New York State Bar Association

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Memorandum by the Dispute Resolution Section

DRS #1 April, 2011

COMMENTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU IN CONNECTION WITH ITS REVIEW OF ARBITRATION FOR CONSUMER FINANCIAL PRODUCTS OR SERVICES

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

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INTRODUCTION

The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 1028 (2009) (the "Dodd-Frank Act") directed the Consumer Financial Protection Bureau (the "Bureau") to conduct a study and provide a report to Congress on the use of agreements providing for arbitration of future disputes between covered persons and consumers in connection with consumer financial products or services. The Act further authorized the Director of the Bureau to prohibit or impose conditions or limitations on such arbitration agreements by regulation if it would be in the public interest, for the protection of consumers, and consistent with the study performed.

This report is submitted by the Dispute Resolution Section of the New York State Bar Association to provide background and highlight issues the Bureau may wish to consider in fulfilling its charge. The report takes no position as to the appropriate treatment of consumer disputes, but strongly supports a thorough examination of dispute resolution processes to ensure that they are in the public interest and fair to consumers.

Consumer arbitration comes in the context of a long history of successful dispute resolution and is a dispute resolution process selected in many contractual agreements entered into by businesses in the United States. With the globalization of the world's economy and the increase in cross-border transactions and business affairs, international arbitration has become the preferred mechanism for dispute resolution in many international business transactions. The continued vibrancy and importance of arbitration for both domestic and international business is demonstrated by the modernization of arbitration laws, both domestically and around the world, to keep pace with current needs and best arbitration practices. In the past few years, a number of states across the United States have adopted the Revised Uniform Arbitration Act. France, Ireland, Hong Kong, Australia, and Ghana, among others, have enacted new arbitration laws in the past year. The issue is whether this successful process translates well in the context of consumer financial transactions. These comments are submitted to the Bureau in order to urge two central points.

First, it is urged that, in considering the "public interest," the Bureau review the broad range of impacts that any changes in this field may have. ***While not defined in the statute, assessment of the public interest should include consideration of fairness to consumers as well as the impact of any changes on price setting by affected businesses, potential impacts on the economy, the impact on the courts, and the impact on global competitiveness.***[1]

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[1] Among the questions that might be appropriate to consider are:

Are consumers better served in arbitration or in court?

Can arbitration with appropriate regulation better serve the public interest and protect consumers?

What is the direct economic impact of any delay in resolution occasioned by a shift from arbitration to litigation of consumer disputes on all of the dispute participants, both the consumer and the opposing party?

What is the indirect economic impact on society of a delay in resolution, if any, occasioned by a shift from arbitration to litigation of consumer disputes if it creates a greater burden upon and further slowdown in the courts?

What will be the impact on the courts if consumer arbitration is shifted to litigation? The number of cases involved in consumer disputes is not *de minimis*. In 2006, approximately 320,000 consumer debt collection cases were filed in New York City alone. This number is comparable to the total number of civil and criminal cases

Second, United States businesses should not, through any unintended consequences of actions by the Bureau, be precluded or limited in agreeing to resolve their business-to-business disputes through arbitration or from participating in arbitration unrelated to consumer interests. ***Thus*, *it is critical that the Bureau keep its focus and respond to the subject presented by Congress: the treatment of arbitration for consumers in the financial sector. The Bureau should take care that it does not negatively impact the broader context of business arbitrations outside the scope of the study and outside the scope of consumer arbitration issues altogether with expansive statements about arbitration or loosely phrased recommendations.***

I. THE LEGISLATIVE HISTORY OF THE DODD-FRANK ACT

The Dodd-Frank Act, born out of the financial crisis, had its origins in the Obama Administration's white paper on financial reform. The paper set forth reforms to support the following five "key objectives": (1) to promote robust supervision and regulation of financial firms; (2) to establish comprehensive regulations of financial markets; (3) to protect consumers and investors from financial abuse; (4) to provide the government with the tools it needs to manage financial crises; and (5) to raise international regulatory standards and improve international cooperation.[2] Under the third key objective, the report recommended the establishment of a single federal agency, the Consumer Financial Protection Agency ("CFPA"),

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filed in the federal trial courts nationwide that year. *See* THE URBAN JUSTICE CENTER, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 3 (Oct. 2007), *available at* www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf. Sixty percent of the 120,000 small claims cases filed in Massachusetts in 2005 were filed by debt collectors. In Cook County Circuit Court in Chicago, 119,000 cases against debtors were pending as of June 2008. *See* FEDERAL TRADE COMMISSION, *Collecting Consumer Debts: The Challenges of Change—A Workshop Report* iii (2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

Would a shift from arbitration to litigation cause an increase in costs for the providers of financial goods or services such that it would cause them to increase charges to consumers to cover the increased costs?

Will costs to the consumer of participating in the dispute resolution process be higher or lower? In considering this question regard may be given not only to the cost of the arbitration process itself, but also to the question of costs as compared to litigation: (a) whether attorneys, if the consumer is represented, ultimately charge more in litigation than in arbitration because a lengthier process may lead to more time devoted to the matter and because of the frequency with which motions and broad discovery are pursued in court actions; and (b) whether the need to take time off from work to attend to court proceedings causes greater economic hardship and costs to consumers than may be occasioned by an arbitration, which can be conducted on papers or by phone or other more flexible process. *See, e.g.*, Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence,* 41 U. MICH. J.L. REFORM 813 (2008).

Would a longer period of time to resolution of disputes require corporations to carry greater reserves for liabilities and increased litigation costs on their books for a considerably longer period of time, thus increasing the overall reserve requirement and making access to capital for growth and more jobs creation more difficult? Would it reduce the per share price of public companies to the detriment of stockholders?

Would eliminating arbitration for consumers in financial sector transactions increase costs for U.S. corporations and reduce their competitiveness in the global arena? Many sectors of commerce are now international. While many other countries do not have arbitration for consumer matters, as discussed below, they also do not have discovery or jury trials, both features which dramatically drive up the cost of participation in the court justice system in the U.S.

[2] *See* DEPARTMENT OF THE TREASURY, *Financial Regulatory Reform: A New Foundation* 3–4 (2009), *available at* http://www.treasury.gov/initiatives/wsr/Documents/FinalReport_web.pdf.

to protect "consumers in the financial products and services markets, except for investment products and services already regulated by the [Securities and Exchange Commission] or the [Commodity Futures Trading Commission.]"[3] The report further recommended that the CFPA be given the authority to regulate or ban mandatory arbitration clauses in specific contexts.[4] Specifically, it suggested that:

> The CFPA should be directed to gather information and study mandatory arbitration clauses in…financial services and products contracts to determine to what extent, and in what contexts, they promote fair adjudication and effective redress. If the CFPA determines that mandatory arbitration fails to achieve these goals, it should be required to establish conditions for fair arbitration or, if necessary, to ban mandatory arbitration clauses in particular contexts, such as mortgage loans.[5]

When the Dodd-Frank Act was introduced in the House, the CFBA was renamed the Consumer Financial Protection Bureau, and the Act contained two provisions which gave the Bureau and the SEC broad authority to ban pre-dispute arbitration clauses for consumers in designated contexts.

