

DANGERS OF DEFERENCE TO FORM ARBITRATION PROVISIONS

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This Article is part of my larger project exploring what I call “contracting culture,” which borrows from legal realism and relational contract theory by considering contextual factors such as negotiators’ relations, understandings, and values. As part of this project, I am pursuing various threads, including empirical studies of how contracting realities impact arbitration. In this Article, however, I focus on how these realities in business to consumer contracts combine with the Federal Arbitration Act and formulaic contract law to foster dangerous deference to form arbitration provisions. The Article then invites procedural reforms and offers suggestions for regulations aimed to temper this deference to protect consumers’ dispute resolution needs without sapping the beneficial use of consumer arbitration.

Pre-dispute arbitration clauses are becoming the norm in consumer form contracts, and United States courts strictly enforce these clauses under the Federal Arbitration Act (“FAA”) and states’ adoptions of the Uniform Arbitration Act (“UAA”).¹ In addition, the Supreme Court’s pro-arbitration jurisprudence has relegated challenges of arbitration agreements to general contract defenses, which many courts apply in narrow and formulaic ways that ignore contracting realities, or in unpredictable manners that leave parties without contracting guidance.² At the same time, courts have confirmed the limited review and finality of arbitration awards.³

At a recent conference, I presented a paper questioning courts’ formulaic enforcement of arbitration agreements without substantive consideration of

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¹ See Yvette Ostolaza, *Enforcement of Arbitration Agreements in Consumer Financial Services Contracts*, 60 CONSUMER FIN. L.Q. REP. 265, 265-66 (2006) (noting growth of consumer arbitration in the wake of the Supreme Court’s recent FAA jurisprudence); see also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (finding that the “liberal federal policy favoring arbitration agreements” supported enforcement of an arbitration agreement although the agreement was silent with respect to arbitration costs and fees (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))).

² See Ostolaza, *supra* note 1, at 265-67 (discussing how courts’ unpredictable application of unconscionability stymies companies’ ability to draft reliable arbitration contracts); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 233-35, 255-56, 262-63 (2002) (discussing “excessive formalism” as preventing courts from policing contract fairness).

³ See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124-32 (2002) (discussing the finality of arbitration awards under the FAA and UAA).

consent, contractual context, or repeat-player advantages.⁴ Borrowing from the work of Stewart Macaulay and Ian Macneil,⁵ I proposed that courts should consider “contracting culture,” which encompasses parties’ relations, understandings, and values with respect to dispute resolution. I also suggested that these cultures fall on a continuum ranging from “intra to extra communal,” depending on the degree parties’ relations, understandings, and needs converge or compete. I used consumer form contracting as an example of an often extra communal culture due to consumers’ and corporate sellers’ lack of personal connections and diverging dispute resolution understandings and values.⁶

I now take this a step further in considering how this culture has fostered deference to companies’ form arbitration provisions and rules, thereby allowing them to essentially privatize justice. This deference to these private rules happens on many levels: (a) companies promulgate form arbitration clauses dictating arbitration provisions that disproportionately serve their needs; (b) arbitration institutions’ rules these companies incorporate in their clauses leave room for companies’ self-interested provisions and may favor these companies as core clientele; (c) consumers assume enforcement of form provisions and rarely even attempt to negotiate them due to lack of awareness, resources, and bargaining power; and (d) courts then reinforce and defer to this regime by strictly enforcing these form arbitration provisions under the FAA and formalistic contract analysis.

Meanwhile, procedural protocols lack power to derail this regime. The American Arbitration Association (“AAA”), in association with a National Consumer Disputes Advisory Committee (“Advisory Committee”), promulgated the Consumer Due Process Protocol (“Protocol”) in 1998 in an effort to instill minimum fairness guidelines for how companies and institutions “should” administer consumer arbitration and mediation programs.⁷ These “shoulds” include clear notice of arbitration clauses and how to obtain information regarding the arbitration process, preservation of consumers’ access to small claims court, and measures ensuring “reasonable cost to consumers” and “reasonably convenient” hearing locations.⁸

Despite the promulgation of the Protocol nine years ago, however, many companies have declined to implement its provisos in their arbitration programs. Furthermore, companies often leave consumers with no choice but to accept these programs or forgo necessary products or services. For example, my examination of nine of the biggest cell phone service companies’ form contracts revealed that consumers who want cell phone service have no real choice but to accept onerous arbitration rules.⁹ This is especially problematic to the

⁴ See Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123 (2007) [hereinafter Schmitz, *Contracting Culture*].

⁵ See Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589, 589–93 (1974) (discussing his “relational contracts” concepts and critiquing “presentiation” in classical law).

⁶ See Schmitz, *Contracting Culture*, *supra* note 4, at 126, 145-72.

⁷ AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL (1998), available at <http://www.adr.org/sp.asp?id=22019> [hereinafter PROTOCOL].

⁸ *Id.*

⁹ See *Collected Cell Phone and Credit Card Arbitration Provisions* (on file with author); see also Notes from Consumer Focus Group by Amy J. Schmitz, in Denver, Colo. (Nov. 18,

extent cell phone service has become necessary for consumers' safety and basic communication needs.

Although some courts have used unconscionability and other contract defenses to police onerous arbitration clauses, other courts seem to adopt an "everyone's doing it" attitude in deferring to these form clauses and rules. They emphasize efficiency goals of contract law in applying formulistic analysis to assume assent and deny unconscionability challenges of these provisions. Commentators then frown on what they deem proactive use of unconscionability to strike arbitration clauses and argue that such use violates the Supreme Court's staunch stance on FAA preemption.¹⁰ This has resulted in haphazard contract law regulation of arbitration that has left consumers without clear or adequate protection from onerous arbitration clauses and companies without contracting guidance.¹¹

Accordingly, this Article questions the propriety of courts' and contractors' deference to companies' consumer arbitration regimes and seeks to spark balanced consideration of federal legislative reforms aimed to temper the FAA's "one-size-fits-all" enforcement of arbitration. Furthermore, instead of calling for a ban on all consumer arbitration, the Article invites interested constituencies to collaborate in crafting mandatory procedural reforms that protect consumers' access to justice without quelling companies' beneficial use of arbitration programs. At the least, the Article suggests that policymakers transform the Protocol "shoulds" into "musts," especially when consumers' statutory rights are at stake.

Part I of the Article discusses the growth and nature of arbitration clauses in form consumer contracts and the institutional rules these clauses generally incorporate. Part II explains how contracting parties and courts defer to these form clauses and rules, thereby tipping what the Article calls the "dominos of deference" against consumers' fair access to justice. Part III then explores the necessity and establishment of legislative procedural protections in consumer arbitration and offers suggestions for minimum procedural fairness rules that borrow from the Protocol. The Article concludes by emphasizing that these are only initial suggestions offered to spark further consideration and debate regarding procedural rules that ensure consumers' fair access to means for vindicating their statutory rights without sapping arbitration of its efficiency benefits.

I. PREVALENCE OF FORM ARBITRATION CLAUSES AND INCORPORATED RULES

Form arbitration provisions and the institutional rules they incorporate are contract terms. It therefore seems appropriate for courts to enforce them under

2006) (on file with author) [hereinafter Consumer Focus Group] (consumers reporting feelings that they lack choice with respect to arbitration terms in form contracts).

¹⁰ Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 39-41 (2006); see also Ostolaza, *supra* note 1, at 265-66, 268 (discussing preemption).

