the Enforcement of Arbitral Awards*

The most widely used means of enforcing international arbitral awards is the United Nations Convention on the Enforcement of Arbitral

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Panel finds it unnecessary to do so in any depth. The jurisprudence which is being rapidly developed by a wide variety of Panelists world-wide under the ICANN Policy provides a fruitful source of precedent").

115. Geist, *supra* note 114.

116. Elizabeth Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 213 (2000).

117. Consumers International, *Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-Border Disputes* (2001), available at [http://www.consumersinternational.org/campaigns/electronic/update\\_disputes\\_in\\_cyberspace\\_2001.pdf](http://www.consumersinternational.org/campaigns/electronic/update_disputes_in_cyberspace_2001.pdf) (Feb. 22, 2001) (explaining that one reason for the lack of international online arbitration mechanisms is the lack of an award enforcement mechanism, and the inability of ODR providers to ensure enforcement against recalcitrant merchants); see also Morrison & Foerster, LLP, *supra* note 106 (concluding that there are four main reasons for the current difficulty in enforcing awards rendered in business to consumer disputes arising from electronic commerce: (1) Enforcement of settlement agreements as judgments is too lengthy and expensive in the cross-border context; (2) Too many European countries have enacted the New York Convention with reservations, and too many African countries have enacted it either with reservations or not enacted it at all; (3) The provisions of the New York Convention were drafted well before the Internet age and present problems of interpretation in the online context that may interfere with the conduct of arbitration; and (4) Defenses to the enforcement of foreign arbitral awards may be interpreted in a way by national courts that inhibits the enforcement of ADR procedures for consumer electronic commerce).

118. Better Business Bureau, *supra* note 15.

Awards<sup>119</sup> (the “New York Convention”). The New York Convention, however, was drafted in 1958<sup>120</sup> and obviously could not have contemplated arbitration in cyberspace. It is therefore doubtful that the New York Convention can provide the predictable means of award enforcement required for the development of cross-border online arbitration.

The New York Convention was drafted jointly by the United Nations (UN) and the ICC in response to the lack of success of prior treaties aimed at the enforcement of foreign arbitral awards.<sup>121</sup> The need for a means of enforcing foreign arbitral awards became particularly crucial when international businesses began to view international arbitration as superior to litigation and increasingly included clauses for arbitration in contracts.<sup>122</sup> At that time, the treaty in place for the enforcement of foreign arbitral awards was the Geneva Convention on the Execution of Foreign Arbitral Awards.<sup>123</sup> It, however, gave the losing party too many ways to delay or to ultimately avoid the enforcement of the award.<sup>124</sup> The New York Convention was an attempt to limit the involvement of national courts in the arbitral process, to restrict the number of options that a losing party could utilize to avoid the enforcement of awards, and to ensure the enforcement of foreign arbitral awards.<sup>125</sup> Currently, there are 125 contracting states and twenty-six extensions to the New York Convention.<sup>126</sup> The New York Convention only governs foreign arbitral awards and is typically implicated when the seat of the arbitration occurs in Country One but enforcement of the award is sought in Country Two.<sup>127</sup> Because the seat of the arbitration is generally chosen by agree-

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119. Convention on the Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter *New York Convention*].

120. See generally MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND TREATIES (2d ed. Kluwer Law International 2001) (1989).

121. VAN DEN BERG, *supra* note 5, at 7.

122. SMIT & PECHOTA, *supra* note 8, at 33 (explaining that the emergence of global markets and the growing economic interdependence of nations in the post-World War II era prompted renewed examination of the internalization of the arbitral process, including the award).

123. Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The “Refusal” Provisions*, 24 INT’L LAW. 487, 493 (1990).

124. VAN DEN BERG *supra* note 5, at 7. The New York Convention replaced the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards and placed a heavy burden on the party seeking enforcement of the award to prove the conditions necessary for enforcement. *Id.* The Geneva Convention required the award to be “final in the country in which it” was made. *Id.* Pre-World War II jurisprudence interpreted this as a requirement of a double exequatur from the country in which the award was given. *Id.* Thus, a party seeking enforcement of an award either had to wait until the time for appeals had expired, prevail on all appeals, or move the court to issue an order that the proceeding was final. *Id.*

125. *Id.* at 491.

