

2012

Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project

Ronald A. Brand

Univ. Prof. & Dir. Of the Center for International Legal Education, School of Law, University of Pittsburgh

Follow this and additional works at: <http://lawcommons.luc.edu/lucilr>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

Recommended Citation

Ronald A. Brand *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 Loy. U. Chi. Int'l L. Rev. 11 (2012).

Available at: <http://lawcommons.luc.edu/lucilr/vol10/iss1/3>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

PARTY AUTONOMY AND ACCESS TO JUSTICE IN THE UNCITRAL ONLINE DISPUTE RESOLUTION PROJECT

Ronald A. Brand[†]

I. Introduction	11
II. The History of the UNCITRAL Negotiations	13
III. Key Issues as the Negotiations Continue	16
A. The Fundamental Role of Party Autonomy and the Need to Ensure it in the UNCITRAL ODR System	16
B. Private International Law, Party Autonomy, and Consumer Protection in the United States and the European Union	18
1. U.S. Law on Choice of Forum	18
2. U.S. Law on Choice of Law	19
3. EU Law on Choice of Forum – The Brussels I Regulation	21
4. EU Law on Choice of Law – The Rome I Regulation ..	22
5. Other Consumer Protection Rules in the European Union: The Consumer Protection Directive, the Proposed ODR Regulation and the Proposed ADR Directive	24
IV. Comparing U.S. and EU Approaches in the Context of the UNCITRAL ODR Negotiations.....	27
A. Comparative Paternalism (Whose Parenting Style is Best?) ..	27
B. Considering the Alternatives in the Context of Cross-Border ODR	31
C. Getting the Benefits of Both Systems	32
V. Concluding Thoughts – Guidelines for a Successful Conclusion in Working Group III	34

I. Introduction

In 2010, the United Nations Commission on International Trade Law (UNCITRAL) directed its Working Group III “to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.”¹ The negotiations have produced a so-far incomplete draft set of procedural rules for

[†] Ronald A. Brand is a Chancellor Mark A. Nordenberg University Professor and Director of the Center for International Legal Education at the University of Pittsburgh School of Law. The author has attended the sessions of UNCITRAL Working Group III on online dispute resolution as a member of the Center for International Legal Education (CILE) delegation, invited by the UNCITRAL Secretariat as expert advisers, as well as meetings of the U.S. Secretary of State’s Advisory Committee on Private International Law Working Group on Online Dispute Resolution. The author thanks Dr. Cristina Mariottini for her substantial advice and input in writing this paper. The opinions expressed in this paper are those of the author and do not represent the positions of any state, organization, or other person.

¹ Report of the 43rd Session of UNCITRAL (June 21-July 9, 2010), U.N. Doc. A/65/17, ¶ 257. Rep. of UNCITRAL, 43d Sess., Jun. 21, 2009-July 9, 2010, ¶ 257, U.N. Doc. A/65/17; GAOR, 65th Sess., Supp. No. 17 (2010) [hereinafter Rep. of the 43d Sess.].

online dispute resolution (ODR) in low-value high-volume electronic transactions.² It is anticipated that three other documents will be prepared—addressing substantive principles to be applied in ODR, guidelines and minimum requirements for ODR providers and neutrals, and a cross-border mechanism for enforcement of the resulting ODR decisions on a global basis.³

The most difficult issues in the ODR negotiations are centered on concepts raising important questions about the coordination of the ODR process with national rules of private international law (conflict of laws), national rules of consumer protection, and the international arbitration law framework. If any global system of ODR is to be successful, it must avoid difficult questions about the application of national mandatory rules of law, it must be considered to provide fair procedures and results for consumers, and the results obtained must be enforceable across borders. This will only happen if the system respects the ability of individual parties (regardless of category) to enter into binding ODR agreements at the time they form the basic contract for an online transaction.

Another key to the success of the ODR negotiations lies in the need for simplicity. In directing Working Group III to engage in the ODR project, UNCITRAL specifically acknowledged that “traditional judicial mechanisms for legal recourse [do] not offer an adequate solution for cross-border e-commerce disputes,” in “small-value, high-volume business-to-business and business-to-consumer disputes.”⁴ Making national courts available for a dispute that involves, for example, an \$80 pair of shoes purchased online in a cross-border transaction, simply does not serve as an adequate path to an effective remedy. Even if a local court can handle such a case in a manner that can justify the time and cost, obtaining recognition and enforcement in the judgment debtor’s home state will remove the effort from any realm of practicality. The same is true for many larger transactions as well. Even preferential access to courts does not provide a feasible path to an effective remedy in low-value high-volume cross-border transactions.

² This paper is current to August 2012, when it was written. The documents produced by and for the Working Group may be found at http://www.uncitral.org/uncitral/commission/working-groups/3Online_Dispute_Resolution.html.

³ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011), ¶ 52, U.N. Doc. A/CN.9/721 (June 3, 2011). This Report explains the broad support, in ¶ 52, for a proposal to replace the current wording of ¶ 4 of Article 1 of the Draft Procedural Rules with the following:

The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which are attached to these Rules as Annexes and form part of these Rules:

- (a) Substantive legal principles for deciding cases;
- (b) Guidelines for ODR providers and arbitrators;
- (c) Minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control; and
- (d) Cross-border enforcement mechanism.

Id. This proposed collection of instruments was carried forward in the November 2011 Working Group Session draft for the preamble of the draft procedural rules. See Note by the Secretariat, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, ¶ 8, U.N. Doc. A/CN/WG.III/WP.112 (Feb. 28, 2012).

⁴ Rep. of the 43d Sess., *supra* note 1, ¶ 257.

Simply stated, for consumers in such transactions, access to courts is not access to justice. An ODR system that is simple, efficient, effective, transparent, and fair offers the hope of real justice in such disputes. What is not yet clear is whether such a system can be created given existing national laws that restrict access to dispute resolution outside of the courts.

Creating a global system of ODR that is simple, efficient, effective, transparent, and fair, is not an easy task. The UNCITRAL negotiations have so far indicated, however, that states may be ready to engage in the effort and that there may be a path to workable results. That path will be closed off, however, if the resulting system requires reference to multiple national laws on matters such as consumer protection, applicable law, and arbitration limitations. The UNCITRAL ODR system must be built in a manner that results in a self-contained system that can and will operate efficiently and effectively.⁵

In this article I begin with a brief review of the history of current international efforts at constructing an acceptable system of ODR for low-value high-volume transactions.⁶ I then consider the important role of party autonomy in the success of any resulting ODR system.⁷ If either the ODR system or national legislation prevents parties from having the autonomy to opt into the resulting system, there can be no successful result. Party autonomy is key to the difficult issues of consumer protection, applicable law, and enforcement within the existing international litigation and arbitration regimes. It simply makes no sense to design a system states agree is fair to all and then, through rules that require reference to national or regional laws, prevent the use of that system. I conclude with some thoughts on how the UNCITRAL negotiations might best continue on the path to an ODR system that can revolutionize dispute resolution by creating real benefits for all participants (particularly for consumers) where little or no practical relief now exists.⁸

II. The History of the UNCITRAL Negotiations

In the summer of 2009, the United States proposed that the UNCITRAL Secretariat “be asked to prepare . . . a study on possible future work that UNCITRAL

⁵ While the United States has used the credit card charge-back system to provide buyers with a high level of protection in online transactions, including consumer transactions, that system is both limited and less than perfect. See, e.g., Gail Hillebrand, *Before the Grand Rethinking: Five Things to do Today with Payments Law and Ten Principles to Guide New Payments Products and New Payments Law*, 83 CHI.-KENT L. REV. 769 (2008) (focusing on the need for protection beyond the credit card context, including in debit card and mobile payment systems).

