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Amy J. Schmitz

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CONSIDERATION OF “CONTRACTING CULTURE” IN ENFORCING ARBITRATION PROVISIONS

AMY J. SCHMITZ†

INTRODUCTION

Form contract provisions requiring binding arbitration are becoming increasingly important due to their rising prevalence in a wide variety of contracting contexts. Furthermore, most countries, including the United States, strictly enforce agreements to arbitrate as signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the “New York Convention”).¹ Meanwhile, domestic and international rhetoric touts the virtues of agreements requiring non-binding dispute resolution processes such as mediation, conciliation, or negotiation (I refer to these contracts as “ADR Agreements” to distinguish them from contracts requiring binding arbitration under the New York Convention, and the Federal Arbitration Act (“FAA”) in the United States).²

Nonetheless, some commentators and policymakers have become skeptical of pre-dispute arbitration clauses because they require parties to waive rights to judicial recourse at a time when parties may not anticipate the development of disputes.

† Associate Professor, University of Colorado School of Law. I thank Nestor Davidson, Christopher Drahozal, and Mark Loewenstein for their comments, and Melissa Pingley, Matthew Peters, and Andra Zeppelin for their research assistance.

¹ In the United States, courts must enforce arbitration agreements and awards under the Federal Arbitration Act (“FAA”). 9 U.S.C. §§ 1–16 (2000) (covering domestic arbitration); §§ 201–08 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)); §§ 301–07 (implementing the Inter-American Convention on International Commercial Arbitration (“Panama Convention”)).

² See Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1, 5–8 (2004) [hereinafter Schmitz, *Refreshing Contractual Analysis*] (distinguishing binding arbitration from non-binding “ADR”).

Furthermore, United States law has diverged from law in many other countries by enforcing pre-dispute arbitration clauses that "repeat players," such as large retailers and manufacturers, routinely include in their form consumer contracts.³ These repeat players justify such clauses as allowing them to reduce dispute resolution costs, while others criticize the use of arbitration as a means for curbing consumer remedies and preventing class actions. In addition, critics of consumer arbitration question whether it improperly impedes the development of law and shields the public from information regarding health, safety, and other policy concerns.⁴ In this way, arbitration may allow private parties to escape public regulation and essentially to privatize law.⁵

United States courts have nonetheless condoned such use of arbitration. The United States Supreme Court has used the FAA to effectuate a pro-arbitration policy that has prevented courts from vigilantly policing the use of arbitration.⁶ In addition, courts have confirmed the limited review and finality of arbitration awards.⁷ This has left parties with one avenue for

³ Although other countries may enforce consumer arbitration provisions in certain contexts, most do not enforce non-negotiable form provisions in consumer contracts. See Jean R. Sternlight, *Consumer Arbitration*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 127, 129-31, 138-40 (2006) [hereinafter Sternlight, *Consumer Arbitration*] (highlighting American law's enforcement of mandatory consumer arbitration under pre-dispute form contracts).

⁴ See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 KANSAS L. REV. 101 (2006) [hereinafter Schmitz, *Privacy Paradox*] (discussing privacy in arbitration).

⁵ 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, *Mobile-Home Mania*] (discussing how manufacturers' use of form arbitration agreements has privatized dispute resolution in the mobile home industry).

⁶ See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (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)); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that the FAA applies to arbitration agreements in employment contracts despite the Act's exclusion for "workers engaged in . . . interstate commerce").

⁷ See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124-32 (2002) [hereinafter Schmitz, *Ending a Mud Bowl*] (discussing the finality of arbitration awards under

challenging arbitration agreements: general common law contract defenses. Meanwhile, this avenue is narrowing as courts become increasingly formalistic in applying contract defenses. Formalist law and efficiency concerns have prompted courts to shy away from substantive consideration of consent, contractual context, or repeat-player advantages.⁸

In relational contract theory and elsewhere, however, scholars have highlighted the importance of context, particularly within close-knit exchange communities.⁹ Indeed, this is particularly important in assessing the fairness and legitimacy of standardized pre-dispute arbitration provisions. This Article therefore seeks to remind courts of the importance of exchange context by proposing a "contracting culture" continuum that acknowledges the impacts of these provisions in a particular communal context. This continuum analysis also highlights the over-and-under-inclusiveness of current pro- and anti-arbitration arguments.

"Contracting culture" encompasses economic and non-economic relational factors that impact dispute resolution agreements, but go beyond common conceptions of "culture" focused on ethnicity, nationality, or religion. This Article therefore explores beyond the primary domestic versus international factors¹⁰ and proposes a continuum of contracting

the FAA and UAA).

⁸ See, e.g., *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108-09 (9th Cir. 2002) (enforcing form arbitration provision in employment agreement, despite absence of bargaining).

⁹ See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724-26, 1745, 1787 (2001) (exploring the cotton industry's development and use of a private legal system ("PLS")); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55-57, 62, 65, 67 (1963) [hereinafter Macaulay, *Non-Contractual Relations*] (analyzing contextual relations in commercial exchanges); Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 855, 859, 873-74 (1978) [hereinafter Macneil, *Contracts*] (analyzing relational nature of long-term contracts); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 976-79, 992-1035 (1999) (explaining the communal development of arbitration and proposing self-regulation as a template for interpreting and applying the FAA).

¹⁰ See, e.g., Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1, 5-6, 21-28 (2005) (discussing the differing roles of apology in Korean dispute resolution); Jeffrey Z. Rubin & Frank E. A. Sander, *Culture, Negotiation, and the Eye of the*

cultures ranging from "intra communal" to "extra communal" in order to highlight how parties' relations, understandings, and values may have the greatest impact on the fairness of form arbitration provisions.

This "contracting culture" continuum also borrows from Professor Ian Macneil's "relational contracts," and his consideration of course of performance, course of dealing, usage of trade, and industry norms. It considers his critique of classical contract doctrine's formalistic "presentation" and narrow focus on exchange as bound by present events of offer and acceptance at the time of contract.¹¹ Nonetheless, this Article also emphasizes emotions, incentives, and practical factors impacting a given relationship.

In addition, the Article applies its continuum analysis specifically to a unique microcosm of contracts—form pre-dispute arbitration provisions—and considers how this analysis differs in construction versus consumer arbitration. It uses the commercial construction context as an example of a more intra communal contracting culture and consumer contracting as an example of a more extra communal culture. Commercial construction may be more intra communal in that it generally involves parties who share connections and understandings regarding industry norms and dispute resolution systems that operate in the industry.¹² In contrast, consumer contracting is often more extra communal to the extent consumers and sellers often have disproportionate bargaining power that augments their differing needs, expectations, and understandings regarding dispute resolution.

Part I of the Article explains the creation of dispute resolution agreements and the proliferation of form arbitration provisions. Part II summarizes how United States courts generally have enforced these form provisions and procedures without deeply or adequately considering communal or relational context. Part III questions this formalistic enforcement by

Beholder, 7 NEGOTIATION J. 249, 250-53 (1991) (highlighting the importance of considering cultural differences relating to ethnicity or nationality and recognizing similar differences due to race, gender, and age).

¹¹ See Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 589-93 (1974) (critiquing "presentation" in classical law).

¹² I specify commercial construction to distinguish residential construction disputes between contractors and consumers, which often involve relational realities that would be more extra communal on my suggested continuum.

proposing the "contracting culture" continuum, using commercial construction as an example of a more intra communal contracting culture and consumer contracting as a culture often leaning toward the extra communal end of the continuum. Part IV applies this continuum analysis and suggests that courts should more clearly consider contracting culture in assessing the enforceability of form arbitration provisions using contract tools such as the unconscionability doctrine. Contracting culture may aggravate or counteract unfairness that may otherwise flow from economic and resource imbalances, and it may be the key factor in determining whether the provision is legally unconscionable.

I. PROLIFERATION OF FORM ARBITRATION PROVISIONS

International and domestic arbitration laws generally require enforcement of valid agreements to arbitrate, but do not specify formation standards for these agreements or process rules for arbitration proceedings.¹³ Parties' arbitration agreements are therefore powerful roadmaps for resolution of their disputes. Furthermore, parties rarely negotiate their arbitration agreements after disputes develop. Instead, they usually become subject to form arbitration clauses in their pre-dispute contracts.¹⁴ In addition, these clauses often incorporate un-negotiated arbitration rules promulgated by administering institutions, such as the American Arbitration Association ("AAA"), the International Chamber of Commerce ("ICC"), or the National Association of Securities Dealers ("NASD").¹⁵ This results in a pro-forma regime that is dependent on context for its fairness and efficiency.

A. *Loose Legislative Regulation of Arbitration*

Legislation governing private dispute resolution is generally broad and says very little about the procedures that should or must apply in a given dispute resolution process. Governments

¹³ Richard E. Speidel, *Common Legal Issues in American Arbitration Law*, in *ARBITRATION LAW IN AMERICA*, *supra* note 3, at 29, 31-34.

¹⁴ See, e.g., Schmitz, *Mobile-Home Mania*, *supra* note 5, at 314-16 (describing use of form arbitration clauses and one-sided bargaining in mobile home sales and financing transactions).

¹⁵ 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).

are understandably reluctant to regulate parties' negotiations or otherwise infringe on their autonomy. With respect to mediation in the United States, for example, states generally have declined to legislate particularized procedures or require summary enforcement of agreements to submit disputes to mediation.¹⁶ Instead, states have adopted the Uniform Mediation Act ("UMA") or other statutes that provide loose standards with respect to confidentiality, mediator conduct, and fair bargaining.¹⁷

International and domestic arbitration laws generally have more force to the extent they mandate summary enforcement of arbitration agreements and awards. There are currently 138 countries that have ratified the 1958 New York Convention, a United Nations sponsored treaty that has fueled the development and growth of international commercial arbitration.¹⁸ This treaty requires signatory nations to implement legislation that directs courts to compel arbitration under valid arbitration agreements and to enforce arbitration awards.¹⁹ Although the

¹⁶ See Uniform Mediation Act ("UMA") § 5(i) (Draft 1999), available at <http://www.law.upenn.edu/bll/ulc/mediat/medam99.htm> (reporting that "[p]rovisions to provide summary and immediate enforcement of agreements to mediate (including mediation clauses), in contrast to arbitration clauses, are uncommon," and citing only two statutes calling for such enforcement, both of which apply only to conciliation in international disputes).

¹⁷ See UMA §§ 1-16 (2001), reprinted in 22 N. ILL. UNIV. L. REV. 165 (2002) (stating rules for confidentiality, mediator privileges and disclosures, and party representation, but not addressing enforceability of mediation agreements); Michael B. Getty, *The Process of Drafting the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 157, 161-62 (2002) (discussing the UMA and loose regulations under state and federal statutes); Elizabeth Strong, *The Uniform Mediation Act, An Opportunity To Enhance Confidentiality in Business Mediation*, 7 ADR CURRENTS 5, 6 (June-Aug. 2002) (discussing confidentiality focus of UMA); see also Schmitz, *Refreshing Contractual Analysis*, supra note 2, at 12-14 (discussing the aim of UMA and its main provisions).

¹⁸ ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 67 (3d ed. 1999); THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, arts. 1-16 (1958), reprinted in *id.* at 491-94 app. A [hereinafter NY CONVENTION]; U.N. Comm'n on Int'l Trade Law [UNCITRAL], Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 17, 2006). See generally INT'L COUNCIL FOR COMMERCIAL ARBITRATION (ICCA), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Jan Paulsson et. al eds., 2006) [hereinafter ARBITRATION HANDBOOK] (generally discussing international commercial arbitration).

¹⁹ See REDFERN & HUNTER, supra note 18, at 67-68, 135-44 (noting the centrality of arbitration agreements); Kenneth F. Dunham, *International Arbitration Is Not Your Father's Oldsmobile*, 2005 J. DISP. RESOL. 323, 326-27 (2005) (discussing

Convention allows for some public policy review of arbitration awards, it generally protects the discretion of arbitrators and does not mandate particular procedures or formation standards.²⁰ The thrust of the treaty and other international principles is to promote enforcement of private commercial arbitration agreements according to their terms.²¹

In the United States, the FAA implements the New York Convention and requires the same enforcement for domestic arbitration agreements and awards.²² Similarly, the Uniform Arbitration Act ("UAA") is model legislation that nearly all states have adopted to require the same basic enforcement for local arbitration agreements and awards beyond the purview of the FAA.²³ Again, these laws do not dictate formation standards for arbitration provisions or mandate many procedural requirements for arbitration proceedings. Instead, they prescribe nearly identical schemes for mandating that courts specifically enforce arbitration agreements according to their terms.²⁴ In addition, they provide for liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators if parties

the development of international commercial arbitration and noting the importance of the New York Convention in that development); see also STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 134-36 (2002) (describing basics of international arbitration law); Leonardo D. Graffi, *Securing Harmonized Effects of Arbitration Agreements Under the NY Convention*, 28 HOUS. J. INT'L L. 663, 679-91 (2006) (discussing the general enforcement requirements of the Convention, but also noting how countries do not uniformly apply these requirements).

²⁰ NY CONVENTION, *supra* note 18, at arts. 1-16; see also REDFERN & HUNTER, *supra* note 18, at 67-68, 135-44 (discussing centrality of the agreement and institutional rules incorporated therein to dictate arbitration procedures); Dunham, *supra* note 19, at 330-31 (discussing common incorporation of arbitral institutions' rules and analyzing these rules due to their importance in dictating the rules of engagement in arbitration procedures).