126. See *New York Convention of 1958*, in YEARBOOK: COMMERCIAL ARBITRATION, Volume XXV-2000 646-51 (Albert Jan Van Den Berg ed. 2000).

127. *New York Convention*, *supra* note 119.

ment of the parties for reasons of convenience and access to evidence, the seat of the arbitration often differs from the place of enforcement.<sup>128</sup> As a practical matter, the place of enforcement, however, is generally the country in which process over the losing party's assets can be obtained with the help of national courts.

There are, nevertheless, some very important caveats to the general principle that foreign arbitral awards will be enforced under the New York Convention. Article V of that convention provides that an award may be set aside by the domestic courts where the arbitration occurs.<sup>129</sup> Moreover, the award may not be enforced by the courts of the country where enforcement is sought if the award violates the public policy of any involved country.<sup>130</sup> Article V, therefore, is a limit to the general goal of the New York Convention, namely enforcement of foreign arbitral awards, because it gives power back to the national courts to decide whether they should be set aside. Once in a national court, the losing

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128. JAN PAULSSON, *THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR: CLAUSES IN INTERNATIONAL CONTRACTS* 25 (2d rev. ed., 1999).

129. *New York Convention*, *supra* note 119, at art. V:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country [the agreement of the parties, or, failing such agreement, was not in accordance with] where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

*Id.* (emphasis added).

130. *Id.* at 2(b).

party may bring up defenses to the enforcement of awards that are available under national law.<sup>131</sup>

Although Article V impedes the enforcement of arbitration awards rendered both online and offline, it has an even greater potential to prevent the enforcement of online arbitral awards. This is true for two reasons. First, the New York Convention requires all contracts for arbitration to be in writing and signed by the parties.<sup>132</sup> This presents an Article V problem because many countries have not yet come to agree that electronic contracts satisfy this requirement.<sup>133</sup> Second, the New York Convention provides for a commercial reservation<sup>134</sup> that allows signatories to refuse to enforce arbitral awards that are not considered "commercial."<sup>135</sup> This reservation has been adopted by fifty-one of the contracting and extension states.<sup>136</sup> Although generally given broad interpretation, it has received the narrowest and strictest international interpretation in support of the general international antipathy towards the arbitration of B2C disputes.<sup>137</sup> The consensus has been that these disputes are not commercial.<sup>138</sup> Thus, either the court at the seat of the arbitration may set aside the award, and/or the courts at the place of enforcement may refuse to enforce it. When an arbitration award is rendered online, aside from other defenses generally available to delay or avoid compliance with foreign arbitral awards, the losing party has two additional defenses: (1) failure to meet the writing requirement; and most importantly (2) that the award falls under the commercial reservation.<sup>139</sup>

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131. *Id.* at 2(a).

132. *Id.* at Article II(1).

133. See Online Arbitration Conference, *Writing Requirement of the Arbitration Agreement* (Feb. 2001), at <http://webboard.mediate.com>.

134. *Id.*

135. *Id.*

136. YEARBOOK, *supra* note 126, at 646 n.2.

137. See RUBINO-SAMMARTANO, *supra* note 120, at 947.

138. *See id.*

139. Other writers who have addressed the issue of how international online arbitral awards will be enforced have focused on a third possible hindrance to the enforcement of online arbitral awards: where the seat of online arbitration lies. See, e.g., Tiffany J. Lanier, *Where On Earth Does Cyber-Arbitration Occur?: International Review of Arbitral Awards Rendered Online*, 7 ILSA J. INT'L & COMP. L. 1 (2000). However, I suggest that this issue is not an impediment to the enforcement of online arbitral awards. Commentators who raise the issue of where the seat of the arbitration lies generally have two concerns. First, a concern that without a physical location for the arbitration some countries may not view the award as international. Second, a concern that any contractually selected seat may not be accepted as the true seat of the arbitration if the parties never physically met there. These two concerns are unfounded for two reasons. One, most national arbitration awards are also defined as "international" arbitration awards entered between persons domiciled in different countries, thus the award will have no identity problem as long as the business and the consumer reside in different countries. Two, it is widely accepted that the parties often name a place as the seat of arbitration solely to have the favorable procedural laws of



