THE EFFECTIVENESS OF ARBITRATION FOR THE RESOLUTION OF CONSUMER DISPUTES

I
INTRODUCTION

American consumers[1] have become increasingly aware of the inability of the existing legal system to effectively resolve their disputes. The problem has been twofold. Substantively, the law has failed to adapt itself to the rapid changes of the marketplace.[2] Procedurally, the legal system has relied on traditional methods of resolution that no longer reflect the needs of consumers.[3]

The response to growing pressure from consumers and their advocate organizations has been to effect some changes in the substantive law. Recently, statutes have been enacted on both the federal and local levels which afford the consumer greater protection in such areas as warranties[4] and installment credit.[5] The courts have employed constitutional and common law theories to protect consumers against unconscionable and unfair transactions.[6] Yet, despite these recent substantive gains, consumers have been unable to satisfactorily resolve their disputes due to existing procedural obstacles.[7]

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1. The term "consumer," as used herein, refers to an individual who purchases goods or services for his own personal consumption. The term "merchant," as used herein, refers to a person or company that, in the regular course of business, sells goods or services directly to the consumer.

2. Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967); Comment, *Installment Sales: Plight of the Low Income Buyer*, 2 COLUM. J. L. & SOC. PROB. 1 (1966); D. CAPLOVITZ, THE POOR PAY MORE (1967).

3. The situation was well described in Comment, *Nontraditional Remedies for the Settlement of Consumer Disputes*, 49 TEMP. L.Q. 385 (1976) [hereinafter cited as Comment, *Nontraditional Remedies*]: "The sense of frustration and helplessness experienced by some consumers in today's marketplace, feeling they have been cheated by merchants but recognizing they have no workable means of obtaining redress, demonstrates the failure of existing institutions to respond adequately to the needs of individual consumers. In spite of the recent proliferation of agencies and organizations created specifically to deal with the problem of consumer protection, many individuals with claims against merchants remain virtually remediless and at the mercy of unscrupulous or uncooperative merchants." *Id.* at 385. *See also* Jones, *Wanted: A New System for Solving Consumer Grievances*, 25 ARB. J. 234 (1970); Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357, 362 (1974); Eovaldi & Gestrin, *Justice for Consumers: The Mechanism of Redress*, 66 NW. U.L. REV. 281 (1971).

4. *E.g.*, MAGNUSON-MOSS WARRANTY ACT, 15 U.S.C. §§ 2301-2312 (Supp. 1975).

5. *E.g.*, CONSUMER CREDIT PROTECTION ACT, 15 U.S.C. § 1602 (1970). *See also* note 32 *infra*.

6. *E.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (due process); Fuentes v. Shevin, 407 U.S. 67 (1972) (due process); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (common law unconscionability).

7. "[T]he kind of procedure that a legal system adopts to regulate the substantive rules of law

The traditional methods of dispute resolution—civil or criminal litigation in a court of law—are inappropriate for the resolution of the typical consumer claim.[8] Nor have non-traditional forums eased the plight of consumers.[9] The need for an effective procedural mechanism has stimulated a search for possible alternatives. Consumer arbitration has been frequently proposed because it combines the best elements of both the traditional and non-traditional methods of resolution.[10] This Note will critically evaluate the consumer arbitration programs that have been established. It appears that while arbitration is generally desirable, it must be tailored to the special needs of the consumer.

II
DEVELOPING A MODEL FOR A CONSUMER DISPUTE RESOLUTION MECHANISM

A. The Nature of Consumer Disputes

Consumer disputes arise most frequently in connection with correspondence schools, home repairs, and the sale of automobiles, appliances and home furnishings.[11] In such transactions, the goods sold or the services rendered are often necessities rather than luxuries. Moreover, these goods and services are generally highly technical and complex. The transactions are often conducted in an atmosphere of distrust, and usually take place between parties with un-

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has an important bearing on the availability of those substantive rules. Procedure can frustrate the application of the rule of law or it can assist in a creative elaboration of those rules in the light of social change." Adams, *The Small Claims Court and the Adversary Process: More Problems of Function and Form*, 51 CAN. BAR REV. 583, 585-86 (1973).

8. Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 403, 409 (1966) [hereinafter cited as *Effective Programs*]; NATIONAL INSTITUTE FOR CONSUMER JUSTICE, CRIMINAL SANCTIONS, (1972) [hereinafter cited as NICJ, CRIMINAL SANCTIONS].

9. *See* Note, *Consumer Protection by the State Attorney General: A Time for Renewal*, 49 NOTRE DAME LAWYER 410 (1973); NATIONAL INSTITUTE FOR CONSUMER JUSTICE, STATE AND FEDERAL REGULATORY AGENCIES (1972) [hereinafter cited as NICJ, REGULATORY AGENCIES]; *Buyer vs. Seller in Small Claims Court*, 36 CONSUMER REPORTS 624 (Oct. 1971) [hereinafter cited as *Buyer vs. Seller*]; NATIONAL INSTITUTE FOR CONSUMER JUSTICE, BUSINESS SPONSORED MECHANISMS FOR REDRESS (1972) [hereinafter cited as NICJ, BUSINESS MECHANISMS].

10. Lippman, *Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives*, 24 MAINE L. REV. 215 (1972); McGonagle, *Arbitration of Consumer Disputes*, 27 ARB. J. 65 (1972); Note, *An Analysis of a Technique of Dispute Settlement: The Expanding Role of Arbitration*, 7 SUFFOLK U.L. REV. 618 (1973) [hereinafter cited as Note, *Expanding Role of Arbitration*]; NATIONAL INSTITUTE FOR CONSUMER JUSTICE, ARBITRATION (1972) [hereinafter cited as NICJ, ARBITRATION].

