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ALTERNATIVE DISPUTE RESOLUTION  
FOR CONSUMER TRANSACTIONS  
IN THE  
BORDERLESS ONLINE MARKETPLACE

BREAK-OUT SESSION 3  
ROOM 3884

MODERATOR:  
SUSAN GRANT

WEDNESDAY, JUNE 7, 2000

- 1                   A T T E N D E E S
- 2
- 3                   Susan Grant
- 4
- 5                   Edward Anderson
- 6                   Sarah Andrews
- 7                   Paul Bland
- 8                   Mark Budnitz
- 9                   Scott Cooper
- 10                  Michael Donohue
- 11                  Charles Goldman
- 12                  Kay Gordon
- 13                  Karen Hagewood
- 14                  Stuart Ingis
- 15                  Philip Johnson
- 16                  Ed Koree
- 17                  Jeffrey Kovar
- 18                  Emily Nolte
- 19                  Lanelle Polen
- 20                  Daniel Schumack
- 21                  Sandra Sellers
- 22                  Frank Torres
- 23                  Yuko Yasunaga
- 24
- 25

1 PROCEEDINGS

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3 MR. INGIS: Just so they have it for the  
4 record, I guess it will be transcribed, and I think what  
5 we'll do, maybe, is just walk through the hypothetical.  
6 And I think what we're supposed to do is try and come up  
7 with at least some sort of consensus or nonconsensus, but  
8 just some results from this discussion to share with the  
9 larger group.

10 So, maybe, we just -- since it isn't such a  
11 large crowd, we can just quickly go around and say who we  
12 are. I'm Stu Ingis, and I work with Piper, Marbury,  
13 Rudnick, and Wolfe and am actually pinch-hitting for Ron  
14 Plessner.

15 MR. YASUNAGA: I'm Yuko Yasunaga, coming from  
16 Ministry of International Trade & Industry, Tokyo, but  
17 I'm into consumer-related policy. Thank you.

18 MR. SCHUMACK: I'm Dan Schumack. I'm here  
19 representing NetMediate Corporation. We are out in  
20 Fairfax, Virginia. And more or less looking to see what  
21 our colleagues have to say about the future and where  
22 it's going.

23 MR. BUDNITZ: I'm Mark Budnitz, I teach law at  
24 Georgia State University.

25 MR. DONOHUE: And I'm Michael Donohue with the

1 Federal Trade Commission.

2 MS. GRANT: I'm Susan Grant from National  
3 Consumers League and tell Ron I don't take it personally  
4 that he didn't want to co-chair this breakout with me.

5 MR. INGIS: Nor should you.

6 MS. GRANT: No, I know.

7 MS. NOLTE: My name is Emily Nolte, and I'm  
8 with Clicksure, which is a quality assurance program for  
9 businesses online based here in Washington, DC.

10 MS. SELLERS: I'm Sandra Sellers, president,  
11 Technology Mediation Services, based in Washington, DC,  
12 McLean, VA.

13 MR. JOHNSON: I'm Philip Johnson, I'm chief  
14 legal counsel for the International Chamber of Commerce  
15 world headquarters in Paris. And my particular project  
16 is trying to oversee the creation of a -- would be to see  
17 arbitration online situation.

18 MR. KOREE: My name is Eddie Koree, I'm with  
19 Latham and Watkins, which has an office here, as well as  
20 several other cities around the United States and the  
21 world. And we have a number of clients who are internet  
22 firms that are interested in the direction that this very  
23 useful discussion is going to have.

24 MS. GRANT: Is there anybody who would be  
25 willing to take notes and be the reporter when we

1 reconvene in the general conference?

2 MR. SCHUMACK: I'll be happy to do that.

3 MS. GRANT: Thank you so much, appreciate it.

4 MR. SCHUMACK: I'll need some paper.

5 MS. GRANT: Oh. Thank you. Okay, I guess  
6 we've been given a couple of scenarios to help us think  
7 through how in real life ADR would work in helping to  
8 resolve these people's online commerce dispute.

9 And I guess it just makes sense to go through  
10 this in the order that we find them. So, the first one  
11 is a U.S. resident, Carol Consumer, who buys dishes from  
12 Dishes-and-Spoons.com for \$95. It's -- according to its  
13 website -- located in Germany. And says that it's  
14 affiliated with a third-party dispute resolution provider  
15 located in the UK.

16 We're just starting. Why don't you introduce  
17 yourself?

18 MS. ANDREWS: I'm Sarah Andrews, I work with  
19 E.P.I.C., the Electronic Privacy Information Center.

20 MS. GRANT: Okay. And I guess taking that  
21 first scenario and going into Question Number 1, you  
22 know, we could look at each of these aspects that are  
23 described and see how they apply to the situation --  
24 should apply to the situation. I guess A being the  
25 independence of the dispute provider. Does anybody have

1 any comment on this from what we know?

2 MR. JOHNSON: Well, in Europe we have a very  
3 clear, unambiguous definition of independence; in  
4 particular, the decision maker -- the individual who  
5 makes the decision cannot be, or have been during the  
6 last three years, affiliated with the ADR mechanism or  
7 with any corporation that is involved in supplying,  
8 support, or anything else to the resolution system.

9 This is an unhappy piece of writing from the  
10 European Commission, and I think that it is going to be  
11 revised because for a place like the ICC with its 120,000  
12 members -- that's where our potential arbitrators or  
13 mediators will come from.

14 And we would be excluded, essentially, from the  
15 market, which is exactly the opposite of what the  
16 Commission wants to see.

17 MS. GRANT: So, this third party dispute  
18 resolution, Disputes Online, would, from at least what we  
19 can tell, probably meet the current EU requirement being  
20 a third party dispute resolution provider.

21 But you're saying that if Dishes-and-Spoons was  
22 a member of your organization, you would be precluded  
23 presently from providing that ADR service.

24 MR. JOHNSON: That's right, or if we wanted to  
25 use someone who had worked for us during the last three

1 years, we would be precluded; or if we wanted to use  
2 someone from Dishes-and-Spoons, or the ADR, or the  
3 Knives-and-Forks, or the Knaves -- and so forth for the  
4 last three years -- precluded.

5 MS. GRANT: Is there anybody who thinks that it  
6 might be a good idea to preserve that more distant  
7 relationship model? Are there any arguments for that?

8 MS. SELLERS: Let me ask for clarification.  
9 So, does that mean that someone who has served as a  
10 neutral for you within the past three years could not  
11 serve as a neutral in a second case?

12 MR. JOHNSON: No, it doesn't.

13 MS. SELLERS: It just means they would have to  
14 be an employee of ICC in order to be precluded from being  
15 a neutral for ICC.

16 MR. JOHNSON: Right, however, it comes down to  
17 the same thing because nobody is going to want to be an  
18 arbitrator in these things. There is not going to be any  
19 money in it.

20 People come to us, as the situation now stands,  
21 because it's very, very profitable for them to be an  
22 arbitrator in these very big cases that we have.

23 Now, we're going down to \$300 dresses from  
24 Paris, or something like that, and the only way that we  
25 think we can make it economic -- economical is by

1 employee consultant arbitrators. We don't believe that  
2 we can do anything else. We can't use volunteers because  
3 of French labor law.

4 MS. GRANT: What issues does that raise in  
5 people's mind, though, concerning things like that -- the  
6 perception of fairness that we talked about this  
7 afternoon? Does that have a potential negative impact on  
8 that?

9 MR. SCHUMACK: It seems to me that your  
10 consumer in the \$300 dress scenario can't have a  
11 perception of fairness unless there is disclosure to  
12 indicate that you don't have an independent party acting  
13 here to massage the problem or work it out.

14 And there is a whole second tier, it seems to  
15 me -- issue here when you look at the large dollar  
16 disputes versus a consumer \$300 transaction or maybe even  
17 less than that.

18 And that is something that you'll hear from the  
19 traditional brick-and-mortar people who have been doing  
20 mediation and arbitration for years. And that is that  
21 they look at that \$300 dispute more as a customer service  
22 or a complaint department issue, and customer service has  
23 never been handled by a third-party neutral. It has  
24 always been some adjunct of the vendor unless the vendor  
25 chooses to out-source.

1 But even when the vendor out-sources, it's  
2 still somebody controlled by the vendor. Their purpose  
3 is very different from that of a neutral. The customer  
4 complaint department, if you will, is there to make the  
5 customer feel better.