¹¹ Ostolaza, *supra* note 1, at 266-67.

the FAA and contract law. The problem is that courts' formalistic enforcement of form contracts converges with their FAA-inspired pro-arbitration glaze to fuel deference to these arbitration clauses that overlooks how these legal forces function in the real world of consumer contracting. Form arbitration clauses are generally not negotiated, but are buried terms in the boilerplate of pre-dispute contracts that consumers may not read or understand.¹² In addition, consumers rarely have the power or experience to negotiate these clauses and may not have easy access to information regarding company-selected arbitration rules or administrators.¹³

A. *Preeminent Consumer Arbitration Provisions*

Most consumer arbitration agreements are "boilerplate," pre-printed form contract clauses. Furthermore, "repeat player" retailers and manufacturers routinely include these arbitration clauses in their non-negotiable form contracts, allowing these players to dictate the rules individuals must follow in asserting their claims.¹⁴ This may be problematic when repeat players use arbitration as means for curbing consumer remedies and preventing class actions. In addition, it allows them to shield the public from information regarding their wrongs and essentially to privatize justice.¹⁵

For example, consumers in *Comb v. PayPal, Inc.* challenged arbitration provisions PayPal required customers to accept for its electronic disbursements services under its "clickwrap" agreement on its website.¹⁶ The provisions defied the Protocol by limiting their remedies and subjecting them to high costs through arbitration. Although consumers mainly used PayPal for small transactions averaging \$55, the arbitration clause precluded any class or consolidated relief, and did not allow customers to pursue claims in small claims court

¹² See Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1240-43 (2006) (highlighting how "'boilerplate' has itself taken on a cultural meaning" that translates into a signal that such form terms are not negotiable, especially with respect to arbitration clauses).

¹³ See Soile Pohjonen, *Proactive Contracting: In Contracts Between Businesses*, 12 IUS GENTIUM 155, 165-70 (2006) (discussing how parties in various contexts may not read or understand contract terms).

¹⁴ I will not rehash the full debate regarding consumer arbitration, as it has been hotly debated for years. See generally EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006) [hereinafter *ARBITRATION LAW*]. Notably, the U.S. diverges from other countries by strictly enforcing non-negotiable form arbitration provisions in consumer contracts. See Jean R. Sternlight, *Consumer Arbitration, in ARBITRATION LAW, supra*, at 127, 129-32, 138-40 (highlighting American law's enforcement of mandatory consumer arbitration under pre-dispute form contracts).

¹⁵ See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704-12, 754 (1999) (discussing how "[a]rbitration privatizes the creation of law"); see also Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 313-15, 371 (2005) [hereinafter Schmitz, *MH Mania*] (discussing how manufacturers' use of form arbitration agreements has privatized dispute resolution in the mobile home industry).

¹⁶ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1169 (N.D. Cal. 2002). The clickwrap contract on PayPal's website required customers to click on "I accept" or "I agree" with respect to the company's User Agreement before accessing the companies' services. *Id.* This applied for PayPal account holders using the service and parties who were not PayPal customers, but sought to access funds sent by account holders. *Id.* at 1173 n.10.

instead of arbitration.¹⁷ Furthermore, PayPal's arbitration clause required consumers to arbitrate in PayPal's home state of California and prescribed application of the AAA's rules for commercial instead of consumer arbitration, thereby requiring consumers to pay high travel costs and an equal share of fees in excess of \$5000.¹⁸ These factors accumulated to lead a California court to strike the arbitration clause as allowing PayPal to "insulate itself" from any meaningful challenges of its practices.¹⁹

Consumers cannot, however, rely on courts to police the fairness of form arbitration provisions using general contract law. Most courts are formulaic in their rejections of contract challenges of arbitration clauses, and commentators criticize courts such as those in California for being overly proactive.²⁰ Furthermore, the FAA preempts targeted application of contract defenses to arbitration clauses, and even California courts may be increasing their support for arbitration. For example, a California court recently condoned enforcement of U-Haul's form arbitration provision although it required employees to waive their rights to class or representative proceedings.²¹

B. Importance of Incorporated Institutional Rules

Arbitral institutions such as the AAA, the International Chamber of Commerce ("ICC"), and the National Arbitration Forum ("NAF") administer arbitration proceedings and promulgate rules companies routinely incorporate by reference in their consumer form contracts.²² These rules may promote efficiency by providing procedural direction and saving parties from investing their resources to draft detailed contractual rules they may never use.²³ Institutional rules also may provide needed neutrality in international disputes or suit particular legal systems or cultures.²⁴ For example, European parties often favor ICC rules because they limit the evidentiary focus to documents, while Ameri-

¹⁷ *Id.* at 1173, 1175-77.

¹⁸ *Id.* at 1176-77 (noting that the California venue was PayPal's "backyard").

¹⁹ *Id.*

²⁰ See Broome, *supra* note 10, at 40-41 (critiquing California courts' use of unconscionability to police arbitration clauses).

²¹ *Konig v. U-Haul Co. of Cal.*, 52 Cal. Rptr. 3d 244, 246-47 (Ct. App. 2006) (holding that the clause was not unconscionable because it was not clear that it would bar employees' access to remedies for "predictably . . . small amounts of damages"). Nonetheless, this opinion has now been superseded, 153 P.3d 955 (Cal. 2007), to allow for reconsideration in the wake of *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007), which placed new limits on pre-dispute class action waivers in employment contracts.

²² See, e.g., Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 Hous. L. Rev. 327 (1996) (discussing how arbitration under NASD or NYSE rules has become mandatory under most broker-dealer contracts).

²³ See Erik Schäfer, *The Use of Arbitration and Mediation for Protecting Intellectual Property Rights: A German Perspective*, 94 TRADEMARK REP. 695, 714-15 (2004) (discussing how parties may include particular institutional procedural rules in their arbitration clauses to supplement the clauses' minimal provisions); see also Philip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, DISP. RESOL. J., Nov. 2005-Jan. 2006, at 60, 63-65 (discussing importance of arbitral rules in clarifying arbitrators' power to sanction parties as means for enforcing discovery orders).

²⁴ See ARBITRATION LAW, *supra* note 14, at 5-6, 141-49 (noting varied approaches of sponsoring institutions); Schäfer, *supra* note 23, at 714-15 (noting neutrality).

can parties tend to prefer AAA rules that allow for broader-ranging discovery.²⁵ Institutions also provide a third-party forum that may help quell tensions among parties with varied backgrounds and experiences.²⁶

In addition, arbitration institutions may craft reasonable rules to garner goodwill and are more likely than self-interested contracting parties to consider the needs of all disputants.²⁷ They also may bring together various constituencies to develop dispute resolution programs geared for particular industries, as the AAA has done with respect to construction disputes.²⁸ Again, the AAA also played a large part in establishing the Protocol's suggested consumer guidelines.²⁹ These included measures geared to give consumers access to information regarding providers' dispute resolution programs, rights to bring disputes to small claims court, and arbitration proceedings at reasonable costs in convenient locations.³⁰ In addition, the AAA announced that it will administer class arbitration under its Supplementary Rules for Class Arbitrations if the parties' agreement provides that disputes shall be resolved by arbitration in accordance with any of the AAA's rules and the agreement expressly allows or is silent regarding class relief, consolidation, or joinder of claims.³¹

Similarly, the National Association of Securities Dealers ("NASD") requires that written awards be provided to the parties and the public in its arbitrations.³² It also has proposed rules allowing parties to require arbitrators to issue these awards with reasoned opinions.³³ Furthermore, the NASD has sought to reduce brokers' nonpayment of arbitration awards since the United States General Accountability Office ("GAO") issued several reports regarding rampant nonpayment rates.³⁴ NASD arbitration, however, is quasi-public to

²⁵ ARBITRATION LAW, *supra* note 14, at 138-44.

²⁶ *See id.* at 141-49 (describing breadth of major sponsoring organizations).