11. NICJ, REGULATORY AGENCIES, *supra* note 9, at 202 *citing from* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL [NAAG], COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL AND THE CONSUMER PROTECTION COMMITTEE, STATE PROGRAMS FOR CONSUMER PROTECTION (1972) [hereinafter cited as STATE PROGRAMS]. *See also Proposed Consumer Controversies Resolution Act: Hearings on S. 2928 Before the Subcomm. on Consumers of the Senate Comm. on Commerce; and Before the Subcommittee on Representation of Citizen's Interests of the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 47 (1974) (Chart B) [hereinafter cited as *Hearings on S. 2928*]. "Consumer disputes" refers to all disagreements, legal or non-legal, between consumer and merchant, and arising out of the initial consumer transaction.

Other consumer complaints involve: a) real estate and land fraud; b) landlord-tenant complaints; c) franchises and distributorships; d) pyramid sales; and e) food, clothing, utilities.

equal financial resources and educational backgrounds.[12] Consumer disputes typically involve complaints about false advertising, improper credit and collection practices, failure to honor warranties, defective merchandise, and claims of nondelivery of goods.[13] The amount of money involved rarely exceeds a few hundred dollars.[14]

Consumer disputes may be taken to one or more forums for resolution.[15] The state may bring a criminal prosecution against the offending party. Many communities have enacted criminal fraud statutes which provide for punishment of merchant violations by the imposition of a fine or by imprisonment.[16] The dispute may also be resolved through civil litigation. This may take several forms: an action between the individual parties, a class action,[17] or a civil action brought by the government.[18] The aggrieved consumer may be awarded either restitution or damages. A claim may also be brought before an administrative agency[19]

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12. D. CAPLOVITZ, *supra* note 2, at 137-54. *See also Nontraditional Remedies*, *supra* note 3, at 387-88.

13. NICJ, REGULATORY AGENCIES, *supra* note 9, at 202, *citing from* STATE PROGRAMS *supra* note 11; *Hearings on S. 2928*, *supra* note 11, at 47 (Chart B). Other major consumer complaints involve breach of contract and billing errors.

14. *Nontraditional Remedies*, *supra* note 3, at 387-88.

15. Ordinarily, the consumer will see these as alternatives (provided the consumer's dispute meets their jurisdictional requirements) and the consumer will pursue his claim in only one of these forums. However, on occasion, the consumer may utilize more than one forum, although not simultaneously. *E.g.*, the consumer may initially bring his claim to a private mediative panel and if unsuccessful there, pursue his claim in court.

16. Criminal litigation in the consumer area arises primarily with regard to consumer fraud. Criminal fraud statutes have been enacted in several states. They are usually enforced by the States' Attorney Generals' Offices. *See* Note, *Consumer Protection by the State Attorneys General: A Time for Renewal*, 49 NOTRE DAME LAWYER 410 (1973). Commentators and enforcement officials have been almost unanimous in their conclusion that such statutes are useless. Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of Ohio Attorney General*, 29 OHIO ST. L.J. 897, 902 (1968); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1018-19, 1122-23 (1967); Comment, *Consumer Protection in Michigan: Current Methods and Some Proposals for Reform*, 68 MICH. L. REV. 926, 928-33 (1970).

17. Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEG. STUD. 47 (1975); NATIONAL INSTITUTE FOR CONSUMER JUSTICE, CONSUMER CLASS ACTION (1972) [hereinafter cited as NICJ, CONSUMER CLASS ACTION]. Such actions are usually initiated on behalf of consumers.

18. These actions are often brought by the attorney general on behalf of consumers under fraud or unconscionability statutes. *E.g.*, N.J. STAT. ANN. § 56:8-2 (Supp. 1975). The public officer can obtain injunctive relief, *e.g.*, HAWAII REV. STAT. § 480-15 (Supp. 1971) and in some cases restitution. *E.g.*, Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971) (the New Jersey Supreme Court held that the Attorney General was authorized by the statute to obtain restitution for the entire class of consumers who had been injured by the defendant).

19. Administrative agencies for the resolution of consumer disputes exist on the federal, state, and local levels. The Federal Trade Commission [FTC] is the primary federal agency charged with protecting the interests of consumers. Typical cases of the FTC include false advertising, high pressure land sales, vocational training programs, and false labeling. Most states have some form of state-wide consumer protection legislation enforced by an agency of the state government, usually the attorney general. In addition, a number of cities and counties have recently established independent consumer protection agencies by local ordinance. Many of these agencies have no formal enforcement powers and their functions are limited to investigation of complaints, conciliation of disputes, and development of educational programs and legislative proposals. Others, however, have been invested with broad powers to make rules, initiate judicial proceedings, and issue cease and desist orders. *See* NICJ REGULATORY AGENCIES, *supra* note 9, at 1-2, 54-68, 431.

if it meets the jurisdictional requirements of that agency.[20] The remedy usually available through this route is a cease and desist order issued against the violating party.[21] Finally, the claim may be handled by a private organization seeking to resolve these disputes through mediation and conciliation. These private programs are conducted by business, consumer, and public service groups.[22]

B. The Need for an Effective Resolution Mechanism

None of the existing methods of consumer dispute resolution offer the consumer a forum in which he may resolve his complaint effectively. Neither the traditional adjudicative forums, nor the non-traditional mediative forums have tailored their procedures to meet the particular needs of the consumer. The only positive development has been the creation of small claims courts, designed for the resolution of some consumer disputes. These have proven to be only a partial solution to the problem of establishing an effective resolution mechanism.

