

Yeah, But Did You See the Gorilla? Creating and Protecting an Informed Consumer in Cross-Border Online Dispute Resolution

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“Resolving the need for consumer protection by inflating the volume of obligatory information which businesses must make available to the consumer or by engaging in a crusade against any and all alternative forms of the enforcement of businesspersons’ rights, is political window dressing which does not address the root cause of the problem, but merely represents a rather mock cure of the consequences.”¹

ABSTRACT

Arian Mack and Irvin Rock coined the term inattentional blindness referring to a tendency for people to be unaware of stimuli that are currently unattended. Even large and significant objects, like a person in a gorilla suit, can go unnoticed when an observer’s attention is engaged by some other aspect of the scene. Despite these well-known experiments, legislators continue to insist upon creating an informed consumer that attends to minutia even in the face of other stimulus. The need to create an informed consumer has reared its ugly head most notably within the world of online dispute resolution (“ODR”). Governments and legislators are concerned that consumers, focused on shopping and price terms, will ultimately be surprised that an alternative dispute resolution (“ADR”) clause within their purchase contract will lead to arbitration and not a day in court.

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1. Alexander J. Bělohlávek, *Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate?*, in 2 CZECH (& CENTRAL EUROPEAN) Y.B. ARB., 17, 21 (Alexander J. Bělohlávek & Naděžda Rozehnalová eds., 2012), available at <http://ssrn.com/abstract=2049115>.

Consequently, the legislative initiatives currently being developed seek to create an informed consumer in relation to ADR.

The informed consumer, however, is proving a difficult creature to create in the cross-border setting. Research into consumer behavior highlights that consumers ignore information presented in a passive manner, even if the clause removes the consumer right to have their day in court. For the most part, consumers are aware that they have little choice in the matter. They also have better things to do with their time and prefer to scroll through the information quickly so they can make their purchase. The unwillingness of consumers to read contract terms has proven especially problematic in terms of dispute resolution clauses, as many fear consumers will not receive consumer or due process protections as afforded under the law. This fear is misplaced, however, as a well-designed ODR platform can use active engagement to increase the likelihood of an informed consumer and provide appropriate legal protections.

This paper will assist in the development of a mechanism to create an arbitration informed consumer by: (1) summarizing current research into consumer behavior, in relation to both contract terms and arbitration clauses specifically, (2) exploring the legislative initiatives designed to protect consumers from arbitration, (3) examining the changing power structure within the online environment and the resulting reasonable consumer expectations, and (4) providing suggestions for the use of technology and service providers as a mechanism to create a more informed consumer.

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I. INTRODUCTION

The growth of e-commerce and consumers' increasing desire to purchase goods cross-border has prompted interesting debates within legislative drafting bodies concerning the best way to protect the on-line consumers. This is especially true because of the presence of overly restrictive contract clauses. Some suggest the solution is to increase attention to important contract clauses. However, social scientists have long recognized that individuals fail to pay attention in many situations, and it is now time this research is considered within the legal e-commerce context. This Part explores the now famous social science experiments that involve a gorilla entering a group without anyone noticing, the growth of e-commerce, and the need for ODR.

A. *Yeah, But Did You See the Gorilla*

In 1999, Christopher Chabris and Daniel Simons designed a now famous experiment to test inattention blindness.² In their study, participants were asked to watch a video in which two teams, one in black shirts and one in white shirts, passed a ball amongst themselves. The study participants were told to count the number of times the players in white shirts passed the ball. Midway through the video a gorilla walks through the game, stands in the middle, pounds his chest, and then exits.³ After watching the video, study participants were asked, "But did you see the gorilla?" More than half the time,

2. ARIEN MACK & IRVIN ROCK, INATTENTIONAL BLINDNESS, 4 (Stephen E. Palmer ed., 1998) (coining the term "inattention blindness" to describe the results of extensive studies of the visual perception of unexpected objects). Inattention blindness is a lack of attention that is not associated with any vision defects or deficits.

3. See Daniel Simons, *Selective Attention*, YOUTUBE (Mar. 10, 2010), <http://www.youtube.com/watch?v=vJG698U2Mvo>.

subjects miss the gorilla entirely. Even after the participants were told about the gorilla, they remain convinced they could not have missed a gorilla pounding its chest in the middle of the group.⁴ Although this study, and subsequent studies that validated its findings,⁵ covers issues related to inattentional blindness, its outcome highlights one of the perplexing issues in relation to ODR. How do we create a body of informed online consumers that takes note of a dispute resolution clause within contracts of adhesion presented to them at the moment of sale? And if this cannot be accomplished, how do we protect quasi-informed consumers entering into the cross-border ODR arena?

B. *The Scope of the Problem*

There is a growing recognition among governments and business that one of the main growth areas of the twenty-first century will be business-to-consumer ("B2C") cross-border e-commerce. While domestic low value e-commerce has grown,⁶ cross-border e-commerce is relatively stagnant or non-existent.⁷ It is becoming readily apparent that consumers wary of the potential complications of buying from foreign providers online have made the decision that it is simply easier — and safer — to shop close to home.⁸ This lack of consumer trust

4. See Daniel Simons & Christopher Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059, 1072 (1999).

5. See, e.g., Steven B. Most, Daniel J. Simons, Brian J. Scholl, Rachel Jimenez, Erin Clifford & Christopher F. Chabris, *How Not To Be Seen: The Contribution of Similarity and Selective Ignoring to Sustained Inattentional Blindness*, 12 PSYCHOL. SCI. 9, 17 (2001); Steven B. Most, Brian J. Scholl, Erin Clifford & Daniel J. Simons, *What You See Is What You Set: Sustained Inattentional Blindness and the Capture of Awareness*, 112 PSYCHOL. REV. 217, 218 (2005).

6. Three product categories (computers, apparel, and consumer electronics) represented more than forty-four percent of online sales (\$67.6 billion) in 2009. Erick Schonfeld, *Forrester Forecast: Online Retail Sales Will Grow to \$250 Billion by 2014*, TECHCRUNCH (Mar. 8, 2010), <http://techcrunch.com/2010/03/08/forrester-forecast-online-retail-sales-will-grow-to-250-billion-by-2014/>; see also ACCENTURE, EUROPEAN CROSS-BORDER E-COMMERCE: THE CHALLENGE OF ACHIEVING PROFITABLE GROWTH (2012), available at <http://www.accenture.com/us-en/Pages/insight-european-cross-border-ecommerce.aspx> (noting that "[s]ales in the 13 largest online markets in the EU are already estimated to be €200 billion"). While in the US, in 2009, 154 million people bought something online, or sixty-seven percent of the online population (four percent more than in 2008). See Schonfeld, *supra*.

7. See European Commission, Digital Agenda Scoreboard 31 May 2011, Working Paper Sect. 4, 13 (English version) (noting that 40% of European Union shoppers use the Internet to buy goods and services, while only 8.8% of Europeans buy online from retailers located in other countries — a minimal increase from 8.1%).

8. See *id.*

is one of the principal reasons why business and governments consider the development of ADR systems to be of such strategic importance to the growth of cross-border e-commerce.⁹ ADR systems can settle disputes adequately without requiring consumers to engage in cumbersome, costly, and lengthy foreign court redress systems. However, to make the cross-border ODR system successful, governments must be confident that the rights of both consumers and businesses are protected. Within this context, it seems nothing currently worries everyone more than the ill-informed consumer accidentally agreeing to a mandatory, final, and binding dispute resolution mechanism.¹⁰ Consequently, current legislative proposals seek to create an informed consumer in relation to ADR.

The informed consumer, however, is proving a difficult creature to create in the cross-border setting. Research into consumer behavior highlights that consumers ignore information presented in a passive manner, even if the clause removes consumers' right to have their day in court.¹¹ For the most part, consumers are aware that they have little choice in the matter, have better things to do with their time, and simply want to scroll through the information quickly so they can make their purchase. The unwillingness of consumers to read contract terms has proven especially problematic when discussing dispute resolution clauses, as governments have become increasingly concerned with business communities' attempts to use ADR as a means to circumvent consumer protections and/or to shield the poor performance of the business from public scrutiny.¹² Businesses' alleged misuse of ADR has prompted many legislative bodies to prohibit and/or place restrictions upon the use of ADR.¹³

This is, however, a misguided attempt to protect consumers. A well-designed ADR mechanism may be the only real means of consumers having access to the justice system. As such, legislative bodies must begin to understand that technology and ODR service providers can encourage the creation of a more informed consumer

9. See *infra* notes 166–67 and accompanying text; see also *id.* (stating “Commission aims to modernise, where necessary, the relevant legal instruments to enhance trust and confidence of European consumers”); European Commission, Consumer Conditions Scoreboard (July 2013), at 4 (“This suggests that there is a significant potential to facilitate (cross-border) e-commerce through measures that increase consumer trust.”).

10. See *infra* notes 33–35 and accompanying text.

11. See *infra* notes 43–53 and accompanying text.

12. See *infra* notes 128–32 and accompanying text.

13. See *id.*

while providing a greater access to justice. This, in turn, will hopefully lead to a greater degree of trust in the cross-border e-commerce world.

This paper will assist in the development of a mechanism to create an arbitration informed consumer by: (1) summarizing current research into consumer behavior—in relation to both contract terms and arbitration clauses specifically, (2) exploring the legislative initiatives designed to protect consumers from arbitration, (3) examining the changing power structure within the online environment and the resulting reasonable consumer expectations, and (4) providing suggestions for the use of technology and service providers as a mechanism to create a more informed consumer.

II. THE CURRENT APPROACH TO CROSS-BORDER BUSINESS-TO-CONSUMER ONLINE DISPUTE RESOLUTION

The growth of domestic online sales has prompted an increase in dispute resolution providers offering to resolve disputes in the online environment. The four mechanisms that are commonly used are: (1) consumer complaint resolution (sometimes known as negotiation),¹⁴ (2) mediation,¹⁵ (3) arbitration,¹⁶ or (4) a combination of the three. In the current domestic-based ODR environment, ODR service providers are generally involved in providing platforms that can use any or all of the listed options, with various amounts of technology supporting or fully facilitating the system. For example, in the private sector, eBay has long had an online mechanism in place to handle disputes involving sales conducted on the eBay platform.

14. See Ernest Thiessen, Paul Miniato & Bruce Hiebert, *ODR and eNegotiation*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 329 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012). eNegotiation is a process that uses “a negotiation support system including computers or other forms of electronic communication that enable parties to negotiate their own agreement.” The most important aspect is that the parties are in full control of accepting or rejecting the outcome. Thiessen, *supra*, at 331.

15. The use and definition of this term is controversial. Generally the term is thought to be defined as “[a] voluntary process in which an impartial mediator actively assists disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions for those issues.” *DICTIONARY OF CONFLICT RESOLUTION* 278 (Douglas H. Yarn ed., 1999). The key is that a neutral third party is involved, parties’ interests are considered and the outcome is often thought of as a win-win — or the product of compromise. See generally Noam Ebner, *E-Mediation*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 357.

16. See generally Mohamed S. Abdel Wahab, *ODR and E-Arbitration*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 387–88.

