

**Laura A. Kaster, General Attorney in Charge of IP litigation,
AT&T Corp. Comments on the
Draft Convention on Jurisdiction and Foreign Judgments
in Civil and Commercial Matters**

AT&T Corp. would like to express its appreciation for the efforts of the US Delegation and for being permitted to share its views. As you all know, in 1992, the United States Government initiated discussions within the Hague Conference on Private International Law to enhance the enforceability of U.S. legal judgments in the courts of other countries. The principal aim of this well-intentioned process was to obtain reciprocal treatment abroad for U.S. judgments in light of the reality that courts in the United States already give effect to foreign judgments under principles of international comity. The process has entailed an enormous amount of work and, of course, those who have labored so hard in the vineyard want to see it come to fruition. We understand that good impulse but AT&T is very concerned that including e-commerce and intellectual property rights will have unintended impact on a nascent Internet. The "Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters" raises numerous questions and concerns by sweeping broadly beyond its original objectives. The arenas original addressed had already been subject to experience; rules that apply in well-mapped geography should not be imposed in a new and unknown territory.

In fact neither the plan for this Convention nor the deliberations leading to the current draft anticipated the revolutionary creation of the Internet, a borderless medium that promises a monumental growth in communication and commerce. The Internet

should not be a part of this effort. As an international telecommunications company and online service provider, AT&T Corp. is interested in the continued blossoming and complete development of the Internet for all of the uses we see today and those we have yet to imagine. We have already seen that the Internet can spawn both boom and bust. We wish to avoid mistakes that may stultify this growth. The Internet is in relative infancy; no one fully understands its promise. We should not rush in to remedy the problem of enforcement of judgments in the traditional legal settings in a manner that can possibly deny or minimize this future promise to all of the citizens of the world. We should also avoid curtailing the possibility that there will be revolutionary legal applications and solutions that will be developed within the Internet itself. We have a small inkling that less costly, more efficient systems may be at hand. It seems most sensible to defer any pronouncements about international jurisdiction and enforcement of judgments concerning Internet-related matters until we can see how this medium evolves.

There are specific concerns regarding e-commerce and intellectual property that we would like to highlight. Our concerns grow out of certain fundamental assumptions about jurisdiction and judgment that necessarily inform our planning as a U.S.- based company. First, with regard to the enforcement of judgments, we look to the “full, faith and credit” clause of the U.S. The United States legal and economic environment has prospered in part because the courts of one state give effect to the judgments of their sister courts in other states. This helps tie the various jurisdictions within the United States into a relatively seamless and internally reliable web of legal responsibility. However, the U.S. “full, faith and credit” model does not translate readily

to the international scene. Different countries have fundamentally different legal systems that, of course, are not all grounded in the common law tradition that prevails in the United States. And, at least as important, there is no single unifying document or doctrine that governs all legal matters to compare to the Constitution, which applies throughout the United States. There is no authority like the U.S. Supreme Court, moreover, which has the power to maintain order and consistency over the judgments rendered in all federal and state courts should they violate the terms of the Constitution, including the broad requirements of “due process” “equal protection” and “freedom of speech.” The integrated legal framework within the United States is fundamentally different from the international framework.

There is no world supreme court governing private international law disputes, nor is there any organic legal document or set of principles that all parties in all countries can look to and agree upon as binding. While this does *not* preclude international legal harmony, the lack of a common, global legal structure makes the enforcement of judgments from country to country a subtle matter that raises more issues than the obvious.

The exercise of jurisdiction in the first instance is even more complex. For us, “Due Process” is a critical philosophical element that must be accounted for in assessing the Draft Convention from a U.S. point of view. Of course, most countries have the concept of fairness woven into their legal rules, but that concept does not necessarily translate to a limit on the exercise of jurisdiction in the first instance. The United States has developed a particularly thorough body of law to judge the “due process” involved in compelling an individual, enterprise, or organization to stand trial in

a distant forum. The U.S. approach may not be perfect and, in part because each dispute is decided on a case-by-case basis depending on the facts at hand. However, based on Supreme Court precedent, a defendant cannot be required to defend itself in a forum with which it has not had at least “minimum contacts,” or where compelling personal jurisdiction would not be “consistent with traditional notions of fair play and substantial justice.” See International Shoe Co. v. Washington, 326 U.S. 310,316 (1945).

While the *ad hoc* nature of this determination may be troubling to those who seek more definition, it is a bedrock notion that aids people and businesses because it usually permits them to affirmatively elect to do business in a given location.

Internet and E-Commerce

The rapid growth of the Internet should not obscure the fact that its final form cannot now be discerned and that we have the power to squelch its development by regulating before we fully understand the consequence. For exactly that reason, the US has so far stayed its hand in taxing Internet transactions. Only deliberate, non-interventionist attitude to the proper rules relating to dispute resolution will serve the goal of promoting the Internet's development. Among many issues, the proper paradigm for the “location” of an Internet viewing of content or purchase is not presently clear, particularly with respect to passive websites accessed from any where in the world, but located in one place only. Internet “exceptionalism” is certainly not a reasonable or proper long-term view. But is it sound for the near term. Until we have an opportunity to review and understand more of the real-world ramifications of Internet

and e-commercial activity, we should be highly circumspect about interfering with its progress or imposing the most constrictive rules.

