THE ONLINE CROSSROADS OF WEBSITE TERMS OF SERVICE AGREEMENTS AND CONSUMER PROTECTION: AN EMPIRICAL STUDY OF ARBITRATION CLAUSES IN THE TERMS OF SERVICE AGREEMENTS FOR THE TOP 100 WEBSITES VIEWED IN THE UNITED STATES

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Every day, individuals and businesses are adjusting to the present reality that we live in an online world. An ever-expanding group of adults, teens and young children connect on a regular basis to the Internet through the use of cellular telephones, iPads, personal laptops and work computers. Businesses of all shapes and sizes strive to tap into the unlimited potential in running international border-defying websites ("sites"), typically containing links to terms of service agreements at the bottom of their site webpages.\(^1\) It is these site terms of service agreements that contractually govern the legal relationships between the individual users and the businesses running these sites.\(^2\) This article examines the findings of an empirical study, evaluating the use of predispute arbitration clauses in the terms of service agreements of the sites most-accessed by United States users. These clauses profoundly affect the individuals and businesses using the Internet.

While online businesses have legitimate reasons to incorporate arbitration clauses in their terms of service, they cannot ignore the impact that these clauses have on their sites’ individual users. Although current United States Supreme Court jurisprudence reflects a relentless willingness of the Court to liberally enforce these executory agreements to arbitrate,\(^3\) online international businesses considering whether to include arbitral provisions within their site terms of service must also account for the private and foreign efforts to regulate the fairness of these provisions. This study reveals that while some sites incorporate arbitration clauses in their terms of service through arguably legitimate efforts to select an effective method of dispute resolution, many other sites employ arbitral clauses that raise significant concerns about fundamental fairness. Although Congress may refuse to flatly prohibit predispute arbitration clauses in site terms of service agreements, it should enact federal legislation that is designed to minimize the harsh effects that these clauses have upon the powerless users of the Internet.

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\(^1\) See Jack Blum, Offer and Acceptance in Cyberspace: Ensuring That Your Client’s Website is Protected by Enforceable Terms of Service, 47 Md. B.J. 18, 19 (2014).

\(^2\) Id.

I. INTRODUCTION

Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.

Samuel Gompers

Individuals enter into contractual relations with online businesses every day on an increasing basis by using the Internet. Websites (“sites”) contain links at the bottom of their web pages to terms of service agreements, setting forth the rights and liabilities of the businesses and individual users interacting on these sites. These terms of service are enforceable even where users do not affirmatively manifest assent, so long as the site provides its users with reasonable notice of these contractual terms. It is not enough to review these

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5 The Internet is more and more becoming a basic part of the everyday activities of individual consumers. Nearly All Consumers (97%) Now Use Online Media to Shop Locally, According to BIA/Kelsey and ConStat, BIA/Kelsey, (Mar. 10, 2010), http://www.biakelsey.com/company/press-releases/100310-nearly-all-consumers-now-use-online-media-to-shop-locally.asp (announcing that the results of a consumer study indicate that the balance of consumers’ local shopping has now shifted to online purchasing); see also Survey: Two-Thirds of Internet Users Make Online Purchases, THE HEARTLAND INSTITUTE, http://news.heartland.org/newspaper-article/survey-two-thirds-internet-users-make-online-purchases (last visited Sept. 30, 2015) (stating that mainstream consumer purchasing is now conducted over the internet).

6 Site terms of service, typically available at the bottom of a site’s web page through a link entitled “terms of service,” “terms of use,” “terms” or “legal,” may bind Internet users to a site’s standardized terms solely by the user’s browsing or accessing of a site without any other affirmative acts. See ROGER LEROY MILLER & GAYLORD A. JENTZ, FUNDAMENTALS OF BUSINESS LAW: EXCERPTED CASES 272–75 (2d ed. 2010) (explaining how browse-wrap terms do not require users to agree to the terms before using the site).

7 Compare Hubbert v. Dell Corp., 835 N.E.2d 113, 122 (Ill. App. Ct. 2005) (finding reasonable notice sufficient to form mutual assent, where the site had provided a statement that online sales were subject to the site’s terms of use, available via a contrasting blue hyperlink at bottom of the site’s web page), with Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 31–32 (2d Cir. 2002) (refusing to enforce a mandatory arbitration clause in the site terms of service where it was unclear if the consumer had an opportunity to review these terms, located on submerged screen).
terms once, where sites often reserve the right to update the substantive terms contained within these agreements. Often an arbitration clause lies deep within these standardized terms designed by the site.

Sites and users governed by the terms of service may arbitrate a dispute between them in a proceeding outside of a courtroom. Arbitration is a contractually defined, private process that affords sites, and to some extent users, the opportunity to shape the rules and procedures that will control the disposition of a later dispute. There are many reasons why businesses and individuals may find that such a flexible process would be an advantageous way to resolve a dispute, as opposed to resorting to litigation. Many sovereigns recognize the utility in arbitrating a dispute and thus enforce these agreements to arbitrate.

However, there is a high risk that sites may abuse this manipulative method of dispute resolution. Sites unilaterally dictate the terms of arbitral proceedings when they incorporate arbitral

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8 For example, Google contains in its terms of service the provision that the site may modify its terms and make them effective fourteen days after posting them. Google Terms of Service, Google, http://www.google.com/intl/en/policies/terms/ (last updated Nov. 11, 2013). I began this study on October 11, 2013, and Google updated its terms of service on November 11, 2013. Consider whether individuals should be required once a month to review the terms of service for each of the myriad of sites that they visit on a daily basis.

9 The individual user has no say in the drafting of site terms of service. This study revealed that thirty percent of the top sites viewed in the U.S. contain arbitration clauses within their terms of service, located on average seventy-seven percent through the entire agreement after 5,250 words of text. See infra Part II, Finding #7.

10 Arbitration is a method of dispute resolution, where a third party “arbitrator” has the authority to consider a dispute and then impose a binding outcome on the parties. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 5 (Vicki Been et al. eds., 2d ed. 2010).

11 See id. at 6–7 (noting that because arbitration is defined contractually, parties shape this dispute resolution process by incorporating desired terms into their agreements to arbitrate). Sites and not users draft the terms of service, allowing sites to dictate most of the shaping of the agreed-upon, arbitral process. However, users retain some say in the molding of this process, where the arbitral clause is silent or explicitly directs the parties to mutually decide a specific term after a dispute arises in the future.

12 Businesses as well as individuals may reasonably conclude that arbitration will allow them to resolve their disputes through a faster, less-expensive procedure, where they may benefit from having greater control over who hears the matter, the rules and timing of the process, and the location of the dispute. See id. at 707.

13 See id. at 558 (noting that “the great majority of sovereign nations have signed key conventions that provide for arbitration of private disputes.”).
provisions in their online terms of service. Sites are repeat players that use their knowledge of the arbitral process to gain a contractual advantage, through the careful placement or omission of key arbitral terms into the agreement. At the same time, users are unaware of these clauses that govern their daily online activities and waive their fundamental rights. Arbitrators cannot ignore the fact that it is the sites that are sending them these disputes. The disparity in bargaining power between the large corporate sites and their individual users gives rise to the potential for manipulation, raising significant concerns about fundamental fairness.

This Article examines the findings of an empirical study, conducted as an expansion upon Professor Michael L. Rustad’s study of the use of predispute arbitration by social networking sites. This empirical study examined the incorporation of predispute arbitration clauses by the top 100 sites viewed in the United States into their terms of service. Part I explains how and why the author selected this particular sample and then categorizes the sites into ten classes, based upon the sites’ key attributes. Part II reveals sixteen noteworthy findings, concerning how the top sites design and incorporate their arbitration clauses in the terms of service. Part III provides the reader and any global online business who is considering the incorporation of an arbitration clause into its terms of service with important information about the relevant laws and private-actor efforts in the United States and in Europe that monitor the use of these clauses. Part IV explains the implications of the statistical data found in light of the relevant laws and private-actor efforts to monitor arbitration agreements in the United States and in Europe. The essential finding is that although some sites employ these clauses through legitimate efforts to select an effective method of dispute resolution, many other sites design these clauses in such a way as to raise significant concerns regarding fundamental fairness. Part V suggests that Congress needs

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14 See infra Part II, Findings #2, #8.
15 See infra Part II, Findings #5, #12, #16.
16 See infra Part II, Findings #10, #11.
17 In 2012 Professor Michael L. Rustad conducted an empirical study of the use of predispute mandatory arbitration clauses in the terms of service of 157 social networking sites viewed across the world. Michael L. Rustad et al., An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements, 34 U. ARK. LITTLE ROCK L. REV. 643 (2012). I also conducted a study on the use of predispute arbitration clauses in site terms of service but expanded the scope of my inquiry to cover a broader array of sites and not just social networks. Where noteworthy, I mention how my findings compare to those of Professor Rustad.
18 See infra Part I.A.
to enact federal legislation that is designed to minimize the harsh effects in form and in substance that standardized, predispute arbitration clauses have upon online users. While the struggles for reform in the consumer, employment and civil rights contexts inform us that there is not enough of a consensus in the United States for decision makers to flatly prohibit standardized, predispute arbitration clauses, new legislation regulating the design and presentation of these clauses in site terms of service agreements may ameliorate issues of fundamental fairness at a minimum cost to online businesses legitimately exercising their freedom to contract. Finally, this Article concludes with a summary of the key issues that global, online businesses must confront when considering whether to include an arbitration clause in their terms of service.

II. THE SAMPLE

A. Choosing a Sample

In an effort to conduct a study of the arbitration clauses which have the greatest impact on United States users, I selected a sample based on Alexa’s list of the top sites viewed in the United States. The sample consisted of 100 terms of service agreements. The actual sample contained 100 of the 104 most-viewed sites as of the date of the sample selection, because not every site in Alexa’s ranking contains a terms of service agreement.

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20 I selected the sample on October 14, 2013. I omitted four of the “top 100 most-viewed sites” from the study, because the four web addresses listed did not contain any links to terms of service agreements. For example, T.co is a domain without its own terms of service link and used as part of Twitter’s micro-blogging service, already accounted for in the sample. See T.CO, http://t.co/ (last visited Sept. 24, 2014). Unlike a domain, Drudge Report is an actual website visited by countless users. However, this site contains no terms of service. See DRUDGE REPORT, http://www.drudgereport.com/ (last visited Sept. 24, 2014). I omitted these four sites, because including them within the sample would not have accurately represented the incidence of arbitration clauses among site terms of service agreements.
B. Classification of Websites Within the Sample

The sites in the sample fall into the following categories, described in the order of occurrence and broken down in Table One below.  