Following markup and various changes to the bill, the Act provides:

> **SEC. 1028. AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.**
>
> (a) STUDY AND REPORT.—The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.
>
> (b) FURTHER AUTHORITY.—The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).
>
> (c) LIMITATION.—The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.[6]

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[3] *Id.* at 55–56.
[4] *Id.* at 62–63.
[5] *Id.*
[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028, 124 Stat. 1376, (2010) (definitions for "covered person" and "consumer financial products or services" are provided in § 1002) [hereinafter the Dodd-Frank Act].

The Dodd-Frank Act also authorizes the Securities and Exchange Commission to engage in rulemaking to reaffirm or prohibit, or impose or not impose, conditions or limitations on the use of pre-dispute arbitration agreements with any customers or clients of any broker, dealer, or municipal securities dealer or investment adviser, arising under the securities laws or the rules of a self-regulatory organization, if the Commission finds it to be in the public interest and for the protection of investors.[7] The Act further includes provisions that ban pre-dispute arbitration agreements in a number of contexts, including mortgages, home equity loans, and whistle blowers reporting securities fraud or commodities fraud.

II. BACKGROUND ON ARBITRATION

Arbitration is a time-tested, cost-effective alternative to litigation. With roots dating back to ancient Egyptian and Roman times, references to arbitration in the U.S. are found in colonial records that show that individuals engaged in certain areas of commerce sought alternatives to judicial processes that were seen as expensive and slow. Arbitrators were usually non-lawyers with experience in the trade in which the dispute arose. Proceedings were short and informal. From these antecedents has emerged modern arbitration which runs the gamut from simple, low-stakes disputes to complex, high-stakes and sometimes cross-border or even investor-state disputes.

In all arbitrations, the dispute is submitted to an individual (or often in larger cases, three individuals sitting as a panel) for resolution. An arbitrator's conduct in the United States is guided by the Code of Ethics for Arbitrators in Commercial Disputes, which was developed by the American Bar Association and the American Arbitration Association.[8] While parties sometimes agree to arbitration after a dispute has already arisen, arbitration agreements are typically found in the original contract. Experience demonstrates that it is difficult for the parties to agree after the dispute arises. The arbitrator generally sets an expeditious schedule, suited for the matter in issue, for resolution of the dispute. Generally, unlike litigation, arbitration involves much less discovery and less dispositive motion practice allowing for a speedier process. Additionally, arbitrators do not usually adhere to the Rules of Evidence. The arbitrator considers the facts and the arguments presented at an in-person hearing, in a written submission, or in a format to which the parties have otherwise agreed, and renders a decision in the form of an award. The award is final and binding on the parties with only limited rights of appeal that generally do not go to the merits of a decision. An arbitral award can be confirmed in court and thereafter enforced like any other final judgment.

There are many factors that attract businesses to arbitration. Some of the principal advantages of arbitration include the ability to reduce time and costs, to tailor the arbitration process to suit the matter at issue, and the finality of the award. In many instances, with the cost of capital, the time value of money, and the paralysis that uncertainty can bring to businesses, the most important consideration in a commercial dispute is that it be completed

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[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921 (a), (b), 124 Stat. 1376 (2010).

[8] *See* AAA/ABA, *The Code of Ethics for Arbitrators in Commercial Disputes* (2004), *available at* www.abanet.org/dispute/commercial_disputes.pdf (last visited Mar. 24, 2011).

quickly. Control over the selection of the decision maker and the ability to select an arbitrator with special subject matter expertise is an important advantage for users. As business transactions have become increasingly complex, the sophistication of the decision maker has become more important. The privacy of the arbitration proceeding and ability to enter into confidentiality agreements can also be significant. The public's access to court filings and hearings and the more adversarial setting is not always a benefit, for example where trade secrets, the maintenance of important business relationships, or reputational risks are in issue.

Additional features are also attractive in international arbitrations. For example, arbitration permits the parties to choose neutral adjudicators and to avoid unfamiliar local courts that may be biased against nonresidents. The arbitrators can be selected for their expertise in more than one legal tradition and for their understanding and ability to harmonize cross-border cultural differences and conduct hearings in various languages or a common language. Moreover, the New York Convention, which has been ratified by over 140 nations, enables the enforceability of international arbitration agreements and awards across borders. In contrast, judgments of national courts are much more difficult, and often impossible to enforce abroad.

A feature that is attractive to many businesses and may be attractive to consumers as well is the flexibility of the arbitration process. Proceedings can be conducted more informally than in court. Conference calls and e-mail correspondence between the arbitrator and the parties can be utilized to obtain quick responses on issues as they arise and to streamline the process, ensuring the least expensive, least intrusive, and quickest proceedings. The arbitration hearing does not occur in a courtroom and is conducted in a setting less daunting than a courtroom. Evidence and argument can be presented by *pro se* litigants who will not get "tripped up" by the rules of evidence. Submissions can be made on papers alone. An arbitration can even be conducted entirely by telephone and e-mail at times convenient to the parties.

In a line of cases beginning with *Gilmer v. Interstate/Johnson Lane Corporation*,[9] the United States Supreme Court has made clear that within the context of the Federal Arbitration Act, "generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be-complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"[10]

III. Prior Studies of Arbitration for Consumers

While there have been many studies of consumer arbitration, there do not appear to be any studies addressing the question of when mandatory arbitration is or is not "in the public interest." Appendix A to this comment lists some of the leading studies that have been conducted addressing certain questions related to consumer arbitrations such as win rates, and cost and time factors. We respectfully refer the Bureau to the studies themselves to draw its own conclusions. The Federal Trade Commission ("FTC"), in its report on consumer debt

[9] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (citations omitted).
[10] *Id.* at 30.

collection, summarized the findings of many of these studies as well as of the testimony received at the FTC hearings.[11] In reviewing the findings, the Bureau should compare arbitration to litigation. Arbitration results alone without such a comparison signify nothing and cannot be the basis for evaluating the process as the challenges in certain contexts may be endemic to the nature of the disputes in question, creating problems in the context of both arbitration and litigation.[12]

IV. CONSUMER DEBT COLLECTION

The Dodd-Frank Act specifies a range of covered financial products and services, all of which must be part of the Bureau's study. The Bureau's conclusion as to arbitration for consumers may not lead to a single result, but may depend on the nature of the transaction. To date, the market segment that has garnered the most intensive study is consumer debt collection, undoubtedly due to the very large number of such cases and the perceived inequities in dispute resolution processes of such claims. The FTC conducted an extensive review of the issue that merits attention.

The FTC has recognized the importance of both the extension of credit and of the collection of debts:

> [C]onsumer credit is a critical component of today's economy. Credit allows consumers to purchase goods and services for which they are unable or unwilling to pay the entire cost at the time of purchase. By extending credit, however, creditors take the risk that consumers will not repay all or part of the amount they owe. If consumers do not pay their debts, creditors may become less willing to lend money to consumers, or may increase the cost of borrowing money. Creditors typically use collectors to try to recover on debts to decrease the amount of their lost revenues. Debt collection thus helps keep credit available and its cost as low as possible.[13]

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[11] FEDERAL TRADE COMMISSION, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 37–71 (Jul. 2010), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf [hereinafter *Repairing a Broken System*].