It does not help buyers who do not have credit cards or wish to use other payment mechanisms. Nor is it as easily applicable in cross-border transactions on a global scale. Thus, any effort to close off the development of a comprehensive system of improved dispute settlement in the online environment may well have the effect of preventing consumer access to adequate remedies in the future. Joining a system that would “dumb-down” protections already available in the United States would, of course, be a mistake. But it would also be a mistake to refuse to work cooperatively toward a system that can spread some of the benefits of U.S. domestic consumer protection across the globe.

⁶ *Infra* Part II.

⁷ *Infra* Part III.

⁸ *Infra* Part V.

might engage in on the subject of online dispute resolution in cross-border e-commerce transactions.”⁹ The Secretariat did prepare such a study,¹⁰ and, at its Sixty-Fifth Session in June and July 2010, “the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business-to-consumer transactions.”¹¹

Working Group III of UNCITRAL was assigned the ODR project, meeting first on December 13-17, 2010 in Vienna.¹² The discussion in Vienna focused on many issues, including the importance of cross-border ODR to consumers.¹³ “It was pointed out that, at present in the case of most cross-border consumer transactions, consumers had, in practice, no rights and so the creation of an ODR standard could have the effect of creating such rights.”¹⁴ Issues discussed included the type of proceedings that might be available in ODR, whether there was need for binding dispute resolution, whether neutrals could correspond directly with separate parties, the need for confidentiality and data protection, how the ODR proceedings would fit with existing international rules for commercial arbitration, and concerns about applicable law, language, and costs of proceedings. Among other things, “[i]t was generally agreed that ODR arbitral decisions should be final and binding, with no appeals on the substance of the dispute, and carried out within a short time period after being rendered, and that further consideration of enforcement issues should be deferred until after issues of substantive and procedural rules had been addressed.”¹⁵ The Working Group requested that the UNCITRAL Secretariat,

(a) Draft generic procedural rules for ODR, including taking into account: the types of claims with which ODR would deal (B2B and B2C cross-border low-value, high-volume transactions); initiation of the online procedure; alerting parties to any agreement with regard to dispute settlement that might be entered into at the time of contracting; stages in the dispute settlement process – including negotiation, conciliation and arbitration; describing substantive legal principles, including equitable principles, for deciding cases and making awards; addressing procedural matters such as representation and language of proceedings; the application of the New York Convention, as discussed; reference to rules of other ODR systems; setting out options, where appropriate.¹⁶

⁹ Possible future work on electronic commerce – Proposal of the United States of America on online dispute resolution, U.N. Doc. A/CN.9/681/Add.2 (June 18, 2009).

¹⁰ Possible future work on online dispute resolution in cross-border electronic commerce transactions, U.N. Doc. A/CN.9/706 (Apr. 23, 2010).

¹¹ Rep. of the 43d Sess., *supra* note 1, ¶ 257.

¹² Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 Dec. 2010), U.N. Doc. A/CN.9/716 (Jan. 17, 2011).

¹³ *Id.* ¶ 42.

¹⁴ *Id.*

¹⁵ *Id.* ¶ 99.

¹⁶ *Id.* ¶ 115.

The Working Group met a second time on May 23-27, 2011 in New York,¹⁷ where it considered the set of Draft Procedural Rules that had been prepared by the Secretariat.¹⁸ Those rules focused on an initial negotiation phase, followed by facilitated settlement, and then binding arbitration.¹⁹ The Working Group further discussed whether the second and third phases were to be separate or related.²⁰ At the end of the session, the Working Group requested that the Secretariat prepare a new working draft of the procedural rules, "taking into account the views expressed by the Working Group at the current session,"²¹ and further requested that the Secretariat prepare documentation for its next session addressing:

- (a) Guidelines for neutrals;
- (b) Minimum standards for ODR providers;
- (c) Substantive legal principles for resolving disputes; and
- (d) A cross-border enforcement mechanism.²²

The third session of negotiations was held on November 14-18, 2011 in Vienna.²³ Work continued to focus on a detailed review of the draft procedural rules.²⁴ The session again wrestled with details of process, as well as issues of consumer protection, coordination with existing UNCITRAL arbitration instruments, and the enforceability of results, with the hope expressed "that the generic procedural rules for ODR could be adopted on a provisional basis at the next Commission session" scheduled for summer 2012.²⁵

While there was hope that the progress made in November 2011 could lead to provisional adoption of the procedural rules at the fourth Working Group session in New York on May 21-25, 2012, for consideration by the Commission at its June-July 2012 meeting, that did not occur. The May session covered a review of the procedural rules dealing with introductory rules, commencement of ODR, negotiation, appointment and authority of neutrals, the relationship between facilitated settlement and arbitration, and the impact of the Working Group deliberations on consumer protection.²⁶

¹⁷ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011), U.N. Doc. A/CN.9/721 (June 3, 2011) [hereinafter Rep. of WGIII 23d Sess.].

¹⁸ Note by the Secretariat, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, U.N. Doc. A/CN.9/WG.III/WP.107 (Mar. 17, 2011).

¹⁹ *Id.*

²⁰ *Id.* ¶ 7.

²¹ Rep. of WGIII 23d Sess., *supra* note 17, ¶ 141.

²² *Id.* ¶ 140.

²³ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 Nov. 2011), U.N. Doc. A/CN.9/739 (Nov. 21, 2011) [hereinafter Rep. of WGIII 24d Sess.].

²⁴ Note by the Secretariat, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, U.N. Doc. A/CN.9/WG.III/WP.109 (Sept. 27, 2011).

²⁵ Rep. of WGIII 24d Sess., *supra* note 23, ¶ 14.

²⁶ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session (New York, 21-25 May 2012), U.N. Doc. A/CN.9/744 (June 7, 2012).

As this article is written in late summer 2012, the next Working Group III session is scheduled for November 5-9, 2012, in Vienna. If no final set of procedural rules is completed at that meeting, it may well be time to declare the process at a standstill. If that happens, it still may not signal the end of the development of a global ODR process. Because all of the instruments being considered in Working Group III are soft law instruments, and no treaty is proposed, it remains possible for the private sector to undertake and implement much of the same work. This may well be one of those instances where the market will move forward when governments fail to do so.