1. Social Networking

Social networking sites ("SNSs") constituted seventeen percent of the sample. SNSs allow users to build relationships by developing and sharing common interests with each other. Coming in many shapes and sizes, these sites attract users through various themes and site layouts. For example, Facebook and LinkedIn let users network through user-maintained profiles, but the latter site is narrower in scope and caters to professionals. YouTube and Imgur target users who desire to upload, share and view videos or pictures, but WarriorForum and Twitter allow users to capitalize on their blogging and microblogging capabilities.

2. Information Delivery

Information delivery sites represented sixteen percent of the sample. These sites compile and display various breeds of user-desired information. Most of these sites, such as CNN, NBC News,
and The Washington Post, deliver leading news stories to users. The remainder of the sites in this category accumulate information pertaining only to special topics. For example, The Weather Channel provides users with updates on forecasts and natural disasters.

3. Sales & Support

Sales and support sites also formed sixteen percent of the sample. These sites offer sales or support services for the products or services of brick-and-mortar or online-only businesses. Target and Best Buy sell goods online in addition to sales at brick-and-mortar stores, whereas AVG and Adobe allow users to purchase online and then download their software products.

4. Entertainment

Entertainment sites made up ten percent of the sample. All of these sites appeal to users’ need to experience some form of enjoyment. The forms of entertainment range from radio streaming through Pandora to downloading pornography at Pornhub.

5. Services of an Online World

Another ten percent of the sampled were sites categorized as “services of an online world.” These sites all provide functions that would not exist in a world without computers and the Internet.

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29 See infra Table One.
31 See infra Table One.
GoDaddy is a domain name registrar and web-hosting provider; Dropbox offers cloud-storage services; and OptMD allows users to opt out of an ad server’s placement of cookies on users’ browsers.\(^{34}\)

6. Multimedia

Multimedia sites made up eight percent of the sample. These sites contain multiple and distinct functions, fulfilling the various needs of a diverse body of users.\(^{35}\) Google not only acts as a search engine but also as the primary access point for users seeking to send emails, play games, and obtain news updates, among other tasks.\(^{36}\) These sites do not offer just one online tool, and it is better to conceptualize them as “digital leathermans.”

7. Advertising/Intermediary

Sites advertising or acting as intermediaries for users represented seven percent of the sample. These sites bring users together, but users do not contract with each other until after they have met, left the site, and are off on their own.\(^{37}\) Yelp provides a forum through which a user may find a nearby, reviewed business, TripAdvisor allows users to browse vacation rental listings, and Craigslist maintains classified ads for those in need of furniture, automobiles or even jobs.\(^{38}\)


\(^{35}\) See Our Products and Services, GOOGLE, http://www.google.com/about/company/products/ (last visited Sept. 25, 2014) (describing the various services that Google provides for users including: search engine, web browser, and email).

\(^{36}\) Id.


\(^{38}\) Id.
8. **Information Database**

Six percent of the sample consisted of sites that contain databases of specific categories of information. Students may browse Dictionary.com for stored definitions and synonyms of indecipherable words while playing an offline game of Scrabble, and movie buffs may find out a favorite actor’s biography or a scheduled movie release date on the Internet Movie Database.\(^{39}\)

9. **Finance**

Sites for financial intermediaries and online payment processors made up five percent of the sample. Bank of America offers online banking for account holders, and PayPal provides a payment-processing tool through which business and consumer users may enter into online transactions.\(^{40}\)

10. **Marketplace**

Five percent of the sample represented sites that provide users with an Internet Marketplace. Users create accounts and then may buy or sell goods or services through the site.\(^{41}\) Users commonly log into Amazon or eBay to buy or sell books, movies or other household goods; other users may buy or sell services on Fiverr for as low as five dollars.\(^{42}\)

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Table 1. Breakdown of Website Classification within the Sample.

<table>
<thead>
<tr>
<th>Category:</th>
<th>Frequency/Percent:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Networking</td>
<td>17</td>
</tr>
<tr>
<td>Information Delivery</td>
<td>16</td>
</tr>
<tr>
<td>Sales &amp; Support</td>
<td>16</td>
</tr>
<tr>
<td>Entertainment</td>
<td>10</td>
</tr>
<tr>
<td>Services of an Online World</td>
<td>10</td>
</tr>
<tr>
<td>Multimedia</td>
<td>8</td>
</tr>
<tr>
<td>Advertising/Intermediary</td>
<td>7</td>
</tr>
<tr>
<td>Information Database</td>
<td>6</td>
</tr>
<tr>
<td>Finance</td>
<td>5</td>
</tr>
<tr>
<td>Marketplace</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

III. SIXTEEN EMPIRICAL FINDINGS REVEALED

Thirty percent of the sampled terms of service agreements contained arbitration clauses. None of the sampled sites contained these clauses within their privacy policies. Appendix A provides a list of the links to the agreements containing arbitration clauses. A discussion follows below of the sixteen noteworthy findings of this empirical study.

A. Finding #1: Perceptible Differences Exist Between the Distributions of Sites with Arbitration Clauses and Categories of Sites Sampled

Certain types of sites appear more likely than others to incorporate an arbitration clause in the terms of service. As Table Two indicates, the Entertainment, Multimedia, and Marketplace sites each accounted for a percentage of arbitration clauses that was double their respective portions of the overall sample. Entertainment sites were ten percent of the sample but employed twenty percent of the arbitration clauses.

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43 See supra notes 19–20 and accompanying text.
44 This is the opposite conclusion, albeit in the context of a different studied population, reached by Professor Rustad. See Rustad et al., supra note 17, at 653 (finding “no perceptible differences between the distribution of social network sites with arbitral clauses” and the total sample).
45 See infra Table Two.
found. Multimedia sites were eight percent of the sample but incorporated sixteen percent of the arbitration clauses discovered. Marketplace sites made up five percent of the sample but used thirteen percent of the arbitration clauses sampled.

Contrast the above sites with their Advertising/Intermediary, Sales & Support, Services of an Online World and Information Database counterparts. Advertising/Intermediary sites were seven percent of the sample and yet none of them had an arbitration clause in the terms of service. Sales & Support, Services of an Online World, and Information Database sites constituted sixteen, ten and six percent of the overall sample respectively, but each of these classes of sites utilized just over three percent of the arbitral clauses found. These types of sites appear less likely to contain arbitration clauses than those described in the preceding paragraph, and thus it would seem that users playing Internet video games are more likely to submit to arbitration than those advertising online for the sale of their used goods.

Table Two. Presence of Arbitration Clauses by Classification of Website.

<table>
<thead>
<tr>
<th>Category</th>
<th>Frequency/Percent:</th>
<th>Arbitration Clause(s):</th>
<th>Percentage of Arbitration Clauses Found:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Networking</td>
<td>17</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>Information Delivery</td>
<td>16</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>Sales &amp; Support</td>
<td>16</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Entertainment</td>
<td>10</td>
<td>6</td>
<td>20.00</td>
</tr>
<tr>
<td>Services of an Online World</td>
<td>10</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Multimedia</td>
<td>8</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>Advertising/Intermediary</td>
<td>7</td>
<td>0</td>
<td>0.00</td>
</tr>
<tr>
<td>Information Database</td>
<td>6</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Finance</td>
<td>5</td>
<td>2</td>
<td>6.67</td>
</tr>
</tbody>
</table>

46 Id.  
47 Id.  
48 Id.  
49 Id.  
50 Id.  
51 I state this finding just to explain a discovered correlation. No attempt is made to explain why certain types of sites appear more likely than others to incorporate an arbitration clause in the terms of service. Causation is left for the reader to ponder.
Table Three: Types of Arbitration

<table>
<thead>
<tr>
<th>Type of Arbitration</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory</td>
<td>19</td>
<td>63.33</td>
</tr>
<tr>
<td>Elective</td>
<td>4</td>
<td>13.33</td>
</tr>
<tr>
<td>Mandatory for Certain Geographic Area</td>
<td>4</td>
<td>13.33</td>
</tr>
<tr>
<td>Mandatory for Claims Under Specified Amount</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Elective for Claims Under Specified Amount</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Mandatory if Mediation Fails</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Total</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

52 See infra Table Three.
53 Id.
54 See infra Table Four.
55 Professor Rustad hinted at the contradiction in a site utilizing an “elective” arbitration clause, where the site in effect has mandated that the user submit to arbitration at the site’s will. See Rustad et al., supra note 17, at 654.
Table Four: Types of Elective Arbitration

<table>
<thead>
<tr>
<th>Type of Elective Arbitration</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Either Party May Elect</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td>Only Website May Elect</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td>Complainant May Elect for Claims Under Specified Amounts</td>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td>5</td>
<td>100</td>
</tr>
</tbody>
</table>

C. Finding #3: Most Sites Choose the American Arbitration Association

Sixty-three percent (n=19) of sites chose the American Arbitration Association (AAA) to act as the arbitral provider. Two of these sites allowed either party to select the Judicial Arbitration and Mediation Services (JAMS) if the AAA is unable to hear the matter within 160 days.\(^{56}\) Table Five shows that only two clauses stated that the arbitral provider was to be mutually agreed upon at a later date.\(^{57}\) One site provided that it alone would choose the provider.\(^{58}\)

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\(^{56}\) An additional thirteen percent (n=4) of arbitration clauses indicate that arbitration would be governed by the AAA Commercial Rules, but did not explicitly address the selection of an arbitral provider. While an educated attorney may posit that this indicates the selection of an AAA provider, the average user may not make such an inference. For example, CBS Sports provides that “[w]e may elect to resolve any controversy or claim arising out of or relating to these Terms or the Services by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association.” CBS Interactive Terms of Use, CBS INTERACTIVE (July 2, 2012), https://cbsi.secure.force.com/CBSi/articles/FAQ/CBS-Interactive--Terms-of-Use?retURL=%2FCBSI%2Fapex%2Fknowledgehome%3Freferer%3DmobileTerms.com&popup=false&categories=CBS_Interactive%3AmTOU&template=template_mobileTerms&referer=mobileTerms.com. Those unfamiliar with the world of arbitration may properly conclude that rules adopted by the AAA will apply to their dispute resolution process but not even consider that a provider has been selected.

\(^{57}\) See infra Table Five.

