American Exceptionalism in Consumer Arbitration

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"American exceptionalism" has been used to reference the United States' outlier policies in various contexts, including its love for litigation.[1] Despite Americans' reverence for their "day in court," their zest for contractual freedom and efficiency has prevailed to result in U.S. courts' strict enforcement of arbitration provisions in both business-to-business

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[1] *See, e.g.*, *Exceptionalism – What is exceptionalism?*, Encyc. of the New Am. nation, http://www.americanforeignrelations.com/E-N/Exceptionalism-What-is-exceptionalism.html (defining and discussing the concept); *see* Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century,* Fac. Pubs. Paper, 1-5, 17-18 (2011), *available at* http://scholarship.law.wm.edu/facpubs/1139 (last visited Dec. 1, 2011) (discussing "American exceptionalism" with respect to pleading standards and the role of judges, but noting how this is diminishing).

("B2B") and business-to-consumer ("B2C") contracts. This is exceptional because although most of the world joins the United States in generally enforcing B2B arbitration under the New York Convention, many other countries refuse or strictly limit arbitration enforcement in B2C relationships due to concerns regarding power imbalances and public enforcement of consumer protections. The resulting clash in arbitration policy has left consumers in cross-border cases uncertain whether they must abide by arbitration clauses in an increasingly global marketplace.

I. Introduction

Many companies routinely include pre-dispute arbitration clauses in their contracts as means for privately and efficiently resolving disputes, especially in international business-to-business ("B2B") contracts. This is due, largely in part, to the international enforcement of arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("N.Y. Convention"), adopted by the United States and 148 other countries.[2] This treaty generally mandates strict enforcement of international arbitration agreements and awards, subject to limited grounds focused on procedural improprieties or lack of a valid arbitration agreement.[3] The N.Y. Convention nonetheless allows nations to refuse enforcement based on "nonarbitrability of the subject matter" or where enforcment "would be contrary to public policy."[4]

The U.S. Congress implemented the N.Y. Convention through Chapter Two of the Federal Arbitration Act (the "FAA") and U.S. courts have vigorously applied this law to both B2B and business-to-consumer ("B2C") arbitration.[5] This coincides with the U.S.'s strict enforcement of domestic arbitration under Chapter One of the FAA.[6] The FAA also augments this strict enforcement with provisions for liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators if parties cannot do so by agreement, limited review of arbitration awards, and treatment of awards as final judgments.[7] Furthermore, the U.S. Supreme Court has mandated the FAA review standards be applied nar-

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, arts. I-XVI, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited Nov. 2, 2012) [hereinafter N.Y. Convention]; *see Status:1958–Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL (2012), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Dec. 1, 2011) (noting 147 countries had adopted the N.Y. Convention).

[3] N.Y. Convention, *supra* note 2, art. V. **R**

[4] *Id.* art. V(2).

[5] Federal Arbitration Act, 9 U.S.C. §§ 201-08, 301-07 (1970) (implementing the N.Y. Convention under §§ 201-208 and the Panama Convention under §§ 301-307); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233, 233-55 (2006) (noting how U.S.'s strict enforcement of arbitration has made the U.S. a popular venue for international arbitration proceedings).

[6] 9 U.S.C. §1-16 (1947-1990). The same is true under the FAA's state counterpart, the Uniform Arbitration Act. Uniform Arbitration Act, 7 U.L.A. §1 (2000).

[7] *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 Ga. L. Rev. 123, 124–35 (2002).

rowly and has admonished states from singling out arbitration for special treatment or otherwise hindering the enforcement of arbitration in contracts affecting interstate commerce.[8] This leaves states with little power to regulate consumer arbitration provisions beyond the application of general contract defenses.[9]

Unlike the U.S., other nations do not extend strict enforcement of pre-dispute arbitration clauses to B2C or employment agreements.[10] France, Germany, and the United Kingdom ("U.K."), for example, generally limit or refuse to enforce pre-dispute arbitration agreements in employment contracts with respect to employees' wrongful dismissal claims.[11] Public policies in these countries protect employees' rights to bring their dismissal claims to public tribunals or courts.[12] Policies in the U.K. and other European countries similarly limit or preclude enforcement of pre-dispute arbitration clauses in consumer contracts.[13] These policies flow from concerns regarding asymmetry of power, enforcement of public rights, and competence of private arbitrators and arbitral institutions.[14]

Similar concerns have prompted private arbitration providers in the U.S. to suggest due process protocols for consumer and employment arbitration.[15] Providers have also promulgated special procedural rules that they use for small dollar cases in uneven bargaining contexts.[16] Policymakers in the U.S. have also become increasingly critical of FAA enforcement of arbitration awards in consumer and employment cases. This can be seen in renewed efforts to enact the Arbitration Fairness Act ("AFA"), which would bar enforcement of pre-dispute arbitration agreements in consumer, employment, and civil rights cases.[17]

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[8] *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (emphasizing limited review).

[9] *See* Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681 (1996) (finding the FAA preempted state notice requirements that singled out arbitration clauses for special treatment); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration).

[10] *See* PABLO CORTES, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION 107-11 (2010) (noting how the United States and the EU have diverged in their enforcement of arbitration in consumer contexts); *see also* Matthew W. Finkin, *Privatization of Wrongful Dismissal Protection in Comparative Perspective*, 37 INDUS. L. J. 149, 153-63 (2008) (highlighting comparative enforcement of arbitration in employment contexts).

[11] Finkin, *supra* note 10, at 149-65. **R**

[12] *Id.*; *see* Clyde & Co. L.L.P. v. Van Winkelhof, [2011] EWHC (QB) 668 (refusing enforcement of an arbitration agreement in an employment relationship).

[13] *See* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 843-64 (2002) (highlighting how the U.S. has diverged from European and most other nations by enforcing pre-dispute arbitration agreements in consumer and employment contracts); *see* CORTES, *supra* note 10, at 106-12. **R**

[14] *See, e.g.*, Finkin, *supra* note 10, at 155-56, 159-60 (discussing policy concerns). **R**

[15] *Consumer Due Process Protocol*, NAT'L CONS. DISP. ADVISORY COMM. (April 17, 1998), *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [hereinafter Protocol]; *JAMS Consumer Arbitration Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS, July 15, 2009, *available at* http://www.jamsadr.com/consumer-arbitration/ (last visited April 4, 2011).

[16] *See* W. Mark C. Weidemaier, *Arbitration and the Invidiuation Critique*, 49 ARIZ. L. REV. 69, 87-91 (2007) (discussing providers' due process rules).

[17] Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or the "Act")[18] bans enforcement of pre-dispute arbitration clauses in mortgage contracts and claims under whistle-blower provisions.[19] It also created the Consumer Financial Protection Bureau ("CFPB") and gave it power to write and enforce various lending and consumer protection regulations that may include prohibitions or limitations on enforcement of pre-dispute arbitration agreements in consumer financial products and services contracts.[20] The Act gives the Securities and Exchange Commission ("SEC") power to limit or prohibit agreements requiring customers of any broker or dealer to arbitrate future disputes arising under federal securities laws.[21]

This Article does not rehash the well-trodden debates regarding the propriety, fairness, and efficiency of consumer and employment arbitration.[22] Instead, it focuses on differences in the enforcement of B2C arbitration in the U.S. versus the European Union (EU) and U.K. and seeks to spark discussion regarding the creation of globally enforceable means for consumers to access remedies. Consumers and companies currently face uncertainties regarding enforcement of pre-dispute arbitration clauses in international B2C contracts due to conflicting and uncertain laws, but arbitration is often the only feasible means for enforcing international contracts. This is especially problematic in the increasingly international online marketplace.