III. Key Issues as the Negotiations Continue

A. The Fundamental Role of Party Autonomy and the Need to Ensure it in the UNCITRAL ODR System

Because the documents being created by Working Group III are not treaties, but are all soft law instruments, they cannot create default rules that will apply absent party consent. This means that the system created by those instruments will work only if parties have the autonomy to opt into the ODR system. This makes good sense in a global framework in which national rules may differ significantly. If the system is to work effectively, it must work through the consent of the parties and free of national law restrictions that would make it operate differently depending on where the parties are from. Merchants simply will not participate in a dispute resolution system that differs for each buyer based on the laws of that buyer's home state. The added cost of such a system will result in merchants opting out, with the net result being that consumers and other buyers will have decreased access to goods and services and will pay higher prices for those goods and services that are sold cross-border.²⁷

²⁷ See European Commission Staff, Commission Staff Working Document accompanying the proposal for a directive on consumer rights Impact Assessment Report, *available at* http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf (last visited Oct. 3, 2012). This has been demonstrated in Europe, where cross-border internet transactions have actually declined as a result of the regulatory barrier to operating on a pan-EU basis posed by fragmented national laws, including consumer protection laws, through the conflict of laws rules in the Rome I Regulation. The Commission Staff Working Document describes the empirical effect as follows:

The cross-border potential of distance selling is not fully exploited by consumers, who could take more advantage of the considerable price differences between the Member States (see below). Cross-border Internet purchases were made by only 6% of consumers surveyed in 2005 (up from 3% in 2003). This compares with the 23% who bought goods or services via the Internet from domestic sellers. The scale of cross-border purchases, as well as its significance compared with domestic shopping is even lower for contracts concluded via phone or post (mail order). This trend is confirmed in 2008—while the number of consumers having used distance sales methods for domestic purchases has increased for all distance sales methods compared to 2005, this number has remained flat for cross-border distance purchases. This discrepancy between trends in cross-border and domestic sales is particularly significant for Internet sales. While the number of consumers using the Internet for domestic purchases increased by 7 percentage points in 2005-2008, from 23% to 30%, this increase was only 1 percentage point over the same period for cross-border Internet purchases, from 6% to 7%.

Id. at 9. The same document concludes that cross-border internet commerce problems are a result of fragmented Member State laws that are applicable through Community Regulations:

The effects of the fragmentation are felt by business because of the conflict-of law rules, and in particular the Rome I Regulation ("Rome I"), which obliges traders not to go below the level of

This necessary focus on party autonomy at the core of the ODR system requires that national legal systems must accept private party ability to agree to ODR on a pre-dispute basis. Thus, it is useful at the outset to understand the extent to which national and regional legal systems currently respect or limit party autonomy to enter into dispute resolution alternatives. While a survey of all national legal system rules in this regard is beyond the scope of this exercise, the laws of the U.S. and EU serve as examples of approaches that must be reconciled with the final UNCITRAL ODR product.

An initial question is whether the UNCITRAL system will distinguish among different types of transactions for purposes of access to and application of the ODR procedures and rules. Private international law rules in many countries do rely on such distinctions, with special rules for what are determined to be weaker parties. Thus, both the Brussels I and Rome I Regulations of the European Union create special rules for consumer transactions, individual agreements of employment, and insurance contracts.²⁸

If different types of parties are subject to different sets of rules in the ODR system, then there must first be definitions created that are capable of use in distinguishing which category a party falls within, someone must be designated to apply that definition, and procedures must exist for determining when and how that someone applies the applicable definition. All of this runs counter to the goals of simplicity, effectiveness, and efficiency. While it has been suggested that consumers should be subject to special rules in the ODR system, implementing such rules would ensure the failure of the UNCITRAL project. The cost—in both time and financial resources—of determining in each case whether one party is a consumer, would be prohibitive. Additionally, there is no reason to believe it would serve any useful purpose. If the system can be created to be transparent, effective, and fair to all parties, there is no need for special treatment based on whether one party is a consumer. This is demonstrated further in the discussion, below, of prohibitions on pre-dispute arbitration agreements.

The negotiations in Working Group III have recognized the need to avoid distinguishing special classes of parties in the ODR process from the outset, with the original Commission charge to the Working Group providing a mandate “to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.”²⁹ So far at least, the Working Group has not deviated from this charge. No special categories or party-based limitations on scope have been created in the draft procedural rules.

protection afforded to foreign consumers in their country. As a result of the fragmentation and Rome I, a trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States. Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.

Id. at 8.

²⁸ *Infra* Parts III.B.3, III.B.4.

²⁹ Rep. of the 43d Sess., *supra* note 1, ¶ 257.

B. Private International Law, Party Autonomy, and Consumer Protection in the United States and the European Union

Even without distinctions for consumers (or any other class of “weaker” party), legal systems take differing approaches to the general question of party autonomy. As already noted, the U.S. and EU approaches provide useful examples of the types of systems that must be reconciled in creating a global ODR system. Thus, it is worth considering those systems at this juncture.

1. *U.S. Law on Choice of Forum*

The latter half of the twentieth century saw a dismantling of prior restrictions on the exercise of party autonomy, allowing international trade to flourish on terms chosen by the parties. While the late Professor Peter Nygh’s statement that “freedom of contract is an essential part of the market economy,” and that “[n]o State can hope effectively to control international contracts,”³⁰ may tend to overstate the case, most legal systems have moved to a twenty-first century world in which parties—particularly in international transactions—have significant freedom to select both the forum in which their disputes will be settled and the law to be applied by the chosen tribunal.³¹ While arbitration represents a special category, with its own international legal regime,³² the movement toward respect for party autonomy has encompassed both choice of court and arbitration.³³

In the United States, three Supreme Court decisions demonstrate the march to respect for party autonomy in choice of forum. In 1972, in *Bremen v. Zapata*, the Court enforced a choice of forum clause between U.S. and Italian parties choosing a London court for a large commercial transaction.³⁴ In 1985, the Court honored the Federal Arbitration Act and New York Convention as demonstrating a strong policy in favor of arbitration in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, enforcing an agreement to arbitrate U.S. antitrust issues in Japan.³⁵ And in 1991, in *Carnival Cruise Lines, Inc. v. Shute*,³⁶ the Court enforced a small print choice of forum clause on the back of a consumer cruise ticket, even though the consumer likely had never read the clause and certainly

³⁰ PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 2 (1999).

³¹ See *infra* notes 39-71 and accompanying text.

³² See generally United Nations Conference on International and Enforcement of Foreign Arbitral Awards, July 6, 1988, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (explaining the core of the international arbitration regime is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force for the United States on December 29, 1970).

³³ See generally NYGH, *supra* note 30 (discussing further the development of party autonomy); see also Ronald A. Brand, *The Rome I Regulation Rules on Party Autonomy for Choice of Law: A U.S. Perspective*, THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (Univ. of Pittsburgh Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2011-29, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973162.

³⁴ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-19 (1972).

³⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

³⁶ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 972 (1991).

Party Autonomy and Access to Justice

had not participated in negotiating its terms. These cases are the core of a strong policy favoring the ability of parties, in all types of transactions, to choose the forum (whether in litigation or arbitration) in which their disputes are to be settled.