1. The Failure of Adjudicative Forums to Adequately Resolve Consumer Disputes

Existing adjudicative forums[23] have failed to resolve consumer disputes effectively for several reasons. Many legitimate complaints cannot, or are not, brought to these forums. Moreover, when the claims are heard, the proceed-

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20. *E.g.*, § 5 of the Federal Trade Commission Act provides for federal intervention against "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in, or affecting commerce." 15 U.S.C. § 45(a)(1) (Supp. 1975). This jurisdictional constraint ("in or affecting commerce") limits the actual parameters of the Commission's statutory power. Similarly, state agencies, particularly those operating under legislation modeled after the Uniform Deceptive Trade Practice Act, are limited in the type of consumer disputes they may resolve. *See* NICJ, REGULATORY AGENCIES, *supra* note 9, at 7-8.

21. *E.g.*, the FTC Act provides that the Commission shall order the respondent to "cease and desist from using such method of competition or such act or practice" upon finding a violation of the basic prohibition against unfair methods of competition or deceptive acts or practices. 15 U.S.C. § 45(b) (Supp. 1975).

22. Private mediative panels have been established by business, consumer, and public organizations. Business programs have been established on an individual, industry-wide, and nation-wide basis. Many manufacturers have established internal grievance mechanisms, *e.g.*, Maytag's "hotline telephone" or Ford's Customer Service Division. Other business efforts have been on the industry-wide level. Several industrial organizations have established Consumer Action Panels [CAPs] to mediate disputes between its members and consumers. The consumer action panel for the appliance industry [MACAP] has been the most effective of these programs. CAPs have also appeared in the automobile industry [AUTOCAP], furniture industry [FICAP], and carpet industry [CRICAP]. Programs have also been developed by local Better Business Bureaus [BBBs].

Consumer groups have been set up on the national, state-wide, and local levels. There are both consumer action groups and consumer education organizations. An example of the former is the Consumer's Education and Protective Agency [CEPA] (located in Philadelphia) which boycotts and pickets merchants who will not voluntarily resolve disputes with consumer members. An example of the latter is the Arizona Consumer's Council.

Public groups include Public Interest Research Groups [PIRGs] and media hotlines. There are more than 350 action line columns in newspapers across the country, and similar services are available through radio and television. *See generally* Comment, *Nontraditional Remedies*, *supra* note 3, at 415-20.

23. Adjudicative forums, such as courts and administrative agencies, are bodies to which the disputing parties present their dispute. A third-party arbiter reviews the evidence and issues a final and binding determination. Adams, *supra* note 7, at 592.

ings are conducted according to the adversarial method of adjudication,[24] an approach not suitable to consumer disputes. Finally, equitable results are often not reached because these forums are bound by substantive and evidentiary rules not designed for the resolution of consumer disputes, and because these forums lack the flexibility to formulate appropriate remedies.

Many disputes are never considered by the adjudicative forums. Strict jurisdictional boundaries limit the claims that may be heard. Constitutional and statutory constraints restrict courts and agencies to certain types of disputes between specified parties.[25] Other claims are not heard because a party other than the consumer has the power to decide whether or not an action will be brought.[26] A consumer still able to bring his claim often will not do so because the forum is inaccessible or operates at inconvenient times and locations.[27]

The present method of adjudication is also inappropriate for consumer disputes. Adjudication according to the adversarial model requires that before a dispute can be resolved, "the interested parties [must] have the opportunity of adducing evidence [or proof] and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments."[28] This means that the parties must be granted an extended period of time to develop all the relevant data. This data must be submitted to the court only in conformity with the strictest rules of procedure so as to guarantee the impartiality of the arbiter. Finally, the parties must retain independent advocates to present the arbiter with the client's view of the data. This approach makes court and agency action in consumer cases lengthy and costly.[29] The class action, which is designed to avoid some of these problems in multiple party, small claim civil suits,[30] does not offer the consumer an acceptable al-

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24. Adjudicative proceedings may be conducted in an adversarial or inquisitorial manner. If the adversarial approach is utilized, the forum relies on the parties to develop the evidence on which the decision is to rest. *Id.* at 593. If the inquisitorial system is the one adopted, the forum gathers the facts and makes the decision. *Id.* at 596.

25. *E.g.*, Criminal prosecutions are usually confined to cases of merchant fraud, *see* note 16 *supra*. The FTC is limited to practices "affecting commerce," *see* note 20 *supra*.

26. *E.g.*, while many individual consumer complaints are received by the FTC, the FTC investigates an individual consumer problem only in exceptional circumstances, where it is suspected that the investigation of a single complaint may lead to the discovery of a pattern of commercial misconduct. Similarly, in many states, the bulk of staff time is consumed in responding to complaints, with formal action undertaken in only a small portion of cases. *See* NICJ, REGULATORY AGENCIES, *supra* note 9, at 2-3.