²⁷ This may be particularly true with respect to the NASD because it is subject to governmental oversight. *See, e.g.*, Press Release, Nat'l Ass'n of Sec. Dealers, NASD Dispute Resolution to Provide Arbitration Awards Online (May 10, 2001), *available at* <http://www.finra.org/PressRoom/NewsReleases/2001NewsReleases/P010078> (stating how NASD worked with the Securities Arbitration Commentator to make awards readily accessible online and maintain the library of awards).

²⁸ *See* AM. ARBITRATION ASS'N, THE CONSTRUCTION INDUSTRY'S GUIDE TO DISPUTE AVOIDANCE AND RESOLUTION (2004), *available at* <http://www.adr.org/si.asp?id=3839> (explaining how the AAA works with the various constituencies in the construction industry to develop dispute resolution procedures and processes required by leading form contracts promulgated by the American Institute of Architects and the Associated General Contractors of America).

²⁹ PROTOCOL, *supra* note 7, at princs. 1-15 & Reporter's Cmts.

³⁰ *Id.*; *see also* AM. ARBITRATION ASS'N, CONSUMER-RELATED DISPUTES SUPPLEMENTARY PROCEDURES (2005), *available at* <http://www.adr.org/sp.asp?id=22014> [hereinafter AAA CONSUMER RULES].

³¹ AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATION (2003), *available at* <http://www.adr.org/sp.asp?ID=21936> [hereinafter AAA CLASS ARBITRATION]; Am. Arbitration Ass'n, AAA Policy on Class Arbitrations (July 14, 2005), *available at* <http://www.adr.org/sp.asp?id=25967>.

³² NASD CODE OF ARBITRATION PROCEDURE 10330 (amended 1997), *available at* http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000927.

³³ Notice of Filing of Proposed Rule Change to Provide Written Explanation in Arbitration Awards, 70 Fed. Reg. 41,065 (proposed Mar. 15, 2005).

³⁴ *See* Per Jebsen, *How to Fix Unpaid Arbitration Awards*, 26 PACE L. REV. 183, 183-95 (2005). Along with instituting other notice and enforcement measures, the NASD amended

the extent that the NASD is a self-regulated agency subject to the oversight of the GAO and the Securities and Exchange Commission (“SEC”).³⁵ This means that the government must approve and monitor the NASD’s arbitration rules and procedures.³⁶

Unregulated administering institutions, however, may have incentive to skew their rules and decisions to favor companies they hope to attract as well-paying repeat clients.³⁷ With escalating competition for arbitration business, administering institutions must market themselves and their rules to the companies that control form contract terms in order to ensure steady business.³⁸ These institutions also may seek to attract and retain repeat players by consulting with them in developing their rules and giving arbitrators incentive to favor these companies.³⁹ At the least, institutions may promulgate permissive rules that do not scare away corporate clients by appearing too favorable for consumers and employees.

In the end, most arbitration institutions adopt broad rules that cover only major procedural events in arbitration.⁴⁰ This generally includes claim submission, arbitrator selection, some information exchange, broad hearing parameters, and award form and timing.⁴¹ Furthermore, institutional rules usually give arbitrators great discretion in conducting proceedings.⁴² Moreover, even when

its code of procedures to streamline default proceedings against defunct brokers and to bar delinquent brokers from enforcing contracts requiring NASD arbitration. *Id.* at 191-93.

³⁵ *See id.* at 196-99 (explaining how although the NASD is not a “state actor,” it bears policy responsibilities); *see also* Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73, 83-96 (2005) (proposing that securities arbitration involves state action to the extent employers mandate arbitration as a condition of employment and the NASD administers securities arbitrations subject to SEC oversight).

³⁶ *See, e.g.*, Order Approving Proposed Rule Change by NASD Relating to Amendments to Rule 10301 of the Code of Arbitration Procedure, 66 Fed. Reg. 19,267 (Apr. 13, 2001).

³⁷ *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212, 1232-35 (2006) (discussing “repeat player” advantages with respect to arbitration privacy); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1650-61 (2005) (examining the “repeat player” phenomenon).

³⁸ For example, there have been allegations that the NAF is predisposed to favor lenders that require its consumer clients to arbitrate all claims with the NAF under its rules. Posting of Paul Bland to Consumer Law & Policy Blog, http://pubcit.typepad.com/clpblog/2006/10/national_arbitr.html (Oct. 19, 2006, 8:16 EST).

³⁹ *See id.* (describing affidavits and other evidence in *McQuillan v. Check N Go* indicating that NAF targeted its advertisements and solicitations to banks, sent its arbitrators judgment forms “filled out so that all the arbitrator need do is check the appropriate box” to allow banks to quickly collect on delinquent debts, and blocked arbitrators from serving if they ruled against corporate parties); *see also* Brief for Nat’l Ass’n of Consumer Advocates as Amicus Curiae Supporting Respondents, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (No. 02-215) (arguing that NAF’s rules and practices are unfavorable for consumers, and attaching NAF marketing letters to lenders boasting how NAF can “minimize lawsuits” and “the threat of lender liability jury verdicts”).

⁴⁰ *See, e.g.*, AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2005), available at <http://www.adr.org/sp.asp?id=22440> [hereinafter AAA COMMERCIAL RULES].

⁴¹ *See* ARBITRATION LAW, *supra* note 14, at 43-56, 138-149.

⁴² *See id.* at 145 (again highlighting vagueness of arbitration rules).

institutions prescribe procedural rules to protect consumers, companies may contract around any rules they dislike.⁴³

The AAA Commercial Arbitration Rules, for example, prescribe arbitration filing and administrative fees that usually exceed \$5000, and require parties to split those fees, subject to reallocation in the award.⁴⁴ These rules also leave arbitrators without clear authority to require depositions or enforce any discovery orders. The AAA Supplementary Procedures for Consumer-Related Disputes, however, cap consumer fees in disputes arising out of form contracts between businesses and consumers. They also preserve consumers' rights to bring these disputes to small claims courts.⁴⁵

It is nonetheless up to contract drafters to select and incorporate such consumer procedures in their contracts. Institutions' rules are not statutory mandates. This means that contract drafters may take, leave, or modify rules to suit their needs.⁴⁶ The FAA then dictates that courts enforce arbitration provisions as written. Likewise, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the UNCITRAL Model Law on International Commercial Arbitration require that courts respect parties' contractual choice of procedural provisions.⁴⁷

Accordingly, companies that dictate terms of form contracts may choose the rules that will apply in their arbitrations and specify the procedures they desire. For example, PayPal opted to incorporate the AAA Commercial Arbitration Rules in lieu of the AAA's consumer procedures in its "clickwrap" contract at issue in *Comb*, and the court assumed that it would have to honor that incorporation.⁴⁸ The court therefore declined to ignore the contract's terms in order to allow for the AAA's application of the consumer procedures to ease cost burdens on consumers.⁴⁹ This meant that the consumers faced over \$2500 in arbitration fees, instead of enjoying the AAA Consumer Rules' \$125 cap for

⁴³ See generally American Arbitration Association Home Page, <http://www.adr.org> (last visited Dec. 11, 2007).

⁴⁴ AAA COMMERCIAL RULES, *supra* note 40, R-43 (allowing for allocation of fees and costs in the award "as the arbitrator determines is appropriate"), R-49 (requiring parties to pay filing fees for their asserted claims unless "extreme hardship" is shown), R-50 (requiring parties to bear expenses of their own witnesses and split other arbitrator fees and expenses unless agreed otherwise) & R-21 (allowing arbitrators to direct "the production of documents and other information" and "the identification of any witnesses to be called" but adding no enforcement "teeth" to this provision); see also O'Neill, *supra* note 23, at 63-64 (discussing how NASD rules also fail to provide for sanctions or other means for enforcing arbitrators' discovery orders).

⁴⁵ See AAA CONSUMER RULES, *supra* note 30 (but also permitting parties to dispute the applicability of these rules).