6 MR. JOHNSON: Well, feeling good is great, but  
7 right now there is about 40 percent of the clients of  
8 U.S. internet sellers sitting in Europe unable to get any  
9 recourse or remedy at all.

10 And the only way that type of situation is  
11 going to really be resolved is by a situation that is  
12 global in nature.

13 The European -- the EU initiative that is being  
14 used only takes care of problems by the -- within the 15  
15 countries. It doesn't resolve any problem outside of the  
16 15 countries.

17 MS. GRANT: Let me stop here to just ask the  
18 people who came in to introduce themselves.

19 MR. ANDERSON: Ed Anderson from the National  
20 Arbitration Forum. We were fired from Room 6059.

21 MS. GRANT: Oh, well, you're very welcome here.

22 MR. KOVAR: Jeff Kovar from the U.S. Department  
23 of State.

24 MR. GOLDMAN: Charles Goldman from Mediation  
25 Arbitration Resolution Services.

1 MS. HAGEWOOD: Karen Hagewood from Square  
2 Trade.

3 MS. POLEN: Lanelle Polen from Winston and  
4 Strawn.

5 MR. TORRES: Frank Torres from Consumers Union.

6 MR. BLAND: Paul Bland from Trial Lawyers for  
7 Public Justice.

8 MR. COOPER: Scott Cooper, Hewlett Packard.

9 MS. GORDON: I'm Kay Gordon.

10 MS. GRANT: Okay. I would ask everybody to  
11 speak up, if you can, because there is air conditioning  
12 noises and other things that make it hard to hear.

13 For the benefit of people who just came in, we  
14 were going through the first scenario. I don't know if  
15 we're going to get any farther than this.

16 It's already getting really interesting, but  
17 this is Carol from the U.S. buying dishes from the German  
18 concern and going -- who uses a third party dispute  
19 service.

20 And this raises issues for the International  
21 Chambers of Commerce about doing ADR themselves for their  
22 members because current European Union rules would make  
23 them not seem as being an independent body for purposes  
24 of doing that.

25 But, actually, the kind of complaint assistance

1 that you're contemplating reminds me of things that some  
2 of the trade associations do here. For instance, the  
3 Direct Marketing Association and its mail order action  
4 line helping people with mail order problems.

5 And it doesn't pretend to be offering an  
6 alternative dispute resolution of the type that we've  
7 been focusing a lot through these talks, but more just a  
8 complaint service.

9 And I guess that it doesn't raise any issues of  
10 whether or not they're independent because if people get  
11 their mail order problems solved, and they're happy; and  
12 if not, there is lots of other places that they can go.

13 So, some of the other issues that we've been  
14 talking about concerning mandatory and binding and so on,  
15 I think come more into play when -- with the need to have  
16 a truly independent body. You wanted to say something.

17 MS. SELLERS: I'm just saying I thought a point  
18 raised by the gentleman from E Resolution was an  
19 interesting distinction. It's, I think, applicable to  
20 this discussion, and that's that there is a difference  
21 between independence and impartiality.

22 And I think it's impartiality that is the more  
23 important of those two concepts that the consumer should  
24 be concerned with preserving.

25 So, no, a -- the neutral who ends up deciding

1 or facilitating the dispute, or whatever, be it mediation  
2 or arbitration, the neutral may not be independent  
3 because they're being paid by a service provider who is  
4 being paid by one of the parties or a group of similarly  
5 situated potential parties, such as the BBB model.

6 But, nonetheless, if the neutrals are chosen  
7 properly and are given the impartiality, independence  
8 satisfaction that they need and deserve to work  
9 officially as a neutral, then they should be able to  
10 render an impartial decision or impartially help  
11 facilitate the settlement.

12 So, to me, that's the distinction to be made  
13 here because I do not see a model whereby consumers will  
14 not have to pay and expect someone else to front the  
15 entire financial burden of this dispute resolution system  
16 -- whatever form it takes -- without having that funding  
17 coming from people who are either a party or have similar  
18 interests to one of the parties in the case.

19 It's just impractical to think that the money  
20 is going to fall out of the sky, so it's got to come from  
21 somewhere. It's not going to come from the consumer,  
22 it's going to come from the other side of the part of the  
23 dispute.

24 So, I think the emphasis here ought to be  
25 impartiality, not strict definitional independence.

1 MS. GRANT: What -- is there a potential  
2 problem if the decision-maker is closely affiliated with  
3 the company or the entity -- the business entity and  
4 makes a lot of decisions in favor of consumers -- is  
5 there a potential problem with that person being fired  
6 and no longer being asked to do this function?

7 And is that -- if there is such a potential  
8 problem, how can we be reassured that that won't happen?

9 MS. SELLERS: Well, I think there are similar  
10 situations within -- I'm making a loose analogy, it's not  
11 exactly direct, but a loose analogy to the government  
12 administrative process in that many agencies have -- in  
13 the U.S. government, many agencies have administrative  
14 law judges or some type of hearing officers that are  
15 employees of that group yet render decisions that will  
16 somehow impact upon that agency's responsibility.

17 Yet they are given the, quote, independence,  
18 and it's certainly presumption of impartiality and are  
19 not accountable in a review sense for their performance  
20 with respect to decisions they come down on.

21 So, it has worked before in other models. I  
22 think it can work within this model, too. And I think  
23 that those types of models are ones that we could use to  
24 look for a basis of setting up that kind of situation in  
25 an international sense, as well.

1 MS. GRANT: Scott.

2 UNIDENTIFIED MALE: I'm sorry to interject. Do  
3 we need to say our names before we --

4 MR. INGIS: It would be easier to just say your  
5 name before you speak.

6 MS. SELLERS: Sorry, this is Sandra Sellers who  
7 has been hogging the microphone.

8 MR. COOPER: I think it was a very good point  
9 that you raised. I just want to try another cut at that.  
10 Scott Cooper with HP.

11 Is that I think that if the system is one where  
12 you can lower your transaction costs, I think in a very  
13 broad base in which you find that you can resolve these  
14 consumer complaints that gives redress to the consumers  
15 at a low transaction cost, which we hope ADR will be and  
16 extends the consumer confidence in trans-border  
17 situations, what you're doing is creating a model I think  
18 where you can serve a rising tide of expectations about  
19 the growth of this market.

20 And I think at least in the beginning, that may  
21 see us through some of the -- what will certainly be the  
22 difficult points of trying to make these systems work  
23 because then people are going to want to make them work,  
24 both on the business side and, hopefully, on the consumer  
25 at this end, and the government side because the

1 opportunities within this -- the growth of this market  
2 are going to be so great.

3         In a sense, it's creating -- it's like found  
4 money. It's creating something that wasn't there before.  
5 It's a little bit I think like what the BBB does with  
6 automobile -- the auto line program, which is an  
7 arbitration program and is required in most states. We  
8 have lemon laws, all the automobile warranty laws.

9         And so, consumers have these great rights to go  
10 to court and all that, but they find that they go to  
11 these arbitration systems that BBB and others run that  
12 the consumers do very, very well in part because the  
13 automobile companies are willing to bend some to let  
14 these things work because their alternative, which is the  
15 higher transaction cost of going to court with all the  
16 special laws that are built into the lemon law -- state  
17 lemon law system that really, kind of, give consumers all  
18 kinds of advantages, it's better for the businesses to  
19 resolve it through an arbitration.

20         So, that's an extreme example, but I think that  
21 it shows that if we can do these things right that  
22 businesses -- enlightened business, and that's always the  
23 leap of faith we're taking here -- will find it in their  
24 enlightened self-interest to try to make these things  
25 work.

1           And if it is a parallel universe of mediation  
2 where consumers do preserve their rights through the  
3 court, then it's even more important, I think, for  
4 businesses to make sure that these things work because if  
5 the word gets out to consumers and to consumer groups  
6 that this is a, you know, a shill, you know, this isn't  
7 working, then it's all going to fall apart, and we're  
8 right back to Square One with, you know, Brussels  
9 convention and everything else.

10           So, I think there -- I would like to think  
11 anyway that on a good day, this whole thing is going to  
12 be sort of self-fulfilling, that people are going to want  
13 to make this work. And I would like to think that  
14 companies like ours are going to try very hard to do  
15 that.