27. Comment, *Nontraditional Remedies*, *supra* note 3, at 393.

28. Adams, *supra* note 7, at 583.

29. Criminal prosecutions can take up to three years before final adjudication. NICJ, CRIMINAL SANCTIONS, *supra* note 8, at 398. Criminal prosecutions are also very costly. The community is often unwilling to bear that cost because of a widespread belief that businessmen, even though violating consumer-oriented criminal legislation, should not be treated as criminals. *Id.* at 393. As to civil cases, the National Commission on Product Safety estimates that because of court costs it is impractical for a consumer to go to court to press civil claims unless these claims are in amounts in excess of a $5,000 range. *See* Jones, *supra* note 3, at 234, 236. Administrative hearings are also protracted and expensive, despite the fact that administrative procedure is only partially based on the adversarial model. *See also* U.S. v. Morton Salt Co., 338 U.S. 632, 641-43 (1950).

30. The class action device is useful in many ways: first, it allows the cost of litigation to be absorbed by a class of consumers rather than by the individual consumer; second, it eases the difficult proof problems by expanding the sources of evidence; third, it strengthens the position of the consumer vis-a-vis the merchant; fourth, class actions inevitably get a great deal of publicity

ternative. Recent court decisions have significantly limited the circumstances in which the class action can be brought.[31]

There are other problems as well. Adjudicative forums are bound by substantive[32] and evidentiary[33] rules which, when applied to consumer disputes, tend to defeat legitimate consumer claims. Even when the consumer is able to obtain a favorable decision, the consumer is rarely compensated for his loss and for the expenses incurred in pursuing his claim.[34] Nor do the remedies imposed deter merchants from continuing their improper practices.[35] Adjudicative forums have failed to impose, and in many cases have been unable to impose, more innovative remedies despite their apparent necessity.[36]

2. Small Claims Courts: A Partial Solution

Recognizing the limitations of traditional adjudicative forums in resolving consumer disputes, every state has established special "small claims" or consumer courts.[37] These forums generally handle contract or tort claims up to

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and educate the public about improper merchant activity. NICJ, CONSUMER CLASS ACTION, *supra* note 17, at 13-48.

31. *E.g.*, Snyder v. Harris, 394 U.S. 332 (1969). *See* Leete, *The Right of Consumers to Bring Class Actions in the Federal Courts—An Analysis of Possible Approaches*, 33 PITT. L. REV. 39, 41 (1971).

32. Under the doctrine of "holder in due course," the consumer in an installment credit transaction may be unable to assert certain defenses in an action against him because the merchant has transferred the installment sales contract to a "good-faith" purchaser. *See* McGonagle, *supra* note 10, at 66. Under new FTC regulations, 16 C.F.R. Part 433 (1975), in all installment credit sales affecting commerce, the credit contract must contain a provision allowing the debtor to assert his claim against a "holder in due course." Another doctrinal problem arises when the complaint involves deceptive advertising. The consumer must prove that the advertiser went beyond permissable "puffing"—something which is difficult to show under present law. *See* McGonagle, *supra* note 10, at 66. Criminal prosecutions often fail because of the difficulties in proving fraudulent intent. New York State has recently amended its criminal fraud law and now allows a finding of fraudulent intent where there has been a showing of a systematic scheme to defraud. N.Y. PENAL LAW §§ 190.60-.65 (McKinney Supp. 1977).

33. Consumers frequently do not keep the type of systematic factual documentation necessary to meet the formal rules of evidence imposed by both courts and agencies. This problem becomes insurmountable in criminal cases where guilt must be established "beyond a reasonable doubt." NICJ, CRIMINAL SANCTIONS, *supra* note 8, at 397-98.

34. NICJ, CRIMINAL SANCTIONS, *supra* note 8, at 413. McGonagle concluded that: "The aim of a prosecution is two-fold: to punish past transgressions and to prevent future transgressions by deterring potential offenders. There is at least one fundamental flaw in the prosecutorial approach to consumer disputes—a conviction does not get the consumer what he really desires, his money back." McGonagle, *supra* note 10, at 65. Similarly, consumer recovery in a civil or administrative proceeding rarely affords the consumer full restitution because of the large expenses incurred in seeking such recovery.

35. Criminal conviction usually results in a suspended sentence, although on occasion the courts may impose a short sentence or a relatively light fine. NICJ, CRIMINAL SANCTIONS, *supra* note 8, at 391-92. Similarly, the infrequency of consumer recovery in a civil or administrative proceeding minimizes the deterrent effect of such proceedings.

36. *E.g.*, specific performance. *But see* note 84 *infra*.

37. Comment, *Nontraditional Remedies*, *supra* note 3, at 398 n.21. *See also* Driscoll, *De Minimis Curat Lex—Small Claims Courts in New York City*, 2 FORDHAM URB. L.J. 479 (1974); Steadman & Rosenstein, *"Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study*, 121 U. PA. L. REV. 1309 (1973); Note, *The Small-Claims Court in the State of Washington*, 10 GONZ. L. REV. 683 (1975); Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, (1969); Note, *Consumer Protection in Pennsylvania*, 30 U. PITT. L. REV. 113, 121-24 (1968); Stol-

a specified jurisdictional amount, awarding only money judgments.[38] Small claims courts seek to be more responsive to consumer complaints. Civil court procedures have been modified so that small claim disputes can be resolved quickly and economically.