## I. WRITING REQUIREMENT

Article II of the New York Convention requires each contracting state to recognize an agreement in writing under which the parties have undertaken to submit to arbitration any or all differences between them.<sup>140</sup> It further defines an “agreement in writing” as an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.<sup>141</sup> UNCITRAL has recognized two situations in which this requirement may act as a barrier to the enforcement of online agreements to arbitrate. The first situation is when “a contract containing an arbitration clause is formed by one party sending written terms to the other, which performs its bargain under the contract without returning or making any other ‘exchange’ in writing in relation to the terms of the contract.”<sup>142</sup> This factual situation is common where the goods sold online are software, in which the only written terms are the ones the consumer accepts before payment, and the downloading of the merchandise entails no further exchange of writings. Secondly, there is a concern about whether “references to ‘writing,’ ‘signature,’ and ‘document’ in conventions and agreements related to international trade [allow] for electronic equivalents.”<sup>143</sup>

The text of the Convention does not make clear whether the law at the seat of the arbitration or at the place of enforcement should determine if the writing requirement is met. However, because Article V of the Convention allows either the national courts at the seat of the arbitration to set aside the award, or the courts at the place of enforcement to refuse to enforce an award, a problematic situation arises whenever a contract for arbitration does not meet the writing requirement for either of the two countries.

While the United States has enacted legislation explicitly giving effect to electronic agreements,<sup>144</sup> other contracting and extension coun-

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that country govern the arbitration. Also, although still controversial, some countries are willing to enforce denationalized arbitral awards in which no seat is selected.

140. *New York Convention*, *supra* note 119, at art. II(1).

141. *Id.* at art. II(2).

142. *Settlement of Commercial Disputes: Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement, Report of the Secretary General*, U.N. Commission on International Trade Law 32d Sess., at 4, U.N. Doc. A/CN.9/WG.II/WP.108/Add.1 (2000), available at [http://www.uncitral.org/english/workinggroups/wg\\_arb/wp-108.pdf](http://www.uncitral.org/english/workinggroups/wg_arb/wp-108.pdf) [hereinafter *UN Secretary General Report*].

143. *Legal Aspects of Electronic Commerce, Legal Barriers to the Development of Electronic Commerce in International Instruments Relating to International Trade: Ways of Overcoming Them*, U.N. Commission on International Trade Law, 38th Sess., at 1, U.N. Doc. A/CN.9/WG.IV/WP.89 [hereinafter *Legal Aspects of Electronic Commerce*].

144. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, § 101

tries have refused to follow suit.<sup>145</sup> When parties from countries with conflicting legislation become embroiled in a dispute, a party disfavoring online arbitration may use the law of either country as a defense on the grounds that an agreement for arbitration never existed.

## 2. COMMERCIAL RESERVATION

The commercial reservation presents the biggest hurdle to the use of online arbitration in cross-border B2C disputes. The New York Convention was drafted for the purpose of enforcing arbitration agreements in commercial disputes, generally defined as disputes between two businesses.<sup>146</sup> One of the goals of the New York Convention was to ensure that contractual clauses, in particular a contractual provision for arbitration, would be enforced.<sup>147</sup> Because the New York Convention's aim is to uphold the contractual agreements of businesses, a valid argument could be made that when two businesses are engaged in an online transaction in which the record between them evidences an intent to resolve all disputes by means of online arbitration, then in keeping with the spirit of the New York Convention, the agreement should be enforced.<sup>148</sup> The New York Convention, however, offers no such underlying policy favoring the enforcement of agreements for arbitration where one of the parties is a consumer. To the contrary, one of the central purposes of the commercial reservation was to prevent the mandatory enforcement of pre-dispute arbitration clauses when one of the parties is a consumer.<sup>149</sup> Thus, whereas business parties about to enter into a contract containing an arbitration clause could stipulate that an electronic agreement is a writing and further agree on the seat of the arbitration, the commercial reservation, in an attempt to protect consum-

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(2001) (providing that an electronic record or contract "may not be denied legal effect, validity, or enforceability solely because it is in electronic form").