²¹ See REDFERN & HUNTER, *supra* note 18, at 135 (describing the agreement to arbitrate as "the foundation stone"); see also UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, arts. 35-36 (1985) (providing some procedures but focusing on requiring enforcement of arbitration agreements and awards).

²² 9 U.S.C. §§ 1-16 (2000); see also Howard M. Holtzman & Donald F. Donovan, *United States*, in *ARBITRATION HANDBOOK*, *supra* note 18, at 44 (Supp. 2005).

²³ See UNIFORM ARBITRATION ACT (UAA) prefatory note (2000), available at <http://www.law.upenn.edu/blj/ulc/uarba/arbitrat1213.htm>. Although much of the discussion focuses on the FAA, the discussion equally implicates application of the FAA's state law twin, the UAA, which has been adopted or is substantially similar to the law in forty-nine jurisdictions. *Id.*

²⁴ *Id.*

cannot do so by agreement, limited review of arbitration awards, and treatment of awards as final judgments.²⁵

This leaves private dispute resolution provisions and procedures to parties' agreements.²⁶ Parties generally do not devote time or resources to negotiating dispute resolution agreements, however, because they usually incorporate these agreements in their pre-dispute contracts. It is not until legal battles erupt that the parties become concerned with the fairness of procedures that they have previously accepted in their initial contracts.²⁷

B. Prevalence of Form Arbitration Provisions

As noted above, it is rare for parties to an ADR or arbitration agreement to specifically negotiate the terms of the agreement and the rules that will apply in their chosen dispute resolution process. Instead, these contracting parties usually decline to invest time or resources discussing the rules that will apply in possible private dispute resolution proceedings, and focus on key terms such as price, timing, and performance standards. Professor Stewart Macaulay found in his early 1960s study of business relations, for example, that business exchanges usually focus on "description, contingencies, defective performances and legal sanction," but reflect little to no planning "concerning legal sanctions and the effect of defective performances."²⁸ This generally is efficient and cost effective when it saves the contracting parties from wasting resources wrangling over details of future sanctions and dispute resolution proceedings that they are very unlikely to use.²⁹

²⁵ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) (emphasizing the FAA's special remedial scheme); Schmitz, *Ending a Mud Bowl*, *supra* note 7, at 125, 145-51 (2002) (discussing the FAA's remedial provisions and emphasizing how they ensure finality of arbitration awards).

²⁶ For further discussion of the contractual focus of arbitration law, see generally Steven J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in *ARBITRATION LAW IN AMERICA*, *supra* note 3, at 88-126 (proposing reforms aimed at solidifying the contractual approach).

²⁷ See Schmitz, *Mobile-Home Mania*, *supra* note 5, at 334-44 (discussing consumer challenges of arbitration agreements in mobile home cases); see also *infra* Part IV (discussing unconscionability and other claims challenging arbitration agreements based on procedures denying class relief or attorneys' fees).

²⁸ Macaulay, *Non-Contractual Relations*, *supra* note 9, at 60.

²⁹ See Tarek F. Abdalla, *Litigation vs. Arbitration: Which Is Better for the Commercial Dispute?*, *PRAC. LITIGATOR*, Sept. 2005, at 47, 52-53 (discussing the

Furthermore, parties to a pre-dispute agreement looking forward to a peaceful and productive contracting relationship are usually reluctant to raise thorny issues of eventual disputes, especially in intra communal contexts.³⁰ As Professor Macaulay found in his study, "[d]etailed negotiated contracts can get in the way of creating good exchange relationships between business units."³¹ Raising pre-contract concerns with conflict can push parties away from a deal or spark needless hostilities.³² It can inject an adversarial air into the contracting atmosphere and taint the process with negativity. Parties may also want to avoid appearing persnickety by questioning boilerplate, which now commonly governs status relationships such as those in the consumer/seller context.³³

Efficiency concerns and relational realities, therefore, continue to make it unlikely that parties will take action to negotiate the terms of a form dispute resolution agreement.³⁴ In addition, studies indicate that negotiators prefer form provisions that operate without parties having to take action, even if those terms are contrary to standard industry practice or legal defaults.³⁵ Contracting parties are therefore unlikely to take action to seek changes in form arbitration clauses, even when

logic of basic arbitration clauses); see also Macaulay, *Non-Contractual Relations*, *supra* note 9, at 58–60 (explaining why standardized contracts without a lot of "red tape" are often cost effective and practical in business exchanges).

³⁰ See Macaulay, *Non-Contractual Relations*, *supra* note 9, at 64 (explaining how detailed negotiations can turn "a cooperative venture into an antagonistic horse trade").

³¹ *Id.* at 64 (emphasizing the importance of non-contractual relations in fostering good business relations).

³² See *id.*; see also Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1609 (1998) (reporting and explaining the results of a contracting study that tested the power of default contract provisions, and noting how negotiators may avoid proposing departures from status quo contract terms because of fear that the proposal could lead to a bargaining impasse).

³³ See Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 29–30 (2002).

³⁴ See Korobkin, *supra* note 32, at 1586–87, 1605–09, 1627 (finding in support of his "inertia theory" that negotiators generally prefer any terms that operate without the parties' specific bargaining to the contrary and explaining how parties favor inaction due to the fear of regretting action that later breeds undesirable results).

³⁵ See *id.* at 1607–09 (reporting how action versus inaction proved more powerful than Coasean theory might expect).

these clauses bar class relief or other remedies that the parties would otherwise have under statutes or legal defaults.³⁶

Courts nonetheless endorse this pro-forma regime with respect to arbitration under the FAA and the Convention.³⁷ This is in contrast to their uncertain and ambiguous enforcement of ADR agreements for mediation or conciliation. Parties' ADR agreements usually do not specify procedures for these non-binding ADR processes because parties seek to maintain the flexibility and freedom to craft procedures as they go through a process. Additionally, ambiguous law governing these agreements leaves parties uncertain whether and how a court would even compel parties to comply with any procedural terms.³⁸

Meanwhile, parties to pre-dispute arbitration contracts often do specify some procedural and remedial rules that will apply in any arbitration proceedings. Drafters of form provisions may provide for ad hoc arbitration that they administer themselves, under procedures that they direct, or they may incorporate all or some procedural rules promulgated by private arbitration administrators, such as the AAA, ICC, or NASD.³⁹ This fosters pro-forma contracting that coincides with rational actor theory. It is rare for negotiators to take the time to read form rules incorporated in their arbitration clauses.⁴⁰ This is even true for individuals unfamiliar with arbitration, who decline to expend their limited resources in seeking to learn about or challenge onerous limitations and procedures under these clauses.

Accordingly, pre-dispute arbitration forms have become the norm in a variety of contracting contexts. Their fairness and efficiency, however, depends on the extent to which the parties

³⁶ See *id.* at 1627. This gives companies that draft form arbitration provisions considerable power in setting the rules that will apply in any arbitration proceedings. See *id.*

³⁷ See, e.g., Dunham, *supra* note 19, at 326-27 (highlighting the role of arbitration rules parties incorporate in their agreements in the international commercial context).

³⁸ See Amy J. Schmitz, *Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith*, 56 DEPAUL L. REV. 55 (2006) (critiquing ambiguity regarding enforceability of ADR agreements, and proposing that courts use implied duties of good faith to properly enforce them).

³⁹ See Dunham, *supra* note 19, at 331-40 (discussing the arbitration rules of the LCIA and ICC as well as other international arbitration rules).

⁴⁰ See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203-04, 1206-17 (2003) (discussing how buyers do not make fully rational contracting choices, often because they do not expend the time and resources necessary to maximize the accuracy of their choices).

share goals, needs, expectations, and understandings regarding arbitration. It is problematic, however, when those with bargaining power lack adequate incentive to draft their arbitration forms to protect individuals' interests. Reputation or other concerns may not be enough, for example, to prompt repeat-player manufacturers with bargaining power and resources to contractually require publication of awards revealing their statutory violations or other misconduct.⁴¹ Indeed, power, experience, understandings, and needs greatly impact contracting and dispute resolution.⁴²

II. AMERICAN ENFORCEMENT OF FORM ARBITRATION CLAUSES AND RULES

Despite fairness issues regarding form contracting, most American courts enforce standard form contracts under the FAA and formalist contract law. Furthermore, the Supreme Court's federalization of arbitration prevents states from limiting arbitration under valid contracts affecting interstate commerce, and its pro-arbitration reading of the FAA has relegated challenges of arbitration clauses to general contract defenses.⁴³ Meanwhile, American courts have lacked sympathy for contract challenges of pre-dispute arbitration clauses.⁴⁴ Most courts dispel criticisms that these clauses are nonconsensual by assuming that parties are free to challenge these clauses or deal

⁴¹ See Schmitz, *Privacy Paradox*, *supra* note 4 (discussing the role of privacy). Nonetheless, securities law may require companies to reveal information regarding their legal scuffles in certain public filings.

⁴² See Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations (With Special Application to Unconscionability and Arbitration)*, 33 WILLAMETTE L. REV. 67, 77-85, 144 (1997) (discussing the importance of power and proposing analysis that illuminates how "contracts and arbitration are part of an overarching institution through which power pervades our lives").

⁴³ See *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (finding the FAA preempted state law requiring express notice of arbitration clauses and emphasizing that the FAA only permits challenges of arbitration clauses based on generally applicable state contract defenses); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272-73, 282 (1995) (holding that the FAA covered a consumers' extermination contract and therefore preempted an Alabama law limiting consumer arbitration); *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984) (determining that the FAA applies in federal and state court).

⁴⁴ See Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 695-97 (2001) [hereinafter Drahozal, *"Unfair" Arbitration Clauses*] (describing the courts' enforcement of arbitration clauses).

elsewhere.⁴⁵ Courts also steadily deny claims that form arbitration clauses overly burden statutory rights or are otherwise unconscionable.⁴⁶

A. *Assumed Assent*

Will theory underlying classical and modern contract law generally endorses strict enforcement of contract terms.⁴⁷ Moreover, many courts and commentators propose that strict enforcement of form terms fosters industrialization and vitality of an efficient market economy.⁴⁸ Many also assume that form arbitration provisions foster efficiency and save costs that corporations may pass on to consumers through lower prices and better quality.⁴⁹ American courts therefore generally conclude that individuals consent to non-negotiable form arbitration clauses on the reasoning that they remain free to walk away from a contract or seek needed goods or services elsewhere.

For example, in *Hill v. Gateway 2000, Inc.*,⁵⁰ a court enforced such an arbitration provision contained in computer purchase terms that were buried among the papers that came with a computer the Hills had purchased over the phone.⁵¹ The Hills

⁴⁵ See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–50 (7th Cir. 1997) (finding assent to a form arbitration clause). *But see* Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1382–86 (1996) [hereinafter Stempel, *Bootstrapping*] (critiquing the courts' "drifting away from, or perhaps abandoning altogether, society's traditional notions of meaningful consent").

⁴⁶ See *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744, 749, 754 (9th Cir. 2003) (en banc) (holding that Title VII did not preclude enforcement of an arbitration clause in an employment contract); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108–10 (9th Cir. 2002) (finding that, although the court has held form arbitration clauses unconscionable in limited situations, the clause at issue was not unconscionable because the employee could opt out of the arbitration program).

⁴⁷ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 160–61 (Oxford Univ. Press 1992) (1977).

⁴⁸ See *id.* at 161.

⁴⁹ See Drahozal, "Unfair" Arbitration Clauses, *supra* note 44, at 741–54 (questioning claims that form arbitration provisions in consumer contracts are unfair); 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) (discussing the efficiency benefits of standard form contracts and explaining why electronic contracts are not adhesion contracts).

⁵⁰ 105 F.3d 1147 (7th Cir. 1997).

⁵¹ See *id.* at 1148, 1151 (enforcing form computer purchase contract requiring arbitration). *But see* *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of same clause); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251, 254, 676 N.Y.S.2d 569, 572, 574 (1st Dep't

claimed that they did not assent to the arbitration provision and that the provision was unconscionable because it precluded class relief, curtailed their right to recover attorney fees under the Magnusson Moss Warranty Act ("MMWA"), and required them to arbitrate their claims under ICC rules before ICC arbitrators.⁵² The court rejected these claims, concluding that the Hills assented to the terms by not returning the computer within 30 days, as the terms required under their "approve-or-return" proviso.⁵³ The court emphasized that such form contracting fosters efficiency and gave little thought to shipping costs and other burdens of requiring the Hills to return the computer in order to reject boxed terms.⁵⁴

Applying this efficiency assumption, courts also find that individuals assent to arbitration clauses added to their contracts after initial contracting, especially when the individuals fail to exercise an option to reject the arbitration terms. In *Circuit City Stores, Inc. v. Najd*,⁵⁵ for example, the court rejected an employee's claim that he did not assent to a one-sided clause requiring him to arbitrate that the employer provided to him after he was hired.⁵⁶ The court found that Najd acknowledged receipt of the agreement in writing and had thirty days to read the document, consult counsel, and reject the agreement. The court therefore concluded that Najd's silence constituted assent.⁵⁷

B. Demise of the Public Policy Defense

Assumed consent to arbitration clauses has dovetailed with courts' rejection of public policy claims that form arbitration provisions and procedures overly burden claimants' ability to enjoy meaningful access to statutory remedies. Some commentators suggest courts should intervene to protect claimants

1998) (enforcing the identical Gateway arbitration clause but vacating the portion of the clause requiring arbitration before the ICC due to the "excessive cost factor that is necessarily entailed in arbitrating before the ICC"); see also Jean R. Sternlight, *Recent Decision Opens Wider Gateway to Unfair Binding Arbitration*, 8 WORLD ARB. & MEDIATION REP. 129, 130-32 (1997) [hereinafter Sternlight, *Recent Decision*] (discussing *Hill*).