The consumer initiates the small claims proceeding by paying to the court a minimal filing fee.[39] In most states merchants may also initiate a proceeding in small claims court.[40] Filing procedures have been simplified.[41] A special "Consumer Notice," stating the general nature of the claim and informing the defendant that he must take certain actions to protect his interests, is sent to the opponent.[42] In communities where there is a large non-English speaking population, the notice may be bilingual.[43] Service by registered mail may be an alternative to, or may supplement, personal service.[44]

Hearing procedures have also been modified. Rigid evidentiary rules have been relaxed, allowing the arbiter to consider all evidence that would enable him to reach a decision that would comport with substantial justice.[45] Moreover, the litigants need not retain attorneys to advocate their case.[46] Advisors are made available to the litigant to help him formulate his legal arguments, allowing the litigant to represent himself in court.[47]

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ler, *Small Claims Courts in Texas: Paradise Lost*, 47 TEXAS L. REV. 448 (1969). This Note will use the New York City Small Claims Court as a model. This court is perhaps the most progressive small claims court in the country.

38. In New York the maximum jurisdictional amount is $1,000. N.Y.C. UNIFORM CITY CT. ACT § 1801 (McKinney Supp. 1976). In other courts the jurisdictional limits range from $200 to $1,500, *e.g.*, CAL. CIV. PROC. CODE § 116.2 (West Supp. 1977) ($750); WASH. REV. CODE ANN. § 12.40.010 (Supp. 1977) ($200-$300).

39. In New York City the consumer pays a fee of $3.20 ($2.00 for court filing fee plus $1.20 for registered mail). *See also* MASS. GEN. LAWS ANN. ch. 218, § 22 (West Supp. 1976) ($3.00); MINN. STAT. ANN. § 491.02 (West Supp. 1977) ($3.00).

40. Comment, *Nontraditional Remedies*, *supra* note 3, at 394. In the New York City Small Claims Courts, a corporation cannot bring suit. Although a corporation cannot sue in small claims court, it can, of course, be sued.

41. Thus, in the New York City Small Claims Court the consumer need only give the clerk the following information: a) his own name and address; b) the exact name and address of the person or corporation he is suing; c) the amount of the claim. *See also* CAL. CIV. PROC. CODE § 116.4 (West Supp. 1977) (standardized form of claim); MASS. GEN. LAWS ANN. ch. 218, § 22 (West Supp. 1976) (statement may be made to court clerk who will inscribe the necessary averments).

42. *E.g.*, the notice sent by the New York City Small Claims Court includes the following statements on the face of the summons in large print: "Important!! You are being sued!! This is a court paper—A Summons Don't throw it away!! Talk to a lawyer right away!! Part of your pay can be taken from you (garnisheed). If you do not bring this to court, or see a lawyer, your property can be taken and your credit rating can be hurt!! You may have to pay other costs too!!! If you can't pay for your own lawyer bring these papers to this court right away. The clerk (personal appearance) will help you." N.Y.C. Form B 270.

43. *E.g.*, New York City provides for the summons to be printed in both English and Spanish. N.Y.C. Form B 296, 270.

44. *E.g.*, D.C. CODE ENCYCL. § 16-3902(a) (West 1966) (alternative); WIS. STAT. ANN. § 299.12 (West Supp. 1977) (alternative); MINN. STAT. ANN. § 491.03(1) (West 1971) (alternative). In the New York Small Claims Court, the court clerk sends an additional notice to the consumer by registered mail, return receipt requested, if the consumer does not appear in court on the due date. This procedure was instituted to reduce the frequency of "sewer service" and consequent default judgment. N.Y.C. UNIFORM CITY CT. ACT § 1803 (McKinney 1963).

45. *E.g.*, N.Y.C. UNIFORM CITY CT. ACT § 1802 (McKinney 1963).

46. *E.g.*, MONT. REV. CODE ANN. § 93-330(2) (Supp. 1975) (attorneys are not permitted unless all parties are represented by an attorney).

47. Usually a court clerk. One small claims court in New York provides the litigants with lay

As a result of the modified procedure in small claims courts, litigation costs are minimized and the resolution process is expedited. Nevertheless, these courts have failed to alleviate the problems of consumers.[48] In part, this is due to the fact that small claims courts are unavailable, unknown, or inaccessible to many consumers. Not enough small claims courts have been established to serve the needs of all consumers.[49] Nor have consumers been adequately informed about the courts that have been established.[50] These courts, moreover, often operate during inconvenient hours or at inaccessible locations.[51] Small claims courts have also failed, in part, because merchants have been allowed to misuse them. Small claims courts are often utilized by merchants to obtain default judgments against consumers.[52]

3. *The Failure of Mediative Forums to Adequately Resolve Consumer Disputes*

Mediative panels,[53] established by business, consumer, and public organizations have also had only limited success. This is so because of their lack of coercive authority and because of their limited resources and support. These panels do not have access to the coercive powers of government either to enforce their decisions or to monitor compliance with them. The panels rely instead on the good faith of the parties. This is ineffective when the parties dis-

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advocates free of charge. The Harlem Small Claims Court in New York City utilizes paraprofessionals called "community advocates." These lay advocates are trained in consumer law and in fact-finding procedures. *Hearings on S. 2928*, *supra* note 11, at 69.

48. *See generally* Jones & Boyer, *supra* note 3; *Buyer vs. Seller*, *supra* note 9; NATIONAL INSTITUTE FOR CONSUMER JUSTICE, SMALL CLAIMS COURTS (1972).

49. SMALL CLAIMS STUDY GROUP, LITTLE INJUSTICES: SMALL CLAIMS COURT AND THE AMERICAN CONSUMER, 22 (1972). Although small claims courts have been established in large municipalities, they are not evenly distributed to meet the needs of all residents. Many small communities do not have such courts at all.