145. Morrison & Foerster LLP, *supra* note 106, at 5 (citing Dutch Civil Procedure Law, art. 1021 and Italian Civil Procedure Law, art. 807). For example, both Dutch and Italian law require "a writing," and only telegrams and telexes clearly meet the requirement. *Id.*

146. RUBINO-SAMMARTANO, *supra* note 120, at 947.

147. Martinez, *supra* note 123, at 491.

148. RUBINO-SAMMARTANO, *supra* note 120, at 56 (explaining that "the main source of international arbitration law remains the intention of the parties. This is the fundamental element of arbitration, whether it is treated as being contractual (i.e. arising from an agreement between the parties) or procedural (i.e. a means through which a legal system obtains a decision)").

149. See, e.g., Morrison & Foerster LLP, *supra* note 106, at 3 (explaining that the Brussels Convention and the EU Directive on Unfair Terms in Consumer Contracts place stringent restrictions on the ability of consumers to waive their right to go to court). Any agreement by a consumer to submit a dispute to ADR and waive the right to go to court would have to be made *after* the dispute has arisen; the consumer would have to enter into such an agreement with full awareness of the consequences; and ADR would have to ensure at least the same degree of procedural fairness for the consumer as would litigation in court. *Id.*

ers, removes consumers' power to bind themselves, at least prior to the dispute, to resolve it by any means of arbitration.

Laws requiring agreements for arbitration with consumers to be made after the dispute arises interfere with the goal of establishing a predictable legal framework for electronic commerce. The purpose of including a contractual agreement for arbitration in the original contract is not only to put the parties on notice as to how any potential disputes will be resolved, but also to allow businesses to anticipate the cost of dispute resolution.<sup>150</sup> When the parties have to wait until after the dispute arises to determine how it will be resolved, this predictability is lost.

The commercial reservation represents the general international antipathy towards consumer arbitration. International consumer groups have historically disfavored arbitration because as a creature of contract it does not have to include all the rights granted by national consumer protection laws.<sup>151</sup> Loss of the protection of national courts was often seen as a major disadvantage because courts apply the legislation that consumer groups often lobby hard to enact whereas arbitrators often apply general standards of international fairness.<sup>152</sup> As the difficulty inherent in applying domestic laws to electronic commerce has become more apparent, many consumer groups have changed sides on the issue and are now in favor of establishing fair procedural standards for international arbitration.<sup>153</sup> The text of the New York Convention and many of its signatory nations, however, has not kept pace with this developing attitude towards consumer arbitration.

### 3. PROBLEMS WITH EFFECTIVENESS OF SOLUTIONS TO DATE

The 32nd session of the UNCITRAL's Working Group on Arbitration has put forth for discussion three suggestions for the development of a means of modernizing the New York Convention so that electronic agreements for online dispute resolution are specifically permitted:<sup>154</sup> (1) draft a protocol amending the New York Convention;<sup>155</sup> (2) preparation of a separate Convention;<sup>156</sup> or (3) simply advocating that the New York Convention, which was drafted under the supervision of the United

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150. See generally Perritt, Jr., *supra* note 12.

151. See generally Robert E. Litan, *Moving Towards an Open World Economy: The Next Phase*, at <http://www.brook.edu/views/papers/litan/19991206.htm> (Dec. 6, 1999).

152. *Id.*

153. See generally Bureau of Consumer Protection, *supra* note 97 (explaining that online arbitration can be a valuable source of consumer protection online, where none currently exists).

154. *UN Secretary General Report, supra*, note 142, at 6.

155. *Id.*

156. *Id.*

Nations, should be interpreted in light of the UNCITRAL Model Law on International Commercial Arbitration.<sup>157</sup> Each of these options presents considerable problems.

a. Amending the New York Convention

The first suggestion, drafting an amendment, is unlikely to receive the widespread international support needed for it to be effective. The law governing amendment of the New York Convention, or the development of an interpretive protocol for the New York Convention, is the Vienna Convention.<sup>158</sup> Article 30, paragraph 4(b) of the Vienna Convention provides in part, “as between a State party to [both the treaty as originally enacted, and the amended version] and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”<sup>159</sup> Any amendment to the New York Convention would only be binding on a signatory who ratified the amendment, and then only when the dispute was between nationals of countries that had both ratified the agreement. Where one of the parties was from a country that had not yet ratified the amended version, the defense that the electronic agreement does not meet the form requirements of the New York Convention would still be available.<sup>160</sup> For an amendment to the Convention to have the most success, all of the signatory nations to the New York Convention as originally enacted would have to come to an agreement on the amended terms and then ratify the new version. The monumental task that would be involved in gathering these nations to amend the New York Convention would likely fail, and has appropriately been described by one author as analogous to building a bridge from New York to Bombay.<sup>161</sup> Additionally, any attempt to revise the New York Convention might jeopardize the level of success that has been achieved in the forty-plus years since its enactment.<sup>162</sup>

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157. *Id.* at 7.

