

## NOTE

### PROTECTING THE NEW FACE OF ENTREPRENEURSHIP: ONLINE APPROPRIATE DISPUTE RESOLUTION AND INTERNATIONAL CONSUMER-TO-CONSUMER ONLINE TRANSACTIONS

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The Internet has emerged as a global, borderless marketplace. Pushing past the traditional confines of distance and other barriers, traditional commerce has transformed into electronic commerce (“e-commerce”) and cyberspace has become a new, fast-developing means of communication as well as a vital business tool.<sup>1</sup> E-commerce has at least three advantages over traditional commerce: lower prices, greater choice, and better information.<sup>2</sup> There are numerous benefits to be gained from trading online such as lower transaction costs and a greater number of suppliers and buyers which increase the market’s diversity and competition.<sup>3</sup> Individuals who could not afford to participate in international commercial transactions under traditional means are now able to shop around the world.<sup>4</sup> Indeed, personal contact between

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1. Ljiljana Biukovic, *International Commercial Arbitration in Cyberspace: Recent Developments*, 22 Nw. J. INT’L L. & BUS. 319 (2002).

2. David Byrne, European Comm’r for Health and Consumer Prot., *Cyberspace and Consumer Confidence*, Address before The Kangaroo Group Conference, Barriers in Cyberspace (Sept. 18, 2000), *available at* [http://europa.eu.int/comm/dgs/health\\_consumer/library/speeches/speech55\\_en.html](http://europa.eu.int/comm/dgs/health_consumer/library/speeches/speech55_en.html).

3. Biukovic, *supra* note 1, at 326.

4. *See id.*; *see also* eBay Homepage, <http://www.ebay.com> (last visited on Apr. 23, 2006).

sellers, distributors, and buyers may become obsolete since an entire transaction can be concluded through just one impersonal contact.<sup>5</sup>

The point of origin for these online transactions is relevant in considering the legal complexities involved in online consumer protection. One survey observed that fifty-one percent of current Internet users are English-speaking and predicted that as of 2005 only twenty-seven percent of Internet users would speak English as a first language.<sup>6</sup> The United States (“US”) accounts for about eighty percent of the world’s e-commerce, followed by Western Europe with ten percent, and Asia with five percent.<sup>7</sup> This data indicates that conflict between “different languages” and “different legal and cultural backgrounds” could cause “disputes over contract performance.”<sup>8</sup>

The increase in consumer-use of the Internet as a virtual marketplace gives rise to novel consumer protection issues. The conventional elements of jurisdiction over consumer protection are near impossible to execute on the World Wide Web<sup>9</sup> because many countries employ consumer protection regimes based on the antiquated presumption that “consumers shop in proximity to where they live.”<sup>10</sup> This presumption, however, is not appropriate for the online cross-border exchanges that are now prevalent. Cross-border transactions raise novel questions with regard to choice of law issues, contract construction and interpretation, as well as what recourses may be available to a disappointed consumer.<sup>11</sup> Compounding that problem is the fact that there is “no single set [sic] of international legal rules applicable to electronic commerce.”<sup>12</sup> Governments have been

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5. Biukovic, *supra* note 1, at 326.

6. *Id.*

7. *Id.*

8. *Id.*

9. Karen Alboukrek, Note, *Adapting To a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace*, 35 GEO. WASH. INT’L L. REV. 425, 425 (2003) (quoting Lori Enos, *Lawyers Call for International Web Standards*, E-COM. TIMES (July 11, 2000), available at <http://www.ecommercetimes.com/story/3744.html>).

10. *Id.*

11. Alboukrek, *supra* note 9, at 425 (quoting Jay M. Tannenbaum, Keynote Address, Gateways to the Global Market Consumers and Electronic Commerce, Address before the Organization for Economic Co-Operation & Development (“OECD”) Ministerial Conference on Electronic Commerce (Oct. 1998) available at <http://www.ottawaoecdconference.org/english/>).

12. Alboukrek, *supra* note 9, at 425-26 (quoting Fred M. Greguras, *An Overview of*

struggling with how to protect their citizenry without imposing barriers to this new means of trade.<sup>13</sup>

E-commerce encompasses “any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact.”<sup>14</sup> While these types of business transactions are usually separated into two categories, business-to-business (B2B) transactions and business-to-consumer (B2C) transactions, this article focuses principally on consumer-to-consumer (C2C) online transactions.<sup>15</sup> The C2C category relates primarily to electronic retailing between merchant-consumers and traditional purchaser-consumers, which has expanded significantly with the growth of the Internet.<sup>16</sup> Although the volume of C2C virtual transactions has grown slowly in comparison to B2B transactions, the impact of this area of commerce should not be underestimated.<sup>17</sup> As early as 1999, e-commerce transactions involving consumers generated \$33.1 billion, which is about 1.4 percent of all retail sales.<sup>18</sup> For example, e-

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*Global E-Commerce Legal Issues, Uncertain International Legal Rules 3* (2000), available at <http://www.gigalaw.com/articles/2000-all/greguras-2000-03-all.html>).

13. Alboukrek, *supra* note 9, at 426.

14. *Id.* at 427.

15. For purposes of this note, “consumers” are defined as natural persons acting for purposes that are outside of their trade, business or profession. The American Bar Association’s Task Force on Electronic Commerce and Alternative Dispute Resolution in Cooperation with the Shidler Center for Law, Commerce and Technology, University of Washington School of Law, *Survey: Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415 (Nov. 2002); see also U.N. Convention on Contracts for the Int’l Sale of Goods (CISG) (1980), available at <http://www.cisg.law.pace.edu> (implementing the phrase “personal, family or household use” in Article 2(a) as part of its definition for consumer-type transactions).

16. Alboukrek, *supra* note 9, at 427.

17. It is important to note that statistics on C2C transactions are typically best described as “guesstimates.” Many scholars and studies conflate the B2C and C2C categories as a result of the use of a business service provider, which interfaces with the consumer parties. See, e.g., The American Bar Association’s Task Force on Electronic Commerce and Alternative Dispute Resolution in Cooperation with the Shidler Center for Law, Commerce and Technology, University of Washington School of Law, *Survey: Addressing Disputes In Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW 415 (2002).

18. US Small Business Administration Office of Advocacy, *Small Business Expansions in Commerce: A Look at How Small Firms are Helping to Shape the Fastest Growing Segments of E-Commerce* (2000), available at [http://www.sba.gov/advo/stats/e\\_comm2.pdf](http://www.sba.gov/advo/stats/e_comm2.pdf).

commerce sales in the US have increased steadily since the late 1990s with a growth of twenty-three percent in the last year alone.<sup>19</sup>

This paper will discuss the growing concerns consumers face as they interact with each other online, and it will also examine the question of how to best resolve conflicts when cross-border disputes arise. Part I provides a brief introduction to electronic commerce and its development in the international marketplace. Part II examines the inadequate level of consumer safety provided for in key states' laws. Part II also discusses the role that governments should take in advancing online appropriate dispute resolution ("OADR")<sup>20</sup> and summarizes the history and current state of OADR. Finally, Part III offers a proposal for resolving C2C online transaction-disputes and for overcoming the obstacles impeding the use of OADR.