[12] For example, one study found that in California, over a 4-year period, in more than 19,000 credit card cases heard by arbitrators, the credit card company prevailed 94 percent of the time suggesting a bias in favor of the claimants. *See* PUBLIC CITIZEN, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf. A subsequent study reported that in court programs, creditors won relief in 98-100 percent of the debt collection cases that went to judgment. Meanwhile, in the American Arbitration Association debt collection cases, the rates were 97.1 percent for the debt collection program run by the AAA and 86.2 percent in the individual AAA debt collection cases. In a significant portion of the cases, both in court and in arbitration, the consumer defaulted. *See* Searle Center on Law, Regulation and Economic Growth, *An Empirical Study of AAA Consumer Arbitrations* (Mar. 2009) (hereinafter *Searle Consumer Arbitrations*); Searle Center on Law, Regulation and Economic Growth, *Creditor Claims in Arbitration and in Court, Interim Report No. 1*, 27 (Nov. 2009) (hereinafter *Searle Interim Report*).

[13] FEDERAL TRADE COMMISSION, *Collecting Consumer Debts: The Challenges of Change—A Workshop Report* iii (2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf [hereinafter *Challenges of Change*].

The FTC started its effort by convening a public workshop in 2007 to evaluate the need for changes in the debt collection system, including the Fair Debt Collection Practices Act, to protect consumers. Based on the workshop record and its experience, the Commission concluded that the debt collection legal system needed to be reformed and modernized to reflect changes in consumer debt, the debt collection industry, and technology. Among the concerns expressed were whether: (1) given the current volume of state court debt collection lawsuits, some of the cases filed lack a sufficient evidentiary basis; (2) procedural aspects of such lawsuits achieved the appropriate balance in protecting the interests of consumers and debt collectors; and (3) the arbitration process adequately addresses consumer interests and is sufficiently transparent.[14]

The FTC followed up with an extensive study and hearings on the issue of consumer debt collection, and concluded "that neither litigation nor arbitration currently provides adequate protection for consumers. The system for resolving disputes about consumer debts is broken."[15] To fix the system, the FTC found that federal and state governments, the debt collection industry, and other stakeholders should make a variety of significant reforms in both litigation and arbitration so that the system is both efficient and fair.

With respect to litigation, the FTC concluded that:

> States should consider adopting measures to make it more likely that consumers will defend in litigation.
>
> States should require collectors to include more information about the debt in their complaints.
>
> States should take steps to make it less likely that collectors will sue on time-barred debt and that consumers will unknowingly waive statute of limitations defenses available to them.
>
> Federal and state laws should be changed to prevent the freezing of a specified amount in a bank account into which a consumer has deposited funds that are exempt from garnishment.

With respect to arbitration, the FTC concluded that:

> Consumers should be given meaningful choice about arbitration. Elaborating on this point, the FTC stated that "'meaningful choice'… does not necessitate that creditors in their consumer contracts offer an alternative to arbitration, such as litigation. Consumers may exercise meaningful choice to arbitrate by refraining from contracting with a creditor, so long as other conditions for meaningful choice and fair process discussed in the report are met."[16]
>
> Arbitration forums and arbitrators should eliminate bias and the appearance of bias.
>
> Arbitration forums should conduct proceedings in a manner which makes it more likely that consumers will participate.

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[14] *Id.*
[15] *Repairing a Broken System*, *supra* note 11, at I.
[16] *Id.* at n.192.

Arbitration forums should require that awards contain more information about how the case was decided and how the award amount was calculated.

Arbitration forums should make their processes and results more transparent.

The Federal Trade Commission reviewed the many studies that have been conducted to assess the fairness and efficiency of arbitration for consumer disputes.[17] The Commission concluded that:

> the private sector should try to develop debt collection arbitration standards, promote compliance with these standards and vigorously enforce them. If the private sector cannot or will not take the action needed, then either the government should develop and enforce such standards or Congress should prohibit debt collection arbitration entirely and have these matters resolved in the public court system.[18]

V. THE U.S. COURTS' TREATMENT OF CONSUMER ARBITRATION AGREEMENTS

In the United States, case law has developed to protect consumers while permitting the economic efficiency that comes from the use of standard form pre-dispute arbitration agreements. In the United States, pre-dispute arbitration agreements between businesses and consumers may be valid even if they are contained in contracts of adhesion whose terms are not subject to negotiation. Consumers are protected against unfair arbitration agreements by the unconscionability doctrine, which is being applied with regularity by the courts in a rapidly developing body of jurisprudence. Indeed, the Supreme Court has before it this 2010 Term a case that squarely presents an issue of unconscionability in an arbitration agreement involving a consumer contract.[19]

In many jurisdictions around the world, pre-dispute arbitration agreements in consumer agreements are void unless they are individually negotiated.[20] For example, the European Union issued a directive requiring member states to provide under national law that unfair terms in consumer transactions not individually negotiated are not binding on the consumer.[21] In its implementing legislation, the English Arbitration Act of 1996 provides that an arbitration agreement with a consumer "is unfair…so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order." The amount specified by the requisite order is £5,000.[22] In some nations, the limitations on consumer arbitration clauses apply across

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[17] *Id.* at 46–48.

[18] *Id.* at 53.

[19] *See* AT&T Mobility LLC v. Vincent Concepcion, 130 S. Ct. 3322 (2010).

[20] For a comparison of the treatment of consumer arbitration in various jurisdictions, see Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World,* 56 U. MIAMI L. REV. 831 (2002).

[21] *See* EU Council Directive on Unfair Terms in Consumer Contracts, 1993/13/EEC of 5 April 1993, *available a*t http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML.

[22] *See* Arbitration Act, 1996, c. 23, § 91 (Eng.); *see also* The Unfair Arbitration Agreements (Specified Amount) Order 1999. For the treatment of a consumer arbitration agreement in excess of that amount under English law, see the discussion in Mylcrist Builders Ltd. v. Mrs. G. Buck, [2008] EWHC 2172 (U.K.). This consumer protection is similar in effect to the American Arbitration Association's and JAMS' consumer standards, discussed below, which enable consumers to go to small claims court for matters within that court's jurisdiction.

borders, as they do under English law, while in others, as in Hong Kong, the limitations on consumer arbitration clauses are expressly stated to not apply in international disputes.[23]

The Bureau may wish to consider whether differences between the U.S. legal system and that of other jurisdictions make this different approach to consumer arbitration desirable. The United States court system grants parties the right to extensive, time consuming, and expensive discovery, unlike the court systems of virtually all other jurisdictions. The right to a jury trial not only in criminal cases but also in civil cases, another anomaly in the U.S. as compared to most other jurisdictions, leads to a much lengthier wait to the day of trial and often requires a more detailed and expensive presentation of the case. In connection with any consideration of banning pre-dispute arbitration agreements in the consumer context, the Bureau may wish to consider the economic consequences of such a decision. The Supreme Court has recognized that there is a financial impact on contract terms as a result of the inclusion of an arbitration agreement.[24]

The unconscionability doctrine, with its procedural and substantive elements, which the courts have applied to protect consumers, is a vehicle for providing a remedy where needed. Unconscionable agreements are not enforceable. The Restatement (Second) of Contracts § 208 provides: "If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Section 2 of the Federal Arbitration Act ("FAA") provides that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[25] It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable under the FAA.[26]

The doctrine of unconscionability has two prongs: procedural unconscionability and substantive unconscionability. Procedural unconscionability is about unfairness in the formation of the contract. Substantive unconscionability is concerned with whether the contractual terms are one-sided, unreasonable, and unfair. Courts generally balance procedural

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[23] *See* Control of Exemption Clauses Ordinance, (1989), Cap. 71, § 15 (H.K.); *see also* Meglio v. Societe, V2000, Cass. 1e Civ, (May 21, 1997) (in which the French court held that the domestic restrictions on arbitration of consumer claims did not apply in international matters).