158. *Legal Aspects of Electronic Commerce*, *supra* note 143, at 7.

159. Vienna Convention on the Law of Treaties U.N. Doc. A/Conf39128 (1980), available at <http://www.un.org/law/ilc/texts/treaties.htm>.

160. *But see* Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 *TEX. INT'L. L.J.* 43, 46-47 (2001) (explaining that the Article VII “More Favourable Law” provision of the New York Convention should be read to require arbitration awards that are not enforceable in the place of the arbitration, but that are enforceable in the country where enforcement is sought to be enforced). Under this understanding, if the law at the place of the arbitration does not allow for consumer arbitration, but the law at the place of enforcement does, the country of enforcement would be required to enforce the award. However, this view is not widely accepted, and has recently been rejected by United States district court decisions. *See, e.g.*, *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999).

161. Davis, *supra* note 160, at 84.

162. *UN Secretary General Report*, *supra* note 142, at 6-7.

b. Interpretation Using the UNCITRAL Model Law as a Guide

The UNCITRAL Model Law is itself ambiguous in many essential clauses and, therefore, reference to it for the purpose of interpreting the New York Convention would continue to lead to unpredictable results. Although the Model Law clearly defines as a writing electronic exchanges such as e-mail, it still requires the agreement for arbitration to be contained in an exchange of writings.<sup>163</sup> As explained above, this is often problematic because many online transactions, such as the sale of software, do not involve a written exchange between the parties.<sup>164</sup> Resort to this method of resolving the difficulties in using the New York Convention to enforce online arbitration decisions would simply be an exchange of one set of problems for another.

c. New Document

When suggesting the preparation of a new document, the UNCITRAL Working Group appropriately expressed concern that “experience has indicated that the process of adopting and securing widespread ratification of a new Convention could take many years, and that meanwhile there would be an undesirable lack of uniformity.”<sup>165</sup> Additionally, the first step in drafting a new multilateral treaty is realization of a need for change. Recent consumer protection legislation of many countries signatory to the New York Convention evidence an entrenched policy that consumers can only bind themselves to resolve disputes through arbitration after the dispute arises.<sup>166</sup> It therefore seems unlikely that widespread ratification will occur of a treaty that provides mandatory enforcement of pre-dispute agreements requiring online arbitration.

Additionally, the low value of many of the disputes that occur online would most likely make resort to a treaty for the enforcement of online awards impractical. The New York Convention and other international arbitration treaties have achieved general success in enforcing awards because they provide for enforcement of awards by the losing party’s own country where the winner’s country would not have the power needed to enforce the award.<sup>167</sup> Signatories to treaties in this sense act as proxies for one another. For example, assume that in a

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163. UNCITRAL Model Law on International Commercial Arbitration, Article VII, available at <http://www.jus.uio.no/lm/un.arbitration.model.law.1985/7.html>.

164. *UN Secretary General Report*, *supra* note 142, at 4.

165. *Id.* at 6.

166. *See, e.g.*, Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 98/257/CE Eur. Comm’n (1996), available at [http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/acce\\_just02\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html).

167. Martinez, *supra* note 123, at 493.

dispute between a resident of Japan and a resident of the United States the United States citizen claims that the Japanese citizen breached a contract and therefore owes him money. If the parties agree to arbitration and the United States citizen wins, but the Japanese national returns to Japan, the United States no longer has the power to protect its citizen. Where there is a treaty between Japan and the United States, however, Japan in effect acts as the United States government and by compulsory process orders the Japanese citizen to pay. In low value online disputes between international parties, however, the country that should be acting as the proxy usually falters because the cost of initiating the process is more than the value of the dispute. Any new convention that attempts to protect online consumers based on the hope that the sovereign of the other nation can be called upon to help will likely be unsuccessful.