2. *U.S. Law on Choice of Law*

The *Restatement (Second) Conflict of Laws* clearly provides for party autonomy on choice of law. In section 186, it states that “[i]ssues in contract are determined by the law chosen by the parties,” so long as that choice is consistent with sections 187 and 188.³⁷ Section 187 then provides that “[t]he law of the state chosen by the parties . . . will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”³⁸ Subsection (2) of section 187 goes further by providing that the parties’ choice of law will govern, even when the issue is not one for which the parties could have written an explicit provision into their contract, unless either (a) there exists neither a “substantial relationship” between the parties, or their transaction, and the chosen state, nor another “reasonable basis” for their choice of law, or (b) application of the chosen law “would be contrary to a fundamental policy of a state which has a materially greater interest” in the dispute, and which would have been the applicable law under section 188 in the absence of an effective party choice.³⁹

Like the *Restatement*, the Uniform Commercial Code (UCC) begins with a statement of respect for party autonomy, followed by limitations. The original UCC of 1956 contained section 1-105, which provided:

When a transaction bears a reasonable relation to this state and also to another state or nation, parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this Act applies to transactions bearing an appropriate relation to this state.⁴⁰

When Article I of the UCC was revised in 2001, this rule was replaced with a new section 1-301, which split the rule, providing complete freedom for choice of law in merchant-to-merchant contracts (deleting the “reasonable relation” requirement) and setting forth specific, expanded limitations on choice of law in consumer contracts.⁴¹ The general rule of this provision was contained in paragraph (b), which read:

- (b) Except as otherwise provided in this section:
 - (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this

³⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 ch. 8, topic 1, applicable law (1971).

³⁸ *Id.* § 187(1).

³⁹ *Id.* § 187(2)(A)-(B).

⁴⁰ U.C.C. § 1-105(1) (1956).

⁴¹ U.C.C. § 1-301 (2001).

Party Autonomy and Access to Justice

State or of another State is effective, whether or not the transaction bears a relation to the State designated; and

(2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.⁴²

In paragraph (e), this rule of party autonomy became subject to a public policy limitation:

(e) An agreement otherwise effective under subsection (b) is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement under subsection (c).⁴³

This 2001 UCC provision did not contain any general reference to mandatory rules—except to the extent those mandatory rules would rise to the level of public policy.⁴⁴ It did, however, contain a separate rule for consumer contracts that incorporated concepts of mandatory rules and followed the European model found in the Rome I Convention (now found in the Rome I Regulation).⁴⁵ Paragraph (d) of section 1-301 allowed a consumer to enter into a valid choice of law clause when the transaction bore a “reasonable relation” to the forum state, but would retain any mandatory rule protections of both the consumer’s state of habitual residence and, in sale of goods contracts, the state of performance.⁴⁶

The first thirty-three states to enact the revised Article 1 all declined to adopt the new section 1-301, and instead retained the substance of former section 1-105.⁴⁷ As a result of this clear rejection of the “uniform” rule, the National Conference of Commissioners on Uniform State Laws and the American Law Institute (ALI) amended the Official Text of section 1-301 in 2008 to revert substantially to the language of the former section 1-105, which had remained the *de facto* uniform rule.⁴⁸

⁴² *Id.* § 1-301(c).

⁴³ *Id.* § 1-301(f).

⁴⁴ *Id.*

⁴⁵ See *infra* Part III.B.4 (discussing Rome I Regulation).

⁴⁶ U.C.C. § 1-301(d) (2001).

⁴⁷ See The American Law Institute, 85th Annual Meeting Program, 8-9 (2008), available at http://www.ali.org/_meetings/Program2008.pdf (the Virgin Islands was the only jurisdiction to enact the revised § 1-301); see also Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1*, Nev. L.J. 1, 19 (2011), available at <http://www.law.unlv.edu/faculty/rowley/RA1.081511.pdf>. The Virgin Islands was the only jurisdiction to enact the revised § 1-301.

⁴⁸ The American Law Institute, 85th Annual Meeting Program, *supra* note 47, annex 1; see also U.C.C. § 1-301(a)-(c) (Proposed Official Draft 2008).

§ 1-301. Territorial Applicability; Parties’ Power to Choose Applicable Law

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties,

(b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state,

3. *EU Law on Choice of Forum – The Brussels I Regulation*

The system now developed within the European Union provides a civil law comparison with U.S. jurisdiction rules. That system is now codified in a Community Regulation commonly referred to as the Brussels I Regulation.⁴⁹ The jurisdictional rules found in Chapter II of the Brussels I Regulation begin with the rule of general jurisdiction found in Article 2: “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”⁵⁰ This is the foundation of jurisdiction under the Brussels system. The important personal nexus is domicile; a defendant may be sued in his state of domicile on any claim, no matter where that claim arose.⁵¹

While the general jurisdiction rule is found in Article 2, at the beginning of the Brussels Regulation, the hierarchy of jurisdictional rules cannot be understood by moving easily through the Convention. Rules found early in the Convention often can be trumped by rules occurring at a later point in the text. The general hierarchical structure of the convention is as follows:

- 1) Article 22 provides for exclusive jurisdiction in certain types of cases, usually dealing with property rights that are territorial in nature and creating jurisdiction in the state in which the property is located or created. If such exclusive jurisdiction exists, then no other rule need be consulted.
- 2) Articles 8-21 provide special rules designed to protect the party considered to be at a negotiation disadvantage in insurance (Arts. 8-14), consumer (Arts. 15-17), and employment (Arts. 18-21) contracts. These rules generally allow the “weaker” party to sue in its home court, and prohibit pre-dispute choice of court agreements.
- 3) Article 23 provides respect for party autonomy (except in insurance, consumer, and employment contracts) by stating that, when one or more of the parties is domiciled in a Member State, the court chosen by agreement of the parties shall have exclusive jurisdiction.
- 4) As noted above, if neither the exclusive jurisdiction rules of Article 22, nor the choice of court (“prorogation”) rule of Article 23 applies, and the matter does not involve an insurance, consumer, or employment contract, then jurisdiction always exists under Article 2 in the courts of the state of domicile of the defendant.
- 5) Articles 5 through 7 then provide “special jurisdiction” rules that allow suit to be brought in a forum other than that of the defendant’s state of domicile. Article 6 deals with jurisdiction over multiple defendants, and requires jurisdiction under another provision as to at

(c) [listing UCC provisions from which derogation is not allowed].

Id.

⁴⁹ See generally Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L012) 1-23 (EC) (amending Annex I and Annex II) [hereinafter Brussels I Regulation].

⁵⁰ *Id.* art. 2(1), § 1, ch. II.

⁵¹ *Id.*

Party Autonomy and Access to Justice

least one defendant. Article 7 is limited to jurisdiction over claims involving the use or operation of a ship. This makes Article 5 the most important source of special jurisdiction rules that allow a measure of forum shopping. Article 5 provides rules for specific types of cases, with the most important being contract cases (Art. 5(1)) and tort cases (Art. 5(3)).⁵²

In a discussion of party autonomy, Article 23 is the relevant provision, and provides for significant freedom in choice of forum:

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.⁵³

The Brussels I Regulation provides special rules for consumers in provisions that include Articles 16 and 17.⁵⁴ Article 16 provides that a consumer “may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled,” and that “[p]roceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.”⁵⁵ Article 17 prohibits pre-dispute choice of court agreements in consumer contracts, allowing a choice of court agreement only if it is “entered into after the dispute has arisen,” unless it “allows the consumer to bring proceedings in courts other than those indicated in this Section,” or if the consumer and the other party are both “at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and [the agreement] confers jurisdiction on the courts of that Member State.”⁵⁶ Thus, consumers get the advantage of their home court as plaintiffs and as defendants. In prohibiting pre-dispute choice of court agreements in consumer contracts, Article 17 allows no discretion in determining whether a chosen court is good or bad, it is simply prohibited.⁵⁷

4. EU Law on Choice of Law – The Rome I Regulation

The Rome I Regulation on law applicable to contractual obligations begins the party autonomy analysis with the same basic rule found in the *Second Restate-*

⁵² Brussels I Regulation, *supra* note 49, art. 5(1)–(3), § 2.