\(^{58}\) Although only one site stated that it alone would choose the provider, eighty percent (n=24) of sites in effect chose the provider. The site alone drafts its terms of service, and when these terms contain an arbitral clause setting forth a specific arbitral provider, the site has already chosen the provider on its own without consulting the user.
Table Five: Arbitration Providers Selected in the Terms of Service

<table>
<thead>
<tr>
<th>Arbitration Provider</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Arbitration Association (AAA)</td>
<td>19</td>
<td>63.33</td>
</tr>
<tr>
<td>Arbitrator Selection Not Addressed</td>
<td>4</td>
<td>13.33</td>
</tr>
<tr>
<td>Judicial Arbitration and Mediation Services (JAMS)</td>
<td>3</td>
<td>10.00</td>
</tr>
<tr>
<td>Mutually Agreeable Provider</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td>Site to Choose</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Provider Knowledgeable in E-Commerce Disputes</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>30</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

D. **Finding #4: No Arbitration Clauses Unequivocally Mandate In-Person Proceedings**

Almost half (n=14) of the arbitration clauses specified whether the dispute-resolution process is to be conducted at a meeting in-person or over the telephone, online, or through written submissions. As Table Six indicates, roughly fifty-three percent (n=16) of the provisions did not address whether arbitration was to be structured as appearance or non-appearance proceedings.\(^{59}\) Only two clauses allowed the user an unqualified right to choose whether arbitration would require appearance or non-appearance-based proceedings.\(^{60}\) Interestingly, two more clauses allowed the user to select appearance or non-appearance proceedings if the amount in controversy was $10,000 or less, while three other clauses allowed the user this choice if the amount was over $10,000.\(^{61}\)

Two sites mandated that the parties would not appear in the event of arbitration. One of these gives the complainant a choice whether the process would be done over the phone, online or through written submissions, while the other does not address the means of non-appearance arbitration or which party would choose those means. Only six percent (n=2) of the clauses required that the arbitration be appearance-based, but this could be satisfied over the telephone and either party could choose not to appear for claims valued at $10,000 or less.\(^{62}\)

\(^{59}\) See infra Table Six.

\(^{60}\) See infra Table Six.

\(^{61}\) See infra Table Six.

\(^{62}\) Compare this with the findings of Professor Rustad, who concluded that forty-three percent of social networking sites required appearance-based arbitral proceedings. See Rustad et al., supra note 17, at 656.
Table Six: Who Chooses What Manner in Which to Conduct the Arbitral Proceedings?

<table>
<thead>
<tr>
<th>Mode of Arbitration</th>
<th>Who Chooses</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mode Not Addressed</td>
<td>N/A</td>
<td>16</td>
<td>53.33</td>
</tr>
<tr>
<td>Appearance or Non-Appearance</td>
<td>Not Specified</td>
<td>3</td>
<td>10.00</td>
</tr>
<tr>
<td>Appearance or Non-Appearance if Claim &gt; $10,000</td>
<td>User</td>
<td>3</td>
<td>10.00</td>
</tr>
<tr>
<td>Appearance or Non-Appearance if Claim ≤ $10,000</td>
<td>User</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td>Non-Appearance</td>
<td>Site</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td>Appearance if Claim &gt; $10,000</td>
<td>Site</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td><strong>Total</strong>:</td>
<td><strong>N/A</strong></td>
<td><strong>30</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

E. Finding #5: Half of the Arbitration Clauses That May Result in In-Person Proceedings May Lead to Proceedings at A Location Not Based on the User’s Location or “Convenience”

As seen in Table Seven, forty percent (n=12) of arbitration clauses provided for proceedings at the user’s residence or at a location based on the user’s “convenience.”63 Two of these clauses state that the user may alternatively elect to arbitrate in New York.64 One-third (n=10) of arbitration clauses mandated that proceedings would be at a fixed location, regardless of user residence or convenience.65 However, one of these clauses indicated that it may be subject to the AAA Supplementary Procedures for Consumer-Related Disputes requiring a different location, while another one of these clauses allowed the user to demonstrate that the pre-determined location would place an undue

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63 See infra Table Seven.
64 Id.
65 Id. For the most part, these mandated fixed locations in Texas, New York, California, and Louisiana. However, xHamster’s terms unequivocally provide that “arbitration shall be conducted in the Republic of Cyprus.” Terms & Conditions/User Agreement, XHAMSTER, http://xhamster.com/terms.php (last visited Sept. 27, 2014). The reader should wonder how much it would cost a United States user to travel to arbitral proceedings in the Republic of Cyprus.
burden on the user, in which case the user’s residence is chosen.\textsuperscript{66} Although twenty percent (n=6) of arbitration clauses did not address location of proceedings, two of these clauses required non-appearance proceedings where location may matter less to a user.\textsuperscript{67} Half (n=14) of the arbitration clauses that may result in an in-person proceeding could also require the user to arbitrate in a location not based on his or her residence or “convenience.”\textsuperscript{68}

Table Seven: Location of Arbitration Proceedings

<table>
<thead>
<tr>
<th>Location of Proceeding</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Based on User Residence or Convenience</td>
<td>12</td>
<td>40.00</td>
</tr>
<tr>
<td>Fixed Location</td>
<td>10</td>
<td>33.33</td>
</tr>
<tr>
<td>Location Not Addressed</td>
<td>6</td>
<td>20.00</td>
</tr>
<tr>
<td>Based on User Residence or Convenience for Certain Geographic Area</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td>Total:</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

F. Finding #6: Arbitration Clauses Tend to Explain Some But Not All of Users’ Rights

The arbitration clauses ranged from 70 to 1415 words in length, with the average clause being 576 words in length and the median clause being 475 words in length.\textsuperscript{69} Table Eight indicates that forty-three percent (n=13) of clauses explained some but not all of the user’s

\textsuperscript{66} See infra Table Seven.

\textsuperscript{67} Id.

\textsuperscript{68} Id. None of these fourteen clauses explicitly based location on the user’s residence or “convenience,” but all of them included terms allowing a party to select either in-person or non-appearance proceedings. See infra Appendix A. The actual location and mode of proceedings is not always known at the time of contract formation. Only after a dispute has arisen will the parties know where and how they would like to proceed in arbitration and have an opportunity to interpret ambiguities within the contract language. In light of this practicality, although only one-third (n=10) of clauses explicitly chose a fixed location not based on the user’s residence, it would seem that it is more relevant to the user to know that half of the arbitration clauses that may result in in-person proceedings could lead to proceedings at a location not based on the user’s residence or “convenience.” See infra Table Seven. These are the situations most costly to the user.

\textsuperscript{69} See infra Table Eight.
rights in arbitral proceedings. These clauses were riddled with legalese that may be indecipherable to the average user and ranged from 311 to 1227 words in length. Over thirty-six percent (n=11) of clauses explained the user’s arbitral rights in great detail. Only one of these clauses was concise, where these clauses ranged from 339 words to 1415 words in length. One fifth (n=6) of the clauses did not explain the rights in clear terms. In fact, these clauses tended to not explain any of the user’s rights in arbitral proceedings, and they ranged from only 70 to 165 words in length.

Table Eight: Level of Detail and Length of Clauses

<table>
<thead>
<tr>
<th>Detail of Clause</th>
<th>Low Word Count:</th>
<th>High Word Count:</th>
<th>Frequency:</th>
<th>Percent:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Some Rights in Legalese</td>
<td>311</td>
<td>1227</td>
<td>13</td>
<td>43.33</td>
</tr>
<tr>
<td>Rights Explained in Detail</td>
<td>339</td>
<td>1415</td>
<td>11</td>
<td>36.66</td>
</tr>
<tr>
<td>Rights Not in Clear Terms</td>
<td>70</td>
<td>165</td>
<td>6</td>
<td>20.00</td>
</tr>
<tr>
<td>Total:</td>
<td>N/A</td>
<td>N/A</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

G. Finding #7: Most Arbitration Clauses Appear Towards the End of the Terms of Service

Not a single arbitration clause appeared in the first half of the terms of service. The clauses varied from being situated at fifty-two

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70 Id.
71 Id.
72 Id.
73 See Conditions of Use, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088 (last updated Dec. 5, 2012); see infra Table Eight. Although a user will desire to be informed of his or her rights in arbitral proceedings, at a certain point an arbitral clause may be so detailed that the excessive wording may serve to actually lessen the user’s comprehension of the terms of arbitration.
75 See infra Table Eight.
percent to ninety-five percent through the terms of service.\textsuperscript{76} The average arbitral clause appeared beginning at seventy-seven percent through the entire agreement after 5250 words of text, and the median clause lay after 4443 words of text.\textsuperscript{77}

**H. Finding #8: Most Arbitration Clauses Attempt to Specify Which Rules Will Apply to A Future Dispute**

As Table Nine indicates, eighty-seven percent (n=26) of arbitration clauses addressed the question of which rules and procedures are to be applied to dispute proceedings.\textsuperscript{78} Half (n=15) of the terms of service require application of both the American Arbitration Association (AAA) Commercial Rules and the Consumer-Related Disputes Supplementary Procedures.\textsuperscript{79} An additional five arbitration clauses only mentioned that they required the application of the AAA Commercial Rules alone.\textsuperscript{80} Two more clauses only mentioned the

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\textsuperscript{76} See \textit{AMAZON}, supra note 73 (showing that for Amazon.com the clause is situated at fifty-two percent).

\textsuperscript{77} See \textit{supra} note 9. The median figure of 4443 words may be a more appropriate estimate of the average number of words a user would need to read prior to coming upon an arbitration provision. The findings reveal that 28 of 30 arbitration clauses appeared at 1432 to 9784 words into the terms of service, with these agreements spanning from 2223 to 10,750 total words in length. Two potential outliers, both pertaining to Finance sites, had arbitration clauses situated at 17,737 of 21,265 words into the terms of service spanning from 19,250 of 24,395 total words in length. \textit{See infra} Appendix A.

\textsuperscript{78} See \textit{infra} Table Nine.

\textsuperscript{79} \textit{Id.} Only eight arbitration clauses explicitly specified that they required application of the AAA commercial rules and supplementary procedures for consumer-related disputes. However, an additional four clauses required AAA “rules” and supplementary procedures for consumer-related disputes, leading to the reasonable inference that both commercial and consumer rules were to apply. The other three clauses within this category explicitly required the application of the AAA Commercial Rules to future proceedings, however these also stated that the supplementary consumer procedures would apply to proceedings in value \(\leq \$75,000\), a stipulation already included in the AAA supplementary procedures. I placed all of these clauses in the same category, because they in effect required the application of both commercial and consumer-related rules and procedures to future disputes.