Originally handled by SquareTrade,¹⁷ a third party company privately handling ODR,¹⁸ and now handled by an internal eBay platform,¹⁹ the system is quite ingenious. The process of submitting a claim is straightforward, the parties resolve their dispute through an online platform,²⁰ and the return of the payment is handled through the use of a charge back.²¹ It is efficient, highly regarded, and widely recognized as a successful system.²² In the public sector, some domestic judicial systems have created or allowed for the extension of what could be thought of as a small claims court into the online world. For example, Mexico has an ODR system called *Concilianet*,²³ which provides consumers a place to resolve disputes with businesses arising from either their online or brick and mortar store purchases. The system is simple, the process is clear, and the entire dispute is often resolved in less than twenty days.²⁴ Most importantly, the outcome of the process is enforceable within the domestic court system because the *Concilianet* system is annexed and supported by the judiciary. This is an incredible use of online platform to resolve disputes and a great advance in providing consumers' access to justice.

The use of private, self-contained, and public quasi-judicial systems eliminates many of the issues frequently associated with the

17. See, e.g., Colin Rule & Harpreet Singh, *ODR and Online Reputation Systems*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 163, 174–75.

18. See generally Susan Nauss Exon, *The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution*, 12 *CARDOZO J. CONFLICT RESOL.*, 19, 29–30 (2011) (explaining and discussing the current top providers and ODR types); Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 *HARV. NEGOT. L. REV.*, 253, 268–69 (2006) (discussing the incomplete system of structural accountability within the Square Trade environment); Ethan Katsh, Janet Rifkin & Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "e-Bay Law"*, 15 *OHIO ST. J. ON DISP. RESOL.* 705, 724–28 (2000) (discussing eBay as a guidepost for future systems).

19. See *eBay Buyer Protection*, *eBAY*, <http://pages.ebay.com/help/policies/buyer-protection.html>.

20. See *Dispute Resolution Overview*, *eBAY*, <http://pages.ebay.com/services/buyandsell/disputeres.html>.

21. See Vikki Rogers, *Knitting the Security Blanket for New Market Opportunities*, in *THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 95, 102.

22. See, e.g., Pablo Cortes, *Online Dispute Resolution for Consumers*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 139, 156–57.

23. *CONCILIANET* information is available at <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>.

24. Sergio Daniel Michel Chavez, UN Delegate from Mexico to the, NGO meeting at Working Group III (May 2012), slides (on file with author).

creation of a cross-border system of dispute resolution. For example, self-contained and judicial extension dispute resolution systems greatly increase the likelihood of domestic consumer protections being enshrined within the system. Moreover, in the case of private self-contained systems, the system itself often contains a means of enforcement through chargebacks,²⁵ while in the public judicial on-line system the final outcomes are almost always enforceable in the local courts.²⁶ In addition, one should not overlook other clearly emerging advantages of these private and domestic-based systems: the platforms are well-designed, the systems are transparent, and the systems quickly resolve disputes in what business and consumers believe is a fair and just manner. One cannot overlook the value associated with the entire community having trust in the system — trust that the system will work, trust that the system is fair, and trust that the outcome will be efficiently and expediently enforced. When trust exists for all parties within a system, many of the other issues are simply window dressing.²⁷ It is easy to see why the domestic-based ODR systems are growing at a swift pace.²⁸

Despite the widespread success of ODR in both public and private domestic markets, the cross-border B2C e-commerce ADR market is surprisingly non-existent.²⁹ In fact, until recently, no cross-border legal text had been attempted. At the current time, the main cross-border electronic commerce transactions (including business-to-business (“B2B”) and B2C transactions) legal text resides with the United Nations Commission on International Trade Law. Drawing

25. Various credit card systems serve as examples. See Vikki Rogers, *Knitting the Security Blanket for New Market Opportunities*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 95, 102.

26. The importance of local enforcement is essential. Some argue with the use of technology enforcement will “seamlessly occur.” Ruha Devanesan & Jeffrey Aresty, *ODR and Justice*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 251, 272.

27. See Noam Ebner, *ODR and Interpersonal Trust*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 203.

28. See generally Exon, *supra* note 17 (explaining and discussing the current top providers and ODR types).

29. U.N. Commission on International Trade Law, Rep. of Working Group III (Online Dispute Resolution) on the work of its twenty-second session, 44th Sess., June 27–July 15, 2011 at para. 31, U.N. Doc. A/CN. 9/716 (Jan. 17, 2011) [hereinafter O.D.R. Working Group 22d Session].

its mandate from the forty-third session,³⁰ the working group has diligently worked for two years on the creation of several instruments: (1) procedural rules, (2) accreditation standards/minimum requirements for ODR providers/platforms, (3) guidelines and minimum requirements for ODR neutrals, (4) principles for resolving ODR disputes, and (5) a cross-border enforcement mechanism.³¹ The ODR system is being designed to create a quick, simple, and inexpensive means of resolving disputes involving low-value, high-volume cross-border electronic commerce transactions. The working assumption of the group is that ODR is a process in three phases: negotiation, mediation/conciliation, and arbitration.³²

There are several issues that are causing domestic-based entrenchment amongst the drafting members of this legal text. One of the more recent issues arising in the area of cross-border ODR is the need to create an informed consumer — the idea that a consumer should be aware of and agree to the use of ODR.³³ In many ways, this issue is of great consequence because the United Nations ODR process is designed to use mandatory, final, and binding arbitration as the final stage of the process. When businesses incorporate an ADR provision into their B2B contract, they predominantly use arbitration because it has proven to be efficient, confidential, and effective in resolving cross-border high value commercial disputes.³⁴ One of the main advantages of the system is that the inclusion of an arbitration clause allows the business to emerge from the arbitration with a final and binding award that is enforceable in the vast majority of the jurisdictions worldwide.³⁵ The importance of such an enforcement

30. See G.A. Res. 65/21, U.N. GAOR, 65th Sess., Supp. No. 17, U.N. Doc A/65/17, at 4 (Jan. 10, 2011).

31. O.D.R. Working Group 22d Sess., *supra* note 29 at para. 21.

32. *Id.* at para. 115.

33. U.N. Commission on International Trade, Rep. of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session, 45th Sess., June 25–July 6, 2012, at paras. 21–28, U.N. Doc. A/CN.9/744 (June 7, 2012) [hereinafter O.D.R. Working Group 25th Sess.]. The Code of Federal Regulations sets forth eight types of information that the U.S. Department of Health and Human Services requires for the purpose of obtaining informed consent as it pertains to human subjects participating in research. 45 C.F.R. § 46.116(a) (2013). For the purposes of this article, the main elements of informed consent can be summarized as: (1) disclosure, (2) competence, (3) comprehension, (4) voluntariness, and (5) agreement. But the use of this standard is certainly controversial, especially within the international community in relation to online consumers. O.D.R. Working Group 25th Sess., *supra*, at paras. 21–28 (2012).

34. See Mohamed S. Abdel Wahab, *ODR and E-Arbitration*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 387, 415.

35. See *id.*

mechanism is unparalleled, as no treaty, convention, or other legal texts allow court judgments to have the same level of enforceability. However, some argue there is one downside — the lack of recourse to the judicial system.

The use of the term “arbitration” within a contract almost completely negates the parties’ ability to have their day in court. The loss of the consumers’ ability to access the courts is of great concern to many commentators,³⁶ especially in light of arbitration clauses being contained within contracts of adhesion. These concerns have caused many state actors, academic commentators, and consumer advocates to argue that arbitration clauses within contracts of adhesion³⁷ should be more heavily scrutinized.³⁸ Consumers should be protected from the removal of the right to their day in court, or at least should be informed of such a significant choice contained within the contract of adhesion. Hence, the use of arbitration within the cross-border consumer ODR system creates a heightened need to ensure an informed consumer. This raises an interesting issue: Is it possible to create an informed consumer in the online world? If not, how can and should the ODR community protect a semi or uninformed consumer?

III. THE REALITY OF THE ONLINE CONSUMER

Creating the informed consumer is a perplexing issue within the world of dispute resolution, one that is heightened in the always changing, easy access, quick result focused online commercial world. Even the definition of “informed” has caused numerous issues since it can mean so many different things to different people. Hence, one must ask, what is an informed online consumer when it comes to an arbitration clause? The National Consumer Disputes Advisory Committee (“NCDAC”), Consumer Due Process Protocol³⁹ provides some

36. See, e.g., Orna Rabinovich-Einy, *Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1, 28 (2004).

37. Sometimes called a take-it-or-leave-it contract, a contract of adhesion is a standard form contract drafted by one party (usually a business with stronger bargaining power) and signed by the weaker party (usually a consumer in need of goods or services), who must adhere to the contract and therefore does not have the power to negotiate or modify the terms of the contract. See Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 636 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

38. See *infra* notes 128–32 and accompanying text.

39. This protocol has been adopted by the American Arbitration Association. See American Arbitration Association, Consumer Due Process Protocol, Statement of Principles of the National Consumer Disputes Advisory Committee (last visited Apr.

guidance. These protocols require “clear and adequate notice of the arbitration provision and its consequence, reasonable access to information regarding the arbitration process,”⁴⁰ and numerous other provisions intended to fully inform the consumer of the risks associated with the selection of arbitration.⁴¹ These provisions require disclosure and explanation of a lot of arbitration specific information, which is often provided through the use of pop-ups, long text scroll boxes, or links to other site areas.⁴² As I read these requirements it immediately strikes me — am I the only one that does not want to read this information before I am allowed to purchase the newest music on Amazon or iTunes?

A. *But Did You See the Gorilla*

Consumers tend to dislike reading or even scrolling through long lists of important information. Noted social scientists Marotta-Wurgler,⁴³ Eigen,⁴⁴ and Plaut and Bartlett⁴⁵ have highlighted that few individuals read the terms contained within an online contract. In fact, even when consumers read their potential contract, it is likely for an insufficient amount of time to yield sufficient comprehension.⁴⁶ For example, in 2011, Zev J. Eigen ran an experiment in which over 1000 Internet users were asked a series of questions in relation to work and employment issues.⁴⁷ In exchange for participating, subjects were allowed to select a DVD from thirty available titles, to be

10, 2012), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [hereinafter Consumer Due Process Protocol].

40. *Id.* at princ. 11.

41. Examples of such provisions include principle 2, which requires access to Information Regarding ADR Program and principle 3, which ensures an independent and impartial neutral. *See id.* princ. 2, 3.

42. *See id.*

43. *See* Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 168 (2011).

44. *See* Zev J. Eigen, *Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Term*, 168 J. INST. AND THEORETICAL ECON. 124, 126 (2012) [hereinafter Eigen, *Experimental Evidence*].

45. *See* Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 LAW & HUM. BEHAV., 293, 297–98 (2012); Amy Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV., 863, 863–65, (2010) [hereinafter Schmitz, *Pizza-Box Contracts*].

46. *See* Eigen, *Experimental Evidence*, *supra* note 44 at 2; cf. William C. Whitford, *The Functions of Disclosure Regulations in Consumer Transactions*, WIS. L. REV. 400, 403 (1973); Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1832–35.