⁴⁶ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1176 & n.15, 1177 (N.D. Cal. 2002).

⁴⁷ See Elizabeth Shackelford, *Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration*, 67 U. PITT. L. REV. 897, 900-03 (2006) (discussing the centrality of party autonomy in international arbitration).

⁴⁸ *Comb*, 218 F. Supp. 2d at 1176 & n.15, 1177 (declining to accept PayPal's arguments that the consumer rules would override the commercial rules in light of the express contract language courts must enforce under the FAA). *But see* Shackelford, *supra* note 47, at 908-12 (arguing that even when parties incorporate institutional rules in their arbitration agreements, they should not be held to application of rule amendments that exceed their reasonable expectations).

⁴⁹ *Comb*, 218 F. Supp. 2d at 1176-77 n.16.

small claims.⁵⁰ In addition, PayPal's contract prevented consumers from using class or consolidated proceedings to ease costs by asserting their claims as a group. It also imposed possibly high travel costs on consumers by requiring them to arbitrate in PayPal's home location of California.⁵¹

II. DOMINOS OF DEFERENCE TO FORM ARBITRATION PROVISIONS

Drafters of form contract terms usually dictate the rules of arbitration in consumer exchanges with little resistance due to courts' and contractors' deference to form provisions. Consumers rarely negotiate or question form arbitration terms, and courts reinforce this deference by presumptively enforcing the terms under the FAA and formalistic contract law. The domino effect of this deference results in treatment of form terms like private "law"—not subject to alteration or considered scrutiny.⁵²

A. Contracting Parties' Adherence to Form Contracts

Drafters of form contract provisions incorporate institutional arbitration rules and modify their provisions to create arbitration terms that suit their interests. After that, however, parties rarely discuss, negotiate, or modify these form terms. They usually enter transactions with optimism that no disputes will arise and do not expend resources considering or discussing the likely impacts of breach.⁵³ "Deal lawyers" usually focus on getting the deal done during contract negotiations and view considerations of potential disputes as not "their problem."⁵⁴ They expect litigators to clean up any problems in contract performance.⁵⁵ Moreover, they correctly assume that they eventually would resolve any contract disputes without court assistance.⁵⁶

Contracting parties also may treat the subject of breach as taboo during initial negotiations.⁵⁷ They seek peaceful and productive contracting relations

⁵⁰ *Id.* at 1176.

⁵¹ *Id.* at 1170, 1175-77.

⁵² As a practicing attorney and now as a teacher, individuals continually tell me that they view form terms like "law" not subject to modification or challenge.

⁵³ See Robert A. Hillman, *Remedies and the CISG: Another Perspective*, 25 INT'L REV. L. & ECON. 411, 412-13 (2005) (considering why parties fail to bargain over remedy and damages provisions in pre-dispute contracts); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55-56, 60-64 (1963) [hereinafter Macaulay, *Relations*] (finding in a study of business contracting that parties rarely discuss provisions regarding resolution of future disputes during initial contract negotiations).

⁵⁴ See James C. Freund, *Calling All Deal Lawyers—Try Your Hand at Resolving Disputes*, 62 BUS. LAW. 37, 42-44 (2006) (describing his and other transactions lawyers' experiences and proposing that "deal lawyers" should use their problem-solving skills to help resolve disputes).

⁵⁵ *Id.* (also noting how deal lawyers employ boilerplate that have typical terms for arbitration, but nothing about avoiding litigation or arbitration).

⁵⁶ See Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 777-80 [hereinafter Macaulay, *Freedom from Contract*] (discussing the scarcity of litigated contracts cases and reporting a 37% decline in contracts case filings in Wisconsin from 1992 to 2001).

⁵⁷ See Hillman, *supra* note 53, at 413 (addressing how contracting parties are usually uncomfortable discussing breach during pre-contract negotiations).

and to avoid detailed nitpicking that may interfere with smooth negotiations.⁵⁸ They also fear that raising pre-contract concerns with conflict may taint collaborative discussions or push parties away from a deal.⁵⁹ Negotiating parties therefore focus on overall trust building and performance planning, as well as navigating their own “intrafirm politics.”⁶⁰

Companies may nonetheless take great care in crafting dispute resolution and other provisions in their form contracts. This generally is economically efficient because they expect to use these forms continually and can spread drafting costs over many transactions.⁶¹ Furthermore, companies know that these terms will control most or all consumer transactions because consumers are unlikely to resist form terms.⁶² Moreover, consumers may be particularly reluctant to question form terms due to their feelings of low power and status with retailers.⁶³

Negotiators also accept form terms without question due to contracting inertia and general preference for provisions that operate without requiring action.⁶⁴ This is true even if those terms are contrary to standard industry practice or legal defaults.⁶⁵ In addition, consumers often do not see need to negotiate or resist form arbitration provisions because they do not appreciate the provisions’ effects or realize how terms may foster unfairness in practice.⁶⁶ Moreover, consumers often feel any attempt to seek changes in form terms would be futile.⁶⁷ This effectively prevents them from resisting form arbitration clauses even when the clauses bar class relief or other remedies consumers later wish they had retained.⁶⁸ Companies therefore limit consumer remedies

⁵⁸ See Macaulay, *Relations*, *supra* note 53, at 60-65 (emphasizing importance of fostering positive business relations).

⁵⁹ Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 *VAND. L. REV.* 1583, 1606-09 (1998) (discussing his study testing the power of default contract provisions and finding negotiators generally acquiesce in status quo contract terms due to fear that suggesting departure could cause bargaining impasse).

⁶⁰ William C. Whitford, *Relational Contracts and the New Formalism*, 2004 *WIS. L. REV.* 631, 635-37 (explaining why parties in relational contracts often rely on implicit terms of their deals).

⁶¹ See *id.* at 638 (noting how businesses may devote more resources in drafting consumer contracts).

⁶² *Id.*

⁶³ Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 *EMORY INT’L L. REV.* 1, 29-34 (2002).

⁶⁴ Korobkin, *supra* note 59, at 1605-09, 1627 (highlighting importance of action versus inaction).

⁶⁵ *Id.*

⁶⁶ *Id.* at 1585-87, 1607-09, 1627 (finding in support of his “inertia theory” that negotiators generally prefer terms that operate without specific bargaining).

⁶⁷ Consumers in the focus groups I recently conducted in Denver, Colorado reported feelings of powerlessness in contracting and stated that they do not attempt to negotiate form terms because it would be futile. Consumer Focus Group, *supra* note 9.

⁶⁸ See Korobkin, *supra* note 59, at 1627; see also Consumer Focus Group, *supra* note 9 (consumers reporting that they value the options of judicial and class relief, and generally are unfamiliar with arbitration, but assume that companies impose it on them because it disproportionately benefits the companies).

and “slip” questionable terms into their form arbitration provisions with little resistance.