\textsuperscript{80} \textit{Id.} Although a site may only mention the AAA’s commercial rules in its arbitration clause, the AAA will have the discretion to apply its Supplementary Procedures for Consumer-Related Disputes, whenever the AAA or its rules are used in a non-negotiated agreement between consumers and businesses that make use of the standardized and systematic application of arbitration clauses. \textsc{AM. ARBITRATION ASS’N, CONSUMER-RELATED DISPUTES: SUPPLEMENTARY PROCEDURES} 4 (2005), \textit{available} at http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&Revision Selection Method=LatestReleased.
application of the AAA Consumer-Related Disputes Supplementary Procedures alone. 81 One last clause mentioning the AAA did not attempt to specify which AAA rules or procedures were applicable. 82 As opposed to the seventy-three percent (n=22) of arbitration clauses favoring AAA rules or procedures, only three clauses incorporated rules adopted by the Judicial Arbitration and Mediation Services. 83

Table Nine: Arbitration Rules and Procedures Selected

<table>
<thead>
<tr>
<th>Arbitration Rules/Procedures</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA Commercial Rules and Consumer-Related Disputes Supplementary Procedures</td>
<td>15</td>
<td>50.00</td>
</tr>
<tr>
<td>AAA Commercial Rules Rules Not Addressed</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>AAA Consumer-Related Disputes Supplementary Procedures</td>
<td>4</td>
<td>13.33</td>
</tr>
<tr>
<td>AAA “Rules and Procedures”</td>
<td>2</td>
<td>6.66</td>
</tr>
<tr>
<td>JAMS “Rules and Procedures”</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>JAMS Comprehensive Arbitration Rules</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>JAMS Streamlined Arbitration Rules</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>30</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

I. Finding #9: A Majority of Arbitral Clauses Were Presented in A Conspicuous Manner

Based on the Uniform Commercial Code (UCC)'s definition of conspicuous, 84 one-third (n=10) of arbitration clauses were presented in an inconspicuous manner. Table Ten confirms that these ten clauses contained text in the same font as the rest of the terms of service. 85 Nothing else in these ten agreements called the arbitral clause to the attention of reading users. However, arguably two-thirds (n=20) of sites did present arbitral clauses in a conspicuous manner. 86 Fifty-six percent (n=17) of sites used clauses in either bold-faced

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81 See infra Table Nine.
82 Id.
83 Id.  
84 A clause may be presented conspicuously if it contains typeface that is in contrast to the surrounding document, such as through the use of bold or all-caps text, a separate font or color, or, if marks or symbols are otherwise present in the document and call the reader’s attention to the term. See U.C.C. § 1-201(b)(10) (2013).
85 See infra Table Ten.
86 Id.
Another three sites included a statement in contrasting font at the top of their terms that noted the presence of an otherwise inconspicuous arbitration clause. Although almost fifty percent (n=14) of sites warned users at the beginning of the terms of service of the arbitration clause placed deep within the document, only three of these “warn” clauses were in the same font as the remainder of the agreement.

Table Ten: Typeface of Arbitration Clauses and Notation of Clause Presence in Agreement

<table>
<thead>
<tr>
<th>Contrasting Format Used:</th>
<th>Clause Noted at Top of TOS:</th>
<th>Frequency:</th>
<th>Percent:</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>No</td>
<td>10</td>
<td>33.33</td>
</tr>
<tr>
<td>Some Bold and Some All Caps Type</td>
<td>Yes</td>
<td>6</td>
<td>20.00</td>
</tr>
<tr>
<td>Some Bold or Some All Caps Type</td>
<td>Yes</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>Some Bold or Some All Caps Type</td>
<td>No</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>None</td>
<td>Yes</td>
<td>3</td>
<td>10.00</td>
</tr>
<tr>
<td>Some Bold and Some All Caps Type</td>
<td>No</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Total</td>
<td>N/A</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

J. Finding #10: Forty Percent of Arbitral Clauses Do Not Even Mention That Rights Are Waived

Forty percent (n=12) of clauses did not even mention that rights are waived or limited by agreeing to submit to arbitral proceedings. Table Eleven shows that all other arbitration clauses at least informed the user that he or she would be waiving the right to a jury trial. Forty percent (n=12) of clauses mentioned that there was no judge

87 Id.
88 Id.
89 Id.
90 See infra Table Eleven. However, one of these sites, Hulu, did kindly hint: “If you’re not sure what all of this means, of course please feel free to ask an attorney.” Terms of Use, HULU (last visited Aug. 7, 2014), http://www.hulu.com/terms. This is practical advice for the user; perhaps he or she can take heed of it right before streaming his or her favorite television show on a Sunday evening, when there is no better time to call an attorney and incur legal expenses.
91 See infra Table Eleven.
presiding over proceedings. Thirty percent (n=9) of clauses mentioned the limited rights to appeal an arbitrator’s decision. Only two of the thirty sampled clauses mentioned that users waived the right to traditional discovery procedures.

Table Eleven: Rights Clauses Explained That May Be Waived or Limited

<table>
<thead>
<tr>
<th>Rights Clauses Mention That May Be Waived or Limited:</th>
<th>Frequency:</th>
<th>Percent:</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Rights Mentioned</td>
<td>12</td>
<td>40.00</td>
</tr>
<tr>
<td>Jury Trial, Judge, Appeal</td>
<td>7</td>
<td>23.33</td>
</tr>
<tr>
<td>Jury Trial</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>Jury Trial, Judge</td>
<td>4</td>
<td>13.33</td>
</tr>
<tr>
<td>Jury Trial, Judge, Appeal, Discovery</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Jury Trial, Appeal, Discovery</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>30</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

K. Finding #11: Users Waive Their Right to Class Action Proceedings in Over Seventy-Six Percent of Agreements to Arbitrate

Users waived the right to class action proceedings in over seventy-six percent (n=23) of the arbitration clauses. Table Twelve indicates that in two of these clauses this waiver was inconspicuous and explicitly limited just to the user. Sites noted at the top of the terms the presence of a class waiver deep within the document in slightly over forty-three percent (n=10) of cases. Five additional class action waivers were printed in either bold or all-caps font. Thus thirty-five percent (n=12) of the sites presented class action waivers in an inconspicuous manner.

92 Id.
93 Id.
94 Id.
95 See infra Table Twelve.
96 Id.
97 Id.
Table Twelve: Who Waives the Rights to Class Action Proceedings?

<table>
<thead>
<tr>
<th>Who Waives Class Actions:</th>
<th>Noted at Top of TOS Agreement:</th>
<th>Frequency:</th>
<th>Percent:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mutually Waived</td>
<td>No</td>
<td>11</td>
<td>36.67</td>
</tr>
<tr>
<td>Mutually Waived</td>
<td>Yes</td>
<td>10</td>
<td>33.33</td>
</tr>
<tr>
<td>Neither Party</td>
<td>N/A</td>
<td>7</td>
<td>23.33</td>
</tr>
<tr>
<td>User Alone Waives</td>
<td>No</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>N/A</strong></td>
<td><strong>30</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

L. Finding #12: Almost Half of the Sites Did Not Mention Relief in Small Claims Court

Only sixteen arbitral clauses explicitly gave users the right to pursue small claims actions.\(^99\)

M. Finding #13: Half of the Arbitration Clauses Did Not Advise the User on How to Obtain More Information on Arbitration Proceedings

Over half (n=16) of the arbitration clauses provided users with no means by which the user may obtain additional information regarding arbitral proceedings. Table Thirteen shows that all of the sampled clauses informed the user whether arbitration would be mandatory or optional.\(^100\) However within each subset of mandatory or optional arbitration, over half (n=13 or 3, respectively) of those clauses provided no means by which the user may obtain more information on arbitration.\(^101\) Fourteen arbitral clauses instructed the user to review

\(^99\) Id. (providing an example).

\(^100\) There is room for the argument that some of the sampled clauses were indefinite and did not in fact advise the user whether arbitration would be mandatory or optional. For example, LinkedIn provides that “[f]or any claim . . . where the total amount of the award sought is less than $10,000, the party requesting relief may elect to resolve the dispute . . . through binding non-appearance-based arbitration.” User Agreement, LINKEDIN, (Sept. 12, 2013), http://www.LinkedIn.com/legal/user-agreement?trk=hb_ft_userag. In this case, where the terms of service are silent in regards to claims of at least $10,000 in value, one may argue that the user is not advised as to whether arbitration of those greater claims would be mandatory or optional. A more reasonable interpretation is one that views those larger claims as falling outside of the scope of the clause. Thus, the user is advised as to whether the proceeding is mandatory or optional in regards to all disputes in fact covered by the arbitration agreement.

\(^101\) See infra Table Thirteen.
the AAA’s website for additional information on arbitration. Apart from the AAA, sites provided users with no other sources that would assist the user in finding out more information on arbitration proceedings.

Table Thirteen: Access to Information Regarding ADR Program

<table>
<thead>
<tr>
<th>Effort to Provide User With Information on Arbitration</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory Arbitration; No Means Given to Find More Information</td>
<td>13</td>
<td>43.33</td>
</tr>
<tr>
<td>Mandatory Arbitration; AAA Website and/or Telephone</td>
<td>12</td>
<td>40.00</td>
</tr>
<tr>
<td>Optional Arbitration; No Means Given to Find More Information</td>
<td>3</td>
<td>10.00</td>
</tr>
<tr>
<td>Optional Arbitration; AAA Website</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>30</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

N. Finding #14: A Majority of Clauses Do Not Explain How to Initiate Arbitral Proceedings

Table Fourteen indicates that seventy percent (n=21) of arbitration clauses did not address how the parties would go about initiating arbitral proceedings. However, five of these clauses did provide the user with the AAA’s website, affording the user an opportunity through which he or she may conduct research and learn on his or her own how to initiate proceedings. Less than one-quarter (n=5) of these clauses, not stating how to initiate arbitral proceedings, at least informed the user how to go about initiating a claim against the website.