[24] As the court said in Bremen v. Zapata Off-Shore Co., "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." 407 U.S. 1, 14 (1972). *See also* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1464 (2009) (in the context of collective bargaining agreements "parties generally favor arbitration precisely because of the economics of dispute resolution . . . As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision . . . in return for other concessions…."); Carnival Cruise Lines v. Shute, 499 U.S. 585, 594 (1991) ("it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"); Roby v. Corporation Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993) (the "financial effect of forum selection and choice of law clauses likely will be reflected in the value of the contract as a whole.").

[25] 9 U.S.C. § 2 (2011).

[26] *See, e.g.*, Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2776 (2010).

and substantive unconscionability. The stronger the procedural unconscionability component, the less the need for proof of substantive unconscionability, and vice versa. By definition, unconscionability requires an individualized assessment that looks at the particulars of a contract—"The test is not simple, nor can it be mechanically applied."[27]

It has been noted that an automatic invalidation of form adhesion contracts would not be a workable solution in today's society. As the courts have stated:

> these sorts of take-it-or-leave-it agreements between businesses and consumers are used all the time in today's business world. If they were all deemed to be unconscionable and unenforceable contracts of adhesion, or if individual negotiation were required to make them enforceable, much of commerce would screech to a halt. 'Because the bulk of contracts signed in this country are form contracts—a natural concomitant of our mass production-mass consumer society—any rule automatically invalidating adhesion contracts would be completely unworkable.'[28]

The central concern with procedural unconscionability is the likelihood of either an absence of meaningful choice or potential surprise. Some courts have found that an arbitration clause embedded in a standard form agreement, coupled with an absence of meaningful choice, is enough to meet the procedural unconscionability requirement of surprise.[29] Other courts have found that the arbitration clause in an adhesive contract is procedurally valid so long as the consumer has an opportunity to opt out.[30] In their analysis, the courts have looked at such factors as: Was it a standard form not subject to negotiation? Was the arbitration clause conspicuous? Was the language used incomprehensible to a lay person? Was there gross inequality in bargaining power?

The central concern with substantive unconscionability is the fairness of the operative terms of the contract. Courts have found the following terms, *inter alia*, of the arbitration agreement to be invalid in some circumstances: unfair arbitrator selection, discovery limitations, distant forum, limitations of remedies, shortening time to file from applicable statute of limitations, confidential arbitration requirements, burdensome costs and expenses, fee-splitting and "loser pays" schemes, unilateral arbitration clauses, and class action waivers.

Numerous court decisions, applying the doctrine of unconscionability to arbitration agreements in order to protect consumers, have either rejected the challenge, struck the entire arbitration clause, or simply eliminated or altered the objectionable term. The Bureau may wish to consider whether the application by courts of the doctrine of unconscionability (perhaps coupled with regulation of arbitration to assure the application of consumer protection standards) is sufficient to protect consumers.

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[27] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450–50 (D.C. Cir. 1965).

[28] *See* Virginia Cicle v. Chase Bank USA, 583 F.3d 549, 555 (2009) (citation and internal quotation marks omitted).

[29] *See* Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846 (2001); Armendariz v. Foundation Health Psychcare Servs. Inc., 24 Cal. 4th 83 (2000).

[30] *See, e.g,* Cicle, 583 F. 3d 549 at 555.

VI. STANDARDS FOR CONSUMER ARBITRATION

The private sector community that offers arbitral services has devoted considerable attention to the concerns about consumer arbitration. For example, in 1998, the American Arbitration Association issued a Consumer Due Process Protocol[31] that has guided the conduct of consumer arbitration at the AAA for many years.[32] It requires such measures as qualified, independent, and impartial neutrals chosen by an equal voice of the parties, an independent administration, reasonable cost which may require the business rather than the consumer to pay, a reasonably convenient location, reasonable time limits, a right to representation, encouragement of mediation, clear notice of the arbitration provisions and their consequences, access to information to ensure a fair hearing, a fair hearing, availability of all remedies that would be available in court, application by the arbitrator of pertinent contract terms, statutes and legal precedents and, on request, the provision of an explanation of the basis for the award. In addition, it provides that consumers retain the ability to take matters to small claims court that fall within small claims court jurisdiction.[33]

JAMS has promulgated its own consumer protection standards with its Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness.[34] The JAMS standards include a requirement that there be a mutual obligation to arbitrate, no limitation of remedies, a neutral arbitrator and ability to participate in selection of the arbitrator, clear notice of the arbitration clause, a right to an in-person hearing in the consumer's hometown, no discouragement of use of counsel, a limited cost to the consumer of $250, and allowance of discovery. It further provides that no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction.

While these consumer arbitration standards have been guiding the conduct of consumer arbitration at the AAA and JAMS for years, with the increased scrutiny of consumer debt collection arbitration, the AAA placed a moratorium on such cases and committed itself to convening consumer advocates, AAA representatives, creditor and debtor representatives, and academics, former judges and government officials to discuss the matter. That committee thereafter came to be known as the National Task Force on Issues Related to the Arbitration of

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[31] *See* AMERICAN ARBITRATION ASSOCIATION, *Consumer Due Process Protocol*, *available at* http://www.adr.org/sp.asp?id=22019 [hereinafter *Consumer Due Process Protocol*].

[32] It should be noted that the principles set forth in these protocols were not binding on any other arbitration institutions. The National Arbitration Forum ("NAF"), a leading provider of consumer debt collection arbitration administration services at the time, did not adopt these protocols. NAF was prosecuted by the Attorney General of the State of Minnesota and is no longer administering consumer arbitrations. *See* Matthew R. Salzwedel & Devona Wells, *National Arbitration Forum Settlement with Minnesota Attorney General*, 1 STATE AG TRACKER 4 (2009), *available at* http://www.fed-soc.org/doclib/20090811_StateAGTracker1.4.pdf. However, its withdrawal from this sector does not obviate the need for the Bureau's analysis and report on arbitration since an arbitration institution that does not adhere to protocols could develop in the future.

[33] *See Consumer Due Process Protocol*, *supra* note 31.

[34] *See* JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (Jul. 15, 2009), *available at* http://www.jamsadr.com/rules-consumer-minimum-standards/.