⁵² *Hill*, 105 F.3d at 1148-50.

⁵³ *Id.* at 1149 (stating that "approve-or-return" provisions such as that in *Hill* make consumers better off "as a group").

⁵⁴ *Id.* at 1149-50.

⁵⁵ 294 F.3d 1104 (9th Cir. 2002).

⁵⁶ *Id.* at 1109.

⁵⁷ *Id.* (highlighting how the circumstances supported assent by silence).

from arbitration clauses that require them to forfeit statutory remedies aimed to foster mandatory public policies.⁵⁸ Furthermore, some question remains whether the illusory nature of individuals' consent to form arbitration provisions is adequate to constitute waiver of these public rights, especially when these individuals lack the power or experience to have a true voice in crafting arbitration provisions and procedures.⁵⁹

Nonetheless, American courts generally have followed the United States Supreme Court's lead in broadly interpreting arbitration clauses to cover contract and statutory claims.⁶⁰ In addition, they conclude that statutory claims generally may be arbitrated on the assumption that contracting parties are free to choose a forum for resolving disputes and that arbitration clauses are little more than specialized forum selection clauses.⁶¹ Under this reasoning, the Supreme Court has condoned arbitration of statutory claims covering employment discrimination, consumer lending, and securities claims.⁶² At the same time, the courts have agreed that even arbitration of statutory claims does not constitute state action subject to due process requirements of the United States Constitution.⁶³

Most courts therefore have denied consumers' arguments that they should not be compelled to arbitrate their claims under the MMWA, which provides consumers with special warranty protections and allows them to collect attorney fees in seeking to

⁵⁸ See Ware, *supra* note 26, at 112–14 (proposing that even under a strict contractual approach to arbitration courts should not enforce awards depriving consumers of important mandatory rights).

⁵⁹ See Sternlight, *Consumer Arbitration*, *supra* note 3, at 143–44 (examining consumer arbitration in America and explaining its mandatory nature); see also Schmitz, *Mobile-Home Mania*, *supra* note 5, at 349 (questioning consumers' waiver of warranty rights through pre-dispute arbitration clauses).

⁶⁰ See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (finding that a statutory age discrimination statute could be subject to arbitration).

⁶¹ See *id.* at 26.

⁶² See Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 79, 82, 92 (2000) (finding Truth in Lending Act ("TILA") claims under a consumer financing agreement may be subject to binding arbitration under the FAA); Gilmer, 500 U.S. at 23 (holding age discrimination statute arbitrable); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484–86 (1989) (overruling prior opinion that held securities claims inarbitrable).

⁶³ See Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1745–65 (2006) (noting American courts' conclusion that private arbitration does not involve state action but critiquing this conclusion with respect to arbitral class actions).

enforce those protections.⁶⁴ For example, in *Hill*, discussed above, the ICC rules incorporated in a form arbitration clause required that the Hills pay roughly \$4,000 in initial arbitration costs in order to pursue their warranty claims against Gateway regarding purchase of a \$4,000 computer.⁶⁵ In addition, the ICC rules did not provide the Hills access to needed discovery, and the ICC's foreign headquarters created communication barriers for the Hills.⁶⁶ The court nevertheless enforced the clause to cover warranty claims, unconcerned that this would have a chilling effect on consumers' vindication of their statutory warranty rights.⁶⁷

Indeed, most courts reject individuals' challenges of arbitration clauses based on claims that high initial costs in arbitration preclude them from vindicating their rights under statutes that provide for recovery of attorney fees.⁶⁸ They rely on the Supreme Court's finding in *Green Tree Financial Corp. v. Randolph*⁶⁹ that Randolph failed to prove such a cost claim. The Court indicated that parties might be able to avoid arbitration based on a sufficient showing of prohibitively high arbitration costs under strong facts, but concluded that the Randolphs had not satisfied that burden in seeking to avoid arbitration of their Truth in Lending Act ("TILA") claims.⁷⁰ This, in turn, has fostered courts' rejection of consumers' cost claims based on insufficient showing of inability to pay and possibilities that arbitrators may waive or reallocate truly oppressive fees.⁷¹

⁶⁴ See Schmitz, *Mobile-Home Mania*, *supra* note 5, at 326-34 (discussing courts' general allowance for arbitration of MMWA rights).

⁶⁵ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, at 1148-49 (7th Cir. 1997); Sternlight, *Recent Decision*, *supra* note 51, at 132; see also *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of same clause); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251, 676 N.Y.S.2d 569, 572 (1st Dep't 1998) (analyzing identical arbitration clause);

⁶⁶ Sternlight, *Recent Decision*, *supra* note 51, at 132.

⁶⁷ See *Hill*, 105 F.3d at 1148, 1151. But see *Brower*, 246 A.D.2d at 254, 676 N.Y.S.2d at 574 (enforcing the same arbitration clause, but finding the ICC costs unconscionable and ordering arbitration before a mutually chosen or court appointed arbitrator).

⁶⁸ See, e.g., *James v. McDonald's Corp.*, 417 F.3d 672, 678-80 (7th Cir. 2005) (rejecting cost-based challenge of arbitration agreement).

⁶⁹ 531 U.S. 79, 91-92 (2000) (holding TILA claims arbitrable despite possibly high arbitration costs).

⁷⁰ The Court found 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. *Id.* at 90-91.

⁷¹ See *James*, 417 F.3d at 678-80 (rejecting cost-based claim due to insufficient

Despite this high rate of failure, some individuals do prevail on challenges of particular arbitration clauses that gut their statutory rights.⁷² In *Ex parte Thicklin*,⁷³ for example, a consumer successfully challenged an arbitration order based on his argument that the MMWA precluded arbitration of his express warranty claims against a mobile home manufacturer since the arbitration provision was in his mobile home purchase agreement with the retailer.⁷⁴ The Court concluded that the manufacturer's failure to disclose the arbitration requirement in its written warranty violated the MMWA's consumer disclosure provisions.⁷⁵

Such results are nonetheless rare. Consumers usually fail on claims that an arbitration agreement's preclusions of class relief, recovery of punitive damages, or recovery of attorney fees prevents them from vindicating their statutory rights.⁷⁶ Furthermore, even if they avoid arbitration of their statutory claims, they often still must arbitrate their tort and contract claims.⁷⁷ In addition, courts may indicate willingness to order

showing and also noting consumers would have to show that arbitration was truly more expensive than litigation in terms of overall costs); see also *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 823-24 (8th Cir. 2003) (reversing the district court's denial of arbitration based on a cost challenge because such questions of arbitrability were for the arbitrator under the parties' agreement). But see *Ball v. SFX Broad., Inc.*, 165 F. Supp. 2d 230, 239-40 (N.D.N.Y. 2001) (finding employee could not be compelled to arbitrate her statutory claims because she had satisfied the burden of proving prohibitive arbitration costs she could not bear).

⁷² See CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 191-204 (2002) (quoting the Court in *Gilmer* and addressing how parties challenge arbitration of statutory claims based on procedures required by a particular arbitration agreement); see, e.g., *Ex parte Thicklin*, 824 So. 2d 723, 728-30 (Ala. 2002) (consumer arguing that even if MMWA claims may be arbitrable, the arbitration clause in this case was unenforceable under the Act).

⁷³ 824 So. 2d 723 (Ala. 2002).

⁷⁴ *Id.* at 728-30 & n.2.

⁷⁵ *Id.* at 730 & n.2; see also *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746-48 (Ala. 2000) (construing an arbitration clause ostensibly calling for binding arbitration per the AAA rules to require nonbinding arbitration in light of the contract's warranty requiring compliance with the MMWA).

⁷⁶ See *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1032-33 (11th Cir. 2003) (ordering arbitration, but finding an arbitrator must decide mortgagors's argument that an arbitration provision precluding mortgagors from recovering statutory punitive and treble damages violated the TILA).

⁷⁷ *Browne v. Kline Tysons Imps., Inc.*, 190 F. Supp. 2d 827, 832-33 (E.D. Va. 2002) (allowing litigation of MMWA claims, but ordering arbitration of TILA and state statutory and common law claims arising out of car sale); see also *Ball v. SFX Broad., Inc.*, 165 F. Supp. 2d 230, 240 (N.D.N.Y. 2001) (ordering only that the employee did not have to arbitrate her statutory claims based on costs).

arbitration if the corporation agrees to pay arbitration costs.⁷⁸ Courts also may order consumers to arbitrate warranty claims against some, but not all, of the parties in an action.⁷⁹ Consequently, statutory arguments have provided little practical fuel for challenging form arbitration provisions and procedures.

C. *Application of Common Law Contract Defenses*

American courts will not entertain constitutional challenges to arbitration provisions or general arguments that arbitration is "inherently unfair to consumers."⁸⁰ Instead, the most feasible challenges of arbitration provisions are based on general contract defenses such as lack of consideration, unconscionability, and fraud.⁸¹ Moreover, the Supreme Court has narrowed these court challenges to those aimed at an arbitration clause itself.⁸² Additionally, it has become increasingly difficult to prevail on these challenges in light of most courts' pro-arbitration

⁷⁸ See, e.g., *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) (finding individual could not be compelled to arbitrate if required to bear the prohibitive arbitration costs but stating that it would reconsider its ruling if the defendants agreed to pay these costs).

⁷⁹ Although some courts use third-party beneficiary and estoppel principles to compel consumers to arbitrate claims against non-signatories to contracts containing arbitration clauses, see *Ex parte Gates*, 675 So. 2d 371, 373-75 (Ala. 1996) (enforcing arbitration against a consumer on behalf of nonsignatory manufacturer based on broad arbitration clause), others refuse to compel non-signatories to arbitrate. See *Ex parte Jones*, 686 So. 2d 1166, 1167-68 (Ala. 1996) (concluding there was no agreement to arbitrate between consumers and the non-signatory to the arbitration agreement); *Ex parte Martin*, 703 So. 2d 883, 886-87 (Ala. 1996) (holding arbitration clause in loan agreement between buyers and sellers did not apply to manufacturer).

⁸⁰ See *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 478 (5th Cir. 2002) (citing United States Supreme Court cases for these findings); see also Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 589-91, 609-10 (1997) (critiquing American courts' consensus that private arbitration does not constitute state action subject to constitutional requirements).

⁸¹ See *Walton*, 298 F.3d at 478 (emphasizing that "courts can consider individual claims of fraud or unconscionability in arbitration agreements as they would in any other contract").

⁸² *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204, 1208-11 (2006) (clarifying that the separability rule is a matter of federal law and applying that rule in finding that an arbitrator must decide claims that the contract was illegal, but leaving it open for parties to bring judicial challenges of arbitration clauses in contracts they claim never existed); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967) (applying "separability" to find courts may only consider attacks on an arbitration clause and not those aimed at an underlying contract).

dispositions and their current formalist application of key defenses such as unconscionability.⁸³

1. Lack of Consideration

Under common contract law, one may argue that an arbitration provision is not supported by consideration. These challenges usually fail, however, because it is sufficient if an arbitration provision is mutual or is part of a larger exchange (*i.e.* arbitration clause is one of many promises in a contract). In *Hawkins v. Aid Association for Lutherans*,⁸⁴ for example, insurance policyholders argued that an arbitration clause added to their insurance contracts after initial contracting was not supported by consideration.⁸⁵ The court quickly rejected their argument, however, because the initial contracts stated that policyholders would be bound by the insurance provider's subsequent changes.⁸⁶

Similarly, in *Marcinko v. Palm Harbor Homes, Inc.*,⁸⁷ consumers alleged that a separate arbitration provision a seller provided to them after a sale was not supported by adequate consideration.⁸⁸ Although the court dismissed the lack of consideration defense because the Marcinkos failed to assert it in the lower court, the court also indicated that the defense lacked merit because the sales contract incorporated the arbitration provision.⁸⁹

The lack of consideration defense is therefore narrow, and most courts strive to find consideration based on the underlying transaction.⁹⁰ Only a minority of courts will find one-sided provisions binding the weaker party lack consideration.⁹¹

⁸³ See Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) [hereinafter Schmitz, *Unconscionability's Safety Net Function*].

⁸⁴ 338 F.3d 801 (7th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004).

⁸⁵ *Id.* at 808.

⁸⁶ *Id.*

⁸⁷ No. 01CA677, 2002 WL 1438658, at *4 (Ohio Ct. App. June 21, 2002).

⁸⁸ *Id.*

⁸⁹ See *id.* at *2, *4.

⁹⁰ See, *e.g.*, *id.*

⁹¹ See *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 860, 862 (W. Va. 1998) (holding an arbitration provision in a consumer loan contract unconscionable where such form provision allowed lender to seek foreclosure and collection actions in court).

Instead, courts find consideration based on other clauses in the contract, thereby disempowering such challenges.⁹²

2. Fraud and Misrepresentation

Fraud, or misrepresentation, is an additional contract defense one may use to challenge an arbitration provision.⁹³ Courts will not hear a fraud challenge of an arbitration clause, however, unless the alleged fraud is specifically directed to the arbitration clause.⁹⁴ One asserting fraud also bears the burden of showing (1) a material representation; (2) that was false; (3) the speaker knew was false or made recklessly without knowing if it was true; (4) the speaker intended that the other party rely on the representation; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.⁹⁵

In light of these stringent elements, consumers rarely succeed on fraud challenges to arbitration provisions. In *FirstMerit Bank*, for example, consumers challenged an arbitration addendum to a mobile home sales agreement based in part on a claim that the sellers improperly failed to disclose or explain the arbitration addendum.⁹⁶ They argued that the sellers had a duty to explain the addendum because it required the consumers to arbitrate all their claims but allowed the lender to judicially foreclose and repossess the home.⁹⁷ The court rejected the fraud claim, however, concluding that the nondisclosure was not an actual misrepresentation.⁹⁸

This conforms with courts' general agreement that there is no duty to inform consumers about arbitration provisions.⁹⁹

⁹² See *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342-43 (Ky. Ct. App. 2001) (denying consumers' challenge of an arbitration provision in a financing contract that allowed the lender to litigate collection and foreclosure suits and emphasizing that courts almost uniformly reject such challenges).