47. *See* Eigen, *Experimental Evidence*, *supra* note 44, at 3.

shipped to them free of charge.⁴⁸ Participants were randomly assigned to one of four conditions that varied the way in which they experienced the pre-consent phase of the exchange of DVD for survey participation.⁴⁹ This experiment yielded one particularly interesting result in relation to the topic at hand. Out of 1003 subjects that had an opportunity to read the seven paragraph participation contract nested in a scroll window, 290 (28.9%) did not review the contract at all.⁵⁰ Of the remaining 713 participants, the mean time spent reviewing the contract was 80.5 seconds.⁵¹ Moreover, excluding three participants with exceptional lengths of time spent on the review, the mean time spent reviewing the contract was significantly lower at a mere 54.1 seconds.⁵² The results are unsurprising; no one pays much attention to online scroll window contracts, even when the information contained is likely to be important.⁵³

If consumers read very little information presented to them, what will draw their attention to the terms presented? Unsurprisingly, consumers show an increased tendency to read the information and/or contractual terms when the purchase is for a higher ticket item.⁵⁴ This is problematic, however, because of the online shopping behavior of consumers. Consumers tend to purchase low cost items online and either gather information online and shop in store or simply shop in store to purchase more expensive items.⁵⁵ Consumers, therefore, tend to purchase low cost items online but are less likely to explore the terms of their contract in an online environment because the purchased items tend to be of a lower value.

Would any of these results be different if the language included within the clause provided information that specifically impacted their personal safety or legal rights? Consider the case of the over-used product warnings. As most people are aware, product warnings

48. *See id.*

49. *See id.*

50. *See id.* at 6.

51. *See id.*

52. *See id.*

53. The Terms & Conditions contained a seven paragraph contract entitled "CONSENT TO PARTICIPATE IN SOCIAL SCIENCE RESEARCH." *Id.* at 4.

54. *See* Shmuel I. Becher & Esther Unger-Avram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 212–15 (2010).

55. *See* Nikki Bard et. al., *Omni-Channel 2012: Cross-Channel Comes of Age* (June 2012), RETAIL SYSTEMS RESEARCH.

in the United States are so overused it rises to the level of the absurd.⁵⁶ The number, length, and overabundance of these warnings are often the fodder of jokes worldwide. Research shows that an oversaturation of product warnings leads people to ignore even useful warnings.⁵⁷ Moreover, from a language and perception context, commentators assert that legalese tends to be overlooked when it is readily apparent that the tone of the text has changed.⁵⁸ Even in the face of a clear warning about a product, most consumers will overlook the safety information if they perceive the product as being safe.⁵⁹ Although this research is specific to warning labels, one can take away some points in relation to the topic at hand. In the current discussion, the customer is shopping online for a low value item, and within this context they have most likely arrived a decision to purchase the item. As such, when faced with a clause that contains clear boilerplate legalese that seems to be in contrast to their perceptions about the product, the customer at best skims through the information, regardless of its potential legal importance or presentation style.

As a consequence of these consumer tendencies, many commentators argue that consumer contracts should contain highlighted text, bold typeface, or larger font sizes in an effort to increase consumers' attention to the important details of the agreement.⁶⁰ In the United States, Congress enacted the Magnuson-Moss Warranty Act in response to an increasing number of consumer complaints regarding the inadequacy of warranties on consumer goods.⁶¹ The purpose of the Magnuson-Moss Act is "to improve the adequacy of information available to consumers, prevent deception, and improve competition

56. See, e.g., Mike Marin, *Warning: Many Product Labels Caution Us About the Obvious*, THE NEWS SENTINEL, May 11, 2013 available at <http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/20130511/ENT/305119994/1009/LARSON>.

57. See, e.g., *Broussard v. Continental Oil Co.*, 433 So.2d 354, 358 (La. App. 1983) (concluding that placing too many warnings on the product would "decrease the effectiveness of all of the warnings"); see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i ("[E]xcessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings . . .").

58. See Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1107 (2006) (noting that drafters of contracts may "care more that a clause have a fixed meaning than a particular meaning").

59. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 698–99 (1999) (describing an instance of cognitive dissonance in which "consumers who make a purchase will be reluctant to process safety information that conflicts with their sense of having selected a beneficial, risk-free product").

60. See *infra* notes 66–68 and accompanying text.

61. See H.R. REP. NO. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7705–11.

in the marketing of consumer products”⁶² The law requires companies to “clearly and conspicuously”⁶³ disclose their informal dispute resolution programs in their written warranties,⁶⁴ including descriptions of the program, rules, and procedures.⁶⁵ Most United States-based customers are well aware of the large font size and/or bold typeface contained within their sales contracts. However, few can actually recall what the language pertained to or explain the importance of the language.⁶⁶ One study has called into question the use of such a device within a consumer contract, as the amount and conspicuousness of information provided up front had an inverse effect on the likelihood of reading fine print.⁶⁷ Consequently, while large text may draw the eye of the consumer, it reduces the likelihood of the consumer reading other non-emphasized text.⁶⁸ When one considers arbitration clauses contained within sales contracts, one has to be concerned with this finding since most arbitration clauses are hidden in the fine print. For example, the Federal Trade Commission determined that the arbitration clauses do not need a heightened level of emphasis when considering arbitration within the context of the Magnuson-Moss Act.⁶⁹ Since consumers view non-emphasized clauses as less important or needing less attention compared to emphasized clauses,⁷⁰ arbitration clauses are thereby easier to hide within the general terms of a sales contract.

This assertion has some tangential support. As Amy Schmitz points out in her analysis of consumer behavior in relation to online contracting containing arbitration clauses, “parties generally focus on key terms such as price, timing, and performance standards. They

62. *Id.*

63. 15 U.S.C. § 2302(b)(1)(B) (2012).

64. *See* 15 U.S.C. § 2302(a)(8) (2012).

65. *See* 15 U.S.C. § 2302(a)(9) (2012).

66. *See* Schmitz, *Pizza-Box Contracts*, *supra* note 44, at 876 n.90 (citing Zev J. Eigen, *Towards a Behavioral Theory of Contract: Experimental Evidence of Consent, Compliance, Promise and Performance* (2009 4th Annual Conference on Empirical Legal Studies, Working Paper, June 1, 2010), available at <http://ssrn.com/abstract=1443549> (exploring interactions of law, morals, and social norms on individuals' behavior with respect to adhesive contracts)).

67. *See id.*

68. *See id.* at 877.

69. The provisions do not require any additional highlighting, etc. *See* Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 Nev. L.J. 37, 53 (2007).

70. *See* Peter Tiersma, *The Language and Law of Product Warnings*, in LANGUAGE IN THE LEGAL PROCESS 54, 58 (Janet Cotterill ed., 2002) (“Faced with an apparent contradiction between the name of a product in large print (Sure-Guard) and a warning in much smaller letters that the product is not unbreakable, we tend to give more credence to the emphasi[z]ed message.”).

usually pay little attention to arbitration or other dispute resolution provisions unless they are especially cognizant or concerned with eventual problems or disputes.”⁷¹ Moreover, there is a consumer preference “for settling purchasing problems through discussions with company representatives, rather than more formalized processes.”⁷² One has to ask if this implies that consumers, preferring to resolve issues with a company, would overlook or consider an arbitration clause less significant regardless of bold typeface, because they prefer to resolve the issues without using a formal adjudication process.

B. *Consumers and Their Propensity To ‘Click and Submit’*

Despite having a greater opportunity in the online world to fully understand the terms and the impact of the terms upon the contractual relationship, the consumer does not use the information to his benefit and instead moves quickly through the contracting process. As highlighted by Corey Ciocchetti, “[f]rom the consumer perspective, the ‘just click submit’ phenomenon is caused by the simple concepts of: (1) must, (2) rush, and (3) trust.”⁷³ A consumer interacting with a website must have the item or the information he is seeking, he is in a rush to obtain it, and he trusts the website or regulators to protect him if any information gathered or agreement terms are outside the bounds of the law.⁷⁴ The consumer’s rush to obtain the item is so prevalent that he is even willing to reveal a high level of sensitive or personal information in order to proceed with the online order or activity.⁷⁵ The need to rush through purchases is a well-documented phenomenon. For example, Robert Hillman conducted a study in which ninety-two students were asked a series of questions in relation to their online purchasing behavior.⁷⁶ When the students were

71. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 129 (2010) (citing Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55–56, 60–62 (1963)) [hereinafter Schmitz, *Legislating in the Light*].

72. Schmitz, *Pizza-Box Contracts*, *supra* note 44, at 900.

73. Corey Ciocchetti, *Just Click Submit: The Collection, Dissemination and Tagging of Personally Identifying Information*, 10 VAND. J. ENT. & TECH. L. 553, 561 (2008).

74. *See id.*

75. *See id.*

76. *See* Robert Hillman, *On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, CORNELL L. FAC. PUBLICATIONS, 1, 4–5 (2005), available at http://scholarship.law.cornell.edu/lrsp_papers/29.

asked why they “fail to read the entire contract” sixty-five percent responded that they “are in a hurry.”⁷⁷ The students’ responses are unsurprising, given that consumers faced with a presumably predictable text tend to assume the text’s contents rather than actually read and interpret them.⁷⁸ Moreover, if consumers are told, either directly or indirectly, that a warning or disclaimer is legal boilerplate, included only to satisfy some legal requirement and not to effectively communicate information, they will likely treat it as such.⁷⁹ Consumers save time by making assumptions concerning the content of the text presented to them and selectively read based upon those assumptions.

In addition, many commentators argue that a consumer’s “must and rush” behavior is amplified for contracts of adhesion because the customer has a sense of demoralization and helplessness against companies’ form contracts.⁸⁰ In the situation where a customer feels powerless, his limited time and resources are better allocated to activities in which he has a level of input and/or control.⁸¹ Hence, the information pop-up window is considered an inconvenience to the consumer, who has already made the decision to purchase the item and knows full well that he has no control over the terms of sale, even if one of the terms is an arbitration clause. A must and rush consumer passively accepts terms contained within contracts of adhesion, including arbitration clauses, because he: (1) has limited resources in terms of time, (2) has no control over the terms, and (3) is not an active participant in the contracting process.⁸² Since the consumer likely does not read the contract, this passive acceptance is true even if the terms are contrary to standard industry practice, impact their legal rights, or are otherwise contrary to legal defaults.⁸³

Interestingly, there does seem to be one method of interrupting the must and rush behavior of online consumers — active engagement in the process. Previous research has considered active

77. *Id.* at 9.

78. See Laura A. Heymann, *Reading the Product: Warnings, Disclaimers, and Literary Theory*, 22 YALE J.L. & HUMAN. 393, 395 (2010) (discussing warnings and the appropriate use of language to convey meaning).

79. See Boardman, *supra* note 58, at 1120–21.

80. See Schmitz, *Legislating in the Light*, *supra* note 71, at 151.

81. See Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1607–09, 1627 (1998) (advancing “inertia theory” based on his findings that parties have an even stronger preference for default contract provisions than some theorists might expect).

82. See Schmitz, *Legislating in the Light*, *supra* note 71, at 128.

83. See Korobkin, *supra* note 81, at 1627.

processes in traditional settings, such as face-to-face interaction,⁸⁴ listening to information during telecommunications,⁸⁵ or the delivery of key information in both oral and written form.⁸⁶ Each method increased individuals' willingness to ask questions, pay attention, and presumptively behave in a contemplative manner.⁸⁷ However, early online consumer behavioral research suggests that the level of interaction required for a consumer to engage in an active process during an online activity may actually be minimal. While consumers report a continued lack of attention to terms when presented in pop-up windows,⁸⁸ series of individual windows,⁸⁹ and links,⁹⁰ they also report a willingness to read terms requiring the consumer to click "I agree."⁹¹ If these self-reported consumer behaviors are accurate, they suggest that consumers respond to a low level active process while online, which may slow down their must and rush response to the online commercial world. This willingness to delay their must and rush instinct could be short lived, and as such might only be beneficial if key information is delivered in a focused manner, not an entire contractual text. However, the research highlights the need to deliver key pieces of information, such as arbitration clauses, in an interactive process.

