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ARTICLES

Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration

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Swindlers, purveyors of substandard products or services, and honest traders unable to perform their agreements can access the global market as easily as

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legitimate and capable businesses. The impersonal nature of e-commerce makes it more difficult for traders to discern a merchant or transaction that will not satisfy their expectations.¹

I. INTRODUCTION

This article analyzes procedural due process concerns as an element of arbitration in online dispute resolution ("ODR") in business-to-consumer ("B2C") e-commerce.² B2C e-commerce will be worth an estimated \$250 billion by the end of 2003, but one factor hindering its growth is the lack of effective dispute resolution. For reasons of cost, jurisdiction, and other problems relating to transnational litigation, courts may not be a feasible forum, thus leaving private mechanisms, such as ODR, as the primary source of dispute resolution. Existing incentives may provide for a level playing field for online arbitration in disputes between merchants; however, these incentives may be nonexistent or inadequate with regard to disputes between consumers and merchants.

The nature of e-commerce is conducive to creating a context in which disputes are more likely than in face-to-face transactions.³ These disputes must be resolvable in an economically efficient manner, employing proc-

¹ Alan Wiener, *Regulations and Standards for Online Dispute Resolution: A Primer for Policymakers and Stakeholders*, (Feb. 15, 2001), available at <http://www.alanwiener.mediate.com/alanwiener/>.

² While ODR is a range of dispute resolution processes from arbitration to mediation to chargebacks, see Henry H. Perritt, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 675-77 (2000), online arbitration is of particular concern because it is the only form of ODR that may command the power of the state to enforce a neutral's award. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 247 (1979) (deeming arbitration "effective, in major part anyway only because public courts enforce such contracts"). Unless the context requires otherwise, the article will use the acronym "ODR" to mean binding arbitration of e-commerce disputes that use significant computer-mediated-communication modalities to substantially further the arbitration processes.

³ See Mary Shannon Martin, *Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-To-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125, 128-32 (2002).

E-commerce transactions are unique for a variety of reasons. First, the nature of e-commerce makes it possible for a very small Internet 'start-up' to begin doing business and to reach a worldwide market with very little initial cost. . . . Second, e-commerce is unique because it is an area that is just beginning to be regulated, and the traditional rules of contract, privacy, and intellectual property, including copyright and trademark, are not always applicable to activity within an intangible medium such as the Internet. . . . Third, with little regulation of the electronic commercial medium, the potential for defrauding cross-border consumers is great, thus justifying a substantial governmental interest in protecting the rights of its citizens as consumers. . . . Fourth, governments are interested in promoting e-commerce because of the technological development it spurs, and the substantial business it generates. . . . Fifth, the nature of e-commerce uniquely facilitates the rapid growth of international business transactions, both large and small.

Id.

esses that the participants to the dispute accept as fair. Otherwise, rational participants will demand significant economic or other compensation to arbitrage the perceived risk or refuse to engage in e-commerce transactions.⁴

Some commentators have assumed that the lack of effective B2C dispute resolution modalities is hindering the development of e-commerce.⁵ One criticism of this assumption is the reality that B2C e-commerce is growing at a phenomenal rate, and the systemic reality of the e-commerce market supports this assertion. That the Internet is a "tax free zone"⁶ may contribute to its growth, and this difference accounts for some risks of engaging in e-commerce. American Express®, Visa®, MasterCard®, Discover®, JBC®, and other credit card issuers are arbitraging the risk by being the dispute mechanism of last resort for most B2C e-commerce transactions.⁷ In addition, the fastest area of growth in e-commerce is brick and mortar merchants with strong trademarks who create an equivalent e-commerce site, thus providing e-consumers with the illusion, if the not reality, of a dispute resolution process. Consumers assume that products purchased online may be returned or disputes may be resolved at the merchant's local physical location. Finally, many consumers will use e-commerce websites to obtain information or to compare prices but complete the transaction at a physical merchant, even if that merchant charges a bit more for the transaction. For merchants to invest in e-commerce infrastructure on the speculation that governments will refrain from taxing e-commerce or that credit card issuers will continue to arbitrage risk is an un-

⁴ See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §4-1-§4-13 (4th ed. 1992).

⁵ See Perritt, *supra* note 2, at 675-77; Lucille M. Ponte, *Throwing Bad Money after Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55, 56 n.1 (2001); Public Comments of Paul Skehan to FTC Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions, at <http://www.ftc.gov/bcp/altdisresolution/comments/skehan1.htm> (last visited Feb. 3, 2003) ("a major reason for the lack of [a European e-commerce market is the] lack of trust or confidence on the part of the buyer . . . how can the buyer be confident that—in the event of the service/goods being unsatisfactory—he or she will be able to complain or seek redress?").

⁶ Internet Tax Freedom Act of 1998, Pub. L. No. 105-277, Title XI, § 1101(a), 112 Stat. 2681-719, 719 (1998); Eugene R. Quinn, Jr., *Tax Implications for Electronic Commerce Over the Internet*, 4 J. TECH. L. & POL'Y 1, ¶¶ 52-60 (2000), at <http://journal.law.ufl.edu/~techlaw/4-3/quinn.html> (last visited Feb. 3, 2003).

⁷ Perritt, *supra* note 2, at 694-698 (discussing credit card chargebacks under Regulation Z and the Fair Credit Billing Act as a means of dispute resolution in e-commerce and noting that major charge card issuers voluntarily extend similar protections to consumers in other countries); Victoria C. Crawford, Note, *A Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberspace Jurisdiction Using Business to Consumer Transactions as a Model*, 25 HASTINGS INT'L & COMP. L. REV. 383, 393-96 (2002). American Express®, Visa®, MasterCard®, Discover®, and JBC® are registered marks of their respective trademark or service mark holders.

necessarily dangerous reliance on third-parties to grow e-commerce.⁸

The e-commerce shopping (contracting) experience takes place in the context of the consumer's real world experiences. In the "real world" there are a plethora of consumer protection regulations and judicial processes that protect the consumer from the full market forces of *caveat emptor* in the provisions of goods and services. In addition, these market forces are restrained in terms of standard form contracting possibilities. Mercantile excesses, through standard form contracts that unreasonably shift liability to consumers or impose obligations on consumers, are limited not only by market forces, but also by government action. Through consumer protection legislation and courts, governments are willing to reform consumer contracts to conform to reasonable consumer expectations and minimal guarantees of process. Whether online dispute resolution will provide consumers a similar level of protection is a contentious debate among consumer advocates, industry representatives, and regulatory institutions.⁹

Relying on the dispute resolution mechanisms provided by traditional state-sponsored courts is problematic for numerous reasons. First, there are issues of obtaining personal jurisdiction over the parties. Second, there are significant costs in terms of litigation in a distant forum. Third, there are significant questions of which body of law should govern the dispute and whether a distant court is competent to apply that body of law. Fourth, state sponsored courts, in the real world, act with glacial speed. This is especially true in comparison with the rapid change in technology and e-business practices in cyberspace. In the relatively brief "history" of e-commerce, courts have not responded to the needs of e-commerce in a manner that kept pace with the need for e-commerce to be governed by settled principles of law. Finally, the effect given to a court judgment of one jurisdiction in another jurisdiction is problematic.¹⁰

If state sponsored courts are unable to meet the need for B2C dispute resolution, an alternative is arbitration. Arbitration potentially avoids many of the pitfalls of using state sponsored courts. Potentially, arbitration is fast,

⁸ Council Directive 2002/38/EC (May 7, 2002), available at http://europa.eu.int/rapid/tart/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/02/673|0|AGED&lg=EN&type=PDF (stating that after July 1, 2003, non-E.U. suppliers of electronic services must charge the country specific value added tax [VAT]); see also Nick Wingfield, *Under Pressure From States, More Online Retailers Start Collecting Sales Tax*, WALL ST. J., Feb. 13, 2003, at D1 (noting that Web retailers voluntarily collecting sales taxes in order to forestall mandatory state taxation of e-commerce).

⁹ See generally Public Comments of the Department of Commerce, Federal Trade Commission, Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions (June 6-7, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/index.htm>.

¹⁰ See Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7, 8 (1998).

convenient, inexpensive, and permits the parties to contract around jurisdictional and choice of law questions. Further, there is a well-established treaty regime for the transnational enforcement of arbitral awards.¹¹

These advantages seem to recommend arbitration as the B2C dispute resolution method of choice. However, in the B2C context, the e-business frequently selects the arbitral forum and pays the associated fees creating an appearance, if not the reality, of bias. Since it is black letter law that “[b]y first making the contract then by declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy.”¹² This is especially problematic in the e-commerce marketplace where mass-market standard form contracts contain terms that are unread or misunderstood by the consumer. When a dispute arises, the consumer then must take the contract of adhesion to an adjudicatory body that the e-merchant selected and whose fees and associated costs are paid for by the e-merchant. The actual, or appearance of, systemic bias in this paradigm may create a crisis of consumer confidence in e-commerce.

If e-commerce is to reach its full commercial potential, consumers must have confidence in ODR.¹³ Broadly, policy makers have three options. First, governments may affirmatively regulate ODR by accrediting ODR providers and establishing de jure standards for B2C ODR services. Second, governments may elect a laissez-fair approach and permit e-commerce to create institutions that support a market for dispute resolution services and permit that market to define the standards for consumer dispute

¹¹ See generally Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867 (1996).

¹² *Parsons v. Ambrose*, 48 S.E. 696, 697 (Ga. 1904);

If permitted to remove all its potential disputes from the public arena, the party with irresistible contracting power will thus have deprived the courts of . . . their natural and appropriate function in cases involving adhesion contract disputes: to redress that imbalance of power. . . . However, the arbitration system as it presently exists is . . . unlikely to do so at all, systematically or otherwise. Acting in tandem, stimulus-and-response fashion with democratically elected legislatures, vigilant courts can do much to protect individuals and less powerful enterprises from corporate overreaching, and to alert the legal apparatus to systemic abuses of power. But they cannot exercise that function if access to the courts is denied to those who need it most.

Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 789 (2002).

¹³ Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution*, 70 FORDHAM L. REV. 985, 993-94 (2001); see also Yuko Yasunaga, *Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace* (June 29, 2000), at http://www.ftc.gov/bcp/altdisresolution/comments/post_workshopcomments/yasunaga.htm (Yasunaga observed that “[a]lthough increasing number of population are involved in B2C electronic commerce, both consumer and business still feel uncomfortable[] [over . . . their] lack [of] knowledge about how to access dispute resolution/redress.”).

resolution. Between these two extremes, there is a third option, the hybrid approach recommended in this article. Government should not mandate any new regulations to govern consumer arbitration; it should provide incentives such as safe harbor provisions to encourage the development of processes and procedures that will result in "due process" and "fair play."¹⁴

Affirmative positive government regulations to regulate ODR may not keep pace with changes in e-commerce technology and business models.

"Top-down" regulation suffers from governmental inefficiency; it is costly and time-consuming. In the fast moving technical world of the Internet, an enactment may not be promulgated in time to match technology in use. Statutory prohibitions may fail because they consistently emerge only after the harm has been done. . . . Top-down regulation also prevents persons from individually choosing to allow a "harm" that, in their personal opinion, is "harmless."¹⁵

Further, in order to be effective in a global e-market place, positive government regulation would require trans-border coordination between governments. There are no existing transnational or bilateral institutions to coordinate this form of government regulation. Nor are there any significant efforts to create such institutions. Lacking coordinating institutions and the political will to support them, the top-down approach to regulating ODR is doomed to failure.

Alternatively, a laissez-faire market solution focusing solely on consumer action is even less likely to succeed, because the process is not transparent. Consumers do not have the time or the incentive to investigate ODR options until the post-contract dispute arises. Further, under the repeat player paradigm that would dominate B2C ODR, the relevant consumers from the perspective of the ODR providers would be the merchant and not the consumer. Accordingly, existing direct market-incentives motivate the ODR provider to cooperate with the merchant rather than a consumer. Regulatory models that provide voluntary safe harbor provisions, coupled with explicit incentives to encourage due process and fair play to ameliorate the repeat-player influence, may be the superior regulatory models because these models are flexible and are more likely to keep pace with the evolution of e-commerce.

This article concludes that a hybrid approach to government incentives that encourage the development of consumer institutions to counter the

¹⁴ See generally POSNER, *supra* note 4, § 20.3.

¹⁵ Malla Pollack, *Opt-in Government: Using the Internet to Empower Choice—Privacy Application*, 50 CATH. U. L. REV. 653, 659 (2001); see also United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), Draft Recommendation on Online Alternative Dispute Resolution (ODR), CEFACT/2001/LG14/Rev.8 (June 27, 2002) § 5.3 ("formal accreditation processes will hinder the free and rapid development of . . . dispute resolution processes.").

market advantages enjoyed by repeat players (such as merchants) and to change the judicial standard of review for a consumer arbitration award may result in a more level playing field for the consumer. For example, one recommendation is that in the consumer context courts should not automatically grant the arbitral award a deferential standard of review.¹⁶ Rather, courts should examine the processes and procedures that produced the arbitration award. As the processes and procedures used by the arbitrator move along the continuum from arbitrary to “due process” and “fair play,” the court will give correspondingly greater deference to the arbitral award. Since awards that fall within these safe harbor provisions will be less expensive to reduce to a court judgment, the arbitrator and the parties have a graduated incentive to assure a more level playing field.¹⁷ The appropriate role of government is to create market incentives to assure a level playing field for the consumer and prevent arbitral overreaching in B2C ODR.

II. THE B2C E-COMMERCE PARADIGM

At least initially, e-commerce (online contracting) takes place in the context of the consumer’s real world experiences. Therefore, it is useful to discuss how these experiences coupled with different forms of dispute resolution make e-commerce problematic from the consumer protection perspective. Parallel to the real world commercial practices, consumers will enter into e-commerce relations and arbitration agreements using mass-market consumer contracts. Mass-market consumer contracts, better known as either standard form contracts or contracts of adhesion, have a long history in modern commercial practice and have been the subject of contentious legal scholarship.¹⁸ Mass-market consumer contracts are pervasive in e-commerce. There are two primary models for e-commerce contracting: click-wrap and browse-wrap contracts. Individuals attempting to install software as a precondition of installing the program must click on “I agree” (click-wrap contract)¹⁹ or, while browsing a website, the visitor may see an invitation to click on a hyperlink to “legal information” or “terms of ser-

¹⁶ Cf. *Convention on the Execution of Foreign Arbitral Awards*, League of Nations Doc. C.659(I) M.220(I) 1927 II, reprinted in 3 INTERNATIONAL LEGISLATION: A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INSTRUMENT 2153 (Manley O. Hudson ed., 1931) (shifting burdens to the party seeking to enforce the arbitral award).

¹⁷ See Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT’L L. 647, 649-50 (1999).

¹⁸ Numerous scholars over the past sixty years have expounded on the general debate surrounding standard form contracts. See, e.g. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, n.15 & n.18 (2002); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, n.107 (1995).

¹⁹ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, n.3 (2d Cir. 2002).

vice" (browser-wrap contract).²⁰ Either model potentially binds the consumer to terms that she is unlikely to have read, much less understood.

The mass-market contract is a double-edged sword.

Because businesses can identify the most sensible allocation of contract risks better than courts, judicial failure to enforce standard terms can harm both consumers and businesses in [online] environments. Businesses also use their knowledge and experience in [real world and online] environments to exploit consumers, knowing that consumers reliably, predictably, and completely fail to read terms employed in a standard form contract.²¹

Thus, "[c]ourts reviewing [online contracts must struggle] mightily to balance the importance of enforcing reasonable consumer contract terms against the need to defend consumers against exploitation."²²

Mass-market consumer contracts tend to be drafted beyond the gray edge of what is legally permissible because these consumer contracts often remain either unread when the consumer "consents" or untested in the courts after the dispute arises.²³ Reading and understanding standard form

²⁰ Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000); DeJohn v. The TV Corp. Intern., 245 F. Supp. 2d 913, 918-19 (C.D. Ill. 2003); Net2Phone, Inc. v. Superior Court, 109 Cal. App. 4th 583, 588 (2003) ("no unfairness in Net2Phone's requirement that certain contractual terms must be accessed via hyperlink, a common practice in internet business.").

²¹ Hillman & Rachlinski, *supra* note 18, at 432-33;

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form .

Restatement (Second) of Contracts § 211 cmt b. (1981); Sajida A. Mahdi, Comment, *Gateway to Arbitration: Issues of Contract Formation under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods*, 96 NW. U. L. REV. 403, 403 (2001) ("Standard form contracts are neither good nor bad, and neither just nor unjust, for they are necessary and generally mutually beneficial.") (internal quotations and citation omitted). When a standard form contract or mass-market license merely incorporates social norms and the default rules that most reasonable consumers would have agreed to in an arm's length transaction, then they are beneficial and should be enforced. This article focuses on standard form contracts and mass-market licenses that shift costs and burdens to the unwary and the unknowing without providing any corresponding benefit.

²² Hillman & Rachlinski, *supra* note 18, at 433.

²³ William T. Vukowich, *Lawyers and the Standard Form Contract System: A Model Rule That Should Have Been*, 6 GEO. J. LEGAL ETHICS 799, 827 (1993); see Hillman & Rachlinski, *supra* note 18, at 444 ("Businesses often delegate the job of drafting their terms to lawyers, who believe that they can best serve their clients by composing an arsenal of one-sided terms without regard to the business environment, or for that matter, anything else."); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1172, 1222, 1224 (1984). The counter argument is that businesses interested in their reputation or who are long term players will not supply overly exploitive contract terms because more sophisticated consumers will pressure business to change the more exploitive terms.

contracts is difficult and time consuming. Frequently, terms are presented to the consumer in a manner designed to maximize frustration with reading the contract while encouraging the consumer to click on "I agree" in order to satisfy this frustration. For example, after shopping online and selecting merchandise, filling in the blank order, and entering credit card data, only then are the terms presented. Only after going through innumerable registration and survey screens does a small box of dark gray text on lighter gray background appear and ask the consumer to click "I agree."²⁴ Contractual terms may be intermixed with advertising text on the web in such a manner as to distract from the legally important terms in favor of content that produces additional sales.²⁵ Further, there is an economic incentive on the part of the drafters to include *in terrorem* clauses in the hopes of dissuading consumers from even contemplating litigation or arbitration.²⁶

Analogous commercial practices in the real world have led to a well-developed body of case law analyzing when standard form contracts or individual terms should be enforced and when courts should either decline to enforce or reform the contract to meet consumer expectations.²⁷ Businesses condition consumers that reading standard form contracts is a waste of everyone's time.²⁸ Consumers "sign standard-form contracts without reading them carefully because they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers. Finally, consumers might refrain from reading standard forms if they believe that courts will strike unreasonable terms."²⁹

This leads to a policy where courts will enforce standard form contracts that provide mutually beneficial terms but "police the terms of standard form contracts to protect consumers from exploitation."³⁰ Doctrinally, this is found in the common law unconscionability doctrine, the Restatement (Second) of Contracts § 211(3) (amended 1981) and §2-302 of the Uniform Commercial Code (amended 1989).³¹ The unconscionability doc-

Hillman & Rachlinski, *supra* note 18, at 441-43. In essence, the marketplace will discipline overly exploitive businesses.