Consumer Debt Collection Disputes (the "Task Force"). In October 2010, the Task Force released the Consumer Debt Collection Due Process Protocol Statement of Principles.[35]

The Task Force considered whether arbitration had the potential to play a positive role in the resolution of consumer debt collection. The Task Force noted that the possibility of providing additional information and forms, the use of telephonic hearings, less formal pleadings, documentary and evidentiary requirements, video conferencing and other less formal communication modalities could potentially be advantageous to the consumer. Arbitration could also provide a mechanism for uniform standards as opposed to the patchwork of systems that exist in state and local courts around the country. Concerns were expressed, however, as to whether arbitration, which requires a second step in court for enforcement, was really advantageous to the creditor and whether there could be a perception that businesses gain an advantage in arbitration by having the opportunity to present numerous cases to the same arbitrator. The Task Force concluded that it would focus on discussing how debt collection arbitration could be regulated to ensure its efficiency and fairness.[36]

The Task Force released additional protocols for consumers in this context in the Consumer Debt Collection Due Process Protocol Statement of Principles, which supplement the Consumer Due Process Protocols. These additional Protocols include requirements that the commencement of the arbitration be in a manner that provides substantial certainty that the debtor will receive notice, that all communication be drafted in a manner easy to understand, including communicating in the consumer's primary language where known, that claims be accompanied by sufficient documentation to establish a prima facie case, that a procedure be established to identify time barred claims, that the answer to the demand for arbitration be simplified, that the appointment of the arbitrator be done in a manner that enhances the perception of neutrality, and that participants take advantage where appropriate of technology such as e-mail, telephonic, or videotaped hearings and proceedings to save time and expense.

VII. A CASE STUDY: ARBITRATION OF TERMINATED AUTOMOBILE DEALERS CLAIMS

In a recent utilization of arbitration for a large class of less advantaged participants, Congress turned to arbitration to afford a remedy to the automobile dealers terminated as part of the bankruptcy proceedings involving General Motors and Chrysler.[37] The American Arbitration Association ("AAA") was designated by Congress in December 2009 to administer the Automobile Industry Special Binding Arbitration Program under Section 747 of Public Law 111-117. The program allowed owners of car dealerships to seek reinstatement of their businesses using binding arbitration if they thought their businesses were improperly closed by

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[35] *See* AMERICAN ARBITRATION ASSOCIATION, National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection Due Process Protocol Statement of Principles* (Oct. 2010), *available at* http://www.adr.org/si.asp?id=6248. The American Arbitration Association initiated this Task Force as a follow up to the investigation it conducted in response to the examination of consumer debt collection launched in March of 2009 by the House of Representatives Domestic Policy Subcommittee of the Committee on Oversight and Government Reform.

[36] *Id.* at 5.

[37] THE AMERICAN ARBITRATION ASSOCIATION, *A Report to Congress on the Automobile Industry Special Binding Arbitration Program* (Nov. 2010), *available at* http://www.adr.org/si.asp?id=6309.

General Motors or Chrysler, which shuttered thousands of dealerships as part of their Chapter 11 reorganizations.

The program began in late December 2009 and final awards were issued in July 2010, thus affording resolution within a short seven-month period. The AAA drew on a pool of over 6,000 neutrals, including former judges and experts in the auto industry field, to assemble a roster of arbitrators for the program. A total of 350 arbitrators were mobilized and assigned cases under the program. Perhaps due to the accessible and streamlined nature of the program, 18 percent of the dealers chose to represent themselves without counsel.[38]

Of the 1,575 arbitration cases filed under the program, 803 were settled, 166 cases were decided by an arbitrator, 493 were withdrawn, and 113 were administratively closed (which means those cases did not advance at all). Of the 166 that were resolved by binding arbitral decision, the arbitrators found in favor of the dealerships in 55 cases (34 percent) and in favor of the manufacturers in 111 cases (66 percent).[39] This result may have been driven by the self-selection through settlement of the stronger dealer cases. An AAA survey of user satisfaction showed a positive experience with over two-thirds (67 percent) responding that they were likely, very likely, or extremely likely to recommend the AAA for arbitration in the future. The survey included parties with all case resolution outcomes.[40]

The report also disclosed that the program required no direct taxpayer funding or congressional appropriations because the parties paid for their own expenses. To minimize cost, the AAA applied a fixed filing fee for cases with non-monetary claims. The Association also offered parties the opportunity to use its Flexible Fee Payment Schedule, a program that allowed parties to pay in several installments, thereby saving money for parties if their cases did not go through the entire dispute resolution process (as occurred with many cases that settled).

VIII. Class Action Waivers

Much of the current controversy relating to consumer arbitration relates to the class action waivers contained in some arbitration agreements. It must be observed that the debate about class action waivers is not about arbitration, but rather about consumer remedies. While many of the cases have arisen in the context of an arbitration agreement, class action waivers in contracts that do not provide for arbitration present precisely the same issue—should class action waivers be void automatically, or is a more nuanced approach desirable? Indeed this precise issue, while framed again in the context of an arbitration agreement, is currently pending in the Supreme Court in *AT&T Mobility LLC v. Vincent Concepcion.*[41]

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[38] *Id.* at 14.
[39] *Id.* at 17.
[40] *Id.* at 19.
[41] *See* AT&T Mobility LLC v. Vincent Concepcion*,* 130 S. Ct. 3322 (2010) (the issue as framed by the petitioner is "[w]hether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." The issue as framed by the respondent is "The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.' Class-action bans—contract provisions that deny the right to pursue class wide relief, whether through litigation or arbitration—

Numerous court decisions have reviewed the validity of class action waivers.[42] No general rule has emerged that has been adopted nationwide that categorically prohibits or invalidates the use of class action waivers. Most states use an individualized approach. In California, class action waivers are unconscionable and thus unenforceable where: 1) they appear in contracts of adhesion whose terms are not subject to negotiation; and 2) the disputes between the contracting parties are likely to involve small damages awards, giving consumers insufficient incentive to bring individual actions and thus effectively insulating a contracting party from liability from wrongdoing.[43] At least twenty states have followed California's approach, finding class action waivers unconscionable when they insulate the drafter from liability,[44] act effectively as an exculpatory clause,[45] and thus license a broad range of wrongful conduct.[46]

Prior to the 2003 United States Supreme Court decision in *Green Tree Financial Corp. v. Bazzle,*[47] class actions in arbitration were rare, although permitted by some state courts.[48] Following that decision, which was read as sanctioning such a process, many class actions were filed and heard by arbitrators. The AAA and JAMS developed special protocols for class actions.[49] The AAA recently reported that it had received 283 class action arbitration filings.[50] Last year, in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.,*[51] the Supreme Court re-addressed the question of class actions in arbitration and held that since arbitration was a creature of consent, class arbitration could only proceed if the contract, construed pursuant to contract interpretation principles, evidenced an agreement between the parties to allow it. The precise impact of this decision on the utilization and availability of class action arbitration remains to be seen.

No view is expressed in this paper on the issue of the enforceability of class action waivers. The Bureau may wish to consider the diverging views on this subject.[52]

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are invalid in some circumstances under generally applicable state contract law. Is such state law preempted by the FAA when the class-action ban to which it is applied is embedded in an arbitration agreement?").