50. *Id.*

51. Comment, *Nontraditional Remedies*, *supra* note 3, at 393 n.46. *E.g.*, Cleveland—8:30 A.M. to 4:00 P.M. on weekdays only; Philadelphia—9:00 to 5:00 daily except Saturdays and Sundays.

52. Thus in the Denver, Colo. Small Claims Court, in a recent year, a survey indicated that only 5% of the more than 15,000 cases filed in that year were suits by consumers. The remaining 95% were suits brought by collection agencies and landlords. *Hearings on S. 2928*, *supra* note 11, at 77. The Small Claims Court in Washington, D.C. was cited at the hearings as a good example of a typical small claims court that provides an effective mechanism in theory but not in practice. *Id.* at 84-86. On paper the system is exemplary. Night and Saturday sessions are provided in the court rules. Notice is by registered mail. At trial normal court rules are suspended. Yet in reality, the District of Columbia Court is little more than a "collection agency court." Eighty percent of the cases filed are brought by corporations. More significantly, 50% of the cases result in default judgments. The existence of the small claims court system is not publicized, nor is there any handbook telling consumers how to use it. Nearly all cases are tried during working hours. Service of notice is grossly inadequate. For example, service is sufficient when the receipt for the registered letter has been signed by anyone with the same last name as the defendant, or any other person who will sign his own name and then the name of the defendant. The flexibility of the proceeding depends on the judge hearing the case. Since the judges rotate from civil court to small claims court some conduct small claims hearings as if they were civil trials. Often they lack sufficient expertise to reach a proper resolution of the dispute. Furthermore, because the judge may only decide the case on the evidence produced in court, the judge may be unable to decide cases effectively where the relevant evidence cannot be presented in the courtroom.

53. A mediative forum is one in which the third party acts merely to bring the disputants together, allowing them to resolve their dispute mutually.

trust each other,[54] or when the panel is perceived as being biased towards one of the parties.[55] Nor have the panels been able to elicit adequate support, both in terms of participation and financial help. Industry panels have been unable to persuade individual businesses to participate in their programs.[56] Consumer and community operated organizations have been unable to obtain adequate financial support or to recruit skilled and experienced personnel.[57]

C. Developing a Model for Consumer Dispute Resolution

The mechanism that will be able to resolve consumer disputes effectively must be capable of responding to the special nature of those disputes. A review of the existing procedures indicates that there are certain minimal features that such a mechanism must have.

The dispute resolution mechanism must be inexpensive since the imposition of any sizeable costs will cause the mechanism to be costlier than the dispute. The mechanism must also be able to resolve consumer disputes quickly so that the consumer can have immediate access to goods and services essential to his well-being.[58]

The mechanism must also have rules and procedures capable of dealing with highly technical and complex issues. The mechanism must be able to draw upon the knowledge and skill of various experts and must utilize flexible procedural and evidentiary rules that will allow this technical information to reach the arbiter. Arbiters should be selected who are capable of comprehending the technical aspects of the dispute. The arbiters should also be able to incorporate into their decisions recent substantive legal developments, yet should not be so bound to substantive rules that equitable results cannot be achieved. The arbiters should also be free to formulate remedies that can effectively resolve the dispute.[59]

The parties must be treated equally by the mechanism despite the fact that the parties appear before it with unequal resources at their disposal. A mechanism based upon the present concept of adversarial adjudication is inadequate since under that model the ability of the parties to present their cases is directly dependent upon their resources.

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54. *See* text accompanying note 12 *supra*.

55. Private panels are often established and operated by special interest groups. Even publicly established organizations, however, are perceived as being partial to a particular group. This is particularly true for the Consumer Action Hotlines. Some of these programs take an obviously anti-merchant stance. Most, however, although consumer oriented, seek a more neutral position.

56. Several furniture retail associations refused to join FICAP. CRICAP was disbanded. *See* note 22 *supra*.

57. Comment, *Nontraditional Remedies*, *supra* note 3, at 420. These organizations, relying on grants and public contributions, rarely have a steady source of income. Their programs are staffed primarily by volunteers. They have a high turnover rate and are often unable to recruit personnel with the requisite technical expertise.

58. Early resolution of the dispute is also desirable for the consumer because he can get satisfaction more quickly and can, in many cases, avoid the embarrassment and harassment of bill collection. Speedy resolution is desirable for the merchant, because he may, when payment is withheld by the consumer, obtain that payment more quickly. NICJ, ARBITRATION, *supra* note 10, at 58.

59. There is an advantage in having an arbitrator who is "familiar with the practices and customs of the calling, and with just such matters as what are current prices, what is merchantable quality, what are the terms of the sale, and the like." American Almond Products Co. v. Consolidated Pecan Sales Co., Inc., 144 F.2d 448, 450 (1944) (Learned Hand, J.).

The mechanism must also be conciliative, if it is to restore confidence in the marketplace. The parties must be encouraged to deal with each other honestly and fairly after the dispute has been resolved. Consumer transactions occur on a neighborhood level.[60] Consumer goods must be bought and/or repaired periodically.[61] Recurring transactions must be conducted in an atmosphere of trust and honesty. The mechanism must not only encourage the parties to have confidence in each other, but to have confidence in the effectiveness of the mechanism itself. The forum must be accessible to the parties. Proceedings must be conducted at a convenient time and place. The arbiter must be, and must be perceived by the parties to be, impartial. The mechanism must also be capable of issuing an enforceable final and binding decision.