16           MS. GRANT: Paul.

17           MR. BLAND: This is Paul Bland, PLPJ. With  
18 respect to the question you asked, Susan, on impartiality  
19 -- there have been some anecdotes and press stories of  
20 arbitration service providers who have ruled for  
21 consumers in amounts or in frequencies that were found to  
22 be displeasing to companies and then been fired after  
23 one-year contracts and replaced with other providers who  
24 were certainly hoped to be better.

25           I mean, I can't say that there was any

1 empirical evidence this happens a lot, but there has been  
2 some press stories of that happening, and I've heard  
3 consumer lawyers talk about that.

4         One thing I want to say about the independence  
5 versus impartiality point is that I think there is a  
6 little bit of misconception sometimes that who funds the  
7 arbitrator is the person who is going to be the one that  
8 the arbitrator is going to have the incentive to please,  
9 because there are a number of settings where the company  
10 will pick the arbitration service provider and then make  
11 the consumer pay for it.

12         And it doesn't mean the arbitration service's  
13 priority is to, kind of, pay the consumer because the  
14 consumer has no choice as to selecting this person and  
15 can't -- isn't in a position to fire them later.

16         So, even if the company is paying all the  
17 money, that's not nearly as important as who is  
18 selecting. And one of the things that we've -- I've seen  
19 some clauses -- some companies are moving towards doing  
20 -- some defense lawyers are advocating is having clauses  
21 that allow, once the dispute arises, allow the consumer  
22 to choose between a number of different arbitration  
23 service providers -- like, put like four or five names  
24 down there

25         And, you know, so the defense lawyer keeps

1 needling me, saying, well, this is really going to wipe  
2 out a lot of the arguments you've been making.

3         And I think that he's right that it is going to  
4 cause a lot of problems for our argument because I think  
5 that one of the things you'll see is that if, after the  
6 dispute arises, the consumer has some choices, then there  
7 will be the kind of effect that Scott was just talking  
8 about.

9         Right now, Scott is saying, well, if there is a  
10 -- if one company -- if one arbitration service provider  
11 has a bad reputation among consumer lawyers, that will  
12 start to unravel the system.

13         There are some arbitration providers with very  
14 bad reputations among consumer advocates and consumer  
15 lawyers. And right now, it's very hard for consumer  
16 advocates, and consumer lawyers, or consumers to do very  
17 much about it in the United States domestic courts where  
18 these arbitration clauses are being enforced, sort of,  
19 whoever the arbitrator is, barring, like, videotaped  
20 evidence that the arbitrator has done something  
21 impartial.

22         If there was this kind of choice for people,  
23 like, after a dispute arises, that might be fairly  
24 different.

25         MR. COOPER: Do you think, though, that with

1 mediation you run into the same problem?

2 MR. BLAND: I think that where it's nonbinding,  
3 it certainly dramatically changes the setting. And I  
4 think the impartiality is far less important where it's  
5 nonbinding because if someone thinks -- I think that that  
6 taking away the binding aspect of it dramatically changes  
7 the whole calculus from the consumer advocate side of  
8 this.

9 MR. BUDNITZ: You talk about independence, and  
10 impartiality, and fair process. I think you also have to  
11 talk about confidentiality to the -- and before I get  
12 into that, I was struck by what Linda Fienberg had to say  
13 with Securities Arbitration, where that is overseen,  
14 monitored, supervised with all kinds of rulemaking by the  
15 Securities and Exchange Commission, and it's done by  
16 NASD, which is heavily regulated.

17 And still, investors, the consumers in that  
18 context have a real problem in thinking that it's not an  
19 independent, impartial procedure. That really struck me  
20 because that is so much more than anything we're even  
21 coming close to talking about in terms of a tight ship.

22 But one of the ways of satisfying consumers  
23 that it is an independent and impartial process is by  
24 making available -- by the providers making available in  
25 aggregate form -- anonymous form -- the data -- who wins,

1 who loses in terms of what kinds of cases and so forth.

2 And having that freely available to consumers  
3 so that if they're given the choice of four or five  
4 different providers, they can make some kind of rational  
5 choice as to which one they should be selecting.

6 And so, I think you just have to work that  
7 confidentiality and public access information into the  
8 whole consideration of independence and impartiality.

9 MS. GRANT: Yes.

10 MR. SCHUMACK: I would be curious whether a  
11 win-loss column would be a sufficient -- or forget about  
12 sufficient -- a meaningful disclosure in order to let  
13 people know if there is bias there.

14 It's conceivable that if the same type of  
15 dispute keeps going to a specific ADR provider, that  
16 there could be an overwhelming result in favor of one  
17 side or the other in a transaction.

18 And to just give out the win-loss information  
19 on behalf of the consumer, or how many times the vendors  
20 win could actually be counterproductive.

21 There is another disclosure, though, that I  
22 think might be useful here, and that would be one that  
23 discloses the actual identity of the service provider and  
24 what their relationship might be to the vendor or the  
25 vendor's industry in terms of who is paying them, types

1 of qualifications that their ADR professionals inside the  
2 organization may have.

3 I don't disagree with the notion that outcome  
4 statistics could be useful, but they could also mislead  
5 consumers into thinking that a system is biased when it's  
6 not.

7 MS. GRANT: Yes.

8 MS. SELLERS: This is Sandy Sellers again. I  
9 think it's a nice concept for the consumers to have a  
10 choice of ADR providers at the time the dispute arises.  
11 However, I think it's impractical.

12 I think a more practical focus would be to say  
13 that within the ADR provider that had been, you know,  
14 chosen by whoever is paying for it, then a consumer could  
15 choose between individual neutrals, so there is still  
16 some consumer choice.

17 But to say the consumer would have a choice of  
18 ADR providers cuts down on the cost efficiencies that  
19 might be negotiated by whoever is paying for it or, you  
20 know, case-a-year as opposed to 100 cases a year.

21 And, secondly, the learning curve for the  
22 neutrals within that -- that and, you know, frankly,  
23 we're talking about \$95 cases here. The cost  
24 efficiencies have to be practically considered for this  
25 system to work consistently and with quality.

1           So, that's another aspect I want to throw in.  
2 I can see choice of individual neutral, not of ADR  
3 provider.

4           MS. GRANT: Well, I think that highlights the  
5 need for an independent, whether it's part of an entity  
6 like the Chamber of Commerce that's providing the service  
7 or a third party.

8           That the way that it's set up and structured  
9 has to be independent so that, you know, consumers can  
10 have that perception of fairness, and that it has the  
11 reality of fairness, and it will be a good, workable  
12 solution.

13          We could spend more time on this issue, but we  
14 have a list of issues. And I'm going to pass the  
15 discussion of cost down to you and go make a phone call.

16          MR. INGIS: Okay. The question is whether we  
17 think that cost should affect -- I guess and maybe we'll  
18 try and throw a few of these in together just based on  
19 the timeframe -- on the value size nature of what the  
20 claim -- whether cost should be taken into account in  
21 ADR.

22          And maybe I'll just start off, and I think --  
23 is going to probably say what Scott is going to say here  
24 -- but I think that it's probably far more important to  
25 have an ADR for some of the smaller transactions that are

1 global because the transaction costs are so much higher  
2 than in a big ticket litigation, for example, that it  
3 almost immediately becomes too high if you have to  
4 proceed in court or fly from one side of the world to the  
5 other to deal, you know, with the returned record.

6 It becomes irrelevant, so I think that cost is  
7 particularly important, and the need for ADR is  
8 particularly evident in small consumer transactions that  
9 are global in nature. Scott.

10 MR. COOPER: Exactly right, and I'm also going  
11 to agree with what Sandy was saying, is that I think  
12 there is -- I was going to say this, a sort of rough  
13 justice kind of equivalency we've got to consider here in  
14 that what we're trying to set up is a program that's  
15 going to serve redress mechanisms for consumers and  
16 trans-border who, basically, have no other reasonable  
17 alternative, you know, and the \$300 dress is kind of the  
18 example that has been thrown out there.

19 I don't think that, in my own mind, that you're  
20 going to have the ability or the luxury of saying, well,  
21 I want that ADR program, and I want that person, and I  
22 want it to -- crafted this way or that way.

23 I think you're going to have to say for that  
24 \$300 transaction, I plug into an ADR system, and I count  
25 on that system to be well-run. I count on that system to

1 be -- have a certain oversight by governments to make  
2 sure it works.