#### I. ELECTRONIC COMMERCE AND THE INTERNATIONAL MARKETPLACE

Before proceeding with the discussion of existing laws regarding consumer protection, an overview of how C2C transactions typically occur is warranted. Online auction sites have grown in popularity to become the prominent means for facilitating C2C transactions. eBay has become the epitome of C2C transactions, with over 203 million registered users and over 400,000 new items added to the site every day.<sup>21</sup> eBay users perform an average of 350 million searches per day, placing bids on almost two billion posted items.<sup>22</sup> eBay bills itself as "the World's Online Marketplace" and notes that it is "the most popular shopping destination on the Internet."<sup>23</sup> This paper will focus on the types of C2C transactions that arise from eBay and other similarly operated sites, such as Yahoo! Auctions. On eBay, registered members

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19. United States Department of Commerce, *Quarterly Retail E-commerce Sales: 2nd Quarter 2006*, available at <http://www.census.gov/mrts/www/data/html/06Q2.html>.

20. Although mediation, negotiation, and arbitration (as well as hybrids of the three) are commonly referred to as alternative dispute resolution, there is increasing consensus among many practitioners in the field that the term "appropriate dispute resolution" is preferable. "Alternative" implies that such methods are secondary rather than a primary means of dispute resolution.

21. eBay, 2006 Analyst Day Report, 10-12, available at [http://files.shareholder.com/downloads/eBay/62861142x0x40833/40a8ae24-730b-46fe-9b85-457add3d3470/AnalystDay\\_2006.pdf](http://files.shareholder.com/downloads/eBay/62861142x0x40833/40a8ae24-730b-46fe-9b85-457add3d3470/AnalystDay_2006.pdf).

22. *Id.*

23. eBay, About eBay, <http://pages.ebay.com/aboutebay.html> (last visited October 26, 2006).

can search for items or list items for sale. Sales are typically consummated through an auction process where the seller lists a minimum bid price and buyers are free to bid on the item (although many sellers list “Buy It Now” prices that allow for a direct sale to be concluded). Once an auction is over, the seller then takes certain steps to finish the sale. The seller is responsible for contacting the winning buyer (typically through email) and providing specific information.<sup>24</sup>

## II. THE INADEQUACY OF EXISTING CONSUMER PROTECTION LAWS

As prominent leaders in the areas of e-commerce protection, the United States and the European Union (“EU”) would best protect its e-businesses and e-consumers through the implementation of a coherent system that converges both states’ interests.<sup>25</sup> Unfortunately, they have held fast to their divergent approaches to Internet consumer protection, resulting in “a tangled web of policy, regulations, and unforeseeability.”<sup>26</sup>

The US has approached its e-consumer policy with a stance favoring business efficiency, flexibility, and practicalities; current US consumer protection laws, however, are ill-equipped to handle C2C online transactions.<sup>27</sup> This is because US law places the onus on consumers to flush out unnoticed or hidden contractual terms and to negotiate a better bargain.<sup>28</sup> “In contrast, EU consumer policy requires e-businesses to provide the e-consumers with enough information to fully appreciate the transaction.”<sup>29</sup>

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24. eBay, Sell Your Item, [http://pages.ebay.com/help/sell/close\\_deal\\_ov.html#contact\\_your\\_buyer](http://pages.ebay.com/help/sell/close_deal_ov.html#contact_your_buyer) (indicating information the seller is required to convey to the buyer includes: shipping cost, how the item will be shipped, when to expect it, payment options, total price and tax) (last visited October 26, 2006).

25. John R. Aguilar, *Over the Rainbow European and American Consumer Protection Policy and Remedy Conflicts on the Internet and a Possible Solution*, 4 INT’L J. COMM. L & POL’Y 1, 1 (1999/2000).

26. *Id.*

27. See Gregory E. Maggs, Internet Solutions to Consumer Protection Problems, 49 S. C. L. REV. 887, 893-95 (1998).

28. See *id.* But see Maggs, *supra* note 27, at 891-92 (noting that the US has various consumer protection laws like the Fed. Food, Drug and Cosmetics Act, and that those acts have been a positive influence on business and consumers alike).

29. Aguilar, *supra* note 25, at 19. But cf. John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT’L & COMP. L. 1, 4 (Spring 1998).

EU consumer and e-consumer policy differs from that of the US because of the EU's parochial tendency to guard against "overzealous e-businesses."<sup>30</sup> The EU's flexible and globalized approach relies heavily on directives and regulations to achieve its goals of consumer trust and accelerated economic and social integration.<sup>31</sup> EU policymakers have applied traditional consumer policies to e-commerce. This has produced such policies as the Distance Contracts (Selling) Directive,<sup>32</sup> and the proposed Distance Selling Financial Directive.<sup>33</sup> Although the EU has implemented minimum standards, such as the removal of laws that curb e-commerce,<sup>34</sup> member states are encouraged to legislate e-consumer protections that are more stringent than minimally required by the EU.<sup>35</sup> The EU's policy of permitting member states to independently grant e-consumers more rights balances the EU's simplified minimum standard approach.<sup>36</sup> The result is that EU states have applied their more developed domestic laws to the area of online commerce.<sup>37</sup>

An example of the application of domestic law to e-commerce is the EU's adoption of the country-of-destination approach.<sup>38</sup> Under this approach, an online transaction will be governed by the law of the consumer's place of domicile.<sup>39</sup> The country-of-destination policy can be problematic in an online-setting because the items available for sale

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30. Aguilar, *supra* note 25, at 15.

31. *Id.* at 16-17.

32. *See id.* at 22-23 (noting that the Distance Contracts Selling Directive will be a model of how economic law will develop, with its right to withdrawal and other rights); *see also* Mark Owen, *International Ramifications of Doing Business Online: Europe*, 564 PLI/P at 263, 277 (June 14-15, 1999) (discussing transposition period for Distance Contracts Directive).

33. Aguilar, *supra* note 25, at 25; *see also* Elisabeth Logeais, *Roundup of Electronic Commerce in the European Union*, 5 No. 5 Multimedia & Web Strategist 1, at P2 (1999) (noting the EU's recent developments related to economic law).

34. Aguilar, *supra* note 25, at 24-25.

35. *Id.* at 25; *see also* Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L.144) at Art. 14, *available at* <http://europa.eu.int/scadplus/leg/en/lvb/l32014.htm> (explaining the detailed information that consumers must be provided with).

36. Aguilar, *supra* note 25, at 25.

37. Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1116 (2002) (detailing how EU nations have applied domestic laws to online commerce).