Part II of this Article provides a synopsis of the U.S.'s exceptional enforcement of B2C arbitration under the FAA and the U.S. Supreme Court's holdings endorsing strict arbitration enforcement even when statutory rights and class re-

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

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

[20] *Id.* § 1028; *see also* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009). This bill, which is now the Dodd-Frank Act, establishes an agency to regulate consumer financial products and services, and authorizes the agency to approve pilot programs for effective disclosure of consumer contract terms. *Id.*

[21] *See* Dodd-Frank, *supra* note 18, § 921 (amending 15 U.S.C. § 78(o) (1934)). R

[22] Indeed, this debate has been surging for many years and there is an abundance of relevant articles, books and commentary. *See generally* Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (critiquing arbitration of employment claims); *see also* Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 213–14 (2006) (defending arbitration to the extent that it is less "lawless" than some fear); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 WASH. U. L. Q. 637, 637 (1996) (critiquing companies' use of arbitration clauses in contracts with consumers and employees); Searle Civil Justice Inst. Task Force on Consumer Arbitration, *Consumer Arbitration Before the American Arbitration Assoc. Preliminary Report,* SEARLE CIV. JUST. INST., at 68-87 (Mar. 2009) (reporting study results indicating that overall, consumers do well in arbitration versus court); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627–86 (2008) [hereinafter Schmitz, *Warranty Woes*] (discussing pros, cons and ideas for reform with respect to consumer arbitration); Amy J. Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, 28 BANKING & FIN. SERVS. POL'Y REP. 16, 16-35 (2009) (critiquing the AFA's approach and offering suggestions for procedural fairness regulations); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEG. L. REV. 115, 115-94 (2010) [hereinafter Schmitz, *Legislating in the Light*] (discussing arbitration debate and research).

lief are at stake. Part III then outlines contrasting perspectives on B2C arbitration in France, Germany, and the U.K. Part IV introduces international movements toward creating Online Dispute Resolution ("ODR") mechanisms that would transcend contrasting views toward arbitration for cross-border B2C disputes. It also suggests means for implementing online arbitration ("OArb") processes to assist consumers in accessing meaningful remedies with respect to international purchases.[23] Part V concludes with a call for international collaboration in creation of such an OArb system.

II. Arbitration Law and Policy in the United States

Arbitration has a rich history in B2B relationships despite courts' historical distrust of such private processes.[24] Furthermore, the FAA and Uniform Arbitration Act ("UAA") ensure arbitration's enforcement and the U.S. Supreme Court has strengthened the FAA's arbitration enforcement beyond the B2B context. This has allowed employment and consumer arbitration to flourish in the U.S. even when statutory claims are at issue. Courts have nonetheless used contract defenses in some cases to police the fairness of arbitration in these uneven bargaining contexts.

A. FAA Law and Jurisprudence

Courts' fear of arbitration's private power prompted passage of the FAA to mandate specific enforcement of arbitration agreements and limited judicial review of arbitration awards.[25] The FAA then served as the model for the N.Y. Convention. The impetus of the law and, in turn, the treaty was to allow merchant and trade groups to efficiently and privately resolve disputes in accordance with applicable norms.[26] However, U.S. courts now apply FAA enforcement of pre-dispute arbitration clauses beyond B2B contexts, including B2C cases. This enforcement is limited only by application of general contracts defenses.

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[23] *See generally* Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178 (2010) (discussing pros and cons of ODR and OArb).

[24] *See* Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L. J. 667, 676-78 (1927) (emphasizing arbitration's independence, but noting arbitration "can by no means be relied upon as a solution of all litigious matters"); *see also* WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 792-97 (1930) (discussing courts' power struggles with arbitration).

[25] *See* Poor, *supra* note 24, at 674-75 (describing courts' historical distrust of the arbitration process). R

[26] *See generally* LUJO BRENTANO, ON THE HISTORY AND DEVELOPMENT OF GILDS, AND THE ORIGIN OF TRADE-UNIONS 33-39 (1870) (exploring the historical means used by merchant and trade groups to resolve disputes privately); *see also* Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. Q. 238, 246 (1930). International arbitration proceedings even continued during the American Revolutionary War despite the closure of the public courts. *See generally* William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193, 207-12 (1956).

1. Arbitrability of Statutory Rights in the U.S.

Despite the U.S. Supreme Court's historic concerns for public enforcement of statutory rights, the Court now sanctions arbitrability of statutory claims unless Congress has expressly precluded arbitration of the claims at issue or there is very strong evidence that arbitration would severely hinder the statute's purpose.[27] The Court therefore has condoned arbitration of a broad range of statutory claims extending to discrimination, consumer lending, and securities fraud.[28] Furthermore, courts construe general arbitration clauses to cover statutory claims and have agreed that arbitration of statutory claims does not constitute state action subject to constitutional due process requirements.[29]

In the B2C context, the Supreme Court has held that Truth in Lending Act ("TILA") claims may be subject to arbitration.[30] The majority of courts have also held that consumers' claims under the Magnusson-Moss Warranty Act ("MMWA") are arbitrable, although the Supreme Court has never addressed the issue.[31] This is true even in cases where the applicable arbitration provision requires consumers to arbitrate outside of their home jurisdictions or requires consumers to pay administrative and filing fees in asserting small-dollar claims.[32]

Most recently, the Supreme Court settled a split in authority in holding that consumers' claims under the Credit Repair Organizations Act ("CROA" or the "Act") may be subject to arbitration.[33] The CROA aims to protect consumers by preventing organizations that sell purported credit repair services from overreaching and requiring these organizations to inform consumers of their right to a private cause of action for violations of the Act.[34] The CROA also precludes organizations from requiring consumers to waive these rights.[35]

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[27] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20-21, 26-27 (1991) (finding statutory age discrimination statute could be subject to arbitration).

[28] *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485-86 (1989) (holding securities claims are arbitrable); *see also* Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 89-92 (2000) (finding the Truth in Lending Act ("TILA") claims arbitrable).

[29] *See Gilmer*, 500 U.S. at 26-27 (stating statutory claims are clearly subject to arbitration); *see also* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions,* 47 WM. & MARY L. REV. 1711, 1714-23, 1745-62 (2006) (discussing agreement that private arbitration does not involve state action).

[30] *Green Tree Fin. Corp. Ala.*, 531 U.S. at 89-92 (finding TILA claims arbitrable).

[31] *See* Schmitz, *Warranty Woes*, *supra* note 22, at 627-32, 641-50 (2008) (discussing arbitrability of MMWA claims). **R**

[32] *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1147-50 (7th Cir. 1997); *see also* Petition for Petitioner at 23, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (No. 96-1760), 1997 WL 33561488 (rejecting the Hills' claim that they should not be compelled to arbitrate their MMWA claims regarding a $4,000 computer because the Hills would have to pay upwards of $4,000 in arbitration costs). *But see* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1337-41 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of the same clause).

[33] Credit Repair Organizations Act, 15 U.S.C. § 1679 (1996); *see* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668-75 (U.S. 2012) (holding CROA claims are arbitrable).

[34] 15 U.S.C. § 1679.

[35] *See id.* § 1679f(a) (precluding "[a]ny waiver . . . of any protection provided by or any right of the consumer. . .").

Prior to the Supreme Court's holding, the majority of courts had concluded that the CROA's right to sue and anti-waiver provisions were not sufficient to manifest Congressional intent to prevent consumers from entering into enforceable agreements for arbitration of claims against an organization for violations of the Act.[36] However, in *Greenwood v. CompuCredit Corp.,* the U.S. Court of Appeals for the Ninth Circuit disagreed with the majority of other appellate courts in holding that the language and purpose of the CROA preclude arbitration of claims under the Act.[37] In that case, the Ninth Circuit held that the consumers had a right to disregard an arbitration clause in their contracts and bring a class action against credit repair organizations for allegedly charging fees on their credit cards in violation of the CROA and California's Unfair Competition Law ("UCL").[38] The U.S. Supreme Court reversed, and confirmed a narrow reading of the CROA's anti-waiver and right to civil remedies provisions to permit arbitration clauses because they simply provide a non-judicial means for accessing CROA remedies.[39]

Some individuals have nonetheless been successful in arguing that the specific procedures or costs of arbitration in their cases precluded them from vindicating their statutory rights. This has allowed employees, for examble, to avoid arbitration of statutory discrimination claims where they proved that the high costs of arbitration were likely to hinder their enforcement of public rights.[40] However, these challenges rarely succeed.[41] This is because the Untied States Supreme Court in *Green Tree Financial Corp. v. Randolph* established a high burden for proving such prohibitive costs.[42] In that case, the Court found that the consumer claimants failed to prove that their inability to pay arbitration costs would hinder their TILA claims.[43] In reaching this conclusion, the Court noted that the arbitrators had discretion to limit or excuse fees for hardship and that, in its oral arguments, the lender offered to pay any prohibitive costs.[44]

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[36] *See* Gay v. CreditInform, 511 F.3d 369, 378 (3d Cir. 2007) (holding CROA claims arbitrable); *see also* Vegter v. Forecast Fin. Corp., No. 1:07-CV-279, 2007 WL 4178947, at *1 (W.D. Mich. Nov. 20, 2007) (holding arbitration clause valid under the CROA).