3 And it may be that I won't get the redress that  
4 I want, and it may be that I will still be aggrieved.

5 Well, I go to court if I really want to.

6 But you're looking for percentages here. You  
7 want to have, I think, you know, a very high percentage  
8 -- in the 90 percent, hopefully, of people who feel at  
9 least they have, sort of, their day in court through this  
10 ADR system.

11 But it is going to be rough justice. You're  
12 not going to resolve all things, and you're not going to  
13 create a system, I think, that's going to offer you the  
14 due process that a court system is. But you shouldn't  
15 try to because that's not what we're trying to do here.

16 So, I think we've got to be very careful about  
17 going down the route of saying, well, it should be  
18 designed this way, it should be designed that way, or  
19 we've got to consider exactly how we ensure impartiality.

20 I think there is going to be a certain leap of  
21 faith these things are going to be set up, there will be  
22 mistakes made; but there will be, hopefully, a natural  
23 correction to these things because consumers, if they  
24 don't feel like they got redress, they're going to walk.

25 And then the system falls apart, and then we're

1 really, you know, behind the eight-ball.

2 MR. INGIS: Right. Frank, and then Phillip and  
3 Frank.

4 MR. TORRES: Thanks. Frank Torres from  
5 Consumers Union. My suggestion is we take one step back  
6 a little bit. And say in the instance of the \$95  
7 dinnerware set -- the person orders it, she gets it, it's  
8 missing half of what she was supposed to get.

9 What is she going to do? She is going to go on  
10 -- she ordered it online, she's going to go online,  
11 hopefully go back to the site. There will be a mechanism  
12 for her to contact this dinnerware manufacturer --  
13 wherever she got it from -- and say, hey, I only got half  
14 of it.

15 Now, if they do the right thing and send her  
16 the other half, then she is made whole, and she will  
17 never reach the stage of going through ADR.

18 Suppose they say, no, we think we shipped you  
19 the whole thing? Then what do they do? Do they  
20 investigate with the shipper to see what happened to it?  
21 Or, yeah, you all of a sudden reach an impasse where, you  
22 know, both sides are saying two different things. And  
23 that's when it gets to the stage where it goes to the  
24 ADR.

25 The suggestion was made yesterday -- and I

1 forget which speaker it was who said, you know, you can  
2 go shopping online 24 hours a day, do you have 24 hours a  
3 day access to the arbitration?

4 I mean, so, she's sitting at her home computer,  
5 it's 12:00 at night. She's, like, I'm really mad or  
6 upset because I'm not being able to resolve my dispute.

7 Is the system that we're envisioning that she  
8 can click on somewhere on the site of the merchant that  
9 she has done business with that will open the door for  
10 her for ADR, where she types in her complaint, e-mails it  
11 to wherever.

12 They, kind of, then get in touch with the  
13 merchant. The merchant gets to give their side, and then  
14 the arbitrator renders a decision, requests more  
15 information.

16 You know, in that scenario -- well, maybe my  
17 point is we just kind of need to get to reality a little  
18 bit to see how it works.

19 Then the question of, can we make that a system  
20 where there is a bunch of different alternatives for the  
21 consumer to select which service provider -- which ADR  
22 service provider because conceivably if you're doing all  
23 this online, the transaction costs of actually getting to  
24 ADR is minimal to get there.

25 So, I think -- my second point is, we need to

1 think of all these factors together to determine maybe  
2 what drives us to some sort of end result.

3 I think to get to the independence question,  
4 that's almost to me where a set of standards may be akin  
5 to, kind of, the lemon law standards so consumers know  
6 whichever service -- ADR service provider is out there,  
7 they're all abiding by the same standards.

8 That -- I don't know how you gauge  
9 impartiality, but, you know, that there is -- if there is  
10 factors of impartiality, that there is a hammer that  
11 comes down.

12 And no merchant can do that, no ADR service. I  
13 think that's, kind of, the role of some government entity  
14 to serve as a hammer for that. So, those are some of my  
15 thoughts.

16 MR. INGIS: That's a statement, sort of,  
17 affirming you would think that there needs to be some  
18 baseline substantive rules, and you would say that it  
19 needs to be done by the governments.

20 Anybody have any reaction whether there are  
21 other means of providing that? Maybe Scott -- or other  
22 means of providing substantive rules?

23 MR. COOPER: I agree that I think that you have  
24 to have guidelines or some sort of minimal standards, or  
25 it could be certification.

1 I'm not too sure exactly where we would end up  
2 on that, but I think you have to have that out there. I  
3 think it shows up not only as your Section V authority  
4 that if you say something and you refuse to live up to  
5 it, that's a deceptive act. That's a given.

6 But, also, that I think, especially in trans-  
7 border, I think that both sides of the ocean are going to  
8 feel much more comfortable if they know that there is  
9 some sort of basic guidelines that all sides have agreed  
10 to is the minimal standards here.

11 I guess I just get back to the point is that  
12 with -- if there is a complaint, somebody files it at  
13 midnight, in the next two days -- or whatever it takes,  
14 three days -- you get some sort of resolution or no  
15 resolution. Perhaps that they can't -- they say, we  
16 can't resolve this because it, you know, we can't find  
17 enough facts about this matter. You know, the company  
18 can show shipping receipts, but the person still says we  
19 didn't get it.

20 You may have impasses like that, but what I  
21 think is going to be very helpful here is that if you get  
22 a pattern of abuse -- in other words, if you have a  
23 number of complaints against that same business for a  
24 series of problems similar to that one, then what you've  
25 got is something that, perhaps, that seal program needs

1 to take and pass that onto whatever regulatory agencies  
2 there are out there and say, would you look at this  
3 please?

4 MR. TORRES: And give the consumers an ability  
5 -- the next consumer that wants to do business with that  
6 site, the ability to go in before they opt to do business  
7 to see something.

8 MR. COOPER: And also that record, I think --  
9 it should be transparent records so that if a consumer  
10 does want to go to court, they can take that record of a  
11 potential pattern of abuse as part of their record that  
12 they would take to court.

13 So, I think you can find self-balancing methods  
14 here, so you may not resolve that one person's complaint  
15 right off the bat. You may never resolve that person's  
16 complaint. It may be something that it's going to be a  
17 certain attrition in e-commerce, just like in the retail  
18 world where a lot of cases may -- not a lot, some cases,  
19 certainly, though, are never going to be resolved, and  
20 people are going to hold grievances, and they will tell  
21 everybody, and they're very upset about it.

22 That may just be a fact of life. But if you've  
23 got these resolution mechanisms and self-regulatory  
24 mechanisms built into this, I think what you're going to  
25 do is get a lot more redress and a lot more ability to go

1 after the bad actors than without these things set up.

2 And given the other alternatives, which is, I  
3 think, is a much more jurisdictional approach and legal  
4 approach that is probably just not going to pass the  
5 costs test, we're back to the rough justice. What is  
6 going to get us the best redress for the greatest number?

7 MR. INGIS: Maybe for an international  
8 perspective, Philip; and then, Yuko, maybe you could  
9 share what you were describing earlier about your  
10 guidelines and your relation with the government in  
11 Japan.

12 MR. JOHNSON: Well, I'll talk about cost from  
13 two points of view. One of the things that you mentioned  
14 several times is giving a list of ADRs -- five ADRs to  
15 choose from.

16 In my opinion, there aren't going to be five  
17 ADRs. There aren't going to -- we're very lucky we're  
18 going to get one at the international level because of  
19 the enormous costs of setting up a worldwide distributed  
20 computer system.

21 Maybe there will be some other people who want  
22 to do this, but I don't know -- I don't really think they  
23 will when they start looking at the economics of it. Our  
24 goal is to not lose money. We don't believe we can  
25 possibly make one franc on this.

1           And then there is something else that since  
2 most of you lawyers are lawyers I would like to bring up  
3 in the cost element, and that is applicable law.

4           When you start sitting down and looking through  
5 all of this and trying to do some costs provisions, I --  
6 based upon the costs of a full-time employee in France,  
7 who is 30 to 35 years old with experience in the law --  
8 came up with the fact that he or she could probably  
9 handle 30 to 35 cases per month, devoting a maximum of  
10 six hours to each case.

11          Now, if you have multiple laws -- A, to even  
12 make the choice, but even worse to have to go find the  
13 right person who speaks Dutch, or who speaks Danish, or  
14 what-have-you -- have them do research on that specific  
15 aspect and get ready to make the decision, you're way  
16 over budget before you ever get anywhere.