²⁴ See Pollstar, 170 F. Supp. 2d at 980-81 ("Notice of the license agreement is provided by small gray text on a gray background.").

²⁵ Web site design itself is instrumental in building trust. See Marie-Christine Roy et al., *The Impact of Interface Quality on Trust in Web Retailers*, at <http://www.cirano.qc.ca/pdf/publication/2001s-32.pdf> (Apr. 2001) (finding "a strong relationship between interface quality and trust.").

²⁶ See Vukowich, *supra* note 23, at 827.

²⁷ See generally Hillman & Rachlinski, *supra* note 18. Further discussion of this body of case law and legal commentary is outside the scope of this article, except as it forms a context in which real world consumer expectations affect their online contracting behavior.

²⁸ *Id.* at 448.

²⁹ *Id.* at 447.

³⁰ *Id.* at 454.

³¹ *Id.* at 459.

trine permits courts to prevent "unfair surprise."³² Section 211(3) provides that if a party has reason to know that a party manifesting assent to a standard form contract would not do so, if she were aware that it contained a particular term, that term is not part of the agreement.³³ Section 2-302 of the Uniform Commercial Code permits a court to reform contracts that are unconscionable.³⁴ The doctrine of reasonable expectations allows a court to blue line out express contract language or refuse to enforce the language if the term frustrates the consumer's reasonable expectations.³⁵ In essence,

³² The unconscionability doctrine has two elements: procedural unconscionability or substantive unconscionability. Procedural unconscionability "result[s] from improprieties in contract formation (such as oral misrepresentations or disparities in bargaining position) rather than from the terms of the contract itself." BLACKS LAW DICTIONARY 1526 (7th ed. 1999). In the e-commerce context, this could occur through misleading text, colors, or graphics designed to lull the consumer into a false sense of security and to distract from the legal import of the contract formation. For example, the contract could be so integrated into the site that the consumer is unaware that she is forming a legal relationship. Substantive unconscionability "result[s] from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances." *Id.* Substantive unconscionability would permit a court to protect a consumer against unfair surprise in the terms of the contract.

³³ RESTATEMENT (SECOND) OF CONTRACTS § 211(3), cmt. f (1981) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."). Further, comment (c) states that there are further restrictions that "standard terms may be superseded by separately negotiated or added terms (§ 203), they are construed against the draftsman (§ 206), and they are subject to the overriding obligation of good faith (§ 205) and to the power of the court to refuse to enforce an unconscionable contract or term (§ 208). Moreover, various contracts and terms are against public policy and unenforceable."

³⁴ 2 U.C.C. § 302 (1989);

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id.

³⁵ See, e.g., *C&J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W. 2d 169 (Iowa 1975) (refusing to apply narrow definition on burglary despite express language where narrow definition would defeat reasonable expectations of a purchaser of burglary insurance);

The reasonable-expectations doctrine, also prominent in insurance form-contract cases, holds that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." As worded, the doctrine allows courts to overturn express contract language if the term contradicts the consumer's reasonable expectations.

When applied, the doctrine of reasonable expectations thus creates an affirmative duty on the part of the business to point out and explain reasonably unexpected terms even if they clearly were stated in the contract. The doctrine reflects the reality that consumers fail to read their contracts and agree to be bound only to reasonable boilerplate.

Hillman & Rachlinski, *supra* note 18, at 458-61.

“the law presumes the general enforceability of standard terms, while negating terms that are procured unfairly, are unreasonable or indecent, or are reasonably unexpected.”³⁶ Within this context of judicial consumer protection, legislative bodies and administrative agencies have interwoven numerous statutes and regulations that provide additional consumer protection.³⁷

Consumers assume that this mantle of consumer protection will shield them in their e-commerce transactions. If consumers have access to courts, then they would be entitled to the level of protection—equitable, statutory, or common law—permitted under the relevant law. This article posits that B2C disputes will not be resolved in court but rather through the private process of arbitration.

In contrast to courts, arbitrators draw their authority and source(s) of law from the contract so they are not necessarily bound to base their decision on a particular domestic law. An arbitral tribunal has no mandate to follow the statutes of various countries, but it does have a mandate to effectuate the intentions of the parties.³⁸

Whether an arbitrator drawing her authority from a contract and being paid by the parties will apply public law principles rather than the private law of the parties is uncertain. It is unclear whether consumer expectations formed in the real world regarding standard form contracts will hold true in e-commerce without some system of government incentives.

III. B2C DISPUTE RESOLUTION

Frequently, commentators offer arbitration as a panacea to B2C dispute resolution.³⁹ Proponents of arbitration contend that it is fast, inexpensive

³⁶ Hillman & Rachlinski, *supra* note 18, at 461.

³⁷ See, e.g., 15 U.S.C. § 45(a)(1) (1982); RESTATEMENT (SECOND) OF TORTS §§ 550-51 (1977); HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW § 128, at 178 (1986) (modern consumer protection statutes now exist in all states); STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 107, at 122, § 32:67, at 335 (1992).

³⁸ Llewellyn Joseph Gibbons, *Rusticum Judicium? Private “Courts” Enforcing Private Law And Public Rights: Regulating Virtual Arbitration In Cyberspace*, 24 OHIO N.U. L. REV. 769, 787-788 (1998) (citing MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 121-24 (1994)) (internal citations and quotation marks omitted).

³⁹ GBDe ADR Working Group, *Recommendations and Guidelines from GBDe 2000 Miami Conference*, ¶ 6 (2000), at <http://consumerconfidence.gbde.org/adrrec.html> (last visited July 30, 2002) (“[A]n important catalyst for consumer confidence in electronic commerce is that Internet merchants offer their customers attractive extra-judicial procedures for settling disputes as an alternative to the cumbersome and expensive resort to courts.”); Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 981-83 (1997).

and promotes privacy, certainty, and predictability.⁴⁰ The arbitral model is simple. The parties freely contract for a resolution of their dispute.⁴¹ In principle, as long as the arbitrator applies the private law selected by the parties to their dispute, they have achieved justice. Historically, the predominant commercial arbitration model focuses on resolving disputes between members of a given industry.⁴² In such cases, all parties are members of the community that established the arbitration process and all are likely to know and accept the norms and customs that govern the industry.

There is no pressing need for legal accountability when the parties share a strong set of acceptable values and seek to use arbitration as a means of preserving and enhancing their relationship.⁴³ Therefore, under most national laws and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), there are limited grounds on which a court may independently review an arbitral award to reach the merits of the underlying dispute.⁴⁴ In con-

⁴⁰ See Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 179-84 (2000) (describing without taking the position of arbitration advocates). Critics question the purported savings because of the informality or efficiency of the proceedings is offset by the fact that state court proceedings are at least in part subsidized by tax payers. See Paul H. Haagen, *New Wineskins for New Wines: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1053 (1998); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 8 (1995). Critics of arbitration note that it is not necessarily more efficient than the judicial system or less expensive. See Kevin C. Kennedy, 31 AM. JUR. POF 3d 496 § 1 (July 2001). Further, ODR is most appropriate when the parties seek to vindicate economic rights or to restore a relationship. Economic rights cases involve an arbitration determining liability and damages. ODR does not function effectively to vindicate legal rights. Cona, *supra* note 38, at 984. Finally, the ability of an arbitrator to award injunctive relief is under the best of circumstances problematic.

⁴¹ Thomas J. Brewer, *The Arbitrability of Antitrust Disputes: Freedom To Contract For An Alternative Forum*, 66 ANTITRUST L.J. 91, 92 (1997).

⁴² Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 950 (2002). The merchant tends to specify that "merchant law" will govern the dispute. The existing default rules in the United States are the Uniform Commercial Code (U.C.C.) and the Convention for the International Sales of Goods (C.I.S.G.) for cross-border transactions. These bodies of law are applied even in transactions not involving goods, for example the licensing of software or other intellectual property. Courts apply these bodies of law by analogy absent a more specific body of law to govern the transaction. Both bodies of law assume contracting between sophisticated merchants who have knowledge that the average consumer does not possess. See Crawford, *supra* note 7 at, 386-87. There is no equivalent domestic or international body of generally accepted "consumer law." *Id.*

⁴³ Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law through Arbitration*, 83 MINN. L. REV. 703, 745-46 (1999).

⁴⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Sept. 30, 1970, 21 U.S.T. 2617, T.I.A.S. No. 6997 (1970) [hereinafter New York Convention]; see *infra* section VII.E.2 (discussing grounds on which to review an arbitral award).

trast, common legal values may not be shared in B2C e-commerce.⁴⁵ This industry-focused model of arbitration does not properly reflect the need in transnational B2C e-commerce, an arbitration model that reflects diverse social and legal cultures, industries, and constituencies. Thus, there may be a greater need for some level of judicial review or state intervention to assure that B2C arbitral awards are fair.

The constraint on the existing commercial arbitration model was that it was between parties who had an ongoing commercial relationship. Implicit in the ongoing relationship was reputation, professional courtesy, and symmetrical knowledge norms that prevented either party or the arbitrator from overreaching. The relative anonymity of e-commerce attenuates the "relationship" and the accompanying reputation or social sanctions necessary to serve as a check on the potential abuses of binding arbitration.⁴⁶ Commercial arbitration was based on freely negotiated contracts between sophisticated merchants and, at the time the parties entered into the agreement, neither party knew if they were more likely to be the complainant or respondent so they negotiated a level playing field.⁴⁷ In industry, the parties contracted *ex ante* for a level playing field or allocated the costs and burdens appropriately to protect their interests.⁴⁸

Commercial and industry models are unlikely to reflect the paradigmatic B2C dispute in e-commerce, disputes between one-time players (consumers) and the repeat players (the merchant, arbitrator, and ODR provider). The e-commerce B2C paradigm is the opposite of the Business-to-Business (B2B) paradigm of disputes between repeat players. In the B2C context, the business selects the ODR provider, and regardless of whether the merchant or the consumer ultimately pays for the ODR ser-

⁴⁵ See Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play And The Quest For Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 1040-1043 (1999) (suggesting that "conflicts involving members of different guilds or cultural groups will arise and that adjudication of such claims will take place in the public courts"); but see Stephen J. Ware, *Arbitration and Assimilation*, 77 WASH. U. L.Q. 1053, 1057-60 (1999) (distinguishing between intra-group arbitration with general arbitration with is more legalistic and administered by neutral organizations having no tie to either party).

⁴⁶ See, e.g., Sirkka L. Jarvenpaa & Emerson H. Tiller, *Customer Trust in Virtual Environments: A Managerial Perspective*, 81 B.U.L. REV. 665, 670 (2001); Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J. L. & PUB. POL'Y 475, 520 (1997); but see Ronald J. Mann, *Information Technology and Non-Legal Sanctions in Financing Transactions*, 54 VAND. L. REV. 1627, 1658 (2001) (stating that it is "quite plausible to me that a professional, Internet-based information merchant would be at least as motivated by pure reputation-based sanctions as a traditional investment bank would be by the combination of legal sanctions and reputation-based sanctions").

⁴⁷ Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 697, 699, 748, 771-72 (2001).

⁴⁸ See JOHN RAWLS, *A THEORY OF JUSTICE* 11-12 (1971).

vices, the ODR provider is dependent solely upon the repeat player (merchant) for future business. In the traditional B2B context, the ODR provider is dependent on both merchants as sources for future business or referrals;⁴⁹ this dependent relationship provided an economic and reputational interest for the ODR provider to assure a level playing field.⁵⁰ Information asymmetry defines online consumer arbitration. Sophisticated merchants contract with consumers, who have little incentive to know or care about dispute resolution modalities before the unlikely event of a dispute arises.⁵¹ In the existing B2C model, there are no inherent reputational, economic or social constraints to prevent the possible abuse of arbitration. Absent such restraints that are catalysts to a fair dispute resolution paradigm, some external review process is required to assure consumers that the process is fair. There may also be a greater need in online consumer arbitration for the government to intervene to protect consumers.⁵²

In the international context, the pressing question is how nation-states may protect the interests of e-consumers without tampering with the elegant simplicity and efficiency of the existing international commercial arbitration model. Prior to the advent of e-commerce, most B2C transactions involved parties in the same legal jurisdiction. Foreign goods were imported through wholesalers and then sold by local merchants. The process had numerous intermediaries who either assist the consumer to resolve the dispute or who serve as proxies for the foreign supplier in litigation. E-commerce is characterized by disintermediation. By removing intermediaries, consumers have access to more goods and services at even lower prices but at the loss of local presence to resolve disputes. The question this article addresses is significant because:

for many classes of persons including ... consumers, a properly constructed arbitration may be distinctly preferable to litigation. It may, in fact, be the only practical option; the critical challenge is to create an environment that ensures

⁴⁹ Menkel-Meadow, *supra* note 42, at 956.

⁵⁰ *Id.*

⁵¹ Ponte, *supra* note 5, at 90-91. As one commentator noted, "Not surprisingly, the power conferred on private parties to use mandatory pre-dispute arbitration clauses to avoid litigation in the courts has been abused. Given the structure of the incentives, it could hardly be otherwise. The cost of imposing these clauses on the uncomprehending, the unaware, and the unwilling are too low, and the incentives to provide for arbitration procedures likely to be adequate to protect the legitimate interests of the aggrieved are too few." Haagen, *supra* note 40, at 1041-42.

⁵² Lack of access to effective dispute resolution modalities also affects participants' attitudes towards the legitimacy of the system, creates attitudes of alienation, encourages illegal activities, and generally results in an attitude of powerlessness. Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 999-1003 (1979). While these non-economic externalities do have economic impact, are significant, and are well worth further study, they are outside the scope of this article.

that the arbitration is both fair and appropriate *and* conducted by arbitrators who are competent, conscientious and impartial.⁵³

The solution is to create a new paradigm that will govern national and international B2C arbitration.

IV. CONSUMER ARBITRATION AGREEMENTS

Pre-dispute arbitration clauses⁵⁴ in consumer contracts⁵⁵ have long been problematic for consumer advocates and legal commentators both of whom object to such clauses because:

First, arbitration is “mandatory”: individuals have no choice but to agree to arbitrate or do without the good or service altogether, and, once they have agreed to arbitrate, they cannot decide to go to court when a dispute arises. Second, arbitration is “unfair”: limited discovery, lack of a jury trial or a right to appeal, repeat-player advantages in selecting arbitrators, no class relief, and excessive fees unfairly disadvantage individuals bringing claims. Finally, arbitration clauses likewise can be “unfair”: clauses drafted by corporations provide for biased tribunals and distant locations for hearings, preclude recovery of attorneys’ fees and punitive damages, shorten time limits for filing claims, and give the corporation, but not the individual, the ability to go to court for some or all claims.⁵⁶

There are already signs of the dangers of unchecked arbitration in the domestic context, including arbitration clauses that through choice of arbitral forum, arbitral institution, cost, or other substantive or procedural rules render the right to arbitration nugatory while denying consumers effective access to the courts.⁵⁷ In e-commerce, consumers experience not only the

⁵³ Haagen, *supra* note 40, at 1043-44 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985)). Online transnational arbitration proceedings may be used to avoid complex and difficult questions regarding jurisdiction, venue, and choice-of-law. Thornburg, *supra* note 40, at 179-84.

⁵⁴ Legal commentators and judges often call or describe a pre-dispute arbitration clause as “mandatory arbitration.” Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069, 1069 (1998).

⁵⁵ This article follows conventional terminology and refers to these contracts as “consumer contracts.” See, e.g., Drahozal, *supra* note 47, at 697 n.10; Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 196 & n.4 (1998) (“‘consumer’ to mean ordinary individuals in whatever capacity: employee, tenant, buyer of goods, etc.”).

⁵⁶ Drahozal, *supra* note 47, at 697.

⁵⁷ See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (ordering consumers to arbitration before the ICC over a \$4,000 dispute); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998) (following the decision of the Hill court in upholding an arbitration clause but ordering the parties to proceed before the AAA); *but see Kloczek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (rejecting Hill), and

conventional domestic dangers of arbitration, but also the added risks of trans-border arbitration. International commercial arbitration law potentially subjects consumers to the unexamined enforcement of inequitable arbitral awards unchecked by any domestic consumer protection regulations.

V. THE EXISTING COMMERCIAL ARBITRAL MODEL

The Internet is especially well suited for a dispute resolution regime based on communication and contract. Arbitration has four essential elements.⁵⁸ First, the parties must voluntarily agree to resolve their dispute via arbitration.⁵⁹ Second, there must be a written agreement.⁶⁰ Third, the dispute must be within the subject matter of the written arbitration agreement.⁶¹ Fourth, the claim cannot be one reserved by law by the public courts of a jurisdiction.⁶² These essential elements of arbitration may be replicated and achieved in e-commerce. Although the second requirement for a written agreement to arbitrate may appear at first blush to be problematic, the contracts of service that make "internectivity" possible between the networks that comprise the Internet may as a last resort provide the "writing." Between the companies that provide the access to the Internet or carry Internet traffic and the sites that aggregate e-merchants or which create e-marketplaces, it is virtually impossible for a consumer or merchant to be in the stream of e-commerce yet outside the stream of contract.⁶³ Theoretically, this seamless web of written contracts may embody the voluntary agreement to arbitrate and serve as the legal predicate for binding ODR.⁶⁴

Commercial disputants generally prefer arbitration to litigation be-

ProCD, Inc., v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)).

⁵⁸ Speidel, *supra* note 54, at 1070.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Initially in its crudest form, ODR will consist of an e-mail exchange of documents and responses to the arbitrator's or opposing party's questions. Based on this evidence, the arbitrator will make the award. Already, this process fails to take complete advantage of the capabilities of computer-mediated communication ("CMC"). Currently, real-time questioning of witnesses is possible using "chat" programs, and inexpensive real-time audio-video teleconferencing is increasingly available.

⁶⁴ E-SIGN, the federal digital signature and contract law provides that

with respect to any transaction in or affecting interstate or foreign commerce—(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

15 U.S.C. § 7001(a) (2000). As a result, there should be no insurmountable evidentiary hurdle to overcome.

cause, by choosing the forum and the law, parties are assured that their dispute will be resolved under mutually acceptable principles.⁶⁵ In arbitration, the parties to the dispute are free to select their own choice of law provisions. Arbitration agreements are generally severable from the contract under dispute and may be subject to a different body of law.⁶⁶ The curial law⁶⁷ governing the arbitral proceedings is in almost all cases the law of the arbitral situs.⁶⁸ The arbitral situs is the jurisdiction where the parties agreed that the arbitration would take place.⁶⁹ This is often a legal fiction because frequently for the convenience of the parties, the actual physical proceedings may take place in a different country.⁷⁰ Curial law governs the selection, appointment, and disqualification of arbitrators, the procedural conduct of the arbitration, the form of the award, the quality and quantity of outside judicial supervision, and potentially which jurisdictions will recognize or enforce the award.⁷¹

The problematic nature of the situs of an arbitral award in ODR is shown by the following example. Suppose one party is in Nigeria, the other is in Singapore, the arbitrator is in the United States, and the ODR provider (arbitral institution) is in London. The dispute arises out of an e-commerce transaction to be licensed and downloaded in Montserrat, West Indies. Neither the parties nor the arbitrator ever meet in person, and the entire arbitration takes place in cyberspace. The answer to the question of situs of the arbitration is not obvious. This may result in an arbitral award that will not

⁶⁵ Haagen, *supra* note 40, at 1052-53; American Society of International Law Proceedings, *Should International Arbitration Awards be Reviewable?*, 94 AM. SOC'Y INT'L L. PROC. 126, 126 (2000) (remarks of Eric A. Posner) [hereinafter Am. Soc. of Int'l L. Proc.].