[37] Greenwood v. CompuCredit Corp., 615 F.3d 1204, 1205 (9th Cir. 2010), *rev'd*,132 S. Ct. 665, 668-75 (2012).

[38] *Id.* at 1214; *cf.* Rex v. CSA-Credit Solutions of Am., Inc., 507 F. Supp. 2d 788 (W.D. Mich. 2007) (holding that CROA claims are arbitrable, but severing as unconscionable the Texas venue provision because the parties negotiated and performed the contract in Michigan and the defendant had a Michigan address).

[39] Greenwood v. CompuCredit Corp., 132 S. Ct. 665, 668-75 (2012).

[40] *See* Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 238-40 (N.D.N.Y. 2001) (finding employee had satisfied the burden of proving prohibitive arbitration costs that she could not bear).

[41] *See, e.g.*, James v. McDonald's Corp., 417 F.3d 672, 675-80 (7th Cir. 2005) (rejecting cost-based challenge of arbitration agreement).

[42] *See* Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 91-2 (2000) (finding that although Randolph had provided information regarding high AAA arbitration fees and costs, it was not clear that she would bear these costs and that she could not pay them).

[43] *Green Tree Fin. Corp. Ala.*, 531 U.S. at 91-2.

[44] *Green Tree Fin. Corp. Ala.*, 531 U.S. at 91-2; *see* Transcript of Oral Argument at 21, Green Tree Fin. Corp. Ala. v. Randolph 121 U.S. 79 (2000) (No. 99-1235), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-1235.pdf (although it is laudable for businesses to offer to

2. Recent Supreme Court Reinforcement of a Pro-Business Stance on Arbitration

The U.S. Supreme Court reinforced its pro-business and pro-enforcement stance on consumer arbitration in the recent cases of *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., AT&T Mobility, L.L.C. v. Concepcion*, and *Rent-A-Center v. Jackson*.[45] The Court in *Stolt-Nielsen S.A* and *AT&T Mobility, L.L.C.* significantly narrowed courts' and arbitrators' power to order class arbitration.[46] Furthermore, the Court in *Rent-A-Center v. Jackson* reinforced its mandate that courts only consider contract challenges that target the enforceability of an arbitration agreement itself and sanctioned provisions allowing arbitrators to determine the validity and scope of their own jurisdiction.[47]

i. Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.

In recent years, concerns have heightened regarding the power of arbitration agreements to squash class actions with respect to statutory, or public, rights. This has prompted arbitral institutions such as the American Arbitration Association ("AAA") to develop rules for class arbitration proceedings, thereby allowing individuals to join together to save time and money in asserting their similar claims despite agreements to arbitrate.[48] Furthermore, the United States Supreme Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle* delegated to arbitrators the determination of whether an arbitration agreement allows for class-wide arbitration.[49]

In the wake of these developments arbitrators began ordering class proceedings, but the Supreme Court's ruling in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.* narrowed their ability to do so.[50] In that case, customers of large shipping companies asserted class arbitration on their antitrust claims relying on their stan-

pay such costs, these post-hoc offers allow them to avoid changing their contracts ex ante, thus reserving the benefits of such assistance to only those who expend resources and time to challenge cost provisions); *see also James*, 417 F.3d at 675-80 (emphasizing that consumers would have to show that arbitration was truly more expensive than litigation in terms of overall costs); *see also* Bailey v. Ameriquest Mortg. Mtg. Co., 346 F.3d 821, 823-24 (8th Cir. 2003) (finding cost challenge of arbitrability was for the arbitrator under the parties' agreement); *see also* Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 846-48 (N.D. Ill. 2001) (stating that the court would reconsider its ruling denying enforcement of an arbitration clauses due to high costs if the defendants agreed to pay these costs).

45 AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743-56 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); Rent-A-Ctr, W., Inc. v. Jackson, 130 S. Ct. 2772, 2777-80 (2010).

46 *See AT&T Mobility*, 131 S. Ct 1740, 1748-53 (stating that classwide arbitration is inconsistent with the FAA); *see also Stolt-Nielsen S.A.,* 130 S. Ct. at 1773-76 (holding a party cannot be compelled under the FAA to class arbitration unless contractual basis indicating parties agreed to).

47 *See* Rent-A-Ctr, W., Inc., 130 S. Ct. at 2777-80 (holding clause in employment contract delegating to the arbitrator exclusive authority to decide enforceability of the arbitration agreement was a valid delegation under the FAA).

48 AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2010), *available at* http://www.adr.org/sp.asp?id=21936.

49 Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451-53 (2003).

50 *Stolt-Nielsen S.A.*, 130 S. Ct. .

dard contracts requiring arbitration in New York.[51] After the dispute arose, the parties stipulated that their contract was "silent" in that there was "no agreement" regarding class proceedings, and therefore asked the arbitrators to determine whether the agreement allowed for proceedings under the AAA's class arbitration rules.[52] The arbitrators found that the agreement allowed for class arbitration in the absence of intent to preclude it.[53]

The Supreme Court changed that result in its five to three decision holding that the parties could not be compelled to participate in class proceedings based on the contract's silence regarding class proceedings.[54] Writing for the majority, Justice Alito concluded that the arbitration panel had "imposed its own conception of sound policy" and exceeded its authority in finding that the sophisticated commercial parties involved in the action intended by their silence to allow for class arbitration.[55] Justice Alito opined that class proceedings would dramatically alter the nature of arbitration by hindering the efficiency and secrecy of the process.[56]

The opinion left questions regarding the viability of the "manifest disregard of the law" standard for vacating arbitration awards and *Bazzle*'s designation of arbitrators to determine whether agreements allow for class arbitration.[57] It also left practitioners asking what constitutes sufficient agreement for class arbitration, especially in uneven bargaining contexts.[58] Meanwhile, courts continued to use state contract law or public policy to strike arbitration clauses with class waivers, even where they otherwise may have severed offending class waivers to nonetheless order arbitration.[59]

ii. AT&T Mobility L.L.C. v. Concepcion

Prior to *Stolt-Nielsen*, courts in California had become proactive in holding class action waivers unenforceable in B2C contracts where they are likely to

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[51] *Id.*

[52] *Id.* at 1765-67.

[53] *Id.* at 1770, n.7.

[54] *Id.* at 1776-77.

[55] *Stolt-Nielsen S.A.*, 130 S. Ct. at 1769-77.

[56] *Id.* at 1776-77. *But see* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212-30 (2007) (noting that arbitration is not necessarily confidential).

[57] *See Stolt-Nielsen S. A.*, 130 S. Ct. at 1768-72 (declining to decide if the "manifest disregard" exists and a non-statutory ground for vacating arbitration awards, and emphasizing that the *Bazzle* opinion giving the arbitrator power to determine whether an arbitration agreement allows for class arbitration was merely a plurality opinion).