17          And there is a tremendous division of opinion  
18 in Europe over this aspect of applicable law. But I  
19 remain absolutely convinced that anyone who tries to do  
20 it other than by a unique system, like the ANSI 12 Rules  
21 or the 1964 Unidraw Rules, or something like that, or  
22 even drawing up your own, assuming that you can still  
23 draft after practicing law for 20 years.

24          MR. INGIS: Let's see if we can move on just  
25 because of time constraints. Thanks for that. Yuko, and

1 then maybe, Susan. We should probably move on further in  
2 the list, too, because I think we have until half past  
3 unless anyone knows of an extension. So, I think --

4 UNIDENTIFIED FEMALE: Until 5:00.

5 MR. INGIS: Oh, we have until 5:00? Okay,  
6 good. Yuko.

7 MR. YASUNAGA: Thank you. I'm Yuko Yasunaga.  
8 Regarding the listed as number one. So -- also, the  
9 Japanese government, they have not issued any guidelines  
10 about ADR since the ADR itself is totally pretty much in  
11 Japan.

12 What I can say with regard to these things is  
13 they are full -- the disclosure is important, and maybe  
14 if the fullest disclosure is realized, idealistically,  
15 consumers can choose the best alternative among the ADR  
16 system.

17 For example, independence case -- from my very  
18 small experiences, let's take example in the Japanese  
19 product liability case. In the Japanese product  
20 liability, industry association has headquarter to  
21 receive the complaints and to have correspondence to each  
22 manufacturer and to give the explanation to consumers.

23 In such a case, because the many manufacturers  
24 of Japanese automobiles or consumer electronics are  
25 pronounced so that the consumers can get very satisfied

1 -- satisfaction -- good satisfaction.

2           However, the -- since such kind of complaint  
3 handling is made by the industry association, disclosure  
4 is not so sufficiently done. So that we need this system  
5 to be improved in the near future. So that maybe full  
6 disclosure is done as a third party, it can make a  
7 variation of those things so that the -- and I guess what  
8 I can say for those things is requirement of full  
9 disclosure.

10           But the requirements can be made by pressure of  
11 media or consumers union and other bodies so that maybe  
12 legislative regulation for that disclosure is not  
13 necessary. So, social pressure is enough.

14           MR. INGIS: Thank you.

15           MS. GRANT: I realize I stepped out for a  
16 minute, and I may have missed some important  
17 conversation, but I just wanted to clarify something  
18 about legal issues.

19           I didn't know whether you were talking about  
20 legal issues in terms of the consumer's dispute, or legal  
21 issues concerning notice. Was it concerning the dispute  
22 itself?

23           MR. JOHNSON: Concerning the method of  
24 resolving the dispute itself.

25           MS. GRANT: Oh, okay, all right.

1 MR. COOPER: Do you run a program in Europe on  
2 these things?

3 MR. JOHNSON: Are you talking to me?

4 MR. COOPER: Yeah. Do you run a -- are you  
5 looking at a program, then, in Europe on ADRs?

6 MR. JOHNSON: Well, ours will not be limited to  
7 Europe, it will be global. It will have people all  
8 around the world.

9 We have already broken our study group into a  
10 Far Eastern group headed up by representatives from any  
11 city. A North American group, and a Europe, and Africa  
12 group in order to take care of one in Africa. But --

13 MR. KOVAR: Are you with the ICC?

14 MR. JOHNSON: Yes.

15 MR. KOVAR: Yes.

16 MS. GRANT: Okay, because I just wanted to make  
17 one point. These hypotheticals don't say what the  
18 consumers' problems are with the transaction; but I think  
19 we can assume that typical problems people have are, I  
20 didn't get it, it arrived damaged, or, you know, the  
21 plates were supposed to have blue flowers and they're  
22 purple.

23 And I don't think for purposes of what should  
24 be the solution to the consumer's problem, we need to  
25 worry about applicable law.

1 I think we can think about basic principles of  
2 fairness and common sense that can guide the what should  
3 be the solutions to the problems. Legal standards for  
4 how all of this is to be done is another matter, which I  
5 realize may vary from place to place.

6 But I just wanted to -- I didn't want to get  
7 hung up in talking about the legal issues of the  
8 consumer's complaint itself because I don't think we  
9 really need to do that.

10 MR. JOHNSON: Well, in terms -- you sort of  
11 went right by one of the really difficult issues, or what  
12 I call major/minor problems.

13 And we don't know what happened to these  
14 dishes, and we don't know what happened to the  
15 silverware. They come to us and they say, it was broken.  
16 You know, if it's dishes, we can say send them to us so  
17 we can decide factually whether it was broken or not.

18 But take a high tech piece of equipment --  
19 we're incapable of judging whether it fits the norms. We  
20 don't have anybody who can do it. And it's very likely  
21 that the only people with the instruments necessary to  
22 judge it is going to be the seller.

23 MS. GRANT: Well, I know that speaking from the  
24 experience of handling consumer complaints at a local  
25 consumer agency for many years that sometimes the

1 consumer has to get the expert advice of a repair person  
2 or someone else who has that expertise to back up the  
3 consumer's claim.

4 But that's, again, more concerned about the  
5 actual facts. And, I mean, you don't have to look at the  
6 situation of the dishes are broken and figure out, well,  
7 legally what should the consumer's remedy be?

8 It's kind of a -- I think we can fly right by  
9 that because that's --

10 MR. JOHNSON: Well, don't forget we're dealing  
11 with the little percentage left over here. We postulate  
12 90 percent, at least, resolved by the sellers in-house,  
13 and then we postulate offering a mediation referral  
14 service.

15 We won't do it ourselves. We would take care  
16 of another 5 percent, and it would only be after all this  
17 effort to come to something. As -- for purposes of  
18 bitterness, or whatever, will finally come to us. So,  
19 we're talking just about the very small percentage.

20 MS. GRANT: Well, you may be overly optimistic,  
21 but that's okay. I mean, I think you may have people  
22 coming to you with problems that you wonder, you know,  
23 how did it get this far?

24 But sometimes people can just be really  
25 unreasonable with each other and not communicate well

1 with each other. And so, I think that's one reason why  
2 things end up needing ADR anyway, and not necessarily  
3 because they're terribly complex technological or  
4 sophisticated legal issues a lot of times.

5 Just going down the list, have we talked about  
6 the quality of the notice about the third party's dispute  
7 resolution that Carol should expect to see on the  
8 website? Are we that far?

9 MR. INGIS: I think we heard at least one  
10 reference to it should be readily apparent, and Frank  
11 said readily apparent to the consumer. Scott.

12 MR. COOPER: I think this gets back to the  
13 point of multiple ADRs or whether you're looking at  
14 single systems here because what you're likely to see is  
15 not a notice saying we have -- we belong to a consortia  
16 of ADRs, and you may choose this, that, or the other  
17 thing, or that you have certain rights built into your  
18 ADR system of redress here.

19 I think you're probably going to seal, and it  
20 may be a, you know, BBB seal, it may be an ICC seal,  
21 whatever. Within that seal, click on, most likely,  
22 you're going to have the listing of what that ADR system  
23 is.

24 If you have a problem with that company over a  
25 product, they are likely going to say, okay, you go to

1 that seal program to resolve that problem. And,  
2 hopefully, then you have -- you have kind of cut in the  
3 fact that it will be independent or at least -- what was  
4 the word we used?

5 MS. GRANT: Impartial.

6 MR. COOPER: Impartial, right, which I think is  
7 a better word. Impartial, and create this necessary  
8 system of redress where if things do fall through the  
9 cracks, you have either a pattern of abuse, or you've got  
10 some other legal recourse that you can turn to.

11 But I don't think you're going to have a system  
12 that is going to be so exacting or so -- built-in  
13 suspenders that it's going to allow the consumer a number  
14 of choices built into it.

15 If you go to that website, and you buy a  
16 product, you are going to have probably one choice as to  
17 what that ADR system is going to be.

18 MR. ANDERSON: Ed Anderson. Scott, do you  
19 envision -- what would happen on a site where there was  
20 no seal? Unless -- I should reiterate from our point of  
21 view, we think that all of this is already governed by  
22 lots of law in -- both inside and outside this country.