B. *Collaboration of Internet Stakeholders Rather than Reliance on National Courts is Preferable*

A means of enforcing online arbitration awards that takes into consideration the Internet's history of self-regulation will be more useful in enforcing online arbitration awards. Assistance in enforcing decisions rendered online should be obtained from those with a stake in the success of online commerce, rather than from national courts and legislatures. Instead of an attempt by sovereign nations to develop a new law for the enforcement of online arbitration, the focus should be on the collaboration of Internet stakeholders to develop a procedurally fair online arbitration system that is enforced without the aid of national courts by a sanction more real than the illusory threat of sanctions by national courts.

Besides each of the individual problems that the three suggestions for the modernization of the New York Convention possess, they all share the difficult requirement that decisions rendered online would have to be enforced by a national court. This requirement is problematic for two reasons: (1) requiring enforcement by national courts will still require at least one of the parties to travel to the country in which the losing party's assets are located, and it is unlikely that either of the parties will be willing to cross national borders to resolve a low value online dispute; and (2) requiring enforcement by a national court automatically implicates mandatory national laws.<sup>168</sup> This is problematic when the contractual agreement of the parties is in opposition to sub-

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168. PAULSSON, *supra* note 128, at 15 (explaining that most courts would be unwilling to enforce decisions that not comply with the country's substantive laws governing arbitration and contract formation).

stantive legal requirements of the national law.<sup>169</sup>

The most efficient means of achieving enforcement of arbitration awards rendered online is to place the power to render a sufficiently harsh sanction in the hands of a group of Internet stakeholders who have an interest in the development of fair, effective, and predictable means of resolving international disputes caused by online transactions.<sup>170</sup> The challenge is for that group of stakeholders to devise an appropriate sanction. The balance of this section will examine some of the sanctions already suggested at international meetings discussing electronic commerce, and then suggest another sanction: domain name loss.

#### a. Trustmarks

The most widely suggested sanction involves the use of "trustmarks."<sup>171</sup> Under this system, the trustmark developers would draft a set of procedural guidelines for businesses engaging in international electronic commerce.<sup>172</sup> A consumer who feels that the business has violated to his detriment one of the provisions of the procedural guidelines would have the option of resolving the problem through the use of online arbitration.<sup>173</sup> An e-business that failed to comply with the decision of the arbitrator would face the sanction of possible loss of the trustmark. Trustmarks have the advantage that the consumer is not the only one with incentive to see to it that the arbitral award is enforced. Likely, even if the process was relatively simple, many consumers who went through the online arbitration process only to have the merchant decide not to comply with the award would not likely seek further avenues of enforcing the award. When the trustmark operator's reputation is tied to the merchant's reputation, however, the trustmark operator has strong incentive to follow the process through and to ensure that the decision of the arbitrator is honored.

However, while entirely practical and easy to implement, it is doubtful that revocation of a trustmark would be a powerful enough incentive to force a business to comply with a decision of an online arbitrator that it found unacceptable. This is because a wide variety of symbols already exist and the standards and quality of each varies

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169. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 145 F. Supp. 2d 1168, 1194 (N.D. Cal. 2001).

170. See generally Better Business Bureau, *supra* note 15.

171. See, e.g., Principles for E-commerce Codes of Conduct, at <http://econfidence.jrc.it/> (last visited Jan. 11, 2002).

172. See generally Better Business Bureau, *supra* note 15.

173. American Bar Association Task Force on E-commerce and Alternative Dispute Resolution, *Draft Preliminary Report & Concept Paper 7*, available at <http://www.law.washington.edu/ABA-eADR> (May, 2001).

greatly.<sup>174</sup> A system of online arbitration award enforcement that relies on revocation of trustmarks would undoubtedly create an industry for their creation. An electronic business unable to meet the high procedural standards of a particularly stringent trustmark provider would likely find another with lower standards.

Even if a trustmark system develops sufficiently high standards to ensure the public that its presence guarantees high quality, it does not necessarily follow that lack of the trustmark means an electronic business holds itself up to lesser standards. This loophole to the trustmark system has prompted some member states of the EU to establish public-private bodies to formally approve and monitor trustmarks which comply with agreed guidelines, and to award them a “super trustmark.”<sup>175</sup> The problem is that a consumer who goes to the electronic business’s website would be unable to determine whether the business has ever had a trustmark or whether it had been removed because of poor conduct. A consumer would have to go to various trustmark websites to determine whether any specific company ever held a trustmark, and then determine why it had been revoked. That type of due diligence from a consumer trying to purchase a set of dishes or some other low value item online is unlikely.