[58] *Id.*

[59] *See* Fenterstock v. Educ. Fin. Partners, 611 F.3d 124, 132-39 (2d Cir. 2010) (holding that *Stolt-Nielsen* did not preclude the court from holding the class waiver unconscionable, but it did bar the court from severing the waiver to enforce class arbitration); *see* Mathias v. Rent-A-Ctr., Inc., 2010 WL 3715059, at *5 (E.D. Cal. Sept. 15, 2010) (holding that *Stolt-Nielsen* did not require that the FAA preempts use of state contract law); *see* Brewer v. Missouri Title Loans, Inc., 323 S.W.3d 18, 18-24 (Mo. 2010) (finding that *Stolt-Nielsen* requires courts to strike arbitration clauses entirely where courts find a class waiver unenforceable under contract law).

hinder statutory or small claims.[60] In *AT&T Mobility L.L.C. v. Concepcion* the Court severely limited these courts in holding that the FAA preempts a state court from using unconscionability to condition enforcement of an arbitration clause on preserving consumers' ability to bring class-wide arbitration proceedings.[61]

Consumers in that case filed a class action lawsuit against AT&T alleging that it had fraudulently offered "free" phones that were not actually free because phone costs were rolled into plan prices and customers paid sales tax on phones.[62] The consumers' standard cellular phone agreements included an arbitration clause that precluded arbitrators from ordering class relief or consolidation, but allowed for small claims court actions, their recovery of double attorney fees if an award exceeded the company's settlement offer, and the company's payment for all arbitration costs.[63] The court in California held the class waiver unconscionable under California state law barring such waivers where they appeared to "cheat large numbers of consumers out of individually small sums of money."[64]

In a five to four decision, the U.S. Supreme Court reversed this holding and admonished California's use of state contract law to hinder enforcement of class waivers. The Court also frowned on the concept of class arbitration altogether, suggesting it hinders the traditional efficiency and cost-saving purposes of arbitration.[65] The opinion nonetheless failed to address left open whether courts may use more general unconscionability law to void class waivers under different circumstances.[66] Still, most have read *AT&T Mobility* to expand the FAA's preemptive power and to augment *Stolt-Nielsen* in severely curtailing judicial and arbitral power to order class arbitration.[67] These opinions seem to welcome U.S. companies' express preclusion of class proceedings of any kind in their standard B2C contracts.[68]

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[60] *See* Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005) (holding class action waiver unenforceable where it targeted small consumer claims); *see also* Gentry v. Super. Ct., 165 P.3d 556 (Cal. 2007) (holding class action waiver in arbitration agreement unenforceable under California law).

[61] AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743-56 (2011).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1747-58.

[65] *See id.* at 1748-55 (emphasizing that class action arbitration sacrifices informality, a major advantage of arbitration, and that class action arbitration rules, unlike the Federal Rules of Civil Procedure, are ill-suited to protecting defendants in class litigation because they do not provide the same appellate review).

[66] *See* Kristian v. Comcast Corp., 446 F.3d 25, 26-55 (1st Cir. 2006) (severing a class action waiver provision in an arbitration clause where the customers sought to bring individually small antitrust claims and distinguishing cases enforcing class action waivers where recovery of attorney fees mitigated the financial impracticability of individual claims).

[67] *See* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 481-91 (2011) (highlighting how recent Supreme Court opinions curtail class action relief).

[68] *See id.* at 477-81 (noting how companies expressly preclude class relief in court or arbitration).

iii. Rent-A-Center v. Jackson

Under the FAA, arbitrators presumptively determine challenges of the underlying contract, but courts, rather than the arbitrators themselves, determine the enforceability of an arbitration agreement unless the parties "clearly and unmistakably" delegate the issue to the arbitrators.[69] The Court in *Rent-A-Center v. Jackson* went further by endorsing enforcement of a provision within an arbitration agreement that gives the arbitrators power to determine arbitrability and their own jurisdiction.[70] In doing so, the Court welcomed companies' use of such delegation clauses to effectively insulate claims from public courts.

In *Rent-A-Center*, an employee claimed that the arbitration clause in his employment agreement was unconscionable with respect to his discrimination claims against his employer. The U.S. Ninth Circuit Court of Appeals agreed with the employee, but the U.S. Supreme Court reversed, holding that the employee had to assert his arbitrability claim in arbitration because the agreement gave the arbitrator "authority to resolve any dispute relating to [its] interpretation, applicability, enforceability or formation."[71] Writing for the majority, Justice Scalia opined that this delegation narrowed courts' authority to only consider challenges to that delegation, and not arguments directed toward the arbitration provision as a whole. In so holding, the Court endorsed arbitrators' power to determine their own jurisdiction, and confirmed another hurdle for consumers seeking to challenge arbitration clauses in court.[72]

B. Limited Survival of Contract Law Challenges of Pre-dispute Arbitration Clauses

These and other Supreme Court pronouncements have adamantly reinforced preemption and courts' narrow power to consider only general contract law challenges of pre-dispute arbitration clauses in B2C cases.[73] These challenges mainly include lack of assent, unconscionability, lack of consideration, or fraud.[74] Furthermore, they are only for the court to determine if they target an arbitration clause and the clause does not contain an enforceable delegation provision.[75]

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[69] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-449 (2006); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

[70] Rent-A-Ctr.,W., Inc. v. Jackson, 130 S. Ct. 2772, 2776-85 (2010).

[71] *See id.* at 2776-78 (employee claiming that the arbitration agreement was unconscionable because it was adhesive and contained an onerous fee-sharing provision, and that this unconscionability claim was a gateway question of arbitrability for the court).

[72] *Id.* at 2778-81.

[73] *See generally* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (discussing formalistic application of contract defenses).

[74] *See* Walton v. Rose Mobile Homes, L.L.C., 298 F.3d 470, 478 (5th Cir. 2002) (emphasizing that courts must use only general fraud or unconscionability defenses).

[75] *Rent-A-Ctr.,W., Inc.*, 130 S. Ct. at 2776-85; *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (solidifying the "separability" concept limiting courts' consideration to attacks on an arbitration clause itself).

Moreover, many courts have been formalistic in their applications of contract law, especially in the wake of *AT&T Mobility*.[76]

Unconscionability challenges of pre-dispute arbitration clauses are the most common and most successful for consumers and employees. Generally, consumers asserting unconscionability must prove that an arbitration agreement is both substantively and procedurally unconscionable.[77] Procedural unconscionability focuses on whether the bargaining process was unduly one-sided, whereas substantive unconscionability asks whether the terms of the provision are oppressive or otherwise unfair.[78] These standards are flexible, thereby allowing courts to consider context and use this defense as a "safety-net" for catching unfair contracts that evade more regimented contract defenses.[79] However, this malleability also may foster uncertainty and open the door to courts' unequal treatment of arbitration provisions.[80] This is what troubled the Supreme Court in *AT&T Mobility.*

Unconscionability nonetheless survives, although many question how *AT&T Mobility* will impact unconscionability challenges based on class waivers.[81] It is often fairly easy for consumers to show that arbitration clauses in form B2C contracts are adhesive, or procedurally unconscionable, but consumers must also show that the provisions are substantively unfair.[82] Some consumers have been successful, for example, in proving this unfairness due to oppressive terms such as carve-outs for a seller's option to litigate, cost and fee allocations that overly burden consumers, inconvenient arbitration hearing locations, and preclusions of statutory remedies.[83]

Ting v. AT&T Corp. provides an example of a court holding an arbitration clause unconscionable in a B2C contract. In that case, the Ninth Circuit found that a confidentiality provision in AT&T's Consumer Services Agreement was unconscionable under California law because it allowed AT&T to potentially prevent seven million Californians from obtaining information regarding discrim-

[76] *See supra* notes 45-46 and accompanying text (discussing *AT&T*).

[77] *See* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 265 (3rd Cir. 2003) (noting both elements of unconscionability under most state contract law).

[78] *See id.* at 266 (finding "take-it-or-leave-it" contract prepared by the employer without negotiation by the employees was procedurally unconscionable); *see also* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1174-75 (9th Cir. 2003) (finding one-year limitation on claims under the arbitration clause in an employment contract was substantively unconscionable because it deprived employees of the benefit of the continuing violations doctrine available under a state employment discrimination statute).

[79] *See* Schmitz, *supra* note 73, at 73-90 (exploring development, evolution, and functions of unconscionability, and critiquing courts' formulaic application of unconscionability). R

[80] *See* AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1743-53 (2011) (finding that the California court had applied unconscionability in a manner that singled out arbitration for negative treatment).