One may argue that the law should not provide consumer protections because it is consumers’ responsibility to read, negotiate, and resist arbitration terms they deem unfair. Indeed, consumers should be more vigilant in their contracting practices and protecting their interests. However, consumers often lack access to counsel or information regarding arbitration, and are correct in their assumptions that they lack power to challenge form provisions. They also report instances in which they have difficulty even contacting retailers to negotiate or challenge form terms. Consumers especially lament the struggles they face in seeking to contact companies via the Internet to clarify or question e-contract terms.⁶⁹ They complain that salespersons insist they lack power to negotiate company controlled form terms and assert that forms are not subject to alteration.⁷⁰

It is true that some consumers do make unreasonable demands on retailers.⁷¹ Most consumers, however, feel trapped in the powerlessness that has become so pervasive that it is the folly of Dilbert cartoons.⁷² Choice and consent to remedy limitations have become legal fictions in consumer form contracts, but courts often condone form provisions in the name of efficiency. It is therefore time to instill fairness limits on these form contracts in order to revive the consumer trust that is central to efficient workings of our economic markets.⁷³

B. *Judicial Enforcement Based on the FAA and Contract Formalism*

The Supreme Court has fueled expansion of consumer arbitration by interpreting the FAA to require strict enforcement of arbitration contract terms and to preempt state law attempts to regulate arbitration.⁷⁴ The Court has held that the FAA precludes states from singling out arbitration agreements for special treatment or otherwise interfering with their enforcement when they affect interstate commerce.⁷⁵ Furthermore, the Supreme Court has steadily denied claims that arbitration clauses overly burden parties’ ability to vindicate their statutory rights. Courts therefore hold that consumers may be required to arbitrate deceptive practices, fraud, and Magnuson-Moss Warranty Act (“MMWA”) claims.⁷⁶ These courts conclude that instead of denying or limit-

⁶⁹ See Consumer Focus Group, *supra* note 9.

⁷⁰ *Id.*

⁷¹ See Macaulay, *Freedom from Contract*, *supra* note 56, at 807 (acknowledging this reality).

⁷² See *id.* at 808 (noting how even Dilbert has chronicled consumers’ lack of true consent to shrink-wrap disclaimers).

⁷³ *Id.* at 819-20.

⁷⁴ See Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, DISP. RESOL. J., Aug. 1998, at 8, 9-11 (highlighting the vast expansion of arbitration in light of the Supreme Court’s pro-arbitration glaze on the FAA).

⁷⁵ See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA applies in federal and state court).

⁷⁶ See *Dobson*, 513 U.S. 265; *Keating*, 465 U.S. 1; see also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 83-84 (2000) (finding Truth in Lending Act (“TILA”) claims under a

ing consumers' claims, arbitration clauses merely prescribe an alternative forum for resolution of those claims.⁷⁷

Nonetheless, some individuals have successfully challenged arbitration clauses based on claims that *particular provisions*, such as high arbitration costs or bans on class actions, preclude them from vindicating their statutory rights.⁷⁸ A few courts have found such procedural provisions so burdensome on consumers that they effectively prevent consumers from asserting MMWA or other statutory rights.⁷⁹ These courts then may order arbitration without the burdensome procedures or strike the arbitration clause in its entirety where offending provisions taint the clause as a whole.

Such successful challenges are nonetheless rare.⁸⁰ The MMWA and its implementing regulations expressly allow for only nonbinding "informal dispute settlement procedures," but most courts hold that these provisions do not displace the FAA's enforcement of agreements to submit disputes to binding arbitration.⁸¹ Furthermore, courts rely on *Green Tree Financial Corp. v. Randolph* to reject challenges based on consumer claims of oppressive arbitration costs.⁸² They generally find that consumers are unable to clear the high hurdle set by *Randolph* of clearly proving they are highly likely to bear onerous arbitration costs and lack the ability to pay those costs.⁸³ In reaching this conclusion, the courts give arbitrators the benefit of the doubt that they will waive or reallocate truly oppressive fees.⁸⁴ Consumers must therefore pay fees and pro-

consumer financing agreement may be subject to binding arbitration under the FAA); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485-86 (1989) (overruling prior opinion to hold securities claims arbitrable); Schmitz, *MH Mania*, *supra* note 15, at 326-34 (discussing courts' general allowance for arbitration of MMWA rights).

⁷⁷ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (finding statutory age discrimination statute could be subject to arbitration).

⁷⁸ See CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 115-18 (2d. ed. 2006) (discussing parties' challenges of arbitration clauses based on particular procedures these clauses require).

⁷⁹ See *Ex parte* Thicklin, 824 So. 2d 723, 728-30 (Ala. 2002) (finding arbitration clause procedures unenforceable because it prevented effective vindication of consumers' rights under the MMWA).

⁸⁰ See *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1026-28 (11th Cir. 2003) (rejecting mortgagors' argument that an arbitration provision precluding mortgagors from recovering statutory punitive and treble damages violated the TILA).

⁸¹ *Magnuson-Moss Warranty Act*, 15 U.S.C. § 2310(a)(3) (2000); Mace E. Gunter, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483, 1487-89 (2000) (discussing purpose and history of MMWA); Garrett S. Taylor, *Read the Fine Print—Alabama Supreme Court Rules that Binding Arbitration Provisions in Written Warranties Are Okay*, 2001 J. DISP. RESOL. 165, 172-76 (disagreeing with Alabama Supreme Court's decision in *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000), to overturn its year-old decision and now hold MMWA claims arbitrable).

⁸² *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (finding *Randolph* did not meet the burden of showing prohibitive costs).

⁸³ See *James v. McDonald's Corp.*, 417 F.3d 672, 676, 678-80 (7th Cir. 2005) (rejecting cost-based challenge of arbitration agreement).

⁸⁴ See *id.* (also noting consumers would have to show that overall costs were higher in arbitration than litigation); *Bailey v. Ameriquist Mortgage Co.*, 346 F.3d 821, 823-24 (8th Cir. 2003) (ordering arbitration and finding cost questions were for the arbitrator).

ceed with arbitration not knowing whether the arbitrator will reallocate those fees in the award or cap them under consumer arbitration rules.⁸⁵

This has relegated challenges of arbitration provisions to general contract defenses, which most courts have applied in formalistic fashions.⁸⁶ Courts and commentators promote this formalistic enforcement of form terms as necessary to foster efficiencies and cost savings companies may pass on to their consumers through lower prices and better quality goods and services.⁸⁷ Courts also find that there is no duty to inform consumers about arbitration provisions although they usually require consumers to waive access to statutory judicial remedies.⁸⁸ They also have become increasingly formulaic in refusing to question assent or apply contract defenses such as lack of consideration and unconscionability to strike arbitration clauses.⁸⁹

Still, consumers have had some success on unconscionability challenges of pre-printed form arbitration provisions. This is more likely when the provisions include “carve-outs” that give the drafter an option to litigate, impose high costs and fees on consumers, require consumers to travel to inconvenient locations, or impose remedy limitations that gut statutory claims.⁹⁰ Indeed, these provisions often defy the Protocol and institutional consumer rules such as the AAA Consumer Rules, prompting some courts to use this defiance to justify their refusal to enforce such terms.⁹¹ At the same time, however,

⁸⁵ See *Ragan v. AT&T Corp.*, 824 N.E.2d 1183, 1196-97 (Ill. App. Ct. 2005) (finding costs not prohibitive under an unproven assumption the AAA would apply consumer instead of commercial rules); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 362-63 (Tenn. Ct. App. 2001) (finding that the consumer did not prove prohibitive costs, even assuming application of the AAA Commercial Rules).

⁸⁶ See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (emphasizing that the FAA only permits challenges of arbitration clauses based on generally applicable state contract defenses); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 & n.2 (9th Cir. 2002) (finding form arbitration clause was not unconscionable); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-49 (7th Cir. 1997) (denying assent and unconscionability challenges of form arbitration clause in boxed terms under strict, efficiency focused analysis).

⁸⁷ See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 434-45, 485-86 (2002) (explaining why electronic contracts are not adhesion contracts and highlighting efficiency benefits of standard form contracts); see also Whitford, *supra* note 60, at 643 (highlighting the emergence of leading contract scholars advocating “a new formalism, which is essentially a return to neoclassical formalism, in contract law”).

⁸⁸ See *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 869-70 (D. Or. 2002) (emphasizing no duty to disclose or explain written agreements). *But see Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (breaking from the majority of courts and requiring clear and express agreement to arbitrate statutory claims), *cert. denied*, 516 U.S. 812 (1995).