102 Id.
103 See infra Table Thirteen.
104 Id. A user may initiate an informal claim against a site by filing a grievance with the site itself but not go so far as to initiate formal arbitral proceedings. These clauses explained how to proceed in just the former case.
Table Fourteen: Exercising the “Option” to Arbitrate

<table>
<thead>
<tr>
<th>Clause Coverage of Initiation of Claims and Proceedings</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did Not Address Initiation of Claims or Proceedings</td>
<td>16</td>
<td>53.33</td>
</tr>
<tr>
<td>Explained How to Initiate Arbitration Proceedings</td>
<td>9</td>
<td>30.00</td>
</tr>
<tr>
<td>Explained How to Raise Claims Against Website</td>
<td>5</td>
<td>16.67</td>
</tr>
<tr>
<td>Total:</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

O. Finding #15: Two-Fifths of Arbitration Clauses Did Not Address The Costs of Arbitration

Forty percent (n=12) of arbitration clauses in the sample did not address the parties’ responsibilities for the costs of proceedings. Of the provisions that did mention costs, Table Fifteen indicates that two thirds (n=12) of these clauses mentioned that payment of costs would be governed by AAA rules. 105 No arbitration agreement provided any estimated costs of arbitration. However, eight terms of service agreements did provide that the site would cover or reimburse the costs of arbitration for certain non-frivolous claims; while five sites agreed to this for claims under $10,000 in value, an additional three sites agreed to this for claims up to $75,000 in value. 106 Two arbitration clauses unequivocally required the user bear the costs of arbitration. 107

105 See, e.g., Conditions of Use, supra note 73 (“Payment of all filing, administration and arbitrator fees will be governed by the AAA’s rules.”).

106 Compare id. (stating that costs for claims under $10,000 will be reimbursed by Amazon unless determined by the arbitrator to be frivolous), with Microsoft Services Agreement, § 10.6.1 “Disputes involving $75,000 or less,” MICROSOFT, http://windows.microsoft.com/en-us/windows/microsoft-services-agreement (last updated June 11, 2014) (stating that costs for claims under $75,000 will be reimbursed by Microsoft).

107 See, e.g. Online Access Agreement, § 20(F), WELLS FARGO, https://online.wellsfargo.com/common/html/wibdisc.html#DisputeResolutionProgram (last updated Sept. 17, 2013) (“Unless inconsistent with applicable law, each of us shall bear the expense of our own attorney, expert and witness fees, regardless of which of us prevails in the arbitration.”).
Table Fifteen: Clauses Addressing the Costs of Arbitrating a Dispute

<table>
<thead>
<tr>
<th>Who Bears Costs of Arbitrating the Dispute</th>
<th>Frequency:</th>
<th>Percent:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs Not Addressed</td>
<td>12</td>
<td>40.00</td>
</tr>
<tr>
<td>Filing and Administrative Fees Governed by AAA Rules</td>
<td>12</td>
<td>40.00</td>
</tr>
<tr>
<td>Website May Cover or Reimburse Costs; no mention of AAA Rules</td>
<td>3</td>
<td>10.00</td>
</tr>
<tr>
<td>User Bears Costs</td>
<td>2</td>
<td>6.67</td>
</tr>
<tr>
<td>Non-Prevailing Party Ultimately Bears Costs</td>
<td>1</td>
<td>3.33</td>
</tr>
<tr>
<td>Total:</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

P. Finding #16: Users May Be Explicitly Required to Bring Claims Within a Short Period

Thirty percent (n=9) of arbitration clauses imposed a limitation on the time period that a user would have to bring an action against the site. Eight clauses required users to bring claims against the sites within one year, and an additional site only gave its users six months to act.\(^{108}\)

IV. Approaches to Arbitration Clauses In the United States and European Union

Any global online business that is considering incorporating an arbitration clause into its terms of service must consider the relevant laws and private-actor efforts that will influence the extent to which it will be able to enforce its arbitral clause. This section provides the reader with a summary of the varying public and private approaches that sites, viewed in the U.S. and in Europe, should contemplate when drafting their arbitral clauses. The following section then examines the above-mentioned study findings in light of the legal efforts summarized below.

\(^{108}\) See e.g. Microsoft Services Agreement, § 10.8, MICROSOFT, http://windows.microsoft.com/en-us/windows/microsoft-services-agreement (last updated June 11, 2014) (stating that claims or disputes not filed within one year of when a claim or notice of claim could have been filed are permanently barred).
A. Enforceability of Arbitration Clauses in the United States

1. Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA)\(^{109}\) “in 1925 in response to widespread judicial hostility to arbitration agreements.”\(^ {110}\) FAA § 2 provides that “a written provision . . . involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”\(^ {111}\) When a party to a contract refuses to submit to arbitration in accordance with an agreement to arbitrate, FAA § 4 allows its opponent to seek a court order directing the parties to proceed to arbitration.\(^ {112}\) Since the FAA is a federal statute, both state and federal courts will find that it pre-empts conflicting state laws.\(^ {113}\)

2. Supreme Court Jurisprudence

Currently the Supreme Court broadly construes the Commerce power,\(^ {114}\) subjecting arbitration clauses to the FAA not only in business-to-business contracts but also in consumer contracts.\(^ {115}\) The

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\(^{110}\) AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

\(^{111}\) 9 U.S.C. § 2 (2012). FAA § 2 reflects a liberal federal policy in favor of arbitration. See Concepcion, 131 S. Ct. at 1745–46 (noting that courts must place arbitration agreements on equal footing with other contracts and enforce them according to their terms, except when invalid due to general contract defenses).


\(^{114}\) See U.S. CONST. Art. I, § 8, cl. 3

\(^{115}\) See Drahozal et al., supra note 3. While it appears that the FAA was meant to apply to business-to-business contracts, the Court interpreted the words “involving commerce” in FAA §2 as reaching the limits on Congress’ commerce clause power. See Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273–74, 282 (1995) (holding that the FAA made enforceable a written arbitration provision in contract between homeowner and termite control company, even where it was argued that the parties contemplated a transaction primarily local and not substantially interstate in nature); see also Rustad et al., supra note 17, at 675 (arguing that the Supreme Court’s expanding interpretation of matters covered by the continued . . .
Court has undertaken a series of decisions in the past few decades, through which it has used the FAA to enforce arbitration clauses, even where they contain class action waivers in consumer contracts. In fact, in the past four terms the Court has on six occasions ruled in favor of the enforceability of arbitration clauses.

In two of its most recent decisions, the Court has worked towards clearing the path of those businesses considering the use of one-sided arbitration clauses in their contracts. In *AT&T Mobility v. Concepcion* the Court held that the FAA preempted California law, declaring unconscionable and thus unenforceable class action waivers in arbitration agreements incorporated into standard, pre-printed wireless consumer contracts. In *American Express v. Italian Colors*, the Court rejected the argument that an arbitration agreement between a major credit card company and a contracting merchant should be unenforceable, where the cost of proving a claim would so exceed the potential recovery that no right-minded plaintiff would pursue the matter. It appears that in case after case, the Court is affording businesses the opportunity to “routinely include these one-sided clauses in settings that policy-makers and corporations have previously never dreamed possible.”

FAA is affording businesses the opportunity to “routinely include these one-sided clauses in settings that policy-makers and corporations have previously never dreamed possible”).

116 See Rustad et al., *supra* note 17, at 676–79 (outlining recent Supreme Court jurisprudence that has “paved the way for arbitration agreements to be included in consumer transactions”); *see also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (noting that consistent with the FAA, courts must rigorously enforce arbitration agreements according to their terms, including terms choosing an arbitrator and rules, even where claims allege violations of federal statutes).


118 See id.


120 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752–53 (2011) (reasoning that enforcement of arbitral clauses according to stated terms was necessary to place arbitration agreements on equal footing with other contracts).

121 133 S. Ct. (2013).

122 *Italian Colors*, 133 S. Ct. at 2310–11 (reasoning that even though it may not be worth plaintiff’s expense in pursuing a remedy, such does not mean an arbitral agreement has eliminated the right to pursue that remedy). The argument rejected by the *Italian Colors* Court is called the “effective vindication rule.” See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc., 473 U.S. 614, 637 (1985) (upholding arbitral clause in an international sales transaction while noting in dicta that the Court was bound to affect the parties’ intentions “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum”). Simply put, the *Italian Colors* Court was willing to enforce an agreement where there would continued . . .
will continue to apply the FAA and to enforce arbitration agreements according to their terms, whether or not they lie in consumer or business contracts, are formed where there is a disparity in the parties’ bargaining power, or come in standard one-sided terms.\textsuperscript{123} Defenses singling out arbitration clauses from other types of contracts on substantive grounds will remain to be rejected, while agreements to arbitrate may still be invalidated at the procedural level by “generally applicable contract defenses, such as fraud, duress, or unconscionability.”\textsuperscript{124}

3. Consumer Due Process Protocol

In light of the fact that U.S. statutory and case law presently favors the enforcement of arbitration agreements, private parties are seeking to promote an equitable solution to arbitration involving disadvantaged individuals. The AAA has adopted the Consumer Due Process Protocol (“Protocol”), developed by the National Consumer Disputes Advisory Committee, in an effort to promote “fundamental fairness.”\textsuperscript{125} The AAA will not administer the dispute resolution proceedings if it determines that the arbitral clause does not “substantially and materially” comply with the fairness standards contained within the Protocol.\textsuperscript{126} In making this determination, the

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\textsuperscript{124} Concepcion, 131 S. Ct. at 1746; see Mills, supra note 117 (noting that since the holding of \textit{Italian Colors} concerning agreements between businesses in the financial services industry also applies to consumer contracts as well, the decisions of \textit{Concepcion} and \textit{Italian Colors} implicitly combine to constrain businesses and consumers alike from challenging properly formed arbitration agreements).


\textsuperscript{126} AAA Review of Consumer Clauses, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/aaa/faces/s/sitesearch?q=review%20of%20consumer%20clause&afrLoop=2780344782988&afrWindowMode=0&afrWindowId=hxd721vp_187%40%3FafrWindowId%3Dhxd721vp_187%26afrLoop%3D2780344782988%26q%3Dreview%20of%20consumer%20clauses%26afrWindowMode%3D0%26 continued’’

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AAA refers to the Protocol’s fifteen listed Principles and their respective commentaries.\textsuperscript{127}

Principle 2 states that consumers should be provided with “full and accurate information regarding Consumer ADR Programs.”\textsuperscript{128} It requires reasonable measures, striving to provide a consumer with the information necessary for effective participation once a dispute arises, that include (1) clear and adequate notice regarding the ADR provisions, including an indication of whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain information regarding the dispute resolution program.\textsuperscript{129}

Principle 5 indicates that arbitral agreements should “make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.”\textsuperscript{130} The AAA recognizes that consumer disputes, well suited to judicial small claims procedures, often involve small amounts of money.\textsuperscript{131}

Principle 6 directs that the dispute resolution program that the site chooses be of reasonable cost to consumers and that “[i]n some cases, this may require the [site] to subsidize the process.”\textsuperscript{132} While the AAA rejected the establishment of a specific requirement that the business pay the costs of mandated arbitration procedures, it did conclude that the business should ensure the consumer “a basic minimum arbitration procedure appropriate to the circumstances.”\textsuperscript{133}

\textsuperscript{127}Id.