23 We don't worry much about the imposition of law  
24 -- it gives guidance. But what if there is no seal?  
25 What if the terms and conditions say -- as they do on

1 lots of websites -- you agree -- by buying the dishes,  
2 you agree to arbitration under a set of rules?

3 MR. COOPER: But I think you would probably  
4 have whatever legal remedies are available to you through  
5 that; and, obviously, you have a lot of warranty laws out  
6 there.

7 What you would not have access to, though,  
8 which is probably going to prove important to consumers,  
9 is an ADR system. But we're not going to be able to  
10 legislate an ADR system, I think, going into this.

11 Now, maybe somewhere down the road, you know,  
12 when we have a certain percentage of companies on the  
13 internet that buy into an ADR, we can start talking about  
14 well, what do we do to avoid the fee riders?

15 Or maybe just people start looking for it, and  
16 it becomes something that is a consumer question of  
17 knowledgeability on the consumer's part. There is a  
18 consumer information component attached to that.

19 I don't think -- and this is sort of, again,  
20 you take one step at a time. I think the first step we  
21 need to take is let's get up a system where at least a  
22 significant percentage -- some critical mass of companies  
23 are doing these things; hopefully, on a trans-border  
24 basis; and that we have a buy-in by governments, and  
25 consumer groups, and others so that they will be -- that

1 consumers will be told to look for those kinds of  
2 opportunities to use an ADR system.

3 I don't think there is any kind of consensus to  
4 go much further than that at this point.

5 MR. ANDERSON: There probably are 200 sites out  
6 there that invoke our code of procedure. There are  
7 probably an equal number that invoke others.

8 Some of them have a direct link that it says,  
9 you'll -- claims will be resolved, and it will help you  
10 get there to file the claim. Some don't.

11 I want to encourage you to visit our site, and  
12 see if you think that the claim form is manageable. We  
13 think it is, we've worked hard at it.

14 But it's -- that whole step process is --  
15 and I think it is correct that there aren't going to be a  
16 whole lot of people that are -- a whole lot of  
17 organizations that are going to do this because that's  
18 not our calculation of the economics, but the calculation  
19 of the economics is pretty ugly. Nobody is going to get  
20 rich providing these small claims dispute resolution.

21 MR. JOHNSON: Well, that's assuming that I get  
22 the subsidies from the European Union that I want.

23 MS. GRANT: Yeah, because, hopefully, they will  
24 get rich doing their e-commerce sales, so this way it  
25 just -- it will pay for it. This is the theory. Mark.

1 MR. BUDNITZ: Mark Budnitz. In terms of  
2 notice, I conducted a survey of websites shortly before  
3 Christmas of 1999, and these are all just very popular  
4 websites, well-known sellers, many of them brick-and-  
5 mortar, as well as some just web sellers.

6 And I found that it's very difficult to  
7 discover the terms and conditions. I was not looking  
8 specifically for ADR provisions or mandatory arbitration  
9 provisions. I was just looking for any terms and  
10 conditions. Very difficult and no uniformity, no  
11 standardization.

12 Sometimes I had to just guess and then go,  
13 maybe, three links down and then, oh, wow, I finally  
14 found the terms and conditions. Sometimes the terms and  
15 conditions would be segmented and be in various places.

16 The point is, it was very difficult to find  
17 them. On the other hand, that homepage is very valuable  
18 real estate for the seller. And they don't want to, and  
19 they can't put everything on there conspicuously and  
20 prominently -- what's this going to be? The ADR terms or  
21 a prominent link to ADR, or should it be the privacy  
22 policy? Should it be this, should it be that?

23 So, it is a difficult dilemma for the web  
24 seller what to do on that homepage, and how to identify,  
25 where to find the terms and conditions, and how easy to

1 make it. But some of them have made it really tough.

2 One other aspect which is -- what I've found is  
3 where I wanted to make print-out copies, of course, of  
4 these terms and conditions -- I was -- I'm a law  
5 professor. I write law review articles on this stuff.

6 I have to preserve the record so that my  
7 editors then want proof of what did it say on that date?  
8 Because after Christmas, a lot of the sites changed their  
9 pages, so I had to preserve that record.

10 And when I ran off those pages on some of those  
11 sites, I got blank pages. They would not run off in  
12 terms of anything legible. They were against a dark blue  
13 background, for example, on the screen, and I'm not sure  
14 if that had something to do with it, but whatever. And  
15 I've had this experience many times.

16 So, there is no way for the consumer to  
17 preserve the terms and conditions, and they do change.  
18 And so, this is another dilemma, and it all goes to this  
19 notice aspect.

20 MS. GRANT: Should you have to click on having  
21 read the notice about how complaints are dealt with  
22 before you can actually make your transaction?

23 MR. BUDNITZ: It sounds fine to me, but, well,  
24 should you also have to click on the disclaimer of  
25 implied warranties? Should you have to click on the

1 privacy policy?

2 This is another dilemma, but when you are  
3 talking about ADR and if you're making it pre-dispute  
4 mandatory, binding arbitration -- if that's the question,  
5 then I say, yeah, yeah, you have to click.

6 And that button has to explain what you're  
7 clicking at because a lot of the buttons are  
8 nondescriptive. They say, submit -- just the button --  
9 or it says, proceed, or it says something that's very  
10 hard to even understand what the consequences of clicking  
11 are. It's very hard for the consumer to even  
12 know whether he or she has accepted the deal, or whether  
13 the consumer is the one making the offer, which is  
14 something else that I studied.

15 And so, it's very confusing. That notice  
16 element is crucial if you're going to have a willing,  
17 knowing consent to the ADR.

18 MS. GRANT: Can I toss timeliness of decision-  
19 making there, too?

20 MR. INGIS: Timeliness of decision-making -- I  
21 guess, you know, I can start with a comment, and I think  
22 that it varies based on the size and type of transaction  
23 again.

24 I think that for smaller disputes, that there  
25 shouldn't be a lot of fact-finding and that type of

1 thing. That, you know, there should be something that is  
2 timely and, you know, resolves the situation in a  
3 somewhat quick manner.

4         And if we're talking about much larger  
5 transactions that may involve lots of fact-finding, I  
6 think that timeliness becomes the question that's a  
7 little less certain.

8         And it may take a long time; and, in fact, that  
9 the time -- the length of time that it takes may affect  
10 the -- be important to the decision, in and of itself, on  
11 both sides of the issue of whether consumers are going  
12 to, sort of, see it through, and whether they should see  
13 it through; and, also, whether businesses will come up  
14 and are willing to make a decision and go forward coming  
15 up with a solution.

16         So, there is maybe a start-up comment on  
17 timeliness. Frank.

18         MR. TORRES: Frank Torres from Consumers Union.  
19 Just two principles come to mind -- and you brought up  
20 one -- that said you have proportionality almost -- kind  
21 of almost a sliding scale, you know, smaller disputes,  
22 shorter amount of time, just resolve it and be done with  
23 it. Versus larger disputes, which admittedly might take  
24 a little bit more time to resolve, but not so much longer  
25 to resolve because that brings me into my second point.

1           And that is, is the intent really to resolve  
2 the issue, or just to delay the consumer from seeking  
3 legal redress later? You know, so that, kind of, is the  
4 dividing line between real arbitration versus, kind of, a  
5 sham to keep consumers out of court.

6           Which may not be the case in every case, but in  
7 the absence of other factors -- say, a government  
8 baseline set of regulations, we could end up with some  
9 not-so-good ADR providers out there, which smaller  
10 businesses or, kind of, the shadier side of the webs  
11 might sign up for because they know that disputes will  
12 get lost in, kind of, a never-never-land, which we want  
13 to avoid.

14           MR. JOHNSON: Philip Johnson. Frank, the way  
15 we handle that is that we have a strict four week -- no,  
16 four weeks, that's right -- four-week period for making  
17 every decision, and no extensions of deadlines are  
18 available under any circumstances, even on the request of  
19 the parties.

20           MS. GRANT: Do you think that there should be  
21 time limits set by law as an outer limit, or should that  
22 be left up to the programs? And does it make a  
23 difference whether it's mandatory and/or binding?

24           MR. INGIS: I think that there are reasons --  
25 Stu Ingis again -- I think that there are reasons where a

1 lengthier period of time may be important for getting all  
2 of the facts out, and that, you know, a shorter amount of  
3 time could cut the ability on either side of getting the  
4 appropriate -- on a case that's -- in a situation that's  
5 very complicated -- of getting appropriate facts that are  
6 necessary to make the right decision.