⁹³ See, e.g., *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) (discussing consumers' challenge of arbitration based on fraud, along with unconscionability, duress, and revocation).

⁹⁴ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that fraud in the inducement is not an arbitrability question for the court unless it goes directly to the arbitration clause).

⁹⁵ *FirstMerit Bank*, 52 S.W.3d at 758.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See, e.g., *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 869-70 (D. Or. 2002) (emphasizing no duty to disclose or explain arm's length written agreements).

Furthermore, most courts decline to require a heightened standard for a consumer's waiver of access to statutory judicial remedies.¹⁰⁰ Accordingly, fraud claims against arbitration provisions are generally futile.

3. Unconscionability

The most commonly asserted ground for challenging arbitration agreements is likely unconscionability. One claiming unconscionability generally must show that an arbitration provision is both substantively and procedurally unconscionable.¹⁰¹ 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.¹⁰² At the same time, courts have become formulaic in their applications of unconscionability, which is threatening the doctrine's utility as a safety net for catching overly burdensome arbitration provisions.¹⁰³

Opponents of arbitration provisions nonetheless have had some success on unconscionability challenges of pre-printed form provisions offered without negotiation.¹⁰⁴ The adhesive nature of these forms does not necessarily make them unconscionable, but parties may prevail on a claim if they also satisfy the substantive

¹⁰⁰ See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1372-73 (11th Cir. 2005), cert. denied, 126 S. Ct. 2020 (2006) (following the majority of courts in declining to apply a heightened "knowing and voluntary" standard to agreements to arbitrate statutory claims). But see *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994) (breaking from the majority of courts and requiring clear and express agreement to arbitrate statutory claims).

¹⁰¹ See *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (noting that most courts require both elements of unconscionability).

¹⁰² See *id.* at 265-66 (finding that a "take-it-or-leave-it" contract prepared by the employer without negotiation by the employees was procedurally unconscionable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003), cert. denied, 540 U.S. 1160 (2004) (finding one-year limitation on claims under arbitration agreement in employment contract was substantively unconscionable because it deprived employees of the benefit of the continuing violations doctrine available under a state employment discrimination statute).

¹⁰³ See Schmitz, *Unconscionability's Safety Net Function*, supra note 83; 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 slow and restrained application of unconscionability in the wake of formalist intellectual and social developments).

¹⁰⁴ See *Alexander*, 341 F.3d at 265 (describing adhesion contracts).

prong of the unconscionability defense by showing that an arbitration agreement's terms are unduly oppressive or unreasonable.¹⁰⁵ Example suspect terms include "carve-outs" that give the drafter an option to litigate, cost and fee allocations that overly burden one party, particularly-inconvenient location selections, and remedy limitations that gut statutory claims.¹⁰⁶

In *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*,¹⁰⁷ for example, a consumer argued that an arbitration provision in a mobile home sales contract was unconscionable because it gave the seller sole power to choose the arbitrator.¹⁰⁸ The court concluded that this provision was fundamentally unfair because it did not even condition the arbitrator selection on the consumer's consent.¹⁰⁹ The court narrowed the consumer's remedy, however, by striking only the arbitrator selection provision while still affirming the trial court's order to arbitrate with a court-appointed arbitrator.¹¹⁰

Success on unconscionability claims is nonetheless uncommon.¹¹¹ Growing formalism in United States contract law and pro-arbitration jurisprudence have converged to limit the viability of these claims.¹¹² Furthermore, once consumer-friendly courts, such as the Alabama Supreme Court, have shifted views since the late 1990s to now curtail unconscionability challenges

¹⁰⁵ See Celeste M. Hammond, *The (Pre) (As)sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 602-04 (2003) (discussing the Supreme Court's strict two-prong unconscionability analysis).

¹⁰⁶ See DRAHOZAL, *supra* note 72, at 113-14 (listing suspect terms and citing cases supporting and denying these claims).

¹⁰⁷ 825 So. 2d 779 (Ala. 2002).

¹⁰⁸ *Id.* at 782.

¹⁰⁹ *Id.* at 783-85 (distinguishing selection provisions that condition arbitrator selection on the other party's consent).

¹¹⁰ *Id.* at 785.

¹¹¹ 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 even when the consumer was unable to afford the arbitration costs and was illiterate and therefore unable to read that there was an arbitration clause when he signed the contract); *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, LLC*, No. 2001 CA 53, 2002 WL 628619, *12-13 (Ohio Ct. App. April 19, 2002) (denying unconscionability challenge based on risk of prohibitive arbitration costs).

¹¹² See Schmitz, *Unconscionability's Safety Net Function*, *supra* note 83 (explaining formalist trends squelching unconscionability's safety net function).

of arbitration agreements.¹¹³ In addition, some courts are quick to raise the efficiency flag in limiting the application of unconscionability claims to void form contracts.¹¹⁴

To be fair, however, this does not mean consumers always lose on unconscionability challenges of arbitration agreements.¹¹⁵ Some commentators question whether courts' use of unconscionability to curb arbitration clauses runs afoul of the preemptive power of the FAA.¹¹⁶ Even if this is true, however, it confirms the need to regulate form arbitration provisions.¹¹⁷ Moreover, the unconscionability doctrine is intended to provide a safety net for courts to catch unfair contracting in cases that do not fit the other defenses, such as lack of consideration and fraud, that require more clear elements.¹¹⁸ This makes unconscionability the most viable means for challenging unfair arbitration provisions in light of current FAA jurisprudence relegating challenges to common contract law. The doctrine's inherent flexibility also allows for consideration of contracting culture.

¹¹³ See Stephen J. Ware, *Money, Politics and Judicial Decision: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 620 (2002) (analyzing Alabama arbitration cases and concluding that "[u]nconscionability challenges to arbitration agreements have fared poorly in the Supreme Court of Alabama since March 23, 1998, when business-funded justices gained a majority on the court"); see also Melissa Briggs Hutchens, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599 at 608-10 (discussing Alabama cases denying challenges based on high arbitration costs).

¹¹⁴ See *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313-315 (Wash. 2000) (enforcing a consequential damages exclusion in a shrinkwrap license for Bid Analysis software although a more flexible and contextual analysis may have better promoted productivity).

¹¹⁵ See Steven J. Burton, *The New Judicial Hostility to Arbitration: Unconscionability and Agreements to Arbitrate* 2-4 (Berkeley Elec. Press, Working Paper No. 1375, 2006), available at <http://law.bepress.com/expresso/eps/1375> (noting consumer success on unconscionability claims).

¹¹⁶ See *id.* at 1-4, 55-57 (critiquing some courts' application of unconscionability to arbitration agreements as evidencing "a new judicial hostility to arbitration in noncommercial cases" that should be pre-empted by the FAA).

¹¹⁷ See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186-89 (2004) (proposing that some courts' "expansion of unconscionability to avoid arbitration" may suggest that controls are needed).

¹¹⁸ See *id.* at 188-89 (noting that expanded application of unconscionability to regulate arbitration may be reasonable due to "the malleability of the doctrine"); see also Schmitz, *Unconscionability's Safety Net Function*, *supra* note 83 (proposing flexible application of unconscionability in light of its philosophical and functional underpinnings).

III. THE CONTINUUM OF INTRA TO EXTRA COMMUNAL CONTRACTING CULTURES

Differences in values and communication styles based on ethnicity, heritage, and nationality are very important, especially in international dispute resolution.¹¹⁹ This Article, however, proposes a broader conception of "contracting culture" in order to highlight holes in current contract formalism and to remind courts that a broad range of relational factors impact dispute resolution agreements. What I term "contracting culture" goes beyond the wealth of the parties, the economics of the commodity at issue, or even the gender and ethnicity of the negotiators.¹²⁰ Instead, it refers to negotiators' competing or complimentary relations, understandings, and values that influence their perceptions and negotiations, and, in turn, the creation and effects of dispute resolution provisions they incorporate in their contracts.¹²¹ In addition, this Article analyzes contracting cultures on a continuum ranging from "intra communal" to "extra communal" to the extent cultural factors converge, using commercial construction as an example of a more intra communal context and consumer contracting as an often more extra communal culture.

A. *Contracting Culture's Role in Dispute Resolution*

Arbitration developed within trade and merchant groups as a means for participants in these groups to privately resolve disputes in accordance with shared understandings and norms of the community.¹²² Nonetheless, as Katherine Van Wezel Stone has observed, fairness concerns about arbitration have grown as

¹¹⁹ See, e.g., Julie Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 289-93 (highlighting the impact of cultural assumptions and invisible differences based on observations of disputing in Nepal versus America); Lee, *supra* note 10, at 1-28 (explaining apology in Korean dispute resolution); Rubin & Sander, *supra* note 10, at 250-53 (proposing heightened consideration of cultural differences relating to ethnicity or nationality in dispute resolution).

¹²⁰ See generally Kevin Avruch, *Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice*, 20 CONFLICT RESOL. Q. 351, 351-61 (2003) (discussing various notions of "culture" and proposing "experience-distant" and "experience-near" conceptions of the term).

¹²¹ *Id.* at 354. Of course, the confines of a "contracting culture" depend on how the context is defined. Construction culture, for example, may be different depending on whether it includes public or international projects.

¹²² Van Wezel Stone, *supra* note 9, at 969-80.

it has expanded into exchanges between "insiders" and "outsiders" to self-regulating communities.¹²³ This Article therefore seeks to remind courts of arbitration's communal genesis. Moreover, it hopes to shed light on the importance of considering contracting culture in policing the fairness of dispute resolution provisions.¹²⁴ These provisions may be fair and beneficial in more intra communal cultures, but problematic and oppressive in more extra communal cultures.

1. Communal Development of Private Dispute Resolution

Communities created arbitration systems designed to resolve their communal conflicts in accordance with custom, equity and internal "law."¹²⁵ They sought to use these systems to limit disruption in trade,¹²⁶ and to avoid "the strict course and tedious ceremonies of Law Suits."¹²⁷ Arbitration was "a matter of free decision, each case being viewed in the light of practical expediency and decided in accord with the ethical or economic norms of some particular group."¹²⁸ It was considered less adversarial than litigation,¹²⁹ and allowed for decisions in accordance with custom and face-saving compromise.¹³⁰ In small communities of several thousands, the courts rarely adjudicated private disputes.¹³¹

As civilizations grew and diversified, communities throughout the world continued to employ arbitration as a means for resolving internal matters.¹³² By the thirteenth century,

¹²³ *Id.* at 1035-36.

¹²⁴ *See id.* This Article applauds Van Wezel Stone's proposal that courts should more closely police arbitration in light of parties' shared or divergent understandings within a community. It also builds on this analysis by broadening the factors that contribute to where relationships may fall on a continuum of contracting cultures.

¹²⁵ JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 22-27 (1918).

¹²⁶ Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 144 (1934).

¹²⁷ COHEN, *supra* note 125, at 117.

¹²⁸ Wolaver, *supra* note 126, at 132.

¹²⁹ *See id.*

¹³⁰ WILL DURANT, *OUR ORIENTAL HERITAGE* 645-47, 795-97 (1954) (discussing ancient roots of arbitration).

¹³¹ *See id.* at 797.

¹³² COHEN, *supra* note 125, at 25-38 (describing various forms of arbitrations in France, Scotland, Denmark, Ireland, Austria-Hungary, Persia, Japan, India, Belgium, Germany, Spain, Italy, Sweden, and Portugal).

community-based private dispute resolution systems gained importance among merchant groups and guilds.¹³³ Merchant guilds sought to govern their own affairs in accordance with internal norms, standards, and rules and ensured compliance with arbitration decisions with non-legal sanctions such as expulsion.¹³⁴

By 1930, nearly every trade or profession in England employed an arbitration system to foster maintenance and regulation of commercial practices and trade success.¹³⁵ Commercial contracts within certain industries routinely included arbitration clauses,¹³⁶ and business communities frowned on the common law courts' inadequate understanding of commercial issues and application of industry norms and standards.¹³⁷ Merchant communities embraced arbitration as means for preserving communal peace and self-determination. The New York Chamber of Commerce, established in 1768, instituted an arbitration committee that continued to resolve merchant disputes when the public courts were closed during the American Revolutionary War and British occupation.¹³⁸ Industry

¹³³ *Id.* at 71-72, 78.

¹³⁴ See Wolaver, *supra* note 126, at 134-35; see also LUJO BRENTANO, ON THE HISTORY AND DEVELOPMENT OF GILDS AND THE ORIGIN OF TRADE-UNIONS, at 33-39 (Burt Franklin 1969) (1870) (discussing how early guilds "had their origin in direct imitation of the family" and assumed the family's role in protecting the community).

¹³⁵ See Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. Q. REV. 238, 246 (1930).