[81] *AT&T Mobility, L.L.C.*, 131 S. Ct. at 1740-60; *see also* Kimberly Atkins, *Future of Arbitration in Supreme Court's Hands*, LAWYERS WEEKLY USA, Nov. 15, 2010, at 299 (highlighting arguments and focus on allowance for class arbitration).

[82] *See* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 265 (3rd Cir. 2003) (describing adhesion contracts).

[83] *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS, 113-14 (2002) (listing suspect terms and citing cases supporting and denying these claims).

ination claims against the company.[84] The court also noted that the confidentiality clause gave AT&T undue advantages in gathering knowledge on how to negotiate its form contracts and control claims.[85]

Nonetheless, most other courts have been unreceptive to consumers' unconscionability challenges of pre-dispute arbitration agreements.[86] For example, one court denied the consumers' challenge of an arbitration provision in their loan agreements that subjected the consumers to high arbitration and appeal costs and precluded class relief.[87] The court rejected the trial court's findings that the arbitration provision was unduly adhesive and made it financially impracticable for consumers to bring individual claims, thereby hindering their access to remedies.[88] The court opined that the overall costs of litigation would exceed the average daily rates of $1,225 that the consumers would pay in arbitration.[89]

Other contract defenses such as lack of assent or consideration and misrepresentation remain available for challenging pre-dispute arbitration clauses. These claims are quite narrow and generally difficult to establish.[90] Courts therefore have enforced arbitration clauses in pre-printed B2C form terms in papers sent with bills, product packaging, and "click-wrap" e-provisions accessible through links in contracts formed over the Internet.[91]

For example, the court in *Hill v. Gateway 2000, Inc.* enforced an arbitration clause located in purchase terms buried among the papers that came with a computer the Hills bought over the phone.[92] Courts similarly find consumers' assent to arbitration clauses in cellular phone service contracts although consumers have no choice but to accept the clauses or cancel the services.[93] Furthermore, courts seemingly condone the illusory nature of consent to form agreements in denying

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[84] *See generally* Ting v. AT&T Corp., 319 F.3d 1126, 1133, 1149–52 (9th Cir. 2003). The Court found that "[a]ny arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award." *Id.* at n.16.

[85] *Id*. at 1152; *see also* Acorn v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) (holding confidentiality provision in arbitration agreement unconscionable); McKee v. AT&T Corp., 191 P.3d 845, 858-59 (Wash. 2008) (holding the same provision unconscionable).

[86] *See, e.g.*, Fleetwood Enters., Inc v. Gaskamp, 280 F.3d 1069, 1077 (5th Cir. 2002) (denying unconscionability challenge to an arbitration agreement); Johnnie's Homes, Inc. v. Holt, 790 So. 2d 956, 963-65 (Ala. 2001) (enforcing a consumer's duty to arbitrate warranty, fraud, breach, and other claims); Green Tree Fin. Corp. v. Lewis, 813 So. 2d 820, 825 (Ala. 2001) (denying unconscionability challenge to arbitration clause by illiterate consumer); Garcia v. Wayne Homes, L.L.C., 2002 WL 628619, at *13 (Ohio Ct. App. 2002) (denying unconscionability challenge based on risk of prohibitive arbitration costs).

[87] Tillman v. Commer. Credit Loans, Inc., 629 S.E.2d 865, 868-80 (N.C. Ct. App. 2006), *rev'd*, 655 S.E.2d 362, (N.C. 2008).

[88] *Id.* at 868-82.

[89] *Id.* at 868-74.

[90] *See* Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1515-20 (2007) (discussing enforcement theories); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 435-51, 485-87 (2002) (explaining why electronic contracts promote efficiency and are not adhesion contracts).

[91] *See* Alces, *supra* note 90, at 1521-24 (discussing the expanding world of contracting practices). **R**

[92] Hill v. Gateway 2000, Inc., 105 F. 3d 1147, 1147-50 (7th Cir. 1997).

[93] Chandler v. AT&T Wireless Servs., Inc., 358 F. Supp. 2d 701, 704-06 (S.D. Ill. 2005).

challenges of arbitration clauses that automatically become effective unless the recipient proactively opts out or otherwise disputes the clause within a stated time.[94]

Consumers face an even higher burden in succeeding on lack of consideration challenges of arbitration clauses. This is because courts find that arbitration provisions are supported by adequate consideration if they are mutual or the arbitration clause is one of many promises in a contract.[95] Courts usually find other contract provisions or circumstances that constitute sufficient consideration to uphold the arbitration clauses.[96] Nonetheless, at least one court found lack of consideration where the arbitration clause was non-mutual and heavily one-sided.[97]

Fraud and misrepresentation claims also tend to fail.[98] A consumer asserting fraud to resist arbitration must target the arbitration clause—not merely the contract as a whole.[99] The consumer then bears a heavy burden in proving that the contract drafter intentionally or recklessly made material misrepresentations about the arbitration that the claimant relied on in accepting the arbitration provision.[100] This is not easy to prove, especially since it is not sufficient that a seller failed to disclose the existence of an arbitration clause.[101]

III. E.U. and U.K. Perspectives on B2C Arbitration

In contrast to strict enforcement of arbitration clauses in B2C contracts in the U.S., laws in Europe and elsewhere preclude or strictly limit enforcement of these clauses. Many countries subject B2C arbitration clauses to special form requirements and strictly limit when they will be allowable. This leaves the law unclear with respect to enforcement of arbitration clauses in international B2C contracts and begs questions about the need for system improvements with respect to current arbitration regimes.

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94 Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108-09 (9th Cir. 2002).

95 Hawkins v. Aid Ass'n for Lutherans, 338 F.3d 801, 808 (7th Cir. 2003) (emphasizing that consideration need not lie in the arbitration provision itself where the initial contracts allow for subsequent changes).

96 *See* Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 341-44 (Ky. Ct. App. 2001) (denying consumers' challenge of an arbitration provision that allowed the lender to litigate collection and foreclosure suits).

97 *See* Arnold v. United Co. Lending Corp., 511 S.E.2d 854, 859-62 (W. Va. 1998) (holding arbitration provision in consumer loan contract unconscionable where lender could seek foreclosure and collection actions in court).

98 *See In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 756-58 (Tex. 2001) (challenging arbitration based on fraud).

99 *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co, 388 U.S. 395, 403-04 (1967) (holding that fraud in the inducement is an arbitrability question for the court unless it goes directly to the arbitration clause).

100 *Firstmerit Bank, N.A.*, 52 S.W.3d at 758.

101 *Id.* at 752-53, 759 (denying consumers' fraud challenge of an arbitration addendum to a mobile home sales agreement based on seller's nondisclosure).

A. European and EU B2C Arbitration Laws

European countries generally bar or limit enforcement of pre-dispute arbitration agreements in B2C contexts under their domestic laws.[102] EU Directives place arbitration clauses among the "unfair" terms precluded by consumer protection policies. Law and policy in the U.K. similarly limits enforcement of B2C arbitration, and precludes enforcement of all arbitration clauses in small dollar cases.

1. France's Red Light on B2C Arbitration

The French Civil Code (the "Code") permits a person to submit to arbitration any dispute in most "commercial," or B2B, matters and impliedly bars enforcement of pre-dispute arbitration clauses in consumer contracts.[103] Furthermore, the Code expressly precludes arbitration with respect to the status and capacity of persons, divorce, and matters involving public policy.[104] The Code also deems "unfair" clauses in B2C contracts which act to the detriment of the consumer where there is "a significant imbalance between the rights and obligations of the parties to the contract."[105] Examples of such "unfair" terms include those with have the effect of "canceling or impeding the institution of legal proceedings or means of redress by the consumer, in particular, by obliging the consumer to exclusively refer the case to an arbitration panel not covered by legal provisions."[106]

Nonetheless, it is unclear whether French courts would enforce pre-dispute arbitration clauses against consumers with power to negotiate their contracts. The Code's reference to arbitration clauses as 'unfair' is specifically with respect to instances where the terms are imposed on one with weaker bargaining power. This seems to place the burden on the consumer to show a clause's unfairness.[107]

It is also unclear whether French courts will apply the Code's preclusion of pre-dispute arbitration clauses in international B2C transactions. Professor Em-

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[102] Peter B. Rutledge & Anna W. Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad*, DISP. RESOL. J., Feb-Apr 2010, at 30, 34 (noting European law's protection of consumers from unfair arbitration provisions). *See also* CONSUMER PROTECTION ACT, R.S.Q. 1978 c. P.40.1, amended by S.Q. 2006, c. 56 s. 11.1 (Can.); CONSUMER PROTECTION ACT, R.S.O. 2002, c.A.30 s. 8(1) (Can.) (invalidating arbitration or other clauses that preclude consumers from bringing class actions).

