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Building Bridges to Consumer Remedies in International eConflicts

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BUILDING BRIDGES TO REMEDIES FOR CONSUMERS IN INTERNATIONAL eCONFLICTS

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Consumer purchases over the Internet ("ePurchases") are on the rise, thereby causing an increase in conflicts regarding these purchases ("eConflicts"). Furthermore, these conflicts are increasingly international as consumers purchase goods over the Internet not knowing or caring where the seller is physically located. The problem is that if the purchase goes awry, consumers are often left without recourse due to the futility of pursing international litigation and the textured law and policy regarding enforcement of private dispute resolution procedures, namely arbitration.

The United States has been exceptional in its robust enforcement of arbitration contracts in business-to-consumer ("B2C") relationships, while other countries have refused or limited enforcement of arbitration in these relationships. Furthermore, some businesses have used their power to impose onerous arbitration regimes in their international B2C online contracts ("eContracts"). Consumers subject to these contracts have been left confused whether they must abide by these regimes, and, even more uncertain, where to turn in seeking remedies on their eContract claims. This essay addresses the lack of consumer remedy mechanisms, and seeks to spark consideration of expanded use of online processes for resolving B2C eConflicts.

I. INTRODUCTION

The Internet has created a boundaryless marketplace for companies and consumers. This has allowed consumers to purchase goods over the Internet from sellers who may be located in other countries. Consumers often benefit from the expanded selection, options, and competitive pricing that this global marketplace provides. However, consumers lose out when an ePurchase goes awry, especially when they have no access to reliable and low-cost mechanisms for seeking remedies with respect to their purchases. Litigation is already impractical for most consumers with respect to domestic purchases, and it is especially problematic or impossible for international consumer claims.

At the same time, companies often include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may

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pass on to consumers through lower prices. Furthermore, arbitration can be especially beneficial in cross-border cases because international arbitration awards may be more enforceable than court judgments. This has led to near universal enforcement of arbitration agreements and awards in business-to-business ("B2B") cases.

The United States has joined with 145 other countries to enforce arbitration in international relationships under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[1] This treaty generally mandates strict enforcement of arbitration agreements and awards in accordance with parties' written agreements.[2] The U.S. Congress implemented this Convention through Chapter Two of the Federal Arbitration Act (FAA), and courts have applied this law with a pro-enforcement glaze to promote arbitration and international comity.[3]

Courts in the United States similarly enforce domestic arbitration under Chapter One of the FAA,[4] and its state counterpart, the Uniform Arbitration Act (UAA).[5] These arbitration laws augment arbitration enforcement with provisions for liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators if parties cannot do so by agreement, limited review of arbitration awards, and treatment of awards as final judgments.[6] The Supreme Court of the United States has read these laws to narrowly restrict courts' review of arbitration awards and refrain from using state law to single out arbitration for special treatment or otherwise hinder enforcement of arbitration in contracts affecting interstate commerce.[7] This

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1. United Nations Conference on International Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, arts.1–16, UNCITRAL, (Jul. 6, 1988), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf [hereinafter NY Convention].

2. *Id.*; ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 68–69 (3d ed. 1999).

3. *See* Federal Arbitration Act, 9 U.S.C. §§ 201–208 (2012) (implementing the New York Convention); *id.* §§ 301–307 (implementing the Panama Convention); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States,* 54 AM. J. COMP. L. 233, 233 (2006) (noting how the United States' strict enforcement of arbitration has made it a popular venue for international arbitration proceedings).

4. 9 U.S.C. §§ 1–16.

5. REV. UNIF. ARBITRATION ACT § 1 (2000). The UAA is model legislation that nearly all states have adopted to require the same basic enforcement for local arbitration agreements and awards beyond the purview of the FAA.

6. *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124–35 (2002), *available at* http://ssrn.com/abstract=943528 (discussing the FAA's pro-efficiency remedial provisions).

7. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (emphasizing that an arbitrator's decision will be set aside "only in very unusual circumstances"); IDS Life Ins. Co. v. Royal Alliance Assocs., Inc., 266 F.3d 645, 649 (7th Cir. 2001) (refusing to vacate an

leaves states with little power to regulate arbitration provisions beyond application of general contract defenses.[8]

This enforcement regime has not been internationally divisive in B2B cases. However, the United States has been exceptional in its extension of this regime to employment and B2C transactions. Despite noted benefits of arbitration in B2B contexts, there have been widespread criticisms of arbitration in B2C and employment disputes. Many nations have therefore shunned enforcement of pre-dispute arbitration agreements in these cases based on public policy and arbitral competence concerns.[9] For example, France, Germany, and the United Kingdom generally cite importance of protecting public rights in refusing to enforce pre-dispute arbitration agreements in employment contracts with respect to employees' wrongful dismissal claims.[10]

Arbitration can be problematic in uneven bargaining contexts. Policymakers worry that private arbitrators will not properly and reliably apply the law, and that companies will hide their transgressions under the cloak of privacy in arbitration. They also criticize arbitration as allowing companies to take advantage of asymetric power in their contracts with individuals.[11] This is why public policies in many countries protect employees' rights to bring their dismissal claims to public tribunals or courts.[12] The same concerns have led the United Kingdom and Europe to limit or preclude enforcement of pre-dispute arbitration clauses in B2C cases.[13]

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award despite a record "suggest[ing] that the arbitrators lacked the professional competence required to resolve the parties disputes").

8. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (finding the FAA limits challenges to arbitration agreements to general contract defenses, and therefore preempted state notice requirements that singled out arbitration clauses for special treatment); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 266 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration); Southland Corp. v. Keating, 465 U.S. 1, 14–15 (1984) (holding that the FAA applies in federal and state court).

9. *See* PABLO CORTES, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION 107–11 (2010) (noting how the United States and the EU have diverged in their enforcement of arbitration in consumer contexts and citing EU Directives and Regulations voiding pre-dispute arbitration clauses in these cases for policy reasons); Matthew W. Finkin, *Privatization of Wrongful Dismissal Protection in Comparative Perspective*, 37 INDUS. L. J. 149, 153–63 (2008) (highlighting comparative enforcement of arbitration in employment contexts and American exceptionalism in its allowance for arbitration of dismissal claims), *available at* http://ilj.oxfordjournals.org/content/37/2/149.full.pdf.

10. Finkin, *supra* note 9, at 149–65.

11. *See, e.g.*, *id.* at 155–56, 159–60 (discussing policies for precluding private arbitration of employment claims).

12. *Id.* at 149–65. *See also* Clyde & Co. L.L.P. v. Van Winkelhof, [2011] EWHC (QB) 668, [2011] C.P. Rep. 31(refusing enforcement of an arbitration agreement in an employment relationship).

13. *See* CORTES, *supra* note 9, at 106–12; Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that*

Concerns about arbitral fairness have also led arbitration providers in the United States to suggest due process protocols for consumer and employment arbitration.[14] For example, the American Arbitration Association (AAA) created a National Consumer Disputes Advisory Committee ("Advisory Committee") in the late 1990s, resulting in promulgation of the 1998 Consumer Due Process Protocol ("Protocol").[15] This Protocol suggested that companies "should" provide consumers with clear notice of arbitration clauses, information regarding the arbitration process, preserved access to small claims court, and measures ensuring reasonable costs and hearing locations.[16] Private arbitration providers have also promulgated special procedural rules that they use for small dollar cases in B2C contexts.[17]

At the same time, public policymakers in the United States have become increasingly critical of FAA enforcement of arbitration in consumer and employment cases. This can be seen in renewed efforts to enact the Arbitration Fairness Act (AFA), which would ban pre-dispute arbitration agreements in consumer, employment, and civil rights cases.[18] Furthermore, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), signed into law on July 21, 2010,[19] bans enforcement of pre-dispute arbitration clauses in mortgage contracts and with respect to claims under

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of the Rest of the World, 56 U. MIAMI L. REV. 831, 843–64 (2002) (highlighting how the United States has diverged from European and most other nations by enforcing pre-dispute arbitration agreements in consumer and employment contracts).

14. *Consumer Due Process Protocol*, NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE (Apr. 17, 1998), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [hereinafter *Protocol*]; *JAMS Consumer Arbitration Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS (July 15, 2009), http://www.jamsadr.com/consumer-arbitration/ [hereinafter *JAMS Fairness Standards*]; *Statement of Ethical Principles for American Arbitration Association, an ADR Provider Organization*, AMERICAN ARBITRATION ASS'N, http://www.adr.org/aaa/faces/s/about/mission/ethicalprinciples?_afrLoop=57082693525650&_afrWindowMode=0&_afrWindowId=fud6h23g7_10#%40%3F_afrWindowId%3Dfud6h23g7_10%26_afrLoop%3D57082693525650%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dfud6h23g7_42 (last visited Apr. 14, 2012) [hereinafter *AAA Statement of Ethical Principles*].

15. *See Protocol*, *supra* note 14.

16. *Protocol*, *supra* note 14.

17. *See* W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 87–91 (2007) (discussing providers' due process rules).

18. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (1st Sess. 2011); S. 987, 112th Cong. (1st Sess. 2011). *See also* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (1st Sess. 2009); *III. Access to Courts, Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1170, 1170–81 (2009) [hereinafter *Access to Courts*] (discussing the AFA and critiquing its blanket approach).

19. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter *Dodd-Frank*].

the whistle-blower provisions of the Act.[20] It also gives the newly created Consumer Financial Protection Bureau (CFPB) the power to write and enforce various lending and consumer protection regulations, which may include prohibition or limitations on enforcement of pre-dispute arbitration agreements in consumer financial products and services contracts.[21] The Act also gives the Securities and Exchange Commission (SEC) power to limit or prohibit agreements requiring customers of any broker or dealer to arbitrate future disputes arising under federal securities laws.[22]

This Essay does not detail this divisive law and policy regarding the propriety, fairness, and efficiency of consumer arbitration. That has been covered elsewhere.[23] Instead, the Essay aims to highlight difficulties created

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20. *Id.* § 1414. The provision amends the Truth in Lending Act (TILA) and is codified in 15 U.S.C. § 1639(c) (the Act's effective date for provisions that do not call for regulations is July 22, 2010).