⁶⁶ UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 16(1) (1985); *Prima Paint Corp. v. Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 5 (1994).

⁶⁷ Curial law may be referred to as *lex arbitri* or *loi de l'arbitrage*, depending on the national legal regime, and generally refers to the body of law that will govern the arbitration proceedings. The curial law is "[t]he law governing the arbitral proceedings is usually the law of the country in which the arbitration hearing is conducted. This law deals with such issues as the appointment and qualifications of arbitrators, the extent of judicial intervention, the procedural conduct of the arbitration, and the form of the award." JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS, § 12.3 (2d ed. 1997).

⁶⁸ BORN, *supra* note 66, at 50.

⁶⁹ *Id.* at 72.

⁷⁰ UNCITRAL, *supra* note 66, at art. 20(1); ISAAC DORE, THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE 20-21 (1993). The effect of the parties selecting a choice of curial law other than the law of the place where the arbitration is taking place is undecided. Okezie Chukwumerije, *Reform and Consolidation of English Arbitration Law*, 8 AM. REV. INT'L ARB. 21, 29-30 (1997). Undecided does not mean unimportant. See Noah Rubins, *The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary, "The Place of Arbitration in International Arbitration—Its Fictitious Nature and Lex Arbitri,"* 1 MEALY'S INT'L ARB. REP. 23 (2001).

⁷¹ Tiffany J. Lanier, *Where on Earth Does Cyber-Arbitration Occur?: International Review of Arbitral Awards Rendered Online*, 7 ILSA J. INT'L & COMP. L. 1, 2 (2000).

be recognized under either municipal law at the named jurisdiction or under the New York Convention when a party seeks extra territorial enforcement of the award.⁷² While the parties to an e-dispute are largely free to craft the procedures governing the arbitration by selecting the situs of the arbitration, the arbitration proceeding must be grounded in some sovereignty if it is to be given effect in the real world.⁷³

The crucial issue is the choice of curial law in e-commerce because the choice of law is not intuitively tied to any one country.⁷⁴ Generally, unless the parties agree, the arbitrator will determine which substantive body of law will govern the dispute. An arbitral tribunal has no mandate to follow the statutes of various countries, but rather its mandate is to effectuate the intentions of the parties.⁷⁵ Further, under recognized arbitral principles of *amiable compositeur* and *ex aequo et bono*, if permitted under the arbitration agreement, arbitrators are free to fashion a "just remedy."⁷⁶ This may include the application of supra-national or a-national normative systems or may involve looking to existing customs of e-commerce. Thus, arbitrators, unlike judges, are free to effectuate the contracting parties' choice of substantive "law," procedure, and forum in adjudicating the dispute to achieve a just result. This broad grant of discretionary authority to use and develop an eclectic body of legal and interpretative principles may be used to create a "common law" of e-commerce roughly along the lines of *lex mercatoria*.⁷⁷ Like the common law, this arbitral body of law may, over time, in-

⁷² See *infra* section VII.D.

⁷³ Lanier, *supra* note 71, at 2, 6.

⁷⁴ Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 237-239 (1986).

⁷⁵ JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 102 (Kenneth R. Simmonds ed., 1978).

⁷⁶ Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 687-88 (1999) ("an arbitrator can decide *ex aequo et bono* (according to equity, justice, and fairness). . . . Therefore, an arbitrator acting as *amiable compositeur* or deciding *ex aequo et bono* may apply the *lex mercatoria*.").

⁷⁷ "Lex mercatoria is a body of "spontaneous" law—law created by standard commercial practices and arbitral decisions." Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, at <http://www.cisg.law.pace.edu/cisg/biblio/audit.html> (last visited July 30, 2002). For a description of the development of *lex mercatoria* and the common law, see Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, SO. ECON. J. 644 (Jan. 1989). Other commentators have addressed how this body of spontaneous law may arise in the context of the Internet. See David R. Johnson & David Post, *Law and Borders--The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Aron Mefford, *Lex Informatica: Foundations of Law on The Internet*, 5 IND. J. GLOBAL LEGAL STUD. 211 (1997); Matthew R. Burnstein, Note, *Conflicts on The Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996).

corporate and develop principles of fairness.⁷⁸

Arbitration may be either ad hoc or institutional.⁷⁹ Ad hoc arbitrations require the parties or the arbitrator to create the procedure and administrative apparatus to effectuate the arbitration.⁸⁰ Frequently, arbitrators conducting an ad hoc arbitral proceeding will adopt the UNCITRAL Arbitration Rules. Institutional arbitration takes place under the auspices of some arbitral institution, such as the International Chamber of Commerce (ICC), American Arbitration Association, or the London Court of International Arbitration.⁸¹ The institution provides the administrative and logistical support to facilitate the arbitration⁸² and must be paid in addition to the fee paid to the arbitrator.⁸³ The institution also provides permissive default rules, which the parties are free to vary by agreement and mandatory rules that the parties may not change.⁸⁴ Many institutions have different rules for different types of disputes.⁸⁵ Since procedural rules may affect the outcome or the enforceability of the award, sophisticated parties are careful in selecting an arbitral institution. Proper selection of an arbitral institution may convey to a party advantages equivalent to those achieved through forum shopping or judge shopping.⁸⁶ The ability to choose the ODR provider may convey an unfair advantage to the e-merchant. Policies that influence institutional ODR providers and grant them incentives to level the procedural playing field are more effective than similar policies that only affect individual arbitrators or individual disputes.⁸⁷

⁷⁸ For example, a just cause termination clause in an employment contract is read by arbitrators to incorporate certain fundamental principles of process developed by arbitral authority over the past 50 years prior to termination. *See, e.g.,* McCartney's Inc., 84 Lab. Arb. Rep. (BNA) 799, 804 (1985); *See* Federated Dept. Stores v. United Food and Commercial Workers Union, Local 1442, 901 F.2d 1494 (9th Cir. 1990) (holding arbitrator did not go beyond essence of collective bargaining agreement in determining due process to be component of issue of good cause for discharge).

⁷⁹ BORN, *supra* note 66, at 9.

⁸⁰ LEW, *supra* 75, at 32-34.

⁸¹ BORN, *supra* note 66, at 9-10.

⁸² *Id.* at 10.

⁸³ *Id.*

⁸⁴ *Id.* at 45-46.

⁸⁵ *Id.* at 14-15 (summarizing the methods used by the American Arbitration Association and the London Court of International Arbitration).

⁸⁶ *See generally* Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48 (1991) (discussing considerations in choosing a place for the arbitration).

⁸⁷ *See* Peter Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991, 1019-1022 (1998) (suggesting that government legal regulation against "mice," small entities that open and close at will in response to regulatory efforts, will be ineffective so the regulatory focus should be on the larger more visible institutions, the "elephants").

VI. MARKET INCENTIVES AND PRIVATE SOLUTIONS

Because judicial review of arbitral awards is extremely limited and deferential, the focus should be on processes that lead to a fair and just award rather than processes that correct error when a party seeks judicial enforcement of an arbitral award. The Federal Arbitration Act, the Uniform Arbitration Act, UNCITRAL Model Law on International Commercial Arbitration, and New York Convention are designed to promote arbitration by encouraging fast and inexpensive judicial orders reducing the arbitral award to a court judgment. One possible way to encourage ODR providers and arbitral tribunals to create processes that support due process and fair play is to establish voluntary guidelines for consumer arbitration. Consumer groups may be encouraged to create more competition in the market for ODR services. Governments may ensure that trustmarks⁸⁸ are symbols of reliability and fairness in ODR.⁸⁹ Finally, as a matter of sound public policy when courts are petitioned to reduce an arbitration award to a court judgment, the resulting judgment should embody an award that comports with due process and fair play. For example, when a party requests a court to enforce an arbitral award, the reviewing court cannot automatically grant a deferential standard of review unless the arbitral process falls within the voluntary safe harbor provisions of the government guidelines.⁹⁰

A. Due Process and Fair Play in an International E-Consumer Context

Articulating a standard for “due process” or “fair play” in a global e-commerce market is at best problematic. “[D]ue process, unlike some legal

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Seals of approval or ‘trustmarks’ are currently a chief mechanism of promoting self-regulation and consumer confidence in electronic commerce. An increasing number of private organizations (Code Owners) are promulgating e-commerce standards and Codes of Conduct and then certifying that online businesses (Code Subscribers) have qualified and/or agreed to abide by the Code. Accredited Subscribers are licensed to display the trustmark on their web site, which is expected to improve consumer confidence.

Alan Wiener, *Regulations and Standards for Online Dispute Resolution: A Summary of Public and Private Initiatives*, at <http://mediate.com/articles/awienner.cfm>.

⁸⁹ Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191, 230 (2002) (“some entity—like a government agency—will need to monitor the provider to see that the alleged standards are acceptable and are being enforced.”); Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 491 (2002).

⁹⁰ Further under new theories of arbitration as state action, there may be a constitutional requirement that courts assure themselves that the procedures used to procure the award meet a minimum level of process. See Richard C. Reuben, *Public Justice: Towards a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 615-629 (1997).

rules, is not a technical conception with a fixed content unrelated to time, place and circumstances[.]"⁹¹ rather, "due process is flexible and calls for such procedural protections as the particular situation demands."⁹² This article will conceptualize criteria for due process in the context of the major e-commerce trading nations, including: Australia, Canada, the member states of the European Union, Japan, and the United States.

The *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* represent a consensus among the major e-commerce global trading nations as to a floor on the rights of e-consumers to alternative dispute resolution.⁹³ Further, G-8 in the Okinawa Charter on Global Information Society endorsed the *OECD Guidelines*.⁹⁴ The *OECD Guidelines* recommend:

[i]n considering whether to modify the existing framework, governments should seek to ensure that the framework provides fairness to consumers and business, facilitates electronic commerce, results in consumers having a level of protection not less than that afforded in other forms of commerce, and provides consumers with meaningful access to fair and timely dispute resolution and redress without undue cost or burden.⁹⁵ [The alternative dispute resolution provider must also] establish fair, effective and transparent internal mechanisms to address and respond to consumer complaints and difficulties in a fair and timely manner...⁹⁶

⁹¹ *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961).

⁹² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁹³ Organization for Economic Co-operation and Development, *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce; Frequently Asked Questions*, at <http://www.oecd.org/pdf/M000014340.pdf> (last visited November 10, 2002) ("OECD is an intergovernmental organization comprised of 29 Member countries, drawn from the world's main developed democracies. The organization provides a forum for governments to discuss economic and social policy in an effort to facilitate economic growth, jobs, trade and development.") (The following 29 countries are members of the OECD: Australia, Austria, Belgium, Canada, Finland, Greece, Ireland, Korea, the Netherlands, Poland, Spain, Turkey, Czech Republic, France, Hungary, Italy, Luxemburg, New Zealand, Portugal, Sweden, the United Kingdom, Iceland, Japan, Mexico, Norway, Slovak Republic, Switzerland, and the United States).

⁹⁴ United States Embassy, *Okinawa Charter on Global Information Society*, at <http://usembassy.state.gov/tokyo/wwwhg063.html> (last visited Nov. 14, 2002) ("Promote consumer trust in the electronic marketplace consistent with OECD guidelines and provide equivalent consumer protection in the online world as in the offline world . . . and explore options to alleviate the difficulties faced by consumers in cross-border disputes, including use of alternative dispute resolution mechanisms . . ."). The G8 is an informal group of eight developed democracies — Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States.

⁹⁵ Organization for Economic Co-operation and Development, *Recommendation Of The OECD Council Concerning Guidelines For Consumer Protection In The Context Of Electronic Commerce*, at <http://www.ftc.gov/opa/1999/9912/oecdguide.htm> (last visited Feb. 5, 2003).

⁹⁶ *Id.*

Consumers are entitled, under this formulation of due process, to an alternative dispute resolution mechanism in e-commerce that provides at least the same protection that the consumer enjoys under the laws of the consumer's domicile. The mechanism must be transparent, fair, efficient, and affordable to the consumer. Although the *OECD Guidelines* do not provide a bright line test against which to measure due process, they do provide factors to determine due process.

Ultimately, the objective measure of due process is whether the consumer receives the process and protection that he or she is entitled to as a resident of a jurisdiction. The proper level is somewhere in between a real world arbitration proceeding that may short circuit consumer rights and a full-blown trial. If in the real world, this dispute would have been disposed of through some summary proceeding, such as small claims court, then small claims court is the level of process the consumer is entitled to in ODR.

While the European Union's *Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes* is neither binding on member states nor does it specifically address e-commerce,⁹⁷ it does provide useful guidance on key principles to govern the resolution of online consumer disputes. The European Union established seven core principles for entities supervising out-of-court settlement.⁹⁸ These principles flesh out the bare recommendations of the OECD.⁹⁹

The first principle is that the decision-maker must be both independent and possess the technical competence to resolve the dispute.¹⁰⁰ The arbitrator should possess the requisite knowledge, experience, and training to properly handle the proceeding, to understand the proceeding, to evaluate the evidence, and to reach a principled decision. The arbitrator should be

⁹⁷ *Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes*, at <http://europa.eu.int/comm/consumers/policy/developments/acce.just/acce.just02.en.html> (last visited Nov. 8, 2002).

⁹⁸ Similarly, in the United States there is the CPR-Georgetown Commission on Ethics and Standards in ADR, *Principles for ADR Provider Organizations* (2002) (describing best practices and baseline procedures for organizations administering ODR programs). CPR-Georgetown Commission on Ethics and Standards in ADR, *Principles for ADR Provider Organizations* (2002), at <http://www.cpradr.org/finalProvider.pdf>. (last visited Feb. 5, 2003). This article focuses on the European Commission's Recommendations in order to place due process concerns and their solution in a transnational context.

⁹⁹ *Commission Recommendation*, *supra* note 97; *Recommendation on the Principles for Out-Of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes*, at http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just12_en.pdf (last visited Nov. 8, 2002).

¹⁰⁰ *Id.*

appointed for a term sufficiently long to permit a fair hearing and should not be removed except for cause or upon agreement of the parties. Finally, the arbitrator should not have a prior relationship with either party that may call her independence into question.

The second principle is that the process be transparent. Information regarding the scope of the arbitration services should be readily available. This would include information regarding procedural, subject matter, amount in controversy or territorial limitations on where the arbitral services may be rendered. Such limitations may also include whether the parties would be permitted to physically appear before the arbitrator, which language(s) would be used in the proceeding, processes governing the submission of evidence, costs of the proceeding, types of rules, principles, or codes of conduct that the arbitrator may apply, and the legal force and effect, if any, of the arbitral award. The ODR provider administering the arbitration should publish at least an annual summary of arbitral decisions. The better practice would be to publish complete awards only redacting information where there is a substantial privacy interest by one of the parties.

The third principle is that all parties be permitted to present their viewpoints and evidence before the decision maker.¹⁰¹

The fourth principle is that:

[T]he effectiveness of the procedure is ensured through measures guaranteeing that the consumer has access to the procedure without being [obligated] to use a legal representative; that the procedure is free of charges or of moderate costs; that only short periods elapse between the referral of a matter and the decision; and that the competent body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.¹⁰²

The fourth principle ensures that consumers or small merchants may participate in the arbitration without undue expense or delay. In many consumer disputes, the costs of arbitration may exceed the value of the dispute. Attorney fees may also make the process unaffordable. Inordinate or unnecessary delays may wear the weaker party down to the point of settling or surrendering either out of frustration or need. The fourth principle permits the role of the neutral to change from the common law referee model to the civil law inquisitional model, depending on the circumstances of the arbitration.

The fifth principle is that:

[t]he decision taken by the body may not result in the consumer being deprived

¹⁰¹ *Id.*

¹⁰² *Id.*

of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident.¹⁰³

The fifth principle insures that consumer expectations, built on real world commercial experience, will carry over into e-commerce. E-merchants should not be able to use either mass market contracts or arbitration to frustrate the consumer protection legislation of the consumer's place of residence nor should they be able to gain an unfair advantage over legitimate brick and mortar businesses by escaping the costs of consumer protection legislation.

The sixth principle is that "[t]he decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this."¹⁰⁴ Under the European Union's principles, pre-dispute binding arbitration is discouraged because it has the effect of denying the consumer her day in court. A fair ODR process should alleviate many of the criticisms of pre-dispute arbitration clauses.

The seventh and final principle is that "[t]he procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure."¹⁰⁵ Depending on the level of the sophistication of the parties, complexity of the issues surrounding the dispute, and the procedural rules of the ODR provider, either the consumer or the merchant may need the assistance of a non-party to properly prepare for the arbitration or to adequately present evidence to the arbitrator. Lay people are often unaware of which "facts" and evidence are legally significant or how to best present their case to the arbitral tribunal.

The European Union's recommendations are an excellent starting point for creating safe harbor provisions for B2C ODR.¹⁰⁶ Due process is a flexi-

¹⁰³ *Id.*

¹⁰⁴ *Commission Recommendation*, *supra* note 97.

¹⁰⁵ *Id.*

¹⁰⁶ These recommendations are in keeping with the general international agreement on due process principles to govern ODR. The Australian Government commented that "As yet there are no agreed international principles governing B2C ADR. . . . [Yet e]xamination of various international standards for business to consumer alternative dispute resolution reveals that there is much in common between the standards and little conflict, notwithstanding the terminology differs." Consumer Affairs Division, The Treasury, *Dispute Resolution in Electronic Commerce* (Oct. 2001), at <http://www.e-commerce.treasury.gov.au/publications/DisputeResolutioninElectronicCommerceDiscussionPaper/dispute.pdf> (last visited Feb. 6, 2003). *Cf.*

ble concept, but there must be an absolute floor for the minimal level of process that each disputant is entitled to receive if the dispute is to receive safe harbor protection. Parties are free to establish higher levels of protection that are commensurate with the needs of higher value disputes or lower levels of protection between knowledgeable and sophisticated parties. Even with due process, at a certain point the law of diminishing returns sets in and additional levels of processes merely become additional levels of sophistry, to ensnare the unwary consumer.

B. Existing Arbitral Incentive

ODR has not yet adopted definitions for due process and fair play,¹⁰⁷ largely because due process and fair play have costs and no corresponding economic reward for the e-merchant or arbitral institution.¹⁰⁸ “It is easy to

The CPR-Georgetown Provider Principles state that provider organizations have responsibilities to: ensure the quality and competence of those ADR neutrals (such as arbitrators) that appear on their lists or are referred to parties for service; provide accurate and complete information about the services provided; take reasonable steps to make services available to low-income parties; disclose all appropriate conflicts of interests; make available a grievance or complaint mechanism about the services offered; require neutrals to adhere to a reputable internal or external ethics code; avoid making false or misleading statements about services provided; take appropriate steps to ensure confidentiality of processes as agreed to by parties or required by contractual provisions or law; and ensure that services that are provided are done so in a “fundamentally fair and impartial manner.” The Provider Principles also recognize that obligations under these principles may vary with the degree of knowledge and sophistication on the part of parties that actively and thoroughly screen and select particular neutrals.

