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"UNFAIR" DISPUTE RESOLUTION CLAUSES: MUCH ADO ABOUT NOTHING?

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ABSTRACT

Dispute resolution clauses are a common and potentially important component of many types of standard form contracts. I examine the use of dispute resolution clauses in 597 end-user license agreements (EULAs) of software packages sold online. I find that 75% of EULAs include choice of law clauses, 28% include forum selection clauses, 6% include arbitration clauses, and none include class action waivers. Sellers are equally likely to include dispute resolution clauses in the EULAs of consumer-oriented and business-oriented products. Despite the concerns of some legal academics, I do not find much evidence of "strategic" use of DRCs to advantage sellers over buyers. For example, sellers located in states with "seller-friendly" laws are no more likely to include choice of law or choice of forum clauses than sellers in states with stronger consumer protections; despite UCITA's flexible choice-of-law rules and otherwise seller-friendly provisions, sellers do not go out of their way to select UCITA; and, there is no evidence that fora selected are intentionally inconvenient to buyers. These results question certain proposals to regulate dispute resolution clauses in consumer form contracts on the basis of strategic behavior by sellers.

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I. INTRODUCTION

Standard form contracts governing consumer transactions often include clauses that specify how disputes will be resolved. Such dispute resolution clauses (DRCs) spell out which law should govern and in which forum a dispute should be heard. The choices made are important because they help determine whether a party will find it worthwhile to seek legal redress upon being injured. And the possibility that such clauses specify laws and fora which are not mutually convenient for the buyer and the seller has multiplied with the growth in online commerce, as such commerce involves transactions between buyers and sellers that are often distant.

The use of DRCs in mass market transactions, both online and traditional, has sparked controversy among academics and legislators. One position that some have taken is that liberal enforcement of DRCs is desirable. DRCs help sellers minimize costs associated with legal complexities of transacting in many states at once. Sellers protect themselves from the risk of being sued in whichever jurisdiction buyers reside, safeguard from having to comply with the laws of inconsistent jurisdictions (a pervasive problem in online transactions), and economize on legal representation by having to be familiar with the law of only one state. This arrangement also benefits consumers, as they would receive the cost savings in the form of lower prices. That is, although the DRCs often limit consumers' options of legal redress *ex post* (by, say, restricting class actions) consumers receive the value of the foregone option *ex ante* in the form of lower prices.[1] Moreover, granting the parties flexibility in contractual choice of law and fora would encourage competition among states to provide more efficient contract laws.[2]

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[1] This view was adopted by the Supreme Court in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). Justifying its decision to enforce a forum selection clause printed on a cruise ticket, the Court stated that "[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the

An opposing position is that sellers' use of DRCs puts the general public and small business users at a disadvantage. Forum selection clauses do not represent a joint effort between buyers and sellers to maximize surplus by reducing commercial uncertainty, but rather the sellers' own prescription of the most advantageous forum. Sellers exploit their superior bargaining power by requiring disputes to be heard in a forum convenient to them, where they have business ties or political influence to benefit from local favoritism.[3] They choose seller-friendly laws and procedural rules, or mandatory arbitration that impairs buyers' ability to seek court relief and might preclude class actions.[4] This inability to seek legal redress is particularly problematic in consumer markets, where buyers are unlikely to shop around carefully and thus only *ex post* mechanisms like litigation would be able to correct market imperfections.[5]

Under this skeptical view, choice of law clauses also remove *ex post* corrective mechanisms by enabling sellers to avoid state consumer protection laws, which are designed, in part, precisely to address market failures stemming from consumers' inability to read or understand the fine print. As one commentator notes (based on anecdotal evidence) that "we now see the aggressive use of choice of law clauses in consumer and small business settings to a degree unimagined in the late 20th Century and this development threatens to undermine the

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form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." See also Clayton P. Gillette, Rolling Contracts as an Agency Problem, 2004 Wis. L. Rev. 679.

[2] See Larry E. Ribstein & Bruce H. Kobayashi, State Regulation of Electronic Commerce, 51 Emory L. J. 1 (2002).

[3] William J. Woodward, Jr., Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy, 54 S.M.U. L. Rev. 697 (2001); William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 Wash. U. L. Q. 243 (1997).

[4] America Online v. Booker, 781 So. 2d 423 (Fla. App. Ct. Feb. 7, 2001). It has been argued that sellers' aggressive use of mandatory and choice of forum clauses has led to a significant reduction in judicial opinions, a consequent slowing down in the development of common law, and a disruption in consumers' ability to obtain compensation for damages. *See* Rex R. Perschbacher & Debra Lynn Bassett, *The End of Law, 84 B.U. L. Rev. 1, 30 (2004).*

[5] Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability, 73 U. Chi. L. Rev. 157 (2006).

consumer law States have developed in the last 50 years."[6] Consequently, consumers are likely to be price insensitive to these clauses and do not consider them in their purchasing decisions, thus failing to demand any price reduction that is potentially associated with these clauses.[7]

While this more academic debate is ongoing, there has been growing activity on the reform front. One of the most contested amendments proposed for Article 1 of the Uniform Commercial Code (UCC) has to do with the choice of law rules. Pre-revision Section 1-105 allows contracting parties to select the law of a specific jurisdiction only if the transaction bears a "reasonable relationship" to the jurisdiction.[8] This requirement limits parties' choice to only a handful of states, such as the state where the parties are headquartered or reside, or where performance takes place. In contrast, revised Section 1-103 makes a distinction between consumer and non-consumer parties. For the latter, it drops the "reasonable relationship" requirement and affords parties greater autonomy by allowing them to choose the law of *any* jurisdiction to govern their transaction.[9] For transactions involving consumers, revised Section 1-103 maintains the "reasonable relationship" requirement and compounds it with a restriction that the chosen regime cannot deprive consumers of mandatory consumer protections afforded by the consumer's state of residence.

In the past few years since the revised Article 1 was approved by ALI and NCCUSL, 21 states adopted the majority of its provisions. However, each retained the constrained approach of Section 1-105 instead of adopting Section 1-103. To this date, only the U.S. Virgin Islands has

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[6] William J. Jr., Woodward, Finding the Contract in Contracts for Law, Forum, and Arbitration, 2 Hast. Bus. L. J. 1 (2006).

[7] For a detailed account of these issues in the credit card market, see Oren Bar-Gill, Seduction by Plastic, 98 Nw. U. L. Rev. 1373 (2004). See also Robert Hillman and Jeff Rachlinski, Standard Form Contracts in the Electronic Age, 77 N.Y.U. L. Rev. 429 (2002) (providing an overview of the behavioral biases that might lead buyers to underestimate the implications of contractual limitations).