⁵³ *Id.* art. 23(1) § 7.

⁵⁴ *Id.* arts. 16–17 § 3.

⁵⁵ *Id.* art. 16(2) § 3.

⁵⁶ *Id.* art. 17(3) § 3.

⁵⁷ *Id.*

ment that is applied in the U.S.⁵⁸ The core rule is found in Article 3, titled “Freedom of Contract,” and states clearly that parties’ chosen law governs a contract.⁵⁹ There are, however, numerous limitations on party autonomy within the Rome I Regulation. The Article 3 rule allowing party autonomy is accompanied by limitations found in Articles 3, 5, 6, 7, 8, 9, 11, 13, and 21 and further elaboration of these limitations is provided in many of the 46 recitals preceding the Regulation text.⁶⁰

The general structure of Articles 3 and 9 of the Rome I Regulation provide public policy limitations on party autonomy through the application of mandatory rules, with Articles 5, 6, 7, and 8 carving out specific exceptions to party autonomy based on categories of protected persons.⁶¹ Article 6 creates special rules for consumer contracts.⁶² In paragraph 1, it creates a presumption that the law of the country where the consumer has his habitual residence will govern a consumer contract, so long as the professional:

- (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.⁶³

Paragraph 2 follows by permitting a choice of law clause in a consumer contract, but providing that the clause “may not . . . have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.” The result is a rather interesting conundrum for the “professional” in the consumer contract relationship. If there is no choice of law clause in the contract, the consumer will get the benefit of the provisions of law designed to protect consumers that are in effect in the country of the consumer’s habitual residence. If a choice of law clause is inserted in the contract, then the consumer will get the benefit of the provisions of law designed to protect consumers that are in effect in both the country of the consumer’s habitual residence and the country whose law is chosen in the clause. This creates a clear incentive for a merchant or professional *not* to place a choice of law clause in a consumer contract.

⁵⁸ See generally Council Regulation 593/2008, of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6-16 (EC) [hereinafter Rome I Regulation].

⁵⁹ *Id.* art. 3(1), ch. II.

⁶⁰ *Id.* Some might also consider the Rome I rules on consent and material validity (art. 10), formal validity (art. 11), and incapacity (art. 13), to present limits on party autonomy.

⁶¹ Rome I Regulation, *supra* note 58, arts. 3-9.

⁶² *Id.* art. 6.

⁶³ *Id.* art 6(1) (a)-(b).

5. Other Consumer Protection Rules in the European Union: The Consumer Protection Directive, the Proposed ODR Regulation and the Proposed ADR Directive

The Brussels I and Rome I Regulations deal primarily with matters in the courts of the Member States of the European Union. The party autonomy rules of the Brussels I Regulation apply only to choice of court agreements, and not to arbitration agreements.⁶⁴ There is another instrument, however, that deals with arbitration agreements, albeit in a tangential manner. That instrument is Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.⁶⁵ Unlike EU Regulations, which have direct effect in Member States, EU Directives are to be implemented by Member State legislation.⁶⁶ The consumer contracts directive does not have blanket rules on choice of forum or choice of law. It is designed to promote legislation that prohibits unfair terms in consumer contracts. Articles 2, 3, and 6 contribute to this process with the following language:

Article 2

For the purposes of this Directive:

- (a) 'unfair terms' means the contractual terms defined in Article 3;
- (b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
- (c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

Article 3

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

⁶⁴ See generally Brussels I Regulation, *supra* note 48.

⁶⁵ Council Directive 93/13/EEC, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29-34 (EC) [hereinafter Consumer Protection Directive].

⁶⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 288 (ex art. 249 TEC), Sept. 5, 2008, 2008 O.J. (C 115) 157-58 [hereinafter TFEU].

Party Autonomy and Access to Justice

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 6

1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.⁶⁷

Most notably, the Annex includes the following language about arbitration agreements in consumer contracts:

TERMS REFERRED TO IN ARTICLE 3 (3) 1. Terms which have the object or effect of:

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.⁶⁸

Two cases interpreting this provision are of particular interest. In the 2006 *Mostaza Claro* case,⁶⁹ the European Court of Justice interpreted Article 6(1) of Directive 93/13 as a mandatory provision designed to re-establish equality between weaker consumers and stronger merchants.⁷⁰ Thus, "a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment."⁷¹

⁶⁷ Consumer Protection Directive, *supra* note 65, arts. 2, 3, 6.

⁶⁸ Consumer Protection Directive, *supra* note 65, Annex.

⁶⁹ Case C-168/05, *Mostaza Claro v. Centro Móvil Milenium SL*, 2006 E.C.R. I-10421.

⁷⁰ *Id.* ¶ 36.

⁷¹ *Id.* ¶ 39.

Mostaza Claro was followed in 2009 by the *Asturcom Telecomunicaciones* case,⁷² in which the Court of Justice stated that Article 6 of the Consumer Protection Directive had equal standing with national rules of public policy.⁷³ Thus,

It follows from this that, inasmuch as the national court or tribunal seised of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task.⁷⁴

The hostility toward pre-dispute arbitration agreements in consumer contracts is apparent in Member State implementation of Directive 93/13.⁷⁵

The provisions set out in Directive 93/13 were mirrored in the Commission's proposal for a Directive of the European Parliament and the Council on consumer rights.⁷⁶ Chapter V of the proposed Directive broadly reflected the provisions of Directive 93/13 and Annex II(c) mirrored Annex I(q) of Directive 93/13—but with an important distinction. While Annex I of Directive 93/13 referred to

⁷² Case C-40/08, *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira*, 2009 E.C.R. I-09579.

⁷³ *Id.* ¶ 52.

⁷⁴ *Id.* ¶ 53.

⁷⁵ *Id.* In England, for example, an arbitration agreement is automatically unfair if it relates to a claim for a pecuniary remedy which does not exceed 5,000 GBP. Furthermore, even when the claim exceeds such a financial limit, compulsory arbitration in B2C contracts will generally be unenforceable by virtue of the 1999 Regulations implementing the Directive if they have the effect of excluding or hindering the consumer's right to take legal statutory action. Nevertheless, there are two situations under which an arbitration agreement is not regarded as "unfair":

(i). if the agreement has been individually negotiated; (ii). if the arbitration clause provides for voluntary or non-binding arbitration.

The Unfair Terms in Consumer Contracts Regulations 1999, 1999, S.I. 1999/2083, § 5 (U.K.).

In Germany and Austria the validity of the provisions is recognized only if the provisions are recorded in a separate arbitration agreement signed by the consumer. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, as amended, § 1031, para. 5 (Ger.); ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE], as amended, art. 617, para. 2, (Austria).

French law historically imposed relatively strict statutory provisions on domestic arbitration clauses between persons involved in commercial activities and consumers. In 1996, however, the Paris Cour d'Appel has held that these domestic prohibitions do not apply in the context of international B2C contracts.