Menkel-Meadow, *supra* note 42, at 966. The principles are very similar to the European Commission’s Recommendations on Out of Court Settlement.

¹⁰⁷ To be a bit more precise, there are existing consumer due process protocols, but they seem honored more in the breach than in their enforcement and are not as pervasive in ODR. For examples of voluntary consumer ADR protocols, see *AAA’s Consumer Due Process Protocol*, at <http://www.adr.org> (last visited Feb. 6, 2003); *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses*, at http://www.jamsadr.com/consumer_arb_std.asp (last visited Feb. 6, 2003). Further, should the ADR provider specified in the arbitration agreement decline to resolve a dispute because the process falls below its consumer due process protocol standard, courts simply order the parties to arbitrate before a provider with different ethical standards rather than finding the agreement to arbitrate to be unconscionable. See *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 232 n. 42 (3d Cir. 1997), *cert. denied*, 522 U.S. 915 (1997). In ordering parties to arbitrate under these circumstances, courts merely facilitate a race to the statutory floor for due process in consumer arbitrations. This purpose of this article is to suggest methods of putting teeth into voluntary compliance regimes.

¹⁰⁸

The strongest case for review of arbitration awards arises when there is a possibility that awards will violate “mandatory rules,” that is, laws that parties are not permitted to contract around. . . . Arbitrators have no incentive to enforce these laws. Indeed, parties will usually want to circumvent them, and arbitrators will enhance their market value by denying application of these laws when the disappointed party tries to enforce them after a dispute arises. The need to maintain these laws against the incentives of parties and arbitrators to violate them provides a strong case for judicial review.

Am. Soc. Of Int’l L. Proc., *supra* note 65, at 126-27.

insist upon 'due process' in consumer arbitration, indeed 'due process' is as widely-cherished as 'mom and apple pie,' but the hard thinking begins when one asks who pays the price of process and how much they pay."¹⁰⁹ Typically, the consumer discovers at the time the e-commerce dispute arises that he or she, as part of a mass-market consumer contract, entered into a pre-dispute agreement to arbitrate any dispute arising from the transaction. The dispute must be resolved under the rules of some arbitral institution selected by the e-merchant. These consumer agreements frequently take the form of "click wrap" contracts or terms buried on the merchant's webpage accessible only through a hyperlink.¹¹⁰ These consumer contracts can best be characterized as contracts of adhesion in which the consumer is "disadvantaged by relative ignorance of the implications of the [arbitration clause], and of the likelihood and nature of a future legal dispute in which the [arbitration clause] would be invoked."¹¹¹

Arbitration clauses are largely irrelevant to the average consumer's life-experience¹¹² and "are in substance, immaterial to the course of the transaction, which would typically center on price. . . . They thus receive little attention from the [consumer]."¹¹³ Even if the consumer is aware of the arbitration clause, he or she is unlikely to possess adequate information to assess the relative costs and benefits of waiving a judicial forum in exchange for a proceeding before an arbitrator.¹¹⁴ Informed consumers are likely to discount arbitration as an improbable event and are, therefore, unlikely to undertake the efforts or costs to research the implications of se-

¹⁰⁹ Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 99-100 (2001).

¹¹⁰ Speidel, *supra* note 54, at 1072.

[T]he owner of a Web site risks alienating virtual visitors if she forces them first to view all of the legal information that a cautious lawyer might recommend. Site designers . . . are also aware that the potential purchaser might not spend the extra time to scroll or 'click' through screens full of disclaimers or other pertinent terms.

Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1283-84 (1997).

¹¹¹ David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 55 (1997).

¹¹² Haagen, *supra* note 40, at 1059-60 ("While people may have strong views about the relative merits of various dispute resolution procedures after they have gone through them, people are likely not to have very good understanding of what these procedures may entail before they have experienced them.").

¹¹³ Schwartz, *supra* note 111, at 56-57; Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903, 1909-1911 (2001); Jeffrey Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer Credit Contracts*, 63 VA. L. REV. 841, 842 (1977).

¹¹⁴ Schwartz, *supra* note 111, at 57.

lecting an arbitral forum.¹¹⁵ Furthermore, the consumer rarely has the opportunity to negotiate terms with the merchant.¹¹⁶ Finally, because these terms are in essence hidden or at least their economic effect underappreciated, merchants are able to offer a better deal on price or visible terms while the consumer unknowingly gambles away choice of forum, cost of forum, and available remedies, in the unlikely event that a dispute eventually arises.¹¹⁷ Therefore, they are unable to give the arbitration clause a market value.

"Market choice activation of the 'invisible hand' requires transparency. Consumers cannot choose *x* unless they can tell when *x* is or is not part of the offer."¹¹⁸ Market failure justifies government intervention. The provision of ODR services represents a market failure because consumers lack sufficient information to properly value the choice of methods of dispute resolution.¹¹⁹ Correspondingly, the issue of whether there is an adequate or even any transfer of "consideration" to compensate the consumer for surrendering a valuable legal right is hotly debated.¹²⁰ There may be countervailing market forces that will protect the e-consumer's interest in a fair arbitration process. Some commentators contend that the reputational sanction serves to adequately address the unfairness in consumer arbitration.¹²¹ Arbitral institutions have strong reputational incentives to respect due process and fair play.¹²² The parties have a strong interest in an enforceable award, and the more tilted the playing field, the less likely the enforcement of the award.¹²³ Theoretically, e-merchants are unlikely to choose ODR providers with poor reputations for fairness because courts are less likely to

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Pollack, *supra* note 15, at 670.

¹¹⁹ See Haagen, *supra* note 40, at 1059-60; ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 48, 235 (2d ed. 1997) (Each decision maker should have "full information about the nature and consequences of his choice.").

¹²⁰ Drahozal, *supra* note 47, at 765-66 nn.441-444; *but see, e.g.*, Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410 (M.D. Ala. 1998) (lowering consumer credit card interest rate from 18.96% to 16.96% if consumer agrees to arbitration); *contra* Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002) (questioning whether there was a quid pro quo for consumers waiving their right to bring a class action suit under an arbitration clause).

¹²¹ Drahozal, *supra* note 47, at 768-71. *But see* Thomas N. Hubbard, *How do Consumers Motivate Experts? Reputational Incentives in an Auto Repair Market*, 45 J. L. & ECON. 437, 437-388 (2002) ("Although there is some sense that reputation is important in expert-service markets, how it works and the key institutions that support it are not well understood."). There is a growing body of research in the area evaluating reputation as a constraint or motivation force in online relationships of reputation studies. The literature should be explored further in the legal context. See Reputations Research Network, at <http://databases.si.umich.edu/reputations/bib/bib.html> (collecting papers).

¹²² *Id.*

¹²³ *Id.*

enforce awards administered by ODR providers with poor reputations and because the merchant may suffer some reputational sanctions in the relevant online business community.¹²⁴

Reputation is most effective in controlling behavior when the parties have repeat dealings with each other.¹²⁵

Reputation is likely to be less effective in one-time consumer transactions, particularly if consumers are isolated and seller can readily discriminate between sophisticated and unsophisticated buyers. It is transactions such as these that have the greatest potential for *abusive use* of arbitration clauses ... and are the ones in which judicial or legislative intervention has the strongest justification.¹²⁶

An anonymous e-consumer with a series of one-time transactions with different e-merchants best describes the e-marketplace. The consumer's relationship both to the merchant who selects the ODR provider and with the ODR provider is that of a one-time player. Reputation is unlikely to be an efficient constraint on the process. Even small merchant-consumers, who may have some relationship with the ODR provider, are unlikely to have an

¹²⁴ Posner, *supra* note 65, at 128 (If arbitrators care about their reputation and routinely ignore mandatory rules they will lose their business.) For a general theoretical discussion of role of reputation see generally Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); Steven Tadelis, *What's in a Name? Reputation as a Tradeable Asset*, 89 AM. ECON. REV. 548 (1999); but see Thomas N. Hubbard, *supra* note 121, at 437-438 ("Theoretical models show that demand-side quality incentives can be weak in expert-service markets. [T]hese models have led academics and policy makers to suspect market failure . . .").

¹²⁵ Drahozal, *supra* note 47, at 768-71. The Internet may be used to mitigate information asymmetry. See Alan Wiener, *Opportunities and Initiatives In Online Dispute Resolution*, at <http://mediate.com/articles/awiener1.cfm> (last visited on Nov. 8, 2002) (discussing programs such as I-level and I-courthouse which permit consumers to publicize their disputes, certification and trustmarks, and of course, the perennially favorite, "your_company_ripped_me_off_and_sucks.com" sites where consumers vent their disagreements). See, e.g., *Lucent Technologies, Inc. v. LucentSucks.com*, 95 F. Supp. 2d 528 (E.D. Va. 2000); Robert A. Badgley, *Internet Domain Names and ICANN Arbitration: The Emerging "Law" of Domain Name Custody Disputes*, 5 TEX. REV. L. & POL. 343, 360-368 (2002). But, as an early study concluded "even the existence of perfect communication among buyers so that all future sales are lost to a cheating firm is not sufficient to assure noncheating behavior." Klein & Leffler, *supra* note 124, at 633 (emphasis added).

¹²⁶ Drahozal, *supra* note 47, at 769 (emphasis added). Internet technology is already used to "discriminate" among consumers. Technologies such as cookies allow merchants to offer different prices to consumers based on pre-determined characteristics. These same technologies may permit merchants to offer different ODR terms to different consumers. Consumers viewed by the merchants as less sophisticated or less able to challenge terms may be subject to more onerous ODR agreements. See, e.g., Andrew G. Celli, Jr. & Kenneth M. Dreifach, *Postcards from the Edge: Surveying the Digital Divide*, 20 CARDOZO ARTS & ENT. L.J. 53, 66-69 & nn.78-90 (2002) (discussing and providing e-commerce examples of e-commerce price-discrimination).

individual relationship with the arbitrator. For example, a major bank may have thousands of delinquent credit card debts that are processed by an ODR provider and then adjudicated by a handful of individual arbitrators. But, a small business may have several arbitrations per year and is unlikely to use the same arbitrator twice. The consumer may only have one arbitration in a lifetime. The largest e-commerce merchants may have sufficient disputes to develop on-going relationships with individual arbitrators. These repeat relationships are the significant relationships for reputational motivation. Because reputational sanctions on merchants or individual arbitrators may be attenuated or non-existent in e-commerce,¹²⁷ consumers may have to rely on the reputation of the arbitral institution to ensure due process and fair play.¹²⁸ However, institutional arbitration is not an unmitigated good; arbitral institutions may aggregate the effects of market forces without the corresponding ameliorative effects of individual responsibility.¹²⁹

There is anecdotal evidence that provider reputation may not adequately protect consumer interests in fair dispute resolution.¹³⁰ There is also empirical evidence in the context of the ICANN's Uniform Domain Name Dispute Policy ("UDRP"). The UDRP is the process under which most Internet domain name disputes are resolved.¹³¹ While the UDRP is distinguishable from the existing B2C dispute resolution paradigm analyzed in this article, the UDRP does have significant similarities with the existing

¹²⁷ See Nader, *supra* note 52, at 1000-01 ("In a modern industrialized society dominated by large corporations and sprawling governmental bureaucracies, public opinion and interpersonal ties can no longer serve as effective mechanisms of social control."); Chrysanthos Dellarocas, *Goodwill Hunting: An Economically Efficient Online Feedback Mechanism for Environments with Variable Product Quality*, at <http://ccs.mit.edu/dell/goodwill%20hunting.pdf> (demonstrating inherent weaknesses in online feedback mechanisms particularly where the "goods" are of variable quality and suggesting an alternative model).

¹²⁸ Drahozal, *supra* note 47, at 769.

¹²⁹ Cf. Hubbard, *supra* note 121, at 464.

¹³⁰ For example, if ADR provider reputation is insufficient to restrain the appearance of arbitral overreaching in the real world, it is unlikely to do so in ODR. See Paul Wenske, *Some Cardholders are Signing Away Their Right to Sue*, THE KANSAS CITY STAR (Apr. 30, 2000), available at <http://www.kcstar.com/projects/carddebt/2side.htm> (for example a credit card issuer won 99.6 percent of the 19,705 consumer disputes that it sent to arbitration over the past two years).

¹³¹ Domain name disputes are frequently between trademark holders and individual registrants of domain names. For example, who has superior right to the domain name McDonald.com, McDonalds the fast food franchise, the Clan McDonald of Scotland, or Jane Doe, the cyber-squatter (cyber-entrepreneur), who registered the domain name first thus staking out her territory? The UDRP is the administrative process that resolves these disputes. See *Uniform Domain Name Dispute Resolution Policy*, at <http://www.icann.org/udrp/udrp-policy-24oct99.htm>; *Rules for Uniform Domain Name Dispute Resolution Policy*, at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>.

B2C dispute paradigm. Under both regimes, one party has the exclusive opportunity to select the ODR provider, thus permitting a party to manipulate the ODR system.¹³² Unlike the existing B2C ODR process, the UDRP process is transparent in that all decisions are published and available on the World Wide Web,¹³³ biographic and other information is available for individual panelists. Additionally, UDRP was the result of an aggressively negotiated, bargained for process at which all the relevant constituencies had the opportunity to participate.¹³⁴ Finally, an award under the UDRP may be challenged *de novo* in a court of competent jurisdiction.¹³⁵ Existing B2C ODR has none of these ameliorative characteristics. Accordingly, existing B2C ODR is likely to be even less consumer friendly than dispute resolution under the UDRP.

As one commentator noted in a comprehensive study of decisions under the UDRP:

Simply put, complainants win more frequently with WIPO and the NAF than with e-Resolution. The statistical data, which has remained consistent since the introduction of the UDRP, shows that complainants win 82.2% of the time with the WIPO, 82.9% of the time with the NAF, but only 63.4% of the time with e-Resolution. Since outcome is what matters most to complainants, they have rewarded WIPO and the NAF with an overwhelming share of the UDRP caseload. Despite the highest fees, neutral rules, and low-key marketing, WIPO commands 58% of the UDRP caseload, compared with 34% for the NAF and a paltry 7% for e-Resolution.¹³⁶

* * *

The data shows that when providers control who decides a case—which they do for all single panel cases—complainants win just over 83 percent of the time. When provider influence over panelists diminishes—which occurs in three-member panel cases since in these cases both the complainant and respondent choose one of the panelists as well as exercise some influence over the choice of the third member of the panel -- the complainant winning per-

¹³² Although it appears there is no empirical research, anecdotal evidence suggests that under the UDRP trademark holders tend to be more sophisticated and have access to superior resources in comparison to domain name registrants.

¹³³ *Search Index of Proceedings Under the Uniform Domain-Name Dispute-Resolution Policy*, at <http://www.icann.org/cgi-bin/udrp/udrp.cgi>.

¹³⁴ *Historical Background on the UDRP*, at <http://www.udrplaw.net/udrphistory.htm> (updated Dec. 27, 2002).

¹³⁵ *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 23 (1st Cir. 2001); *Bord v. Banco de Chile*, 205 F.Supp.2d 521, 523 (E.D. Va. 2002); *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 752 (E.D. Va. 2001); see Stephen J. Ware, *Domain-Name Arbitration in the Arbitration Law Context: Consent to, and Fairness in, the UDRP*, 6 J. SMALL AND EMERG. BUS. L. 129, 161-62 (2002) (“Courts review UDRP arbitration *de novo*. This is the most rigorous, least deferential, standard of review possible. This is in stark contrast to the no-rigor, extremely deferential, standard of review courts give to arbitration under the FAA.”).

¹³⁶ Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, at <http://aix1.uottawa.ca/~geist/geistudrp.pdf>.

centage drops to 60 percent. . . . As of July 7, 2001, an astonishing 53% of all NAF single panel cases—512 of 966—were decided by only six people. The complainant winning percentage in those cases was an astounding 94%. Although respondents failed to respond in some of those cases, the skewed caseload is unique to the NAF with neither WIPO nor e-Resolution presenting a similar caseload imbalance.¹³⁷

Clearly, at least in the UDRP context, the reputation of the ODR provider may not be sufficient to deter either arbitral over-reaching or the perception of a pro-complainant bias in ODR. There are sufficient systemic market similarities between domain name dispute resolution and B2C ODR in other contexts to suggest that the UDRP model predicts the failure of the existing B2C ODR paradigm to provide fair ODR services.

The strongest arguments for a market driven approach assume that reputational sanctions would be sufficient to provide a fair market for ODR services.¹³⁸ Although these market forces may function in theory, considering the extremely deferential standard of review given to arbitral award under existing law, it is unlikely, except in the most blatantly egregious cases, that a court would ever reach the question of bias.¹³⁹ Further, at the margin, the merchant who selects the arbitral institution will not require a guarantee of winning individual disputes, just a small percentage in his or her favor over numerous disputes may be sufficient to justify future business to the arbitral institution and arbitrator.¹⁴⁰ This subtle bias in ODR services may

¹³⁷ *Id.*

¹³⁸ Drahozal, *supra* note 47, at 771-72 (“arbitration institutions have strong incentives to promote the fairness of the arbitral process”); John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2457 (2000) (“Those with reputations for fairly arbitrating disputes between buyers and sellers will see their business grow and their profits increase.”).

¹³⁹ Deseriee A. Kennedy, *Predisposed with Integrity: the Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 766 (1995) (citing *Health Services Mgmt. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992)) (“A relationship between the arbitrator and the party or its representatives is unlikely to be the source of vacation of an award unless the alliance is out of the ordinary course of business and is so ‘intimate—personally, socially, professionally, or financially—as to cast serious doubt’ on the arbitrator’s impartiality.”).

¹⁴⁰ *Cf.*

From the perspective of some parties and arbitrators, this leads to “compromise” awards in which arbitrators are accused of “splitting the baby” to keep both parties reasonably happy (or equally unhappy), and prevents more definitive rulings when those are actually more accurate or “just.” To the extent that arbitrators sufficiently “please” their clients to be chosen again, a different ethical concern arises in the possibility that a “repeat player” effect occurs when one kind of party (such as an employer, major institution, large corporation, or high volume merchant) often uses arbitration (and particular arbitrators) more often than the other side (one-shot litigants, such as consumers, securities purchasers, patients) and knows how to “play” or “work” the system (whether the process itself, or the particular arbitrator).

Carrie Menkel-Meadow, *supra* note 42, at 955; see Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Em-*

only be proven over numerous cases using complex statistical analysis. Most B2C ODR would not justify the expense of conducting a study to determine systemic bias. Even if there was funding to support such a study, most commercial arbitration awards are unpublished, the arbitrator does not provide a reasoned opinion, and there may not be sufficient factual similarities among the cases to permit statistical analysis. Consequently, there may be insufficient data to undertake this sort of study in order to prove or disprove market incentive theories that reputation can provide a level playing field.