[8] UCC §1-105; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188(2) (1971).

[9] A narrow restriction is that the law chosen should not violate a fundamental of the jurisdiction whose law would otherwise apply. UCC §1-103.

adopted Revised Article 1 in full.[10] As legislatures continue to consider different versions of revised Article 1, it is clear that the issue of dispute resolution clauses is deemed one of the major topics of importance.

The approach of Section 1-103 of Revised Article 1 was partly driven by earlier efforts to increase choice of law flexibility in transactions involving computer information, such as software, where the physical location of the transaction is irrelevant.[11] Rejected by every state except for Maryland and Virginia, UCITA has very permissive choice of law and forum sections and allows parties to select *any* law contractually regardless of their relationship to the enacting states.[12] Aside from its permissive choice of law and forum rules, UCITA has been widely criticized as weakening consumer protections and favoring software publishers. Commentators are particularly concerned by Maryland and Virginia's adoption of UCITA, noting that UCITA's liberal choice of law and forum rules "create new forum shopping opportunities". Most important, despite most states' rejection of UCITA, this statute can still become a standard if enacting states attract enough sellers to their jurisdiction.

In spite of the charged academic debates and the regulatory flux of electronic commerce, there is little evidence on how sellers actually use DRCs in their standard form contracts, and in particular whether there is any evidence of systematic abuse. Many of the claims in the debate are based on anecdotal impressions of commentators or exposure to a few extreme cases that were litigated. None of these varied claims have been substantiated by a more systematic examination of a broad sample of contracts.[13]

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[10] V.I. CODE ANN. tit. 11A, § 1-301 (2003).

[11] VA. CODE ANN. §§ 59.1-501.1 to 59.1-509.2 (2001 & Supp. 2005); MD. CODE ANN., COM. LAW §§ 22-101 to 22-816 (LexisNexis Supp. 2003). This proposed law provides rules governing fair use, reverse engineering consumer protection, and the enforceability of shrink-wrap licenses.

[12] UCITA 109 (2000).

[13] An exception is a recent study by Geoffrey Miller and Theodore Eisenberg of the use of choice of law and forum clauses by large corporate parties in merger agreements. Theodore Eisenberg & Geoffrey P. Miller, Ex

This paper addresses the DRC debate in the context of End User Software License Agreements (EULAs)—the standard form contracts used in software transactions online. I analyze a sample of 597 software EULAs. For each EULA, I record detailed information regarding the DRC provisions, such as whether the seller includes choice of law, choice of forum, and/or arbitration clauses, and note the chosen state whose laws or fora were selected to govern the dispute. I explore who uses what type of DRC and whether there is any indication that they are used in a way that abuses consumers' rights.

My main descriptive findings are as follows. 75% of EULAs contain a choice of law clause in their standard form contracts. Forum selection is much rarer than choice of law, with only 28% of EULAs containing such a clause, hence providing little support for the hypothesis that their widespread use is depriving buyers of their day in court. The use of arbitration is even rarer, with only 6% of EULAs containing such a clause. Moreover, not a single EULA includes a class action waiver. While such low numbers might be surprising to commentators on both sides of the debate, these data should be reassuring to those who have expressed fears that a widespread use of forum selection and arbitration clauses are effectively eliminating buyers' options to seek redress *ex post.* And sellers are equally likely to include DRCs in EULAs for consumer-oriented products as in those of products that are directed to larger business. This result questions the reasoning behind Section 1-103's differential treatment of business- and consumer-oriented transactions.

I also look for any hints that sellers are using DRCs "strategically." I find that sellers located in more seller-friendly states, such as the UCITA states of Maryland and Virginia, are actually *less* likely to have choice of law clauses than sellers located in more consumer-receptive

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Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements, NYU Law and Economics Research Paper No. 06-31 (August 2006).

jurisdictions, such as California and Massachusetts. 86% of the contracts that contain a choice of law clause stipulate the laws of the state where the seller is headquartered. In addition, despite UCITA's liberal choice of law and forum rules and relatively seller-friendly rules, we do not see a stampede of sellers locating in UCITA jurisdictions.

There is also no evidence in my sample that the modest fraction of sellers that uses choice of forum clauses goes out of its way to select a forum that may be inconvenient for buyers. Choice of forum clauses always stipulate the same state as choice of law clauses, which in turn is typically the headquarters state. Of course, sellers could be selecting a local forum to obtain beneficial treatment from courts, but since the median firm with a choice of forum clause has only 35 employees, firms here are not large enough to have real political clout. The more likely explanation is that firms simply select the most convenient forum, which is the local forum.

Finally, among the small fraction of EULAs that contain arbitration clauses, about 30% (and 50% of those that pertain to consumer-oriented products) stipulate California law and venue. This is inconsistent with the suggestion that sellers are trying to select pro-seller laws to govern their substantive claims, as California affords many protections to consumers in arbitration. Also, the vast majority of arbitration clauses select the American Arbitration Association to govern the dispute, a widely recognized neutral organization with supplemental procedures for disputes involving consumers. The distribution across arbitration organizations is similar for business-oriented products

The remainder of this chapter describes the data and the statistical tests with more detail.

II. THE SAMPLE

I use a large subsample of the EULAs which I put together in a previous study.[14] That study looked at 647 EULAs from 598 distinct companies. Typically, the EULA of one representative product is studied for each company, but for 49 companies, I gather EULAs for both the "business" and "consumer" versions of the same product. All software products for which EULAs were gathered in that sample are sold online through a corporate website to U.S. buyers.

In this paper, I narrow the sample down to companies for which I was able to document that the company was incorporated in the U.S. or else had a major U.S. subsidiary. This led to a sample of 597 EULAs from 552 companies. For each EULA, I record whether it includes a choice of law clause and, if so, the state whose law is chosen. I follow the same process for choice of forum clauses. Finally, I record whether the EULA contains an arbitration clause, the arbitration forum, and the name of the organization that will arbitrate the dispute.[15] As a company's choice of a particular law or venue may be closely related to its location or state of incorporation, especially if the choice is not "strategic," I note the state of incorporation as well as the state of headquarters.[16] To determine whether sellers impose more stringent DRCs on unsophisticated buyers, I note whether the product seems directed to the general public or to business users.[17]

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[14] Florencia Marotta-Wurgler, *Competition and Quality of Standard Form Contracts: An Empirical Analysis of Software License Agreements*, NYU Law and Economics Paper; Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse For Buyers? Evidence From Software License Agreements*, NYU Law and Economics Paper. As the sample in this paper overlaps heavily with that used in previous papers, I refer the reader to those papers for further details on the data collection procedure.