[103] Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 391 (2010); *see* Rutledge & Howard, *supra* note 102, at 34 (noting French law). R

[104] *France*, *in* WORLD ARBITRATION REPORTER 1641, 1652 (Bette E. Shifman & Wendy S. Dorman eds., JurisNet, LLC 1st ed. 2007).

[105] CODE DE LA CONSOMMATION [C. DE LA CONSOMMATION] art. L132-1 (Fr.), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=61 (last visited Jan. 27, 2012).

[106] *Id.* art. L132-1 Annex 1(q). This is pursuant to Décret n° 2011-48 portant réforme de l'arbitrage, which modifies Articles 1442 et seq. of the French Code of Civil Procedure (entered into force on May 1, 2011). French Code of Civil Procedure – Art. 1442-1527 and Civil Code Title XVI of the Arbitration Agreement (Compris) (law No. 72-625 of July 5, 1972) – art. 2059-2061. CODE CIVIL [C. CIV.] art. 2059-61 (Fr.), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=610 (last visited Jan. 25, 2012).

[107] *See* Rutledge & Howard, *supra* note 102, at 34 (noting this burden placed on consumers). R

manuel Gaillard of Paris XII University has highlighted French courts' distinction between domestic and international arbitration enforcement and concludes that the Cour de Cassation has consistently promoted the enforcement of international arbitration over the past twelve years.[108] He also notes two cases in which French courts upheld pre-dispute arbitration clauses in cross border consumer contracts.[109] He nonetheless acknowledges that the law remains unclear in areas of public policy.[110]

At the same time, the N.Y. Convention should dictate more pro-enforcement treatment, especially in light of the limited grounds for non-enforcement set forth under the Convention.[111] However, the Convention allows courts to refuse enforcement when due to "nonarbitrability of the subject matter" or when enforcement is "contrary to public policy."[112] Some countries use these grounds to refuse enforcement of international B2C arbitration clauses. Also, scholars suggest that French law and policy with respect to arbitration awards applies equally to domestic and international cases.[113] This may explain why the legal community in France generally assumes that B2C arbitration clauses are unenforceable. Indeed, the International Chamber of Commerce ("ICC") based in Paris does not even conduct B2C arbitrations.[114]

2. Germany's Yellow Light on B2C Arbitration

Germany takes more of a "yellow light" approach toward enforcing pre-dispute arbitration clauses in B2C contracts. Instead of precluding all enforcement of B2C arbitration clauses, the German Arbitration Law and the German Civil Code focus on form and notice.[115] Although pre-dispute arbitration clauses are

[108] Emmanuel Gaillard, Professor, University of Paris XII, *The Jurisprudence of the Court of Cassation in International Arbitration,* Lecture at the Court of Cassation, March 13, 2007, *available at* http://www.courdecassation.fr/colloques_activites_formation_4/2007_2254/inter-vention_m._gaillard_11066.html?idprec=9748# (last visited April 18, 2012).

[109] *Id.* (citing Cass. civ. 1st, March 30, 2004, Rado Lady c. Painvewebber and Cass. civ. 1st, May 21, 1997, c Meglio. Jaguar stereo).

[110] *Id.*

[111] N.Y. Convention, *supra* note 2, art. IV; 9 U.S.C. § 201 (2006). R

[112] N.Y. Convention, *supra* note 2, art. V(2); 9 U.S.C. § 201. R

[113] *See* Kristina L. Morrison, Comment, *A Misstep in U.S. Arbitral Law: A Call for Change in the Enforcement of Nondomestic Arbitral Awards*, 46 TORT TRIAL & INS. PRAC. L.J. 803, 811-15, n. 44 (2011) (citing Emmanuel Gaillard, *France*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, at 466, §6.209, indicating that French rules for enforcement of arbitration awards apply equally to international and domestic arbitration).

[114] E-mail from ICC Int'l Ct. of Arbitration to Holly Andersen, Research Assistant to Professor Amy Schmitz (Oct. 24, 2011, 6:59 MST) (on file with author) (bluntly indicating that "ICC arbitration could not be applied to consumer contracts").

[115] *See generally* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, REICHSGESETZBLATT [RGBL] 97, as amended, §§ 1025-66, *available at* http://www.gesetze-im-internet.de/englisch_zpo/index.html (last visited Jan. 27, 2012) [hereinafter ZPO]; DEUTSCHES SCHIEDSVERFAHRENSRECHT, 1998, REICHSGESETZBLATT [RGBL] (Ger.), *available at* http://www.dis-arb.de/en/51/materials/german-arbitration-law-98-id3 (last visited Jan. 27, 2012) [hereinafter German Arbitration Law]; BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL] 195, as amended, §§ 305-10. (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_bgb/ (last visited

ostensibly enforceable, they must be written in an "intelligible and transparent manner" under the good faith requirement of Section 307(1).[116] Furthermore, the German Arbitration Law specifies that an arbitration agreement to which a consumer is a party must be in a separate document personally signed by the parties.[117]

The German Civil Code also states that in B2C contracts, "[s]tandard business terms are deemed to have been presented by the entrepreneur, unless they were introduced into the contract by the consumer."[118] This is true for form contract terms even if they are intended only for non-recurrent use to the extent that the consumer had no influence on their contents.[119] Nonetheless, courts assessing unreasonable disadvantage under section 307 (1) and (2) must consider "the other circumstances attending the entering into of the contract."[120] Failure to meet the form requirements can be remedied by appearance in court.[121]

3. European Council Directives

France and Germany are EU member-states and thus their enforcement of B2C arbitration in cases involving parties from different Member States generally follows EU Council Directives. This is important because the EU Directives with respect to consumer contracts deem arbitration clauses in B2C contracts presumptively unfair.[122] In voiding such a clause, the court in one recent case explained that Council Directive 93/13/EEC declares unfair any clause that excludes or hinders the consumer's right to take legal action, particularly by requiring arbitration. It also emphasized that courts have power under European Court of Justice ("ECJ") rulings to revisit the enforcement of an arbitration clause in a B2C contract at the award enforcement stage. This is true even where the consumer has failed to raise the issue until that time.[123]

Accordingly, regardless of Germany's "yellow light" approach to B2C arbitration under its national laws, German courts have struck down arbitration clauses under the EU Directives where the clauses required arbitration in the United

Jan. 27, 2012) [hereinafter BGB]. Taken as a whole, these statutes illustrate Germany's "yellow light" approach to B2C arbitration.

116 Rutledge & Howard, *supra* note 102, at 30, 34 (citing Marco Ardizzoni, German Tax and Business Law, 1066 (Thomson/Sweet & Maxwell 2005)). R

117 *See* ZPO, *supra* note 115, § 1031(5) ("No agreements other than those referring to the arbitral proceedings may be contained in such a document or electronic document."). R

118 BGB, *supra* note 115, § 310(3). R

119 *Id.*

120 *Id*.

121 ZPO, *supra* note 115, § 1031(6). R

122 Jana Kolackova & Pavel Simon, *At the Edge of Justice: Arbitration in Unequal Relationships*, 1 CZECH & CENT. EUR. Y.B. OF ARB. 183, 188 (2011).