38. *Id.*

39. *Id.*

are available simultaneously in all countries and sellers are faced with the daunting prospect of complying with the standards imposed by varying states.<sup>40</sup> The global nature of e-commerce is problematic for a C2C because obedience to the laws of one country carries with it the risk of prosecution under the laws of another.<sup>41</sup>

A “recent case involving an attempt by European courts to apply the country of destination policy” illustrates the difficulties encountered.<sup>42</sup> One such case involved Yahoo!, an Internet service provider and web portal that hosts an auction site similar to that of eBay. Yahoo!<sup>43</sup> allowed sellers to “post Nazi memorabilia on its online auction site in violation of a French law, which forbids the posting of Nazi-related propaganda and memorabilia.”<sup>44</sup> A French not-for-profit organization, La Ligue Contre Le Racisme Et l’Antisemitisme (“LICRA”), sent a cease and desist letter to Yahoo!’s headquarters in California that unless Yahoo! ceased presenting Nazi objects for sale on the US auction site within eight days, LICRA would move competent jurisdiction to force the company to abide by French law.<sup>45</sup>

Yahoo! refused to remove the content. LICRA then served process on Yahoo! in California and filed a civil complaint against Yahoo! in a French court “for violation of the French statute forbidding the display of the Nazi-related materials.”<sup>46</sup> Yahoo! was ordered by the French Court to “dissuade and render impossible any access by Internet users located in France to the Yahoo! Internet auction displaying Nazi artifacts.”<sup>47</sup> Yahoo! argued that it was “technologically impossible for it

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40. *Id.*

41. *Id.*

42. *Id.* See also *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).

43. See *Stewart & Mathews*, *supra* note 37, at 1116 n. 29 (stating that the court in *Yahoo!*, 145 F. Supp. 2d found that Yahoo! subsidiary corporations also operate Yahoo! sites and services in twenty other countries, including, for example, Yahoo! France, Yahoo! Japan and Yahoo! India); *Stewart & Mathews*, *supra* note 37, at 1116 n. 29 (stating that the court in *Yahoo!*, 169 F. Supp. 2d at 1183 noted that Yahoo!’s regional sites use the local region’s primary language, target the local citizenry, and operate under local laws).

44. *Stewart & Mathews*, *supra* note 37, at 1116.

45. *Id.* (quoting *Yahoo!*, 145 F. Supp. 2d at 1172.).

46. *Id.* at 1116-17.

47. *Id.* at 1117 (quoting *Yahoo!* 145 F. Supp. 2d at 1172).

to prevent” citizens in France from viewing the content, and “that removing the content would violate the right to free speech guaranteed by the US Constitution.”<sup>48</sup> The French Court rejected Yahoo!’s arguments and reaffirmed its original order.<sup>49</sup> In response to the French ruling, Yahoo! commenced an action in the United States District Court in California seeking a declaratory judgment stating that the French order was unenforceable under US law since the ban would impermissibly infringe upon Yahoo!’s rights under the First Amendment.<sup>50</sup> In granting the declaratory judgment, the district court held 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>51</sup>

The Yahoo! case illustrates the difficulty of enforcing laws designed to protect consumers where the law of the consumer’s domicile and the law of the seller’s domicile conflict. The dilemma faced by Yahoo! was created in part by the EU’s country-of-destination policy and it “has the potential to recur because . . . the majority of much online commerce is between consumers and businesses located in the United States and the EU.”<sup>52</sup> Rather than increasing the predictability of determining which law will apply, the EU’s e-commerce policy has created a rift between the two governments with the largest financial investments in online commerce.<sup>53</sup>

In addition to the conflicts between policy approaches, a second issue barring the application of current national law is the lack of consensus on jurisdiction and what constitutes an international transaction. Currently, international conventions and national laws governing international commercial arbitration have developed different definitions of what constitutes an international transaction and an international dispute.<sup>54</sup> There is no universally accepted test to determine whether a dispute is “international” in nature. The European

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48. *Id.* at 1117.

49. *Yahoo!*, 169 F. Supp. 2d at 1188.

50. Stewart & Mathews, *supra* note 37, at 1117.

51. *Id.*

52. *Id.* (citing Out-of-Court Dispute Settlement Systems for E-Commerce: The Report from the Workshop held in Brussels on 21 March 2000, [http://www.federcomin.it/sviluppo/Produzio.nsf/all/AB130AEEEE4848C7C125690E00393B4C/\\$file/Reportv20apr.pdf](http://www.federcomin.it/sviluppo/Produzio.nsf/all/AB130AEEEE4848C7C125690E00393B4C/$file/Reportv20apr.pdf) (last visited 24 Oct. 2006)).

53. Stewart & Mathews, *supra* note 37, at 1116-18.

54. Biukovic, *supra* note 1, at 329.



Convention on International Commercial Arbitration indirectly defines international disputes as those “arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States.”<sup>55</sup>

The jurisdictional issue is especially relevant in light of the global nature of the Internet. Conducting business over the Internet will subject unsuspecting parties to foreign law in a foreign jurisdiction.<sup>56</sup> So far, countries’ attempts at governing electronic commerce have treated the Internet as a tangible area within their jurisdiction that can be regulated as any other physical area. There are, however, no geographic borders in cyberspace.<sup>57</sup> Therefore, the application of traditional means of governance to online activity is often unsuccessful because a state’s power is derived from its ability to assert power over persons, and jurisdiction is essentially defined by physical boundaries.<sup>58</sup>

These characteristics of traditional governance are difficult to reconcile with the Internet’s lack of a physical presence<sup>59</sup> and there needs to be some means of resolving C2C e-commerce disputes that avoids these issues. OADR is such a solution.<sup>60</sup> OADR avoids jurisdictional issues because parties can bind themselves to dispute resolution through an arbitration agreement.<sup>61</sup>

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55. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364-66 (entered into force on Jan. 7, 1964).

56. Catherine Kessedjian & Sandra Cahn, *Dispute Resolution On-Line*, 32 Int’l Law 977, 978 (1998).

57. See David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1375 (1996) (explaining that “[t]he 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”).

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

59. Stewart & Matthews, *supra* note 37, at 1120-21.

60. Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 854 (2001) (outlining the advantages of OADR over other means of resolving C2C disputes).

61. E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 200 (1996) (explaining that parties can choose the law governing their arbitration agreement, thereby eliminating jurisdiction problems).

## III. SOLUTION: A CONVERGENCE OF LAW AND SELF REGULATION

A. Governments' Role in the Future of Online Consumer Protection

The Internet is a global medium, and the US cannot regulate it alone. In order to sustain the rapid growth of e-commerce, EU and US e-consumer policy must converge to form a global,<sup>62</sup> governmentally-enforced legal framework wherein self-regulatory mechanisms<sup>63</sup> that incorporate flexibility and business practicality can support e-consumers in their new dual role as sellers and buyers.<sup>64</sup>

B. Self-Regulation on the Internet

The Internet has a relatively long history of self-regulation.<sup>65</sup> Prior to the emergence of the Internet, local area networks ("LANs"), run by private companies or universities, developed their own internal rules for use, with communications regulated and monitored by closed, private forums.<sup>66</sup> The rules were designed to facilitate their specific uses of the Internet and were based upon a community-understanding of what was necessary for functioning efficiently.<sup>67</sup> Self-regulation merely ensures that the rules governing an activity are tailored to the needs of those they will affect.<sup>68</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>69</sup>

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62. *Id.*

63. *Id.*

64. *Id.* at 51.