C. New Arbitral Incentive

Since current market incentives and existing legal safeguards are inadequate in online consumer arbitration,¹⁴¹ governments should promote an environment that supports consumer confidence in ODR by providing or encouraging market incentives that minimize the intrusion of regulation and respect party autonomy. Formal affirmative governmental regulation of ODR may result in placing conflicting, inconsistent requirements on ODR providers.¹⁴² In addition, governmental regulation tends to lag significantly behind technological change and is unlikely to keep pace with evolving e-commerce technology and business methods.¹⁴³ Consequently, this article proposes a hybrid approach similar to the current United States Federal Trade Commission's approach to e-commerce regulation¹⁴⁴ or the Commonwealth of Australia's best practices model¹⁴⁵ both of which demand leadership from government, recommend that government promote dialogue among the stakeholders, aggressively enforce existing laws and consumer protection regulations, and provide incentives for good consumer practices; all without imposing new legal mandates on arbitral providers.

1. Trustmarks for ODR Providers

Governments or private parties could establish certification that a site

ployers and Employees, 64 UMKC L. REV. 449, 478-79 (1996).

¹⁴¹ COOTER & ULEN, *supra* note 119, at 48 ("severe asymmetries [in information] can disrupt markets so much that a social optimum cannot be achieved by voluntary exchange. When that happens, government intervention in the market can correct for the informational asymmetries and induce more nearly optimal exchange.").

¹⁴² See Swire, *supra* note 87, at 991 ("The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.").

¹⁴³ Pollack, *supra* note 15, at 659.

¹⁴⁴ See *id.* at 656-59.

¹⁴⁵ Wiener, *supra* note 1, at Part I; UN/CEFACT, *supra* note 15, at 12 ("The promotion and implementation of ODR can be done especially in combination with self-regulatory instruments for electronic business such as codes of conduct and trust-mark schemes.")

is “consumer fair” by using “trustmarks.”¹⁴⁶ Potentially, trustmarks would raise consumer awareness on arbitral issues and lower the consumer’s transaction cost to learn the e-merchant’s online dispute resolution policy.¹⁴⁷ E-merchants or ODR providers without a seal of approval would suffer reputational sanctions.¹⁴⁸

The trustmark program is similar to the existing certification mark programs that consumers already rely on¹⁴⁹ [e.g., Good Housekeeping Seal of Approval, Underwriters Laboratory (UL), or the Better Business Bureau (“BBB”)]. To obtain a certification mark, the e-merchant applies to the entity or certifying authority¹⁵⁰ and agrees to comply with the certifying au-

¹⁴⁶ American Bar Association Task Force on E-commerce & Alternative Dispute Resolution Draft Preliminary Report & Concept Paper 5-10 (May 2001), at <http://www.law.washington.edu/ABA-eADR/drafts/docs/2001.05.21draft.doc>. Professor Catherine Kessedjian, Deputy Secretary General of the Hague Conference on Private International Law,

proposed to start with a process of site-certification along the lines of the work done within the [ICC] and other private organizations. This certification process should include minimum substantive rules of protection for the consumer including warranties, and a fair and easy dispute resolution mechanism which could possibly be free of charge to the consumer. When a site has obtained the certification label, it could provide for the application of the law of the country of origin and for the courts of that country for the residual cases which could not be solved by the dispute resolution mechanism part of the certification. If a site has not been certified, then the law and the courts of the consumer’s location would be competent.

Id. See Hague Conference on Private International Law, *Geneva Round Table on Electronic Commerce and Private International Law* (Oct. 25, 2000), at <http://www.hcch.net/e/events/press01e.html> (last visited July 29, 2002).

¹⁴⁷ See Erik Dubrin, *McDonald’s or the Michelin Guide? Revealing Quality Through Private Sector Certification*, Econometric Society World Congress 2000 Contributed Papers, at <http://fmwww.bc.edu/RePEc/es2000/1097.pdf> (discussing and modeling the role of certification intermediaries).

¹⁴⁸ Ponte, *supra* note 5, at 87-88 (“ODR trustmark programs could provide consumers with a level of confidence about their ODR provider regarding basic standards of quality and fairness. Providers failing to live up to these standards would lose their trustmark certification, a clear signal to online consumers about the quality and reputation of an ODR provider.”); see generally A. Michael Froomkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49 (1999) (establishing the basic paradigm for third-party facilitation in e-commerce).

¹⁴⁹ Some of the better known online trustmarks are BBBOnline, BetterWeb, Casetrust, CommerceTrust, Clicksure, IMRG Hallmark, JADMA seal, Labelsite, Ladybird, PublicEye, Safemall, TrustUK, and SquareTrade. See *Caslon Analytics Profile: Trustmarks*, at <http://www.caslon.com.au/trustmarksprofile.htm> (last visited Feb. 6, 2003). Two of these trustmarks are of particular interest. *SquareTrade* is the trustmark of an ODR provider. See *SquareTrade*, at <http://www.squaretrade.com> (last visited Feb. 6, 2003). *Trustuk* is endorsed by the government of the United Kingdom. See *TrustUK*, at <http://www.trustuk.org.uk/default.asp?option=7> (last visited Feb. 6, 2003).

¹⁵⁰ See The GBDe Trustmarks Working, Recommendations and Guidelines Presented by the Working Group at the GBDe 2000 Miami Conference, at http://consumerconfidence.gbde.org/trust_rec.html (last visited Feb. 6, 2003) (for an excellent overview and analysis of trustmarks).

thority's code of conduct. The e-merchant then displays the trustmark on its Web page so the consumer knows that the e-merchant complies with some behavioral standard or code of conduct. The customer may click on the trustmark symbol to go to the certifying authority's website to learn more about the e-merchant or code of conduct. If the e-merchant fails to comply with the code of conduct, then the consumer may complain to the certifying authority. Additionally, the certifying authority will have a clearly defined procedure in place to handle disputes between the consumer and the e-merchant. E-merchants who do not cooperate with the certifying authority to resolve consumer disputes or who fail to comply with the certifying authority's code of conduct may have their right to use the trustmark revoked and thereby suffer reputational sanctions.

To further ensure compliance standards, the certifying authority may monitor the e-merchant for current and continual compliance with its code of conduct. Therefore, the first line of defense in this process is the certifying authority's use of the trustmark. In order to maintain the reputation of the trustmark and in order to maintain the legal authority to issue a trustmark, the certifying authority must enforce the rules under which the trustmark was issued to the e-merchant. This provides governments and their courts a "stick" to back up the "carrot" of self-regulation for existing consumer protection legislation, which can then be used to assure that e-merchants and ODR providers comply with the terms of the certifying authority, posted policies, and regulations.¹⁵¹ While this posits a voluntary regulatory regime, once an e-merchant or the ODR provider adopts these policies, failure to comply with them is either a breach of contract or an unfair and deceptive trade practice.¹⁵² Either ground may permit government intervention. Finally, industry and ODR providers should want to demonstrate that self-regulation, voluntary regulation, or government leadership is insufficient to provide effective, inexpensive, and fair ODR because the alternative will be affirmative government regulation.

Unfortunately, private trustmarks have not lived up to their potential. Very few entities are members of trustmark regimes. Those entities that are members often do not post the trustmark or post it in an inconspicuous place on the website. The seal of the certifying trustmark authority lacks

¹⁵¹ *In the Matter of Geocities*, File No. 9823015, at <http://www.ftc.gov/os/1998/9808/geo-ord.htm>; see Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2058 (2000) ("By encouraging websites to provide privacy policies in the first place, the FTC has created a situation in which it is now able to extend its enforcement jurisdiction onto the Internet.").

¹⁵² United States Department of Commerce, *Safe Harbor Overview*, at http://www.export.gov/safeharbor/sh_overview.html ("Private sector self regulation and enforcement will be backed up as needed by government enforcement of the federal and state unfair and deceptive statutes.").

reputational power.¹⁵³ The remedies for violating the membership terms are inadequate. Finally, the general requirements of most certifying authorities to obtain a trustmark are well below reasonable consumer expectations for ethical business practices. Nonetheless, the aggressive use of governmental or quasi-governmental authority to establish trustmark providers may minimize or solve much of the existing problems.

2. Consumer ODR Providers

Consumer organizations and non-profit business organizations may serve as trusted intermediaries to resolve consumer disputes. One of the pioneering providers of ADR services for consumer disputes is the Better Business Bureau. The not-for-profit nature of the ODR provider would minimize the economic incentives that may create a systemic bias in the ordering of the arbitral process.¹⁵⁴ Further, as a not for profit, the ODR provider could service the B2C market at a reduced rate and perhaps with volunteer arbitrators to minimize the costs of arbitrating low dollar value disputes. Volunteer arbitrators would have no incentive to call close cases in favor of the repeat player in the hope of further business or further informal social relations. While in theory this process has much to commend it, as a practical matter, as long as the merchant chooses the ODR provider, there would still be incentives to the non-profit to encourage merchants to use their services or the ODR provider would become obsolete through non-use assuming that the e-merchant continues to select the ODR provider in consumer disputes.

3. Increased Judicial Review of Arbitral Awards

E-merchants add arbitration clauses to consumer contracts because they perceive that arbitration is economically advantageous. Without negating the e-merchant's economic incentive to use ODR, there is a contin-

¹⁵³ Pollack, *supra* note 15, at 690, 692-94. The concept of a trustmark is that consumers will trust the seal organization even if they do not know the member company. Even the best-known privacy trustmarks lack consumer confidence. *See id.* It is not clear that even with substantial private investment to raise consumer awareness that this will change in the context of ODR. It is unlikely that the reputational issue will change dramatically when well-known brick and mortar providers such as the American Arbitration Association and the Better Business Bureau move into ODR. *See id.* (discussing BBBOnline in the privacy context).

¹⁵⁴ Avner Ben-Ner, *Who Benefits From The Nonprofit Sector? Reforming Law and Public Policy Towards Nonprofit Organizations*, 104 YALE L.J. 731 (1994) (suggesting the demand-side (consumer) interests in the control of not-for-profits may be inadequate to assure adequate delivery of not for profit services). For example, not-for-profit ADR providers may merely reallocate "profits" from stakeholders to its employees or other institutional commitments and programs or consumer interests may play a second fiddle to the interests of institutions and foundations providing funding to subsidize inexpensive consumer ODR.

uum of changes that would improve the existent ODR paradigm, some of which may add "costs." E-merchants should be willing to bear these costs as long as the costs associated with arbitration remain less than those associated with pursuing traditional litigation. This optimal point where the cost of consumer due process equals or is less than the marginal cost of litigation depends on the industry, type of good or service and its price, location of the parties, and many other factors.¹⁵⁵

For an incentive model that focuses on arbitration to work, after adding the costs associated with due process, arbitration must remain more affordable than litigation.¹⁵⁶ From the e-merchant's perspective, arbitration offers many cost reducing advantages. Arbitration may reduce the risk of unpredictable jury verdicts, including verdicts with inordinate punitive damage awards.¹⁵⁷ Expert arbitrators may be better able than the courts to detect substandard performance of contractual obligations, including those imposed by trade customs.¹⁵⁸ Arbitrators may apply better rules than the default rules that a court must apply to the dispute.¹⁵⁹ Parties may construct an arbitral regime to encourage them to arbitrate the economically optimal quantity and types of disputes.¹⁶⁰ With these advantages, it is unlikely the e-merchants will reject arbitration even if the arbitration award may be subject to the costs of some heightened standard of judicial review on the rare circumstance that a party elects to challenge the arbitration award.¹⁶¹

¹⁵⁵ Courts always recognize that, outside of a few *de minimis* generalized requirements, one must define due process in a specific context and at a specific cost. Government regulations are unlikely to be subtle enough to find the optimum regulatory point to protect consumers and e-merchants across industries, technologies, and types of good or services without imposing unnecessary economically inefficient burdens or adding unnecessary additional uncertainty to the arbitration process. *See Hannah v. Larche*, 363 U.S. 420, 442 (1960) ("Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.").

¹⁵⁶ Shavell, *supra* note 40, at 6, n.8. Clearly, if state sponsored dispute resolution is cheaper than private dispute resolution, all things being equal, participants will prefer state sponsored dispute resolution. One thing that may not be equal is that some parties may be willing to pay a significant premium for speed and privacy in the adjudication process or neutral expertise in the subject matter of the dispute.

¹⁵⁷ *Id.* at 5.

¹⁵⁸ *Id.* at 6.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* For example, parties could contract for a strict liability standard if one party could cure defects at a nominal cost or contract for a negligence standard if defects may be cured only at an inordinate cost.

¹⁶¹ For example, despite that fact the decisions under the UDRP are freely reviewable in state sponsored courts and often involve valuable intellectual property rights, only 25 of the cases out of over the 3,000 that have been decided have been challenged in courts. *See Elizabeth G. Thornburg, Fast, Cheap, and Out of Control*, 6 J. SMALL & EMERGING BUS. L. 191, 224 & n.137 (2002); *cf. Carrie Menkel-Meadow, Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RES. 19, 61 & n.178 (1999) ("parties may be content with an ability to be heard by a third person neutral if

The best model would be that in which only arbitral awards that could not be enforced under existing law would receive no judicial deference. Awards that are otherwise enforceable would be subject to varying degrees of judicial deference and review.¹⁶² If the model for non-binding arbitration provides adequate incentives for the parties to arbitrate, then the even more judicially deferential sliding scale of review recommended in this article is also feasible.¹⁶³ The feasibility of this model will depend on how well arbitration predicts the outcome of a party's attempt to challenge the award.¹⁶⁴ Non-binding arbitration has three possible predictive values—it can perfectly predict the trial outcome, imperfectly predict the trial outcome, or have no predictive value.¹⁶⁵ If non-binding arbitration perfectly predicts the trial outcome, the parties will voluntarily arbitrate and accept the arbitration award as a cost effective alternative to trial.¹⁶⁶ If non-binding arbitration is an imperfect predictor of the trial outcome, the parties may choose to arbi-

if they are convinced that the process is otherwise fair”).

¹⁶² This idea is not entirely novel. Professor Posner suggested that “[t]he normative argument is that courts should enforce mandatory rules randomly” and randomly review arbitration awards to assure that the award complies with the mandatory law of the jurisdiction. See Am. Socy’ Int’l L. Proc, *supra* note 65, at 126-29. Of course, only reviewing awards where at least one party is dissatisfied is a more efficient use of scarce judicial resources. Absent collusion, parties are in the best positions to detect arbitral error.

¹⁶³ See *infra* section VII.B for a discussion of the UDRP, an example of an existing real-world non-binding ADR model that functions without the sanction of judicial enforcement.

¹⁶⁴ A number of the articles that try to model parties’ use of ADR/litigation rely on certain assumptions that are problematic at best. For example, one writer posits that there are three possible approaches in the decision to pursue ADR: 1) where ADR perfectly predicts trial outcomes; 2) where ADR has no predictive value; and, 3) where ADR is an imperfect predictor of trial outcomes. Shavell, *supra* note 40, at 13-19. Clearly, the first two options have very little value in examining parties’ decisions to pursue litigation after an arbitral decision. Absolute certainty exists only as an abstraction, and as a matter of legal strategy, provides no additional information; it is a simple binary approach without any uncertainty. In contrast, the third possibility, that arbitral decisions provide imperfect information about the outcome of future trials, reflects the uncertainty faced by all possible litigants. It is here that further study should be focused. But some of the premises found in current research should be revisited. For example, pareto optimality hardly seems appropriate when the actions of two legal opponents are under consideration. Next, the amount that would be won at trial will vary according to the parties’ different processes, imperfect information, and experience. And, litigation can never be seen as costless. All of these factors must be included in any model that attempts to predict where a party elects to pursue litigation following an “unsuccessful” outcome in ADR. Clearly, if a plaintiff or defendant loses at ADR and thinks that this outcome was outside their respective probability, the questions should be: how good was their assessment of their p -hat; were the p -hats reasonably close; and, is the payout so large that they are willing to risk additional costs for an uncertain outcome. All of this can best be modeled using conditional probability. Some of these components may be available from the databases that track ADR. Future research should consider the information collected by these databases in examining the likelihood of further litigation following ADR. *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 17-18.

trate because it may produce information that leads to settlement based on the arbitral process or arbitrator's decision.¹⁶⁷ The third possibility is that the arbitration will provide no information that leads to a settlement and does not predict trial outcomes. If the non-binding arbitration provides no information useful in predicting success at trial or in other ways placing a settlement value, then the arbitration will merely absorb resources and the parties will not arbitrate.¹⁶⁸ Because under the recommended model, courts will give at least some deference to arbitral awards other than currently unenforceable ones, arbitration would be at a minimum an imperfect predictor of outcome at trial. Considering that most arbitral awards will not be challenged in courts and those awards that fall within the safe harbor provisions will receive various levels of deference, in the vast majority of challenges, the arbitral award would be a perfect predictor of trial outcome.¹⁶⁹

One can independently justify judicial review of arbitral awards as an appellate correction measure.¹⁷⁰ State sponsored court review harmonizing conflicting arbitral awards provides incentives for arbitrators to do their best and legitimize the arbitral process because the award may be reviewed by an additional, ostensibly neutral body.¹⁷¹ Further, arbitrators in the e-commerce context may frequently be applying laws that no state-sponsored court has yet had the opportunity to interpret. Judicial review then serves an additional error correction function and a public law making function; functions that may not otherwise take place if these disputes remain in the private realm.¹⁷² This is in contrast to brick and mortar commerce where

¹⁶⁷ *Id.* at 19; Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*, 53 U. CHI. L. REV. 366, 372-74 (1986) (discussing summary jury trials as providing information useful to predict trial outcome and settlement).

¹⁶⁸ Shavell, *supra* note 40, at 18.

¹⁶⁹ See generally Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) [hereinafter Shavell II]. Because arbitration is a form of voluntary settlement, then the settlement literature may be instructive. In one study of judicially reviewed settlements, the court approved 67% of the bankruptcy settlements, 84% of the class action settlements, and 83% of the antitrust settlements. Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 72 (1999).

¹⁷⁰ See generally Shavell II, *supra* note 169. The settlement literature also suggests that judicial review of arbitral awards is justified because "[t]he costs of a prolonged trial are avoided by holding a less costly fairness hearing on the proposed settlement [arbitration award], and the court's review assures that inadequately represented parties will not be injured" Weisburst, *supra* note 169, at 59.

¹⁷¹ Shavell II, *supra* note 169, at 425-26; cf. Weisburst, *supra* note 169, at 66 ("The primary benefit of judicial review of settlements is that it protects inadequately represented interests at the settlement negotiation stage, where those interests are especially vulnerable.").

¹⁷² Cf. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL. F. 19, 26-27 (1987) (commenting that "precedents exist principally to help people conform their conduct to law" and that settlement (in our case arbitration) may result in the creation of "too few precedents").

arbitrators frequently follow well-trodden legal paths and apply known legal principles to novel facts. In cyberspace, both the law and the facts may be novel, and there is a need to create a common law based on both judicial decisions and arbitral awards.