[42] *See* cases discussed in F. Paul Bland Jr. & Tami Alpert, *Banning Class Action,* 44 TRIAL 36 (2008).

[43] *See, e.g.,* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.*, AT&T Mobility LLC v. Vincent Concepcion*,* 130 S. Ct. 3322 (2010).

[44] *See, e.g.,* Kinkel v. Cingular Wireless LLC, 857 N.E. 2d 250, 274 (Ill. 2006).

[45] *See, e.g.,* Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88, 99 (N.J. 2006).

[46] *See, e.g.,* Scott v. Cingular Wireless, 161 P. 3d 1000, 1009 (Wash. 2007).

[47] *See generally* Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).

[48] *See e.g.,* Keating v. Superior Court, 645 P.2d 1192, 1206–10 (Cal. 1982), *rev'd in part on other grounds sub nom.*, Southland Corp. v. Keating, 465 U.S. 1 (1984); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 864–67 (Pa. Super. Ct. 1991).

[49] *See AAA Supplementary Rules for Class Arbitrations, available at* http://www.adr.org/sp.asp?id=21936; *JAMS Class Action Procedures*, *available at* http://www.jamsadr.com/rules-class-action-procedures/.

[50] Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, Stolt-Sielsen S.A. et al., v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_NeutralAmCuAAA.pdf.

[51] Stolt-Nielsen, S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010).

[52] In this regard, the Bureau may wish to consider the learning with respect to the related issue of jury trial waivers in contracts. *See, e.g.*, Brian S. Thomley, *Nothing is Sacred: Why Georgia and California Cannot Bar Contractual Jury Waivers in Federal Court,* 12 CHAP. L. REV. 127 (2008); Wayne Klomp, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts,* 6 NEV. L.J. 545 (2005).

IX. ACCESS TO THE COURTS

Any assessment of consumer arbitration must examine the litigation alternative to arbitration since without arbitration, disputes will have to be resolved in court. Court congestion and the recent cutbacks in judicial budgets, as well as innovations in the courts to foster efficiency, are relevant to this analysis as they affect access to the courts for the resolution of disputes.

Reports of court congestion have spanned several decades. In 1956 the Stanford Law Review reported on the court congestion of that time and proposed arbitration as a solution after concluding that the various steps that had been taken by courts around the country were insufficient.[53] Chief Justice Warren delivered an address in 1958 on the enormous caseload pressing on the federal courts with an increase in the civil case load of 60 percent since 1941 and stated that court congestion "was compromising the quantity and quality of justice available to the individual citizen."[54] In 1959, it was reported that the average civil jury suit to trial delay in Chicago was 59 months.[55] An examination in 1989 of the civil court delays in Chicago revealed that the institution of concerted efforts over twenty years to solve the court congestion problem—including changes in law, the introduction of case management techniques, and the addition of 77 new judgeships—had not alleviated the chronic massive delay problem.[56]

Data for 2009 regarding disposition of civil cases shows a median of 23.4 months through trial in the federal courts, with the median in various districts ranging from 14.9 to 57.3 months.[57] The median through appeal was 32.1 months.[58] The Bureau of Justice Statistics reports that for state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months and for bench trials was 18.4 months.[59] Delays for appeals similar or lengthier than in federal court are likely to be found for state court appeals, a statistic that is not reported. These statistics are likely to deteriorate with the current budget crises.

Empirical research has also been conducted on the length of time required to complete a dispute in arbitration. One study found that the average time from the filing of the demand to the final award was 6.9 months.[60] As discussed below, delays in resolution of disputes not only

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[53] *See Compulsory Arbitration to Relieve Trial Calendar Congestion*, 8 STAN. L. REV. 410, 410–19 (1956).

[54] Earl Warren, *Delay and Congestion in the Federal Courts*, 42 J. AM. JUD. SOC. 6 (1958).

[55] *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 544 (1989).

[56] *Id.* at 547–48.

[57] *See Judicial Business of the United States Courts*, *2009 Annual Report of the Director*, Table C-5, at 172, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf. The median through resolution if settlements are included is 8.9 months. *Id.*

[58] *Id.* at Table B-4, at 103.

[59] BUREAU OF JUSTICE STATISTICS, *Civil Justice Survey of State Courts (CJSSC), Bureau of Justice Statistics 2005*, *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=242 (this is the most recent compilation of data by this source).

[60] *Searle Consumer Arbitrations*, *supra* note 12, at 2; *see also* Sarah Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals,* 113 PENN ST. L. REV. 1051, 1070–73 (2009) (also finding a mean of less than seven months from the filing of the demand to conclusion in arbitration cases that go to hearing).

has a negative impact on people's lives as they await resolution but also has real economic, dollars and cents, consequences. Justice delayed is indeed justice denied. Consideration may also be given to whether parties feel pressured to settle and accept terms not wholly acceptable in order to avoid long delays.

The Bureau may also wish to consider the recent cutbacks in funding of the judiciary in light of today's hard pressed state and local governments. State after state report cutbacks in funding for the judicial branch with 65 percent of states reporting reductions for fiscal year 2010 and 57 percent of states reporting reductions for fiscal year 2011,[61] with consequent reductions in access to justice. For example, the Los Angeles Superior Court, the nation's largest trial court system, predicts anticipated layoffs of roughly one-third of its personnel, and the closure of 139 courtrooms used as civil courtrooms out of its total courtroom count of 605 for all cases. Civil caseload clearance capacity is expected to fall by no less than 35 percent by 2013.[62] Florida reports a rapidly growing caseload coupled with funding which peaked in 2004-2005, forcing courts to slow or suspend the processing of civil cases.[63] Iowa reports a 9.3 percent reduction in staffing, ten days of court closure, and a delay in processing, *inter alia*, small claims cases.[64] Many consumer cases are low-dollar value cases which, with the more limited resources of the courts, may suffer disproportionately long delays and lack of attention as courts focus on their criminal and larger stakes civil matters. The American Bar Association has convened a blue-ribbon Task Force on Preservation of the Justice System, which is charged with exploring the extent and impact of the underfunding of the judiciary on access to justice for all. The ABA report, which is being conducted by means of a survey in early 2011, should be reviewed when it is issued.[65]

While the length of time to resolution should be examined, consideration should also be given to what the courts are doing to expedite processing of disputes. For example, in September 2010, California signed into law the Expedited Jury Trials Act[66] pursuant to which cases will be heard before a judge and an eight-person jury. Each party will be given three peremptory challenges in selecting the jury and each side will be limited to three hours to put on its case—including opening and closing arguments. Unless the parties agree to relax the rules, the California Rules of Evidence will apply. Although participation in the program is voluntary, verdicts—reached by six members of the jury—are binding unless the litigants

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[61] NATIONAL CENTER FOR STATE COURTS, *Budget Shortfalls by State*, *available at* http://www.ncsc.org/information-and-resources/budget-resource-center/states-activities-map.aspx (last visited Mar. 30, 2011).