¹³⁶ SAMUEL ROSENBAUM, A REPORT ON COMMERCIAL ARBITRATION IN ENGLAND 13-14 (1916). A book of legal forms published in 1627 included a special section on "Compromise and Arbitration," and another in 1655 contained a brew-house lease that required the parties to submit disputes to a four member arbitration panel composed of two from each of the party's companies. *Id.*

¹³⁷ COHEN, *supra* note 125, at 71-72 (stating that before Lord Mansfield became Chief Justice in England in 1756, courts treated mercantile questions "so ignorantly" that merchants would privately resolve their disputes through arbitration).

¹³⁸ See William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 208-09 (1956) (finding that the Chamber's need for arbitration prompted a special meeting that produced a letter to the British Commander requesting arbitration meetings to resolve mercantile disputes during the revolutionary war). Arbitrations served as the only forum for resolution of civil disputes during the British occupation and continued to thrive after the revolution in both England and North America. *Id.* at 209-12; see also ROSENBAUM, *supra* note 136, at 14-15. Even when the courts closed on September 11, 2001, due to the destruction in New York and Washington D.C., arbitrations continued to proceed in offices of the American Arbitration Association ("AAA"). Interview with Lance Tanaka, Vice President, AAA, in Denver, Colo. (Sept. 12, 2001) (notes on file with author).

associations also used arbitration panels to efficiently end the deluge of post-war disputes¹³⁹ and to protect their "way of doing business" in the continually diversifying markets.¹⁴⁰

2. Factors Contributing to Contracting Culture

"Culture" often refers to "refinements of a civilization," such as art and literature.¹⁴¹ Broader conceptions of culture, however, embrace factors such as relations, expectations and values of a group that shape how players in the group negotiate and resolve disputes.¹⁴² This Article proposes that courts should consider these factors in enforcing dispute resolution provisions and procedures.

a. *Relations and Interdependencies*

Arbitration and ADR agreements may foster "relational" exchanges under Ian Macneil's relational contract theory.¹⁴³ This is because relational contracts usually involve parties who contract over time or share ties in a group. In real world contracting, however, exchanges generally fall somewhere on a murky spectrum between wholly relational and discrete, depending on the degree of the parties' interconnections and symbiotic reliance. For example, long-term supply contracts are generally more relational than one-time purchases at a gas station on the highway.¹⁴⁴

Similarly, those within a group or community may not all contract on a regular basis, but they may at least share some common connections. This may make their contracting culture

¹³⁹ ROSENBAUM, *supra* note 136, at 14–15. After the war, the flood of fights among cotton traders prompted the Liverpool Cotton Association to establish an arbitration committee to handle international disputes. *Id.*

¹⁴⁰ See, e.g., Jones, *supra* note 138, at 211–12 (depicting arbitration among North American mercantile communities).

¹⁴¹ Gold, *supra* note 119, at 292.

¹⁴² See *id.* at 292–96, 302–17 (proposing a broader notion of culture and explaining how it impacts modes of dispute resolution within a group).

¹⁴³ See generally Macneil, *Contracts*, *supra* note 9, at 889–91, 895–97 (discussing dispute resolution in relational contracts as means to retain status quo, create harmony, and foster communications, and not to create great change or quickly fix relationships); see also Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 877–907 (2000) [hereinafter Macneil, *Relational Contract Theory*] (clarifying and extending his work with relational contracts).

¹⁴⁴ See Macneil, *Relational Contract Theory*, *supra* note 143, at 894–98 (discussing the spectrum nature of relational contracts).

more intra communal to the extent that their common relationships prompt them to prefer community-based understandings of justice focused on problem solving and preserving connections in the community.¹⁴⁵ They may seek to avoid "justice" focused on rule of law and getting retribution against those who breach the law.¹⁴⁶ Instead, they are likely to employ private dispute resolution systems that promote restorative over retributive justice.¹⁴⁷

Furthermore, they may agree to exchanges with open terms to allow for flexibility, expecting to cooperate to fill in and comply with contract terms.¹⁴⁸ Accordingly, they may agree to stepped dispute resolution processes that require parties to mediate or use other non-binding means to mutually resolve conflicts before resorting to binding arbitration or litigation.¹⁴⁹ In this way, parties rely on their relations and understandings of implicit standards and norms instead of believing it necessary or efficient to submit disputes directly to a third party for final determination.¹⁵⁰

Although these types of intra communal relations and interdependencies are traditionally associated with native communities that share ethnic or religious ties, they also may exist within other groups.¹⁵¹ For example, the sports community has developed the Court of Arbitration for Sport ("CAS"), in part, to foster good relations and escape rigid legal remedies.¹⁵² CAS

¹⁴⁵ See John M. Ptacin et al., *The Bethel Therapeutic Court: A Study of How Therapeutic Courts Align with Yup'ik and Community Based Notions of Justice*, 30 AM. INDIAN L. REV. 133, 133-39 (2005) (discussing use of community justice systems and therapeutic courts to resolve disputes within Native communities in Alaska).

¹⁴⁶ See *id.* (discussing fairness goals of native communities).

¹⁴⁷ See *id.* (using and explaining these different notions of justice).

¹⁴⁸ See Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 151-54 (2005) (discussing attributes of relational contracts and applying them in employment contexts); Macneil, *Relational Contract Theory*, *supra* note 143, at 878-83 (explaining relational contracts).

¹⁴⁹ See *infra* Part III.B.1 (describing stepped processes employed by players in commercial construction).

¹⁵⁰ See *id.*; see also Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 551-53, 558-60, 573-76 (2003) (finding in a study of franchise agreements that arbitration provisions were less likely where the parties rely on implicit terms but expect to ensure compliance with these terms and control litigation through less formal means).

¹⁵¹ See Van Wezel Stone, *supra* note 9, at 969-79 (explaining the communal development of arbitration within traditional and trade groups).

¹⁵² Richard H. McLaren, *The Court of Arbitration for Sport: An Independent*

arbitrators exercise discretionary power to provide relief "where an injustice is committed through a strict application of the law."¹⁵³ This allowance for flexible remedies in arbitration has also led the AAA to adopt rules that allow arbitrators to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties."¹⁵⁴

Common relational connections and peace preservation interests also drive intra communal groups to favor the privacy of arbitration and mediation.¹⁵⁵ Judicial trials threaten group peace and prosperity by publicizing disputes and community secrets, while private dispute resolution allows losing disputants to "save face" and avoid negative publicity. Additionally, parties may avoid ego preservation tactics thought to infect the formal adversarial process of trial.¹⁵⁶

b. *Understandings and Expectations*

Shared norms, understandings and expectations among negotiators can greatly impact the deals they reach and the dispute resolution systems they employ. This is why community-based private dispute resolution systems gained importance within trading communities.¹⁵⁷ Arbitration thrived because it created means for communities to resolve their disputes in accordance with shared understandings and norms that provided

Arena for World Sports Disputes, 35 VAL. U. L. REV. 379, 381 (2001).

¹⁵³ *Id.* at 404. McLaren nonetheless warns that the CAS is limited by "the appropriate legal frame work." *Id.*; see also Lindland v. U.S. Wrestling Ass'n, 230 F.3d 1036, 1037-38 (7th Cir. 2000) (ordering USA Wrestling to certify Lindland as its nominee for the Olympic Games in accordance with the re-wrestle ordered by an arbitrator).

¹⁵⁴ COMMERCIAL ARBITRATION RULES R. 43 (AAA 2005), available at <http://www.adr.org/sp.asp?id=22440#R43>. The Rule expressly allows the arbitrator to order specific performance of a contract, to "make other decisions, including interim, interlocutory, or partial rulings, orders, and awards," and to assess the fees, expenses, and compensation. In addition, the award may include interest and/or attorneys fees. *Id.*; see also Int'l Inst. for Conflict Prevention and Resolution, RULES FOR NON-ADMINISTERED ARBITRATION, R. 10.1-10.4 (2005), available at <http://www.cpradr.org/pdfs/arb-rules2005.pdf>. (empowering arbitrators to "apply such law(s) or rules of law as it determines to be appropriate" unless the parties expressly mandate application of particular law in their arbitration agreement).

¹⁵⁵ See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 124, 134-35 (1992) (highlighting the secrecy of dispute resolution within the diamond industry).

¹⁵⁶ See Baum, *supra* note 135, at 250.

¹⁵⁷ See *supra* notes 134-154 and accompanying text (discussing rise of arbitration among guilds and merchant groups).

a basis for specialized, private "law".¹⁵⁸ Arbitrators were called not to apply strict judicial law, but instead to allow merchants "to get their questions settled in accordance with their instincts and habits of thought."¹⁵⁹

Although arbitration has outgrown its historical roots in many respects,¹⁶⁰ it continues to thrive in specialized industries because it allows determinations based on field-specific norms that often are not understood or applied in public courts.¹⁶¹ These specialized industries are therefore more intra communal to the extent they promote arbitrators' application of custom and trade rules. This may be true, for example, with respect to CAS and World Intellectual Property Organization ("WIPO") arbitrations.¹⁶²

In addition, the cotton industry may also be considered more intra communal due to the importance of shared understandings and standards in the cotton trade. Lisa Bernstein found in her study of the cotton industry that merchants within the trade community prefer private dispute resolution because it allows for flexible awards based on a Private Legal System ("PLS") made up of industry created contract default rules traders generally understand and respect.¹⁶³ She found that arbitrators' application of this PLS promotes efficiency and relationship restoration.¹⁶⁴ Furthermore, arbitrators may grant partial decisions and leave issues for parties' later agreement in order to foster relationship restoration.¹⁶⁵ Community players' more intra

¹⁵⁸ Over time, merchants developed their own "special law" based on trade custom, norms, and standards. COHEN, *supra* note 125, at 73.

¹⁵⁹ *Id.* at 3.

¹⁶⁰ See *supra* notes 4-8 and accompanying text (questioning haphazard expansion of the scope and application of the FAA).

¹⁶¹ See McLaren, *supra* note 152, at 380-81 (highlighting the CAS arbitrators' application of widely accepted principles that may some day be recognized as the "*lex sportiva*").

¹⁶² See *id.*; see also Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 TRANSNAT'L LAW 357, 369-71 (1996) (discussing the evolution of arbitration in intellectual property disputes and emphasizing that arbitration is particularly appropriate for resolution of such disputes because they involve specialized and technical issues); Christine Lepera, *What the Business Lawyer Needs To Know About ADR: New Areas in ADR*, 13 PLL/NY 709, 711-14, 719 (1998) (describing increased use of arbitration to resolve disputes involving intellectual property rights, online technology, and entertainment issues).

¹⁶³ See Bernstein, *supra* note 9, at 1725.

¹⁶⁴ *Id.* at 1783.

¹⁶⁵ *Id.* at 1784-85.

communal culture fuels the industry's social and informational infrastructures that foster successful reliance on non-legal sanctions and private means for resolving disputes.¹⁶⁶

Again, significant ethnic and religious differences often play important roles in shaping negotiations and dispute resolution in international trade. However, international trade negotiators also may create more intra communal contracting cultures due to their reliance on commonly understood and accepted principles of international law, known as *lex mercatoria*.¹⁶⁷ Although some question the use of *lex mercatoria*, international parties may prefer to contract out of national laws in some way and use arbitration to facilitate enforcement of these rules.¹⁶⁸ Furthermore, they may share an interest in privately resolving their disputes outside the politics of a nation's courts.¹⁶⁹

c. *Values and Needs Regarding Dispute Resolution*

Merchant communities first developed arbitration as means for avoiding the courts and "resort to outside means for enforcing awards."¹⁷⁰ They valued non-adversarial and private dispute resolution, which saved them from the disruptions of the formal court process. Community participants understood that the only choice was to accept arbitrators' decisions or risk expulsion from the community, and thus the market.¹⁷¹ Peer pressure and

¹⁶⁶ See *id.* at 1785-88.

¹⁶⁷ See COHEN, *supra* note 125, at 73 (noting that the first work on the *Lex Mercatoria*, or Merchant Law, was published in 1622 as a customary law commonly accepted among all nations); Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 TUL. L. REV. 871, 915-16 (2001) (discussing *lex mercatoria*); Kazuaki Sono, *The Rise of Anational Contract Law in the Age of Globalization*, 75 TUL. L. REV. 1185, 1185-86 (2001) (discussing the rise of delocalized contract law in international commercial arbitration). *But see* Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 524-26, 551 (2005) [hereinafter Drahozal, *Contracting Out of National Law*] (explaining understandings of *lex mercatoria* but finding empirical evidence of limited use of such transnational commercial law in international commercial arbitration).

¹⁶⁸ See Drahozal, *Contracting Out of National Law*, *supra* note 167, at 551-52.

¹⁶⁹ Victor Perez Vargas & Daniel Perez Umana, *The UNIDROIT Principles of International Commercial Contracts in Costa Rican Arbitral Practice*, 58 UNIF. L. REV. 179, 179-98 (2006) (highlighting growth of arbitration in Costa Rica and application of accepted international contract standards in both international and domestic arbitration).

¹⁷⁰ DANIEL BLOOMFIELD, *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 16 (1927).

¹⁷¹ *Id.* (describing how merchants rarely sought judicial intervention due to non-

concerns for reputation therefore drove many merchants to comply with arbitration decisions without resort to public legal sanctions.¹⁷²

In this way, contracting contexts may be more intra communal in transactions in which the parties share values and needs regarding dispute resolution. Parties may mutually wish to avoid harm to their reputations that litigation could cause. Furthermore, they may voluntarily accept private dispute resolution provisions and abide by private determinations in order to foster goodwill and avoid other non-legal sanctions.