The current regulatory model for e-commerce is for governments to provide leadership to encourage industry and consumer interest groups to create voluntary e-commerce standards. Once industry voluntarily adopts these standards, governments can then enforce the standards through “unfair and deceptive” trade practice laws that ensure compliance with the voluntary standards.¹⁷³ Governments can also act through moral persuasion, with the ever-present threat of positive government regulation. The solution proposed in this article, in keeping with existing regulatory practice in e-commerce, is that governments should encourage arbitral institutions to adopt policies similar to the *OECD Guidelines* or the *European Union’s Recommendations on Out of Court Settlement of Consumer Disputes*. If these provisions become standard in the arbitral industry, then arbitral institutions would no longer have an economic incentive for a race to the ethical bottom in search of clients. In addition, if these terms become standard, e-businesses would have an independent incentive to adopt them.

The ultimate sanction that a government may apply is the repudiation of the arbitration as a legitimate process to resolve consumer disputes. In the special case of consumer arbitration, governments could impose impediments and procedural requirements that are absent in commercial B2C arbitration. Governments could elect to shift the burden of proof from the consumer to the e-merchant. The party seeking to enforce the award could be required to make some showing that the process leading to the award comports with due process and fair play. If the arbitrator and ODR provider follows the *OECD Guidelines*, this will be a minimal burden. Already, many arbitral institutions have rules governing commercial arbitration that either comply or substantially comply with the OECD requirements.

Alternatively, courts could apply shifting standards of review depending on the level of process that was applied during the arbitration. Under the New York Convention, the total denial of due process renders the arbitration award potentially unenforceable.¹⁷⁴ This is the existing floor for due

¹⁷³ Llewellyn Joseph Gibbons, *Resolving E-Commerce Disputes, B2B, and B2C: An Introduction to Some Online Dispute Resolution Modalities*, ADR & THE LAW 348 (18th ed. 2002).

¹⁷⁴ Whether the parties may contract for judicial review under the New York Convention is unclear. For example, there is a split in the circuits interpreting the Federal Arbitration Act and whether it permits the parties to contract for judicial review in excess of that provided for in the FAA. *Compare* *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *and* *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th

process. I propose that the floor be raised in steps.

Consumer expectations are defined by their culture and real world experiences, and consumers expect and demand a higher level of process than is currently provided by ODR. ODR should meet these expectations. Therefore, when a party seeks to enforce the award, government should endeavor to ensure that consumer expectations as to process and protection are met. Consumers will expect to receive at least the same level of protection in ODR as they would receive in a dispute resolved using traditional non-cyber means of dispute resolution. This would not require the parties to relitigate the underlying dispute before the court, but rather the court would examine the process leading to the award and determine whether the award comports with the laws and public policy of the enforcing jurisdiction. Depending where the arbitration falls on the due process continuum from arbitrary and capricious to due process and fair play, the court may reform the award, remand with instructions for further proceedings, or vacate the award and order the dispute to trial in a state sponsored court.

D. Judicial Review or Judicial Deference of Arbitral Awards

If the *OECD Guidelines* state aspirational policies that may be hard to identify and quantify in practice, the *European Union's Principles* are sufficiently definite that one can use them to measure the due process of an ODR provider. Arbitral awards that fall within the "safe harbor" provisions of the *Principles* established by the European Union should be presumptively enforceable in a court, and those B2C arbitral awards that do not comply with the *OECD Guidelines* should be presumptively unenforceable in court absent an affirmative finding by the court that the parties received "due process"; and, those awards rendered with some process between these two benchmarks will receive varying degrees of judicial scrutiny. Finally, courts should not enforce those consumer arbitration awards that do not comport with section V of the New York Convention under any circumstances.¹⁷⁵

Cir. 1995) with *Chi. Typographical Union v. Chi. Sun- Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991); compare *Syncor Int'l Corp. v. McLeland*, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished opinion) with *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001); *UHC Mgmt. Co., Inc. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998); *Crowell v. Downey Cmty. Hosp. Found.*, 95 Cal. App. 4th 730 (2002); see Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 108-10 (1997).

¹⁷⁵ Section IV is permissive. It provides that a court may elect *not* to enforce an award that does not comport with the New York Convention, but a court may elect to enforce the award. In B2C international commercial arbitration, the New York Convention should be the floor.

1. *Selecting the Standard of Review*

"A standard of review is 'a limiting mechanism which defines an appellate court's scope of review.'"¹⁷⁶ A differential standard of review would require a careful balance between encouraging parties to raise significant bona fide issues on appeal and discouraging them from unnecessarily or frivolously relitigating the merits of the underlying dispute. As the process and procedures used by the arbitrator and the ODR provider move along the continuum from arbitrary to "due process" and "fair play," the court would give correspondingly greater deference to the arbitral award. Since awards that fall within these voluntary safe harbor provisions would be less expensive to reduce to a court judgment, the arbitrator, arbitral institution, and the parties have an incentive to assure a more level playing field.

The rationale behind all appellate review may be fairly characterized in two extremes: an appellate court will defer in large part to a trial court's determination where the lower court is in a better position to make that determination than is the appellate court; conversely, little or no deference is accorded where the appellate court is as capable of determining the question as is the trial court.¹⁷⁷ The standard of review should promote both judicial and arbitral efficiency while protecting consumer interests in a fair process.¹⁷⁸ Courts should examine the process and procedures used to produce the award.

The reviewing court will often be in the same position as the arbitrator in making factual determinations; therefore, the standard of review should be sufficient to ensure arbitral compliance with due process and fair play considerations and achieve error correction without unduly encouraging unnecessary or frivolous appeals.¹⁷⁹ This requires a normative determination of which sorts of errors society is prepared to tolerate. If errors of law

¹⁷⁶ Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991) (quoting Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L. J. 377, 379 (1984)).

¹⁷⁷ *Id.* at 239 (quoting *State v. Pepin*, 328 N.W.2d 898, 900 (Wis. Ct. App. 1982)).

¹⁷⁸ B2C disputes potentially implicate two sets of interests. These interests are independent from the perspective of the disputants but are independent from the perspective of the sovereign. Frequently, there is a private dispute. For example, a breach of contract may raise issues of consumer protection laws. The parties wish to resolve the dispute, and the state has an interest in having effective and adequate enforcement of consumer protection legislation by having the consumer litigate these issues as a private attorney general. Even if the proper resolution of a private law dispute does not normally implicate state interests (a contention that I disagree with), the state's interest in having its public law enforced is a sufficient interest and public policy concern to justify intervention in what is usually a purely private dispute resolution mechanism.

¹⁷⁹ See Andrew F. Daughety & Jennifer F. Reinganum, *Appealing Judgments*, JOE C. DAVIS WORKING PAPER No. 99-3, at 44 (Mar. 1999), available at <http://papers.ssrn.com/sol3/delivery.cfm/98090711.pdf?abstractid=124368> (analyzing the effect of evidentiary standards on a party's propensity to bring an appeal).

are the greater threat to the development of consumer confidence, then there should be a heightened standard of review for the arbitrator's application of law to the facts. Correspondingly, if errors of fact are more significant to the development of consumer confidence in e-commerce, then those questions may receive heightened scrutiny.

Alternatively, the claims of error will receive the same level of review and permit the costs of the judicial review to deter frivolous review. Finally, there is the option of permitting a "free appeal" to a trial court, but appeals from that judgment would be only by permission of the court. There is a third type of error: those made by the reviewing court. This article begs the question of whether subsequent appeals are appropriate once the award enters the public courts, but it does suggest that because the public law-making function is significant, subsequent appellate review of trial court judgments on arbitral awards is justified, and the normal "costs" of judicial proceedings should deter frivolous appeals of orders confirming or vacating arbitral awards.

2. *Cold Appellate Record in ODR*

The function of the "record" in ODR, as opposed to ADR or trial courts, is different; this difference may affect the role of the reviewing court. Frequently, appellate courts are loath to review the fact finding of a lower court because the appellate record is arguably incomplete. The appellate record lacks the "nuances, and attitudes that influence a trial judge. .

"¹⁸⁰ As the United States Supreme Court has remarked:

'[i]t is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified and was cross-examined . . . , is the sole judge of the credibility of a witness and of the weight to be given his testimony.' No such determination of credibility is possible when the witness comes before the trial factfinder by the reading of a cold transcript.¹⁸¹

This is because both personal experience and empirical research

¹⁸⁰ United States v. Taylor, 487 U.S. 326, 342-43 (1988); Cannon v. Cannon, 80 F. Supp. 79, 80 (D.C. 1936) ("Experience has demonstrated that one of the surest ways to determine the credibility of any witness is to observe the manner and demeanor of that witness on the stand."); EDWARD J. DEVITT ET AL., FED. JURY PRAC. & INSTR. § 73.01 (1987); Rebecca White Berch, *A Proposal to Amend Rule 30(b) of The Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 FORDHAM L. REV. 347, 349 (1990) ("definition of speech includes not only the speaker's lexical and syntactic choices—items that can be stenographically transcribed—but also the paralinguistic features—items that cannot be captured by stenographic transcription.").

¹⁸¹ California v. Green, 399 U.S. 149, 198 (1970) (citation omitted).

teaches that “[w]hen [a] listener perceives a conflict between the speaker's statement and the accompanying meta-communication cues, the listener usually disbelieves the statement, since ‘we trust actions more than ... words.’”¹⁸² This deference to meta-communications that do not appear in the record results in a rule that, generally, “[t]he reviewing court may consider only those few matters bearing on credibility that can be fully determined from a cold appellate record.”¹⁸³

ODR takes place using computer-mediated communications, which are easy and inexpensive to preserve for further proceedings. Outside of cyberspace, there are significant costs to record ephemeral oral testimony and a significant portion of the communicative context may not appear in the transcript.¹⁸⁴ In contrast to ADR or traditional trial practice, the arbitrator or the parties may save the entire record and transmit it for subsequent proceedings.¹⁸⁵ In ODR, the appellate record is identical to the evidence adduced before the arbitral tribunal.¹⁸⁶ The initial fact finder has no greater access to meta-communication cues than does any other viewer or reader of the record. Accordingly, there must be another basis to restrain appellate courts from interfering with the fact-finding of the arbitrator independent of whether the fact finder is in the best position to evaluate the evidence. Since the fact finder and appellate reviewer are equally competent to make findings of fact, limited appellate review must be justified on the principle of judicial efficiency. *De novo* consideration of the record is likely to result in unnecessary appeals. The reviewing court must establish standards of review that protect the error detecting, correcting, and law making function of the reviewing court. The level of review must be consistent with appropriate appellate function, from correcting errors of law or fact to developing or clarifying the law.

3. Review of Arbitration Awards in Private Law Disputes

When an arbitrator is adjudicating a *purely* private law issue, the suggested relationship between a reviewing court and the arbitral tribunal is

¹⁸² Edward J. Imwinkelried, *Demeanor Impeachment: Law And Tactics*, 9 AM. J. TRIAL ADVOC. 183, 186 (1985) (citation omitted).

¹⁸³ *Drost v. Texas*, 47 S.W.3d 41, 45 (Tex. App. 2001).

¹⁸⁴ Robert C. Bordone, Note, *Electronic Online Dispute Resolution: A Systems Approach - Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 181 n.26 (1998).

¹⁸⁵ The bandwidth of the proceedings may vary from text that is readily recordable and requires very little storage space to video conferencing which will consume substantial bandwidth and require significant storage space. But in either case, storage is readily available and relatively inexpensive. For example, a record of a video proceeding may be compressed and stored as .mpeg files on CD-ROMs.

¹⁸⁶ It is not clear what this loss of meta-communication will mean to the fact-finding process. Gibbons, *supra* note 38, at 539. However, this loss is equally present in all levels of the proceedings.

analogous to one before an administrative agency and subsequent judicial proceedings.¹⁸⁷ The parties to the dispute entrusted its resolution to the arbitrator because the arbitrator has a special ability to interpret the written contract in light of the norms of the industry and e-commerce technology.¹⁸⁸ These factors are usually outside the experience and competency of a state court, even assuming under the rules of evidence that such evidence is admissible.

Common law countries,¹⁸⁹ civil code countries,¹⁹⁰ and international adjudicatory bodies¹⁹¹ have well-established standards of judicial review for administrative proceedings. For example, courts in the United Kingdom frequently apply a two-element test as a standard of review for administrative actions:

The 'Wednesbury' principle that a discretionary decision of a public body/officer should only be set aside if it is so unreasonable that no reasonable authority could ever come to it,¹⁹² [and] ... the proportionality principle re-

¹⁸⁷ Generally, few disputes will be purely private law disputes. Most, if not all, disputes will require the application of public law principles to the private dispute. This may result in my proposed dichotomy becoming, in practice, a distinction without a difference from public law disputes.

¹⁸⁸ Bordone, *supra* note 184, at 204.

¹⁸⁹ See Richard Clayton, *Regaining a Sense of Proportion: The Human Rights Act and The Proportionality Principle*, 5 EUR. HUM. RTS. L. REV. 504 (2001) (standards of review for human rights issues discussing several common law countries).

¹⁹⁰ Deborah D'Angelo, *The "Check" on International Peace and Security Maintenance: The International Court of Justice and Judicial Review of Security Council Resolutions*, 23 SUFFOLK TRANSNAT'L L. REV. 561, 565-66 (2000) (citing Germany, France, Japan, and the European Community's ("EC") High Court of Justice).

¹⁹¹ See Marco Bronckers & Natalie McNelis, *Fact and Law in Pleadings Before the WTO Appellate Body*, INT. T.L.R. 1999, 118-23 (discussing different standards of review used in WTO appellate proceedings). Frequently, a single treaty regime may have multiple standards of review respecting the juridical and cultural autonomy of the adherents, for example:

[Under the North American Free Trade Agreement (NFATA),] [e]ach country has a standard of review that is spelled out in Chapter 19, and they differ significantly from each other. The standard in the United States is based on substantial evidence on the record, and the agency's decision must be made in accordance with the law. In Mexico, the standard of review is set out in Article 238 of the "Código Fiscal de la Federación" [Federal Fiscal Code], based solely on administrative record. In Canada, the standard of review involves the application of principles of natural justice and fair play, a much more equitable view of things. Although it looks like due process, it is not exactly application of due process as [lawyers] think of it in the United States. Thus, the standard of review is distinct for each country.

James Holbein, *The Administration of Chapter 19 Binational Proceedings Under NAFTA*, 5 U.S.-MEX. L.J. 57, 61 (1997) (citations omitted).

¹⁹² Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223 (1947) (C.A.). Judicial review of administrative action in British law is governed in part by the Wednesbury standard. Wednesbury review scrutinizes administrative action to determine whether a minister has followed the statutory objective and whether the minister has refrained from taking into account irrelevant considerations. Once those questions are an-

quire[s] the courts to weigh and balance the aims of an act, measure or decision against the impact upon the applicant.¹⁹³

Canadian courts will review administrative acts to determine if there was “(1) a violation of natural justice; (2) an act in excess of jurisdiction; (3) a refusal to exercise jurisdiction; (4) an error of law; or (5) ‘an erroneous finding of fact ... made in a perverse or capricious manner or without regard to the material before it.’”¹⁹⁴

Because I am more familiar with the conventions, connotations, denotations, and proper lexicographic uses of these terms of art in the United States, I will discuss this topic using terms that are more familiar to U.S. lawyers. For example, if the arbitrator is interpreting private law provisions¹⁹⁵ in a contract dispute between the parties, then the standard of review should be whether the arbitral award was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... [or] unsupported by substantial evidence.”¹⁹⁶ Presently, courts have some power under the New York Convention to examine an award to determine whether it is arbitrary, capricious, in bad faith, or contrary to law. I am proposing that in the special context of consumer arbitration that the consumer be afforded the additional protection to insure that there is “substantial evidence” to support the arbitral award. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁹⁷ “Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁹⁸ “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one,” the Court’s review function is exhausted where a rational basis is found.¹⁹⁹ This standard may be sufficient to deter arbitral overreaching and provide an incentive to assure fair awards without encouraging unnecessary relitigation of issues already adjudicated in the arbitration.

swered in favor of the minister, a decision may only be reversed if a court finds that the minister has come to a conclusion so unreasonable that no reasonable authority could ever have come to it. Rafael Raffaelli III, *Regina v. Secretary of State for the Home Department ex parte Brind: Unconventional Intrusions on Freedom of Expression*, 17 BROOK. J. INT’L L. 221, 237 (1991) (analogous in the United States to the rational basis test).

¹⁹³ Erika Szyszczak, *Judicial Review of Public Acts*, 23 EUR. L. REV. 89, 90 n.5 (1998).

¹⁹⁴ James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 TEMP. L. REV. 503, 558-59 (2000) (citation omitted).

¹⁹⁵ This assumes there is no independent public policy interest reflected in that contract or dispute that would warrant a higher or more searching standard of review.

¹⁹⁶ *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999).

¹⁹⁷ *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

¹⁹⁸ *Villa v. Sullivan*, 895 F.2d 1019, 1021-22 (5th Cir. 1990).

¹⁹⁹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

4. *Review of Arbitration Awards in Public Law Disputes*

Unlike a court reviewing the resolution of the dispute of private parties and the private law governing their relationship, a reviewing court should treat arbitral decisions applying public law in a manner analogous to that of an appellate court reviewing a trial court.²⁰⁰ The arbitrator has no special competency in interpreting or applying public law. Nevertheless, the arbitrator may still have had a unique opportunity to observe the witness and make credibility determinations or the arbitrator may bring technical knowledge or skills to the dispute that may not be possessed by a generalist judge. The state has an interest independent of the parties in having public laws fairly and uniformly applied to disputes. E-commerce disputes are likely to require the charting of new legal territory rather than the treading of well-worn legal paths of known legal principles.²⁰¹ Policy dictates that courts guard their judicial interpretation function in the context of B2C dispute resolution.

The standard of review is a normative decision, optimally one that promotes error correction and the creation of law without promoting frivolous appeals. "[B]ecause ... parties are not frivolous in how they use appellate resources, they will proceed only when they have a reasonable likelihood of securing access to higher level courts and when a decision on the merits will not lead to a policy or outcome unfavorable to their interests."²⁰² The standard of review will therefore either encourage or discourage a losing party from bringing an appeal by making success on appeal more or less likely. Success may be measured in absolute terms; the court enforcing or declining to enforce the arbitral award. Success may also be measured in terms of the court's ability to create law; the court's ability to reach a legal issue on which the party wishes to create public law. Standards of review make either measure of success more or less probable in a given case.

If the question is one of public policy or the interpretation of a public law, the reviewing court should engage in an independent review of the public policy or questions of law. "[I]ndependent review represents an intermediate level of scrutiny, more rigorous than the abuse-of-discretion or clear-error standards, but stopping short of plenary or *de novo* review."²⁰³

²⁰⁰ Since most disputes will raise questions of the application of public law to the private dispute, this will most likely be the default mode governing most disputes.

²⁰¹ Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1263 (2001) ("The American justice system substantially relies upon private enforcement to help define and explain regulatory legislation and to insure that it is enforced.").