Swedish legislation provides for the invalidity of consumer arbitration agreements as to defined categories of future disputes, together with an express proviso that the exception is inapplicable where contrary to Sweden's international obligations (in particular, the New York Convention). Lag Om Skiljeförfarande [SFS] [THE SWEDISH ARBITRATION ACT OF 1999] 116:1, 6 (Swed.).

As for Italy, the relevant provision used to be Art. 1469-bis and -ter of the Civil Code, whose statutory provision was very similar to the ones provided in the Austrian and German ZPOs. However, Art. 36(2) of the Consumer Code now holds: "Terms shall be void, even if they have been individually negotiated, where they have the object or effect of: . . . (b) excluding or limiting the actions of the consumer vis-a-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional." Codice del Consumo 6 settembre 2005, n. 206, art. 36(2) (It.).

⁷⁶ *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct. 8, 2008).

“terms which may be regarded as unfair,” Annex II of the proposed Directive, apparently acknowledging the ECJ’s opinion in *Mostazo Clara*, listed contract terms that “are considered unfair in all circumstances.”⁷⁷ Accordingly, under Annex II(c) of the proposed Directive, contract terms which have the object or the effect of “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions” would have been be unfair in all circumstances.⁷⁸

The Commission’s stark changes to Directive 93/13 were not adopted, however. The resulting Directive 2011/83,⁷⁹ in its Article 32, provides the following resolution of the issue:

Article 32. Amendment to Directive 93/13/EEC

In Directive 93/13/EEC, the following Article is inserted:

Article 8a

1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:
 - extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or,
 - contain lists of contractual terms which shall be considered as unfair,
2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.
3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.

Thus, the resulting Directive continues the approach in Article 3 of Directive 93/13, focusing on the unfairness of particular contract term, but allowing each Member State to determine specific types of terms to be considered to be unfair. This may lead to Member State implementation of Directive 2011/83 that includes specific prohibition of pre-dispute agreement to arbitration in consumer contracts.

⁷⁷ *Id.* art. 34.

⁷⁸ *Id.* Annex II(c).

⁷⁹ Council Directive 2011/83/EU, 2011 O.J. (L 304) 22.11.2011. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

IV. Comparing U.S. and EU Approaches in the Context of the UNCITRAL ODR Negotiations

A. Comparative Paternalism (Whose Parenting Style is Best?)

In the United States, the law has not developed such a head-on approach to private international law and other limitations on party autonomy in consumer contracts as has been the case in the European Union. The same rules that govern choice of law in contracts in general most often will govern choice of law in consumer contracts.⁸⁰ The failure of the 2001 revised version of UCC § 1-301, with its paragraph (e) rule on consumer contracts,⁸¹ to be adopted anywhere but in the Virgin Islands indicates the difficulty of gaining legislative support for such a consumer protection rule in the United States.⁸² In the realm of choice of forum, the *Bremen*, *Mitsubishi Motors*, and *Carnival Cruise Lines* trilogy of U.S. Supreme Court decisions underlines the similar deference to party choice of a dispute resolution forum.⁸³

This does not mean, however, that the U.S. system has no limits on party autonomy in choice of forum or choice of law. Those limits in choice of law come in the form of mandatory rules that would apply in the absence of party agreement on choice of law and in the ultimate imposition of public policy. The *Second Restatement* allows only limited derogation from mandatory rules that would have been applicable in the absence of a choice of law provision and there is no reference to the substantive content of those rules.⁸⁴ It does this by beginning with the proposition that the chosen law will govern all matters that could have been resolved by explicit provision of the contract.⁸⁵ It then goes on to provide that the chosen law will also be applied in matters covered by mandatory laws unless there is no substantial relationship with the chosen state and there is no other reasonable basis for the choice or if the chosen law would be contrary “to a fundamental policy of a state which has a materially greater interest in determining the particular case.”⁸⁶

Nor does the rejection in the United States of conflicts rules for the protection of consumers indicate the lack of a public policy to protect consumers. The choice has been made, however, to accomplish this purpose outside the context of rules of private international law. While the law applicable to questions of

⁸⁰ See, e.g., *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 710 (Cal. Ct. App. 2001) (rejecting an agreement choosing Virginia law because California law provided greater protection for consumers).

⁸¹ See *supra* text accompanying note 45. The 2001 version of the UCC § 1-301(e) retained the reasonable relationship requirement for consumer contracts and prevented derogation from mandatory consumer protection rules.

⁸² See *supra* text accompanying notes 47-48 (showing the Virgin Islands is the only place that has adopted the 2001 revised version of UCC § 1-301).

⁸³ See *supra* text accompanying notes 34-36 (discussing the *Bremen*, *Mitsubishi Motors*, and *Carnival Cruise Lines* cases).

⁸⁴ *Supra* text accompanying notes 37-39.

⁸⁵ CONFLICT OF LAWS § 187(1).

⁸⁶ *Id.* § 187(2).

jurisdiction can differ substantially from general rules on applicable law, cases in the United States have continued to provide similar analysis of the two matters on the issue of party autonomy. Thus, the U.S. Supreme Court decision in *Carnival Cruise Lines, Inc. v. Shute*,⁸⁷ while dealing with the question of choice of forum, is instructive generally on the question of party autonomy.

In *Carnival Cruise Lines*, the Court held reasonable a small print choice of court clause on the back of a cruise ticket that required litigation of all disputes in Florida, even for consumers from the state of Washington.⁸⁸ Justice Blackmun's opinion for the majority acknowledged that "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line."⁸⁹

The difference in bargaining power of the parties was not, however, the only interest considered by the Court.

Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: first, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.⁹⁰

What is interesting here is the Court's failure to consider any overriding public policy or mandatory rule that might protect a consumer. In part this may have been because no such rule existed.⁹¹ Nonetheless, upholding the merchant-imposed choice of court clause against the consumer was justified on the basis of (1) the merchant's interest in litigating all similar disputes in a single forum, (2) joint interests of predictability, and (3) the general (public) interest of all con-

⁸⁷ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

⁸⁸ *Id.* at 594-5.

⁸⁹ *Id.* at 593.

⁹⁰ *Id.* at 593-4 (citations omitted).

⁹¹ The Court did consider the argument that the choice of court clause violated a federal statute prohibiting waiver of liability clauses in contracts for the carriage of persons, but found the statute was not applicable. *Id.* at 595-6.

sumers of such cruises in the lower price that is assumed to result from upholding such clauses on the basis of the first two interests.⁹²

Applying the rationale of the *Carnival Cruise Lines* decision to questions of party autonomy, and in particular to issues of choice of forum and choice of law, we can discern two very different approaches to consumer protection. On the one hand, the use of private international law rules limiting choice of forum and law are founded on the belief that consumers are best protected if, when a dispute arises, they have the advantage of dispute settlement in their home courts, applying their home law. This is the approach found in the Brussels I and Rome I Regulations. It focuses on protection of the interests of those consumers who ultimately have disputes with the merchant. It does not, however, give due consideration to the interests of all consumers at the contract formation stage of the transaction. Even the Rapporteurs for the Rome I Regulation considered this a defect in this particular approach to using private international law for consumer protection, suggesting that the protection offered by the consumer provisions of the Rome I Regulation “is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings,” and recommending “backing up” such rules with more accessible methods for alternative dispute resolution.⁹³

On the other hand, the U.S. approach views the interests of all similarly situated consumers and begins with the (unstated) question of how the greatest number of consumers can be benefited. The court in *Carnival Cruise Lines* concluded that it is reasonable to assume that the general benefit to all similarly situated consumers of a lower price for the cruise ticket outweighs the detriment to the individual consumer who develops a dispute with the merchant and is then compelled to take the merchant’s choice of law and forum.⁹⁴ Thus, the U.S. approach focused on the contract formation stage and the benefits to all similarly situated consumers, and gave less attention to the litigation stage interests that are the core of the European approach.