For example, Professor Macaulay found in his study of contracting between businesses within a commercial community that "contract and contract law are often thought unnecessary" due to power of non-legal sanctions against those who do not honor commitments or produce good products.¹⁷³ Prior dealings, personal relationships, and concern for maintaining good business reputations may compel players within a business community to comply with their contracts, or resolve disputes without the aid of the courts.¹⁷⁴ This is because private dispute resolution often solves far more problems than rigid litigation and static contract law in such intra communal contracting cultures.¹⁷⁵

In addition, parties to more intra communal exchanges may share other needs for avoiding litigation or other disruptive dispute resolution processes. Their mutual interests in completing performance, especially in a long-term contract, may outweigh inclinations to sue for immediate "justice" or retribution. For example, general contractors and sub-contractors may mutually agree to resolve disputes privately, or even delay discussions of disputes regarding such small changes in performance, in order to complete a project on schedule and avoid liability to the owner of the project.

legal sanctions).

¹⁷² *Id.*

¹⁷³ Macaulay, *Non-Contractual Relations*, *supra* note 9, at 63.

¹⁷⁴ *See id.* at 63-64.

¹⁷⁵ *See* Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of the Yellow Submarine*, 80 TUL. L. REV. 1161, 1169-70 (2006) [hereinafter Macaulay, *Contracts*] (advancing "new legal realism" geared to move us toward the "living law").

B. Examples to Consider on the Contracting Culture Continuum

1. Commercial Construction Context

Repeated relations and common connections generally exist in commercial construction contexts. This is why players in these contexts often prefer arbitration and arbitrators' freedom to order remedies not available in court.¹⁷⁶ For example, an arbitrator may direct a builder to complete construction of a house¹⁷⁷ despite the judiciary's general refusal to order specific performance of construction contracts.¹⁷⁸ Additionally, players on commercial construction projects, including corporate owners, contractors, subcontractors, suppliers, architects, engineers, and construction managers, may share an interest in maintaining good relations. This is especially true where they have had prior dealings or hope to work with one another in the future. Moreover, even contracting strangers within the industry may hope to promote goodwill in order to generate future business.¹⁷⁹

This has contributed to the rise of binding arbitration as "the mainstay of construction dispute resolution."¹⁸⁰ Parties to construction contracts are likely to know one another on personal and professional levels and share mutual connections.¹⁸¹ This

¹⁷⁶ See, e.g., *David Co. v. Jim Miller Constr., Inc.*, 444 N.W.2d 836, 838, 840-41 (Minn. 1989) (affirming arbitrator's award ordering a builder to purchase defective housing units from the owner, regardless of whether relief would not have been appropriate in court).

¹⁷⁷ See *Bradigan v. Bishop Homes, Inc.*, 20 A.D.2d 966, 966, 249 N.Y.S.2d 1018, 1019 (4th Dep't 1964).

¹⁷⁸ See *Or. Ry. Co. v. Or. Ry. & Nav. Co.*, 37 F. 733, 734 (C.C.D. Or. 1885) ("As a general rule a contract to build or repair will not be specifically enforced by a court of equity."); *Cartwright v. Or. Elec. Ry. Co.*, 171 P. 1055, 1056 (Or. 1918) (emphasizing the settled, general rule denying specific performance of contracts for building and construction and contracts to make repairs); cf. *Dixon v. City of Monticello*, 585 N.E.2d 609, 619-20 (Ill. App. Ct. 1992) (ordering specific performance of a home sales contract and reimbursement from purchaser for interest accrued to the date of closing).

¹⁷⁹ See generally Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463 (1998) [hereinafter Stipanowich, *Reconstructing Construction Law*] (explaining realities of commercial construction projects).

¹⁸⁰ *Id.* at 565 (predicting that "binding arbitration, long the mainstay of construction dispute resolution, will probably remain the preferred alternative to litigation").

¹⁸¹ See *id.* at 465-70, 505 (highlighting prevalence of arbitration in the construction industry); see also James P. Moore & Robert A. Shearer, *Expanding Partnering's Horizons: The Challenge of Partnering in the Middle East*, 59 DISPUTE

creates a more friendly and accountable contracting culture in which players feel an inherent duty to abide by their promises and treat one another fairly. These players have therefore preferred to resolve disputes through binding arbitration, even when courts generally refused to enforce arbitration agreements under ouster and revocability doctrines.¹⁸²

In addition, construction industry arbitrators generally have technical expertise in construction or construction law.¹⁸³ They also are usually familiar with the prevailing form construction contracts, and their provisions for a combination of ADR and arbitration.¹⁸⁴ The AIA 1997 A201 General Conditions of the Contract for Construction ("AIA Conditions") used on many construction projects require such a stepped dispute resolution process.¹⁸⁵ These steps require parties to first submit claims to the project architect for initial determination within 21 days after they "first recognize[] the condition giving rise to the [c]laim."¹⁸⁶ After the earlier of the architect's decision or 30 days after a claim is first submitted, the parties then must seek to resolve their disputes through mediation conducted under the AAA Construction Industry Mediation Rules.¹⁸⁷ If mediation

RESOL. J. 54, 56 (Nov. 2004–Jan. 2005) (discussing the construction industry's long use of private means to resolve disputes); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 139 (1996) (also discussing the ADR norm in construction contexts).

¹⁸² See *Hetrick v. Friedman*, 602 N.W.2d 603, 609–10 (Mich. Ct. App. 1999); Jones, *supra* note 138, at 212–15 (explaining how parties to construction contracts voluntarily submitted to arbitration of future disputes under form pre-dispute arbitration agreements, even when courts refused to specifically enforce these executory agreements).

¹⁸³ See Jones, *supra* note 138, at 212–13 (explaining prevalence of construction arbitrations conducted between 1800 and 1920, primarily because those in the industry desired to have disputes decided by a technician in the field).

¹⁸⁴ See Thomas J. Stipanowich, *Of "Procedural Arbitrability": The Effect of Noncompliance with Contract Claims Procedures*, 40 S.C. L. REV. 847, 847–50 (1989) (discussing arbitration under the standard AIA contract provisions and its acceptance in the construction industry for many years); Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 375 (1998).

¹⁸⁵ AIA, *AIA Document A201—General Conditions for the Contract for Construction* (1997), in 2 JAMES ACRET, *CONSTRUCTION INDUSTRY FORMBOOK* 12-54 to 12-56, 12-74 to 12-77 (3d ed. 2005) [hereinafter *AIA Conditions*] (using AIA as typical construction form contract and reprinting the dispute resolution provisions in the form).

¹⁸⁶ *Id.* at 12-74.

¹⁸⁷ See *id.* at 12-76. The contract further specifies that mediation must "proceed

fails, then the parties must arbitrate any remaining claims in accordance with the AAA Construction Industry Arbitration Rules.¹⁸⁸

Moreover, the AIA Conditions may promote global settlement by permitting consolidated arbitration. They allow for proceedings that include the owner, contractor, separate contractors with a stake in the project, and any other contracting parties "substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration."¹⁸⁹ Some critique the Conditions, however, for failing to clearly require multi-party arbitration including architects, engineers, subcontractors, insurers, sureties, and others who may bear responsibility or liability for claims.¹⁹⁰ They question the Conditions' protection of the architect from joinder in arbitration without the architect's express consent. This may nonetheless be reasonable because project architects are usually key witnesses who should remain neutral in assessing and reporting what happened on a project.

The AIA conditions are representative in the industry. A typical standard form construction contract promulgated by the Associated General Contractors of America ("AGC Short Form"), also used on many construction projects, similarly allows for private dispute resolution of any claims related to a project.¹⁹¹

in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order." *Id.* It is unclear, however, whether and how a court will give effect to such agreements to mediate. See Schmitz, *Refreshing Contractual Analysis*, *supra* note 2, at 1-4 (discussing ambiguity of judicial enforcement of agreements to mediate).

¹⁸⁸ See *AIA Conditions*, *supra* note 185, at 12-76; see also Interview by Matthew Peters, Research Assistant to Amy J. Schmitz, with Lance Tanaka, Vice President, AAA, in Denver, Colo. (July 13, 2006) (notes on file with author) (stating that construction contracts routinely require private dispute resolution and that most include mediation clauses as a precursor to arbitration, but noting a movement to allow for litigation instead of arbitration due to judicialization of arbitration).

¹⁸⁹ *AIA Conditions*, *supra* note 185, at 12-77.

¹⁹⁰ See Thomas E. McCurnin, *Two-Party Arbitrations in a Multiple-Party World*, 26 CONSTR. LAW. 5, 5 (2006) (critiquing lack of clear joinder and consolidation rules and recognizing the need for multiple-party dispute resolution in construction disputes).

¹⁹¹ Associated General Contractors of America ("AGC"), *Document No. 205 Standard Short Form Agreement Between Owner and Contractor (Where the Contract Price Is a Lump Sum)* (2000), in ACRET, *supra* note 185, at 13-61 (using the AGC contract for lump sum as a typical construction form contract and reprinting the dispute resolution provisions in that contract).

The AGC Short Form requires a contractor to give the owner notice of a claim within 14 days after occurrence of a condition giving rise to the claim, but allows exceptions for claims related to increases in contract price or time or in case of "emergency."¹⁹² It also requires that parties seek to settle disputes relating to the contract "first through direct discussions," and if that fails, through mediation under the AAA Construction Industry Mediation Rules.¹⁹³ The AGC Short Form then differs from the AIA Conditions by allowing parties to choose between two provisions for finally determining remaining claims, one requiring binding arbitration under the AAA Construction Industry Arbitration Rules and the other allowing parties to assert remaining claims in litigation.¹⁹⁴ The form also allows the "prevailing party" in a binding proceeding to recover reasonable attorney fees, costs, and expenses incurred in connection with the proceeding.¹⁹⁵

Private dispute resolution also has become a norm in international construction contracting. Players on international construction projects value ADR regardless of ethnic and religious diversity because they often share concerns regarding tight project timelines and budgets, and seek to preserve their reputations and relationships in the construction industry.¹⁹⁶ This is why an ADR technique known as "partnering" has been successful on international projects, including projects in the Middle East where stakeholders are faced with especially volatile cultural and political differences.¹⁹⁷ Partnering provisions have been gaining popularity because they call various stakeholders and players on a project to attend a pre-construction workshop facilitated by an ADR professional who aids participants in identifying common goals and critical issues and setting agendas

¹⁹² *Id.* (stating that a contractor should give an owner notice before proceeding with extra work "[e]xcept in an emergency").

¹⁹³ *Id.*

¹⁹⁴ *Id.* The form sets out a paragraph for arbitration and one for litigation, and the contracting parties must check a box indicating which paragraph in the form they choose to follow.

¹⁹⁵ *Id.* Presumably, this cost shifting provision is designed to encourage parties to resolve disputes voluntarily through discussions or mediation, in that the provision only applies with respect to costs of any binding dispute resolution process.

¹⁹⁶ See Moore & Shearer, *supra* note 181, at 56-58 (noting common understandings and goals of players on international projects and explaining how these bonds may transcend ethnic or religious differences).

¹⁹⁷ See *id.* at 55-59 (discussing values of partnering on Middle East projects).

for how they will privately resolve disputes that may arise during performance.¹⁹⁸ This promotes trust, open communication, and team-building skills that foster dispute prevention.¹⁹⁹

Accordingly, commercial construction contexts sit at the intra communal end of the contracting culture continuum. These contexts are more relational in that they involve intra communal parties who are continually building relationships on their projects and common connections in the industry. Furthermore, these parties generally understand and accept industry norms, standards, and rules not only with respect to construction, but also about dispute resolution. They generally condone the accepted construction contract forms and the forms' private dispute resolution provisions, as well as other non-legal sanctions aimed to ensure performance.²⁰⁰ In addition, parties' needs to complete a project on time and on budget also foster amicable and private dispute resolution in lieu of litigation. Indeed, this has prompted the industry to move toward partnering and other more flexible dispute prevention processes.²⁰¹

Nonetheless, the placement of an exchange relationship on the contracting culture continuum will depend on particularities of the context. For example, construction contracts between residential consumers and contractors may be extra communal when consumers have no say in form arbitration clauses and no prior experience with construction or private dispute resolution.²⁰² Moreover, the depth and texture of ethnic and political differences may impact the communal nature of

¹⁹⁸ *Id.* at 56; Stipanowich, *Reconstructing Construction Law*, *supra* note 179, at 501 (discussing emergence of partnering, especially on international construction projects).

¹⁹⁹ See Stipanowich, *Reconstructing Construction Law*, *supra* note 179, at 501-02 (highlighting the trend toward facilitated conflict management in the construction industry and the promotion of strategies such as partnering aimed to prevent disputes).

²⁰⁰ See *supra* notes 185-188 and accompanying text (explaining use of stepped processes in more intra communal contexts).

²⁰¹ See Stipanowich, *Reconstructing Construction Law*, *supra* note 179, at 500-02 (emphasizing growth of mediation and other stepped techniques for preventing conflict); Interview by Matthew Peters, *supra* note 188 (noting growth of mediation in construction disputes and the AAA's recent move to revise its form contracts to allow parties to choose arbitration or litigation if mediation fails).