²⁰² See Burton M. Atkins, *Alternative Models of Appeal Mobilization in Judicial Hierarchies*, 37 AM. J. POL. SCI. 780, 782 (1993).

²⁰³ *United States v. Tortora*, 922 F.2d 880, 883 (1st Cir. 1990).

The appeals court must determine that “[i]f upon careful review of all the facts and the trial judge’s reasons the appeals court concludes that a different result should have been reached, the . . . decision may be amended or reversed.”²⁰⁴ In the ultimate analysis, “appellate courts are ill-equipped to resolve factbound disputes, this standard cedes particular respect, as a practical matter, to the lower court’s factual determinations.”²⁰⁵ Independent review, when properly applied, should result in affirming the arbitrator’s credibility determinations when live testimony is critical. In cases where the record is documentary, the appeals court could, when appropriate, engage in a more searching review of the record. In either case, the reviewing court may examine the record to assure that the arbitrator applied the proper legal principles to the public law issues in the dispute and that the award accords with the public policy of the enforcing jurisdiction.

5. Judicial Review in Practice

A significant question is how courts will apply this model of commercial consumer arbitration in practice. The range of disputes go from fully negotiated agreements to be arbitrated by sophisticated parties to the more common, ubiquitous, mass market contract that remains unread or uncomprehended by the consumer.²⁰⁶ This article recommends that one element to determine the appropriate level of review is the process by which the parties procured the arbitration clause. In essence, as the contracting process moves from the classic model of a freely negotiated agreement embodying the meeting of the minds to a contract of adhesion, courts should give correspondingly less deference to the agreement to arbitrate and the process provided for in the agreement unless it embodies processes and procedures that protect consumer expectations of due process.

Freely negotiated arbitration agreement clauses by sophisticated comprehending parties should receive substantial judicial deference as such an agreement embodies the free will of the parties and presumably represents an agreement that maximizes individual utility and the proper market allocation of risk. The current status quo probably provides adequate protection for these parties.

However, freely negotiated arbitration agreements will be the exception rather than the rule in most e-commerce transactions. Therefore, one

²⁰⁴ *United States v. O'Brien*, 895 F.2d 810, 814 (1st Cir. 1990).

²⁰⁵ *Tortora*, 922 F.2d at 882-83.

²⁰⁶ As a practical matter, the costs of bringing a court proceeding after the arbitration will be significant. These costs should moot appeals of arbitral awards unless the underlying issue is significant. These appeals will quite often be brought to establish settled legal principles to guide future arbitral awards, because a party has some other incentive to bring financially irrational litigation, or, in a rare case, the value of the dispute itself may justify these subsequent judicial proceedings.

must analyze as a practical matter how this will play out in the market place. Resolved disputes may be largely divided into four categories: consumer-wins, consumer-loses, merchant-wins, merchant-loses.²⁰⁷ This article starts with the default rule that the merchant will select the arbitration processes and that the merchant has the incentive to select processes that favor her position. The easiest cases should be consumer-wins or merchant loses. The court should interpret the agreement to arbitrate against the party drafting the arbitration clause and provide deference to an arbitral award against the drafter. However, this is insufficient. The court must also compare the award against the remedy sought in order to assure that the consumer received a complete and adequate remedy or a merchant "loss" is not in reality an award against the consumer. For example, a merchant loss could result in an award where the merchant receives less than she requested but more than she is legally entitled to. The more complicated situation is where the consumer-loses or merchant-wins. In this case, the court should examine the process that led to the award, and as the award moves into the safe harbor provisions that assure a minimal level of consumer due process, the enforcing court should apply an increasing level of deference to the arbitration award. This may include shifting the burden for enforcement from the party challenging the award to the prevailing party.

VII. INTERNATIONAL ENFORCEMENT OF ARBITRAL AWARDS

If governments encourage due process and fair play standards as part of the arbitration process and instruct courts to apply a heightened standard of review, will such policies be permissible under existing international commercial arbitration law?²⁰⁸ Of the major conventions on the international enforcement of arbitral awards,²⁰⁹ the most important is the United Nations Convention on the Recognition and Enforcement of Foreign

²⁰⁷ For the purposes of this section, "the party" is the one who commences the action. In consumer-wins situations, consumer commences the action and is successful at arbitration.

²⁰⁸ Because each country is free to unilaterally change its municipal law governing consumer arbitration, I will not address the question of enforcing domestic arbitration awards.

²⁰⁹

The conventions applicable to the recognition and enforcement of arbitral awards include the New York Convention, the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, the World Bank's 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, the European Convention on Commercial Arbitration of 1961, and the 1975 Inter-American Convention on International Commercial Arbitration of Panama.

Kenneth T. Ungar, *The Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717, 722 (1987) (internal citations omitted). Some Conventions may provide for broader enforcement. For example, the 1975 Inter-American Convention does not contain a provision limiting its scope to relationships that are considered commercial under the national law of a member state. Kennedy, *supra* note 40, at § 6.

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).²¹⁰ The New York Convention is the primary legal basis for enforcing international commercial arbitration awards.²¹¹ If a consumer dispute is commercial in nature and is between parties in different countries or parties in the same country seeking to enforce the award in a third-country, then the arbitration may result in a “foreign” arbitration award for the purposes of the New York Convention.

For example, under the New York Convention, an award rendered in Ohio, United States, and enforced in Paris, France, is subject to the New York Convention. Should the parties seek to enforce the award in Massachusetts or California, then the New York Convention no longer applies, and the party seeking to enforce the award must rely on the municipal law of the United States or the individual state.²¹² The New York Convention does not require that the parties come from different countries or even that at least one of the parties be a citizen of a state that is a signatory to the New York Convention.²¹³ It merely requires that the award be issued in a member country or if issued in a non-member country, enforced in a member country that does not require reciprocity.

²¹⁰ Ungar, *supra* note 209, at 722; New York Convention, *supra* note 44; Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1060-61 (1961). But as noted in subsequent discussion of the New York Convention, there are provisions that may require reinterpretation, clarification, or renegotiation if the New York Convention is to provide a predictable basis on which to resolve e-disputes in the B2C context. For example, it is unclear the effect of arbitrating in one jurisdiction but specifying that the law of another jurisdiction will apply to the arbitration. Alan Scott Rau, *New York Convention in the American Courts*, 7 AM. REV. INT'L ARB. 213, 224-25 (1996).

²¹¹ RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 101 (2000). The grounds on which to set aside an award under UNCITRAL are virtually identical to those under the New York Convention. Peter Binder, *Application for Setting Aside as Exclusive Recourse Against Arbitral Award*, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 205, 208-10 (2000); MURRAY SMITH, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 522 (1991). Accordingly, these recommendations may be useful in improving the law in jurisdictions that have adopted UNCITRAL.

²¹² New York Convention, *supra* note 44, at art. I.

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Id. There is one caveat. For example, if the award involves a foreign party or if there was a substantial nexus to another jurisdiction, then some courts may apply the New York Convention to the award. See Edward Chukwuemeke Okeke, *Judicial Review of Foreign Arbitral Awards: Bane, Boon or Boondoggie?*, 10 N. Y. INT'L L. REV. 29, 36-37 (1997).

²¹³ *Id.* at 36.

In international commercial arbitration, there is the strong presumption that arbitrations are valid and the award should be enforced.²¹⁴ The New York Convention's "pro-enforcement bias"²¹⁵ prevents any court from reviewing the merits of the underlying dispute when the prevailing party seeks to convert the arbitral award into a court judgment.²¹⁶ Therefore, one must exclude the dispute or the resulting arbitral award from one governed under the New York Convention in order for a shifting standard of review proposal to work.

This section will discuss the key provisions of the New York Convention. First, the two predicate provisions that bring the "agreement to arbitrate" and the underlying dispute within the subject matter of the New York Convention, then the enforcement provisions and the limited grounds on which a court may decline to enforce an award and will conclude by analyzing whether member states to the New York Convention could adopt a sliding standard of review of arbitral awards in the B2C context.²¹⁷

A. Subject Matter of the New York Convention

The New York Convention governs agreements to arbitrate that relate to a "subject matter capable of settlement by arbitration and [that are] in writing."²¹⁸ All "defined legal relationship[s], whether contractual or not" are susceptible to resolution by arbitration, so most e-commerce disputes will fall within the rubric of the legal relationship limitation on arbitral subject matter.²¹⁹ Assuming that the dispute arises out of a defined legal relationship, if there is a valid written agreement to arbitrate, courts in adhering states must order the parties to arbitrate, if so requested.²²⁰

²¹⁴ 9 U.S.C. § 201 (2000) (This section of the code makes enforcement of the Convention law); Stephen T. Ostrowski & Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650, 1653 (1998).

²¹⁵ *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

²¹⁶ GARNETT, *supra* note 211, at 103.

²¹⁷ Some Conventions may provide for broader enforcement. For example, the 1975 Inter-American Convention does not contain a provision limiting its scope to relationships considered commercial under the national law of a member state. Kennedy, *supra* note 40, at § 6. Accordingly, the analysis must be undertaken for each treaty regime that a country may adhere to. Such analysis is outside the narrow scope of this article.

²¹⁸ New York Convention, *supra* note 44, at art. II (1).

²¹⁹ *Id.*; Pedro Menocal, *We'll Do It For You Any Time: Recognition and Enforcement of Foreign Arbitral Awards and Contracts in the United States*, 11 ST. THOMAS L. REV. 317, 321 (1999); *but see*, New York Convention, *supra* note 44, at art. I(3) (allowing states to limit enforcement "to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.").

²²⁰ *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982) (citing New York Convention, *supra* note 44, at art. II (3)).

Courts have not yet decided whether an electronic contract to arbitrate will be enforced under the New York Convention. Article II(2) of the New York Convention provides that “[t]he term ‘agreement in writing’ shall include an arbitral clause ... contained in an exchange of letters or telegrams.”²²¹ In the jurisdictions that have adopted electronic signature laws, electronic agreements to arbitration may be treated as writings under the New York Convention. The New York Convention supports both agreements to arbitrate and the arbitral award.²²² And once the arbitral award is issued, courts must enforce the award subject to the narrow limited exceptions provided for in the New York Convention.²²³

The writing requirement is problematic in the context of e-commerce, where the contract may be embodied in an exchange of email, in a click on a box labeled “agree,” or by proceeding beyond a warning. The law of the enforcing country defines “writing” for the purposes of the New York Convention in Article 7 of the UNCITRAL Model Law on International Commercial Arbitration as “other means of telecommunication which provide a [written] record of the agreement.”²²⁴ The United Kingdom Arbitration Act defines writing as “being recorded by any means.”²²⁵ The European Union’s Directive on Electronic Signatures provides that electronic signatures “satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a hand-written signature satisfies those requirements in relation to paper-based data; and are admissible as evidence in legal proceedings.”²²⁶ Under the United States Electronic Signatures in Global and National Commerce Act (“E-Sign”), online and electronic contracts signed with an electronic signature will have the same legal force as a signed paper contract.²²⁷ Recent proposed amendments to the Uniform Commercial Code (“UCC”)²²⁸ and a proposed uniform law, the Uniform

²²¹ New York Convention, *supra* note 44, at art. II(2).

²²² *Id.* at art. V; see *Scherk v. Albert-Culver Co.*, 417 U.S. 506, 520 (1974).

²²³ *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 945 (S.D. Tex. 2001) (quoting *In re Arbitration Between Trans Chem. Ltd. and China Nat’l Mach. Import and Export Corp.*, 978 F. Supp. 266, 309 (S.D. Tex. 1997) (citing New York Convention, *supra* note 43, at Art. V)).

²²⁴ UNCITRAL Model Law, *supra* note 66, at art. 7(2).

²²⁵ Arbitration Act of 1996, 1996 c. 23, § 5(6) (Eng.).

²²⁶ The Council Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic Signatures, 2000 O.J. (L 13) 12, available at http://europa.eu.int/comm/internal_market/en/media/sign/Dir99-93-ecEN.pdf.

²²⁷ Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7006, 7021, 7031. The Uniform Commercial Code (UCC) defines writing as “any . . . intentional reduction to tangible form.” U.C.C. § 1-201(46) (1994).

²²⁸ See, e.g., American Law Institute and National Conference of Commissioners on Uniform State Laws, *Proposed Amendments to Uniform Commercial Code Article 2—Sales* § 2-103(o), available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.pdf> (“‘Record’ means

Computer Information Transaction Act ("UCITA"), delete the spatially limited concept of "writing" in favor of the more inclusive term "record." A record is "information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form."²²⁹ All of these statutes would permit a court to enforce an arbitration agreement entered into and memorialized by electronic communication.

Courts in jurisdictions that have not adopted definitions of electronic communication as constituting writings and signatures may have to look to the text of the New York Convention. There may contain an independent basis to enforce electronic contracts. The New York Convention validates the technology of the late 1950s, telegrams, as an electrical method of communicating a writing. Telexes and telegrams are the immediate predecessors to e-mail. Therefore, e-mail should be recognized as a "writing." The drafters of the New York Convention could hardly have desired to freeze commercial practices into the straightjacket of immediate post-war technology, especially in light of the great flexibility contained within the New York Convention to grow with evolving commercial practice. So, as long as there is a sufficient "writing" to meet the evidentiary intent behind the writing requirement,²³⁰ then there is more than a colorable basis to hold that an exchange of e-mail or an affirmative mouse-click to be sufficient to constitute a "writing" for the purposes of creating an enforceable arbitration agreement.

B. Reservations

Over half the signatories to the New York Convention have exercised their right to limit the applicability of the Convention.²³¹ An adherent to the New York Convention may limit its applicability by electing two possible exceptions: reciprocity or commercial subject matter.²³² The first possible reservation is reciprocity and the other is limiting the New York Convention to "commercial" relationships.²³³

information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form"); Revision of Uniform Commercial Code, at Art. 1, § 1-201(33a), *available at* <http://www.law.upenn.edu/bll/ulc/ucc1/Ucc161401.htm> ("Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form").

²²⁹ Uniform Computer Information Transactions Act § 102(55) (amended 2001), *available at* <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm> (last visited Oct. 6, 2002).

²³⁰ *Cf.* JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW* 200-01 (1999).

²³¹ *Id.* at 207-10.

²³² New York Convention, *supra* note 44, at art. I (3).

²³³ Considering the number of signatories to the New York Convention, this may be an insignificant problem. See Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 46 & n.16 (2002) ("One hundred twenty-six countries, includ-

1. Reciprocity Reservation

The first reservation is reciprocity. The New York Conventions permits countries to only recognize awards issued in other member states.²³⁴ This is one reason that the situs and the curial law governing the arbitration may be legally significant and especially problematic in ODR.²³⁵

C. "Commercial" Relationship Reservation

The second reservation permits a country to limit its enforcement "to differences arising out of legal relationships, whether contractual or not, which are considered as *commercial under the national law of the State . . .*."²³⁶ Member states may also limit their application of the New York Convention to disputes arising out of legal relationships that are considered "commercial" under the domestic law of the enforcing country.²³⁷ Despite the legal significance of the term "commercial," the New York Convention does not define it.²³⁸ This compels commentators and the courts to analyze existing practices as a guide to interpret the term.

A 1977 Bombay, India High Court case set a precedent for countries to exclude some classification of disputes from enforcement by holding that

ing the United States, have ratified this treaty.").

²³⁴ See Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1, 4 (1971).

²³⁵ Elisabeth M. Senger-Weiss, *Enforcing Foreign Arbitration Awards*, 53 WTR DISP. RESOL. J. 70, 73-74 (1998).

²³⁶ New York Convention, *supra* note 44, at art. I (3) (emphasis added); Senger-Weiss, *supra* note 235, at 73-74.

²³⁷ *Id.*; Statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, Before the Senate Committee on Foreign Relations, S. Rep. No. 91-702 app. at 6 (1970) ("our purpose in adhering to the Convention is for the beneficial effects it will produce for the foreign commerce of the United States and not to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union.").

²³⁸ See *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973) ("Research has developed nothing to show what the purpose of the 'commercial' limitation was. We may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like."); GIORGIO GAJA, INTERNATIONAL COMMERCIAL ARBITRATION III.A.1-III.C.226 (reprinting the *Preparatory Works* for the New York Convention). Compare this lack of a definition with the proposed Hague Conference On Private International Law, art. I, at <http://www.hcch.net/e/conventions/draft36e.html> (last visited February 3, 2003). Article I *specifically* excludes:

revenue, customs or administrative matters . . . a) the status and legal capacity of natural persons; b) maintenance obligations; c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition or analogous proceedings; f) social security; g) arbitration and proceedings related thereto; [and] h) admiralty or maritime matters.

Id.

not only must the underlying transaction be commercial, but also, the domestic law of the enforcing country must prescribe the transaction as a commercial transaction.²³⁹ In the United States, this would require a change in the law to redefine commercial to exclude consumer contracts. Under U.S. law, "commercial" means "a contract evidencing a transaction involving commerce" and applies to all contracts that Congress could regulate under the full sweep of its Commerce Clause powers.²⁴⁰ Other countries have excluded certain classifications of disputes from the term "commercial" by statute.²⁴¹

The commercial relationship clause reservation is one possible avenue for a nation to exclude foreign arbitral awards against their citizens from enforcement under the New York Convention. In order to apply the sliding standard of review that this article proposes, countries that have limited the applicability of the New York Convention to "commercial" relationships, may attempt to exclude consumer contracts by redefining "commercial" under domestic law to exclude consumer contracts.²⁴² Theoretically, there are several possible methods of avoiding enforcement under the "commercial" relationship reservation of the New York Convention. Perhaps the simplest is to exclude transactions under a specified value. This would protect the smaller and possibly less sophisticated merchants and consumers. Consumer transactions could be defined as a transaction that "at the time of contracting [is] intended to be used primarily for personal, family, or household purposes."²⁴³ It is also possible that a consumer transaction, in contrast with a commercial one, could be defined as "any contract between

²³⁹ The *Chemtex Fibres* court held that

In my opinion, in order to invoke the provisions of Section 3 [requiring a High Court to stay a legal proceeding brought in a matter where an arbitration clause properly applied], it is not enough to establish that an agreement is commercial. It must also be that it is *commercial by virtue of a provision of law or an operative legal principle in force in India*.

India Organic Chemicals, Ltd., v. Chemtex Fibres, Inc., 4 Y.B. COM. ARB. 271, 272-73 (1979) (Bombay, India) (technology transfer agreement was not considered a commercial relationship under Indian law, and, therefore, the Court held that the award was outside the scope of the Convention) (emphasis added); *but see* Eur. Grain & Shipping, Ltd. v. Bombay Extractions, Ltd., 8 Y.B. COM. ARB. 371, 375 (1983) (Bombay, India) (expressly rejecting the "law in force in India" language).

²⁴⁰ See *Prograph Intern. Inc. v. Barhydt*, 928 F. Supp. 983, 988 (N.D. Cal. 1996) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995)).

²⁴¹ Ungar, *supra* note 209, at 726 & n.49; see ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 54 (1981) (citing Article 51 of Decision No. 24 (Andean Foreign Investment Code, adopted on December 30, 1971), *reprinted in* 16 I.L.M. 138, 153 (1977)).