[15] Although the inclusion of class action waivers in credit card form contracts has attracted a lot of attention from legal academics, I find no evidence of their use in software license contracts. For this reason, I don't record whether the EULA has a class action waiver. The same is true for clauses requiring that the parties meet with a mediator before going to court. I found only one EULA that required mediation.

[16] Some companies have offices in several states, but for practical purposes I only record the location of their headquarters.

[17] For example, a scrapbooking software product is would be categorized as a "consumer" product, and a client management product would be categorized as a "business" product.

I also collect several other market, product, and company characteristics for use as control variables. The summary statistics are similar to those reported in my previous studies, so I only mention them briefly. Average revenue is $537 million but median revenue is only $2.4 million, indicating that the average is driven by very large companies such as Microsoft and Adobe. Ninety-two percent of the companies in the sample are corporations, 5% are limited liability companies, and the remaining companies are sole proprietorships or partnerships. Publicly-traded companies make up 16% of the sample. A little under half of the products in the sample, 43%, are oriented towards consumers (or small home businesses) rather than businesses. The average price of consumer-oriented products is $137 and the median price is $65, while the average price of business-oriented products is $1,297 and the median price is $499.

III. THE PRESENCE OF DRCs IN SOFTWARE EULAS

A. How Pervasive are Choice of Law, Forum, and Arbitration Clauses?

Some of the most novel findings of the paper are simple descriptive statistics. The right column in Table 1 shows that a majority, or 75% of the EULAs in the sample, include choice of law clauses. In contrast, only 28% of EULAs includes forum selection clauses. And only 6% of the EULAs include arbitration clauses. Are these results surprising? We expect internet sellers to include choice of law clauses to minimize the costs of having to comply with the laws and regulations of multiple jurisdictions. Given that such clauses are generally enforceable, it is harder to understand why 25% of sellers in the sample choose to remain exposed to the risk of having to comply with inconsistent laws. This is especially puzzling, considering that sellers (not matter how small) can easily copy the dispute resolution provisions from more sophisticated EULAs, thus reducing the drafting costs of these clauses to a very low level. Even if the chances

of being sued are small, one significant lawsuit could wipe out a small seller. A possible explanation is that choice of law clauses can hurt vendors because they increase the probability that class actions will be certified. That is, a choice of law clause will eliminate the argument that the case lacks commonality because the laws of many states will have to be applied to adjudicate the rights of class members.[18]

The results above may be influenced by the presence of many small companies in the sample with relatively simpler licenses. Since larger companies tend to sell more software, the left column in Table 1 shows the revenue weighted average for of presence of DRCs to provide a sense of the type of EULA that a given buyer is actually likely to encounter in the market. Under this measure, the proportion of EULAs with choice of law clauses increases to 91%, the proportion with forum selection clauses rise moderately to 42%, and the proportion with arbitration clauses shrinks dramatically to 1%. The presence of choice of law clauses now seems more consistent with expectations.

Even under this revised measure, the question remains why forum selection and arbitration clauses are so rare, given that otherwise sellers who mass-market their products over the Internet are exposed to the risk of getting sued virtually anywhere a plaintiff resides. It is also surprising that sellers include choice of law clauses but fail to include choice of forum clauses. These results are not inconsistent with those of Eisenberg and Miller who, in a recent study of choice of law and forum selection clauses in 412 intensely negotiated merger and acquisition contracts by sophisticated commercial parties, find that only 53% contain forum selection clauses.[19] Sparse use of these clauses is common among large and small parties alike. Perhaps sellers involved in mass-market transactions do not include choice of forum or arbitration in their

[18] I thank Geoff Miller for this point.

[19] See Eisenberg & Miller, supra note 13.

contracts because they perceive their enforcement to be uncertain. Absent unconscionability, however, forum selection and arbitration clauses have generally been enforced (including those contained in shrinkwrap and clickwrap software license agreements).[20]

The sparse use of arbitration seems particularly surprising if this form of adjudication is indeed faster, cheaper, and more predictable than traditional adjudication. Alternatively, this might reflect the nature of software disputes, in which it is common for one party to seek injunctive relief. Parties seeking equitable remedies, as is common in disputes involving issues of intellectual property or confidentiality, might prefer that a court rather than an arbitrator be the one to grant such remedies.

Not a single EULA out of 597 includes a class action waiver. Again, sellers might not use class action waivers because of concerns about their enforceability, or because of the bad publicity such waivers might generate. While much analysis remains to be done, these results immediately cast doubt on casual claims that sellers' rampant use of choice of forum and arbitration clauses deprive buyers of their day in court, or that sellers are shielding themselves from liability by making it impossible for buyers to aggregate low-value claims.

B. Relationships Among DRCs and Market, Product, Buyer, and Seller Characteristics

This section explores the results above in further detail. Table 2 breaks down the sample into twelve main software sectors as classified by Amazon.com, for example "Business and Office" includes products used for check printing, marketing, word processing, and office management. The table breaks these categories further into consumer and business-oriented

[20] In most states, forum selection clauses are *per se* enforceable absent unconscionability. The same is true for forum selection clauses in software license agreements and online contracts. See, e.g., Cairo, Inc. v. Crossmedia Serv., Inc., 2005 WL 756610 (N.D. Cal. Apr. 1, 2005) (upholding forum selection clause in license agreement. However, the states of Idaho, North Carolina, and Montana, have enacted statutes prohibiting the enforcement of forum selection clauses in consumer transactions. In addition, Georgia courts have refused to enforce forum selection clauses in consumer contracts. See, e.g., Fidelity & Deposit Co. v. Gainesville Iron Works, Inc., 125 Ga. App. 829 (Ga. Ct. App. 1972).

products. Within each group, the table notes the number of EULAs that include choice of law, forum, or arbitration clauses.

For example, the sample includes 185 EULAs from products in the "Business and Office" sector. Of these, 137 (74%) include choice of law clauses, 52 (28%) include forum selection clauses, and 7 (4%) include arbitration clauses. 63 of the EULAs in this category are for consumer-oriented products, of which 46 (73%) include choice of law clauses, 19 (30%) include forum selection clauses, and 3 (5%) include arbitration clauses. The remaining 122 EULAs are for business-oriented products, 91 (75%) of which include choice of law clauses, 33 (27%) include choice of forum clauses, and 4 (3%) include arbitration clauses.

The propensity to use different types of DRCs is similar across sectors—in each sector, EULAs are more likely to include choice of law than choice of forum or arbitration clauses. Slight differences arise, however, as evidenced by the F-tests, which reject the equality of incidence of choice of law and arbitration clauses across sectors. Products in the "Home and Hobbies" and "Education" sectors tend to have less DRCs than sectors such as "Business and Office." Surprisingly, in product categories that are generally directed to buyers are that are less likely to be repeat players or careful shoppers, the incidence of DRCs is not higher. Another point worth noting is the heterogeneity within sectors. If other product characteristics are held constant, this heterogeneity suggests that it would be possible for concerned buyers to comparison shop for their preferred DRCs.