65. Stewart and Matthews, *supra* note 37, at 1121-22.

66. Bordone, *supra* note 58, at 182.

67. *Id.*

68. 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").

69. See generally A Framework for Global Electronic Commerce, available at <http://www.uazone.org/gis/ecom.htm> (last visited on Apr. 25, 2006) (noting that the private sector has led the expansion of the Internet and electronic commerce and should continue to lead electronic commerce); A European Initiative in Electronic Commerce, available at <http://www.cordis.lu/esprit/src/ecomcomc.htm> (last visited on Apr. 25,

In the past, arbitration was disfavored by consumer interest groups because it was viewed as limiting the rights granted by national consumer protection laws.<sup>70</sup> As the difficulty of applying domestic laws to e-commerce has become more apparent, many critics have changed sides and are now in favor of establishing fair procedural standards for OADR.<sup>71</sup> However, “many doubt whether any e-business would limit self-interested actions or have the ability to regulate foreign or domestic deceptive trade practices.”<sup>72</sup>

Governments have an “interest in promoting online consumer protection because e-consumer confidence reinforces the Internet as a viable commercial medium.”<sup>73</sup> Without government action, C2C sellers may resort to vigilantism to protect their budding online businesses from abuses, and buyers would be similarly tempted to take self-help measures to protect against fraud.<sup>74</sup> Yet, government action must balance market and social policies while also being careful not to eliminate the attractions of e-commerce: efficiency, low costs, an easily accessible consumer base, and the ability to conduct simultaneous business transactions.<sup>75</sup> A middle ground must be found that incorporates EU and US perceptions of e-consumer protection and the unique characteristics of the Internet.<sup>76</sup> Somewhere in the schism between self- and government-regulation rests the balance for properly governing e-commerce transactions on the Internet.

The key to finding the right mix between the two, lies in determining the appropriate roles of business and government in international consumer protection within the online marketplace. Governments can encourage the use of technology to resolve online global disputes in consumer transactions.<sup>77</sup> Physically going to court is not the sole method of resolving legal disputes. Another option is

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

71. Stewart & Matthews, *supra* note 37, at 1136.

72. Aguilar, *supra* note 25, at 10; see also, John Rothchild, *Protecting the Digital Consumer The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 962, 965 (1999).

73. Aguilar, *supra* note 25, at 11.

74. *Id.* at 11.

75. Rothchild, *supra* note 72, at 941-43.

76. Aguilar, *supra* note 25, at 14.

77. Alboukrek, *supra* note 9, at 456.

appropriate dispute resolution, which “refers to out-of-court methods for resolving disputes, including negotiation, mediation, and arbitration.”<sup>78</sup> “Utilizing OADR for resolving online global disputes in consumer transactions would mitigate the problem of having to travel to a foreign jurisdiction for the purpose of filing a complaint against a seller or vice versa.”<sup>79</sup> OADR allows parties in different jurisdiction to resolve their disputes over the Internet without the complications of working within a foreign legal system or undertaking travel expenditures.<sup>80</sup> OADR is typically performed through the use of mediation or negotiation programs and in some cases the use of third-party facilitators. Consumer confidence would be enhanced by allowing consumers to use the same technology they use for shopping online to resolve disputes.<sup>81</sup>

The government’s role in OADR would be to educate and encourage its development in the private sector. Governments should be educating consumers and businesses about the benefits of ADR and the possibility of incorporating it into online consumer transactions. Governments should also assume the role of ensuring that these OADR programs are fair and effective.<sup>82</sup> Moreover, governments should work together to develop a legal framework for C2C transactions because a strict self-regulatory approach is insufficient. A sad truth of commerce, whether traditional or online, is that “not all [sellers] are legitimate, not all legitimate [sellers will] participate in self-regulatory programs, and not all participants [will] uphold program standards.”<sup>83</sup> There is also the danger of fraud and dishonest business practice. Furthermore, low barriers to entry and the vast consumer base that drives the increase in C2C transactions means new entrants may not care about reputation or repeat customers.<sup>84</sup> Establishing minimum standards for “international consumer protection will ensure the effectiveness of self-regulation and

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78. *Id.* at 455

79. *Id.*

80. *Id.* (quoting Federal Trade Commission, Consumer Protection in the Global Electronic Marketplace: Looking Ahead (2000), available at <http://www.ftc.gov/bcp/icpw/lookingahead/lookingahead.htm>).

81. Alboukrek, *supra* note 9, at 456.

82. See generally FTC, *supra* note 80.

83. Alboukrek, *supra* note 9, at 456; See also *id.* at 433-34 n.85 (quoting Michael Pastore, *Fraud Continues to Haunt Online Retail*, E-COM. TIMES (Mar. 4, 2002) available at <http://www.internetnews.com/ec-news/article.php/984441> “More than \$700 million in online sales were lost to fraud in 2001, representing 1.14 percent of total annual online sales of \$61.8 billion . . .”).

84. Alboukrek, *supra* note 9, at 456

strengthen consumer confidence.”<sup>85</sup>

OADR can provide the needed self-regulated medium for online, international C2C dispute resolution. Consumer contracts are being analyzed simultaneously by governments and by various interest groups, and there is agreement that disputes arising from these contracts should be resolved by OADR methods, but that governments should provide some sort of public legal framework.<sup>86</sup>

Recent international meetings have addressed topics with such titles as “Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution,”<sup>87</sup> “Out of Court Dispute Settlement Systems for E-Commerce,”<sup>88</sup> and “Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace.”<sup>89</sup> These meetings approached online arbitration as a means of resolving international online disputes.<sup>90</sup> 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 commerce.<sup>91</sup> The theme emerging from these conventions, although discussed in varying terms, encourages the use of online arbitration as a means of providing consumer protection where no mechanisms currently exist.<sup>92</sup>

Although these international conferences focused on B2C online transactions, it is online C2C transactions that are ideally suited to OADR.<sup>93</sup> Millions of users buy and sell each day on the various e-

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85. *Id.*

86. Biukovic, *supra* note 1, at 327.

87. Stewart & Matthews, *supra* note 37, at 1123.

88. *Id.*

89. *Id.*

90. *Id.*

91. 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) (“[A]lthough 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.”), available at <http://www.hcch.net/e/workprog/jdgm.html>.