21. Dodd-Frank, *supra* note 19, § 1028. *See also* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (1st Sess. 2009) (the bill that is now the Dodd-Frank Act establishing an agency to regulate consumer financial products and services and authorizing the agency to approve pilot programs for effective disclosure of consumer contract terms); David S. Evans & Joshua D. Wright, *How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products,* 2 BLOOMBERG L. REP.: RISK AND COMPLIANCE 9, 9–14 (Oct. 2009), *available at* http://ssrn.com/abstract=1491117 (critiquing the Dodd-Frank Act for advocating broad applications without adequate evidentiary basis).

22. Dodd-Frank, *supra* note 19, § 921 (amending 15 U.S.C. § 780 (1934)).

23. Indeed, this debate has been surging for many years, and there is an abundance of relevant articles, books, and commentary. *See, e.g.*, Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (critiquing arbitration of employment claims); Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 213–14 (2006) (defending arbitration to the extent that it is less "lawless" than some fear); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1247–1342 (2009) (highlighting the arbitration debate and critiquing arguments advancing the fairness of pre-dispute arbitration agreements); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent,* 62 BROOK. L REV. 1381, 1410–14 (1996) (critiquing companies' use of arbitration provisions); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 637 (1996) (critiquing companies' use of arbitration clauses in contracts with consumers and employees); *Consumer Arbitration Before the American Arbitration Assoc.: Preliminary Report*, SEARLE CIVIL JUSTICE INST., 68–87 (Mar. 2009), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_010205 (reporting study results indicating that, overall, consumers do fairly well in arbitration versus court on warranty claims). *See also* Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627 (2008) [hereinafter *Warranty Woes*] (discussing pros, cons, and ideas for reform with respect to consumer arbitration); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115 (2010) [hereinafter *Legislating in the Light*] (discussing arbitration debate and research, and need for disclosure regulations in light of empirical data); Amy J. Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, 28 BANKING & FIN. SERVICES POL'Y REP. 16 (2009) [herein-

by problematic and uncertain enforcement of B2C arbitration, and invites use of the Internet to create fair and globally enforceable Online Dispute Resolution (ODR) and Online Arbitration (what I call "OArb") mechanisms. Such mechanisms could build bridges for consumers to access remedies with respect to eConflicts. They would capitalize on the growth and efficiency of the Internet while protecting consumers from onerous or costly procedures that render remedies meaningless.

II. IMPORTANCE OF DEVELOPING FAIR AND ACCEPTED B2C REMEDY MECHANISMS

It is no surprise that international B2C eConflicts are on the rise along with international consumer ePurchases. What many fail to consider, however, are the hurdles consumers face in seeking resolution of these conflicts. It usually is not feasible for consumers to sue recalcitrant businesses located abroad due to the futility of pursuing international litigation and unclear enforcement of foreign judgments. This leaves these businesses with little incentive to voluntarily provide remedies to consumers with respect to their ePurchases.

At the same time, many companies cognizant of their own needs for uniform contract enforcement mechanisms have adopted arbitration programs that bypass the uncertainty and variability of public court systems. These companies promulgate form contracts that require consumers to submit any disputes arising from their ePurchases to binding arbitration. As highlighted above, the United States has been exceptional in its robust enforcement of these B2C arbitration contracts under federal and international law. Businesses applaud this enforcement as allowing them to cut conflict resolution costs through adoption of arbitration programs, and arguably pass on the savings to consumers through lower prices and better quality goods.

Nonetheless, there are valid criticisms of some companies' use of pre-dispute arbitration clauses in B2C contracts. Some companies abuse their use of arbitration clauses to avoid legal regulations and impede consumers' access to remedies. This has led some policymakers in the United States to clamor for major legislative and regulatory changes with respect to such arbitrations. Moreover, such policy issues have led other countries to limit or bar enforcement of pre-dispute arbitration agreements in these B2C cases.[24]

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after *Regulation Rash*] (critiquing the AFA's approach and offering suggestions for procedural fairness regulations).

24. *See supra* note 12 (citing references regarding other nations' limitations on B2C arbitration).

Concerns regarding the fairness of B2C arbitration suggest cause for careful consideration of remedy-system improvements. Furthermore, divisive and uncertain enforcement of arbitration clauses in international B2C contracts creates confusion and inefficient litigation for consumers and companies. Consumers and companies suffer when companies cannot rely on any savings from arbitration programs, and pass those savings on through lower prices and better quality. Furthermore, everyone suffers when litigation over arbitration enforcement clogs the courts and hinders arbitration's purported efficiency benefits.[25]

Nonetheless, those that denounce enforcement of pre-dispute arbitration clauses argue that the unfairness of these clauses outweigh any necessity or benefits. They propose that companies and consumers will agree to arbitrate post-dispute if arbitration would be beneficial. This is the approach of the AFA noted above. This is unwise, however, because parties are loathe to agree to anything post-dispute when relationships sour. In addition, companies cannot lower prices or otherwise pass on cost savings based on the hopes of establishing post-dispute arbitration programs.[26]

Furthermore, consumers' falsely negative assumptions about arbitration often prevent them from agreeing to post-dispute arbitration agreements. However, the data indicates that consumers are generally satisfied with their arbitration experiences.[27] For example, a 2009 study of AAA consumer arbitrations found that consumers were generally satisfied with their proceedings and succeeded in 53.3% out of 301 arbitrations studied. They also recovered an average of $19,255, or 52.1%, of the damages they sought in those arbitrations.[28]

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25. *See* Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, 2777–80 (2010); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967); Walton v. Rose Mobile Homes, LLC, 298 F.3d 470, 478 (5th Cir. 2002) (each discussing courts' unpredictable application of contract defenses and other challenges of arbitration clauses).

