

TACD

TRANS ATLANTIC
CONSUMER DIALOGUE

DIALOGUE TRANSATLANTIQUE
DES CONSOMMATEURS

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Tacd Resolution On The Proposed Hague Convention On Jurisdiction And Foreign Judgments In Civil And Commercial Matters

WHEREAS:

Access to justice is one of the cornerstones of consumer protection. The principle that consumers should be able to seek justice in the courts of their home jurisdictions is founded on that cornerstone and reflects the need to ensure effective redress for unfair, deceptive, and abusive business practices. This principle is especially important in the electronic marketplace, where consumers could be at a considerable disadvantage if they are subjected to the jurisdiction of distant courts when disputes arise. Depriving consumers of access to their own courts in the case of cross-border disputes is effectively denying them their right to redress via the public justice system.

Businesses can limit the jurisdictions in which they transact with consumers to those jurisdictions in which they are comfortable being subject to litigation.

The emergence of alternative dispute resolution options for consumers in cross-border disputes, while welcome, vary considerably, have yet to prove their effectiveness, and will not meet the needs of consumers in all cases. The existence of ADR options does not diminish the need of consumers for access to judicial redress.

As a practical matter, court actions are usually a last resort for consumers. If effective ADR options for cross-border disputes are established and well-publicized, consumers will choose to use them. There is no need to make court redress contingent upon the prior exercise of ADR options.

It is unfair to enforce choice of forum clauses in standard form contracts against consumers as these contracts are not negotiated. In such cases, the seller's choice of forum is imposed on the consumer; there is no meaningful choice of forum by the consumer.

It is important that the definition of consumer in the Hague Convention is sufficiently broad to reflect the reality of consumer transactions. For example, members are concerned that individuals who purchase airline tickets or computer software for business purposes under non-negotiable contract terms are not protected under the current draft Convention. The TACD intends to produce a separate resolution on this issue prior to the June meeting of the Hague Conference.

Concerns have been raised within the TACD over the potential chilling effect of the Convention on speech, for example the expression of dissent or criticism of corporate and government policies. The TACD is reviewing this issue prior to the June meeting.

There are important differences in national laws regarding intellectual property, including such issues as "fair" or "innocent" use, limits to trademark rights in the areas of criticism, parody or comparative advertising, scope of patent protection, and term of copyright protection. Cross-border recognition and enforcement of Internet-based intellectual property judgements raises the prospect of reduced public rights to fair use of such property, contrary to the public interest.

RESOLVED THEREFORE THAT:

The proposed Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters should promote and protect the consumer interest in access to justice. Specifically:

1. Consumers who transact from their home jurisdictions should not be denied the right to litigate disputes regarding those transactions in the courts of their home jurisdictions.
2. Claims by businesses against consumers should always be brought in the courts of the consumers' home jurisdiction.
3. There should be no "prior resort" conditions (e.g., prior resort to ADR) for the application of jurisdiction in the case of consumer contracts.
4. Non-negotiable choice of forum clauses in standard form contracts should never be enforced against consumers.
5. Consumers should be able to have local judgements against foreign businesses easily recognized and enforced in foreign jurisdictions.
6. Intellectual property should be excluded from the Convention.