\textsuperscript{128}Consumer Due Process Protocol, supra note 125, at Principle 2 (noting that “Consumers should have access to all information necessary for effective participation in ADR.”).

\textsuperscript{129}Id.

\textsuperscript{130}Id. at Principle 5.

\textsuperscript{131}Id. at Principle 5, cmt. (noting that “access to small claims tribunals is an important right of [c]onsumers which should not be waived by a pre-dispute ADR agreement”).

\textsuperscript{132}Id. at Principle 6 (recognizing the fundamental principle that a person should never be denied access to court due to an inability to pay court costs and noting that various private ADR tribunals have now begun to institute mechanisms to defray the expenses of proceedings).

\textsuperscript{133}Id. at Principle 6, cmt. (noting that in some cases the need to ensure reasonable costs for the consumer will require a provider of goods or services to subsidize the costs of mandated ADR proceedings). The AAA even included this practical suggestion: “In the event that an ADR procedure is mandated by the

\textit{continued . . .}
Principle 7 states that face-to-face arbitral proceedings should take place at a location that is “reasonably convenient to both parties.”\textsuperscript{134} While recognizing that courts honor agreements to arbitrate at a particular location absent certain contractual formation defenses such as fraud or undue influence, the AAA suggested that if the parties cannot specifically identify a convenient location in the clause, they should not determine location until after a dispute has arisen.\textsuperscript{135}

Principle 11 provides special provisions that are directed explicitly to agreements to arbitrate.\textsuperscript{136} It incorporates the requirements of Principles 2 and 5.\textsuperscript{137} It then adds that businesses drafting agreements should give “a clear statement of the means by which [c]onsumers may exercise the option (if any) to submit disputes to arbitration.”\textsuperscript{138} The AAA gives the practical suggestion that notice of the agreement to arbitrate and its basic consequences should be “conspicuous notice.”\textsuperscript{139} Sites viewed in the U.S. and considering the use of the AAA in arbitral proceedings must check whether their proposed arbitral terms comply with the Protocol Principles.

\textsuperscript{134} Id. at Principle 7 (observing that while some states have enacted laws placing geographical limitations on the locations chosen in arbitral agreements, such laws may be preempted by the FAA).

\textsuperscript{135} Id. at Principle 7, cmt. (noting that the Advisory Committee was amenable to continued . . . clauses providing for an agreed-upon process for independent determination of proceeding location if the parties fail to agree, while refusing to set arbitrary mileage limits or choices of near major cities).

\textsuperscript{136} Id. at Principle 11.

\textsuperscript{137} Id. at Principle 11. (stating that “[c]onsumers should be given a. clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character; b. reasonable access to information regarding the arbitration process . . . ; c. notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases . . .”).

\textsuperscript{138} Id.

\textsuperscript{139} Id. at Principle 11, Practical Suggestions.
B. Enforceability of Arbitration Clauses in the European Union

1. Directive on Unfair Terms in Consumer Contracts

The European Council Directive 93/13/EEC on unfair terms in consumer contracts ("Unfair Terms Directive") seeks to harmonize the Member States’ laws governing the terms in consumer contracts, while providing a framework for those laws to remove unfair terms. The Unfair Terms Directive applies to contractual terms between “consumers” and “sellers or suppliers.” Article 3(1) states that a term that “has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations . . . to the detriment of the consumer.” Article 3(3) incorporates an Annex to the Unfair Terms Directive that contains a non-exhaustive list of potential unfair terms. The Annex expressly states that terms that have the effect of hindering a consumer’s right to exercise any legal remedy, “particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,” may be regarded as unfair.

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141 See Council Directive 93/13 (noting that disparities in laws relating to contract terms between consumers and sellers or suppliers of goods and services resulted in distortions of competition among Member States).
142 Id. at art. 1(1). A consumer is “any natural person who . . . is acting for purposes which are outside of his trade, business or profession.” Id. at art. 2(b). A seller or supplier is “any natural or legal person who . . . is acting for purposes relating to his trade, business or profession.” Id. at art. 2(c).
143 Id. at art. 3(1). Article 3(2) notes that a term is regarded as “not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract”. Id. at art. 3(2). The “unfairness” of a term is assessed at the time of completion of the contract in light of all of the circumstances surrounding completion. Id. at art. 4(1). In the case of ambiguity, terms are interpreted to have the most favorable meaning for the consumer. Id. at art. 5. The assessment of “good faith” requires particular consideration of the parties’ relative bargaining positions. Id. at pmbl. (noting that seller or supplier meets the requirement of “good faith” where he or she deals fairly and equitably with the [consumer]).
144 Id. at art. 3(3).
145 Id.; id. at Annex 1. While it is unclear whether the phrase “arbitration not covered by legal provisions” is meant to proscribe arbitral proceedings completely unregulated or only partially unregulated by courts, statements by the EU reflect the adoption of a bar on all mandatory arbitration in consumer contracts. See Drahozal, supra note 3, at 365–66. See also Zdenek Novy, Arbitration Clause as Unfair
2. Implementation of Directive on UnfairTerms by Member States

Article 6(1) of the Unfair Terms Directive requires the Member States, under their respective national laws, to render unenforceable any terms unfair to a consumer. Article 7(1) mandates that the Member States also utilize “adequate and effective means to prevent the continued use of unfair terms.” The Member States’ approach to assessing the unfairness of standard-form arbitration clauses vary. While some countries regard these clauses as per se unfair and thus unenforceable, others assess validity against certain factors under the facts and circumstances of each case. This variation in approaches is due to the fact that the Unfair Terms Directive is on “minimum harmonization,” where Member States are always free to enact more protective laws for consumers. Another explanation for these


146 Council Directive 93/13, supra note 140, at art. 6(1).
147 Id. at art. 7(1).
149 Id. (noting that while German law assesses arbitral clauses in consumer contracts against the distance of the arbitral tribunal from residence of consumer and costs of arbitration to consumers, Austrian law prohibits all arbitration clauses contained in standard terms).
150 See Novy, supra note 145, at 4.
varying approaches to enforceability is that some of the European countries have had issues in implementing the Unfair Terms Directive.\textsuperscript{151}

3. Enforcement of Directive on Unfair Terms by European Court of Justice

The European Court of Justice (“ECJ”) interprets the requirements set forth in the Unfair Terms Directive, but it is ultimately up to a Member State’s national court to decide whether a particular disputed term is unfair and unenforceable.\textsuperscript{152} Moreover in\textit{ Mostaza Claro v. Centro Móvil Milenium SL}\textsuperscript{153}, the ECJ held that a national court in an action for an annulment of an arbitral award must determine\textit{sua sponte} whether the arbitration agreement in a mobile telephone contract contained an unfair term and if so must void the agreement, even when the consumer-party did not plead unfairness in the arbitral proceedings.\textsuperscript{154} This decision imposes an obligation on national courts

\textsuperscript{151} See id. at 18–21 (arguing that the Czech Republic has not properly implemented the Unfair Terms Directive, where not only have Czech legislators failed to adopt the entire indicative list contained in the Annex to the Unfair Terms Directive, but also Czech courts are not even conscious that arbitration clauses may be unfair terms); see also Guido Alpa, A Glance at Unfair Terms in Italy and the United Kingdom (What an Italian Lawyer can Learn from the English Experience), 15 EUR. BUS. L. REV. 1123, 1128 (2004) (noting that some of the early difficulties in implementing the Unfair Terms Directive in Italy were attributable to an incorrect translation of the Directive).


\textsuperscript{154} Id. at para. 39 (Oct. 26, 2006), available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=72541&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=393847. In\textit{ Mostaza Claro}, the consumer-defendant did not object to the validity of the arbitration agreement during arbitral proceedings, and only after the issuance of an award did she argue that the continued . . .
that is necessary to realize the goals of the Unfair Terms Directive.\textsuperscript{155} Member States’ national courts must consider whether arbitral clauses are unenforceable, unfair contract terms, whether or not a consumer challenges them pursuant to the Unfair Terms Directive.\textsuperscript{156}

Sites viewed in EU countries and considering the incorporation of an arbitration clause into the terms of service must check whether their proposed arbitral terms would be considered unfair under relevant Member States’ laws.

V. ANALYSIS OF THE STUDY FINDINGS

A. Many Arbitration Clauses Used by the Top Sites Raise Concerns For Fundamental Fairness

This study’s results highlight the concerns that legislatures, courts and private actors should have when considering the enforceability of arbitration clauses contained deep within site terms of service agreements. All but one (n=29) of the clauses sampled gave the sites the power to force arbitral proceedings upon users in certain disputes.\textsuperscript{157} One-third (n=10) of the clauses stated that proceedings were to take place at a pre-determined location, without regard to the user’s location or convenience.\textsuperscript{158} Almost half (n=14) of the clauses did not mention small claims, an omission that leads reading users to infer that they do not retain the right to seek redress before small claims courts.\textsuperscript{159} Over two-thirds (n=16) of sites did not advise users

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\textsuperscript{155} See id. at para. 37; see also Novy, supra note 145, at 9–10 (noting that national courts would not be able to balance interests of consumers and businesses without being able to annul arbitration awards not challenged during arbitration proceedings).

\textsuperscript{156} See Sein, supra note 148, at 54 (observing that while the “European Union legislator does not have general competence to regulate the civil proceedings of the Member States,” judgments of ECJ have considerable impact on those States’ civil proceedings).

\textsuperscript{157} See infra Part II, Finding #2. Eighty-three percent (n=25) of the arbitration clauses explicitly stated that arbitration would be mandatory. Id. Four of the five remaining clauses provided the site with an option to elect arbitration, in effect binding on the user and thus mandatory in nature. Id. Only one clause provided that the “complainant” might elect for arbitration. Id. If the site is seeking redress, arbitration is again binding on the user and in effect mandatory in nature. Only when the user is the complainant would arbitration truly be elective for the user.