26. Others have also argued that the AFA approach of barring enforcement of pre-dispute arbitration clauses in broad and ill-defined categories was over- and under-inclusive, and that it may be more beneficial to legislate procedural reforms. *See, e.g.*, *Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees—Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007)*, 121 HARV. L. REV. 2262, 2267–68 (2008) (critiquing the Act's broad scope and approach).

27. *See* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1054–75 (2009) (questioning assumptions that arbitration is bad for consumers); *Arbitration: Simpler, Cheaper, and Faster than Litigation*, HARRIS INTERACTIVE, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (last visited Apr. 14, 2012) (indicating that forty percent of those who lost in arbitration were still satisfied with the process). *See also Legislating in the Light, supra* note 23 (discussing the empirical data).

28. Task Force on Consumer Arbitration, *supra* note 23, at 68–87 (noting that business claimants' 83.6% success rate does not necessarily indicate pro-business bias because these claims were clear nonpayment cases).

There is a need for more comparison statistics for B2C litigation, but, nonetheless, the data overall suggests that arbitration is not as "bad" for consumers as many assume.[29] Furthermore, many companies conform their arbitration programs to the Protocol noted above and follow providers' rules safeguarding fairness in B2C proceedings.[30] Moreover, the need for enforceable arbitration programs escalates in international eConflicts where traditional judicial remedies are impractical or nonexistent.

That is not to say that costly and unfair arbitration programs are better than no arbitration in international cases. Current arbitration programs are not sufficiently regulated, transparent, or user-friendly. For example, studies focused on pre- and post-process perceptions and satisfaction with respect to dispute resolution highlight the need for sufficient notice and dispute resolution education.[31] In one study, survey findings indicated that the disputants' initial perceptions of dispute resolution processes did not impact what processes they ultimately used. The researchers surmised that this was likely due to parties' lack of necessary knowledge or experience regarding dispute resolution processes to make informed assessments.[32]

Such problems with current arbitration systems are not insurmountable, especially with respect to resolution of eConflicts. The Internet provides inexpensive means for educating consumers about arbitration and other available ways for resolving claims with respect to their ePurchases. Arbitration providers already have begun to capitalize on the benefits of the Internet and computer-mediated communication ("CMC") to expand consumer education and B2C remedy mechanisms.[33] Furthermore, growth of CMC

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29. *See Federal Arbitration Act: Is the Credit Card Industry Using it to Quash Legal Claims?: Hearings Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 123 (2009) (testimony of Christopher Drahozal acknowledging need for comparison statistics for B2C litigation).

30. Task Force on Consumer Arbitration, *supra* note 23, at 70–87.

31. Donna Shestowsky & Jeanne M. Brett, *Disputants' Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study* 1–5, 21–26 (U.C. Davis Legal Studies Research Paper Series, Working Paper No. 130, 2008), *available at* http://ssrn.com/abstract=1103585 (discussing a longitudinal field study involving 108 completed paper surveys of disputants with cases filed in late 2004/early 2005 followed by phone surveys with forty-four of these disputants and forty-four cases in which twenty-six were settled or dismissed, nine went to trial, one to mediation, and one to arbitration).

32. *Id.* at 30–42 (concluding that courts could improve disputants' ex-post satisfaction by subsidizing neutral fees for court mandated ADR and giving disputants the option of pursuing trials).

33. *See* Llewellyn Joseph Gibbons, *Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 3 (2002) (discussing consumer use of the Internet to access information and utilize dispute resolution).

provides fuel for expansion of transparent and user-friendly ODR and OArb processes that are free or low-cost for consumers.[34]

III. SUGGESTIONS FOR USING OARB TO EXPAND CONSUMERS' ACCESS TO REMEDIES

A. Minimum Standards

As I have suggested for in-person B2C arbitration, policymakers also should require that B2C remedy mechanisms for resolution of global eConflicts must comply with procedural fairness standards similar to those set forth in the Protocol.[35] These standards should include the following:

- *Notice*: Consumers should not be surprised to learn that they must arbitrate or abide by another process for resolving their claims after disputes develop. Instead, the burden should be on companies to clearly and concisely state in their contracts how consumers can file claims and where they can find further resources. This notice should include contact information for the designated dispute resolution providers and list any fees a consumer must pay in order to file claims.
- *Consumer Voice in Selection of Neutrals*: The NY Convention and FAA require a baseline degree of arbitrator neutrality. However, regulations should go further to ensure consumers have equal voice in selecting arbitrators or other neutrals charged with making determinations with respect to consumers' claims. Consumers should have power to choose neutrals from a list or database of individuals who have received accreditation after completion of training and compliance with strict disclosure requirements.
- *Contained Costs*: Although the overall cost differential of arbitration/private dispute resolution versus litigation is unclear, some companies' arbitration clauses may impose high front-end filing and administration costs that hinder individuals from bringing claims. Rules should cap consumers' arbitration fees. Moreover, expansion of free or low-cost ODR

34. *See* Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178, 240–43 (2010) (discussing how online arbitration ("OArb"), opens new avenues for consumers to obtain remedies on their contract complaints). *See also* Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 308–10 (2008) (noting use for consumer small claims); Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 327–29 (2008) (discussing how use of online ADR can foster efficient dispute resolution and maximize the growth of e-commerce in England and abroad).