Some interesting conclusions can be drawn from this wealth of research presented in these two Parts. First, consumers fail to read information presented to them, and even when they read information they often fail to fully attend to the information, leaving them without real comprehension of the information presented.⁹² While consumers pay attention to information presented pertaining to high-ticket items, these are not the type of items traditionally purchased in the online environment. Consumers pay a slightly higher amount of attention to information that is presented in a larger font, but the

84. See Jeff Sovern, *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, ST. JOHN'S LEGAL STUD. RES. PAPER SERIES, No. 12-0010, at 19 (July 12, 2012 forthcoming), available at <http://ssrn.com/abstract=2103807>.

85. See Laura M. Buchholz & Robert E. Smith, *The Role of Consumer Involvement in Determining Cognitive Response to Broadcast Advertising*, 20 J. OF ADVERT. 4-17, (1991).

86. See Sovern, *supra* note 84, at 41-42.

87. See *id.*

88. Only five percent of the respondents are more likely to read when they "must click" on a link to another page to read the terms. See Hillman, *supra* note 76, at 14.

89. See *id.* at 13.

90. See *id.* at 14 (finding that only five percent of the respondents are more likely to read when they "must click" on a link to another page to read the terms).

91. See *id.* at 13.

92. See *supra* notes 43-53 and accompanying text.

use of a larger font distracts attention from other information being presented.⁹³ This is problematic in terms of arbitration clauses within contracts of adhesion as arbitration clauses are often easily hidden due to the sheer length of the total text, the legalese used, and the lack of emphasis placed on the text.

Must, rush, and trust are the key terms to consider when considering consumers online commercial behavior. In the online commercial environment, consumers save time by making presumptions concerning the text and legalese within language presented to them and selectively read based upon those presumptions.⁹⁴ Consumers' must and rush behavior is amplified when it comes to contracts of adhesion because the customer understands he has little choice in terminology and as such, consumer are accustomed to passively accepting terms contained within pop-up boxes and website links.⁹⁵ However, when a consumer is an active participant, even with something as simple as an "I accept" button, the consumer's attention can be drawn to the information provided.⁹⁶

Yet all of this consumer online behavior relies on one key component — trust. Consumers trust that they will be protected from terms contained within contracts of adhesion that are outside the bounds of lawful.⁹⁷ One could thus argue that there is a real need to ensure that consumers' trust is not misplaced. One way to accomplish this is to protect consumers from clauses that allow the stronger party to use arbitration in a significantly advantageous manner.

IV. LEGISLATIVE ATTEMPTS TO PROTECT CONSUMERS FROM ARBITRATION

In response to the realities of consumers' lack of attention and power within the contractual relation, legislatures and courts around the world have attempted to craft protections for consumers.⁹⁸ Even a conservative reading of the Hillman study's results⁹⁹ yields a clear pattern: consumers believe that the law will protect them, either by influencing or restricting terms contained within the contract or by refusing to enforce unfair terms. Unfortunately, crafting these protections is one of the highest hurdles to overcome before the creation

93. See *supra* note 55 and accompanying text.

94. See *supra* notes 73–79 and accompanying text.

95. See *supra* notes 80–83 and accompanying text.

96. See *supra* notes 84–91 and accompanying text.

97. See *supra* note 73 and accompanying text.

98. See Hillman, *supra* note 76, at 22–23.

99. See *id.* at 14–15.

of a cross-border, low value dispute resolution mechanism becomes a reality. One has to ask, are these protections actually useful, or do these non-harmonized protections simply get in the way of a modern cross-border e-commerce dispute resolution mechanism?

There are currently three approaches to arbitration clause regulation that are typically advanced: (1) prohibit the use of arbitration, (2) limit the final and binding aspects of the award, and (3) prohibit pre-dispute agreements to arbitration. All are problematic to the furtherance of cross-border ODR.

A. *Prohibiting Arbitration Does Not Protect Consumers*

Of all the attempted restrictions placed upon ODR, the prohibition on the use of arbitration and limits in relation to the final binding nature of the award are the most problematic. One should note, however, that the inclusion of arbitration within the cross-border ODR structure is an issue that has already been decided,¹⁰⁰ despite widespread criticism of the inclusion from numerous industries and commentators. As such, the use of arbitration as the third stage of the cross-border ODR mechanism is a currently a reality. However, the inclusion of arbitration will continue to present problems as numerous legislative initiatives seek to prevent: (1) the use of arbitration in its entirety and (2) the award being final and binding upon the parties, as discussed in the next Part. Removing arbitration as a legitimate means of resolving a dispute is shortsighted, especially in light of the growing availability of dispute resolution in an online world.¹⁰¹

One complaint about e-commerce is the lack of simple, rapid, efficient, and affordable legal redress in case of non-delivery; non-conformity of the delivered product; or shortcomings in after-sales services. Traditional courts are rarely the best option, as the vast majority of online cross-border consumer sales are for low value goods, and the problems that arise in these situations are often easily resolved.¹⁰² Most consumers perceive the judicial system to be overwhelming, expensive, time consuming, and often one-sided favoring

100. See O.D.R. Working Group 25th Sess., *supra* note 33, at 8.

101. As discussed by Working Group III at UNCITRAL. See *id.*

102. According to the July 2013 European Scoreboard “less than half of EU consumers (44%) find it easy to resolve disputes with sellers/providers through alternative dispute resolution (ADR) and fewer than four out of ten (36%) find it easy to resolve disputes through courts.” While “[s]ome common reasons for not pursuing a complaint are that it would have taken too long (37%); the sums involved were too

the business.¹⁰³ The limitations of the court system are further complicated by the distance between the parties and from the court, as well as foreign law and unfamiliar customs.

A well-designed ODR platform with a neutral ODR provider, however, increases access to justice, as it is cost effective, simple, accessible anywhere with Internet access, and expedient in resolving disputes. Academics and governments in the United States¹⁰⁴ and the European Union¹⁰⁵ have highlighted the lack of debate that a well-designed ODR platform would increase consumers' access to justice. The issue in terms of ODR is not really about access to justice; it is instead whether the ODR model should include mandatory arbitration in the case of consumers. For instance, the U.S. Supreme Court case of *AT&T Mobility, LLC v. Concepcion* (2011)¹⁰⁶ highlights the question of whether arbitration clauses within consumer contracts

small (37%); or a satisfactory solution appeared unlikely (27%).” European Commission, *The Consumer Conditions Scoreboard: Consumers at Home in the Single Market*, 9th ed. (July 2013) at 5, available at http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf. See also eMarketer, *Ecommerce Sales Topped \$1 Trillion for First Time in 2012* (eMarketer online (Feb. 2013), available at <http://www.emarketer.com/Article/Ecommerce-Sales-Topped-1-Trillion-First-Time-2012/1009649>).

103. See Marc Galanter, *Why the “Haves” Come out Ahead*, 9 L. & Soc’y Rev. 95, 121 (1974) (discussing the role of repeat players in the judicial system); Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 55–56 (1999); Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort? Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT’L ARB. 479, 480 (2005).

104. See United States Permanent Mission to the Organization of American States, Department of State, *United States Response to Proposals for a Convention and Model Law on Jurisdiction and Applicable Law*, Draft Inter-American Convention on The Law Applicable to International Consumer Contracts and Transactions, OEA/Ser.G CP/CAJP-2837/10 21 (Apr. 2010).

105. See, e.g., Commission Recommendation (EC) No. 310/2001 of 4 Apr. 2001 on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes, 2001 O.J. (L109) 56–61 [hereinafter Commission Recommendation 2001/310/EC]; Commission Recommendation (EC) No. 257/98 of 30 Mar. 1998 on the Principles Applicable to the Bodies Responsible for Out-of Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 31–34; [hereinafter Commission Recommendation 98/257/EC].

106. See *AT&T Mobility, LLC v. Concepcion*, 1315 S. Ct. 1740 (2011).

are unenforceable?¹⁰⁷ The answer should be no.¹⁰⁸ Yet, the use of arbitration in consumer contracts is widely restricted in Europe,¹⁰⁹ and recent legislative initiatives within the arbitration United States have prohibited or restricted the use of arbitration. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act provides that no residential mortgage loan, secured by the principal dwelling, may require any other non-judicial procedure as the method for resolving any controversy arising out of the transaction.¹¹⁰ Section 1028 of Dodd-Frank allows the Consumer Financial Protection Bureau to issue regulations that prohibit or restrict the use of mandatory arbitration agreements if, based on the results of a mandated study which it provides to Congress,¹¹¹ it finds this action to be “in the public interest and for the protection of consumers.”¹¹² Clearly, there is growing concern with the use of arbitration when consumers are involved in a relationship involving a power imbalance.

However, if an ODR cross-border B2C mechanism is to be developed, it will have to include arbitration to ensure enforcement. In the

107. Of course, the case highlights many issues — for example, the issue of class actions. Class actions are a mechanism frequently cited as one method of providing access to justice for consumers of low cost items. The Supreme Court of Canada in *Western Canadian Shopping Centres Inc v. Dutton* observed that without class actions, “the doors of justice remain closed to some plaintiffs, however strong their legal claims.” *Western Canadian Shopping Centres Inc v. Dutton*, [2001] 2 S.C.R. 534, para. 28. (Can.).

108. The case, however, was about a State’s (California) ability to prohibit arbitration clauses within a contract of adhesion. The Supreme Court determined this was a power reserved to the federal government via the Federal Arbitration Act (“FAA”). This is not to say, however, that states cannot review arbitration clauses within consumer contracts for provisions or aspects that are unconscionable. For a further discussion, see Anjanette H. Raymond, *It’s Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L.R. 666, 681–83 (forthcoming 2013) (discussing the case and the need for federal legislation on the issue) [hereinafter Raymond, *It’s Time the Law Begins to Protect Consumers*].

109. See Mary Shannon Martin, *Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT’L. L.J. 125, 155 (2002).

110. Dodd-Frank Wall Street and Consumer Protection Reform Act, Pub. L. No. 111-203, § 1414(e), 124 Stat. 1376, 2149–51 (2010) (codified at 15 U.S.C. § 1639(c) (2012)).

111. The Consumer Financial Protection Bureau announced on April 27, 2012 that it has initiated its study of consumer arbitration as mandated by section 1028 of the Dodd-Frank. See Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25, 148 (Apr. 27, 2012).

112. Dodd-Frank Act, Pub. L. No. 111-203, § 1028(b), 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C. § 5518 (2012)).

cross-border e-commerce B2C world, when a dispute arises, the parties must have a simple and effective mechanism to enforce their final outcome. For now, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)¹¹³ is the only feasible means of enforcing the outcome of the ODR process that applies to a wide range of B2C cross-border disputes. Promulgated by the United Nations Commission on International Trade Law, the New York Convention requires states to follow common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.¹¹⁴ Currently, there are 146 parties to the Convention, including the United States, all of Europe, Asia, Africa, and the majority of the Middle East.¹¹⁵ The convention is widely regarded as a successful international harmonizing instrument that has greatly promoted the use of arbitration to resolve international commercial disputes.¹¹⁶

While there has been some debate concerning the applicability of the convention to international online commercial disputes involving consumers,¹¹⁷ the majority of current commentary supports its application to the online commercial B2C environment.¹¹⁸ The ability of the ODR process to contain arbitration as a third stage, and hence to draw benefit from a worldwide enforcement mechanism, cannot be overstated. Because the arbitration awards are enforceable worldwide through a simple and efficient judicial process, arbitration is a necessary final stage within the cross-border ODR platform to ensure enforcement of the final award.