7         So, I think that, again, at some point you  
8 don't want it to go on forever, and it may be, you know,  
9 tie it back to Frank's concept, again, of proportionality  
10 I think is the relevant question.

11         So, maybe there should be time limits, but it  
12 may be based on the type of dispute that we're talking  
13 about.

14         MR. ANDERSON: Ed Anderson. Our code of  
15 procedure has very demanding time limits, and we get  
16 constant whining from the litigants that they want  
17 extensions for all sorts of wonderful reasons.

18         The ICAN Program that people have talked about  
19 has absolute time limits, and it just drives the  
20 litigants nuts. That it's, you know, 30 days, and it's  
21 over. No ifs, ands, or buts.

22         And there are some fairly significant  
23 litigation there. And I don't know if a consumer could  
24 shop for time limits if there weren't some standard.

25         If Phil has a standard that says four weeks,

1 and we have a standard that says eight weeks, and they  
2 would rather have it done in four weeks, how in heaven's  
3 name would they ever figure that out in a --but there are  
4 good arguments for both. How in the heck you figure the  
5 dishes case out -- the dishes case depends on the burden  
6 of proof, I suppose.

7 Which you say, well, we don't want to think  
8 about substantive or procedural law. Ultimately, these  
9 cases where you have no evidence turn on who has got the  
10 burden.

11 MS. GRANT: Well, we'll get to substantive law,  
12 if we get that far. I just didn't want us to get hung up  
13 on it. Is there more that people want to contribute  
14 about time limits?

15 MR. DONOHUE: I would just like to contribute  
16 one thing, which is that although we said 5:00 before  
17 given the likelihood that we would get lost on the way  
18 back, break at five to -- I think we kind of want to  
19 start right at five.

20 MS. GRANT: Okay, all right. Well, then maybe  
21 we should skip the next one. I mean, we could spend days  
22 in here on this. But if people do have some more  
23 comments about the issues of voluntary binding, et  
24 cetera, you know, it would be very helpful to have them.

25 MR. SCHUMACK: I do have a thought on that. It

1 seems to me that your average consumer today, in the  
2 absence of any system to be created for ADR, has certain  
3 courthouse rights. And that those courthouse rights may  
4 not be meaningful on a cross-border transaction.

5 So, that without imposing mandatory ADR, the  
6 consumer has a lot of incentive to want to participate so  
7 there may not be a need to impose through regulation that  
8 the system takes place.

9 Now, when you look at industry leaders like HP,  
10 HP wants to continue to be an industry leader, and they  
11 want to continue to have good customer relations. They  
12 have the incentive to participate in voluntary programs,  
13 also.

14 And so, what we're really left with is if there  
15 is a need to legislate at all, it may only be a need to  
16 legislate for rogue vendors -- the folks who are never  
17 going to settle a cross-border dispute because they know  
18 that the consumer can't afford to come get them over a  
19 \$300 dispute.

20 But it would really be unfortunate if good  
21 vendors -- people who have, you know, good customer  
22 relations that are known for the quality of their  
23 products and services -- would be strapped with the costs  
24 of a mandatory system and regulatory compliance simply  
25 because of those rogue vendors.

1           And this, I think, brings us back to this  
2 notion that if you use some type of seal program long  
3 enough, eventually that has got to be a customer  
4 preference item in the long run because market forces  
5 will drive customers towards good vendors -- people with  
6 good reputations.

7           And, ultimately, the ones who are willing to  
8 shop in fly-by-night organizations are going to get what  
9 they're asking for.

10          MS. SELLERS: I have a comment concerning the  
11 intersection of time limitations and mandatory  
12 proceedings that I ground on previous experience  
13 concerning U.S. laws with Section 337 proceedings before  
14 the U.S. International Trade Commission.

15          Those cases are ones that were governed by  
16 statutory time limitations where the respondents were a  
17 foreign entity usually -- I mean, there were also  
18 domestic ones, but foreign entities who would find out  
19 they had 30 days to respond to a complaint, and then at  
20 most, maybe five months until they got to trial, and it  
21 was a full-scale GAT litigation.

22          As a result of feeling very disadvantaged being  
23 the respondent caught with a sudden bombshell and no time  
24 in which to really prepare, complaints were brought to  
25 the GAT, which were won by the complaining parties.

1           That forced the U.S. to change the statutory  
2 time limits under Section 337, the problem being that the  
3 complainant who had a year to prepare this case came in  
4 and then gave the respondent no time to prepare a  
5 defense.

6           I have a similar concern in these concerns  
7 where a consumer is bringing a complaint, and then a  
8 business may have something they have got to pull  
9 together that -- granted, we're probably not talking  
10 about this in a \$95 dispute, but maybe we will for a  
11 \$10,000 dispute.

12           I don't know, but I have a concern about the  
13 disadvantage that may be perceived as unfair to the  
14 defendant in these cases if they have no time to put  
15 together a sufficient defense and are bound by a decision  
16 or bound to at least participate in the decision.

17           MS. GRANT: Well, I think when we've been  
18 talking about mandatory, we've been talking about  
19 mandatory that the consumer who does business with the  
20 business has to go through the ADR system, not that the  
21 -- not mandatory on the business to go through it.

22           I mean, it's really -- we've really been  
23 talking about whether it should be mandatory on the  
24 consumer.

25           MS. SELLERS: Well, that's -- I said -- my

1 comment concerned the intersection of time limitations,  
2 and mandatory, and being bound by a decision coming out  
3 of a timeframe that may cause one party to be at a  
4 disadvantage to defend themselves.

5 MS. GRANT: Right, that's certainly a valid  
6 concern.

7 MR. JOHNSON: Our solution is to start off at  
8 the beginning with binding for the seller, and he can  
9 never get out of that.

10 If and when the consumer decides to come to us  
11 and invoke our services, he has agreed; and, therefore,  
12 we go forward on a final and binding, and that passes  
13 muster under the EU.

14 MR. BUDNITZ: But when -- the way it's going to  
15 happen in the consumer situation is it's the seller who  
16 has wanted to have the ADR and has made that a condition  
17 of entering into the agreement. And so, the seller said,  
18 I want to do it through ADR.

19 Second of all, I think there has been general  
20 consensus throughout the two days that in most cases, the  
21 consumer is first going to go complain to the merchant.

22 So, the merchant knows about this dispute  
23 already. He doesn't find out about the dispute suddenly  
24 when he goes into ADR. ADR is way down at the end.

25 And so, there is going to be plenty of notice

1 ahead of time. So for, I think, for most disputes it's  
2 not going to be this problem of, oh, gee, what a big  
3 surprise, I didn't know, and I have to prepare all of a  
4 sudden.

5 MR. COOPER: Maybe that should be the mandatory  
6 requirement is not that you have a mandatory ADR before  
7 you go to court, but if you go to ADR, what is mandatory  
8 for the consumer is that they have to go through the  
9 business first to try to resolve it.

10 Or the other way would be a little bit more  
11 complicated would be that when you go into an ADR, the  
12 first thing the ADR person will do is shoot it back to  
13 the company and say, can you resolve this before we even  
14 have to start a mediation? Maybe that's just the way  
15 it's going to be.

16 MR. BUDNITZ: Well, we have that model already  
17 with some of the credit card provisions, for example. It  
18 says on the regulations, first you have -- the consumer  
19 has to go to the merchant and try to work it out. Only  
20 then, if that doesn't work, can you go invoke the truth  
21 in lending regulations.

22 MR. COOPER: It gets right back to the cost  
23 issue. Unless you can drive down those costs so that you  
24 can handle a \$95, you know, transaction, we're not doing  
25 what we're supposed to be doing.

1           So, any way you can get that, you know, back  
2 down to the merchant and resolved as quickly as possible,  
3 that's what you want to do.

4           MS. GRANT: Okay, that's very helpful.  
5 I'm going to shoot application of procedural rules down  
6 to you.

7           MR. INGIS: I'm wondering -- just based on the  
8 timeframe -- that maybe we should turn -- let me just try  
9 and -- since we have about five minutes -- to try and  
10 weave the final three concepts in together so we at least  
11 have a response to everything.