⁹² *Id.* at 593-4. This, of course, assumes that any savings to the merchant will be passed on to the consumer in the form of a lower price. In a competitive market this should occur, but there is no certainty that the Court’s analysis in this regard was consistent with the reality of the specific market it was addressing.

⁹³ Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), at amend. 14, COM ((2005) 0650 – C6-0441/2005/0261) (Aug. 28, 2007). One report quotes the Rapporteurs as stating:

With [. . .] reference to consumer contracts, recourse to the courts must be regarded as the last resort. Legal proceedings, especially where foreign law has to be applied, are expensive and slow. The introduction of a mechanism to deal with small claims in cross-border cases is a step forward. However, the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. It is therefore considered that, particularly as regards electronic commerce, the conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems.

Giorgio Buono, *Rome I: EP Rapporteur’s Compromise Amendments and Council’s Working Text*, CONFLICT OF LAWS.NET (Sept. 16, 2007), <http://conflictoflaws.net/2007/rome-i-ep-rapporteurs-compromise-amendments-and-councils-working-text/>. This statement was repeated in Final Compromise Amendments, EUR. PARL. DOC. 9/36 (2007).

⁹⁴ *Supra* notes 87-92 and accompanying text.

Party Autonomy and Access to Justice

At first glance, there is logic to each of these approaches. But neither of them provides real party autonomy. Each is an exercise in governmental paternalism, dictating a specific path without real consumer choice. The Rome I approach leaves no room for a consumer who would prefer at the outset to receive a better price as a trade-off for accepting clauses in a contract that may be considered at the time of contract formation as unlikely to matter. If only one out of a thousand consumers in a similar transaction ends up with a dispute with the merchant that would result in litigation, then the U.S. approach results in a benefit to the 999 similarly situated consumers—each of which receives a lower price for the item purchased and none of which develops a dispute with the merchant. Is it a fair trade-off to make dispute resolution more difficult for one consumer in exchange for providing some, perhaps marginal, reduction in price to 999 other consumers? Or is it a fair(er) trade-off to make dispute resolution easier for one consumer in exchange for a marginally higher price charged to 999 other consumers? Either approach represents a policy choice that should be carefully considered by those creating the law. What should be considered, however, is reality, not just theory.

The U.S. Supreme Court did purport to consider this policy choice in *Carnival Cruise Lines*, with the majority of the Justices accepting the policy that would benefit more consumers in some small way while placing the limited number of consumers for whom a legal dispute results at a litigation disadvantage.⁹⁵ The Brussels I and Rome I Regulations represent the opposite choice in the consideration of the same trade-off. Under the EU Regulations, prices may be marginally higher for all consumers, but for those who end up with a dispute with a merchant, dispute resolution *should* be both more economical and on more favorable terms.

The problem with the EU approach is that, in most consumer transactions it is likely that the amount in controversy is simply too small to justify litigation in the first place (and certainly too small to justify the secondary litigation required to enforce the initial judgment in the judgment debtor's home jurisdiction). Thus, such private international law rules, which ostensibly protect consumers, most likely result in no real benefit while bringing with them the corresponding loss of the transaction stage possibility of lower prices and enhanced access to goods and services.

B. Considering the Alternatives in the Context of Cross-Border ODR

As noted earlier,⁹⁶ the UNCITRAL ODR negotiations presume that, for the type of low-value high-volume online transactions being considered, access to courts is of little practical value—and thus does not equate to access to justice. Thus, there really is no one who benefits from a system that ensures them the

⁹⁵ *Supra* notes 87-92 and accompanying text.

⁹⁶ *Supra* note 65.

ability to go to national courts. As the study by the European Parliament has stated, any such benefits are “largely illusory.”⁹⁷

It is not only the EU Parliament that has questioned this effect of the current combination of private international law and consumer protection laws in the EU. A Commission Staff Working Document on consumer protection noted the fragmentation of consumer protection laws within the EU, and the impact of Rome I as a result:

The effects of the fragmentation are felt by business because of the conflict-of law rules, and in particular the Rome I Regulation (“Rome I”), which obliges traders not to go below the level of protection afforded to foreign consumers in their country.

As a result of the fragmentation and Rome I, a trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States. Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.⁹⁸

This analysis mirrors that provided by Justice Blackmun in the *Carnival Cruise Lines* case in the U.S. Supreme Court.⁹⁹ But, while both legal systems have acknowledged the problem, neither has yet provided rules that grant both a lower price and product/services availability at the transaction stage *and* consistent protection of the consumer/buyer when a dispute arises. This is precisely the opportunity available in the UNCITRAL Working Group III negotiations.

C. Getting the Benefits of Both Systems

As noted above, the U.S. approach to party autonomy and consumer protection in cross-border transactions weighs in favor of enforcing choice of forum and choice of law provisions, even when those provisions are unilaterally dictated by the stronger party in the relationship. The EU approach, on the other hand, assumes that all relationships in which there is a weaker party (especially consumer contracts) will result in unconscionable conduct by the stronger party in dictating both choice of forum and choice of law. The result in Europe is a tendency towards complete prohibition of pre-dispute agreement on choice of forum.¹⁰⁰

⁹⁷ Commission Staff Working Document Accompanying the Proposal for Directive on Consumer Rights Impact Assessment Report, at 8 (2008), available at http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf.

⁹⁸ *Id.*

⁹⁹ *Supra* notes 87-92 and accompanying text.

¹⁰⁰ It must be noted that, while the Brussels I Regulation effectively provides such a prohibition in the context of choice of court, the New York Convention (to which all EU Member States are parties) does not provide such a prohibition in the context of arbitration. The European Court of Justice has, however, applied the European Consumer Protection Directive to support national prohibitions of pre-dispute arbitration agreements in consumer contracts on a case-by-case basis. *Supra* Part III.B.5.

The problem with a complete prohibition on pre-dispute agreements to a choice of forum, and particularly a prohibition on pre-dispute agreement to arbitration at the conclusion of the ODR process being considered in UNCITRAL Working Group III, is that, while it may protect consumers from having bad dispute resolution mechanisms imposed on them, it also prevents consumers from entering into agreements to go to good dispute resolution mechanisms. The entire purpose of the UNCITRAL ODR project is to create a *good* dispute resolution mechanism. Moreover, it is to create a good dispute resolution mechanism where none currently exists as a practical matter. If the same process results in the application of rules that prevent parties, particularly consumers, from using the system being created, it will be a failure.¹⁰¹

It is not enough to say that consumers should have an option to use the dispute resolution system, while merchants should be bound to use it. That removes none of the unpredictability and risk currently faced by merchants. The response to that type of risk by merchants, particularly in Europe, has been either to raise prices or to opt out of cross-border transactions altogether.¹⁰² That does not help consumers.