Of course, there are several other options to enforce final outcomes that do not arise from arbitration, but each of these are based

113. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T. 2517, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [hereinafter New York Convention].

114. See JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 693 (2003).

115. See U.N. Comm'n on International Trade Law, Status 1958, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

116. See, e.g., LEW ET AL., *supra* note 114, at 693–94; NIGEL BLACKABY ET AL., *REDFERN & HUNTER ON INTERNATIONAL ARBITRATION* (5th ed. 2009); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (3rd. ed 2009).

117. See Mohamed S. Abdel Wahab, *ODR and E-Arbitration*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 387, 415–18.

118. Provided they comply with the requirements of the New York Convention, such as final and binding awards and compliant with basic due process requirements. See *id.* at 412.

in either a judicially supported system of ODR¹¹⁹ or contained within a single purchase or payment system.¹²⁰ In fact, the largest ODR platform, SquareTrade, reports that an estimated eighty-five percent of disputes¹²¹ are resolved well before the arbitration stage of ODR. However, the research into this area focuses on domestic sales. Moreover, the outcome of the dispute is often enforceable within a self-contained payment mechanism, such as a chargeback,¹²² which is usually coupled with a reputational system. These enforcement mechanisms work very well but are limited to parties with credit cards, and often to domestic law and credit card or sales contracts that allow chargebacks.

Moreover, the business community has not demonstrated a willingness to not take advantage of the insertion of an arbitration clause within consumer contract. The easiest way to seek this advantage is to refuse to cooperate with any resolution that does not have the backing of the judiciary. However, mediation lacks predictable and expedient cross-border enforceability. Although a party failing to honor a mediation agreement is considered to be in breach of the agreement, resolution requires judicial involvement, which is costly, time consuming, and oftentimes uncertain. Consequently, mediation awards in the cross-border context are only as strong as the parties' willingness to honor their agreement.¹²³

119. As is envisioned within the Europe through the recent adoption of the Directive on consumer ADR and the Regulation on consumer ODR. See European Commission, *New Legislation on Alternative and Online Dispute Resolution (ADR) and (ODR)* (June 18, 2013), http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm [hereinafter EUROPA Press Release].

120. eBay is probably the most successful system to date. It is a self-contained though very large system, which has a defined base of sellers and buyers. eBay has ultimate control of its 'members' and controls members' reputations as a built-in enhancement to enforcement (this issue will be discussed later). See generally Ethan Katsh, Janet Rifkin & Alan Gaitenby, *E-commerce, E-disputes and the E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON. DISP. RESOL. 705, 724-27 (2000) (discussing the progression of eBay).

121. See Juan Pablo Cortez Dieguez, *Does the Proposed European Procedure Enhance the Resolution of Small Claims?* 27 CIV. JUST. Q. 83, 96 (2008), available at http://www.academia.edu/228025/Does_the_proposed_European_procedure_enhance_the_resolution_of_small.

122. See Vikki Rogers, *Knitting the Security Blanket for New Market Opportunities*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION *supra* note 14, at 95, 102.

123. One study of Maine courts compared the compliance rate of payment made by defendants using mediation with those that were decided by the court. In the mediated cases, 70.6% defendants paid in full, 16.5% paid in part and 12.8% did not pay at all. By contrast, in the cases decided by the judge, only 33.8% of defendants paid in full, 21.1% paid in part and 45.1% did not pay at all. See Lorig Charkoudian, *Giving*

If the purpose of ODR is to improve the position of the consumer and provide him a better access to justice, the absence of an easily enforceable award dilutes the entire system. No party should be allowed to delay justice through the breach of a mediation agreement. Since arbitration is enforceable through the New York Convention, using it as a mandatory third stage of the dispute resolution process reduces this dilatory tactic and thereby creates a more efficient and expedient system that greatly improves enforcement. Ideally, disputes would never get to the “third stage” of the ODR process, yet the use of mandatory arbitration as the final stage may be one of the key components to ensure a consumer’s access to justice.

B. Limiting Arbitration to a Non-Binding Outcome Is Really the Answer

Despite the clear need to include arbitration as the third stage within the low value cross-border B2C ODR process, many legislative initiatives seek to remove one of the key advantages to such an inclusion — the final and binding nature of the award.¹²⁴ First, as previously discussed, mandatory arbitration is an essential step in the ODR process, as it will increase the likelihood of compliance with the final award through the use of the enforcement mechanism in the New York Convention. Under the New York Convention, a court can refuse to recognize or enforce an award if “the award has not yet become binding on the parties”¹²⁵ Consequently, in order for an arbitration award to be enforced under the wide reach of the New York Convention, the award must be final and binding¹²⁶ upon the parties. Although the phrase “final and binding” has been subject to definitional arguments, there is little doubt that the production of a

Police and Courts a Break: The Effect of Community Mediation on Decreasing the Use of Police and Court Resources, 28 CONFLICT RESOL. Q. 141, 142 (2010).

124. For example, binding arbitration is restricted within one of the newest texts of Europe, the Directive on consumer ADR and the Regulation on consumer ODR. “ODR is not intended to and cannot be designed to replace court procedures, nor should it deprive consumers or traders of their rights to seek redress before the courts. This Regulation should not, therefore, prevent parties from exercising their right of access to the judicial system.” Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L165) 1, 3 at para. (26).

125. New York Convention, *supra* note 113, at art. V(1)(e).

126. “Binding” generally means that no further arbitral appeals are available but this does not mean that there has been an exhaustion of all court appeals in the country in which an arbitral award was rendered. See Gerald Aksen & Wendy S. Dorman, *Application of the New York Convention by United States Courts: A Twenty Year Review (1970–1990)*, 2 AM. REV. INT’L ARB. 65, 83 (1991).

final and binding award is the first essential step in seeking recognition and enforcement of the award.

Despite the importance of final and binding awards, legislatures have sought to eliminate (1) the final and binding nature of the award and/or (2) the binding nature of the award in relation to one of the parties. In the United States, Congress has shown a proclivity to protect consumers through limitations placed on the binding nature of arbitration awards. For example, under the Magnuson-Moss Act, the decisions of an informal dispute settlement mechanism "shall not be legally binding on any person."¹²⁷ The Magnuson-Moss Act is not applicable in cross-border disputes, but it does highlight one of the larger legislative attempts within the United States to protect consumers from ADR clauses within consumer agreements. Could this also be the position that the United States would take in relation to cross-border disputes? It seems unlikely, but the provisions are still concerning, as they signal a growing United States legislative attitude against consumer arbitration.

In contrast, restrictions placed upon the outcome of the arbitration process are the norm in Europe. Compulsory arbitration agreements are prohibited in Europe. However, "soft" forms of arbitration might be permitted, provided that an agreement to arbitrate arises after "the dispute has materialised[.]"¹²⁸ In these situations, some European commentators argue that a reading of Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes¹²⁹ and the Unfair Terms Directive¹³⁰ allow arbitration, provided that: (1) it is individually negotiated or (2) it does not affect consumers' right to resort to court.¹³¹ Since the vast majority of online sales are completed through the use of a contract of adhesion,¹³² the likelihood of an individually negotiated arbitration clause contained within a low value online sale is slim. In practical terms, the impact of these provisions is that even non-mandatory arbitration cannot result in a final outcome, as recourse to the courts must be allowed.

Including a provision that requires access to the courts post-arbitration would defeat one of the main reasons for arbitration as the

127. 16 C.F.R. § 703.5(j) (2003).

128. Commission Recommendation 98/257/EC, *supra* note 105, at 33.

129. *Id.* at 31.

130. See Council Directive 93/13, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) (EC). [hereinafter Council Directive 93/13/EC].

131. See Zheng Tang, *An Effective Dispute Resolution System for Electronic Consumer Contracts*, 23 COMP. L. & SEC. REP., 42, 47 (2007).

132. Cf. Kessler, *supra* note 37, at 636; Rakoff, *supra* note 37, at 1220.

final stage of the cross-border ODR process — the use of the New York Convention to enforce the award. Without the award being final and binding, there are few reasons to include arbitration within the ODR process as the New York Convention will not allow the enforcement of a non-final award.¹³³ Second, creating a system of non-binding outcomes misses the main point of cross-border ODR: providing a fast and economically efficient means of resolving a dispute. Creating a system that has three non-binding levels that ultimately end up in the courts will do nothing more than frustrate consumers yet again. One can almost imagine the next round of research that will report consumers' responses to questions about their experience with the ODR process: "You mean I have to go through three rounds of frustration and then I still have to go to court?" Quickly followed by the consumer asking, "Isn't this for a \$200 (or less) dispute?" The elimination of the final and binding nature of an arbitration award is a poor choice and will ultimately not protect the consumer. Instead, it will add yet another layer of frustration to the process.

One proposal offered in response to this criticism is to make the arbitration award binding upon the business but not the consumer.¹³⁴ While this is an interesting attempt to protect the consumer, this type of award is not enforceable under the New York Convention, as the award must be final and binding on *the parties*.¹³⁵ The wording of the provision is clear — the award must be binding on *both* parties. Consequently, cross-border rules with non-binding awards will find the New York Convention inapplicable.

Moreover, the legislative attempts to create a non-binding award to protect consumers should be considered a consumer protection that shifts the balance of power too significantly. Although the majority of this paper considers the standpoint of the consumer, it is important to recognize that consumer protections must be balanced between the business and consumer. Otherwise, the business will simply not engage in cross-border transactions. Cross-border commercial transactions involving a consumer are already a risky proposition for a business. The business has to navigate various commercial sale laws, worry about the hazard associated with shipping goods over a longer

133. See Commission Recommendation 98/257/EC, *supra* note 105, at 31–34.

134. For example, in the United States the Better Business Bureau offers 'Conditionally Binding Arbitration,' which provides customers the ability to accept a valid decision; however, the business is legally bound to abide by the decision. See BETTER BUSINESS BUREAU, Rules of Conditionally Binding Arbitration, Rule 28G, available at <http://www.bbb.org/us/Dispute-Resolution-Services/Conditionally-Binding/>.

135. See New York Convention, *supra* note 113, at Art. V(e).

distance and ensuring that domestic consumer protection laws are observed, all while taking a leap of faith that the customer is not using a stolen credit card and that a real person is placing the order. Yet, these risks are worth the opportunity to increase access to a larger pool of customers and should be assumed as a cost of doing business in a cross-border environment. Just like consumers, businesses in the online world worry about lengthy, costly, or otherwise prohibitive systems to resolve disputes.¹³⁶ The absence of a quick, predictable, and efficient redress system should not be a cost of doing business in cross-border online sales when the goal is to increase cross-border e-commerce.

C. *Prohibition on Pre-Dispute Agreements To Arbitrate*

The final common consumer protection in relation to arbitration does not directly or immediately impact the enforceability of the arbitration award. Instead, the issue is the timing of the formation of the agreement to arbitrate. Within this area, a great divide exists between Europe and the United States, which in the long run may impact the cross-border ODR system to a greater extent than any other issue previously considered.