92. Stewart & Matthews, *supra* note 37, at 1122-23.

93. Richard Michael Victorio, *Professional Contribution: Internet Dispute*

commerce sites on the Internet. One such site, eBay, partnered with the Online Ombuds Office to offer mediation to buyers and sellers of auction-related disputes.<sup>94</sup> Most of the complaints received at eBay were from buyers “regarding items not received, items damaged in transit, misunderstandings about color or quality, and complaints about a negative comment placed in a feedback file.”<sup>95</sup> Of the cases handled, fifty percent resulted in settlements.<sup>96</sup> “The eBay project, despite its small size and the small amount in dispute, shows promise as a model of OADR for commercial Internet sites.”<sup>97</sup>

### C. Online Alternative Dispute Resolution

OADR can take place either entirely or partly online and involves two types of disputes: those arising in cyberspace and those arising offline.<sup>98</sup> “Since the expansion of international trade and investment over the past few decades, international commercial arbitration has been resolving disputes arising from a variety of commercial agreements.”<sup>99</sup> When international commerce went online, traditional off-line international arbitration centers launched web sites.<sup>100</sup> There is general agreement “that virtual arbitration can and should be used as a technique for the resolution of online international commercial disputes.”<sup>101</sup>

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*Resolution (iDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RESOL. L.J. 279, 279 (2001).

94. See Carl S. Kaplan, *Mediators Help Settle Online Auction Disputes*, N.Y. TIMES, May 7, 1999, available at <http://www.nytimes.com>.

95. *Id.* at 17.

96. Victorio, *supra* note 93, at 299.

97. *Id.*

98. See Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 FORDHAM L. REV. 985, 990-95 (2001) (discussing the types of disputes encompassed by OADR).

99. Biukovic, *supra* note 1, at 319.

100. *Id.* at 320. See also Rosabel E. Goodman-Everard, *Directory of Arbitration Websites and Information on Arbitration*, available at [http://www.arbitration-icca.org/directory\\_of\\_arbitration\\_website.htm](http://www.arbitration-icca.org/directory_of_arbitration_website.htm) (last visited Apr. 22, 2006).

101. Biukovic, *supra* note 1, at 320. See, e.g., Llewellyn Joseph Gibbons, *Rusticum Judicium? Private “Court” Enforcing Private Law and Public Rights: Regulating Virtual Arbitration in Cyberspace*, 24 OHIO N.U. L. REV. 769 (1998) (discussing the efficiency of arbitration in cyberspace); Llewellyn Joseph Gibbons, *Private Law, Public “Justice”: Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769 (2000) (discussing the importance of online arbitration and the need for transparency); Richard Hill, *On-line Arbitration: Issues and Solutions*, 15 ARB.

A number of the OADR “websites are fully automated and require little human intervention, while others involve a neutral third party as a facilitator.”<sup>102</sup> Prominent online dispute resolution centers include: the World Intellectual Property Organization Arbitration and Mediation Centre (“WIPO”) in Switzerland (<http://arbiter.wipo.int/domains/index.html>); the National Arbitration Forum (“NAF”) in the United States ([www.arbitration-forum.com](http://www.arbitration-forum.com)); Virtual Magistrate in the United States ([www.vmag.org](http://www.vmag.org)); CyberSettle.com in the United States ([www.cybersettle.com](http://www.cybersettle.com)); ClickNsettle in the United States ([www.clicknsettle.com](http://www.clicknsettle.com)); Center for Public Resources Alternative Dispute Resolution (“CPRADR”) in the United States ([www.cpradr.org](http://www.cpradr.org)); SquareTrade in the United States ([www.squaretrade.com](http://www.squaretrade.com)); and Online Resolution in the United States ([www.onlinerresolution.com](http://www.onlinerresolution.com)). Of these sites, only two offer services to eBay users: SquareTrade and Online Resolution. Although the focus has primarily been on B2B or B2C transactions, C2C is, perhaps, the area in which the greatest OADR advancements can be made.

Under an OADR approach, through a forum such as Squaretrade, disputes arising from online auction sites would be resolved in a relatively simple manner. First, a buyer or seller would file a case and fill out an “online form designed to identify the problem and its possible resolutions.”<sup>103</sup> Next, SquareTrade notifies “the other party via an automatically generated email and provides instruction on responding to the case.”<sup>104</sup> “The case and all related responses appear on a password-protected Case Page” on the website. “Once each party is aware of the issues, the parties attempt to reach an agreement using SquareTrade’s Direct Negotiation tool,” which is a “completely automated web-based communications tool.”<sup>105</sup> “Using SquareTrade’s secure Case Page, the

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INT’L 199 (1999) (discussing the legal obstacles to online arbitration); Richard Hill, *The Internet, Electronic Commerce and Dispute Resolution: Comments*, 14:4 J. INT’L ARB. 103 (1997) (discussing articles about online dispute resolution); Michael E. Schneider & Christopher Kuner, *Dispute Resolution in International Electronic Commerce*, 14:3 J. INT’L ARB. 5 (1997) (arguing that the multi-national nature of internet commerce necessitates arbitration).

102. Goodman, *supra* note 100 at 4.

103. SquareTrade, [http://www.squaretrade.com/cnt/jsp/odr/learn\\_odr.jsp;jsessionid=eygj6qg691?vhostid=daffy&stmp=squaretrade&cntid=eygj6qg691](http://www.squaretrade.com/cnt/jsp/odr/learn_odr.jsp;jsessionid=eygj6qg691?vhostid=daffy&stmp=squaretrade&cntid=eygj6qg691) (last visited on Apr. 22, 2006).

104. *Id.*

105. *Id.*

parties try to reach an agreement by communicating directly with each other.”<sup>106</sup>

SquareTrade also provides for a mediator to assist the parties if a resolution cannot be reached during a negotiation. While the use of a neutral third-party aids in reaching a mutually agreeable solution, parties are informed that the SquareTrade mediator’s power only extends to recommending a resolution, not enforcing one.<sup>107</sup>

#### D. Varying Forms of OADR

OADR websites such as SquareTrade offer services that are entirely online and focus primarily on negotiating monetary settlements. These websites serve as a neutral arena in which to exchange settlement offers. SquareTrade, as well as other sites such as Cybersettle<sup>108</sup> and SettlementOnline,<sup>109</sup> are examples of online negotiation. However, in addition to negotiation, OADR also encompasses mediation and arbitration.

OneAccord<sup>110</sup> is a website that utilizes a computer software program to enable multiple parties to participate in interest-based mediations.<sup>111</sup> In the first phase of the mediation, an attorney who has completed a special 30-hour online training course serves as a third-party facilitator<sup>112</sup> and works with the parties over the Internet to help them express their interests and identify issues.<sup>113</sup> The facilitator works with each party individually to elicit their own initial confidential preferences among each of the issues and to determine possible

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106. *Id.*

107. *Id.*

108. *See* Cybersettle, <http://www.cybersettle.com> (last visited Apr. 25, 2006).

109. *See* SettlementOnline, <http://www.settlementonline.com> (last visited Apr. 25, 2006).

110. *See* SmartSettle, <http://www.oneaccordinc.com> (last visited Apr. 25, 2006).