²⁰² See Stipanowich, *Reconstructing Construction Law*, *supra* note 179, at 503-05 (noting how residential construction contracting is very different from commercial contracting, and that homeowners may be at a disadvantage in negotiations due to lack of industry understandings or technical expertise).

international projects, and political pressures may affect the culture of public construction exchanges. This Article, therefore, is merely a first step in a larger exploration of the fairness of private dispute resolution provisions in different contracting cultures.²⁰³

2. Consumer Contracting

Professor Jean Sternlight has noted that mandatory consumer arbitration is a "uniquely U.S. phenomenon."²⁰⁴ Policies in the European Union and elsewhere may allow for voluntary consumer arbitration, but they generally bar companies' use of mandatory pre-dispute form arbitration clauses that preclude consumers' access to litigation.²⁰⁵ Despite proposals for reform in the United States, American law has not followed other nations in limiting consumer arbitration and requiring public access to arbitration determinations affecting consumers.²⁰⁶

Consumer contexts, however, raise real concerns regarding possible misuse of private arbitration systems due to consumers' bargaining disadvantages with corporate sellers and lenders.²⁰⁷ Furthermore, consumer contracting cultures may be more extra communal when consumers do not share relations and connections in an industry or with arbitration providers that corporations may befriend as repeat players who routinely arbitrate. These repeat player corporations are often insiders that choose the arbitration providers and draft arbitration

²⁰³ I currently am beginning a qualitative empirical study of contracting and dispute resolution on a construction project, and I plan to expand and enrich that research with a quantitative study. I also am doing the same with respect to contracting and dispute resolution in the consumer culture. Such empirical study is necessary to understand contracting in the real world. See also Macaulay, *Contracts*, *supra* note 175, at 1165-72, 1188-90 (highlighting need for research and understanding of the "living law" and the importance of recognizing the workings of the real world).

²⁰⁴ See Sternlight, *Consumer Arbitration*, *supra* note 3, at 138.

²⁰⁵ *Id.* at 139-40; see also Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 251-53 (2006) (noting the FAA's coverage of e-contracts and how the United States differs from most other countries in enforcing pre-dispute arbitration agreements in consumer electronic contracts).

²⁰⁶ See Sternlight, *Consumer Arbitration*, *supra* note 3, at 139-40.

²⁰⁷ Concerns regarding one-sided arbitration agreements arose at common law. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 68-71 (1992).

contract terms that suit their needs. Meanwhile, "little-guy" individuals are generally outsiders to the extent they lack understanding or control of these terms.

Little-guy consumers may therefore become subject to form arbitration provisions on a take-it-or-leave-it basis without understanding or experience with arbitration.²⁰⁸ These arbitration provisions become "mandatory" to the extent consumers rarely read or understand them or have real opportunity or inclination to find competitor companies who do not impose similar provisions.²⁰⁹ In addition, consumers generally lack resources to research and use these mandatory arbitration schemes.²¹⁰ Individuals' preference for inaction and underestimation of litigation risks also prevent them from taking action to abolish or seek revisions of form arbitration clauses.²¹¹

Insiders' imposition of form arbitration provisions is powerful. Corporate parties draft form provisions that are subject to little or no public or legal oversight. Defenders of this

²⁰⁸ See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637-38 (1996) (critiquing companies' inclusion of arbitration clauses in their contracts with consumers, employees, and other "little guys"); see also Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 765-67 (2001) [hereinafter Cole, *Uniform Arbitration*] (critiquing rampant use of form arbitration provisions in employment contracts); Geraldine Szott Moohr, *Opting in or Opting out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087, 1092-94 (1999) (discussing unfairness of arbitration in traditionally non-merchant contexts); Stempel, *Bootstrapping*, *supra* note 45, at 1410-12 (critiquing industries' rampant inclusion of arbitration provisions in form contracts in markets such as securities in which individuals have no meaningful alternatives to these forms); Schmitz, *Mobile-Home Mania*, *supra* note 5, at 313-22 (discussing manufacturers' use and misuse of form arbitration agreements in purchase and finance agreements with consumers).

²⁰⁹ See Sternlight, *Consumer Arbitration*, *supra* note 3, at 140-41 (discussing the debate regarding the characterization of arbitration as "mandatory" and explaining why the characterization is appropriate).

²¹⁰ Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452-54 (1996) (critiquing form arbitration clauses in employment contracts); Cole, *Uniform Arbitration*, *supra* note 208, at 768-69 (extending her discussion of arbitration in employment contexts); Stempel, *Bootstrapping*, *supra* note 45, at 1407-08, 1410-12, 1420-21 (critiquing impositions of form arbitration provisions where individuals have no real opportunity to negotiate or avoid these provisions).

²¹¹ See *supra* notes 28-36 and accompanying text (explaining Korobkin's "inertia theory"); Sternlight, *Consumer Arbitration*, *supra* note 3, at 141 (noting how consumers may not be as "rational" as economic theory assumes and that they "predictably underestimate the risk of having to sue the company").

norm argue that this provides consumers with faster and less expensive means for asserting claims than they would obtain through litigation and fosters economic efficiency that results in lower prices for the public.²¹² Critics of consumer arbitration respond that it is unfair based on its non-consensual nature as well as biases that favor the repeat-players that draft form provisions and routinely use these arbitration systems.²¹³

Repeat-players' form provisions may augment consumers' bargaining disadvantages by impairing consumers' legal rights and remedies. These players often have different dispute resolution values and needs than consumers, and power to select arbitrators with incentives to skew procedures to favor these repeat clients.²¹⁴ Companies may also draft arbitration provisions to preclude class relief, shorten time limitations on asserting claims, bar recovery of punitive damages and attorney fees, and limit access to injunctive relief.²¹⁵ Blanket arbitration of consumers' claims also may stymie development of consumer law and prevent the public from learning about companies' statutory violations.²¹⁶

Of course, these concerns do not prove true in all consumer cases, and there are legitimate defenses of consumer arbitration. Many consumers would prefer to pay lower prices than to retain access to the courts to resolve any eventual disputes.²¹⁷ Furthermore, some complain that consumers often abuse class relief in court and that arbitration saves tax dollars by

²¹² See Sternlight, *Consumer Arbitration*, *supra* note 3, at 148–51 (summarizing defenses of consumer arbitration).

²¹³ See *id.* at 141–48 (explaining criticisms of consumer arbitration).

²¹⁴ This is what some have called the "repeat provider" bias, although providers defend that they have no direct influence over arbitrators and strive to be neutral. See Sternlight, *Consumer Arbitration*, *supra* note 3, at 144–45.

²¹⁵ See *id.* at 146–47.

²¹⁶ See *id.* at 141–48 (discussing the individual and public interest criticisms of mandatory arbitration).

²¹⁷ 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, 254–64, 292 (2006) (emphasizing the overall cost savings of pre-dispute arbitration clauses for companies and consumers and critiquing cost analysis that fails to consider these savings in assessing costs of pursuing arbitration claims); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 210–15 (1998) (explaining how arbitration clauses benefit consumers and the purchasing public).

preventing consumers from clogging the courts with frivolous claims.

Indeed, the debate regarding consumer arbitration has raged for years; therefore, I will not recount its intricacies here.²¹⁸ Suffice it to say that the American consumer arbitration phenomenon is controversial. Moreover, the expansion of form arbitration provisions in consumer contracts means that arbitration provisions now bind individuals whose relations, understandings, and values regarding dispute resolution compete with those of the corporations that draft and control these arbitration forms.²¹⁹ This raises significant questions worthy of study regarding the fairness and legitimacy of form arbitration provisions in such extra communal contracting cultures.²²⁰

IV. CONSIDERING CONTRACTING CULTURE IN APPLYING UNCONSCIONABILITY TO POLICE ARBITRATION PROVISIONS AND PROCEDURES

As explained above, United States courts' interpretations of the New York Convention and FAA have left general contract defenses as the most viable tools for challenging arbitration provisions. In addition, courts' efficiency-focused consent assumptions and formulaic applications of contract defenses have further limited challengers' options for seeking relief from burdensome arbitration provisions.²²¹ The unconscionability doctrine, however, retains an equitable core that makes it a viable tool for acknowledging contracting culture in policing fairness of arbitration forms. This Article, therefore, invites courts to apply this doctrine with clear consideration of contracting culture and an exchange's intra or extra communal

²¹⁸ This summary was meant only to give a taste of the arguments, as they have been hashed out in books and articles too numerous to cite. For a synopsis of arguments and studies, see generally Sternlight, *Consumer Arbitration*, *supra* note 3, at 127-84.

²¹⁹ See, e.g., *Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 265-66 (5th Cir. 2004) (holding illiterate plaintiffs to an arbitration clause in loan and insurance terms they did not read or understand).

²²⁰ Again, I am in the early stages of an empirical study of consumer contracting and dispute resolution. See *supra* note 203 (noting my research in the construction culture); see also Macaulay, *Contracts*, *supra* note 175, at 1190-93 (highlighting the need to ask about the effectiveness of form contracts and problems in communicating default provisions).

²²¹ See *supra* Part II (discussing limitations on challenges of arbitration clauses).

character. In this way, the Article seeks to revive contextual consideration of form arbitration provisions and to highlight that economic and resource imbalances do not necessarily make arbitration provisions legally unconscionable. Courts should resist the popular push to avoid deep contract review and to base determinations on status assumptions.²²²

A. *Acknowledging Contracting Culture in Assessing Procedural Unconscionability*

As explained above, procedural unconscionability focuses on the bargaining relations between contracting parties and asks whether a contract was overly adhesive. In the arbitration context, courts may find procedural unconscionability when a contracting party must accept a form arbitration provision on a take-it-or-leave-it basis without explanations or negotiation.²²³ Courts must be careful, however, to consider contracting culture in order to avoid assuming that economic and resource imbalances necessarily lead to one-sided bargaining.

Arbitration provisions in intra communal contracting cultures are unlikely to be procedurally unconscionable. Instead, it is generally efficient and fair to enforce even form arbitration terms in these contexts when players understand and respect the terms, and private dispute resolution can provide better means than litigation for solving the parties' disputes.²²⁴ Players in commercial construction contracting, for example, generally expect to resolve disputes under the form dispute resolution provisions of the AIA or AGC contracts and the AAA Construction Industry Mediation and Arbitration Rules these contracts prescribe. Furthermore, even if players have not read or researched these provisions, they nonetheless understand and value the use of private processes to resolve project disputes.²²⁵

²²² This proposed analysis invites acknowledgement of the true workings of the world. See Macaulay, *Contracts*, *supra* note 175, at 1193-94 (concluding that new legal realism may not help create unified, clear, and simple contract theories, but such realism is necessary to prevent inaccuracy that could lead us into "undersea mountains").

²²³ See *supra* Part II.C.3 (discussing unconscionability).

²²⁴ See *supra* Part II.A (explaining how modern contract theory supports form contracting).

²²⁵ See *supra* Part III.B.1 (depicting the typical contracting culture on construction projects).

In addition, courts should recognize and enforce provisions that foster voluntary dispute resolution through their stepped processes.²²⁶ Form construction contracts, for example, generally preclude a claimant from submitting claims for a binding arbitration decision or judgment until after the claimant has sought negotiations and/or mediation. Indeed, construction players have led the way in crafting and pursuing dispute prevention mechanisms, such as partnering.²²⁷

Moreover, it generally is fair to enforce these arbitration provisions in such intra communal cultures even where the parties are not necessarily economic equals. For example, a small subcontractor hired by a large general contractor to install drywall may not have an army of lawyers to analyze and negotiate contract provisions, let alone settle disputes.²²⁸ The subcontractor may have adequate power to protect itself, however, due to shared reputation interests with the general contractor and the general contractor's reliance on the subcontractor to complete its work. A building needs drywall, and the general contractor will become liable to the owner and others for damages due to delay if it has to find a replacement drywall subcontractor in the midst of a project. A general contractor also wants to protect its reputation among subcontractors and save the costs of paying a replacement a premium for lack of lead-time and expedited work.

Consequently, mutual needs and interests often foster balanced and cooperative contracting orientations that may prevent intra communal players from taking advantage of economic or resource disparities.²²⁹ In addition, detailed form contracts in these cooperative contexts are often reasonable and efficient. Researchers found in a study of simulated purchasing

²²⁶ See *supra* notes 185–188 and accompanying text (explaining stepped provisions).

²²⁷ See *supra* notes 197–199 and accompanying text (explaining partnering).

²²⁸ See *Crain Const. Co. v. Dinatale*, No. A-0764-03T1, 2004 WL 3250387, at *3 (N.J. Super. Ct. App. Div. Nov. 3, 2003) (summarily rejecting subcontractor's claim that arbitration clause was unconscionable). I also use this example based on my experiences as a construction lawyer in Minneapolis, Minnesota, and Seattle, Washington.

²²⁹ See Thomas S. Atkin & Lloyd M. Rinehart, *The Effect of Negotiation Practices on the Relationship Between Suppliers and Customers*, 22 *NEGOTIATION J.* 47, 49–52 (2006) (reporting findings from empirical study of how negotiation practices affect resulting contracts and business relationships and concluding that negotiators with cooperative orientations often avoid coercive tactics).

negotiations, for example, that despite their hypothesis that negotiators' cooperative orientations would lead to less contract formality, cooperativeness actually led to *greater* contract formality.²³⁰ This may help explain why the AIA Conditions discussed above are quite long, complicated, and formal.²³¹

This also suggests that formulaic arbitration provisions and rules may be beneficial in intra communal contracting cultures. Complicated form contracts are not necessarily means for legislating power differentials.²³² Furthermore, it seems that the more intra communal a culture is, the more likely it is that negotiators within that culture will have cooperative attitudes. Mutual dispute resolution values and needs in more intra communal contracting cultures may counteract uneven economic resources and lead to reasonable arbitration provisions.²³³

Courts should, therefore, continue to enforce form arbitration provisions in intra communal cultures like those in commercial construction contexts. The degree of deference owed to an arbitration provision in a particular exchange, however, should depend on the extent of cooperativeness and mutual understanding in that exchange.²³⁴ Courts should consider dynamics of personal relationships among the negotiators and be careful in labeling and defining cooperative contracting cultures.²³⁵

This also means that courts should be particularly vigilant in assessing the procedural unconscionability of form arbitration provisions in extra communal contracting cultures. Consumers often do not share relationships, connections, or understandings with corporate sellers and lenders. Furthermore, consumers' and

²³⁰ *Id.* at 47, 52-54, 61.