The European Union has long sought to protect consumers in a variety of ways. Council Directive 93/13/EEC and Commission Recommendation 98/257/EC both play a central role in assessing the “unfairness” of arbitration clauses in consumer contracts.¹³⁷ Council Directive 93/13/EEC stipulates that consumers may challenge standard provisions in consumer contracts as unfair.¹³⁸ In the view expressed in the Directive, consumers can challenge “disproportionate” provisions, which create a marked imbalance at the expense of the consumer and are thus at odds with the proportionality requirement.¹³⁹ While clauses must be examined on a case-by-case basis, some are considered *prima facie* unfair,¹⁴⁰ such as those that irrevocably bind the consumer to terms that they had no real opportunity of

136. In fact, some businesses are concerned about the absence of due process. See *Arbitration Aggravations*, BLOOMBERG BUS. WK., 38–39 (Apr. 29, 2007) (arguing that there is a growing concern reported by arbitration council that the arbitrators, who want repeat business, won’t want to offend either side and so will essentially split the baby to resolve disputes).

137. Council Directive 93/13/EC, *supra* note 130; Commission Recommendation 98/257/EC, *supra* note 105.

138. Other than those concerning the price or the subject matter of contract. Council Directive 93/13/EEC, *supra* note 130.

139. *Id.*

140. Subject to contrary evidence. *Id.*

becoming acquainted with *before the conclusion* of the contract.¹⁴¹ One could argue the Directive provision is applicable if the consumer enters into an arbitration agreement that is contained within a contract of adhesion.

The absence of clarity in the “unfair” provision has prompted several domestic bodies within Europe to give more breadth to the Directive. For example, section 617 of the Austrian Code of Civil Procedure allows the conclusion of arbitration agreements only for disputes that are already pending, and even then only subject to the fulfillment of special criteria, especially with regards to the form of the arbitration agreement.¹⁴² In contrast, the pro-arbitration courts of Germany have determined that arbitration agreements are generally not “surprising” for consumers and do not put the party that accepted the [general] terms of contract at a disadvantage.¹⁴³ One can quickly see the divergence in interpretation of the enforceability of pre-dispute arbitration clauses within contracts of adhesion.

The lack of certainty also exists in the United States, with the courts sharply divided on the issue of the enforceability of pre-dispute binding arbitration of written warranty claims.¹⁴⁴ The U.S. Supreme Court has yet to examine this issue, but certainly will need to when

141. *Id.* at 33.

142. For example, the agreement must be signed in person by the consumer, who must have received instructions regarding the differences between arbitration and litigation. *See* Bělohávek, *supra* note 1, at 2.14.

143. *See id.* at 2.16.

144. Most appellate courts that have addressed the issue, including the U.S. Courts of Appeal for the Fifth and Eleventh Circuits, as well as the state supreme courts in Illinois, Texas, Michigan, and Alabama, have held that Magnuson-Moss Warranty Act (“MMWA”) claims are arbitrable. *See* Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 479 (5th Cir. 2002); Davis v. Southern Energy Homes Inc., 305 F.3d 1268, 1275 (11th Cir. 2002); Southern Energy Homes Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000) (*per curiam*); Borowiec v. Gateway 2000 Inc., 808 N.E.2d 957, 965–66 (Ill. 2004); Abela v. General Motors Corp., 677 N.W.2d 325, 327–28 (Mich. 2004); *In re* American Homestar of Lancaster, Inc., 50 S.W.3d 480, 483–92 (Tex. 2001). But some courts — including the Mississippi Supreme Court and Maryland’s highest court — have refused to enforce these agreements. *See* Koons Ford of Baltimore Inc. v. Lobach, 919 A.2d 722, 737 (Md. 2007); Parkerson v. Smith, 817 So. 2d 529, 549, 553 (Miss. 2002) (*en banc*); Rickard v. Teynor’s Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003); Browne v. Kline Tysons Imports, Inc., 190 F. Supp. 2d 827, 831 (E.D. Va. 2002). Most recently, a divided panel of the Ninth Circuit joined the minority position in *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1030–31 (9th Cir. 2011), *pet. for reh’g en banc* filed, No. 09-55963 (9th Cir. Oct. 4, 2011). In an opinion authored by Judge Stephen Reinhardt, the majority held that claims under the MMWA cannot be arbitrated. *Id.* at 1031.

presented with an appropriate case.¹⁴⁵ If the Supreme Court were to rule against the use of pre-dispute arbitration covered by the Magnuson-Moss Act, could this decision be extended to pre-dispute arbitration agreements involving cross-border disputes? Probably not, as the issues arising under the Magnuson-Moss pre-dispute arbitration enforceability rests in some very specific language within the Magnuson-Moss Act. More importantly, the U.S. Supreme Court has historically upheld arbitration clauses in relation to consumers.¹⁴⁶ The famous Supreme Court cases of *Allied-Bruce Terminex v. Dobson*¹⁴⁷ and *Doctor's Associates v. Casarotto*¹⁴⁸ clearly delineated the law and set the precedent that arbitration provisions should be treated "upon the same footing as other contracts"¹⁴⁹ under United States law, and this includes pre-dispute arbitration agreements.¹⁵⁰ More recent Supreme Court decisions, including *AT&T Mobility, LLC v. Concepcion* (2011)¹⁵¹ and *CompuCredit Corp. v. Greenwood*

145. See Archis A. Parasharami, Kevin Ranlett & Scott M. Noveck, *Are Claims Under the Magnuson-Moss Warranty Act Exempt from Arbitration?*, BLOOMBERG BNA's U.S.L. WK., April 2012, at 1, 1.

146. See generally Raymond, *It's Time the Law Begins to Protect Consumers*, *supra* note 108.

147. 115 S. Ct. 834, 838–39, 841 (1995). See generally Janet M. Grossnickle, *Allied-Bruce Terminix Cos. v. Dobson: How the Federal Arbitration Act Will Keep Consumers and Corporations out of the Courtroom*, 36 B.C.L. REV. 769, (1995) (explaining that the FAA will increase the likelihood that contracts will prohibit the use of courts as a means for consumers and corporations to resolve disputes).

148. *Doctor's Associates v. Casarotto*, 116 S.Ct. 1652, 1656 (1996).

149. *Id.* For reviews of the interplay between the Supreme Court's interpretation of the Federal Arbitration Act and state legislation, see generally Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 670–74 (1996); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 189–93 (2002); Raymond, *It's Time the Law Begins to Protect Consumers*, *supra* note 108, at 673.

150. See *Marmet Health Care Center v. Brown et al.*, 132 S.Ct. 1201, 1204 (2012) (upholding a pre-dispute agreement to arbitrate in a nursing home contract). See also Michael L. Rustad, Richard Buckingham, Diane D'Angelo & Katherine Durlacher, *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 644 (2012) SUFFOLK U.L. RES. P., No. 12-18, available at <http://ssrn.com/abstract=2043199>; Michael H. LeRoy & Feuille, Peter, *Judicial Enforcement of Pre-Dispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 277–88 (2003); Margo E. K. Reder, *Securities Law and Arbitration: The Enforceability of Predispute Arbitration Clauses in Broker-Customer Agreements*, COLUM. BUS. L. REV. 91, 92 (1990); S.I. Strong, *Mass Procedures as a Form of "Regulatory Arbitration"*, *Abaclat v. Argentine Republic and the International Investment Regime*, 38 THE J. CORP. L. (forthcoming 2013) (manuscript at 3); John Wood, *Opening the Door to Justice: Amending the Federal Arbitration Act to Remedy the Unjust Use of Predispute Arbitration Agreements* 4–5 (Feb. 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=2014428>.

151. *AT & T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1756–58 (2011).

(2011),¹⁵² make it clear that the Court favors broad enforcement of consumer arbitration agreements.

Despite numerous decisions that widely support consumer-based arbitration, consumers remain skeptical of the arbitration process.¹⁵³ This consumer bias has been recognized by United States businesses as they seek to ensure consumers of their willingness to address consumers' arbitration concerns. For example, Peter Rutledge and Christopher Drahozal recently studied the dispute resolution clauses contained within credit card agreements. They found that a large majority of credit card issuers do not include arbitration clauses in their credit card agreements.¹⁵⁴ A sizable portion of "credit card arbitration clauses expressly permit cardholders to bring claims in small claims court."¹⁵⁵ Although further research is certainly needed, and these early results are limited to a specific industry, some businesses recognize the need to have an expedient and efficient access to justice mechanism in place for consumers. This might be best accomplished by offering the choice of arbitration after the initial internal complaint process has broken down, but before the more formal dispute resolution process begins. Could the prohibition on pre-dispute arbitration clauses be the wave of the future that would actually protect consumers in the United States?¹⁵⁶ Strangely, this may be a time when the answer is an enthusiastic "maybe."

152. 131 S. Ct. 2874, 2885 (2011) (upholding arbitration of claims under Credit Repair Organizations Act).

153. As evidenced by the continual introduction of the Arbitration Fairness Act within the United States. See Arbitration Fairness Act, H.R. 1873, 112th Cong. § 402(a) (2011). For a further discussion, see Raymond, *It's Time the Law Begins to Protect Consumers*, *supra* note 108, at 684.

154. Over eighty percent. See Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2 BYU L. REV. 1, 41, available at <http://ssrn.com/abstract=210139941>.

155. Sixty-one and one tenth percent of issuers; 98.4% of credit card loans outstanding. *Id.* at 41.

156. See generally Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CON. PROT. J. 11, 115 (1993) (discussing adhesion contracts and consumer protections); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. DISP. RESOL. 267, 267(1995) (discussing the limits of consumer protections); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1385 (1996) (discussing the decreasing role of consent in arbitration); Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U.L. REV. 1, 3 (1992); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C.L. REV. 931, 1017 (1992) (discussing the expansion of the FAA and its impact on arbitration); Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50

First, it is worth noting that numerous arguments exist to enforce terms in a contract of adhesion, even one that includes an ADR clause. As can be seen within United States academic¹⁵⁷ and case commentary,¹⁵⁸ there is little doubt that the world of contracting places a very high value on freedom of contract, honoring bargains, and enforcing contractual terms, even those that pertain to consumers faced with mandatory arbitration clauses.¹⁵⁹ Certainly, as an academic that argues on a consistent basis for freedom of contract and the importance of enforcing agreements as written (with certain exceptions), I am not in a position, nor do I desire, to disagree with the vast majority of scholars and case law. However, a post-dispute

DEPAUL L. REV. 1191, 1211 (2001) (discussing the elimination of consumer protections through arbitration); Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1343–44 (2002); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 54 (2003); Margaret L. Moses, *Privatized 'Justice'*, 36 LOY. U. CHICAGO L.J. 535, 560 (2005).

157. See, e.g., Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–59, 262–64 (2006) (asserting that pre-dispute agreements should be enforced because they reduce process costs, especially attorney's fees, for employees and consumers that would not be possible through post-dispute agreements); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 284 (2004); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, WIS. L. REV. 33, 53 (1997).