12          MS. GRANT: Okay. Great.

13          MR. INGIS: So, I'm just, sort of, read for a  
14 second here. I think one aspect that we really need to  
15 talk about -- and I think it ties into procedures -- it  
16 certainly ties into charge-backs or debit cards, and some  
17 of the stuff I was looking in the back we already talked  
18 about -- but, certainly, on the international convention  
19 concept and even, you know, certification of programs,  
20 this is the international aspect of all of this.

21          And it seems to me that it's important to  
22 consider in the case of the debit card and credit card  
23 that, you know, even if we, sort of, get a legal analysis  
24 of this situation, which we certainly could do in the  
25 United States as to rights that none of that may matter

1 when we're dealing with international transactions.

2 And so, it would seem to me that we should get  
3 some input on what people think about the relationship  
4 between the different areas that we're talking about here  
5 and how they fit into the international framework.

6 MR. JOHNSON: I want to say something -- I  
7 thought you were looking for something that's specific in  
8 here, the application and procedural rules.

9 In most countries outside of the -- what we  
10 call Anglo-Saxon world -- there is no body of evidentiary  
11 rules. Evidence is carried out by the judge who is  
12 considered to have enough training to know whether to  
13 take this under consideration, or reject it, or what-  
14 have-you.

15 And since you mentioned Germany, this is very  
16 interesting. The right to a hearing under German law is  
17 a real mess. It started, of course, at the end of the  
18 Second World War when the United States imposed a  
19 constitution on Germany and included a due process  
20 clause.

21 And as the constitution of the United States  
22 has been evolving ever since, so has the constitution of  
23 Germany. And one of the things they have been evolving  
24 into is the fact that due process requires that you must  
25 be able to see face-to-face -- not only the other party,

1 but the judge.

2 So, they are -- there was a major effort in  
3 Germany to come up with an online -- I can't remember  
4 what it's called -- but anyway, and they just folded  
5 after a year. They couldn't get around this particular  
6 constitutional issue.

7 MS. GRANT: Well, if this wasn't mandatory or  
8 binding and was just an alternative and not a substitute  
9 for the formal legal forum, would it be a problem in  
10 Germany?

11 MR. JOHNSON: The head of the people that put  
12 it together and closed it down considered that the aspect  
13 of being binding had nothing to do with it.

14 That it was simply something on which you  
15 couldn't get the execution. You couldn't get it  
16 enforced.

17 MS. GRANT: In a court afterwards?

18 MR. JOHNSON: Right.

19 MS. GRANT: Okay. Because I see other  
20 alternatives for enforcement, though.

21 MR. INGIS: Would you -- your suggestion,  
22 Susan, maybe be -- maybe just so we have some sort of  
23 conclusion to the end, something to the fact that ADR may  
24 allow for the -- may provide solutions in the great  
25 majority or a lot of situations in areas where conflicts

1 in law would be -- such as you set forth -- may not be  
2 resolvable? Is that a fair statement?

3 MS. GRANT: I think it's an opportunity, and I  
4 also think that if ADR systems included some way of  
5 making the consumer whole by a guaranty fund, or an  
6 insurance program, or something so that then having to  
7 try to execute the decision in court wasn't something  
8 that you had to do. You know, then you could get around  
9 some of those problems.

10 MR. INGIS: Perhaps, you know, one example --  
11 but not the only one, certainly -- would be charge-backs  
12 to that where you hadn't heard from -- I guess on the  
13 charge-back thing I'm always cautious to say that's the  
14 only solution that, you know, it's one of many potential  
15 global, sort of, funds or security insurance mechanisms.

16 MS. GRANT: Right. I -- after saying let's  
17 just ignore the line, I do have one question. If it  
18 wasn't a question of common sense, the dishes are broken,  
19 but it was a situation where somebody in their particular  
20 country -- that country happens to have a direct selling  
21 law that gives you a cancellation right. And the  
22 country of the company that you're dealing with doesn't.  
23

24 And if Carol's complaint is, I've changed my  
25 mind, and I want to assert my cancellation right under my

1 law. So, she's actually bringing up a legal issue from  
2 her country that doesn't happen to be the same law of the  
3 seller's country.

4 I could see the possibility of situations like  
5 that arising and wonder what people feel about whether  
6 those kinds of issues should be considered in ADR and  
7 what weight they would give it -- be given.

8 MR. KOVAR: Jeff Kovar from the State  
9 Department. You don't have a one-size-fit-all solution  
10 here. That's the problem.

11 I mean, you have a huge range of possible  
12 disputes. And, you know, if you've got a \$500 dispute,  
13 you don't have the money to get into choice of law  
14 questions.

15 So, if you're going to have to resolve it in  
16 some sort of a formal process because the process failed  
17 in just dealing with the merchant, you're going to have  
18 to have some sort of a checklist. And if you meet the  
19 checklist, you get your money. And if you don't, you  
20 don't.

21 And you're not going to have the resources  
22 available to -- I think as you were saying -- to go in  
23 and analyze all the choice of law questions because, of  
24 course, the choice of law questions will help determine  
25 who wins.

1           But if you're really at that point, then the  
2 whole system is going to break down unless you've got a  
3 \$20,000 case involving a consumer, and you may. You may  
4 find you have a lot of those in the end. You may find  
5 you have \$50,000 cases with consumers.

6           And the same thing goes for enforcement, which  
7 was your other point. The notion of some sort of an  
8 international pot of money that's contributed by -- I  
9 don't know -- every time you click on a website, a penny  
10 goes to some international pot to pay off claims.

11          I mean, that's a possibility. But, again,  
12 you're going to have to have a cut-off for the kind of  
13 claims that are available to take part in that.

14          And the ones that are allowed to take part in  
15 that are going to have a very -- are going to have to  
16 have a very scaled back process. It's going to cut a  
17 lot of corners, it's not going to get into a lot of  
18 technical legal issues. It's going to resolve things  
19 on a checklist basis. It has got to. And if you look  
20 at --

21          MS. GRANT: So, would you expect us to include  
22 some consideration of the consumer's expectation that she  
23 had the cancellation right that she thought she had?  
24 Would it include being able to raise those substantive  
25 legal issues?

1 MR. KOVAR: I mean, you have to work all that  
2 into your procedures. And, again, you know, ADR  
3 procedures, there are tons of ADR procedures out there --  
4 ICC, AAA, this, that, and the other thing.

5 Same thing with mediation. In fact, Onsutrell  
6 mediation rules, we're now drafting a model law in  
7 Onsutrell on mediation. That's a current project right  
8 now. This stuff all exists.

9 But, again, you're talking about stuff that  
10 might be -- that will be very useful for one level of  
11 transaction. Whereas, I think what you're talking about  
12 is something for a much lower value set of transactions,  
13 and I think it's important to keep all that in mind as  
14 you're asking questions.

15 MR. INGIS: Looks like we're getting the  
16 bus here, but for just to conclude for when, you know,  
17 you reflect us up there, I think Jeff's point and  
18 Susan's statements covers it right -- is that there  
19 are a multiplicity of means of dispute resolution  
20 just like in the offline world that should be handled  
21 through a multiplicity of different potential -- or  
22 multiplicity of different types of problems that  
23 should be handled through multiple means of dispute  
24 resolution.

25 And the degree of substantive guidelines

1 and procedures probably will relate across, you know,  
2 the different -- they will be different based on  
3 the different type of dispute we're dealing with and  
4 dispute resolution mechanism, or something to that  
5 effect.

6 MS. GRANT: Well, thank you. I'm glad we've  
7 settled all that.

8 (Whereupon, at 5:00 p.m., the session was  
9 concluded.)

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1 CERTIFICATION OF REPORTER

2 DOCKET/FILE NUMBER: P004309

3 CASE TITLE: ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER

4 TRANSACTIONS IN THE BORDERLESS ONLINE

5 MARKETPLACE

6 HEARING DATE: JUNE 7, 2000

7

8 I HEREBY CERTIFY that the transcript contained

9 herein is a full and accurate transcript of the notes

10 taken by me at the hearing on the above cause before the

11 FEDERAL TRADE COMMISSION to the best of my knowledge and

12 belief.

13 DATED: JUNE 19, 2000

14

15

16 SONIA GONZALES

17

18 CERTIFICATION OF PROOFREADER

19

20 I HEREBY CERTIFY that I proofread the transcript for

21 accuracy in spelling, hyphenation, punctuation and

22 format.

23

24

25 SARA J. VANCE