35. *See Regulation Rash*, *supra* note 23 (offering a "top ten" tailored more for in-person arbitration fairness regulations).

mechanisms would help alleviate cost concerns for both companies and consumers.[36]

• *Access to Information*: Arbitration critics have highlighted how arbitration's uncertain allowance for discovery can be problematic for consumers in B2C eConflicts who need to gather information within the companies' control. For example, limited or uncertain discovery in arbitration may hinder a consumer from obtaining interoffice memoranda to prove company management's knowledge regarding a defective product. Regulations should therefore ensure consumers' access to needed evidence, while continuing to give arbitrators discretion to set reasonable limits on discovery in order to contain costs and time involved in the dispute resolution process. Use of the Internet can help further this objective with online document exchanges.

• *Finality and Compliance*: Regulations should strictly limit time for conducting and concluding a contractually required process for resolving eConflicts. For example, rules for OArb could require that claimants submit all their arguments and complete evidentiary exchanges within thirty days of complaint filing. The rules could then give online arbitrators no more than five days to make determinations, and provide means for ensuring strict and timely compliance with those determinations. This fosters efficiency and gives meaning to remedies ordered. Indeed, awards are meaningless if consumers must fight to actually enforce them.

• *Preservation of Statutory Remedies*: Many countries base their refusals to enforce arbitration of B2C disputes on concerns that arbitrators will not protect public rights, and proponents of the AFA echo such concerns.[37] Regulations therefore should bar limits on statutory remedies in binding private dispute resolution processes unless the parties agree to limits after disputes arise. This recognizes that B2C contracting generally lacks the robust contractual freedom that supports pre-dispute contract remedy limits in B2B contexts. Furthermore, statutory rights deserve special protection to further their public interests. For example, statutes such as the Truth in Lending Act (TILA) rely on consumers' prosecutions of these claims and requests for statutory damages to help curb lenders' misconduct.

• *Public Disclosure*: Although privacy has been a hallmark of arbitration and other private dispute resolution mechanisms, it should not prevent public exposure of company improprieties that impact consumers' health or safety.[38] In addition, B2C remedy mechanisms will not gain international

36. *See AAA Statement of Ethical Principles*, *supra* note 14 (discussing the AAA's fee schedule for consumer claims).

37. CODE DE LA CONSOMMATION art. L132-1 & art. L132-1 Annex 1(q) (Fr.), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=61 (last visited Apr. 14, 2012) (directing that arbitration clauses that hinder consumer remedies are void as "unfair").

38. *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212–18 (2006) (considering benefits and drawbacks of privacy in arbitration).

credibility and acceptance unless they are sufficiently transparent. Regulations therefore should require disclosure regarding applicable processes to the extent necessary to foster consumer protections and preclude companies from using a mechanism's privacy to escape liability or otherwise hide legal violations.[39]

B. Implementation Through Online Remedy Mechanisms

The above considerations should guide creation of mandatory minimum standards for internationally endorsed eConflict resolution processes. This section aims to build on these initial standards in offering further suggestions for the development and implementation of these processes.

Again, the Internet gives policymakers exciting opportunities for building eConflict resolution mechanisms that capitalize on the benefits of CMC. The aim should be to craft OArb and other ODR processes that comply with mandatory minimum standards for transparency and fairness. Furthermore such processes should be user-friendly and worth their costs in light of the complexity and possible payout on the claims at issue.[40] Processes should be sufficiently simple for consumers to use without the need for legal assistance and should allow consumers to obtain neutral claim evaluations and enforceable remedies.[41]

Use of CMC and ODR is not entirely new. Online remedy processes already exist. For example, the Better Business Bureau (BBB) facilitates mechanisms for resolving consumers' complaints against automobile dealers, cellular phone companies, and most other B2C merchants.[42] These mechanisms help consumers gain companies' attention to their claims and often lead to dispute settlements. These processes are non-binding unless the parties agree that the result will be final, but companies' reputational concerns often prompt them to provide remedies on claims that the BBB determines valid and supported by adequate information to be worthy of response. Furthermore, these processes help consumers structure their com-

39. *See id.* at 1230–34 (highlighting dangers of secrecy in arbitration).

40. Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 OTAGO L. REV. 305, 308–16 (2010).

41. *See id.* at 309–18 (noting what works and does not work in dispute resolution mechanisms).

42. The BBB has been active in handling consumers' escalating complaints against cellular phone companies. *See US BBB 2009 Statistics Sorted by Complaint*, BETTER BUS. BUREAU, http://www.bbb.org/us/storage/16/documents/stats%20pdf/us_complaint.pdf (last visited Apr. 14, 2012); *US BBB 2008 Statistics Sorted by Complaints*, BETTER BUS. BUREAU http://www.bbb.org/us/storage/16/documents/stats%20pdf/us_by_complaint_2008_inter.pdf (last visited Apr. 14, 2012); *US BBBs Sorted by Complaint 2007*, BETTER BUS. BUREAU, http://www.bbb.org/us/storage/0/shared%20documents/complaintstats/stat2007/us_by_complaint_2007.pdf (last visited Apr. 14, 2012).

plaints and communications with companies.[43] This can be especially useful for consumers who otherwise lack the education or experience to assert complaints on their own.