158. See, e.g., Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 866 (2004) (asserting post-dispute agreements do not raise the same incentive concerns as pre-dispute agreements); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567 (2001) (finding post-dispute agreements to be an "illusory" alternative); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317–18 (2003) (enforcing post-dispute agreements to arbitrate will not work well in practice); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 32 (2003) (asserting post-dispute agreements to arbitrate are unwise and not likely to occur); Ware, *supra* note 157, at 263–64 (2006) (asserting that employees and consumers gain by lowering transaction costs through pre-dispute agreements and that gain would not be possible with post dispute agreements).

159. However, in this particular area targeted research is sparse. See Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 161 (2004) (asserting that "[t]he field needs a well-designed empirical examination of how arbitration compares to the traditional litigation process, preferably using random assignment or matched pairs of cases").

agreement to arbitration has several advantages,¹⁶⁰ especially in light of the need to create a harmonized cross-border ODR instrument.

As previously highlighted, consumers do show a willingness to pay attention to information that is particularly relevant to an issue at hand. While consumers' pay little attention to arbitration clauses presented to them at the time of sale, they pay attention to terms that are relevant at the moment of presentation of the term.¹⁶¹ In addition, while consumers prefer to settle issues through a discussion with the company,¹⁶² their attention could turn toward the need to resolve the dispute through other available means once that avenue has been exhausted. One could thus argue that consumers may pay attention to a contract that has as its main purpose the establishment of the dispute resolution process, especially if the consumer has already been unsuccessful in resolving the dispute through informal means.

Second, the issues related to "must and rush" may be completely eliminated when the contract is not about quickly receiving goods, but instead about resolving an issue that stands in the way of the customer receiving the goods that they ordered. This is no longer a must and rush situation. The simple fact is that the timeframe for must and rush purchasing is long over in terms of the consumers' perspective. Instead, the consumer is focused on resolving the issue at hand: creating the dispute resolution mechanism that will allow them to resolve their issue with the merchant.

Third, there would be considerably less opportunity for the business to hide, bury, and overcomplicate the arbitration clauses within a larger purchase contract. In fact, as discussed in Part V, a well-designed ODR platform will eliminate the business' ability to craft the ODR contract after the dispute has moved into the more formal ODR process.

Fourth, there is an issue that has been pointed out in relation to post-dispute arbitration contracts — incentives to agree to use ODR over litigation. In terms of economic incentives, one can appreciate that a post-dispute arbitration agreement may be more difficult to

160. See, e.g., Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 251 (2004) (asserting that arbitration systems designed by one party over a weaker party should be treated "with a healthy dose of skepticism" by the courts because it may "allow one party to nullify public policy as embodied in law").

161. See Schmitz, *Legislating in the Light*, *supra* note 71, at 128.

162. See Schmitz, *Pizza-Box Contracts*, *supra* note 45, at 881.

negotiate. Both parties are now fully aware of the issue at hand and are likely to be past the stage of behaving in a hospitable manner. Moreover, neither party may want to run the risk of entering into an unfavorable agreement, especially if the parties are aware of the full nature of the issue and the potential strengths and weakness of the complaint.¹⁶³ Although such criticisms are often based in employment law and international commercial arbitration commentary, these same criticisms apply to post-dispute arbitration agreements that relate to e-commerce as well. However, the economic incentive may be less salient in ODR for several reasons: (1) while the nature of the complaint is known, there are often fewer tactical positions or defenses raised in a simple consumer to business e-commerce dispute; (2) the technology used could prevent the full disclosure of opposition position information; (3) the technology used could assist the consumer in fully appreciating the nature and legal protections available, and as such, the information imbalance could be overcome; and (4) the need to be expedient in the resolution of a relatively straight forward e-commerce dispute may trump the need to position oneself in terms of litigation strategy and outcome.

Finally, when considering the harmonization and the creation of a cross-border e-commerce ODR text, post-dispute arbitration agreements may be the best choice in light of the overwhelming desire to move ahead with the drafting text. The current state of the law in many countries means that there are significant limitations placed on arbitration clauses within consumer contracts. However, almost all legal systems would enforce post-dispute agreements to arbitrate, as long as the business is using its more powerful position to create a disproportionately unfair provision. As discussed in Part V, the ODR provider and the corresponding platform technology can facilitate the creation of the agreement without delay or additional cost. One could thus argue the disadvantages would be slight in this particular case. In fact, the International Chamber of Commerce has long used a process called the "Terms of Reference," when conducting international commercial arbitration. At its essence, it is nothing more than an agreement to arbitration procedure and an affirmation of a full agreement to arbitrate post-dispute. Moreover, at least some businesses,

163. See Estreicher, *supra* note 158, at 567; Maltby, *supra* note 158, at 316; Sherwyn, *supra* note 158; Ware, *supra* note 157, at 262; Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 74 (2007).

such as the credit card industry and others, are beginning to recognize the importance of allowing dispute resolution choice at the point that the dispute has arisen.

As can be seen, although outright prohibitions and significant limitations relating to ODR and/or arbitration for the resolution of consumer-based e-commerce disputes are a poor choice, the use of a post-dispute agreement needs further exploration. Post-dispute agreements, when done correctly through the use of an ODR service provider, may engage the consumer in a more active process, reduce the power imbalance between the parties, and allow for harmonization of a cross-border ODR system to be widely adopted. However, as explained in the next part, such a system may fail if the service providers are not considered an essential part of the process.

V. TECHNOLOGY AND SERVICE PROVIDERS AS KEYS IN CREATING AN INFORMED CONSUMER

The rise of the Internet has seen a rise in demand for online dispute settlement mechanisms. This need has existed since the early days of widespread access to the Internet; however, as technology advanced, so did the needs of the online community.¹⁶⁴ Today as more activity occurs across national lines, it is not surprising that ODR is a growing necessity. For example, in 2001 the European Commission published a Recommendation on the principle of mediation/conciliation, which stresses:

New technology can contribute to the development of electronic dispute settlement systems, providing a mechanism to effectively settle disputes across different jurisdictions without the need for face-to-face contact, and therefore should be encouraged through principles ensuring consistent and reliable standards to give all users confidence.¹⁶⁵

The recommendation also highlights that a successful technology-based ODR platform will ensure the impartiality, transparency, effectiveness, and fairness of the overall system.¹⁶⁶ If this is true, why haven't ODR systems been more widely used in the cross-border commercial world? Academics advance several theories as to the cause of the absence of cross-border ODR, but most point to the concerns surrounding the online consumer in a cross-border commercial

164. See Ethan Katish, *ODR: A Look at History*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 9, 13.

165. Commission Recommendation 2001/310/EC, *supra* note 105, at 57.

166. See *id.* at 58.

environment.¹⁶⁷ These concerns become amplified when the ODR mechanism includes mandatory final and binding arbitration as the final stage of the process, since this effectively removes judicial oversight from the process. Within the context of this paper one must ask, how can dispute resolution designed technology and the service provider assist in reducing the hesitation in relation to consumers? The simple answer is that we need to stop using technology as a passive information delivery provider and instead allow technology to be used as a fourth party in the dispute resolution process.

A. *Service Providers and the Platforms They Design as a Key Ingredient*

It has long been recognized the technology can and should assist in the process of dispute resolution.¹⁶⁸ In fact, technology is already being widely used as both an assistant and a full participant in the dispute resolution process.¹⁶⁹ However, no cross-border systems exist for cross-border, low value, consumer-to-business disputes, and few domestic systems use technology in a manner that would be necessary to create an enforceable and widely regarded cross-border dispute resolution system.¹⁷⁰ The following is one suggestion of how such a system could work as it relates to the creation of the dispute resolution agreement.

As consumers ourselves, most of us are well versed in the complaint process of the business world. Consumer Q fails to receive the items ordered within the timeframe stipulated by Merchant K. Consumer Q notifies Merchant K of the issue, by telephone or an online

167. See generally Pablo Cortes, *Online Dispute Resolution for Consumers*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION, *supra* note 14, at 139, 149–50.

168. See Ethan Katsh, Leon J. Osterweil, Norman Sondheimer & Daniel Rainey, *Experimental Application of Process Technology to the Creation and Adoption of Online Dispute Resolution*, Proceedings of the 7th Annual International Conference on Digital Government Research, DG.O 2006, ACM International Conference Proceeding Series, San Diego CA, May 2006, pp. 273–74, (2006) (noting that a technology-intensive approach should be widely accepted in dispute resolution as a “fourth party”).

169. See, e.g., Arno R. Lodder & John Zeleznikow, *Artificial Intelligence and Online Dispute Resolution*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION, *supra* note 14, at 61.

170. Many United States judicial systems allow for the limited use of technology and arbitration, but none truly allow for the proceeding to not occur in person. For example, the Northern District of California is one of ten federal district courts authorized by 28 U.S.C. §§ 651–58 to establish a mandatory, nonbinding court-annexed arbitration program; however, the program still requires an in-person hearing. See BARBARA S. MEIERHOEFER, FED. JUDICIAL CTR., COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 13 (1990).

form. If all goes well, Merchant K resolves the issue to Consumer Q's satisfaction. Although this scenario depicts a relatively straightforward and well-known process, the internal complaint process must be understood by those designing the overall ODR mechanism. For the consumers, the first stage of resolving their issue often involves the consumer being provided with information that assists in adjusting their expectations.

Many consumer complaints involve late delivery and simple issues, each of which can be quickly resolved by the merchant. For the merchant, this first stage is essential because gathering complaints often signals issues within supply chains and basic order fulfillment functions. This information can then be used to create more efficient and productive systems. As such, this is an essential internal control stage for the business and should be subject to limited regulation. However, internal business complaint systems are also obviously designed and controlled by the business itself, which also implements the outcomes. Consequently, the ODR mechanism must regulate any attempt on the part of the business to mislead, misinform, or misuse the information provided by the consumer.

This limited regulation should not be interpreted as requiring businesses to implement such a system. Both businesses and consumers should be allowed to break off communications at any time, should they feel the process is not moving forward or being resolved in an inappropriate manner.

At the point that either party desires to move outside the businesses' internal process, the consumer should be able to quickly find — or be presented with — a webpage that provides links to ODR providers that the business has selected as its recommended dispute resolution providers. The business would be able to display these providers and use their services, provided they comply with the ODR Code of Conduct discussed in the next Part. It would be within the hands of the consumer to select one of the recommended providers as the business would assent to the use of the provider by displaying the ODR provider's information.

Once a provider is selected, the consumer would no longer be located on a webpage controlled or influenced by the business. Instead, the consumer would visit a webpage controlled entirely by the ODR provider. The ODR provider could then provide the necessary information to the consumer about the arbitration process and, more importantly, the choices that the consumer has within the dispute process. One of these choices would be to opt against pursuing a claim

with the chosen ODR provider, but to instead elect among: (1) abandoning the dispute altogether; (2) selecting a different ODR provider; and (3) pursuing the claim in domestic court. The information page could contain information such as: definitions and explanations, process expectations, typical outcomes, traditional length of time to resolve disputes, and a table comparing and contrasting the ODR with the traditional court process.¹⁷¹ After the consumer selects the ODR provider, the consumer would become an active participant in forming the dispute resolution agreement. It is at this point that the consumer would enter into an ODR agreement that would include as the third stage — mandatory, final, and binding arbitration.¹⁷²

The creation of the arbitration agreement at this later stage of the process eliminates some key concerns raised in the above Parts of the paper. For example, after the dispute, the consumer is more likely to be paying attention and reading the information, as the dispute is the key issue in their minds.¹⁷³ The use of technology may just provide the opportunity to create an active process of dispute resolution clause creation, thereby increasing the likelihood that the consumer will pay attention to key dispute resolution terms.¹⁷⁴ The consumer could be asked to read a paragraph containing links to more information and a clear description that recourse to the court system is no longer an option. At this early interaction stage, the consumer could be expected to check a box selecting their “primary complaint,” and in response the platform could provide statistical information concerning the traditional time to resolve this specific type of dispute, the likelihood of success, the potential recovery available, and relevant corresponding information in relation to this type of dispute within the court system. The ODR system could also have a text box communication system that provides the consumer with live chat to ask the ODR provider about issues or questions that have arisen. After completing these tasks, the consumer should be expected to perform some type of action, such as typing the word arbitration into a text box, to accept the terms of the arbitration agreement. Such a method is simple, not overly time consuming (unless the consumer wants to spend considerable time on the process),

171. Of course, the ODR provider could alter the information provided based on preferences revealed by the consumers as they interact with the webpage over time.