111. *See* Ernest M. Thiessen & Joseph P. McMahon, Jr., *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643, 647 (2000) (describing OneAccord negotiation process and then applying it to a hypothetical ADR problem); SmartSettle, <http://www.oneaccordinc.com/html/process.html> (last visited Apr. 26, 2006) [hereinafter Smartsettle Process] (outlining the six phases of the OneAccord negotiation process).

112. *See* SmartSettle Professional Development and Training, <http://www.smartsettle.com/html> (last visited Apr. 26, 2006). [hereinafter SmartSettle Professional Development]

113. *See* SmartSettle Process, *supra* note 111.



outcomes.<sup>114</sup> The OneAccord software uses the parties' data to develop settlement packages for the parties to consider, and the mediator continues to work with the parties to evaluate the packages and to refine their preferences.<sup>115</sup> At the end of the negotiation, if a resolution has been reached, a final written agreement is drafted and signed by all of the parties.<sup>116</sup>

Aside from negotiation and mediation, neither of which is binding on parties, OADR can also take the form of arbitration. Of the three forms of appropriate dispute resolution, arbitration may be the best format for cross-border disputes as all decisions are binding. This would eliminate enforcement and jurisdictional issues that could arise if a party appealed the resolution of a dispute.<sup>117</sup>

Even if there were a harmonization of international law governing online C2C disputes, international litigation over these disputes would be impractical.<sup>118</sup> Despite the value of online dispute resolution processes to businesses, whose disputes can range in value in the hundreds of millions of dollars, the average value of C2C disputes is only a few hundred dollars.<sup>119</sup> Requiring consumers to travel to a remote forum to seek redress in an unfamiliar legal system would in effect deny consumers access to judicial redress.<sup>120</sup> Since online

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114. See Thiessen, *supra* note 111, at 647 (describing OneAccord negotiation process and applying it to a hypothetical negotiation problem). See also SmartSettle Process, *supra* note 111.

115. See SmartSettle Process, *supra* note 111.

116. See *id.*

117. See Hang, *supra* note 60, at 856.

118. See Stewart & Matthews, *supra* note 37, at 1126. See also, 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 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).

119. See Stewart & Matthews, *supra* note 37, at 1126; Press Release, National Consumers League, *Consumers Lost \$4.3 Million to Internet Fraud in First Ten Months of 2001*, NCL's Internet Fraud Watch Reports (Nov. 7, 2001), <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).

120. See Bureau of Consumer Prot., Fed. Trade Comm'n, *Consumer Protection in the Global Electronic Marketplace: Looking Ahead* (Sept. 2000), available at

disputes often arise between individuals from different countries, under a traditional dispute resolution approach, at least one of the parties will have to litigate abroad.<sup>121</sup> Individuals can save time and money by participating in a dispute resolution process from their respective residences.<sup>122</sup> It eliminates the need to rent a neutral facility in which to conduct the mediation. Also, the relevant documents and materials are readily available and do not have to be mailed internationally.<sup>123</sup> 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>124</sup> Online arbitration allows for disputes to be resolved without consumers having to endure the burden and expense of travel, or navigate the complexities and uncertainties of a foreign legal system.

Online arbitration may be the only feasible option in cases where the low value of the transaction effectively bars the consumer from seeking redress or where one or more of the parties cannot afford to travel abroad.<sup>125</sup> Particularly with respect to C2C disputes, conducting dispute resolutions under the same means employed by the parties to consummate their transaction will level the playing field because both parties will necessarily have access to the essential tools needed for OADR—the Internet and e-mail.<sup>126</sup>

#### E. Drawbacks of OADR

The biggest shortcoming of OADR is its ineffective means of enforcement. This is where state involvement becomes necessary. International agreements could facilitate e-commerce and protect consumers by establishing a predictable legal environment based on a decentralized approach;<sup>127</sup> however, effective self-regulation requires a

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<http://www.ftc.gov/bcp/icpw/lookingahead/global.htm>.

121. See Hang, *supra* note 60, at 854.

122. See *id.*

123. See Llewellyn Joseph Gibbons et al., *Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M.L. REV. 27, 42 (2002).

124. Stewart & Matthews, *supra* note 37, at 1126.

125. *Id.* at 1127

126. *Id.*

127. See White House, *A Framework for Global Elec. Commerce*, at Principle 3, <http://www.technology.gov/digeconomy/framewrk.htm> (last visited Apr. 25, 2006).

joint public and private effort.<sup>128</sup> The government's role should be to encourage the creation of mandatory codes-of-conduct<sup>129</sup> acceptable to the competing interests of e-businesses and e-consumers.<sup>130</sup>

To be effective, OADR for C2C e-transactions must be more than just a step away from the courtroom door. Once the arbitral process has started, any decision of the arbitrator must be binding on both parties.<sup>131</sup> A non-binding resolution would be no different from having a court judgment that lacked an efficient enforcement mechanism, as was the case in *Yahoo! v. La Ligue Contre Le Racisme.Et l'Antisemitisme*.<sup>132</sup> The convergence of international law and OADR is crucial to ensuring the effectiveness of the resolution system. Although online arbitration has the potential to provide the essential legal framework needed for the continued development of cross-border C2C commerce, it is unlikely that Internet stakeholders will be willing to invest in developing online arbitration systems unless there is some assurance that awards will be enforced.<sup>133</sup>

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

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128. See The FTC on 'Internet Fraud' Before the Subcommittee on Investigations of the Governmental Affairs Committee, United States Senate, Washington, D.C. Feb. 10, 1998, available at <http://www.ftc.gov/os/1998/02/internet.test.htm>.

129. Rothchild, *supra* note 72, at 946-49.

130. Aguilar, *supra* note 25, at 53-54.

131. A relevant, though ancillary, issue is whether the consumer should have the opportunity to opt out of online arbitration during contract formation. If arbitration were mandatory and without international governmental support, it would potentially be attacked in domestic courts. See Stewart & Matthews, *supra* note 37, at 1127-28.

132. See *id.* at 1127.

133. See Morrison & Foerster, LLP, *Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*, available at <http://www.kuner.com/data/pay/adr.pdf> (last visited on Apr. 25, 2006) (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).

Foreign Arbitral Awards (the “New York Convention”).<sup>134</sup> However, the New York Convention was drafted in 1958, long before the emergence of the Internet. The very language of the New York Convention prevents its use as a predictable means of award enforcement in cross-border online arbitration.<sup>135</sup> The primary goals of the New York Convention were “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>136</sup> The New York Convention only governs foreign arbitral awards and is typically implicated when the seat of the arbitration occurs in one country but enforcement of the award is sought in another.<sup>137</sup> The place of enforcement is, for all intents and purposes, “the country in which process over the losing party’s assets can be obtained with the help of national courts.”<sup>138</sup>

Aside from the fact that the New York Convention was not intended to apply to C2C online transactions, it also has the potential to prevent the enforcement of online arbitral awards. First, the New York Convention requires that all contracts for arbitration be in writing and signed by the parties.<sup>139</sup> This presents a particular problem for C2C transactions, which typically occur without a contract. For example, the US has adopted legislation explicitly recognizing electronic agreements as contracts.<sup>140</sup> Many other countries have taken the contrary stance that electronic agreements do not satisfy the New York Convention’s writing requirement.<sup>141</sup> Therefore, when parties from countries with conflicting legislation become embroiled in a dispute there is potential for a party that is hostile to online arbitration to argue that an agreement for arbitration never existed.<sup>142</sup>

Second, under the New York Convention’s commercial reservation, signatory governments may refuse to enforce arbitral awards that are not

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134. See 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”].