By creating a fair system, and at the same time making it self-contained so that there can be no reference to national or regional rules that will prevent its effective use, UNCITRAL Working Group III can get the best of both the current U.S. approach and the current EU approach while avoiding the disadvantages of either of them. Such a system can reduce the risk of multiple-forum and multiple-law litigation for merchants, thus enticing them to participate in cross-border online commerce. At the same time, the result should be lower prices and greater product and service availability for all buyers, including consumers. It will also mean that, when a dispute arises, the buyer/consumer is fully protected by having a simple, efficient, effective, transparent, and fair system for the resolution of that dispute—a system that can produce an enforceable, binding result. In other words, where access to courts has not provided access to justice, the UNCITRAL system can provide real access to justice.

It may be that unlimited respect for party autonomy runs the risk of the stronger party to a transaction imposing unfair choice of forum requirements on

¹⁰¹ See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221, art. 6. There is in consumer protection circles the belief that provisions such as Article 6 of the European Convention on Human Rights (ECHR) requires that certain parties, particularly consumers, always have access to their own national courts, thus preventing use of effective alternative dispute resolution. *Id.* Article 6 provides that, “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” *Id.* It is both nonsensical and contradictory to begin an UNCITRAL project with the foundational assumption that, for low-value high-volume online transactions, access to courts is not access to justice (which is the basic assumption underlying the entire negotiations), and then to block any progress towards real justice by inserting rules that require that certain parties (consumers in particular) *always* retain access to their home courts. If provisions like Article 6 of the ECHR mean anything, they must mean that states should provide access to real justice, even when that cannot be provided through traditional national judicial mechanisms. Thus, there can be no justice if states maintain prohibitions on pre-dispute agreement to arbitration or other alternative dispute mechanisms for disputes arising from low-value high-volume transactions.

¹⁰² See *supra* notes 66-69 and accompanying text.

the weaker party. The logical response to this risk is not, however, to prohibit all pre-dispute choice of forum agreements. A complete prohibition is the equivalent of responding to the fact that some consumers get cheated when they buy a used car by prohibiting all consumers from buying used cars. Such a rule will prevent a consumer from being cheated by being a party to a bad used car deal, but it will also prevent a consumer from making a good deal on a used car. We should not be creating a good system for dispute resolution while denying the class of persons who can most benefit from it the right to use it.

The possibility exists for giving all parties both predictability at the transaction stage and an effective forum at the dispute settlement stage. This will remove the risk of uncertainty created by the potential for multiple-forum and multiple-law litigation for the merchant, and as a result should make products and services both more available and lower priced for the consumer. Because most online transactions are accomplished with up-front payment mechanisms, it will also provide consumers/buyers with an effective remedy where none now exists at the dispute settlement stage. It can only happen, however, if the issue of party autonomy is properly addressed and if the system can be designed to prevent the application of rules prohibiting binding pre-dispute choice of forum.

V. Concluding Thoughts – Guidelines for a Successful Conclusion in Working Group III

The work undertaken by UNCITRAL Working Group III has the possibility of significantly enhancing the benefits, availability, and safety of cross-border online transactions. If the project can result in the successful creation of a fair and effective set of generic procedural rules, a fair and effective set of guidelines and minimum requirements for online dispute resolution providers and neutrals, a relevant and self-contained, set of substantive legal principles for resolving disputes, and an effective cross-border enforcement mechanism, it will make a major contribution to both international commerce and consumer protection.

The system to be created by Working Group III must be simple, efficient, effective, transparent, and fair. Only a system that has these characteristics will invite the trust of both merchants and purchasers (including consumers) to enter into cross-border, low-value high-volume electronic transactions that otherwise create risks that keep both sellers and buyers from engaging in such transactions. The process of developing the system must recognize that both sellers and buyers require assurance that their interests will be protected in order to generate the proper level of trust in that system. If either sellers or buyers opt out of, or are inadequately protected by, the system, then it simply will not work.

The following guidelines will help insure that the instruments to be created by Working Group III result in a simple, efficient, effective, transparent, and fair ODR system:

- 1) The system must recognize that alternatives for efficient and effective dispute resolution do not currently exist for cross-border, low-value high-volume electronic transactions. This has already been accom-

Party Autonomy and Access to Justice

plished but is not fully acknowledged when some insist on prohibitions on binding pre-dispute choice of forum agreements.

- 2) Simplicity and efficiency require as few exclusions from scope as possible. A system that begins with computer-based communication and analysis will not easily allow determinations that require human discretion or the application of difficult definitions designed to distinguish between types of parties to a dispute.
- 3) Efficiency and effectiveness require that the system be self-contained and avoid the need for reference to national rules of private international law. A uniform system that relies on the differences that exist in national rules of private international law will create disparate results depending on the location of parties and the need to "locate" the transaction. This would create difficulties that should not occur in the system. Stated more simply, efficiency and effectiveness require that the system avoid the trap of thinking that rules of private international law can be used to protect consumers in cross-border, low-value high-volume electronic transactions.
- 4) Efficiency, effectiveness, and transparency require that the system encourage dispute resolution that not only results in a binding decision, but provides an automatic method for the enforcement of that decision (*e.g.*, charge-back methods or automatic payment reversal).
- 5) Transparency and fairness require that a party to a cross-border, low-value high-volume electronic transaction receive clear notice of the dispute resolution option and a separate opportunity to choose not to engage in a transaction if that party decides to avoid the dispute resolution process that is offered.
- 6) Fairness requires that the system be designed so that states may agree that the system itself is simple, efficient, effective, and transparent. Private international law rules that exist to protect weaker parties from unfair procedures are not necessary when states agree at the outset that the system of dispute resolution operates to provide adequate protection of the weaker party. Thus, the fairness of the system itself is the ultimate test of the simplicity, efficiency, effectiveness, and transparency required to replace protective rules of private international law. If states find the system to meet these tests, then the system itself will replace the need for "protective" rules of private international law, and will itself result in the type of consumer protection often sought by such rules of national law. This is an instance where a uniform system of law is much better than relying on national rules of private international law or national rules of consumer protection. Simplicity, efficiency, effectiveness, and transparency can only result if there is a single, self-contained system, with as few opportunities for divergence through national law as possible.
- 7) Simplicity requires that the substantive legal principles to be applied in the ODR process provide a focused and limited set of claims that may be brought and set out a focused and limited set of remedies that

Party Autonomy and Access to Justice

may be assessed. Existing ODR systems for online transactions have demonstrated that the vast majority of disputes in low-value high-volume online transactions lend themselves to a small, discrete set of claims and options for remedies. More complex issues (*e.g.*, product liability, personal injury, class actions, multiple party claims, etc.) need not be a part of a successful ODR system.

In the fall of 2012, the UNCITRAL Working Group III negotiations have reached a critical stage. The potential benefits of an effective cross-border ODR system are denied by none. The path to their creation, however, is currently blocked by those unable to see beyond existing national and regional laws described as accomplishing goals that, in the context of ODR at least, they serve to frustrate. Working Group III has the opportunity to combine the best of the elements of U.S. and EU private international law and consumer protection. What is required is a fresh approach to concerns created by recent technological developments. If the Working Group can get beyond theoretical ties to old rules created for past realities, and embrace new rules that provide positive practical results in the new internet environment, it can make a very significant contribution to both international trade and consumer protection.