Finally, a single mechanism should be available to resolve most, if not all, consumer disputes. The existing structure of overlapping forums offers the consumer a confusing array of alternatives. Determining which of the forums has the authority to hear the dispute, and then selecting the forum most appropriate for its resolution, requires a familiarity with resolution techniques that most consumers do not have. The result often is that consumers do not bring their claims anywhere.[62]

III

THE EFFECTIVENESS OF CONSUMER ARBITRATION

Arbitration is the voluntary[63] submission of a dispute[64] to an impartial arbiter selected by the disputing parties, for a final and binding[65] determination reached pursuant to a procedure prescribed by the parties.[66] Consumer arbitration programs have adopted various permutations of this model of dispute resolution.[67] These programs will be evaluated in terms of the model set out in Part II of this Note.

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60. D. CAPLOVITZ, *supra* note 2, at 49-57.

61. *See* text accompanying note 11 *supra*.

62. Comment, *Nontraditional Remedies*, *supra* note 3, at 386.

63. Although arbitration is usually defined as "voluntary" on the theory that it arises from a contractual agreement between the parties, arbitration may, in fact, be "compulsory" when the parties are required to resort to arbitration by statutory enactments. However, compulsory arbitration has been sharply criticized as violating the basic nature of arbitration. *See* text accompanying notes 88-89 *infra*.

64. The agreement, constituting the basis for arbitration, may be either an agreement which provides for the submission to arbitration of existing disputes or an agreement which provides for the arbitration of controversies or disputes arising in the future.

65. In practice, however, some arbitration proceedings are not binding on the parties.

66. *See* M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 3 (1968).

67. The inadequacy of existing forums for the resolution of consumer disputes has received a considerable amount of attention over the years. Two major proposals have been advanced to remedy this situation. The first proposal is to strengthen the existing small claims court model. The second and broader proposal is to develop a comprehensive program of consumer arbitration. This Note will focus on this latter proposal, which has gained the attention of the U.S. Congress, *Hearings on S. 2928*, *supra* note 11; has been the subject of a major recommendation by the National Institute for Consumer Justice, NICJ, ARBITRATION, *supra* note 10; and has gained the endorsement of many leading practitioners and commentators. *See* note 13 *supra*.

A. *Compulsory Consumer Arbitration Programs*

Although the arbitration process is generally thought of as a voluntary one, it may be compelled by the courts or the legislature.[68] Both branches of the government have developed consumer arbitration programs on a limited scale.

Several state legislatures have at one time or another adopted compulsory consumer arbitration programs, which require that certain types of small claim disputes brought to its courts must be resolved by arbitration.[69] The most comprehensive program is in Pennsylvania.[70] A similar program was adopted for a period of time in New York.[71] The state programs are not intended to resolve all small claim consumer disputes, and the small claims courts continue to operate simultaneously with these programs.[72]

The procedures, up to the time notice is served, are governed by traditional court rules, since the proceeding begins as a judicial action.[73] Special arbitration rules have been developed, however, for the arbitration hearing.[74] The hearings are conducted by court appointed attorneys[75] who are delegated broad authority including the power to subpoena witnesses and documents, the power to administer oaths, and the authority to determine the admissibility of

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68. *See* M. DOMKE, *supra* note 66, at 7.

69. *E.g.*, some states have required motor vehicle claims under a specified amount to be submitted to arbitration. *E.g.*, LAWS OF NEVADA, ch. 38, §§ 215-235 (1976); ILL. ANN. STAT. ch. 13, § 1065.159 (Smith-Hurd, 1971, repealed 1971) (This statute was declared unconstitutional in Grace v. Howlett, 51 Ill.2d 478, 283 N.E.2d 474 (1972) because it called for mandatory arbitration but did not provide for trial by jury. To be constitutional, the statute must afford the parties, at some point, the opportunity of having a trial de novo both as to the law and as to the facts).

70. PA. STAT. ANN. tit. 5, § 30 (Purdon Supp. 1976-1977). The prototype of the Pennsylvania procedure was introduced in 1952. 1951 Pa. Laws, No. 590. The law provided that the local civil courts could compel any party seeking to use its forum to first submit their claims, if under $10,000, to an arbitrator. In 1955 the state supreme court held that the statute was constitutional although the parties were not granted their right to trial by jury. The court rejected the challenge that the statute was a deprivation of property without due process and that it violated the state's statutory guaranty of a jury trial because the parties were able to obtain a trial de novo upon completion of the arbitration. The United States Supreme Court dismissed the appeal. *In re* Smith, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1955).

71. The program began with the enactment by the legislature in 1970 of an amendment to the Judiciary Law, 1970 N.Y. Laws, ch. 1004, authorizing the Administrative Board of the Judicial Conference to "promulgate rules for compulsory arbitration of claims for the recovery of a sum of money not exceeding three thousand dollars." The legislature began an experimental program in the City Court of Rochester. Bronx County adopted the program in 1971, and Binghamton in 1972. The program was held constitutional in Bayer v. Ras, 71 Misc. 2d 464, 336 N.Y.S.2d 261 (Monroe County Ct. 1972) because it provided for a court trial de novo.

72. *See, e.g.*, Steadman & Rosenstein, *supra* note 37, at 1320.

73. New York, 22 N.Y.C.R.R. § 28.6(b) (McKinney 1973); Pennsylvania, PA. STAT. ANN. tit. 5, § 36 (Purdon 1963) ("in the same manner as a writ of summons in a personal action is now served").