#### b. eBay Model

A mechanism for sanctions based on the eBay model for informing potential buyers and sellers of the reputation of other eBay members is another possible sanction.<sup>176</sup> This model may be superior to the use of trustmarks because information about other members is presented in the same space in which the transaction occurs. All eBay members, both buyers and sellers, receive feedback from other members who have engaged in transactions with them.<sup>177</sup> A summary of the results of the feedback is presented next to the member’s user identification.<sup>178</sup> Persons who wish to engage in transactions with members can access the feedback that the member has received at the point of the potential transaction.<sup>179</sup> This configuration allows the party wishing to trade with the

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174. Scribbins, *supra* note 14, at 11.

175. Principles for E-commerce Codes of Conduct, *supra* note 171.

176. An auction style online trading website offering for sale practical, unique, and interesting items such as automobiles, jewelry, musical instruments, cameras, computers, furniture, sporting goods, tickets, and boats. See <http://pages.ebay.com/community/aboutebay/overview/index.html>.

177. Members receive a +1 point for each positive comment, zero points for each neutral comment, and -1 point for each negative comment. *Id.*

178. eBay, *Feedback Forum*, at <http://www.ebay.com>.

179. *Id.*



member to learn immediately of the member's track record without having to go to another website.

The eBay model could be adapted by requiring all electronic businesses to have a page dedicated to comments received about them from consumers, and one that displays the results of the online arbitration process offered to its consumers. Consumers wishing to engage in transactions with the business would have the opportunity to check the website's comment page, and businesses with poor records should eventually lose consumers. Although this approach may seem sound theoretically, a recent study showed that most consumers do not check ratings before they purchase, and that a business's rating has no effect on the final sale price.<sup>180</sup> Most consumers simply do not anticipate disputes when they are about to engage in online transactions, and therefore only look at the business's track record after a dispute has arisen. Because the Internet offers a global marketplace for businesses, the chances that consumer word of mouth will eventually be enough to require the business to engage in better business practices is small.

c. Inclusion of Online Currency Providers in the Process of Enforcement: Cyber-Currency

Eventually, as international B2C commerce matures, a cyberspace currency or "e-purse" is certain to develop.<sup>181</sup> Some technologists have predicted the use of cybercash from cyberaccounts resting on a cyber-consumer's web browser or personal web page that will become part of the international banking and credit card industry.<sup>182</sup> If this develops, the most effective means of providing enforcement of B2C online arbitration awards would be to include the name of the bank or credit card company in the process. If a dispute is resolved by means of the online arbitration process, the power of the e-purse provider could be brought to bear. If a vendor fails to comply with an arbitration award, there could be a website with a database that, like the trustmark model, lists the names of all non-compliant businesses. Eventually, when the process gains sufficient credibility, it might be appropriate to provide as a sanction the removal of the credit authorization from one or more of the cyberbanks or cyber credit card companies to that vendor. This solution, however, remains futuristic.

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180. Stephen S. Standifird, *Reputation and E-commerce: eBay Auctions and the Asymmetrical Impact of Positive and Negative Ratings*, 27 J. OF MGMT. 3 (2001).

181. See generally Payment by e-purse over the Internet: Second Sub-group meeting of the PSTDG and PSULG held on 9 Oct. 2000, Working Document of the European Commission, MARKT/174/2000.

182. *Id.*

d. ICANN-Type Domain Name Loss

An effective system for ensuring compliance with the decision of online arbitrators could also tie compliance with the decision of online arbitrators to the business's domain name; an online death penalty, so to speak. An electronic business that continuously refuses to comply with the decisions of the online arbitrator would eventually lose the privilege of operating under its domain name. The process would have to work as a sort of adjunct to the ICANN process in which, as a requirement of registering a domain name, the business would be forced to submit to the decision of online arbitrators.