Again in contrast to the consumer abuse hypothesis, Table 2 shows that the incidence of DRCs is similar for consumer- and business- oriented products. EULAs of business-oriented products are more likely to include choice of law clauses, and less likely to include forum selection clauses, but the differences are very small and not statistically significant (unreported).

Since 45 companies in my sample sell both business and consumer versions of the same product, I can also test whether sellers offer more restrictive contracts to unsophisticated consumer than to savvy business buyers and also control for company and product characteristics. I find that sellers use virtually the same clauses for both business and consumer versions (unreported). Thus, even sellers who could in principle easily discriminate among buyer types do not, in fact, offer more onerous DRCs to less sophisticated consumers. These results are consistent with what I found in previous studies, that EULAs of consumer products did not have more restrictive terms (in dimensions other than dispute resolution) than those of business products, and that sellers of consumer software were equally likely to use "pay now, terms later" contracts with both types of buyers.[21]

Table 3 develops this analysis by studying the company, product, and market characteristics that are associated with a particular dispute resolution clause. In models (1) through (4), the dependent variable is *Choice of Law Specified*, a dummy variable that takes the value of 1 the EULA includes a choice of law clause and 0 otherwise.[22] Product price is the only product characteristic that increases the chance that the EULA will include a choice of law clause, with a 100% increase in price increasing the probability of a choice of law clause by 4% to 5%. This is result is robust to the inclusion to state, market, and sector fixed effects. While I am agnostic about causality, lacking an instrument for product price, this positive association is not, at face value, consistent with the theoretical prediction that sellers must offer lower prices in order to accept terms favorable to sellers. Instead, perhaps an explanation is that buyers of more expensive products are more likely to sue in the event of a dispute, and thus sellers of more

[21] *Supra* note 14.

[22] As an alternative to simple "linear probability" models, I have also estimated logit models, with virtually identical results in terms of statistical significance and implied economic significance. I report the linear probability models because they are simpler to interpret.

expensive products (who face more lawsuits) are more likely to reduce their higher expected legal costs by subjecting their transactions to a unique law. Another possible explanation for this result might have to do with the fact that an overwhelming number (40%) of choice of law clauses select the laws of California or Massachusetts, two states known for their pro-consumer laws.[23] Choice of law clauses are priced, perhaps, to reflect the benefit they accord *consumers*. More realistically, though, choice of law clauses are not first-order determinants of product price, and it is hard to imagine that most buyers factor EULAs' inclusion of a choice of law clause in their purchase decision. [24]

As to company characteristics that are associated with a choice of law clause, the results show that larger companies and, controlling for size, younger companies are more likely to include these clauses. The size relationship may have to do with the fact that larger companies are more likely to obtain legal advice from counsel who may take more precautions to limit exposure legal exposure and in particular may wish to select the law with which they are most familiar.[25] EULAs of larger companies are especially likely to be more restrictive in disclaiming liability restricting use of the license. This also suggests that smaller sellers are not simply copying the EULAs of larger companies. The age relationship is somewhat curious, but quite strong. Perhaps older companies may have more established relationships with or better reputations among their customers and thus be less likely to get involved in formal legal disputes. Or, a less elaborate explanation is that many younger software companies were set up exclusively with a plan to market software online across state boundaries; for many older

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[23] See Section IV, infra.

[24] A choice of law clause, if priced, would probably have an effect of price of a few cents of the dollar for most products. See James J. White, Contracting Under Amended 2-207, 2004 Wis. L. Rev. 723, 742 (stating that "[f]or a nickel or a dime, almost all of us would […] agree to arbitrate").

[25] This finding is consistent with my earlier finding that the EULAs of larger companies tend to have more restrictive contacts than those of smaller companies. See Marotta-Wurgler, *supra* note 14.

companies in the sample, on the other hand, selling software online represents an expansion of product lines, and their legal departments may not have kept up.

In models (5) through (8), I examine the factors that affect the likelihood that a EULA will include a forum selection clause. The dependent variable is *Choice of Forum Specified*, a dummy variable indicating the existence of a forum selection clause. In models (9) through (12) the dependent variable is *Arbitration Clause Specified*, another dummy variable. The results are generally similar to those for choice of law clauses. Larger companies are significantly more likely to include these DRCs, as are younger companies. On the other hand, product price plays no role for either of these clauses, in contrast to the results for choice of law clauses. Interestingly, public companies are, all else equal, more likely to include choice of forum clauses. "Developer" licenses are somewhat more likely to include arbitration clauses.

These results—that buyer type is not related to the frequency of DRCs—contrast with anecdotal claims that sellers are more likely to impose restrictive DRCs (such as mandatory arbitration) to the general public or less sophisticated buyers. Still, despite this evidence, one might still be concerned that consumers are being discriminated against in another way, that they are not getting price reductions in exchange for accepting restrictions, while business are. However, as discussed above, note that DRCs are not compensated for with lower prices on average across buyer types; indeed, the only significant relationship between price and the presence of DRCs (involving choice of law provisions) is *positive*, not negative. Nonetheless, I have tested for the possibility that the tradeoff between DRCs and price is more favorable for business buyers, i.e. more negative for them and more positive for consumer buyers. I create an interaction variable of the log of price and the consumer buyer dummy, include it alongside the previous variables, and examine its coefficient. Unreported results show no significant

coefficients of either sign. Thus there is no empirical evidence of a different tradeoff between DRCs and price for business and consumer buyers.

IV. LOOKING FOR EVIDENCE OF STRATEGIC USE OF DRCs

A. Are Choices of Law More Likely in Seller-Friendly States?

The last column of each panel of Table 3 shows that the location of the headquarters of the company is not a primary determinant of the presence of a DRC, as the state fixed effects are at best marginally significant. Nonetheless, it may be the case that sellers are discernibly more likely to select DRCs in seller-friendly states such as Delaware, Maryland, New York, and Virginia, and less likely to select them in more consumer-friendly states such as California, Illinois (at the state level), Iowa, Massachusetts, and North Carolina.[26] (Assume for the moment that when sellers select a particular law, they select the law of their headquarters state. We will relax this below.)