Similarly, the social networking website Facebook has implemented an ODR mechanism through TRUSTe for resolution of consumers' privacy disputes.[44] Under the applicable rules, Facebook must comply with TRUSTe determinations regarding the misuse of personally identifiable information or violations of privacy. The effectiveness of the TRUSTe process is unclear, however, because consumers confused by Facebook's labyrinth of terms and conditions are generally unaware of their rights to use the process.[45]

It is no surprise that the BBB and Facebook have used ODR processes. These processes can save companies and consumers time and money. Online processes also may ease the stresses of seeking assistance by providing a structured, text-based means for communicating needs.[46] Furthermore, the Internet has opened new avenues for consumers to share purchase and product information, and for companies to gather information to assist their marketing efforts.[47] Watchdog groups also have used the Internet to alert consumers regarding unsafe products and onerous consumer contracts. They also should use their websites to post information about companies' dispute resolution mechanisms.

To date, many ODR mechanisms are non-binding. However, online remedy mechanisms with respect to international B2C eConflicts should be binding. OArb in particular is warranted for effective resolution of these

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43. Alice F. Stuhlmacher & Amy Walters, *Gender Differences in Negotiation Outcome*, 52 PERS. PSYCHOL. 653, 657–59 (noting research suggesting that constraints on communication modes may reduce gender bias).

44. *See* John Gamble, *Facebook & TRUSTe*, TRUSTE (May 12, 2010), http://www.truste.com/blog/2010/05/12/facebook-truste/ (noting Facebook and TRUSTe's business relationship since 2006). *See also File a Privacy Complaint*, TRUSTE, http://watchdog.truste.com/pvr.php?page=complaint (last visited Apr. 14, 2012); *Privacy Program Requirements*, TRUSTE, http://www.truste.com/privacy-program-requirements/ (last visited Apr. 14, 2012); *Watchdog Dispute Resolution Process*, TRUSTE, http://www.truste.com/why_TRUSTe_privacy_services/online-privacy-watchdog (last visited Apr. 14, 2012).

45. *See Watchdog Dispute Resolution Process*, *supra* note 44 (further explaining the TRUSTe process). Notably however, the process strictly limits eligible claims and allowable remedies, and gives TRUSTe great discretion in applying these limits. *Id.*

46. *See* Jelle van Veenen, *From :-(to :-) Using Online Communication to Improve Dispute Resolution*, 1–20 (Tilburg Inst. for Interdisciplinary Studies of Civil Law & Conflict Resolution Sys., Working Paper No. 002/2010, 2010), *available at* http://ssrn.com/abstract=1618719 (noting how online communications can improve dispute resolution).

47. Stuhlmacher & Walters, *supra* note 43, at 659 (noting studies showing that CMC eases communication bias by reducing social cues and subconscious propensities present in F2F communications).

disputes because it provides a binding award.[48] While ODR that facilitates voluntary agreements is laudable, it is often unsuccessful and allows parties to "walk away" without reaching resolution. This leaves businesses especially prone to "walk away" from consumers' cross-border complaints because these businesses know that consumers face insurmountable hurdles in pursing cross-border litigation. By requiring parties to commit to binding arbitration, OArb agreements provide incentive for parties to take the process seriously and put aside their anger to reach a resolution.[49]

Nonetheless, OArb commitment must be voluntary and properly regulated to ensure fairness.[50] As noted above, some companies impose onerous arbitration clauses in their B2C form contracts. Some also claim that B2C arbitration improperly curbs consumer rights due to pro-business administration.[51] Although it is questionable whether this negativity is warranted, negative perceptions nonetheless matter. OArb procedures will not gain international endorsement or consumers' open-minded participation unless all involved are assured that the procedures are neutral and fair.[52] Policymakers and dispute resolution providers must work together to build OArb mechanisms that sufficiently protect consumers from surprise and preserve their rights to internationally recognized standards for due process.

Accordingly, the minimum standards parsed above should guide policymakers in constructing OArb that is low-cost, speedy, and accessible.[53] OArb policies should cap consumers' costs and set strict time limits for companies to respond to complaints. Policies also should allow for sufficient but properly limited discovery, and set clear timelines for evidentiary sub-

48. OArb differs from other ODR because it results in a final third-party determination without the cost and stress of traditional litigation. *See* Schmitz, *supra* note 34, at 178–244 (proposing expansion of OArb).

49. *See Warranty Woes*, *supra* note 23, at 658–61, 677–80 (discussing importance of finality with respect to consumer disputes).

