AMERICANS for FAIR ELECTRONIC COMMERCE TRANSACTIONS

May 16, 2005

Mr. Jeffrey Kovar
Assistant Legal Advisor for Private International Law
U.S. Department of State
2430 E Street, NW
Suite 203, South Building
Washington, DC 20037-2851

Dear Mr. Kovar:

Re: Draft Hague Convention on Exclusive Choice of Courts Agreements

Americans for Fair Electronic Commerce Transactions (AFFECT) is a national coalition of consumers, retail and manufacturing businesses, financial institutions, technology professionals and librarians committed to the growth of fair and competitive U.S. markets in software and other digital products. Our members include non-profit organizations such as U.S. library associations and the Society of Information Management (SIM) and companies such as Boeing, Caterpillar and Prudential Financial. We have written to you previously about the draft Hague Convention and we appreciate your willingness to consider our views.

Our members remain very concerned that the scope of the Convention continues to include choice of court terms in non-negotiated agreements. The Convention may be entirely appropriate and desirable for U.S. businesses and non-profits, small and large, which negotiate commercial contracts every day. However, the Convention is neither appropriate nor desirable where non-negotiated contracts are concerned, particularly when those contracts are in the form of shrink-wrap or click-on agreements.

When a company or organization buys software or other digital information—and even when buying other types of products that come packaged with a CD-ROM or DVD, for example—the seller, including the creator, supplier and distributor, often presents terms that are contrary to what one might expect when buying traditional goods and services.

1301 Pennsylvania Ave. NW Suite 403 Washington, D. C. 20004
voice: 202-628-8410 fax: 202-628-8419
www.affect.ucita.com cashworth@alawash.org

The problem is it can be hard to find out what the terms are when buying digital products in the mass market. Often the seller will not make the terms of the "license" available until after you have opened the sealed package. At that point, you cannot negotiate more favorable terms, nor do you have much, if any, recourse if you reject them. This anti-customer approach is used now by many digital product sellers and could soon be used in transactions for "smart" goods that incorporate software into their design, such as for autos, fax machines and microwave ovens.

This problem is not limited to off-the-shelf products. When you purchase or "license" a digital product via the Internet, you are asked to click "I agree" to terms. Those terms, if enforced, may prohibit you from criticizing the product, transferring it to someone else (including a successor business) or using it to create new products – or the terms may require that your business sue or be sued in a distant forum in the event of a dispute. Whatever other terms might be deemed later by a court to be fair or unfair, AFFECT is in the first instance concerned that the draft Hague Convention will indiscriminately validate exclusive choice of court terms regardless of whether such terms were actually "agreed to" by the parties to the agreement.

The current language in Articles 5, 7 and 9 – each of which contains some grounds for a court to decline to enforce a choice of court term or to enforce a judgment based upon a choice of court term – sets an impossibly high bar. If that language cannot be improved, another way to exclude non-negotiated agreements from the scope of the Convention would be to amend Article 3(a) to read as follows:

"[E]xclusive choice of court agreement" means an agreement **knowingly** concluded by two or more parties, **where the parties have had the opportunity to affect the terms of the agreement**, that meets the requirements of paragraph c)...."

We hope that you will seriously consider this proposal and would be pleased to discuss it further with you.

Sincerely,

Carol B. Ashworth

Carol B. Ashworth
Coordinator

1301 Pennsylvania Ave. NW Suite 403 Washington, D. C. 20004
voice: 202-628-8410 fax: 202-628-8419
www.affect.ucita.com cashworth@alawash.org