[62] *See* B. Roy Weinstein & Stevan Porter, *Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court* (Dec. 2009), *available at* http://www.micronomics.com/articles/LA_Courts_Economics_Impact.pdf.

[63] *See* The Washington Economics Group, Inc., *The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Under-Funding* (Feb. 2009), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/1C1C563F8CAFFC2C8525753E005573FF/$FILE/WashingtonGroup.pdf?OpenElement [hereinafter *The Economic Impacts of Delays*].

[64] *See Justice in the Balance: The Impact of Budget Cuts on Justice, Iowa Judicial Branch* (Jan. 13, 2010), *available at* http://www.iowacourts.gov/wfData/files/StateofJudiciary/JusticeInTheBalanceJan2010.pdf.

[65] For information about the Task Force on Preservation of the Justice System, see http://www.americanbar.org/groups/justice_center/task_force_on_the_preservation_of_the_justice_system.html (last visited Mar. 24, 2011).

[66] CAL. CIV. PROC. CODE §§ 630.01–630.12 (2011).

discover evidence of fraud or misconduct. In another innovative effort, Broward County, Florida recently implemented a "*Pro Se* Day" on a Saturday as a special docket-clearing session for people filing for uncontested divorces and name changes on their own without lawyers. In one-half of a day, the court closed 400 cases.[67] Undoubtedly, many other courts have developed time saving processes which should be explored.

Ironically one of the tools that has been in use for many years to reduce the burden on the courts is arbitration.[68] In many small claims courts and other courts around the country, arbitration is offered as an alternative for litigants who desire a more timely hearing of their case. Some of these arbitrations are non-binding and others are binding. If there were an influx of additional consumer cases added to court dockets, it seems highly probable that there would be an increase in the courts' use of arbitration alternatives. While this process would have the advantage of affording a post-dispute option to the consumer, it still requires the consumer to ascertain how to access the court system and deal with the delay of the court process before reaching arbitration. Consideration may be given to whether this would be the worst of all possible worlds as consumers will have to negotiate and understand both systems of adjudication.[69]

X. THE ECONOMIC IMPACTS OF ELIMINATION OF CONSUMER ARBITRATION

In considering the desirability of a prohibition on consumer arbitration in financial service or product transactions, the analysis of the "public interest" should include an examination of the financial implications. The first factor that seems relevant is the economic impact of a longer period from the filing of the action to resolution. While the Bureau will conduct its own review of the literature on the subject of duration of litigation versus arbitration, there is considerable support for the proposition that resolution is approximately three times faster in arbitration, or an average of about seven months from the filing of a demand in arbitration to the issuance of an award, as opposed to about twenty-two months on average from the filing of a complaint to a judgment in court.[70]

An example of the economic impact of delay in resolution is illustrative. Assuming a successful claim for $10,000 and a delay of fifteen months until resolution, a discount rate, a tool typically used to account for the time value of money, can be applied. Applying a 10 percent discount rate with respect to the $10,000 claim on which recovery is delayed by twelve months yields a loss in the real value of the recovery of about $1,000, or 10 percent of the

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[67] *See* Andres Viglucci, *Families Turn Out for Easy Divorces in Broward*, SUNSENTINEL.COM (Dec. 13, 2010), *available at* http://articles.sun-sentinel.com/2010-12-12/news/fl-broward-easy-divorces-20101212_1_divorcing-couples-carol-lee-ortman-administrators; *see also* Broward County Bar Association Blog, *Saturday Pro Se Court Day Will Clear 400 Cases*, *available at* http://www.browardbarblog.org/broward-county-bar-events/saturday-pro-se-court-day-will-clear-400-cases/ (last visited Mar. 24, 2011).

[68] *See, e.g.*, Barbara S. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990), *available at* http://ftp.resource.org/courts.gov/fjc/courtannarb.pdf; *see also* A. Leo Levin, *Symposium: Reducing Court Costs and Delay: Court-Annexed Arbitration*, 16 U. MICH. J.L. REFORM 537 (1983); Edgar Lind, *Arbitration High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court, available at* http://www.rand.org/pubs/reports/R3809.html (last visited Mar. 24, 2011).

[69] *See* Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 587–625 (2009).

[70] *See supra* notes 59 and 60.

recovery. In other words, the present value of the recovery received twelve months later on a claim of $10,000 is $9,000, thus reducing the value of the recovery by 10 percent.[71]

The County of Los Angeles conducted an analysis to predict the economic impact of the increased duration of litigation due to lost operating capacity driven by the budget constraints. The study reports that when litigants do not know the results of the dispute, they live in a state of uncertainty. The person against whom the claim is lodged cannot spend the money since it might be owed, and the person claiming to be owed the money cannot spend it because the money is not yet in hand. Both parties are constrained and prevented from putting the money to its highest and best use. Further, the resources at issue are removed from circulation. Based on the data in Los Angeles, economic losses due to the slower resolution of litigation were projected at $30 billion in economic output, translating to more than 150,000 jobs and $1.6 billion in tax revenue.[72] Findings from a similar study conducted in Florida showed that the total adverse economic impact of the projected increased civil court case delays on the Florida economy would be almost $17.4 billion annually and lead to an adverse impact on 120,000 jobs.[73]

The Bureau may wish to consider developing a similar economic impact analysis of any proposal it considers.

XI. PRO SE APPEARANCES

In late 2009, the American Bar Association Coalition for Justice undertook a study of judges throughout the United States to determine the effect of the economic downturn. The study addresssed three important questions focusing on the year 2009. First, had the judges seen a change in the number of filings and what types of cases have seen the greatest change? Second, was there a change in the number of people appearing *pro se* without benefit of counsel? Third, what was the impact of being self-represented?

Sixty percent (60 percent) of the judges stated that fewer parties were being represented by counsel. When asked how lack of representation impacts the parties, 62 percent of all judges said that outcomes were worse. When asked how parties were negatively impacted, ninety-four percent (94 percent) of those responding stated that the failure to present necessary evidence was the most common problem. Eighty-nine percent (89 percent) said that parties were impacted by procedural errors. Ineffective witness examination (85 percent) and failure to properly object to evidence (81 percent) were both cited by more than four-fifths of the judges as issues. Seventy-seven percent (77 percent) of the judges cited ineffective arguments. Several judges noted that even when a party won at hearing, they were not able to proffer an order or judgment in a form that could be enforced to the court.[74]

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[71] The award of pre-judgment interest, permissible in some cases, may compensate for all or part of this impact depending on the interest rate allowed and the appropriate discount rate to use.

[72] *See* Weinstein & Porter, *supra* note 62, at 1.

[73] *See The Economic Impacts of Delays*, *supra* note 63, at 12–17.

[74] *See* AMERICAN BAR ASSOCIATION COALITION FOR JUSTICE, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts* (Preliminary) (Jul. 12, 2010), *available at* http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf.