\textsuperscript{158} See infra Part II, Finding #5.

\textsuperscript{159} See infra Part II, Finding #12.
of any rights to have costs of proceedings covered by the sites.\textsuperscript{160} Forty percent (n=12) of the sites did not even mention that users would be waiving their rights to a jury trial, a judge, and modern liberal discovery rules or that there would be limited grounds to appeal an arbitral award.\textsuperscript{161} Five clauses purported to bind users to commercial arbitration rules, without mentioning whether a user’s status as a consumer would result in the application of a different set of rules and or procedures.\textsuperscript{162} While not all of the arbitration clauses were offensive on all of these grounds, a good portion of these clauses contained enough of the above-listed characteristics to raise concerns for fundamental fairness.

For example, CBSSports.com subjects its users to the following dispute resolution process:

\begin{quote}
We may elect to resolve any controversy or claim arising out of or relating to these Terms or the Services by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. Unless we establish a different location, arbitration hearings will be held in San Francisco, California. The arbitrator’s award will be binding and may be entered as a judgment in any court of competent jurisdiction.\textsuperscript{163}
\end{quote}

This arbitral clause, appearing ninety-two percent of the way through the terms of service, grants the site, but not the user, the right to have a matter brought before an arbitrator of the site’s choosing.\textsuperscript{164} The site purportedly advises the user that arbitration is to be governed by commercial rules.\textsuperscript{165} Proceedings are to be conducted in California, unless the site chooses to arbitrate in another location; and there is no consideration of the user’s residence or convenience.\textsuperscript{166} The site does not advise the consumer as to whether or not the parties retain the right to avail themselves of proceedings in a small claims court. It also does not advise the consumer whether it may require the user to arbitrate in-person. The clause makes no effort to explain the consequences of a user’s submission to arbitration, nor does it provide the user with any means to obtain additional information on arbitral proceedings. The

\textsuperscript{160} See infra Part II, Finding #15.
\textsuperscript{161} See infra Part II, Finding #10.
\textsuperscript{162} See infra Part II, Finding #8.
\textsuperscript{163} CBS Interactive, supra note 56. (referring to site as “we” as opposed to both of the contracting parties).
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
clause states nothing about the costs of arbitration. A user may never even notice that it could be subject to arbitral proceedings, where this clause appears at the end of the terms of service in the same ordinary font as the rest of the agreement and where there is no language at the top of the terms of service calling the user’s attention to the presence of the clause. This site does not give the user adequate information to understand the significance of the agreement to arbitrate, and the terms that do lie within these mere sixty-nine words are all in favor of the site and make no concessions to the user. Despite the problematic provisions that sites employ for arbitration clauses within their terms of service, the U.S. Supreme Court’s current jurisprudence affords businesses the opportunity to continue to employ these terms. Over seventy-six percent (n=23) of the sampled arbitration clauses forced users to waive their rights to class action proceedings and required the parties to arbitrate on an individual basis. These sites can now remain confident that these terms will not be invalidated on the basis that it would be unconscionable for users to agree to arbitrate individually, even where it would be cost-prohibitive to seek redress for small claims. When state laws invalidate these terms of service on grounds of “general principle[s] of unconscionability or public-policy disapproval of exculpatory agreements,” the FAA will continue to preempt those state laws and render enforceable agreements to arbitrate.

B. Why These Sites Might Fare Differently if They Are Viewed by European Users?

Sites considering whether to incorporate an arbitration clause within the terms of service must not rely blindly on the liberal federal policy favoring arbitration. Contrary to the U.S. approach of enforcing arbitration clauses pursuant to the broad mandate of the FAA, European courts in the Member States implementing the Unfair Terms Directive must consider the “unfairness” of these clauses in consumer contracts. Thus, sites accessed by both U.S. and European users must consider whether their prescribed dispute resolution mechanisms are fair. Many if not all of the sampled arbitral clauses would be subject to the Unfair Terms Directive, if the sites employing them directed their

167 See supra Part II, Finding #11.
169 Id. at 1747.
170 See Case C-168/05 Elisa María Mostaza Claro, at para. 33.
activities to users in Member States. The enforceability of the sampled clauses depends upon the particular Member State’s approach to assessing the “unfairness” of the specific terms at issue. While some European countries would deem the arbitration clauses contained in the sampled, non-negotiated terms of service to be per se unfair terms and consequently unenforceable, other countries would use a more in-depth inquiry to determine whether the terms have resulted in a significant imbalance in the parties’ rights and obligations to the detriment of the consumer. This study’s results highlight the concerns that would be raised by the courts in this latter category when faced with a site seeking enforcement of an arbitral clause contained in its terms of service. With regard to the terms of service agreements that contain arbitration clauses sharing some of the above-described questionable attributes, they operate to alter the rights and obligations of sites and users. The question of whether or not this alteration constitutes a significant imbalance to the detriment of the user will depend upon the particular terms in the clause at issue. This study’s findings suggest that a good portion of arbitral clauses used by the top sites in the U.S. would run afoul of Member States’ laws implementing the Unfair Terms Directive.

171 While this part of the analysis applies characteristics of the sampled arbitral clauses to the Unfair Terms Directive, I acknowledge that the Unfair Terms Directive will not govern the sampled sites that are not in fact viewed in the EU. Further, the Unfair Terms Directive would not apply in the case of any users who are acting within their trade, business or profession. See Council Directive 93/13 at art. 1(1). However, given that more and more individuals as consumers are using the Internet on a daily basis to fulfill their needs, it is worth considering how the sites sampled would fare under the Unfair Terms Directive. See Nearly All Consumers (97%) Now Use Online Media to Shop Locally, According to BIA/Kelsey and ConStat, supra note 5.

172 See supra notes 146–51 and accompanying text.

173 See id.

174 See supra part IV. B.

175 See id.

176 It is unquestionable that the terms in an arbitration clause akin to that used by CBSSports.com would constitute a significant imbalance in the rights and obligations of the parties to the detriment of the user. See supra part IV. B. However, arbitral terms akin to those used by a site like Warrior Forum may be a closer call. See Terms of Use Agreement, WARRIOR FORUM, http://www.warriorforum.com/tos.html (last visited May 1, 2013) (stating that arbitration is to be elective by either party, proceedings are to be either in-person or non-appearance-based, location is to be based on consumer’s needs if AAA Consumer Rules so require, jury trial rights are explicitly waived, Supplementary Procedures for Consumer-Related Disputes are to be applicable, terms are to be in conspicuous text, the site is to pay for excessive costs of proceedings, and the AAA site is listed with more information on arbitral proceedings).
C. How does the Sample Fare in Light of the Consumer Due Process Protocol?

Although U.S. judges may have their hands tied to a greater extent than their European counterparts, this does not mean that sites can disregard U.S. private efforts to curb the unfairness in agreements to arbitrate between parties of differing bargaining power. Where a selected arbitral provider conditions the use of its services upon the satisfaction of private administrative standards, the site must be sure to design its arbitration clause so that it accounts for these standards. In light of the fact that over seventy-six percent (n=23) of sampled sites incorporated the rules of the AAA, the below discussion applies the sample findings to the Consumer Due Process Protocol. If the clauses choosing the AAA fail to meet these standards, the AAA has the discretion to refuse to arbitrate the claim. The analysis below leads one to question whether the sampled sites have met the AAA’s standard of administrative review, “substantial and material compliance” with the Protocol.

1. At Least Half of the Clauses Sampled Do Not Comply with Principle 2

Over half of the sampled arbitration clauses did not comply with the minimum requirements set forth explicitly by Principle 2. Recall that compliance with this Principle would require at a minimum not only a statement indicating whether arbitration is mandatory or optional but also means by which a consumer may obtain additional information on arbitration. All sampled clauses at least indicated

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177 See supra part IV.A.2 and note 124.
178 See supra Part II, Finding #8 and note 80.
179 As a practical matter, one may question the likelihood that an arbitration provider paid to administrate claims would refuse to hear the matter. See Sein, supra note 148, at 56 (noting serious doubts in independence and neutrality of arbitrators having personal interest in conducting proceedings and consequently disregarding voidness of clauses).
180 See supra part IV.A.2 and note 124.
181 See supra part IV.A.2 and notes 126–27. I say “at a minimum” because Principle 2, in addition to these two prongs, actually requires that sites provide users with full and accurate information about arbitration proceedings that is sufficient to enable users to effectively participate in proceedings. Id. The analysis in this section is limited to the two prongs that are necessary but not sufficient for compliance with Principle 2, because not only would it be conjecture to estimate how the AAA would administratively evaluate the compliance of each of these sites’ arbitral clauses under the myriad details of arbitral proceedings, but also a continued . . .
whether arbitration would be mandatory or optional. However, fifty-three percent (n=16) of the clauses did not provide the user with means by which he or she may obtain additional information on arbitration proceedings. The fourteen arbitral clauses that did provide such means all directed users to use the AAA website to obtain more information; sites pointed to no other sources of information on arbitration proceedings in their terms of service. At least a majority of the sampled arbitration clauses did not provide users with “full and accurate information” regarding arbitration, and the sites employing these clauses do not provide users access to all of the information necessary to participate effectively in the case of a dispute.

2. *Almost Half of the Clauses Sampled Do Not Comply with Principle 5*

Almost half of the sites incorporating arbitration clauses into their terms of service do not satisfy Principle 5, where only sixteen out of the thirty arbitration clauses sampled indicated that the parties retain the right to pursue small claims actions.

3. *Ambiguities With Respect to Costs of Proceedings May Protect the Clauses from Per Se Running Afoul of Principle 6*

While it is unclear what percentage of the sampled arbitration clauses *per se* run afoul of Principle 6, it was determined that forty-three percent (n=13) of clauses did not incorporate the AAA’s suggestions by which a site may fulfill the “principle of reasonable cost.” The Protocol did not adopt an explicit requirement that businesses pay the costs of mandatory arbitration proceedings on behalf of consumers. However, it did provide that the program should be of “reasonable cost” to the consumer. It is debatable whether the forty percent (n=12) of clauses not addressing costs, or even whether the additional twelve clauses stating that costs of procedures were to be governed by AAA rules, operate to deprive users of arbitral consideration properly limited to the two prongs is extensive enough to provide the reader with the main concern raised by the study findings, that over half of the top sites viewed in the U.S. *per se* do not comply with Principle 2.