To investigate this possibility in detail, Table 4 breaks the sample down by headquarters state and reports the incidence of DRCs by state. As reported previously, 75% of EULAs contain a choice of law clause, and hence of the states with at least one EULA in the sample, 75% of those EULAS contain a choice of law clause. Now examine the incidence of choice of law clauses in seller-friendly states. The percentage of EULAs with such clauses in Delaware, Maryland, New York, and Virginia is 100, 61.5, 60.8, and 80, respectively. Two states are above average and two states below. The observation-weighted average percentage of EULAs in these states that contain choice of law clauses (i.e., downweighting Delaware relative to the other states because it only pertains to two EULAs) is 65.4.

[26] I am grateful to Jean Braucher and Bill Woodward for providing this taxonomy. This taxonomy is also consistent with the Harris Poll Ranking of states' liability systems.

Compare this to the incidence of choice of law provisions in the more consumer-friendly states of California, Illinois, Iowa, Massachusetts, and North Carolina. There, the percentages of EULAs including choice of law clauses are 78.7, 88.8, 66.7, 80.8, and 70.6, respectively. Thus, three out of five states' companies have an above-average proportion of choice of law clauses. The observation-weighted average percentage is 73.2. Thus, sellers located in more seller-friendly states are actually *less* likely to have choice of law clauses than sellers located in less consumer-receptive jurisdictions.

B. Do Sellers Actively Establish Relationships in Seller-Friendly States?

A key assumption in the above analysis is that when a corporation selects a choice of law, it selects the law of its own state. Of course, the easiest way for sellers to establish the UCC's Section 1-105 "reasonable relationship" requirement under the current approach is to establish their business in the state whose laws they wish their transactions be governed by. Alternatively, sellers can satisfy this requirement just by incorporating in a given state.[27] Table 5 examines this possibility by looking at the relationship between seller location and choice of law for the subsample of EULAs with a choice of law clause. The most salient feature of the table is the strong concentration of firms along the diagonal, indicating that most EULAs in this subsample (86%) do indeed select the laws of the states where the seller is located, consistent with the premise of the previous subsection.

One way for sellers to behave strategically is to locate in states with seller friendly laws, such as Delaware, Maryland, New York, and Virginia, as described above. This behavior has been observed, for example, in credit card companies that generally choose to locate in Delaware

[27] When incorporation alone is the sole relationship to the selected law, there has been disagreement among courts on whether that state is "reasonably related" to the transaction. Thus, enforcement will depend on the forum that hears the dispute. For cases where incorporation alone suffices to establish a relationship, see, e.g., CIENA Corp. v. Jarrard, 203 F.3d 312, 324 (4th Cir. 2000) and Valley Juice Ltd. v. Evian Waters of France, Inc., 87 F.3d 604, 608 (2d Cir. 1996). See also Restatement (Second) of Conflicts of Laws §187.

or South Dakota to take advantage of their favorable laws. Do software publishers tend to locate in seller-friendly states? Table 5 shows that 275 (or 61%) of EULAs with choice of law clauses are from sellers located in California, Illinois, Iowa, Massachusetts, and North Carolina. In contrast, only 50 (or 11%) of EULAs are from sellers in the relatively seller-friendly states of Delaware, Maryland, New York, and Virginia. Although state size has a great influence on these numbers (California is the largest state in the U.S. and thus, will have more businesses located in it), I control for state size in an unreported regression to test whether sellers are more or less likely to locate in seller-friendly states. I find that, controlling for size, software sellers are still *more* likely to locate in California and Massachusetts (and Washington). There is no such evidence for seller location in seller-friendly states.

Perhaps it is the deviations from the diagonal that contain some support for strategic use of choice of law. However, there is no obvious deviation toward the "seller-friendly" states and away from the "buyer-friendly" ones examined in the previous subsection. In particular, given that UCITA is particularly seller-friendly for software publishers, it is interesting to focus just on Maryland and Virginia. However, of the 62 EULAs that do not select the laws of the sellers' home state, only one selects Virginia, and none selects Maryland. A useful perspective on these results involves a comparison between firm location and state of incorporation. As has been widely documented (and as I have confirmed in this sample), sellers that do not incorporate in their home state are most likely to incorporate in Delaware. That is, for corporate law purposes, many firms appear to make careful decisions and perhaps incur costs to choose the state of incorporation. In contrast, there is no evidence here to suggest that they go similarly out of their way to establish out-of-state relationships for consumer law purposes.[28]

[28] Eisenberg & Miller, supra, note 13, also find that companies are more likely to select Delaware for incorporation than they are likely to select Delaware law in their choices of law and forum. The remaining off-

C. Choice of Forum

Finding little evidence of strategic use of choice of law clauses, we turn to choice of forum clauses. Recall that forum selection is much rarer than choice of law, with only 28% of EULAs containing such a clause, and hence the potential for systematic abuse is lower. In this subset, perhaps choice of forum could be used strategically in that sellers go out of their way to select a forum that is inconvenient for buyers. There is no evidence of this in my sample, however, as *choice of forum clauses (when they are used) are always exactly equal to choice of law*, which in turn is almost always the headquarters state. Still, choice of forum could be considered strategic to the extent that it requires out of state buyers to litigate in particular forum, which may be distant from the buyer.

One other way in which choice of forum could be used strategically is suggested by Bebchuk and Cohen. They point out that one reason for sellers to incorporate in-state is to obtain beneficial treatment by courts.[29] Unfortunately, the analogous hypothesis for choice of forum clauses is difficult to distinguish from the simpler hypothesis that sellers simply choose the forum that is most convenient. The fact that the median of the 156 firms in my sample with a choice of forum clause has only 35 employees, however, suggests that the majority of firms here are simply not large enough to have meaningful political clout.

D. Arbitration

Finally, sellers can take advantage of buyers by choosing to arbitrate claims. The main concern about arbitration is its very use, which deprives consumers of the possibility of a jury

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diagonal 14% includes a number of U.S. subsidiaries of foreign-owned firms whose EULA specifies the law of the firms' home country and firms that have been acquired in the recent past but whose EULAs still stipulate the law of the state of the original firm.

[29] Lucian Bebchuk and Alma Cohen, Firms Decisions Where to Incorporate, 46 J. of L. & Econ 383 (2003).

trial. Regardless whether arbitration is viewed as abusive or as a less costly alternative to litigation, arbitration is very rare in my sample, so it will receive only brief attention below.