50. *See* David J. Bilinsky, *10 Collaborative Principles for Leading a Successful ODR System Initiative*, ODR & CONSUMERS 2010 (Sept. 1, 2010), http://www.odrandconsumers2010.org/ 2010/09/01/10-collaborative-principles-for-leading-a-successful-odr-system-initiative (guest post by Ben Ziegler) (providing tips for increasing confidence in e-commerce through ODR systems); David J. Bilinsky, *Implementation Consideration for ODR*, ODR & CONSUMERS 2010 (Aug. 2, 2010), http://www.odrandconsumers2010.org/2010/08/02/implementation-considerations-for-odr (discussing best practices for ODR); Schmitz, *supra* note 34, at 235–40 (discussing fairness limits and safety measures for OArb).

51. *See, e.g.*, Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867–68 (Cal. Ct. App. 2002) (holding that a class action ban in an arbitration agreement was unconscionable where it was likely to preclude most consumers from seeking remedies on their small claims).

52. *See* Schmitz, *supra* note 34, at 226–44 (proposing regulated ODR for consumer complaint resolution).

53. *See supra* Part III.A.

missions. Clear rules should also set deadlines for arbitrators to render awards, and give parties short timelines for any appeals.

These arbitrators also should have power and means for holding companies responsible for failing to quickly comply with arbitration awards. Parties must be held to strict deadlines for complying with awards, and garnishment or other such mechanisms should be available to force this compliance. In addition, regulators should seek user feedback in order to foster continual system improvements, and compile ratings for arbitrators and merchants subject to the process.[54]

Furthermore, online arbitrators must be neutral and properly trained, and consumers must have a voice in selecting the arbitrators. This can be accomplished by creating a database of accredited arbitrators that includes credentials and other background information regarding each arbitrator. Consumers should then have the power to choose from among these approved arbitrators. This would help consumers to have a voice in the process and to feel more comfortable with the anonymity of CMC.

OArb transparency regulations could mimic California's code provisions requiring arbitration administrators to gather and post basic information regarding consumer claims in an easily searchable format.[55] This information includes the names of companies involved, types of disputes, prevailing parties, time from filing to disposition, claim and award amounts, arbitrators' names, and other basic information not properly redacted as confidential.[56] Such postings help increase trust and transparency with respect to the process, and reveal recalcitrant companies. They also would give businesses incentive for providing quick remedies to avoid embarrassment, and uncover party and award patterns that would suggest an arbitration administrator's bias for repeat-player companies who continually use its services.[57]

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54. *See* Schmitz, *supra* note 34, at 226–44. *See also* Xu Junke, *Development of ODR in China*, 42 No. 3 UCC L. J. ART 2, 265–72 (2010) (discussing ODR in China and the need for increased online trust and consumer confidence to boost ODR processes and encourage "self-discipline" of e-commerce); Colin Rule et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments*, 42 No. 3 UCC L. J. ART 1 (2010), *available at* http://colinrule.com/writing/ucclj.pdf (last visited Apr. 14, 2012) (discussing how to create a global system for resolving consumer disputes and highlighting the United States' proposal for an ODR system). Full discussion of ODR and OArb and means for expanding them in a measured manner is beyond the scope of this Article, but further discussion may be found in Schmitz, *supra* note 34, at 177–244 (proposing prudent expansion).

55. CAL. CIV. PROC. CODE § 1281.96 (West 2011).

56. *Id.*

57. Further research and policy discussions should nonetheless guide OArb's development. *See* Rule et al., *supra* note 54, at 222–30. Debates on ODR have grown on global levels, and hold great promise for consumer claims resolution. *See The 11th International*

Alongside OArb mechanisms, policymakers also should maintain a central website for consumers to research and share product information and complaints.[58] For example, they could learn from online watchdog websites such as the Utility Consumers' Action Network (UCAN).[59] UCAN provides an online forum for consumers to alert others regarding contract dangers and to offer suggestions for avoiding or responding to consumer issues.[60] Similarly, the new Consumer Product Safety Commission (CPSC) database launched in March 2011 provides consumers and manufacturers with a central portal for reporting and learning about product problems.[61] The *New York Times* and other news sources also maintain online columns for voicing consumer complaints and seeking assistance.[62]

Nonetheless, policy initiatives may be necessary to verify complaint information and combat cyber bullying and anti-normative behavior on the Internet.[63] Regulators should monitor postings to preclude abusive or false

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Online Dispute Resolution Forum, ODR 2012, http://www.odr2012.org/node?page=1 (last visited Apr. 14, 2012) (announcing the most recent ODR conference).

58. *See* Gibbons, *supra* note 33, at 3 (discussing how the Internet is used by consumers to research prices). Although some individuals are not sufficiently careful in communicating online, there is some evidence that a growing number of online users are becoming more cautious in light of privacy and other concerns. Susan C. Herring, *Computer-Mediated Communication on the Internet*, 36 ANN. REV. INFO. SCI. & TECH. 109, 144–45 (Blaise Cronin ed., 2002) (noting how internet users are becoming more careful in their online communications due to concerns about privacy threats).

59. *See* UCAN, http://www.ucan.org (last visited Apr. 14, 2012) (describing itself as a "non-profit, public interest consumer advocacy" group focusing on energy, communications, and water, and providing a complaint forum along with additional resources). *See also* Mike Scott, *Cell Phone Companies Changing Contract Terms*, THE FINE PRINT: UCAN'S CONSUMER WATCHDOG BLOG (Nov. 12, 2007), http://www.ucan.org/blog/telecommunications/wireless/contract_change/cell_phone_companies_changing_contract_terms (alerting others of changes in contracts that many would not catch).