135. Stewart & Matthews, *supra* note 37, at 1131.

136. *Id.*

137. See New York Convention, *supra* note 134.

138. See Stewart & Matthews, *supra* note 37, at 1132.

139. See New York Convention, *supra* note 141, art. II(1).

140. Stewart & Matthews, *supra* note 37, at 1134-35.

141. *Id.* at 1133.

142. *Id.* at 1135.

considered to be commercial in nature.<sup>143</sup> The commercial reservation is indicative of the New York Convention's purpose: the enforcement of arbitration agreements in *commercial* disputes—generally defined as disputes between two businesses.<sup>144</sup> International interpretation of the commercial reservation suggests a general antipathy towards the arbitration of disputes that are not business to business in nature.<sup>145</sup>

#### F. Auction Site: Feedback Systems and Exile

Many sites which facilitate and host C2C transactions have processes aimed at both preventing misconduct and enforcing arbitral decisions. Two of the most common methods are the feedback system and the threat of exile from a particular virtual market. On eBay, for example, non-paying bidders (“NPBs”) face repercussions applied through a system of accelerating sanctions.<sup>146</sup> For the first and second offenses, the NPB receives a warning. After a third offense, the NPB receives a warning and a thirty day suspension during which all eBay privileges are suspended. If the NPB commits a fourth offense, the penalty is an indefinite suspension from the auction site and the NPB can no longer buy or sell items. This type of expulsion system is premised on the assumption that parties will honor the rules of bidding because the inability to advertise or do business on the Internet, is too great a “competitive disadvantage in the new global business community.”<sup>147</sup>

The feedback system is a second tool for ensuring the enforceability of arbitral awards.<sup>148</sup> The system provides both sellers and bidders with

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143. *Id.* at 1133.

144. *Id.* at 1135.

145. *Id.* at 1133.

146. *See generally* eBay, Unpaid Item Policy, <http://pages.ebay.com/help/policies/unpaid-item.html> (last visited Aug. 31, 2006).

147. Joseph A. Zavaletta, *Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal*, 7 J. TECH. L. & POL'Y 2, 12 (2002). (eBay is such a powerful source of business for advertisers, sellers and buyers that the inability to use eBay would be such a disadvantage as to make noncompliance of eBay rules extremely dangerous.)

148. *See* Ichiro Kobayashi, *Article: Private Contracting and Business Models of Electronic Commerce*, 13 U. MIAMI BUS. L. REV. 161, 207 (2005). Other websites which provide feedback forums in the context of B2C and C2C transactions include Epinion.com, Yahoo! Shopping Auction, and Amazon.com.

an online bulletin board on which to post information about online transactions.<sup>149</sup> eBay's feedback system may provide a model solution to the effectiveness issue.<sup>150</sup> eBay's system is effective because information about both sellers and buyers is presented in the same space in which the transaction occurs. Prior to engaging in a transaction, buyers and sellers on eBay can review each other's feedback quickly and conveniently without having to go to another website.<sup>151</sup> The eBay system 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, such as statistical results, 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—it is presumed—will eventually lose consumers.

On its own, however, a feedback system is not enough to ensure that parties will comply with an arbitral award. Studies have shown that most consumers do not check ratings before they purchase.<sup>152</sup> Rather, buyers tend to look at ratings after a dispute has arisen.<sup>153</sup> "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 are relatively small."<sup>154</sup> Despite this drawback, feedback forums have the potential to be a vital and necessary component for ensuring the effectiveness of online arbitration in conjunction with the support of a legal framework created through international cooperation of governments.

While a feedback system provides consumers with a chance to comment on another party's behaviors post-transaction (and possibly post-arbitral award), it does not ensure enforcement of awards that include refunds or exchanges of goods. An advantage that B2B and

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149. *See id.* Members receive a +1 point for each positive comment, zero points for each neutral comment, and -1 point for each negative comment. Additionally, the number of transactions completed by a member and the length of time membership has been held is also provided to consumers.

150. *See generally*, eBay Feedback Forum, <http://pages.ebay.com/services/forum/feedback.html> (last visited October 26, 2006).

151. *See* Stewart & Matthews, *supra* note 37, at 1141-42.

152. *See, e.g.*, Stephen S. Standifird, *Reputation and e-commerce: eBay auctions and the asymmetrical impact of positive and negative ratings*, 27 J. MGMT. 3 (2001).

153. *See* Stewart & Matthews, *supra* note 37, at 1142.

154. *See id.* at 1141-42.

B2C merchants have is the ability to accept credit cards as payments. Credit cards provide some degree of certainty that merchants will receive payment and consumers can receive a refund should the transaction sour.<sup>155</sup> Unfortunately, individual consumers acting as sellers in C2C transactions face difficulty in obtaining merchant accounts that allow them to accept credit cards.<sup>156</sup> However, C2C parties can now utilize online payment services that would allow both credit cards, debit cards, and other payments to be accepted.<sup>157</sup>

Six years ago, experts correctly predicted that the future would give rise to the use of “e-purses” or online cyber-accounts in international C2C transactions.<sup>158</sup> Online payment services can now provide the final component necessary to the effective enforcement of C2C online arbitration awards. PayPal, a subsidiary of eBay, is a prime example of an online automated payment system.<sup>159</sup> Yahoo! and Amazon.com also operate their own payment service providers.<sup>160</sup> Online payment services function as both reputational intermediaries at the informal relation-preserving stage and dispute mediators at the informal end-game stage.

PayPal operates in 103 countries with over forty million members.<sup>161</sup> Under PayPal’s system, before a seller or buyer can

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155. The US’s “Truth in Lending Act” is a federal law designed to protect consumers in credit transactions by requiring clear disclosure of key terms of the lending arrangement and all costs. 15 USC 1601. The Act regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes. *Id.*

156. See nclnet.org, Online Auctions 2001 Survey: Summary of Findings, <http://www.nclnet.org/shoppingonline/auctionsurvey.htm> (2001) (noting that in only 17% of the transactions did the buyer give his credit card number directly to the seller).

157. See Kobayashi, *supra* note 148, at 209.

158. 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.