For the small sample of sellers that use arbitration, one concern is that sellers will select pro-seller laws to govern the substantive claim. This is not the case in my sample, however, as sellers who select arbitration invariably select the law of the state in which they are headquartered. The same is true for arbitration location. In fact, about 50% of arbitration clauses in the EULAs of consumer-oriented products select California law and California venue. As is well known, California affords many protections to consumers in arbitration.[30]

Finally, sellers could be somewhat strategic in their choice of procedural arbitration rules, for instance, by selecting an organization that charges high fees to consumers or that have seller-friendly procedural rules. I find that 74% (25 out of 34) of the arbitration clauses in consumer-oriented EULAs select the American Arbitration Association, a widely recognized neutral organization with supplementary procedures for consumer disputes involving a standard form contract drafted by a larger business.[31] A little over 10% of consumer contracts do not stipulate an arbitration organization, and the remaining fraction selects the National Arbitration Forum or JAMS to govern the arbitration. Of these two, consumer advocates have expressed concern only about NAF's high fees. The sample is too small to test whether the distribution across organizations is similar for business-oriented products.

V. SUMMARY AND IMPLICATIONS

[30] For example, the California Arbitration Act mandates a waiver of arbitration fees for low income consumers and requires arbitration organizations to publish its consumer arbitration decisions See California Code of Civil Procedure Sections 1284.3, 1281.96.

[31] The consumer section of the AAA webpage reads: "The AAA will only administer your dispute if the arbitration clause meets certain fairness standards that are contained in the AAA's Consumer Due Process Protocol… [U]under the AAA's procedures, you may claim any amount of special damages such as attorney's fees or punitive damages, without an increase in fees." At http://www.adr.org/Consumer.

Sellers often reduce the uncertainty about which laws and regulations will apply to their transaction by including choice of law, forum, or arbitration clauses in standard form contracts. This practice has sparked heated debate among legal academics and legislators. A serious concern is that sellers take advantage of consumers' lack of bargaining power or attention to fine print by including choice of law clauses that deprive consumers of state consumer protection laws, forum selection clauses that make it too costly for consumers to pursue their claims in court, and individualized arbitration clauses that prevent class actions.

Relying on one of the first large-sample analysis of the actual use of DRCs, this analysis finds little evidence to substantiate this concern. DRCs are not used to a greater extent against consumers; they are not used strategically to inconvenience buyers or to import pro-seller contract law regimes; and they most often refer to the state where the seller is headquartered. In fact, what commentators often perceive as the most effective anti-buyer DRCs—forum selection clauses and arbitration clauses—are used very little in the context of software license agreements.

TABLE 1

DISPUTE RESOLUTION PROVISIONS: SUMMARY STATISTICS

NOTE.—Means, revenue weighted means and standard deviations for choice of law, forum, and arbitration provisions in a sample of 597 software EULAs.

	Mean	**Revenue Weighted Mean**
	(s.d.)	**(s.d.)**
Choice of Law Clause	.75	.91
	(.43)	(.29)
Choice of Forum Clause	.28	.42
	(.45)	(.49)
Arbitration Clause	.06	.01
	(.23)	(.12)

TABLE 2

PREVALENCE OF DISPUTE RESOLUTION PROVISIONS

NOTE. —Number of EULAs in the sample and number of EULAs with choice of law, choice of forum, or arbitration clauses, as described in Table 1, by sector and user type. Software sectors are based on groups of related Amazon.com product categories. Consumer products are those oriented towards the general public or small business users, while business products are those oriented toward medium- or large-size business users.

	ALL				Consumer				Business			
Sector	**N EULAs**	**N w/ Choice of Law Clause**	**N w/ Choice of Forum Clause**	**N w/ Arbit. Clause**	**N EULAs**	**N w/ Choice of Law Clause**	**N w/ Choice of Forum Clause**	**N w/ Arbit. Clause**	**N EULAs**	**N w/ Choice of Law Clause**	**N w/ Choice of Forum Clause**	**N w/ Arbit. Clause**
Business & Office	185	137	52	7	63	46	19	3	122	91	33	4
(% of total sector)		(74)	(28)	(4)		(73)	(30)	(5)		(75)	(27)	(3)
Education	68	41	12	1	42	24	9	0	26	17	3	1
(% of total sector)		(60)	(18)	(1)		(57)	(21)	(0)		(65)	(11)	(4)
Graphics	50	37	15	4	21	16	8	2	29	21	7	2
(% of total sector)		(74)	(30)	(8)		(76)	(31)	(10)		(72)	(24)	(7)
Home & Hobbies	26	15	3	1	20	11	2	1	6	4	1	0
(% of total sector)		(58)	(12)	(4)		(55)	(10)	(5)		(67)	(17)	(0)
Linux	7	4	3	2	3	2	1	2	4	2	2	0
(%of total sector)		(57)	(42)	(29)		(67)	(33)	(67)		(50)	(50)	(0)
Networking	53	43	15	4	12	10	6	1	41	33	9	3
(% of total sector)		(81)	(28)	(8)		(83)	(50)	(8)		(80)	(22)	(7)
Operating Systems	5	5	2	0	3	3	1	0	2	2	1	0
(% of total sector)		(100)	(40)	(0)		(100)	(33)	(0)		(100)	(50)	(0)
Personal Finance	39	32	14	7	6	4	2	1	33	28	12	6
(% of total sector)		(82)	(36)	(18)		(67)	(33)	(17)		(84)	(36)	(18)
Programming	7	3	1	1	6	3	1	1	1	0	0	0
(% of total sector)		(43)	(14)	(14)		(50)	(17)	(17)		(0)	(0)	(0)
Utilities	67	57	21	1	35	30	10	1	32	27	11	0
(% of total sector)		(85)	(31)	(1)		(86)	(29)	(3)		(84)	(34)	(0)
Video & Music	36	30	13	2	31	25	10	2	5	5	3	0
(% of total sector)		(83)	(36)	(5)		(81)	(31)	(6)		(100)	(60)	(0)
Web Development	54	44	18	4	17	14	8	1	37	30	10	3
(% of total sector)		(81)	(33)	(7)		(82)	(47)	(6)		(81)	(27)	(8)
All Markets	**597**	**448**	**169**	**34**	**259**	**188**	**77**	**15**	**338**	**260**	**92**	**19**
(%)		**(75)**	**(28)**	**(6)**		**(73)**	**(30)**	**(6)**		**(77)**	**(27)**	**(6)**
F-test		**2.53*** **	**1.127**	**2.42*** **		**1.55**	**1.025**	**2.63*** **		**1.177**	**1.01**	**1.37**

TABLE 3

REGRESSIONS: CHOICE OF LAW, FORUM, AND ARBITRATION AND PRODUCT AND COMPANY CHARACTERISTICS

NOTE. —Linear probability regression results. In the left panel, the dependent variable is a dummy indicating a EULA that has a choice of law clause. In the middle panel, the dependent variable is a dummy indicating a EULA that has a choice of forum clause. In the right panel of the table, the dependent variable is a dummy indicating a EULA that has an arbitration clause. Product characteristics include the natural log of the price of the product for which the EULA is collected, and dummies indicating consumer-oriented products, multi-user products, and developer products (the default is single-user license). Company characteristics include the size of the company as proxied by the natural log of revenue, the natural log of the age of the company since incorporating as of 2005, and a dummy for publicly traded companies. Fixed effects may include Amazon.com software sectors (e.g. "Business & Office), Amazon.com software markets (e.g. "Business & Office > Business Accounting > Accounting"), and state where the company whose EULA is collected is either incorporated or headquartered,. Standard errors are in parentheses, ***, **, and * indicate statistical significance at the 1%, 5%, and 10% level, respectively. Significance of F-Tests for fixed effects are indicated by asterisks.