It will not, after all, be the citizens of the United States who would be primarily prejudiced by curtailing the global expansion of online enterprises. If the Draft Convention were finalized in its current form it would threaten to balkanize a unified Internet and to encourage denial of access to the citizens of the globe who have not yet had the full benefit of its new tools, but whose laws may be too restrictive to risk permitting access. We believe e-commerce should be excluded entirely. If e-commerce is not excluded entirely, the Draft Convention should be modified to make clear that no signatory may exercise jurisdiction based solely on the existence of Internet or online presence within that jurisdiction. In addition, under no circumstance should freedom of contract be curtailed or the potential for arbitration been reduced. The exact wording and scope of these exceptions can be negotiated, but the fundamental point is to allow the Internet and e-commerce to progress further without undue inhibitions in order to foster its growth, and to preserve its full potential for all citizens of the world.

Intellectual Property

A related, but distinct, area of concern involves the adjudication of intellectual property rights (and other non-physical torts). We believe that they should be excluded entirely. Accordingly, AT&T is of the view that Articles 10 and 13 should be deleted in their entirety. While there are a number of existing international conventions addressing intellectual property rights, and they have been recently brought within the ambit of the World Trade Organization series of agreements, the fact is that intellectual property is

very much a feature of domestic understandings and substantive rules. For the purposes at hand, AT&T is primarily focused here on trademarks, copyrights and information-related subjects like defamation and advertising.

It is not yet appropriate to rely on a unified system for adjudicating or enforcing trademark rights where so many different national substantive standards are involved. However, we agree with Verizon's statement that if trademarks are the subject of an ultimate Convention, we support both exclusive rights and Alternative A in article 12 without exception for incidental questions and that Article 12 cannot be preempted by other Articles.

A unified approach is also inappropriate with regard to advertising standards and the general field of unfair or deceptive trade practices. In Germany, for example, it was illegal until very recently to offer unconditional, full-refund guarantees if a customer is dissatisfied with a product for any reason, or to offer rebate or "point" programs to encourage customer loyalty. If advertising or marketing practices such as these were subject to international jurisdiction under the Draft Convention, the Internet would expose any company using such strategies to a world of potential litigation.

With respect to copyright, different countries have significantly different approaches to "fair use," contributory or vicarious liability, and, indeed, to the basic right of free speech. Accordingly, online service providers and content providers could find themselves exposed to liability if they are subject to jurisdiction under the terms of the current Draft Convention. We would, be more comfortable allowing the Internet-related aspects of intellectual property, in particular, to evolve a little bit more over time before locking in the terms of internationally-accepted jurisdictional principles.

Business-to-Consumer Transactions

The Draft Convention unwisely expands private international law, in our opinion, to the new province of business-to-consumer (B2C) transactions. We believe this is untimely as well as ill advised. Before the Internet, and thus under existing commercial practice and legal experience, companies in one country (at least outside Europe) were not in the habit of transacting business with individuals in a different country. This is a very new, very salutary commercial development. It opens up all manner of new products, services and related opportunities to people everywhere. But the corresponding rules need time to ripen. In the US, the Supreme Court allows legal rules to percolate before it will address them; the lower courts and the states are viewed as experimental laboratories for testing rules of resolution for new issues, precisely to avoid premature rule-making. Acting too soon will not protect individuals, it will risk denying them access to the wealth of offerings that companies might be willing to market internationally so long as they do not fear undue repercussions if they do so. Acting too soon may also preclude the development of expeditious and less costly remedies on the Internet itself. We should not experiment with B2C international legal conventions until we have a chance to understand this phenomenon much better than we do today.

We are especially concerned with the Draft Convention's hostility to freedom of contract in general. Both businesses and individuals should be considered capable of making choices (such applicable law and forum, or electing arbitration) without being treated as wards of the state. For Internet transactions, in particular, it makes no sense to require default "choice of forum" rules that cannot be amended by the parties,

including consumers. If an individual does not wish to accept the forum specified by e-commerce web site, the consumer could not possibly be more free to take his or her business elsewhere.

International Legal Regimes

In conclusion, AT&T Corp. is in favor and not at all opposed to exploring new and creative approaches toward resolving international legal disputes. We participated early and often in proceedings before the World Intellectual Property Organization (WIPO) in cases involving Internet domain name disputes under the rules and standards promulgated by the International Corporation for Assigned Names and Numbers (ICANN). In our view, this international dispute resolution facility is both fair and efficient, and could easily serve as a model for online, multi-lateral adjudication of trans-border legal challenges in the Internet era. In addition, there is a potential for enforcement mechanisms on the WEB that are unique, such as those used voluntarily by all who buy and sell on E-Bay, that may provide an entirely new way to approach Internet commerce.

AT&T is not opposed to the original goals underlying the Draft Convention; we are opposed to its reach into unexplored and undeveloped realms that require time to gestate. The current draft takes on the risk of imposing unintended negative consequences in too many novel areas. The hard work of the Commission need not go unrecognized or unfulfilled but it should not enter spheres outside of those originally contemplated and not yet well understood. The Internet, e-commerce, and intellectual property rights should be allowed additional rein before subjecting them to conclusive international jurisdictional rules. The world's substantive standards in these areas are

yet too disparate and too new to warrant the articulation of baseline litigation standards. We would strongly encourage the participants in the Hague Conference to step back in these areas and follow the maxim “first do no harm.” The rules of the most restrictive national forum must not be invited to deter global online progress.

Thank you for the opportunity to make this submission.