The process would no doubt be a controversial one. ICANN is continuously criticized as a means of giving more power to the already powerful trademark holders.<sup>183</sup> If that criticism holds any merit, it is that those who govern the process are not doing so responsibly. It would be hard to argue that the sanction provided by ICANN, domain name loss, is not the more potent and efficient manner of dealing with the problem of cybersquatting. To avoid the type of criticism that the ICANN procedure receives, the ability to determine under what circumstances an electronic business can be faced with domain name revocation would have to be put into the hands of a responsible group of Internet stakeholders whose only interest is in the fair management of online dispute resolution.<sup>184</sup> This would create a sort of online arbitration legislature. Three groups that most obviously should be included in this legislature include consumers, online businesses, and UNCITRAL. Any system of online arbitration would hold the ability to decide when and whether to provide redress for perceived wrongs to consumers. Thus, a consumer group should be involved in developing a set of procedurally fair rules to govern online arbitration.<sup>185</sup> Any mandatory system of dispute resolution that does not involve national governments will initially be mistrusted by some consumer groups. Consumer groups have traditionally disfavored globalization of laws governing commerce because national consumer lobbyist groups work hard at convincing their respective legislatures to raise certain domestic standards often only to see them become the subject of negotiation in international agreements.<sup>186</sup> These groups have historically had little say regarding international affairs and, therefore, in an attempt to maintain some con-

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183. Thornburg, *supra* note 116, at 153, 159-68.

184. See, e.g., Albert Gidari, *Executive Summary of the Internet Law and Policy Forum Observations on the State of Self Regulation on the Internet*, at <http://www.ilpf.org/events/selfreg/> (Feb. 27, 2002) (explaining that Internet governance should be in the hands of private Internet stakeholders).

185. *Id.* (explaining that Internet governance should be in the hands of national governments).

186. Litan, *supra* note 151.

control over the protections given to consumers, have sought to have all laws applicable to consumers enacted nationally, rather than through international conventions.<sup>187</sup> As mentioned above, this attitude is changing and residual fear by consumer groups that loss of control over drafting of consumer legislation will lead to a lesser standard of consumer protection can be reduced by involving consumer groups in any legislative functions related to the development of a system for international online arbitration.<sup>188</sup> Involvement of consumers will ensure that the process does not lead to a reduction in the level of consumer protection by comparison with the protection consumers would enjoy, under national law, through the application of the law by the courts. With input from a variety of consumer groups this requirement can be met with a system of dispute resolution that does not mirror the judicial process of any one nation.

Naturally, businesses whose domain name could be threatened by online arbitration should also have input in the drafting of the rules of procedure for online arbitration. One of the benefits of self-governance is that any procedure that the parties had a say in creating always enjoys better compliance.<sup>189</sup> Although the concern that allowing businesses to set the rules that govern their activity will lead to less consumer protection is not without merit, presence of a consumer group in the drafting of procedural rules for enforcing online arbitration awards will act as a check on the free reign of promoting the self interest of electronic businesses. Moreover, one of the biggest concerns among electronic businesses is the inability to predict which procedural and substantive rules will govern their actions and how online disputes will be resolved. Thus, many electronic businesses may be willing to allow for a process that provides more consumer protection in order to gain predictability.<sup>190</sup>

A third group that would be helpful in drafting procedural rules for enforcing online arbitration awards is UNCITRAL. The United Nations was pivotal in the development of the New York Convention, and many domestic arbitration laws are patterned after UNCITRAL's Model Law.<sup>191</sup> UNCITRAL also has expressed its interest in the development of an efficient means of resolving online disputes and has historically been successful in the drafting of international laws governing

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187. See generally Litan, *supra* note 151.

188. *Id.*

189. See generally Trans Atlantic Consumer Dialogue, *Alternative Dispute Resolution in the Context of Electronic Commerce*, (Feb. 2000), at <http://www.tacd.org> (explaining that compliance is always better when the group being controlled has input into the rules).

190. See generally Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT'L ECON. L. 563 (2000).

191. See generally VAN DEN BERG, *supra* note 5.

commerce.<sup>192</sup>

Effective procedural rules governing online arbitration can be developed with the input of these three groups as well as others interested in the success of international online arbitration and electronic commerce. Thus, an efficient means of resolving online disputes can be achieved through self-regulation.

#### IV. CONCLUSION

The future of cross-border B2C commerce is dependent on the development of a fair, efficient, and predictable means of dispute resolution. An enforceable system of online arbitration can fill that need.

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192. See generally *UN Secretary General Report*, *supra* note 142.

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