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182 See supra Part II, Finding #2.
183 See supra Part II, Finding #13.
184 See supra part IV.A.2 and note 126.
185 See supra Part II, Finding #12. See also p.38.
186 See supra notes 130–31 and accompanying text.
187 See supra note 131.
proceedings at a “reasonable cost.” For now, one can note that fourteen terms of service agreements afforded the user means of arbitrating in other than in-person proceedings, and an additional three sites provided for circumstances in which the site may pay for some of the user’s responsibility for costs of the proceedings. This appears to be some effort on the sites’ part to meet the AAA’s suggestions. However, one must also note that two clauses unequivocally required the user to bear the costs of arbitral proceedings, appearing to impose potentially unreasonable, one-sided obligations on users regarding the costs of proceedings. Ten clauses required the parties to arbitrate in a fixed location, without regard to the user’s residence or convenience. Terms like these operate to increase the user’s expenses, leading to a cost-prohibitive method of dispute resolution that effectively leaves a reasonable user with no means or redress for nominal injuries.

4. Clauses Unequivocally Requiring Arbitration at a Fixed Location Violate Principle 7

More than one-quarter (n=8) of arbitration clauses did not follow the advice of Principle 7, which states that face-to-face arbitral proceedings should be at a location reasonably convenient to both parties. Specifically, of the clauses where the user may be subject to in-person proceedings, eight mandated that users arbitrate at a fixed location regardless of the user’s residence or convenience.

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188 Given that there is no explicit requirement that an agreement to arbitrate cover the responsibility for costs in a certain way, it is difficult to argue that these terms of service agreements constitute a per se violation of Protocol Principle 6. In fact, it may be appropriate to remain silent as to responsibility for costs, where a lot of information is unknown before a dispute has arisen, such as the specific location in which the proceedings would take place or whether proceedings will be in-person or non-appearance based. The reasonableness of the allocation of costs among the parties sometimes cannot be determined until after a dispute has arisen and more information on the proceedings becomes available to the parties. Also, it makes little sense to argue that mere incorporation of the AAA rules would run afoul of its own Consumer Due Process Protocol. See Costs of Arbitration (Including AAA Administrative Fees), American Arbitration Association, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=Latest Released (last visited Dec. 10, 2013) (providing framework in which consumers bear less of the burden of costs than businesses).

189 See supra Part II, Findings #4, #15.
190 See supra Part II, Finding #15.
191 See supra Part II, Finding #5.
192 See supra notes 132–33 and accompanying text.
193 Id.
remainder of the sites did not run afoul of this Principle, where fourteen arbitration clauses provided that proceedings would be located at a location based on the user’s convenience or residence, and six clauses did not even address proceeding location. 194

5. Clauses Tend to Fail to Satisfy Principle 11

Seventy-three percent (n=21) of the clauses sampled did not meet the minimum requirements of Principle 11, specifically designed to address agreements to arbitrate. Each of these twenty-one clauses failed to meet at least one of the requirements of Principles 2 or 5, both of which are incorporated into Principle 11, or failed to meet the additional requirement that agreements to arbitrate contain a clear statement explaining the means by which consumers may exercise the option to submit a dispute to arbitration. 195

These five conclusions lead one to question whether the sampled sites have met the AAA’s standard of administrative review, “substantial and material compliance” with the Protocol. The author submits that many of the sampled sites have designed clauses in violation of the Protocol, raising significant concerns about fundamental fairness.

VI. A SUGGESTION FOR CONGRESS

This empirical study confirms that the top sites viewed in the U.S. have designed arbitration clauses in their terms of service that raise concerns for fundamental fairness. Many of the arbitration clauses sampled did not comply with the minimum standards set forth by the Consumer Due Process Protocol, even though over seventy-six percent (n=23) of sampled sites incorporated the rules of the AAA. The U.S. Supreme Court’s jurisprudence in the past several terms reflects a willingness to liberally enforce clauses like these and affords businesses the opportunity to continue to employ like terms. 196 This is not surprising in light of the fact that not all agreements to arbitrate are unfair and that arbitration may be beneficial to both parties to a dispute. 197 U.S. businesses will continue to rely upon this judicial juggernaut at the expense of individuals. This study reveals that it is

194 See supra Table Seven.
195 See supra Table Fourteen.
196 See supra notes113–23 and accompanying text.
197 See supra note 12 and accompanying text. Many small and medium-sized businesses would be unable to operate if they were subject to litigation every time a customer filed a grievance.
apparent that private actor efforts to regulate the unfairness in arbitral clauses have not had enough of an impact on questionable arbitrability practices. Congress needs to enact federal legislation that is designed to minimize the harsh effects caused by widespread use of standardized and mandatory, predispute arbitration clauses.

Struggles for reform in the consumer, employment, and civil rights contexts inform us that there is not presently enough of a consensus in the U.S. for decision makers to flatly prohibit standardized predispute arbitration clauses. In 2011 members of Congress introduced the Arbitration Fairness Act of 2011, intended to amend the FAA so that predispute arbitration agreements are unenforceable in the context of consumer, employment or civil rights disputes. Although this bill arguably would have restored the rights of Internet users subject to arbitration clauses in site terms of service agreements, it did not make it past the committee stage. Senator Al Franken (D. Minnesota) has now introduced the Arbitration Fairness Act of 2013, a bill currently referred to the Senate Committee on the Judiciary and intended to have the same effect as its proposed predecessor. This author predicts that this bill will also not be approved.

Congress should enact legislation that is not as drastic as the Arbitration Fairness Act but that is still capable of reducing the harsh effects caused by widespread use of standardized and mandatory predispute arbitration clauses. Legislation completely banning predispute arbitration in the consumer, employee and civil rights contexts in the U.S. has been unsuccessful since at least 2005, and its intrusiveness on freedom to contract and the ability to shape a suitable dispute resolution process has attracted strong criticism. The author suggests that, as opposed to completely banning companies from incorporating predispute arbitration clauses into their terms of service,

198 See, e.g., infra notes 199–203, and accompanying text.
199 See Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 3 (2011), available at https://www.govtrack.us/congress/bills/112/s987; see also Rustad et al., supra note 17, at 680–81 (arguing that Arbitration Fairness Act of 2011 was just the kind of action needed to restore social media users’ rights).
202 See id. at § 3.
203 See George H. Friedman, The Arbitration Fairness Act of 2013: A Well-Intended but Potentially Dangerous Overreaction to a Legitimate Concern, SEC. ARB. COMMENTATOR, June 2013, at 1, available at http://www.proffriedman.com/files/SAC_AFA_Article_final_06-2013_.pdf (arguing that the Arbitration Fairness Act of 2013 is an extreme measure that would do more harm than good and advocating for less extreme reforms).
Congress enact legislation regulating these clauses so that their mode of presentation and substantive terms are in substantial conformity with key Principles set forth in the Consumer Due Process Protocol. Online sites should be required to explicitly inform users (1) that they retain the right to pursue relief in small claims courts where in-person arbitral proceedings would be cost-prohibitive, (2) that users give up their rights to a jury trial, administration of proceedings by a judge, and liberal discovery procedures, and (3) how to obtain more information on arbitration proceedings and how to initiate proceedings. If the site is to require face-to-face proceedings, it should either provide that proceedings are to take place at a location based on the user’s residence or convenience or leave the issue up to the mutual agreement of the parties after a dispute has arisen; otherwise, the user should have the option to elect non-appearance based proceedings. Arbitration clauses within terms of service agreements should be conspicuous. Sites should seek an affirmative manifestation of mutual assent for arbitration clauses that are combined with class action waivers, given the extent to which this combination operates to deprive aggrieved consumers of a practical remedy. Even if Congress enacted legislation containing not all but at least some combination of the above suggestions, such legislation would go a long way towards restoring the rights of redress of individual users.

VII. CONCLUSION

Every day more and more individuals and businesses enter into contractual relations on the Internet simply by a site's use of terms of service agreements. This Article has examined the findings of an empirical study of the sites most viewed by U.S. users. Sites of all sorts operate online and deal with consumer, employee and small business users. This study has shown that a vast portion of powerful online businesses includes arbitration clauses in site terms of service. Through this process, a site is not just selecting its preferred method of dispute resolution; it is altering the rights and liabilities between the site and its users. The empirical findings of this study, aimed at a sample of the site terms of service agreements having the greatest impact on U.S. users, prove that many sites are altering these parties’ rights and liabilities to the detriment of users, raising concerns over fundamental fairness. Every day users waive their rights to litigation without affirmatively manifesting assent to this waiver. This waiver is a problem that is most harmful for those users with small dollar claims.
When applying these top sites’ arbitral agreements to the public and private approaches to enforceability of arbitration clauses in the U.S. and in Europe, it is apparent that public and private actor efforts to regulate the unfairness in arbitral clauses have not had enough of an impact on questionable arbitrability practices. Global online businesses operating in both the U.S. and in Europe must consider the enforceability of their terms under the Unfair Terms Directive.\footnote{204}{See Council Directive 93/13, \textit{supra} note 138, at art. 6, 7.} Where sites incorporate arbitration clauses into their terms of service that select an arbitral administrator like the AAA, these sites must account for standards imposed by the administrators themselves.\footnote{205}{See \textit{Supplementary Procedures for the Resolution of Consumer-Related Disputes}, \textit{supra} note 80, at 4.} Sound business justifications aside, global online businesses must strive to maintain their integrity when it comes to dealing with weaker, individual users. These businesses must consider their terms in light of standards such as the Consumer Due Process Protocol because, ultimately, a dispute resolution process serves the most utility for all where sites design fair clauses with adequate notice to users.\footnote{206}{See \textit{Consumer Due Process Protocol: Statement of Principles of the National Consumer Dispute Advisory Committee}, \textit{supra} note 123.} This study has affirmed that many sites are not in compliance with these standards. For now it appears that the global sites most viewed in the U.S. are in need of a small push by Congress, a push that would minimize the harsh effects caused by the widespread use of standardized, predispute arbitration clauses. Only with further remedial action will we be able to help the lambs of the Internet keep out of the mouths of the lions.
## VIII. Appendix A: URLs to Terms of Service Agreements with Arbitration Clauses

<table>
<thead>
<tr>
<th>Ranking</th>
<th>Site Name</th>
<th>URL to Site’s Terms of Service Agreement</th>
</tr>
</thead>
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<td>5</td>
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</tr>
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</tr>
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