⁸⁹ See Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (exploring development, evolution, and functions of unconscionability, and critiquing courts' formulaic application of unconscionability); see also Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 812-13 (2004) (emphasizing restrained application of unconscionability).

⁹⁰ See DRAHOZAL, *supra* note 78, at 113-14 (listing suspect terms and citing case support).

⁹¹ See *Pine Ridge Homes, Inc. v. Stone*, No. 05-04-00002-CV, 2004 WL 1730170, at *1-3 (Tex. App. Aug. 3, 2004) (affirming the finding that arbitration provision requiring consumer to pay both parties' filing fees was “so one-sided as to render it unconscionable”

targeted applications of unconscionability face FAA preemption when they single out arbitration as a “lesser caste.”⁹²

Accordingly, consumers cannot rely on findings of unconscionability to ease the burdens of onerous arbitration provisions. Many courts conclude that arbitration clauses are not so substantively and procedurally unfair that they are unconscionable.⁹³ Furthermore, although flexible contract law analysis can foster fairness by accounting for context, courts’ current case-by-case contract law regulation of arbitration has been inadequate and haphazard. It has left consumers without adequate protection and companies without guidance regarding the enforceability of their arbitration provisions. The time is therefore ripe for legislative limits on what is permissible in consumer arbitration.

III. ESTABLISHMENT OF PROCEDURAL PROTECTIONS IN CONSUMER ARBITRATION

Legislative clutter certainly has its drawbacks and contractual autonomy is worth protecting. However, the dominos of deference to form arbitration provisions stack up against consumers to an extent that justifies the establishment of clear procedural ground rules for consumer arbitration. The Protocol then provides a starting template because its “shoulds” have existed since 1998, and some courts have given them credence as appropriate fairness standards. The FAA’s preemptive force, however, makes it necessary that Congress transform these “shoulds” into federal legislative “musts” in order to give them true impact.⁹⁴ Furthermore, business and consumer voices should aid Congress in creating legislative standards aimed to balance efficiencies and procedural fairness of arbitration. To that end, this Article seeks to spark discussion of such procedural parameters in the hopes of transforming rhetoric into sufficiently clear guidelines that ease the uncertainties and inadequacies of current regulation.⁹⁵

A. Transformation of “Shoulds” to “Musts”

The FAA preempts states’ attempts to require procedural fairness rules for consumer arbitration or otherwise inhibit enforcement of arbitration agreements according to their terms. Furthermore, companies have ignored the Protocol’s

because it defied the Protocol and the AAA Consumer Rules, and the AAA indicated that it would not enforce such a provision).

⁹² See Broome, *supra* note 10, at 65 (arguing that California courts have applied “distorted” unconscionability analysis to arbitration clauses); Ostolaza, *supra* note 1, at 265-66, 268 (discussing preemption).

⁹³ Procedural unconscionability asks whether the bargaining process was unduly one-sided, whereas substantive unconscionability focuses on whether the terms of an arbitration provision are oppressive or otherwise unfair, and most courts require that one prove both to succeed on an unconscionability challenge. See *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (noting that most states require proof of both elements of unconscionability).

⁹⁴ Schmitz, *MH Mania*, *supra* note 15, at 355-57.

⁹⁵ Such legislative fairness standards have been introduced in Congress, but they have sparked little debate or action. See Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000) (bill referred to the Senate Committee on the Judiciary in 2000).

“shoulds,” and arbitral institutions have little power or incentive to impose consumer-friendly procedures or otherwise regulate companies’ arbitral programs. Administering institutions have been under fire for favoring repeat-player companies and promulgating permissive rules that generally allow for companies’ manipulation to their disproportionate advantage.⁹⁶ In addition, companies may require ad hoc arbitration, thus eliminating any institutional opportunities to prescribe consumer rules or otherwise police consumer arbitrations.

Moreover, all companies do not police the fairness of their own arbitration practices. Some companies have continued to dictate arbitration provisions that ignore fairness guidelines such as those the Protocol suggests. For example, many companies do not allow for class relief or access to small claims court in their form arbitration provisions.⁹⁷ Meanwhile, consumers have limited and uncertain success in challenging such provisions under general contract theories.⁹⁸ Clear minimum standards would therefore at least set a fairness floor for consumer arbitration. In addition, such standards may promote efficiency by providing contracting guidance and limiting costly and uncertain judicial challenges.

Nonetheless, this is not a call to ban arbitration of consumer disputes. Again, contractual liberty generally supports enforcement of parties’ agreements. Furthermore, arbitration may benefit companies and consumers by easing dispute resolution costs and providing an equitable forum where parties can air concerns. However, realities of one-sided form provisions and their burden on consumers’ access to statutory remedies make fairness standards especially important for protection of statutory, or public, rights such as those the MMWA provides.

Any legislated arbitration standards could therefore target these non-negotiable form provisions in cases involving such statutory claims. Indeed, policymakers could begin by clarifying the MMWA’s murky template for creation of dispute resolution standards.⁹⁹ The Act expressly encourages warrantors to establish “informal dispute settlement procedures” for resolution of warranty claims and charges the Federal Trade Commission (“FTC”) with prescribing and monitoring minimum requirements for such procedures.¹⁰⁰ The FTC then prescribes broad guidelines for nonbinding dispute resolution mechanisms aimed mainly to ensure that consumers have notice and information regarding such mechanisms and that the mechanisms are neutral, low cost, expeditious, and fair.¹⁰¹

⁹⁶ See *supra* notes 38-39 and accompanying text (discussing bias claims against NAF).

⁹⁷ See Collected Cell Phone and Credit Card Arbitration Provisions, *supra* note 9.

⁹⁸ See *supra* Part II.B (discussing courts’ unclear enforcement of arbitration clauses).

⁹⁹ 15 U.S.C. § 2310 (2000) (providing for establishment and monitoring of dispute resolution procedures for consumers’ warranty claims under the Act); 16 C.F.R. §§ 700.8, 703.1-.5 (2007) (establishing disclosure and procedural requirements regarding notice, information, costs, neutrality, and review); see also Amy J. Schmitz, *Motivating the MMWA to Confront the Consumer Contracting Culture* (work in progress, on file with author) (proposing amendments to the MMWA that set forth minimum fairness rules for resolution of warranty claims under the Act).

¹⁰⁰ 15 U.S.C. § 2310.

¹⁰¹ 16 C.F.R. §§ 700.8, 703.1-.5.

This seems to open the door for Congress to reinvigorate a MMWA dispute resolution regime with more particularized procedural regulations of warrantors' binding arbitration programs. Furthermore, a proposal for procedural regulations may have more legislative muscle than current calls to bar all predispute arbitration agreements in consumer and employment transactions.¹⁰² It also could provide policymakers with a template for regulating arbitration of consumers' Truth in Lending Act and other statutory claims.

B. *Procedures Aimed to Balance Fairness and Efficiency*

Regulation of arbitration agreements' terms should not quell beneficial use or sap efficiencies of consumer arbitration programs. The growth of consumer arbitration over the past decade indicates that companies must benefit from their arbitration programs,¹⁰³ although it is uncertain whether they share these benefits with consumers.¹⁰⁴ Furthermore, some consumers prefer arbitration to litigation regardless of uncertainties regarding whether it results in lower prices or higher quality products.¹⁰⁵ Accordingly, the Protocol provides a good starting point for establishing fairness guidelines because varied consumer and business voices contributed to its creation.¹⁰⁶

1. *The Protocol's Starting Points*

Although it provides fairly vague aspirations, the Protocol suggests some guidelines for protecting consumers' access to remedies through companies' arbitration programs. It generally asks arbitration providers to offer consumers

¹⁰² Bills banning predispute arbitration provisions in all consumer and employment contracts have not been successful. *See, e.g.*, H.R. 3651, 109th Cong. (2005) (bill lingering in committee to amend the FAA to preclude arbitration of employment disputes unless the employee and employer agree to arbitrate after the dispute arises); H.R. 2969, 109th Cong. (2005) (another bill lost in committees to preclude enforcement of predispute arbitration agreements in employment contracts); H.R. 1994, 109th Cong. (2005) (bill lost in committee addressing predatory mortgage lending practices, and including provisions barring enforcement of predispute arbitration agreements in any consumer transactions for personal, family, or household goods or services).