123 *Id.* at 188-89; *see* Stephen Wilske & Lars Markert, *Germany*, WORLD ARB. REPORTER GER-5 (Loukas Mistelis & Laurence Shore eds., JurisNet, LLC 2nd ed. 2010) (citing ECJ, Case C-168/05, Mostaza Claro v. Móvil, Decision 26 October 2006) (noting that the ECJ directs courts to examine on their own motion whether the arbitration agreement is void, even if the consumer has neglected to raise this issue with the arbitral tribunal).

States of disputes between Dutch and German parties.[124] Similarly, The Czech Republic has been fairly pro-arbitration in B2B cases and created the Prague-based Arbitration Court to provide alternative dispute resolution ("ADR") for .eu domain name disputes.[125] It also established an arbitral system for settling disputes between patients and their health insurance companies.[126] Courts in the Czech Republic nonetheless have held arbitration clauses in B2C contracts void as "unfair" to the consumer under the EU Directives and a presumption of uneven bargaining power in B2C contracts.[127] One scholar described Czech arbitration as "wild" due to courts' uncertain enforcement of arbitration in the wake of the Directives and conflicting policies.[128]

B. U.K. Protection of Consumers in Arbitration

English laws generally adhere to the N.Y. Convention in enforcing arbitration agreements in B2B relationships. However, the English Arbitration Act of 1996 precludes enforcement of all arbitration agreements if the pecuniary remedy is less than £5,000.[129] This law applies to both pre- and post-dispute agreements as means for preserving access to English small claims proceedings.[130]

English courts also may limit enforcement of pre-dispute arbitration clauses in B2C contracts more generally. Although B2C arbitration agreements are ostensibly enforceable, courts will only enforce pre-dispute arbitration provisions in B2C contracts if the seller can prove that the arbitration provision was individually negotiated and made in good faith. Courts also will refuse to enforce a pre-dispute arbitration clause if such enforcement would cause a significant imbalance to the detriment of the consumer.[131]

Furthermore, the English regulation governing Unfair Terms in Consumer Contracts includes arbitration clauses in its non-exhaustive list of terms which may be deemed unfair.[132] This statute mimics the Council Directive 93/13/EEC. Nonetheless, the U.K. does not deem all enforcement of B2C arbitration provisions void, but rather leaves room for a more pro-enforcement attitude in interna-

124 Jan Kraayvanger & Mark C Hilgard, *Setback for Use of Arbitration Against Consumers: the ECJ Rules that Article 6 of Directive 93/13 is a Rule of Public Policy*, 15 NO. 2 IBA ARB. NEWS 45 (IBA, London), Sept. 2010, at 45.

125 *See About the Czech Arbitration Court*, ADR.EU, *available at http://eu.adr.eu/about_us/court/index.php* (last visited Jan. 28, 12) (providing information about the non-profit Czech Arbitration Court).

126 Kolackova & Simon, *supra* note 122, at 184-85. R

127 *Id.* at 188-90.

128 Tomas Pavelka, *The Wild Arbitration Blows Retreat?: On Implementation of the Unfair Contract Terms Directive in the Czech Republic*, SOC. SCI. RES. NETWORK, April 20, 2001, at 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837686 (last visited March 4, 2012).

129 Unfair Arbitration Agreements (Specified Amount) Order 1999, 1999, S.I. 1999/2167, ¶ 3 (U.K.), *available at* http://www.legislation.gov.uk/uksi/1999/2167/contents/made.

130 Arbitration Act, 1996, c. 23, § 91.1, (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1996/23/contents.

131 Unfair Terms in Consumer Contracts Regulations, 1999, §5(1), (U.K.), *available at* http://www.legislation.gov.uk/uksi/1999/2083/contents/made.

132 *Id.* sch. 2 (1)(q).

tional contexts.[133] At the same time, nations like Mexico have become more favorable toward enforcement of arbitration clauses in cross-border cases in order to promote efficient dispute resolution and international comity.[134]

IV. Creating a Global remedy mechanism to Address Clashing Policy

International enforcement of court judgments remains uncertain and impractical for most B2C disputes. Furthermore, international divergence in laws regarding enforcement of B2C arbitration agreements prevents companies from being able to rely on—and thus pass along savings from—arbitration clauses in their international B2C contracts. This often leaves consumers with no means of obtaining remedies with respect to their cross-border contracts. Accordingly, international policymakers are developing online dispute resolution mechanisms that transcend arbitration and litigation enforcement concerns.

A. International Movements to Develop Cross-Border ODR for B2C Claims

The EU has proposed Regulations calling for use of ODR for cross-border disputes, and the United Nations Commission on International Trade Law ("UNCITRAL") has instituted a Working Group on ODR for establishing a type of OArb for B2C disputes.[135] Hopefully, these groups will ultimately collaborate to create globally accepted mechanisms for providing consumers throughout the world with means for obtaining remedies with respect to their ePurchases.

1. E.U. ODR Directives

The EU has proposed a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes ("EU ADR Directive"), as well as a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes ("EU ODR Regulation").[136] Together, this Directive and Regulation aim to establish an ODR system at the EU level that will promote European commerce by providing a mandatory framework for resolution of cross-border disputes. However, these proposals preserve Member States' power to determine the means for implementing the framework.[137]

[133] Rutledge & Howard, *supra* note 102, at 33. R

[134] *See* Pierre Bienvenu, *The Enforcement of International Arbitration Agreements and Referral Applications in the NAFTA Region*, *in* COMMERICAL MEDIATION AND ARBITRATION IN THE NAFTA COUNTRIES 149,164 (Luis Miguel Díaz & Nancy A. Oretskin eds.,1999) (stating "the trend in the Mexican courts is to hold parties to what they contract for and estop parties from complaining later"); *see also* Margarita Trevino Balli & David S. Coale, *Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?*, 30 TEX. INT'L L.J. 535, 542-43 (1995) (explaining the broadening of issues subject to arbitration).

[135] *See* Colin Rule & Vikki Rogers, *Building a Global System for Resolving High-Volume, Low-Value Cases*, 29 ALTS. TO HIGH COST LITIG. 135 (Int'l Inst. for Conflict Prevention & Resolution, New York, NY), (July/Aug. 2011) (explaining formation of working group).

[136] *The Out-Of-Court Settlement of Consumer Disputes*, COM (1998) 198.

[137] *Commission Staff Working Paper Executive Summary Of the Impact Assessment*, at 69, SEC (2011) 1409 final (Nov. 29, 2011).

Prior EU non-binding ADR Directives have yielded little results, with only 40% of the existing ADR schemes being reported to the EU under old Directives.[138] Directives that encourage the development of ADR are laudable, but do not prompt most Member States to act.[139] Moreover, even mandatory rules take time for implementation, and such implementation is essential for success of any EU Directives.[140]

The new ODR Regulation proposal brings the ADR Directives into the digital age in order to confront the uncertainty about efficient means to resolving on-line cross-border disputes.[141] Companies currently resist selling to consumers in other countries because of laws that generally require merchants to sue consumers in their home locations.[142] In addition, the new Regulations would allow for in-person, along with online, dispute resolution in order to acknowledge that many consumers do not have the means or opportunity to conduct the entire ADR process online. Furthermore, the Regulations envision synergy between ADR and ODR by emphasizing that "[i]f ADR coverage at national level does not improve, it is not possible to develop ODR for cross-border online disputes."[143]

With that in mind, the EU proposed an updated framework ADR Directive to ensure that consumers can refer all their domestic and cross-border disputes to quality ADR schemes, and receive information on ADR schemes competent to deal with their disputes. It also specifies that ADR schemes participate in existing EU sector-specific ADR networks, but preserves Member States' freedom to choose the form and methods for ADR schemes. In addition, the Regulation requires establishment of an EU system for a web-based platform. This platform would emanate from national ADR schemes, but reach further in effectively dealing with cross-border e-commerce disputes online.[144]

Ultimately, the Regulations seek to ensure that consumers are able to submit to the EU web-based platform any dispute related to cross-border ePurchases.[145] The platform aims to be user-friendly by providing standard forms and electronically directing disputes to the competent national ODR scheme.[146] The platform will allow use of native languages, uniform technical specifications for interconnection with national ADR schemes, and common rules for timing, eligibility conditions, and common procedural aspects. Experts will facilitate the function-

138 *Id.*

139 *Id.*

140 *Id.* at 29 (also noting that the recommended Directives will continue to set out ADR principles that schemes should respect and ask Member States to notify on an ad hoc basis those ADR schemes that function in accordance with these principles).