²³¹ *See supra* notes 185-190 and accompanying text (discussing and citing AIA contract terms).

²³² *See supra* note 45 and accompanying text.

²³³ *See supra* notes 183-202 and accompanying text (discussing provisions in construction contracts); *see also* Drahozal, "Unfair" Arbitration Clauses, *supra* note 44, at 720-22, 721 n.195, 741 (providing empirical evidence that form arbitration clauses in franchise agreements between franchisors and franchisees are generally fair despite power and resource differentials and that those with less power may even benefit from "unfair" arbitration provisions due to efficiency benefits of such provisions).

²³⁴ *See* Atkin & Rhinehart, *supra* note 229, at 59-61 (finding that "personal characteristics and negotiation practices" impact satisfaction with contracting and the establishment of long-term relationships).

²³⁵ *See id.* at 60 (highlighting "the importance of determining who the most appropriate lead negotiator should be in any given negotiation").

corporations' dispute resolution values may compete. For example, consumers often value class relief because it allows them to save costs by asserting small dollar claims as a group. Corporations, however, often use arbitration clauses to preclude class actions as means for chilling these consumer claims and keeping them private.²³⁶

These players also often have disparate bargaining power that companies with power use to foster their values and needs to the disadvantage of consumers with little arbitration resources or experience.²³⁷ Corporations may offer these form provisions to consumers on a take-it-or-leave-it-basis at a time when the consumers do not realize the significance of these provisions. Furthermore, repeat-player corporations usually draft these form provisions knowing that consumers generally do not read or understand these provisions. Consumers also usually lack the power contractually to protect themselves from arbitration procedures that these players prescribe.

Accordingly, some courts appropriately recognize that this uneven bargaining in consumer arbitration contexts may lead to procedural unconscionability.²³⁸ Courts should be careful, however, not to jump to conclusions in assuming that resource imbalances necessarily lead to procedural unfairness. Again, a subcontractor with limited resources may not be subject to unconscionable disadvantages with respect to arbitration provisions.²³⁹ This helps to explain why subcontractors often are proponents of arbitration.²⁴⁰

²³⁶ See Sternlight, *Consumer Arbitration*, *supra* note 3, at 144–47 (discussing corporate use of arbitration to limit consumer and employee remedies).

²³⁷ I am currently testing these assumptions through empirical studies of construction and consumer contracting. Also, note that my study of construction contracting is different from the Atkin and Rinehart study in that I am doing a qualitative examination of players' experiences on a construction project instead of volunteers' experiences during simulated negotiations. See Atkin & Rinehart, *supra* note 229, at 58–59 (reporting findings from purchasing-negotiation simulations with students in a classroom).

²³⁸ See, e.g., *Wis. Auto Title Loans, Inc. v. Jones*, 696 N.W.2d 214, 220 (Wis. Ct. App. 2005) (finding consumer loan agreement procedurally unconscionable based on specific findings that Wisconsin Auto offered the loan terms "in a take it or leave it manner," and that "Jones was in a desperate situation").

²³⁹ See *supra* text accompanying note 228 (discussing how resource imbalances may not disrupt the intra communal character of construction contracting in many cases).

²⁴⁰ See *Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861, 862–63 (6th Cir. 2006) (discussing a subcontractor seeking to compel arbitration against the larger general

Moreover, even in seemingly extra communal consumer cases, courts should not jump to procedural unconscionability conclusions without considering contracting culture. In *Porpora v. Gatliff Building Co.*,²⁴¹ for example, the court quickly concluded that the arbitration provision in the contract between a family-owned building company and an owner of a \$297,000 home was procedurally unconscionable because the builder included the clause in all of its contracts and did not explain arbitration to the homeowners.²⁴² The court failed to consider that the parties did not necessarily have uneven bargaining power or resources. It also failed to recognize that the owner could have inquired about the clause or contracted with another builder. Moreover, arbitration may have been the best avenue for the parties to resolve their disputes quickly and possibly preserve the parties' relations.

Home contracting is not easily categorized as intra or extra communal. Instead, residential construction exchanges fall in varying places on the intra to extra communal continuum, depending on the particularities of the exchange at issue. Large corporate builders may take advantage of bargaining imbalances in some cases, but homeowners often have adequate power and resources to protect themselves in other cases. Consumers looking to build a home usually have many contractor options, and contractors compete for business and goodwill. This suggests that courts should not assume heavy-handed contracting in residential cases. Earnest courts should be careful to consider the relations, experiences, understandings, and options of parties involved.

B. Monitoring How Contracting Culture Affects Substantive Unconscionability

Substantive unconscionability calls courts to consider whether the particular terms of an arbitration provision are unduly harsh or oppressive in practice. Revived formalism in contract law, however, has prompted many United States courts to avoid any substantive fairness analysis and to assume the fairness or unfairness of arbitration terms without truly

contractor).

²⁴¹ 828 N.E.2d 1081 (Ohio Ct. App. 2005).

²⁴² *Id.* at 1084-86.

considering how these terms apply in context.²⁴³ This Article seeks to break that trend by emphasizing the importance of carefully considering how contracting culture affects the practical application of arbitration provisions and procedures. Identical terms can have very different impacts in various contexts.

As is true with respect to procedural unconscionability, form arbitration terms are often substantively fair in intra communal contexts. This is because intra communal parties with mutual understandings and dispute resolution values are likely to use form terms that are reasonable in their contexts. For example, players on a commercial construction project often incorporate AIA dispute resolution provisions that prescribe a stepped process requiring mediation as a precursor to binding arbitration as a last resort.²⁴⁴ The intra communal culture lends toward such collaborative dispute resolution because the players understand that expensive or adversarial claims procedures could delay or derail the project.²⁴⁵ The AIA stepped process provides parties with opportunities to resolve their disputes privately without halting performance or damaging reputations and relations in the industry.

In addition, arbitration terms barring class relief usually have little import in commercial construction disputes because these disputes generally do not involve many claimants with similar claims. Meanwhile, AIA and other forms often allow for some consolidation, although they could more clearly allow for required joinder of all those on the project with a stake in a dispute.²⁴⁶ Players on a construction project may agree to consolidate all claims in one arbitration proceeding as means for fostering global resolution of disputes. For example, a construction project may involve various separate contracts among the owner, the contractor, subcontractors, and engineers, with only some of the contracts even including arbitration

²⁴³ See Schmitz, *Unconscionability's Safety Net Function*, *supra* note 83 (discussing how courts have strictly limited consideration of substantive fairness, usually opting to assume terms are sufficiently fair); *see also supra* note 106 and accompanying text (listing terms courts have considered suspect).

²⁴⁴ See *supra* notes 183–195 and accompanying text (discussing AIA and AGC form contracts).

²⁴⁵ See *supra* notes 176–204 and accompanying text (discussing construction culture).

²⁴⁶ See *supra* note 190 and accompanying text (discussing allowance for some joinder, but need for more clarification in AIA forms).

clauses. Despite the players' options to require separate proceedings, however, they may choose to join in one proceeding in order to pool their defense resources and avoid being scapegoats for each other. Furthermore, consolidation prevents the inefficiencies and preclusion problems caused by multiple awards or judgments on the same facts and issues.

In contrast, form arbitration procedures precluding class relief may unfairly chill injureds' claims in extra communal contexts in which parties do not share norms and understandings, let alone access to resources.²⁴⁷ Such forms may be substantively unconscionable because they provide one-sided roadmaps for vindicating claims and may dissuade consumers from asserting small dollar warranty claims.²⁴⁸ Furthermore, consumer class actions may be important in curbing and shedding light on warranty and other legal violations by corporations. It therefore may be proper for the court to refuse to enforce class action waivers or to reform such arbitration provisions to allow class arbitration.²⁴⁹

In *Hill*, for example, the Hills sought to assert their warranty claims with other similarly situated consumers due to the small dollar amount of their individual claim and their lack of individual resources to pay arbitration and attorney costs.²⁵⁰ There were other consumers with warranty claims similar to the Hills', but each consumer would likely spend more money pursuing an individual claim than each stood to collect on that claim. By pooling their resources in a class action, however,

²⁴⁷ See, e.g., Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 528-46 (2005) (discussing how strict application may undermine goals of contract law and may perpetuate power imbalances).

²⁴⁸ Schmitz, *Unconscionability's Safety Net Function*, *supra* note 83 (proposing that courts embrace unconscionability's flexibility by adding a "safety net" prong to Professor Leff's widely accepted two-prong analysis); see also Kim, *supra* note 247, at 554-66 (proposing a "dynamic approach" for interpreting contracts to allow for consideration of evolving needs and norms).

²⁴⁹ *Compare* *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994) (striking the whole arbitration clause because its unfairness tainted the entire arbitration process), *with* *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485-86 (D.C. Cir. 1997) (reforming AAA arbitration rules applicable under an employment agreement that required the employee to bear arbitrator fees where such expenses were likely to prevent the employee from the opportunity to vindicate her statutory rights).

²⁵⁰ See *supra* notes 51-54 and accompanying text (discussing *Hill*).

consumers could obtain some compensation while possibly forcing Gateway to answer for its warranty violations.²⁵¹

Similarly, the so-called "American rule," requiring parties to bear their own attorney fees and costs, is generally accepted in the United States. However, this rule can have disproportionate impacts in extra communal arbitration contexts, which some courts have acknowledged due to the high up-front costs of arbitration.²⁵² As an initial matter, an outsider to arbitration may accept an arbitration fee-splitting provision without realizing its possible ramifications. The outsider may then be dismayed when arbitration filing and administration costs and arbitrators' fees not applicable in litigation effectively squelch any incentive the potential claimant may have had for asserting claims.²⁵³

Nonetheless, courts should be careful not to assume that fee-splitting provisions will be unreasonably harsh. Courts often fail to fully consider that even apparently high arbitration costs are still less than what one would pay in total fees litigating the claims in court. In *Porpora*, discussed above, for example, the court understandably was concerned with the estimated \$4,000 in fees and costs the homeowner would bear to even attain an initial hearing in the AAA arbitration prescribed in the contract.²⁵⁴ However, the court should have been more careful in assessing the veracity of the homeowner's unsupported statement of financial hardship and the possible application of the AAA rule allowing for deferral or reduction of these fees in the case of hardship.²⁵⁵ Moreover, the court did not consider that litigation of the contract claims would likely cost the homeowners more than arbitration due to increased time and attorneys' expenses. The court assumed procedural and substantive

²⁵¹ See *id.*; see also *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756–58 (Tex. 2001) (denying consumers' claims that an arbitration provision was unconscionable where the financially bereft consumers would have to pay filing fees of at least \$2,000, \$250/day/party hearing fee, and other arbitrator and hearing costs in order to assert claims regarding a loan agreement).

²⁵² See, e.g., *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 254–55, 676 N.Y.S.2d 569, 574–75 (1st Dep't 1998) (enforcing the Gateway arbitration clause but voiding designation of ICC arbitration due to excessive costs).

²⁵³ See *Cole*, 105 F.3d at 1483–85 (reforming fee-splitting procedures due to risk of exorbitant arbitration fees and costs).

²⁵⁴ *Porpora v. Gatliff Building Co.*, 828 N.E.2d 1081, 1085–86 (Ohio Ct. App. 2005).

²⁵⁵ See *id.*

unconscionability without appreciating the contracting culture of the parties involved.²⁵⁶

The substantive fairness of arbitration clause procedures depends on context and the parties involved. Divergent dispute resolution understandings and values in more extra communal cultures may augment power and resource imbalances to allow a form drafter with disproportionate power to slip harsh arbitration provisions into a contract. Additionally, the party without arbitration experience may not realize the significance or impact of the provision. In more intra communal contracting cultures, even if parties have disproportionate resources, the parties often share understandings and interests in private dispute resolution provided for in a form agreement. In addition, such forms may require private processes that benefit intra communal players and foster exchange efficiencies.

CONCLUSION

This is merely the first step in a larger exploration of contracting culture and its role in the creation and enforcement of dispute resolution provisions. It recognizes that concerns with context in enforcing form arbitration provisions are not new, and continually collide with questions regarding practical and efficient application. This Article nonetheless uses the "contracting culture" continuum to revive principles from legal realism and relational contracts that have lost luster in the shadows of law and economics and contract formalism. Real life contracting encompasses not only bargaining factors, but also the parties' shared understandings and values regarding resolution of contract disputes. This goes beyond economic differentials or conceptions of culture focused on race, ethnicity, and nationality, and can be applied in both domestic and international contexts.

Furthermore, the continuum analysis this Article proposes of form arbitration provisions seeks to create structure for acknowledging how parties' relations, understandings, and dispute resolution values converge or compete in a particular exchange. Wealth, race, gender, and ethnicity are important in analyzing the unconscionability of form arbitration provisions, but courts should broaden their assumptions to consider the overall intra or extra communal character of an exchange giving

²⁵⁶ See *id.* at 1086.

rise to a form provision. In intra communal cultures, such as that in commercial construction contexts, form provisions are often beneficial due to parties' relations, understandings, and dispute resolution needs. In extra communal cultures, such as that in consumer contexts, however, competing understandings and values may aggravate bargaining imbalances and foster unfairness of form arbitration provisions.