¹⁰³ In 2005 alone, the AAA received 1652 consumer disputes including claims related to banking, lending, credit cards, mortgages, education, home construction, cell phones, real estate, car sales, warranties, accounting, and financial advice. *See* E-mail from Jennifer Jester Coffman, Senior Vice President of the Am. Arbitration Ass'n, to Amy J. Schmitz, Assoc. Professor, Univ. of Colo. Sch. of Law (March 16, 2007) (on file with author). Sixty-eight percent of these disputes involved claims of less than \$75,000. *Id.*; *see also* Am. Arbitration Ass'n, Consumer Arbitration Statistics, <http://www.adr.org/sp.asp?id=29470> (last visited Dec. 12, 2007).

¹⁰⁴ *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 686-93 (1996) (critiquing free market justifications for arbitration of consumer claims and concluding that "failing to regulate the market with respect to arbitration clauses is likely to lead to an inefficient result that benefits those who impose form arbitration agreements").

¹⁰⁵ *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-264, 292 (2006) (proposing that pre-dispute arbitration clauses benefit companies and consumers).

¹⁰⁶ *See* PROTOCOL, *supra* note 7 (explaining its collaborative creation in the introductory notes).

procedures and remedies deemed essential for them to assert their claims. The Protocol therefore requires companies and arbitration administrators to provide consumers with full information about their arbitration programs, equal voice in selecting impartial neutrals, the option to proceed in small claims court, reasonable arbitration fees and costs, and convenient hearing locations. It also calls for clear time limits, reasoned awards, and preservation of consumers' access to representation, evidence, adequate hearings, and remedies in arbitration proceedings.¹⁰⁷

a. Notice and Neutrality

Federal arbitration law does not require heightened notice of arbitration clauses. Realities of consumer contracting, however, suggest that the law should require companies to provide consumers with clear notice of an arbitration clause and information regarding the companies' arbitration programs to help legitimize consumers' consent to form arbitration provisions. Companies also should supply resources for consumers to consult to learn more about arbitration providers and procedures.

In addition, it may ease biases resulting from providers' relationships with particular companies to allow consumers to participate in choosing arbitration providers for their cases.¹⁰⁸ The Protocol, for example, requires that consumers have an "equal voice" in arbitrator selection and that arbitrators comply with fairly strict arbitrator disclosure rules.¹⁰⁹ Legislative limits also should further clarify that "equal voice" bars companies from unilaterally choosing arbitrators and that an award may be vacated if an arbitrator blatantly breaches disclosure requirements.

This does not mean to suggest that policymakers should mimic California in vacating an award for any arbitrator failure to make disclosures pursuant to ethical standards on par with those established for judicial programs.¹¹⁰ Instead, procedural regulations should aim to clarify disclosure standards that account for the differences between arbitrators and judges, but better ensure arbitrator neutrality than courts' currently narrow reading of the FAA's "evident partiality" review of awards.¹¹¹ Furthermore, courts should reconsider their general refusal to vacate awards for nondisclosure and their reservation of

¹⁰⁷ See *id.*; see also Schmitz, *MH Mania*, *supra* note 15, at 345-70 (suggesting guidelines for arbitration of mobile home consumers' warranty claims).

¹⁰⁸ See, e.g., Posting of Paul Bland, *supra* note 38 (discussing alleged bias of NAF for lenders).

¹⁰⁹ PROTOCOL, *supra* note 7, at princ. 3; see also Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong (2000) (emphasizing that parties should have a right to "a competent, neutral arbitrator," and an "equal voice" in arbitrator selection); AAA CONSUMER RULES, *supra* note 30 (requiring impartial neutrals).

¹¹⁰ CAL. CIV. PROC. CODE § 1286.2(a)(6) (West 2002) (grounds for vacating arbitration award) & § 1281.9(a)(1) (West 2007) (grounds for disqualification). Federal courts have nonetheless held that the FAA preempts enforcement of these disclosure standards in NASD arbitrations to the extent they impose standards more stringent than those under the NASD rules incorporated in such securities-related agreements. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1136-38 (9th Cir. 2005).

¹¹¹ See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (emphasizing the narrowness of bias under FAA section 10).

what they deem the “draconian” remedy of vacatur for cases involving an arbitrator’s “significant compromising relationship” with a party.¹¹² Consumer arbitration rules should at least follow the new United States Navy arbitration regulations in requiring “mutual agreement” on arbitrator selection and ensuring arbitrators’ disclosure of “an official, financial or personal conflict of interest with respect to the issue in controversy.”¹¹³

b. Reasonable Costs and Locations

Clear cost rules and caps would be a key component of procedural limits. Consumers’ leading complaint about arbitration is its often high filing costs. Furthermore, this has burdened parties and courts with inefficiencies and uncertainties of litigation about arbitration in the wake of *Randolph*.¹¹⁴ *Randolph* set hefty hurdles for consumers to prove high costs and inability to pay those costs, and adopted a “wait-n-see” approach that essentially forces consumers to complete arbitration procedures in hopes that arbitrators will ease cost burdens in their awards.¹¹⁵

Mandatory cost limits could help ease these burdens and uncertainties by automatically capping consumer arbitration fees and costs, or shifting such costs to companies for low-income consumers subject to form arbitration provisions.¹¹⁶ Furthermore, these rules should not leave consumers to gamble on whether arbitrators will waive or reduce fees in the award.¹¹⁷ Instead, rules could set income/cost schedules that administrators or arbitrators could apply at the outset of arbitration proceedings, subject to variation in special circumstances. California, for example, requires arbitration providers to waive arbitration fees for “indigent” consumers with a gross monthly income that is less than 300% of the federal poverty guidelines.¹¹⁸ It also mandates that arbitration providers must give consumers written notice of the right to a fee waiver.¹¹⁹

¹¹² *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 280-86 (5th Cir. 2007) (en banc) (emphasizing the narrow review of arbitration awards as necessary to preserve its finality).

¹¹³ U.S. DEP’T OF THE NAVY, SECNAV INSTRUCTION 5800.15(4), USE OF BINDING ARBITRATION FOR CONTRACT CONTROVERSIES (March 5, 2007), available at <http://doni.daps.dla.mil/SECNAV.aspx> (follow “05000 General Management Security and Safety Services” hyperlink; then follow “05-800 Laws and Legal Services” hyperlink; then follow “5800.15” hyperlink).

¹¹⁴ See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82-91 (2000).

¹¹⁵ See *id.*

¹¹⁶ AAA CONSUMER RULES, *supra* note 30 (providing a fee schedule based on claim amount and capping fees at \$250 for telephonic hearings and \$750 per day of in person hearings for claims not exceeding \$75,000; also allowing parties to bring claims to small claims court).

¹¹⁷ AAA COMMERCIAL RULES, *supra* note 40, at R-43 (allowing arbitrator to “assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate” and to award attorneys’ fees if authorized by the parties’ agreement or other law); *Id.* at R-49 (allowing AAA to defer or reduce fees upon showing of hardship); *Id.* at R-50 (requiring parties to bear expenses equally unless they agree otherwise or the arbitrator assesses expenses in the award).

¹¹⁸ CAL. CODE CIV. PROC. § 1284.3(b)(1) (West 2007).

¹¹⁹ *Id.* § 1284.3(b)(2).