141 *Id.* at 25-6.

142 *Id.* at 26.

143 *Id.* at 62.

144 *Id.* at 65.

145 *Id.* at 53.

146 *Id.*

ing of the web-based platform and the European Consumer Centres Network (ECC-Net) will finance the platform.[147]

2. UNCITRAL ODR Project

The UNCITRAL ODR Working Group—with representatives from over 60 nations, including the United States—is currently aiming to create a binding online mechanism for settling conflicts regarding cross-border online purchases.[148] The goal is to establish a globally enforceable and accepted means for consumers and businesses to resolve claims regarding eContracts. However, the project is currently limited to claims regarding payment and delivery with respect to those contracts. This would exclude warranty and other more complicated claims, which often infiltrate any breach of contract claim.[149]

The Working Group has been meeting regularly in person and via teleconferences, and has been gaining support from many Member States.[150] The project creates promise for consumers seeking remedies with respect to their eContracts. Though this project may currently have limits, it could create momentum for a broader OArb process covering a wider range of global e-commerce disputes.[151]

B. Building on International Momentum to Create a Globally Accepted OArb System

Nations have different views on B2C arbitration with good reason. Some companies abuse pre-dispute arbitration clauses to escape liability and sidestep legal regulations. However, it would be unwise to preclude use of all such clauses in international B2C contracts. Insistence on post-dispute arbitration agreements is impractical because parties rarely agree to arbitrate after relationships have soured. It also may harm consumers because companies are not inclined to lower prices or otherwise pass on cost savings based on the hopes of establishing post-dispute arbitration programs.[152] Furthermore, the data indicates that consumers are generally satisfied with their arbitration experiences, and arbi-

147 *See generally European Consumer Centres Network*, EUR.COMM., http://ec.europa.eu/consumers/ecc/index_en.htm (last visited Jul. 23, 2011).

148 *See generally Working Group III*, UNCITRAL, http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html (last visited April 13, 2012) (setting forth materials and resources for the working group).

149 *Id.*

150 I recently became an ABA Delegate to the Working Group and am eager to participate and assist with this endeavor.

151 Further description of the Group's work are outside the scope of this article, but much more extensive discussion will be forthcoming. This is an exciting process and I am thankful to be a part of it.

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

tration may be the only feasible binding remedy process in cross-border disputes due to difficulties of enforcing foreign court judgments.[153]

That is not to say that unfair arbitration regimes should suffice for B2C claims. Instead, policymakers should capitalize on benefits of Computer Mediated Communications ("CMC") such as e-mails and online chatrooms to create a globally accepted and enforceable OArb framework.[154] Internet dispute resolution processes save parties' time and money, while easing stress and environmental impacts of travel and paper documentation involved with in-person processes.[155] Furthermore, OArb is particularly suited for cross-border claims because it results in a binding award enforceable under the N.Y. Convention.[156] OArb also may be more satisfactory and productive than non-binding processes because parties participate knowing that the process will end in a final determination.[157]

Nonetheless, global B2C OArb systems must be properly regulated in order to earn consumers' and companies' trust, and help ensure their enforcement. As I have suggested elsewhere, policymakers should require that OArb mechanisms comply with procedural fairness standards similar to those set forth in the Protocol.[158] Mandatory regulations should set minimum standards that help ensure transparency, accessibility, and overall due process. Furthermore, properly regulated OArb processes should be user-friendly and worth their costs in light of the complexity and possible payout on the claims at issue.[159]

OArb mechanisms must be sufficiently simple for consumers to use without the need for legal assistance and should allow consumers to obtain neutral claim evaluations and enforceable remedies.[160] Regulations should cap consumers'

[153] Harris Interactive, Arbitration: Simpler, Cheaper, and Faster than Litigation, Conducted for U.S. Chamber Inst. For Legal Reform 6 (April 2005), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (last visited May 22, 2011) (indicating that 40% of those who lost in arbitration were still satisfied with the process); *see also* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1054-75 (2009) (questioning assumptions that arbitration is bad for consumers).

[154] Full discussion of the pros and cons of ODR and OArb, and proper regulation of a B2C remedy system is beyond the scope of this paper and has been covered elsewhere. Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 328–29 (2008) (discussing benefits of ODR); *see* Schmitz, *supra* note 23, at 205-07 (discussing how online arbitration, what I term "OArb," opens new avenues for consumers to obtain remedies on their contract complaints); *see also* Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 308–10 (2007-2008) (noting use for consumer small claims). R

[155] ODR does come with accessibility and trust issues, but these drawbacks pale in comparison with its benefits. Noam Ebner & Colleen Getz, *ODR: The Next Green Giant*, 29 CONFLICT RESOL. Q. 283, 286 (discussing how ODR helps the environment by eliminating travel and cutting down on paper use); *see generally* Schmitz, *supra* note 23, at 181-85 (discussing pros and cons of ODR and OArb). R

[156] OArb differs from other ODR because it results in a final third-party determination without the cost and stress of traditional litigation. *See* Schmitz, *supra* note 23, at 183-86, 193-99 (advocating for OArb). R

[157] *See id.* at 193.

[158] *See, e.g.*, Schmitz, *supra* note 22, at 23-9 (offering a "top ten" tailored more for in-person arbitration fairness regulations). R

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

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

costs and set strict time limits for companies to respond to complaints. Policies also should allow for sufficient but properly limited discovery and limit time on evidentiary submissions and awards. Furthermore, arbitrators must have power to hold companies responsible for failing to quickly comply with arbitration awards.

Parties must have an equal voice in choosing arbitrators from a database of neutral, trained, diverse, and accredited individuals. The database should also capture parties' feedback through follow-up surveys in order to foster continual system improvements.[161] At the same time, a "trustmark" or ratings system for OArb mechanisms could boost the credibility of the system and provide guidance for consumers and companies in choosing a mechanism for resolving their particular disputes.[162] This could be similar to what the Better Business Bureau uses in the U.S. to indicate that a company abides by best practices in the given industry.[163] Again, no mechanism will be successful unless parties accept and trust it. Indeed, it is imperative that even countries that usually frown on traditional B2C arbitration nonetheless enforce this OArb system.[164]

V. Conclusion

The United States has been exceptional in its strict enforcement of B2C arbitration under the FAA and N.Y. Convention, while other nations have refused or limited enforcement of these arbitrations due to policy concerns. Nonetheless, consumers and businesses crave fair, reliable and enforceable means for resolving cross-border disputes. This is especially true with respect to growing e-commerce. Accordingly, the EU and UNCITRAL are developing global OArb and ODR mechanisms that transcend divergence and ambiguity regarding litigation and enforcement of face-to-face arbitration for resolution of e-commerce disputes. This gives policymakers great opportunity to collaborate in creating globally enforceable OArb mechanisms that promote transparency and abide by fairness standards.

[161] Colin Rule et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments*, 42 UCC L.J. 221, 239-40 (2010) (discussing how to create a global system for resolving consumer disputes); *see* Schmitz, *supra* note 23, at 235–37; *see also* Xu Junke, *Development of ODR in China*, 42 UCC L.J. 265, 266–72 (2010) (discussing importance of trust and consumer confidence to boost ODR processes). *See also* Schmitz, *supra* note 23, at 178–244 (proposing prudent expansion of ODR and Oarb). R

[162] *See* Schmitz, *supra* note 23, at 237-40 (proposing a trustmark system). R

[163] *Id.*

[164] Further discussion of ideas for creating a fair and accessible OArb system are beyond the scope of this article due to space limitations. *See generally* Schmitz, *supra* note 23, at 237-40 (proposing a trustmark system). *See e.g.*, Amy J. Schmitz, *Building Bridges to Consumer Remedies in eConflicts,* 34.4 U. A. L. Rev. (forthcoming 2012). R