	Dep. Var.: Choice of Law Specified				**Dep. Var.: Choice of Forum Specified**				**Dep. Var.: Arbitration Clause Specified**			
	(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**	**(7)**	**(8)**	**(9)**	**(10)**	**(11)**	**(12)**
Ln Price	.04***	.05***	.05***	.04**	-.01	-.01	.00	-.01	.00	.00	.01	.00
	(.02)	(.02)	(.02)	(.02)	(.02)	(.02)	(.02)	(.02)	(.0)	(.01)	(.01)	(.00)
Consumer	.02	.04	.04	.01	0	.01	.01	-.01	.01	.02	.03	.00
	(.05)	(.05)	(.05)	(.05)	(.05)	(.05)	(.05)	(.05)	(.02)	(.03)	(.03)	(.00)
Multi-User	-.07	-.06	-.06	-.05	-.02	-.01	.00	.00	.00	.00	.00	.00
	(.06)	(.06)	(.08)	(.07)	(.07)	(.07)	(.10)	(.07)	(.03)	(.04)	(.04)	(.03)
Developer	.01	-.04	-.01	.01	.07	.03	.05	.1	.08*	.02	.04	.08*
	(.07)	(.08)	(.10)	(.07)	(.07)	(.08)	(.10)	(.08)	(.04)	(.04)	(.05)	(.04)
Ln Revenue	.02**	.02**	.01	.02***	.03***	.03***	.02**	.03***	.01**	.01***	.01**	.01**
	(.01)	(.01)	(.01)	(.01)	(.01)	(.01)	(.01)	(.01)	(.00)	(.00)	(.01)	(.01)
Ln Age	-.13***	-.12***	-.13***	-.12***	-.18***	-.18***	-.22***	-.17***	-.07***	-.06***	-.06***	-.07***
	(.03)	(.03)	(.04)	(.0)	(.03)	(.04)	(.04)	(.04)	(.02)	(.02)	(.02)	(.03)
Public	.09	.06	.07	.09	.12*	.11*	.09	.11*	-.04	-.04	-.01	-.04
	(.06)	(.06)	(.07)	(.06)	(.06)	(.06)	(.07)	(.06)	(.03)	(.03)	(.04)	(.03)
Fixed Effects	No	Sector**	Market*	State*	No	Sector	Market**	State	No	Sector**	Market	State
N	597	597	597	597	597	597	597	597	597	597	597	597
Adj. R^2	.06	.07	.09	.07	.07	.06	.11	.06	.03	.04	.05	-.01

TABLE 4

DISPUTE RESOLUTION PROVISIONS: BY STATE

NOTE.—Number of EULAs in the sample and number of EULAs with choice of law, choice of forum, or arbitration clauses, as described in Table 1, by state where the company is headquartered and user type. Consumer products are those oriented towards the general public or small business users, while business products are those oriented toward medium- or large-size business users.

	All				Consumer				Business			
HQ State	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**
AL	1	1	1	0	1	1	1	0	0	0	0	0
		(100)	(100)	.		(100)	(100)	.		.	.	.
AK	1	0	0	0	0	0	0	0	1	0	0	0
		.	.	.		.	.	.		.	.	.
AZ	9	6	4	0	1	1	0	0	8	5	4	0
		(67)	(44)	.		(100)	.	.		(63)	(50)	.
AR	0	0	0	0	0	0	0	0	0	0	0	0
		.	.	.		.	.	.		.	.	.
CA	169	133	57	10	80	59	27	7	89	74	30	3
		(79)	(34)	(6)		(74)	(34)	(9)		(83)	(34)	(3)
CO	17	11	6	2	4	3	0	0	13	8	6	2
		(65)	(36)	(12)		(75)	.	.		(62)	(46)	(15)
CT	4	2	1	0	1	1	1	0	3	1	0	0
		(50)	(25)	.		(100)	(100)	.		(33)	.	.
DE	2	2	1	0	0	0	0	0	2	2	1	0
		(100)	(50)	.		.	.	.		(100)	(50)	.
FL	25	21	11	3	11	9	6	2	14	12	5	1
		(84)	(44)	(12)		(82)	(55)	(18)		(86)	(36)	(7)
GA	8	7	2	2	3	3	0	1	5	4	2	1
		(88)	(25)	(25)		(100)	.	(33)		(80)	(40)	(20)
HI	1	0	0	0	1	0	0	0	0	0	0	0
		.	.	.		.	.	.		.	.	.
ID	4	3	1	0	3	2	1	0	1	1	0	0
		(75)	(25)	.		(67)	(33)	.		(100)	.	.
IL	18	16	6	1	11	10	4	1	7	6	2	0
		(89.8)	(33)	(6)		(91)	(36)	(9)		(86)	(29)	.
IN	1	1	1	0	0	0	0	0	1	1	1	0
		(100)	(100)	.		.	.	.		(100)	(100)	.
IA	3	2	1	0	3	2	1	0	0	0	0	0
		(67)	(33)	.		(67)	(33)	.		.	.	.
KS	2	0	0	0	2	0	0	0	0	0	0	0
		.	.	.		.	.	.		.	.	.
KY	1	1	0	0	1	1	0	0	0	0	0	0
		(100)	.	.		(100)	.	.		.	.	.
LA	1	0	0	0	0	0	0	0	1	0	0	0
		.	.	.		.	.	.		.	.	.
ME	4	2	1	0	3	2	1	0	1	0	0	0
		(50)	(20)	.		(67)	(33)	.		.	.	.
MD	13	8	3	0	7	5	2	0	6	3	1	0
		(62)	(23)	.		(71)	(29)	.		(50)	(17)	.