The Bureau may wish to consider whether in arbitration, with its more informal setting and expectations, these obstacles would have a less detrimental impact on capable *pro se* representation. Are procedural errors less likely as arbitration procedures are less rigid and can be set out in simple, short arbitration rules? Is the arbitration process more easily accessible and easier to explain to the *pro se* litigant when the arbitrator and the case managers are involved? Is failure to object to evidence properly and the proper introduction of evidence less of a concern in arbitration as the rules of evidence are not strictly adhered to in arbitration and arbitrators are likely to consider the weight to be given to evidence based on its trustworthiness, whether or not a formal objection is lodged? Are issues concerning the provision of an enforceable order or judgment alleviated because parties generally need not present an order or judgment to the arbitrator since the arbitrators draft the award? It would seem that inquiry along these lines as to the ability of individuals to represent themselves effectively in court versus arbitration should be considered by the Bureau in its study.

XII. ONLINE DISPUTE RESOLUTION – DOMESTIC AND INTERNATIONAL

Many scholars have suggested that arbitration in the form of an online dispute resolution ("ODR") process could be most useful for consumers.[75] E-commerce between business and consumers is growing rapidly. As reported by the U.S Census Bureau:

> U.S. retail e-commerce sales reached almost $142 billion in 2008, up from a revised $137 billion in 2007—an annual gain of 3.3 percent. From 2002 to 2008, retail e-sales increased at an average annual growth rate of 21.0 percent, compared with 4.0 percent for total retail sales. In 2008, e-sales were 3.6 percent of total retail sales—up from 3.4 percent in 2007.[76]

While the U.S. Census Bureau statistics include only the value of goods and services sold online whether over open networks such as the Internet, or proprietary networks running systems such as Electronic Data Interchange, there is considerable support for the extension of legal standards for ODR to mobile commerce as well as electronic commerce (mobile commerce reflects transaction sales for goods and services concluded using the mobile phone as the intermediary, either for purposes of accessing the merchant's online site and/or using the mobile phone account to pay for the goods as well).

ODR involves the use of the Internet, e-mail, and other information technologies in lieu of the traditional face-to-face dispute resolution model. It offers efficiency, cost savings, and convenience for the disputing parties, while relieving the courts of an additional caseload. For smaller claims in particular, not having to take days off from work, or find coverage at home in order to attend to a dispute can be of enormous benefit to consumers. The Bureau may wish to consider this option as it develops its response to the Congressional mandate with respect to domestic transactions.

The Bureau should note that the Congressional mandate under the Dodd- Frank Act does not distinguish between international and domestic transactions, and does not direct the Bureau to conduct a separate analysis of arbitration in these two different settings. ODR can be of special benefit to the consumer in the international context. For example, a U.S. consumer buying a product online from another country is simply not going to be able to pursue a claim against the supplier in its home country; nor would he or she want to do so even if the economics and convenience factors were not prohibitive for fear of an unfamiliar set of procedures, an unfamiliar language, and fear that some courts abroad might favor their own domestic corporations in assessing the claim.

Efforts on several fronts have been pursued to develop ODR for cross-border disputes involving consumers.[77] One such effort by the United Nations Commission on

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[75] *See, e.g.*, Amy J. Schmitz, *'Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178 (2010); Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111 (2002); Catherine A. Rogers, *The Arrival of the Have-Nots in International Arbitration*, 8 NEV. L.J. 341 (2007); *but see* Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT'L L.J. 823 (2004).

[76] U.S. CENSUS BUREAU, *U.S. Census Bureau E-Stats*, 3 (May 27, 2010), *available at* http://www.census.gov/econ/estats/2008/2008reportfinal.pdf.

International Trade Law (UNCITRAL) is progressing.[78] At the 43rd session of the United Nations Commission on International Trade Law held in New York from June 29–July 9, 2010, state delegations overwhelmingly supported the creation of a working group to develop legal standards (the form to be determined) for ODR mechanisms established for the resolution of cross-border electronic commerce disputes.[79] Many delegations viewed traditional dispute resolution mechanisms, including litigation through the courts, as inappropriate for addressing high-volume, low-value disputes resulting from cross-border e-commerce transactions and too costly and time-consuming in relation to the value of the transaction.[80] Notably, the mandate extended to the Working Group included both Business- to-Business and Business-to-Consumer disputes in its scope.

The Department of State, Office of Legal Adviser, Office of Private International Law, is actively engaged with UNCITRAL in its ODR initiatives.[81] A similar effort has been commenced with the Organization of American States (OAS).[82] In its review, the Bureau may wish to give special consideration to cross-border transactions, for instituting any ban or limit on pre-dispute agreements to arbitrate consumer disputes may be to the detriment rather than to the benefit of consumers in the international marketplace. Furthermore, absent coordination with the Department of State, Office of Legal Adviser, Bureau action may interfere or even conflict with protocols and agreements that are being developed for such international consumer commerce by U.S. governmental representatives.

XIII. TREATY OBLIGATIONS

The United States is party to the New York Convention,[83] a treaty that has been ratified by over 140 countries and the Panama Convention,[84] a treaty that has been ratified by 19 countries, and a series of bilateral investment treaties. The New York and Panama Conventions commit the U.S. to enforce foreign arbitral awards and the bilateral investment treaties impose a host of obligations on the United States. Before any approach by the Bureau is finalized, the

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[77] Vikki Rogers & Christopher Bloch, *Cross Border Commerce and Online Dispute Resolution: Emerging International Legislative and Systematic Developments* (Oct. 27, 2010), *available at* http://www.ibls.com/internet_law_news_portal_view.aspx?s=sa&id=1993.

[78] UNCITRAL, Working Group III (Online Dispute Resolution) 22nd Session, 13-17 December 2010, Vienna, *available at* http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html (last visited Mar. 24, 2011).

[79] *See* Rogers & Bloch, *supra* note 77, at n.4 ("Note submitted to UNCITRAL in support of the assignment of a Working Group to ADR. Approximately 40 organizations and institutions from every region of the world endorsed the Note.").

[80] United Nations General Assembly, United Nations Commission on International Trade Law 44th Session, Report of Working Group III (Online Dispute Resolution) (A/CN.9/716, Jan. 17, 2011), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V11/801/48/PDF/V1180148.pdf?OpenElement.

[81] U.S. Department of State Advisory Committee on Private International Law (ACPIL): Online Dispute Resolution (ODR) Study Group, 75 Fed. Reg. 66420 (Oct. 28, 2010), *available at* http://edocket.access.gpo.gov/2010/pdf/2010-27297.pdf.

[82] *Id.*

[83] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York 1958), *available at* www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf.

[84] *See Inter-American Convention on International Commercial Arbitration* (Panama 1975), *available at* http://www.oas.org/juridico/english/treaties/b-35.html

Department of State, Office of the Legal Adviser and other experts in the field should be consulted to ensure that any action conforms to U.S. treaty obligations.[85]

CONCLUSION

The Bureau has before it an important and difficult task in responding to the Congressional mandate under the Dodd-Frank Act. We appreciate the opportunity to share our thoughts regarding arbitration for consumers in financial service and product transactions. We are available to meet and discuss the issues involved and thank you for your consideration of our comments.

[85] For a discussion of possible U.S. treaty violations presented by arbitration bills introduced in Congress, see Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 484–89 (2009).

APPENDIX A

This Appendix lists some of the leading studies that have been conducted addressing certain questions related to consumer arbitrations.

I. Consumer Arbitration

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II. Employment Arbitration

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