159. See PayPal, <http://www.paypal.com> (last visited Apr. 25, 2006).

160. See David E. Sorkin, *Payment Methods for Consumer-to-Consumer Online Transactions*, 35 AKRON L. REV. 1, 10 (2001).

161. See eBay Annual Report 2003, <http://investor.ebay.com/annual.cfm> (2003) (noting that the bulk of the over \$12.2 billion in total payment volume transacted on the PayPal platform consisted primarily of payments to individuals and small businesses trading on eBay and various other online shopping sites, that between 2003 and 2004 PayPal’s accounts grew by roughly 20 million at an average of 46,000 per day, and that PayPal averaged \$33.5 million in daily payment volume with an average payment of

conduct business through the service, they must create an account with PayPal.<sup>162</sup> This requires the listing of a funding source for payments, such as a credit or debit card. Payments are deducted from the buyer's account and automatically reflected in the seller's PayPal account balance.<sup>163</sup> Sellers may use their account balances to send a payment to someone else, use their PayPal account to shop online, withdraw the money to a bank account, or even use a PayPal debit card for "real" commerce transactions.<sup>164</sup>

Automated access to accounts makes online payments systems an attractive way of ensuring OADR's effectiveness. Services such as PayPal can operate as a third party arbitrator to settle disputes between sellers and buyers.<sup>165</sup> PayPal's Buyer Complaint Policy "indicates that PayPal will try to help buyers recover funds from non-complying sellers, and help complying sellers reduce the risk of chargeback."<sup>166</sup> Upon receiving a chargeback claim from the buyer, PayPal policy provides that PayPal has authority to investigate the underlying claim. "If the seller cannot present sufficient evidence, PayPal is entitled to collect the amount the buyer paid from the seller."<sup>167</sup> The use of chargebacks is not new to the realm of appropriate dispute resolution. In fact, the credit card chargeback is the most frequent means of ADR in consumer disputes in the US.<sup>168</sup> However, problems arise when the initial transaction did not use a credit card, but rather a money order or personal check. In this case, the parties should be required to supply

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\$53 sent during this period). PayPal currently allows sellers to accept payment in over 15 forms of currency. See PayPal, available at <http://www.paypal.com> (last visited Nov. 27, 2006). Since PayPal's creation in 1999, other similar service sites have sprung up. See, e.g., BidPay—Auction Payment Service, available at <http://www.bidpay.com> (last visited January 3, 2007). In contrast to PayPal, BidPay is strictly an online-auction payment service that is only available to sellers with a US bank account. *Id.*

162. See Kobayashi, *supra* note 155 at 210.

163. See *id.*

164. *Id.* "Real" transactions, for the purposes of this article, are defined as those transactions being initiated, conducted, and finalized offline.

165. See *id.*

166. See PayPal Website, Buyer Complaint Policy, available at [https://www.paypal.com/cgi-bin/webscr?cmd=p/gen/ua/policy\\_buyer\\_complaint-outside](https://www.paypal.com/cgi-bin/webscr?cmd=p/gen/ua/policy_buyer_complaint-outside) (last visited October 26, 2006).

167. See Kobayashi, *supra* note 155 at 210.

168. See Timothy P. Lester, *Globalized Automatic Choice of Forum: Where Do Internet Consumers Sue?: Proposed Article 7 of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters and its Possible Effects on e-Commerce*, 9 New Eng. J. Int'l & Comp. L. 431, 462 (2003).



credit or debit card information at the beginning of the OADR process to help ensure the enforceability of the award.

Consumers are obviously comfortable with using credit cards for online transactions. Credit cards are the main method of Internet payment.<sup>169</sup> Credit cards represent a total of \$ 1.23 trillion in commerce in the US alone.<sup>170</sup> The credit card chargeback is the most frequent ADR vehicle for consumer disputes in the US.<sup>171</sup> Additionally, although European governments have not required credit card issuers to use chargeback mechanisms, chargebacks are fairly common in European card agreements.<sup>172</sup> Although both online automated payment systems and credit card chargebacks ensure that OADR awards will be enforced, credit cards have additional benefits: major credit card networks are already established, they extend chargeback protection internationally, and they “have adopted special consumer protection chargeback rules for e-commerce.”<sup>173</sup> “When a dispute arises, a cardholder can have the issuer reverse the charge by issuing a chargeback to the seller’s account.”<sup>174</sup> The use of credit cards within the OADR process, however, is not without flaws. For example, a credit card provider’s power to adjudicate any transactional dispute is dependent on the card issuer’s agreements with merchants and cardholders.<sup>175</sup> The laws that govern credit card providers, such as the US’s Fair Credit Billing Act and Regulation Z,<sup>176</sup> focus on B2C transactions. There are currently no laws that would cover C2C credit card chargebacks, or allow a consumer-seller to receive a chargeback.

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169. See *id.* at 461; see also Henry H. Perritt, Jr., *Legal and Technological Infrastructures for Electronic Payment Systems*, 22 Rutgers Computer & Tech. L.J. 1, 2 (1996).

170. Federal Reserve, Press Release, *Fed Announces Results of Study of the Payments System. First Authoritative Study in 20 Years*, Nov. 14, 2001, <http://www.federalreserve.gov/boarddocs/press/general/2001/20011114/default.htm>.

171. See Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 Ky. L.J. 885, 945 (2000).

172. See Lester, *supra* note 168, at 464.

173. *Id.* at 462.

174. See *id.*

175. *Id.*

176. *Id.* (“[T]he Fair Credit Billing Act, (15 U.S.C. § 1666 (1994), regulates credit card providers. Federal Reserve Board Regulation Z, (12 C.F.R. §§ 226.12-13 (1997), . . . provides important rules regarding ‘liability limitations, error and dispute resolution, and disclosure’ in e-commerce.”). *Id.*

## IV. CONCLUSION

The Internet has aided the development of a new means of commerce that allows for global relationships at low costs.<sup>177</sup> In order for global e-commerce to achieve its full potential, principles that have worked well in the conventional marketplace must be examined anew before they are applied to the online marketplace.<sup>178</sup> When enacting their e-commerce regulations, states must recognize that central to any policy are the interests and needs of the consumer in their dual role as seller and a buyer. Consumer confidence is necessary to sustain the current level of growth in the online marketplace. The best way to achieve consumer confidence while effectively protecting consumers in the global electronic market place is through international cooperation among governments and the private sector. Consumer protection will never be effective if it is advanced unilaterally by the government or by the private sector. Instead, advantages that each sector has in advancing e-commerce and consumer protection must be leveraged. The private sector has greater expertise in e-commerce, as well as the ability to develop a code of conduct for online C2C transactions faster than conventional legal channels. Governmental efforts and resources should be spent educating consumers and merchants about new methods such as OADR and the code of conduct for online C2C transactions, as well as creating a supportive framework for OADR. The partnership between the private sector and government should take into account the characteristics unique to international C2C transactions, and establish a new paradigm that advances the dual role of consumers as both sellers and buyers in the global electronic marketplace.<sup>179</sup>

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177. See Alboukrek, *supra* note 9, at 459 n.308.

178. *Id.* at 459.

179. See *id.* at 460.