60. UCAN, *supra* note 59.

61. CPSC database is also part of a larger technology upgrade aimed to provide consumers and others with greater access to complaint information. *Iffy Product? Now a Way to Tell*, CONSUMER REP., Feb. 2011, at 16, 16–17 [hereinafter *Iffy Product*] (highlighting the difficulties of obtaining information regarding complaints and companies' power in blocking information) (discussing the new database and other technology upgrades contemplated by the CPSC).

62. *See, e.g.*, David Segal, *Scammed? Rebuffed? Ignored? Read On*, N.Y. TIMES, May 10, 2009, http://nytimes.com/2009/05/10/your-money/10haggler.html (regular column, *The Haggler*); David Segal, *The Refund that Circled Before Landing*, N.Y. TIMES, May 7, 2009, http://nytimes.com/2010/05/09/business/09haggler.html (noting the first anniversary of the column, and responding to consumers' submitted questions and complaints).

63. *See* van Veenen, *supra* note 46, at 20–23 (discussing how online communications may actually heighten adherence to social norms, reduce the stress of F2F communication, and allow for emotive communications).

comments.[64] Furthermore, regulations should bar companies from disingenuously promoting their products and services by paying for positive reviews or posting fake reviews ("flogging") on blogs and review sites.[65] Information-sharing mechanisms do not enhance consumer education or inform purchase practices when postings are not trustworthy.

These OArb and complaint posting mechanisms must be internationally endorsed and incorporated. This is essential due to the increase in international B2C eContracts and current lack of globally accepted and enforceable mechanisms for resolving eConflicts. Indeed, the UNCITRAL Working Group on ODR is leading an effort to establish an ODR mechanism for resolution of certain eConflicts. This project is discussed by others in this Symposium.[66] I recently became involved in this project and look forward to working with others in the group.

Nonetheless, the project is limited and will hopefully spark development of more expansive OArb mechanisms for B2C disputes. For example, the UNCITRAL Group's current proposal does not cover ODR for warranty disputes. However, warranty claims are often at the heart of B2C eConflicts. It would therefore be wise to build on momentum of the current UNCITRAL project to develop an OArb program for resolution of defective product disputes.

In sum, these are merely reform ideas to build on. Furthermore, reforms should increase consumers' awareness and remedy resources without increasing litigation or government oversight that will augment public and private costs. Transparent and accessible remedy mechanisms need not require complicated disclosures that augment costs and lead to information overload. Instead, companies could provide customers with simple OArb mechanisms and useful forms that guide their submission of complaints. In addition, an international public or other independent organization com-

64. Charles Starmer-Smith, *Tripadvisor Reviews: Can We Trust Them?*, TELEGRAPH (London) (Oct. 20, 2010), http://www.telegraph.co.uk/travel/hotels/8050127/Tripadvisor-reviews-can-we-trust-them.html (discussing fake and spiteful reviews that severely impact businesses, despite the reviews' lack of verification).

65. Lisa Thomas & Robert Newman, *Social Networking and Blogging: The New Legal Frontier*, 9 J. MARSHALL REV. INTELL. PROP. L. 500, 516–17 (2009) (providing examples of companies faking reviews); Mark Balnaves & James Mahoney, Editorial, *The Illusion of Control in Public Relations*, PUB. REL. RESOURCE CENTER, http://www.prismjournal.org/global.html (last visited Apr. 14, 2012) (also discussing companies covert schemes); Starmer-Smith, *supra* note 64 (discussing purchase reviews posted on the popular travel review site).

66. *See generally* Colin Rule, *Quantifying the Economic Benefits of Economic Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*, *supra* at 765–76. *See also* Louis F. Del Duca, Colin Rule & Zbynek Loebl, Facilitating Expansion of Cross-Border E-Commerce-Developing a Global Online Dispute Resolution System, THE PENN ST. U. LEGAL STUD. RES. PAPER SERIES No. 25-2011 (Dec. 10, 2011), *available at* http://ssrn.com/abstract=1970613.

prised of consumer and industry leaders could monitor these mechanisms for fairness, and post outcomes with respect to all companies on a searchable website.[67] Such transparency should spark companies to improve their complaint handling processes and help empower consumers to pursue legitimate complaints and protect their rights.

IV. CONCLUSION

Consumers need access to reliable resolution mechanisms for B2C eConflicts on international levels. Litigation and in-person arbitration have not provided such mechanisms due to prohibitive costs, unclear law, and clashing public policies. At the same time, UNCITRAL's ODR Working group is seeking to expand use of online remedy mechanisms for consumers in international eConflict cases. These efforts provide promise for consumers, but have not yet produced results. Consumers are therefore left on an "island" with no bridges to reliable, fair, and low-cost mechanisms for obtaining remedies with respect to international ePurchases gone awry. Accordingly, it is time for policymakers to build bridges for consumers to access remedies in these cases. Policymakers should capitalize on CMC to create efficient and low-cost international OArb mechanisms that sufficiently protect consumers from onerous company practices.

67. A full discussion of the options is beyond the scope of this Essay. Instead, this Essay seeks to spark discussion and creative ideas for educating and empowering consumers in the most efficient and effective manner—which may be through public or private means.