172. Again, this is necessary as the current cross-border ODR system envisions the use of arbitration as the third stage of the process.

173. See *supra* notes 43–53 and accompanying text.

174. See *supra* notes 84–91 and accompanying text.

and potentially effective in creating an informed consumer assenting to an arbitration agreement.

A system designed in such a manner removes one of the key issues — the business's ability to use its power advantage in a contract of adhesion to include provisions, terms, or conditions within the contract that significantly disadvantage the consumer, who is in the weaker position. As this system is envisioned, the ODR provider, not the business, is the party controlling information flow, terminology, term inclusion, and the dispute contract. For example, a well-designed system would contain a large amount of information such as the number of disputes of this type previously resolved, traditional ODR choices made by consumers, and the success rate of particular claims. At crucial points in the decision making process, the consumer could receive information specific to the choice they face and the most common choice made by other consumers. The use of technology as an assistant in creating an active process of dispute resolution agreement¹⁷⁵ could ensure that the consumer would benefit from active engagement in the process the presentation of the right information to make an informed decision about the pursuit of their claim.

One should note, however, that I am not advancing the idea that this particular method should be legislated within the harmonizing ODR instrument. Instead, the ODR harmonizing text has to be designed with a level of generalness that does not prescribe the actual system. To provide these protections, the harmonizing instrument should require: (1) mandatory use of an autonomous, neutral service provider; (2) a requirement that the business' use of the system can only occur after it demonstrates its compliance with the ODR service providers Code of Conduct, which prohibits businesses from misleading or misinforming consumers; (3) that all codes of conduct include a provision requiring the business to provide easy and clear instructions and information for locating the external ODR providers; (4) that the service provider protect as confidential consumer information and dispute specific information capable of identifying the consumer; (5) a service provider that ensures a level of information delivered prior to the creation of the dispute resolution agreement; (6) that the ODR agreement is formed after the consumer initiates the dispute; and (7) that the agreement is formed through some type

175. Providing the system is truly autonomous from the business and that the system is designed in a neutral manner. See Orna Rabinovich-Einy & Ethan Katsh, *Lessons from Online Dispute Resolution for Dispute System Design*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION*, *supra* note 14, at 39, 58–59 (discussing the role of technology).

of online activity, such as typed in language. These protections address the issues raised earlier in the paper, are not overly time consuming for the consumer, are not overly burdensome or concerning for the business, and create an arbitration agreement that is widely enforceable.

B. *Arbitration Institutions Are Already Playing a Role in Protecting Consumers*

ODR service providers providing dispute resolution to consumers should create a Code of Conduct, which businesses would need to agree to abide by if they wished to use the ODR platform and service provider. The Code of Conduct would include protections for consumers in relation to pre-dispute arbitration clauses as well as protections that prevent hidden, restrictive, overly complex, or other methods of inhibiting consumers from finding and utilizing ODR providers. Of course, the common criticism of codes of conduct is that codes often lack enforcement mechanisms and provide few incentives for the business to agree to the provisions contained within the code.¹⁷⁶ While these criticisms may be accurate in a number of areas, the criticisms are being addressed within the arbitration community with a relative degree of success. For example, two of the largest arbitral institutions, the American Arbitration Association (“AAA”) and Judicial Arbitration and Mediation Service, Inc. (“JAMS”) have both promulgated due process protocols governing consumer arbitrations.¹⁷⁷ These Consumer Due Process Protocols¹⁷⁸ create the expectation of a fundamentally fair process in arbitration by requiring adequate notice, an opportunity to be heard, and an independent decision maker.

176. See Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV. 453, 455–56 (2005) (highlighting that codes of conduct are not enforceable and therefore are less likely to be complied with).

177. In fact, both have promulgated protocols in relation to employment as well and the AAA has promulgated protocols governing health care and debt collection arbitrations. See AM. ARBITRATION ASS'N, *Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses* [hereinafter *AAA Rules Updates*]; JUDICIAL ARBITRATION AND MEDIATION SERVICES, INC., JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2009), available at www.jamsadr.com/consumer-arbitration/ [hereinafter *JAMS CONSUMER MINIMUM STANDARDS*].

178. See Consumer Due Process Protocol, *supra* note 39, at princ. 2, 3, 12; JAMS CONSUMER MINIMUM STANDARDS, *supra* note 177.

To ensure compliance, both the AAA and JAMS state that they will refuse to administer a case when the arbitration clause “materially fails to comply with the relevant protocol.”¹⁷⁹ The AAA takes an active part in the process and offers the opportunity for review of consumer arbitration clauses both before and after a dispute arises. Before a dispute arises, the AAA provides an advance review in which the business submits the clause for review prior to its use.¹⁸⁰ If the business fails to supply the clauses prior to implementations, the AAA reserves the right to decline its administrative services.¹⁸¹ At the post-dispute stage, the AAA reviews the arbitration clause upon submission of the claim to the AAA. Once this submission occurs, the AAA reviews the arbitration clause for compliance with the Consumer Due Process Protocol.¹⁸²

If the clause complies with the Protocol, the business is classified as “acceptable” on the AAA business list. However, if the clause fails to comply, the AAA contacts the business to request a waiver of any offending provisions.¹⁸³ The AAA also requests a waiver for all future disputes and provides guidance to the business regarding the changes that can be made to bring the clause into compliance with the Protocol.¹⁸⁴ Should the business fail to waive the clause or bring it into compliance, the AAA policy is to refuse to administer the case,¹⁸⁵ an approach that JAMS employs as well.¹⁸⁶ In essence, businesses that fail to comply with Due Process Protocols are assisted in compliance, but if compliance is not something the business is willing to work toward, the arbitration institutions will refuse to administer the case. If the arbitration institutions actually follow this practice,

179. See Consumer Due Process Protocol, *supra* note 39, at princ. 1; JAMS Consumer Minimum Standards, *supra* note 177.

180. See AAA Rules Updates, *supra* note 177.

181. See *id.*

182. See AM. ARBITRATION ASS'N, *Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration* 33–34 (2003) (“Specially designated AAA staff members review clauses submitted in consumer cases . . . to check protocol compliance.”).

183. Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 309 (2012) (citing *Ragan v. AT&T Corp.*, 824 N.E.2d 1183, 1194 (Ill. App. Ct. 2005)).

184. See *id.* at 309–10.

185. See *id.* at 310 (citing AAA Rules Updates, *supra* note 177; JAMS CONSUMER MINIMUM STANDARDS, *supra* note 177).

186. See JAMS CONSUMER MINIMUM STANDARDS, *supra* note 177 (explaining that JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness).

this is a very important step in ensuring basic protections to consumers facing arbitration clauses within contracts of adhesion.

A recent study done by Christopher R. Drahozal and Samantha Zyontz entitled *Private Regulation of Consumer Arbitration*¹⁸⁷ has found that the practice by these arbitration institutions is having an impact on the arbitration clauses within contracts of adhesion.¹⁸⁸ Their research has an incredibly positive outcome:

We find that the AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations . . . the time period studied, the AAA refused to administer a substantial number of cases (almost ten percent of its total consumer caseload) that involved a protocol violation. Moreover, in response to AAA protocol compliance review, over 150 businesses have either waived problematic provisions or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol.¹⁸⁹

As the report demonstrates, institutions can have an impact on the actions of a business in relation to dispute resolution mechanisms. In fact, a similar system is also showing promise in the area of employment.¹⁹⁰ It seems these systems may accomplish the goals of protecting weaker parties, while still being used by businesses.

However, as the consumer study authors note: "We do not assert that private regulation alone — with no public regulatory backstop, such as through court oversight — suffices to ensure the fairness of consumer arbitration proceedings."¹⁹¹

UN Working Group drafts show work toward needed oversight in cross-border ODR.¹⁹² Certainly the harmonized cross-border ODR text could insist that each ODR provider utilized by a business meet

187. See Drahozal *supra* note 183.

188. *Id.* at 289.

189. *Id.* at 289–90.

190. See Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 341 (2006) (describing the "Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes," developed by several groups representing employers, employees, and neutral organizations in 1995, and asserting that "[i]t has been adopted by the major arbitration service providers" who "will refuse to arbitrate cases under rules inconsistent with the . . . Protocol"). See generally Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005) (discussing the evolution of procedural safeguards).

191. Drahozal, *supra* note 183, at 290.

192. O.D.R. Working Group 25th Sess., *supra* note 33, at 21–28 (2012).

minimum standards, one of which would be the creation of and compliance with a Code of Conduct prohibiting the use of unfriendly consumer directed practices in the creation of the dispute resolution agreement. Therefore, in the cross-border ODR instance, the requirement for such a system of code of conduct compliance can be insisted upon within the harmonizing international text. This additional support opportunity goes well beyond private initiatives and increases the probability of the successful use of a code of conduct-based system.

VI. CONCLUSION

One has to wonder how the ODR world got into the predicament of even needing to worry about creating an informed consumer. Currently, arbitration as a final stage of cross-border e-commerce B2C dispute resolution is an essential element of the process because of the absence of a true mechanism of enforcement. Governmental representatives, however, are concerned that consumers will be caught in yet another contract of adhesion that contains significantly one-sided provisions. This is especially true in the case of arbitration with a final and binding award, as it removes the consumer's ability to seek redress in the court system. Therefore, the current version of the cross-border B2C ODR system has to be concerned with creating an informed or quasi-informed consumer. Online consumers are a "must have now, in a rush" community, do not read long contract clauses, prefer to not scroll through text passively, do not use online resources to understand terms, and generally feel powerless in the face of contract of adhesion. These behavioral understandings demonstrate that consumers simply do not read contract terms, even arbitration clauses, regardless of presentation style or emphasis. But consumers do read terms that are immediately important to them and do pay attention when asked to actively engage in the contracting process. Consequently, active engagement with contracting coupled with post-dispute agreements to arbitrate may protect consumers in ODR. Skeptics argue this is a poor starting point for ODR, as it leads to delays in the process, but technology can greatly reduce agreement timeframes and can minimize power imbalances between the parties. Thus, one can argue that the service providers and their platforms may just be the key to the entire process, serving as a gatekeeper to the ODR world. Minimal protections and regulatory oversight will ensure the legal success of the system. More importantly, if a system

is crafted with an eye toward creating confidence in the dispute resolution system, the cross-border e-commerce environment will flourish, ultimately benefiting business, consumers, and governments.