²⁴² Ungar, *supra* note 209, at 725-26.

²⁴³ Uniform Computer Information Transactions Act (UCITA) § 102(15), at <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm>.

a consumer and a business for goods or services that the purpose of which is outside a consumer's normal trade or profession"²⁴⁴

Courts could also take a bright line approach to the transactions, focusing on the time the parties enter into the agreement and deferring to the parties' intent at the time of contracting. Alternatively, courts could take a hybrid approach starting with a rebuttable presumption that the transactions are consumer contracts, but the e-merchant may prove that this is a commercial transaction within the meaning of the proposed act and therefore the New York Convention would apply. The first type of provision would provide a bright line rule. E-merchants would know that if the transaction had a value of less than x , then arbitration would be subject to the type of sliding review discussed in this article. The second type of provision is more problematic; the merchant would have to know the subjective intent of the purchaser at the time the transaction is completed. Nevertheless, this type of provision would protect high value transactions that are truly consumer transactions and allow for low value transactions that are truly commercial. Of course, in the case of an individual who is both a consumer and a merchant, the focus would be on the purpose for the transaction at the time of purchase. These questions may be resolved in the drafting phase of the proposed legislation and would be a matter of domestic public policy.

Such a law would not deny the prevailing party the right to enforce the award. E-merchants would be free to seek enforcement in other jurisdictions that do not have the same limitations.²⁴⁵ But, presumably unsophisti-

²⁴⁴ The 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 6(1).

Merchants may be defined as a person:

- (A) that deals in information or [goods] of the kind involved in the transaction;
- (B) that by the person's occupation holds itself out as having knowledge or skill peculiar to the relevant aspect of the business . . . involved in the transaction; or
- (C) to which the knowledge or skill peculiar to the practices . . . involved in the transaction may be attributed by the person's employment of an agent or broker or other intermediary that by its occupation holds itself out as having the knowledge or skill.

UCITA, *supra* note 229, at § 102(46).

²⁴⁵ SMITH, *supra* note 211, at 453 ("The party seeking enforcement is free to try elsewhere. He still has a valid award and he may be able to enforce it in another [country] in which the losing party has assets."); cf. Christopher R. Drahozal, *Enforcing Vacated Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 462 (2000) (Summarizing the dominant approaches to awards annulled by a court in the arbitral situs. The French approach is that if the award meets French standards then French courts will enforce the award. The *Chromally* Approach is that if the award meets American standards and the parties have agreed not to appeal then it may be enforced. The LSA approach is that an award annulled in the arbitral situs should be enforced unless it was on grounds that are internationally recognized. Finally, the comity approach is that an award annulled in the arbitral situs should be enforced unless the decision to vacate was "procedurally unfair or contrary to fundamental notions of justice." All of these approaches result in awards that are vacated or

cated consumers will not have significant assets within the reach of courts other than in their country of residence, and the domestic court may then review the award to assure that it comports with the level of due process that a resident of that country would expect in a consumer transaction.²⁴⁶

Unfortunately while the New York Convention is ambiguous as to the meaning of "commercial," redefining the term "commercial" to exclude B2C contracts would violate the spirit, if not the letter, of the Convention unless a member state is willing to exclude consumer contracts from all forms of arbitration. This seems to be reflected in the European perspective on consumer arbitration.

[I]n some Member States (e.g., France), consumer disputes can be found non-arbitrable, at least to the extent that the right of consumers to go to court is excluded. However, such restrictions apply mainly in the case of domestic arbitrations, and may not apply with regard to international arbitrations involving consumers, such as those falling under the New York Convention.²⁴⁷

While there is this evidence of limiting the subject matter of domestic arbitration, there does not appear to be any support or examples of any country excluding consumer arbitration awards from enforcement under the New York Convention.²⁴⁸

annulled in the arbitral situs being enforced against the consumer in other jurisdictions.)²⁴⁶

Because the status of consumer contracts under the Hague Conference on Private International Law produced a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters is still an open question as of the writing of this article, this article does not speculate on whether an award that would be unenforceable in the consumer's home country then reduced to a judgment in a third-country could be then enforced in the consumer's country of residence under the Hague Convention.

²⁴⁷ Morrison & Foerster LLP (Brussels), *Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce* (Apr. 2000), at <http://consumerconfidence.gbde.org/adrstudy.doc> (citing Vincent Tilman, *Arbitrage et nouvelles Technologies: Alternative Cyberdispute Resolution*, 2 REVUE UBIQUITÉ, 47-64 (1999) (citing as support Art. 2061 of the French Civil Code, Art. 631 of the Code de commerce, and case law of the Cour de Cassation)); FOUCHARD GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 38, 347-48 & n. 144-45 (Kluwer Law International 1999) ("In consumer contracts, the French courts have held . . . that the international character of the purchase of consumer goods was sufficient for an arbitration clause to be effective.").

²⁴⁸ Article 3 of the European Union's Directive on Unfair Terms in Consumer Contracts is one such example. It permits member states to prohibit contract clauses as presumptively unfair if such clauses exclude or hinder

the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, at

D. Grounds on which a Court may Refuse to Enforce an Arbitral Award

If consumer arbitration awards are not excludable from the New York Convention because they are “commercial” relationships under domestic law, then Article V provides the exclusive grounds on which to refuse to enforce an arbitral award.²⁴⁹ Under Article V of the New York Convention, even if there are grounds on which the court may decline to enforce an award, these grounds are *permissive* so that the court may still elect to enforce the award.²⁵⁰ Under the New York Convention, a court may decline to enforce an arbitral award if a party is subject to some incapacity;²⁵¹ the agreement is not valid under the laws of the state governing the arbitration agreement;²⁵² a party was not given proper notice or was unable to present their case;²⁵³ the tribunal exceeded its jurisdiction;²⁵⁴ the tribunal was not composed in accordance with the agreement of the parties or the laws of the jurisdiction governing the arbitration;²⁵⁵ the arbitral award is not binding or has been set aside under the laws of the jurisdiction governing the award;²⁵⁶ the subject matter of the dispute is not arbitral under the laws or public pol-

<http://www.lex2k.org/sfc/eudirective.html> (last visited Feb. 21, 2003). But, “[i]t is unclear what is meant by ‘arbitration not covered by legal provisions’ but presumably this means that any ADR system which forecloses a consumer’s ability to go to court must provide legal safeguards similar to those applicable in the court system.” One commentator asserted without analysis or citation to other legal authority that “While it is far from certain, it appears that, under the national law of some Member States, disputes with consumers would per se not be considered ‘commercial,’ so that the arbitral awards rendered in consumer ADR may not be enforceable under the New York Convention in such countries.” Christopher Kuner, *Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*, 5 ELEC. COMM. & L. REP. (BNA) 773, 778 (July 19, 2000), available at <http://www.kslaw.com/library/pdf/00000365.pdf>.

²⁴⁹ New York Convention, *supra* note 44, at art. V(1) (“enforcement of [an] award may be refused, at the request of the party against whom it is invoked, *only if* that party furnishes . . . proof that” one of the enumerated defenses is applicable); *see, e.g.*, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445-46 (11th Cir. 1998) (citing *M & C Corp. v. Erwin Behr GrmbH & Co.*, 87 F.3d 844, 851 (6th Cir. 1996)).

²⁵⁰ New York Convention, *supra* note 44, at art. V(1). Also, article VII is usually interpreted to require the court to award the prevailing party, the same rights as she would have under domestic arbitration law so that even if there is a valid defense under the New York Convention, but domestic law does not independently recognize such a defense, then the arbitration award should be enforced; *see, e.g.*, *In the Matter of the Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907, 914 (D.C. 1996); Jan Paulsson, *Rediscovering the NY Convention: Further Reflections on Chromalloy*, 12 MEALEY’S INT. ARB. REP. 20, 30 (Apr. 1997); G. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards*, 14 J. OF INT’L ARB. 140, 150-51 (1997).

²⁵¹ New York Convention, *supra* note 44, at art. V(1)(a).

²⁵² *Id.*

²⁵³ *Id.* at art. V(1)(b).

²⁵⁴ *Id.* at art. V(1)(c).

²⁵⁵ *Id.* at art. V(1)(d).

²⁵⁶ New York Convention, *supra* note 44, at art. V(1)(e).

icy of the enforcing country;²⁵⁷ and finally, the award violated the public policy of the enforcing jurisdiction.²⁵⁸ This section will examine each provision in Article V in order to determine which, if any of them, may provide a basis on which a state may exclude B2C arbitral awards from enforcement under the New York Convention.

1. Incapacity/Invalidity Under the New York Convention

The New York Convention provides that if the parties to the agreement are “under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made,” a court *may* decline to enforce the arbitral award.²⁵⁹ Because the parties to the arbitration award are free to select the law that will govern the arbitration, this provision may provide illusory relief. While this provision has some promise, a sophisticated merchant or arbitration provider will contract around consumer protection laws or court decisions predicated on this provision. The court must apply the parties’ choice of law provisions. If the parties fail to select a body of law, then the law of the place of the arbitration applies. Nevertheless, states may still legislate that consumer arbitration agreements are only valid under some specified set of contingencies, including judicial review that properly weigh the respective interests of the e-merchants in an enforceable award and the consumer’s due process.

2. Tribunal Exceeded its Jurisdiction

This provision will rarely provide grounds on which to protect the e-consumer. “If the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission,” a court may decline to enforce the award.²⁶⁰ The agreement to arbitrate will most likely specify that *all* disputes arising out of the parties’ legal relationship are subject to arbitration. There is some suggestion in the literature and case law that mistakes of law may constitute an arbitrator exceeding his or her jurisdiction.²⁶¹ But:

[i]n the main, a successful challenge to an arbitration award, ... depends upon

²⁵⁷ *Id.* at art. V(2)(a).

²⁵⁸ *Id.* at art. V(2)(b).

²⁵⁹ *Id.* at Art. V(1)(a). In the United States, it is very likely that the parties must initially raise the question of incapacity before the arbitrator as part of the proceeding. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 388, 403-04 (1967).

²⁶⁰ New York Convention, *supra* note 44, at Art. V(1)(c).

²⁶¹ Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49, 60-138 (1997).

the challenger's ability to show that the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."²⁶²

Therefore, it is unlikely that its provision would provide for adequate judicial review of awards.

3. *Lack of Proper Notice*

If "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case[,]" a court may elect not to enforce the arbitration agreement.²⁶³ Courts will not second-guess an arbitrator unless the process falls to a level where there is no process. Therefore, it is unlikely that this provision will provide much protection for consumers.

4. *Tribunal not Composed According to Arbitration Agreement*

"The composition of the arbitral authority of arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place."²⁶⁴ This section has been used to challenge awards if the arbitrator is biased or if the arbitrator was not selected according to the agreed upon procedures. Under this provision, governments are not free to establish procedures for the selection of arbitrators that ensure a fundamentally fair process nor are they free to review the appointment other than that are in compliance with the procedures elected by the parties. Because the parties are free to agree on any method to choose the arbitrator, this is unlikely to provide any protection to the consumer.

5. *Non-arbitrability of Subject Matter of the Dispute*

This is the most likely ground on which nation states could insulate B2C disputes from judicial enforcement under the New York Convention. The subject matter of the dispute must be out of a "defined legal relationship, whether contractual or not, concerning subject matter capable of settlement by arbitration."²⁶⁵ Courts must enforce arbitration awards unless

²⁶² *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) (quoting *Local 1445, United Food and Commercial Workers v. Stop & Shop Cos.*, 776 F.2d 19, 21 (1st Cir.1985)).

²⁶³ New York Convention, *supra* note 44, at Art. V(1)(b).

²⁶⁴ *Id.* at Art. V(1)(d).

²⁶⁵ *Id.* at Art. II(2)(a).

the award is void under local law²⁶⁶ or enforcement is otherwise excused under the New York Convention.²⁶⁷ Second, courts must give foreign arbitration awards national treatment.²⁶⁸ Governments must provide at least the same level of enforcement for an award under the New York Convention as they would for a domestic arbitration award. If this is so, then the United States merely needs to fine-tune its arbitration law to exclude B2C consumer disputes. The unfortunate side effect would be to relegate B2C consumer arbitration to the individual states for such consumer protection, if any, as each state may deem appropriate. This interpretation, while increasing consumer protection in transnational ODR, will cause unnecessary confusion and may even provide less protection for consumers in domestic arbitration, if one assumes a race to the bottom in choice of arbitral forum clauses governing these disputes. In short, it is not clear that the United States, as a practical matter, could exclude B2C arbitration awards from the scope of the New York Convention without unnecessary violence to domestic arbitration under the Federal Arbitration Act.

6. *Violated the Public Policy of the Jurisdiction*

“Each state may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not.”²⁶⁹ “In arbitration, the concept of public policy defines the margin of autonomy—and possibly error—of an arbitral tribunal which the public authority is willing to tolerate.”²⁷⁰ One reading of New York Convention would permit courts to evaluate the award in light of domestic public policy considerations, for example the need to protect consumers. Such a reading would solve many of the thorny issues surrounding e-consumer arbitration.²⁷¹ A nation may attempt to exclude B2C from arbitration under the

²⁶⁶ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 660 n.35 (1985) (quoting *Compagnia Generale Construzioni v. Piersanti*, [1980] *Foro Italiano* I 190, in 6 Y.B. COM. ARB. 229, 230 (1981) (“the Corte di Cassazione in Italy has held that labor disputes are not arbitrable under the Convention in that country.”)).

²⁶⁷ William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT’L L. 805, 810 (1999).

²⁶⁸ *Id.*; New York Convention, *supra* note 43, at Art. III (“There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”).

²⁶⁹ William Grantham, Comment, *The Arbitrability of International Intellectual Property Disputes*, 14 BERKELEY J. INT’L L. 173, 179 (1996). “The recognition of the award would be contrary to the public policy of that country.” New York Convention, *supra* note 43, at Art. V(1)(b).

²⁷⁰ Christoph Liebscher, *European Public Policy after ECO Swiss*, 10 AM. REV. INT’L L. 81, 89 (1999).

²⁷¹ *Arguendo*, an award that cannot be enforced because it violates public policy may also be an award in a matter that is not capable of arbitration. Compare Art. V(2)(a) with Art. II

New York Convention as a matter of domestic public policy. Nevertheless, this facile solution may not be consistent with a more reasonable interpretation of the New York Convention.²⁷²

Courts and commentators have read into the public policy provision of the New York Convention a further limitation that the arbitral award violates a *core principle* of the nation's public policy.²⁷³ The text of the New York Convention suggests such a narrow interpretation. "The French text of the Convention, which is considered equally authentic, uses the term 'ordre public,' which may have a different meaning."²⁷⁴ "Arbitration literature tends to use the terms 'public policy' and 'ordre public' interchangeably, although there is a view that the latter term has a wider scope than the former."²⁷⁵ *Ordre public* encompasses a concept sometimes referred to as "ordre public interne."²⁷⁶ Under *ordre public interne*, judges may prevent the enforcement of the arbitration award to prevent enforcement of transactions which are "held to offend public order" or prevent parties from contracting around mandatory statutory requirements. There is a related concept "ordre public externe," and "in the area of private international law, is interchangeable with public policy."²⁷⁷ Governments may invoke *ordre public externe* to prevent application of a foreign law, otherwise applicable under principles of international law, on the basis that the foreign law "would sanction conduct that offends against the forum's concept of fun-

of the New York Convention, *supra* note 44; *see, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 164 n.9 (1st Cir. 1983) *affm'd in part, rev'd in part* by 473 U.S. 614 (1985) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 530-31 n.10 (1974) (Douglas, J. dissenting)).

²⁷² *Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. ESCOR, 19th Sess., Annex, Agenda Item 14 § 49, at 5, U.N. Doc. E/2704 and Corr. 1, E/AC. 42/4/Rev. 1 (1955) (Public policy exception to be limited "to cases in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system where the award is invoked."); *Arizona v. California*, 292 U.S. 341, 359-60 (1934) ("when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning.").

²⁷³ *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir. 1975) (This provision "is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."); *see, e.g., Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974); *Andros Compania Maritima, S.A. v. Marc Rich & Co. A.G.*, 579 F.2d 691, 699, n.11 (2d Cir. 1978); *see LEW, supra* note 75, at 531-39.

²⁷⁴ Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO ST. J. ON DISP. RESOL. 365, 375 (1985).

²⁷⁵ Grantham, *supra* note 269, at 178 n.32 (citing JULIAN D. M. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 402 (1978)).

²⁷⁶ Timothy G. Ackermann, *Dis'ordre'ly Loopholes: Trips Patent Protection, GATT, and the ECJ*, 32 TEX. INT'L L.J. 489, 495 (1997).

²⁷⁷ *Id.*

damental norms.”²⁷⁸

The better reading of the New York Convention is that the public policy exception requires a court to enforce an arbitration award unless that award violates a fundamental core value of the legal system of the country requested to enforce the arbitral award. Therefore, it is unlikely that consistent with treaty obligations under the New York Convention member states could exclude B2C transactions from the scope of the New York Convention.

E. Modifying the New York Convention

The New York Convention was written over forty years ago, and it has not been revisited to reflect the market realities of a new millennium—a post-industrial revolution information-driven economy.²⁷⁹ The New York Convention reflects an immediate post-WWII concept of international trade that clearly envisioned sophisticated merchants capable of ordering their business affairs across national borders and arbitrating for the risks associated with transnational commerce. This paradigm does not reflect the typical B2C e-commerce transaction. Because it is unclear whether the New York Convention will permit nations to protect consumers in B2C trans-border arbitrations, it must be revisited to provide explicitly for the interests of consumers, and perhaps small merchants, engaging in trans-border transactions. The treaty should be amended to permit nations to exclude certain types of consumer transactions from the scope of international arbitration or to permit nations to require minimal consumer safeguards in arbitrating disputes arising out of B2C transactions. Finally, the treaty should reflect the reality of e-commerce transactions, such as formally validating electronic contracts to arbitrate.

VIII. CONCLUSION

ODR may yet meet the needs of B2C e-commerce. A core function of any dispute resolution policy is to inspire confidence. If consumers are not confident that their disputes will be resolved fairly, they will either avoid e-commerce or discount the value of the e-goods or e-services to account for the perceived risks associated with e-commerce. Either option would create an inefficient e-commerce marketplace. Theoretical and empirical data suggest that without structural intervention, e-markets may not provide private dispute resolution that inspires consumer confidence in its efficiency, accuracy, and integrity. This suggests government regulation, but there is a danger that government regulation may stifle innovation at the birth of

²⁷⁸ *Id.*

²⁷⁹ New York Convention was negotiated in 1958. Cole, *supra* note 274, at 369.

ODR.

Therefore, government's role in ODR must be subtle and marginal. Governments should lead voluntary market efforts to change structural incentives but not command legal compliance. By providing the appropriate incentives, governments may encourage the private sector to create ODR policies and procedures that are fair, comport with due process, and build e-consumer confidence. This will create private markets for "justice." In the instances where a private party seeks public enforcement of an arbitral award in B2C disputes, governments should provide a thorough independent review of the private award to insure that it comports to the public policy concerns of due process and fair play and that it facilitates consumer protection policies.