Nonetheless, such rules should require consumers to show need or that they meet stated income standards.¹²⁰ In addition, cost limits should account for savings of expedited proceedings and use of telephonic or “desk” arbitration options that allow parties to tell the arbitrator about their cases online or during conference calls.¹²¹ Such desk or telephonic hearings may ease expenses of arbitration by eliminating travel, minimizing scheduling hassles, and streamlining discovery and recording procedures.¹²² However, such hearings also may augment consumers’ technological disadvantages¹²³ and diminish healing benefits of in-person discussions.¹²⁴

Arbitration regulations should therefore give consumers the option of in-person hearings at convenient locations. They also should preserve the option of bringing disputes to small claims court in appropriate cases.¹²⁵ The Protocol, for example, preserves this option and requires that any arbitration hearings be “at a location which is reasonably convenient to both parties.”¹²⁶

c. Preservation of Remedies and Class Relief

Policymakers should take special care to acknowledge the distinctions between arbitration and remedy or rights waivers. Companies should not be permitted to use arbitration clauses to quash consumers’ statutory rights and meaningful access to remedies.¹²⁷ This is fast becoming common practice, however, as companies promulgate form arbitration provisions that bar consumers’ recovery of punitive or exemplary damages, collection of attorney fees, and access to class relief. These provisions chill consumers’ claims and stymie public policies.¹²⁸ Furthermore, they hinder consumers’ prosecution of class

¹²⁰ California requires consumers requesting waivers to declare under oath their income and number of persons in their households, but does not allow arbitration providers to require additional evidence of indigence. *Id.* § 1284.3(b)(3). Perhaps it would better prevent fraud to require consumers to present additional proof when their statements lack credibility due to other evidence.

¹²¹ See PROTOCOL, *supra* note 7, at princ. 6 (calling providers to develop programs “which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of the goods or services provided, and the ability of the Consumer to pay”).

¹²² AAA CONSUMER RULES, *supra* note 30.

¹²³ See Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 470-71 (2002) (explaining that a consumer may not have technological tools, online computer time, or sufficient computer skills to participate in cyber mediation or arbitration).

¹²⁴ See Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1420 (1997) (discussing psychological benefits of in-person mediation).

¹²⁵ See Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000) (section 17(c)(11) of proposed rules requiring that parties have the right to opt out of arbitration for small claims).

¹²⁶ PROTOCOL, *supra* note 7, at princ. 7.

¹²⁷ See U.C.C. § 2-316 (2003) (stating rules for enforcing warranty exclusions and modifications in contracts for sale of goods).

¹²⁸ See, e.g., *Cieslewicz v. Mut. Serv. Cas. Ins. Co.*, 267 N.W.2d 595, 599-601 (Wis. 1978) (explaining that punitive damages aim to punish or deter bad conduct).

proceedings as “private attorneys general,”¹²⁹ which is especially important in light of limited and disparate enforcement of consumer protections by states’ public attorneys general.¹³⁰

Accordingly, legislative “musts” should at least protect consumers’ rights to recover statutory attorney fees on prevailing claims. This also helps counteract attorneys’ distaste for representing consumers with small claims in arbitration. In addition, it may also be proper to preserve consumers’ access to class relief in appropriate cases.¹³¹ Such relief could be limited, however, by special procedures for certification, class notice, award strictures, and disclosures.¹³² Furthermore, any class relief requirements should account for rules capping consumers’ arbitration costs, as lower costs may help ease burdens of asserting claims in individual arbitrations.¹³³

2. *Additional Ideas to Consider*

The Protocol is only a starting point for transforming fairness “shoulds” into legislative “musts.” Congress also should take the opportunity to clarify its vague “reasonableness” standards and to adopt additional procedural parameters aimed to balance consumer and corporate interests.¹³⁴ For example, it is important that arbitration be final and time-limited to prevent unnecessary delays that may harass opponents and frustrate efficiency benefits of arbitration. At the same time, fairness rules should protect parties’ rights to be heard and present their cases. To that end, legislative rules again could borrow from the U.S. Navy arbitration regulations in guarding parties’ reasonable hearing

¹²⁹ See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5-22, 97-104 (2000) (discussing arbitration’s effect on consumers’ access to class relief and proposing that companies should not be permitted to hinder consumers’ vindication of statutory rights through class relief waivers). *But see* *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 321 (Ct. App. 1986) (gathering cases and stating this conclusion). These and other competing concerns make this a question for further debate among interested constituencies. Cf. Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” *Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1381 (2000) (proposing that “class action in reality is an instrument of abuse and corruption”); Sternlight, *supra*, at 12-15 (noting how class actions allow small dollar claimants to assert their rights more economically as a group).

¹³⁰ See Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 609-18 (2006) (reporting study of disparate enforcement of consumer protections by usually elected state attorneys general due to economics and politics).

¹³¹ Class arbitration is controversial and uncertain, and full debate is beyond this Article. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447-59 (2003) (eluding the question of whether Green Tree can contractually preclude class relief in its consumer arbitration clauses by holding that arbitrators must first determine whether the clauses preclude class arbitration).

¹³² See, e.g., AAA CLASS ARBITRATION, *supra* note 31 (covering these and other special issues of concern in class arbitration).

¹³³ See AAA CONSUMER RULES, *supra* note 30 (discussing caps on consumers’ arbitration costs).

¹³⁴ See, e.g., Schmitz, *MH Mania*, *supra* note 15, at 345-65 (providing additional suggestions for reform).

rights, but also requiring shorter timelines for claims of \$100,000 or less and written awards within thirty days after close of the arbitration hearing.¹³⁵

Furthermore, legislative regulations should ensure that parties have access to evidence and information they need to present their cases. They must be cautious, however, not to impose costly and time-consuming procedures that overly judicialize proceedings. Policymakers should therefore preserve allowance for streamlined discovery and evidentiary rules in consumer arbitration.¹³⁶ Arbitration should not simply become private litigation. The key is to balance consumers' benefits from such rules with risks of increased prices and interest rates resulting from judicialized procedures.¹³⁷

Policymakers also could craft rules that help streamline proceedings and contain costs by allowing for liberal joinder in proper cases involving the same issues and disputes. This may save all parties the costs, time, and hassles of multiple proceedings. It also may help stop companies from dodging responsibility by blaming each other for warranty claims.¹³⁸ Furthermore, parallel proceedings create risks of inconsistent rulings.¹³⁹ Again, these are suggestions for policymakers to consider and debate.

CONCLUSION

The time is ripe for Congress to consider adoption of fairness regulations for consumer arbitration under non-negotiable form contracts, especially where necessary to protect statutory rights. The Protocol's provisos can no longer linger as "shoulds" that companies may ignore in drafting their consumer form contracts. Instead, this Article invites policymakers to develop clear rules that balance fairness and efficiency, and ease uncertainties of current contract defense regulation. Of course, this is a tough task. It is nonetheless a task worth tackling in order to preserve consumers' access to statutory remedies, quell the rising tide of arbitration litigation, and ease consumers' skepticism and negativity toward companies' arbitration regimes.

¹³⁵ U.S. DEP'T OF THE NAVY, *supra* note 113, at 5800.15(3)-(6).

¹³⁶ Compare Sternlight, *supra* note 104, at 683-84 (warning of dangers of corporations' use of arbitration to prevent consumers from getting needed discovery), with Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 93 (discussing drawbacks of judicialized arbitration).

¹³⁷ See Ware, *supra* note 136, at 90 (noting how judicialization of proceedings often results in increased business costs that are passed on to the populace through higher prices).

¹³⁸ See Schmitz, *MH Mania*, *supra* note 15, at 313-26, 360-61 (proposing liberal joinder in mobile home warranty cases).

¹³⁹ See *id.*