DISPUTE RESOLUTION PROVISIONS: BY STATE (Continued)

	All				Consumer				Business			
HQ State	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**
MA	73	59	17	5	28	23	5	0	45	36	12	5
		(81)	(23)	(7)		(82)	(18)	.		(80)	(27)	(11)
MI	15	12	4	0	4	3	2	0	11	9	2	0
		(80)	(27)	.		(75)	(50)	.		(82)	(18)	.
MN	9	7	3	1	7	5	1	1	2	2	2	0
		(78)	(33)	(11)		(71)	(14)	(14)		(100)	(100)	.
MS	1	0	0	0	0	0	0	0	1	0	0	0
		.	.	.		.	.	.		.	.	.
MO	4	3	1	1	4	3	1	1	0	0	0	0
		(75)	(20)	(20)		(75)	(25)	(25)		.	.	.
MT	3	3	3	0	2	2	2	0	1	1	1	0
		(100)	(100)	.		(100)	(100)	.		(100)	(100)	.
NE	3	2	0	0	1	0	0	0	2	2	0	0
		(67)	.	.		.	.	.		(100)	.	.
NV	5	4	2	0	2	2	1	0	3	2	0	0
		(80)	(40)	.		(100)	(50)	.		(67)	.	.
NH	9	9	4	1	4	4	2	0	5	5	2	1
		(100)	(44)	(11)		(100)	(50)	.		(100)	(40)	(20)
NJ	12	8	2	0	6	2	0	0	6	6	2	0
		(67)	(17)	.		(30)	.	.		(100)	(33)	.
NM	3	2	1	0	3	2	1	0	0	0	0	0
		(67)	(33)	.		(67)	(33)	.		.	.	.
NY	23	14	8	0	13	9	5	0	10	5	3	0
		(61)	(35)	.		(70)	(39)	.		(50)	(30)	.
NC	17	12	4	1	6	3	1	0	11	9	3	1
		(71)	(24)	(6)		(50)	(17)	.		(82)	(27)	(9)
ND	1	0	0	0	0	0	0	0	1	0	0	0
		.	.	.		.	.	.		.	.	.
OH	10	9	0	1	3	3	0	1	7	6	0	0
		(90)	.	(10)		(100)	.	(33)		(86)	.	.
OK	2	1	0	0	1	0	0	0	1	1	0	0
		(50)	.	.		.	.	.		(100)	.	.
OR	19	13	5	2	7	5	4	0	12	8	1	2
		(68)	(26)	(11)		(71)	(57)	.		(67)	(8)	(17)
PA	12	7	2	0	3	1	0	0	9	6	2	0
		(58)	(17)	.		(33)	.	.		(67)	(22)	.
RI	3	3	2	0	1	1	0	0	2	2	2	0
		(100)	(67)	.		(100)	.	.		(100)	(100)	.
SC	0	0	0	0	0	0	0	0	0	0	0	0
		.	.	.		.	.	.		.	.	.
SD	0	0	0	0	0	0	0	0	0	0	0	0
		.	.	.		.	.	.		.	.	.
TN	3	0	0	0	2	0	0	0	1	0	0	0
		.	.	.		.	.	.		.	.	.
TX	25	18	2	1	6	4	0	0	19	14	2	1
		(72)	(8)	(4)		(67)	.	.		(74)	(11)	(5)

DISPUTE RESOLUTION PROVISIONS: BY STATE (Continued)

	All				Consumer				Business			
HQ State	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**	**N EULA**	**N w/ Ch. of Law Clause (%)**	**N w/ Ch. of Forum Clause (%)**	**N w/ Arbit. Clause (%)**
UT	11	7	1	1	7	3	1	0	5	4	0	1
		(64)	(9)	(9)		(43)	(14)	.		(80)	.	(20)
VT	1	0	0	0	1	0	0	0	0	0	0	0
		.	.	.		.	.	.		.	.	.
VA	15	12	3	1	5	4	1	1	10	8	1	0
		(80)	(20)	(7)		(80)	(20)	(20)		(80)	(10)	.
WV	0	0	0	0	0	0	0	0	0	0	0	0
		.	.	.		.	.	.		.	.	.
WA	28	23	8	1	12	10	5	0	16	13	3	1
		(82)	(29)	(4)		(83)	(42)	.		(81)	(19)	(6)
WI	4	3	1	0	0	0	0	0	4	3	1	0
		(75)	(2)	.		.	.	.		(75)	(25)	.
WY	1	0	0	0	0	0	0	0	1	0	0	0
		.	.	.	.	.	.	.	.	.	.	.
Oth.	1	1	0	0	0	0	0	0	1	1	0	0
		(100)	.	.	.	.	.	.		(100)	.	.
All EULA	**597**	**448**	**169**	**34**	**259**	**188**	**77**	**15**	**338**	**260**	**92**	**19**
(%)		**(75)**	**(28)**	**(6)**		**(73)**	**(30)**	**(6)**		**(77)**	**(27)**	**(6)**
Avg. State	**13**	**10**	**4**	**.7**	**6**	**4**	**2**	**.3**	**7**	**6**	**2**	**.4**

TABLE 5
LOCATION AND CHOICE OF LAW

NOTE.—The left column lists the states where the companies whose EULAs are collected are headquartered. The top row lists the states (and the District of Columbia) whose law is selected in a EULA's choice of law clause. The category "Oth." refers to the law of a country other than the United States or headquarter location outside the United States.

Choice of Law

HQ State	St.	AL	AZ	CA	CO	CT	DE	DC	FL	GA	ID	IL	IN	IA	KY	ME	MD	MA	MI	MN	MO	MT	NE	NV	NH	NJ	NM	NY	NC	OH	OK	OR	PA	RI	TX	UT	VA	WA	WI	Oth.	All
	AL	1																																							1
	AZ		4																													1				1					6
	CA			115			1			1								3															2			1	1	1		8	133
	CO				9																																			2	11
	CT					2																																			2
	DE						2																																		2
	DC																																								0
	FL			2					17																															2	21
	GA									6																														1	7
	ID										3																														3
	IL											14								1	1																				16
	IN												1																												1
	IA													2																											2
	KY												1																												1
	ME															2																									2
	MD						1										7																								8
	MA			3	1		1											52																		1				1	59
	MI											1							10																					1	12
	MN																			6										1											7
	MO																				3																				3
	MT				2																	1																			3
	NE																						2																		2
	NV																	1						2																1	4
	NH									1						1		1							5															1	9
	NJ																									8															8
	NM																										2														2
	NY																											14													14
	NC																												12												12
	OH							1																						8											9
	OK																														1										1
	OR																															11						1		1	13
	PA						1																										6								7
	RI																																	3							3
	TX			1	1																														14						18
	UT																								1											6					7
	VA			1																																	9			2	12
	WA						1											1																				21			23
	WI			1																																			2		3
	Oth.								1																																1
	All	1	4	123	13	2	7	1	18	8	3	15	2	2	0	3	7	58	10	7	4	1	2	2	6	8	2	14	12	9	1	12	8	3	14	9	10	23	2	20	448