74. In New York, 22 N.Y.C.R.R. § 28 (McKinney 1973). In Pennsylvania, most of the arbitration rules are incorporated into the statute itself. The courts may also promulgate rules of court which "adopt as an entirety the system of arbitration by boards or panels of attorneys which is contained in the pertinent provisions of the Act of 1836, as modified by the various provisions contained in the basic amendment of 1952." Klugman v. Gimbel Brothers, Inc., 198 Pa. Super. 268, 277, 182 A.2d 223, 227 (1962).

75. Each claim is heard by a panel of three attorney arbitrators. 22 N.Y.C.R.R. § 28.4 (McKinney 1973) (appointed by the designated chairman); PA. STAT. ANN. tit. 5, § 31(VII) (Purdon 1963) (appointed by a court clerk).

evidence.[76] The arbitrator may apply flexible rules of evidence and procedure.[77] Hearings are conducted at a time and place designated by the parties or by a court-appointed official.[78] Rules allowing the exclusion of outside parties, and allowing the proceedings to be conducted without a record are designed to ensure the privacy of the hearing.[79] The entire arbitration process must be completed within a specified time period.[80] After the arbitration process has been completed, a party dissatisfied with the results may commence an action in court for a de novo determination of the claim.[81] The state legislatures have sought to discourage such action by requiring the party filing the court action to pay all the arbitration costs whether or not he is successful in that action.[82] If no application for a trial de novo is made, the community bears the costs of the arbitration.[83]

The courts have also utilized compulsory arbitration to handle consumer disputes. Some courts have ordered the compulsory arbitration of factual disputes arising out of consent orders where the consumer is a beneficiary of such an order.[84]

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76. In New York, 22 N.Y.C.R.R. § 28.8(b) (McKinney 1973); in Pennsylvania, PA. STAT. ANN. tit. 5, § 30 (Purdon Supp. 1976-1977).

77. In New York, 22 N.Y.C.R.R. § 28.8(a) (McKinney 1973) (The rules of evidence "shall be liberally construed to promote justice"). In Pennsylvania, governed by rules of court. In certain counties local rules of court direct that arbitrators follow the "established" rules of evidence, *e.g.*, LANCASTER CO. C.P. ARBITRATION R. 43 § 8 (1959); in others, that they give them liberal construction, *e.g.*, PHILADELPHIA MUNIC. CT. ARBITRATION R. III(E) (1958); the rules of still other counties are silent on the subject.

78. In New York, 22 N.Y.C.R.R. § 28.6 (McKinney 1973); in Pennsylvania, PA. STAT. ANN. tit. 5, § 33 (Purdon 1963).

79. In New York, 22 N.Y.C.R.R. § 28.9(b) (McKinney 1973); in Pennsylvania, PA. STAT. ANN. tit. 5, § 121(VI) (Purdon 1963).

80. In New York, the rules direct that the hearing be conducted not less than 15 or more than 30 days from the date the case is assigned. If the hearing cannot be scheduled within the 30 days, the reasons must be communicated to the Arbitration Commissioner (the Administrator) who may then continue the case. Any case which has been continued twice will be referred to the court for a hearing on the reasons why arbitration has not proceeded. Following such a hearing, the court may order a dismissal of the case. Upon completion of the hearing, arbitrators are required to render a prompt decision. The time limitation is 20 days for the filing of a report and award. 22 N.Y.C.R.R. § 28.6, .11 (McKinney 1973). In Pennsylvania, hearings take place within a few weeks of appointment of the arbitrators, and awards are to be filed within 20 days of hearings. PA. STAT. ANN. tit. 5, § 31(VIII) (Purdon 1963). This provision has, however, been interpreted as directory rather than mandatory, so that awards rendered more than 20 days after the hearing are not void. Kuzemchak v. Bukofski, 2 Pa. D. & C.2d 810 (Luzerne County C.P. 1955).

81. The arbitrators may not be called to testify, and their report and award may not be admitted into evidence. If the parties do not file for a trial de novo within a specified period, the arbitrator's award is final and enforceable. In New York, 22 N.Y.C.R.R. § 28.12 (McKinney 1973). In Pennsylvania, PA. STAT. ANN. tit. 5, § 71(V) (Purdon 1963).

82. In New York the demandant must reimburse the court clerk in the amount of the arbitrators' fees. 22 N.Y.C.R.R. § 28.12 (McKinney 1973). In Pennsylvania, the demandant must repay to the county the cost of the arbitration, not to exceed 50% of the amount in controversy. This payment is not a recoverable item of costs even if the appealing party prevails. PA. STAT. ANN. tit. 5, § 71(V) (Purdon 1963).

83. In New York, the state will pay each arbitrator $35 and the chairman $45. 22 N.Y.C.R.R. § 28.10 (McKinney 1973); in Pennsylvania, payment is governed by court rule. Fees ranging from $10 to $50 per case for each arbitrator have been set by the courts and are paid by the county.

84. State of Washington v. Carpetria, No. 713326 (Super. Ct., King County, Wash., filed Jan. 2, 1970) (court required a merchant who was found to be engaged in fraudulent practices relating to

The compulsory state arbitration programs have been specifically designed to resolve consumer disputes. Notice procedures have been made subject to traditional judicial safeguards. Impartiality and fair play are protected by virtue of constant judicial supervision. The arbitrators—attorneys—are familiar with the substantive law. If either one of the parties is dissatisfied with the proceedings that party has a right to have that claim reheard, de novo, by a court. Yet, studies of these programs[85] indicate that they are limited by their basic structure; they are unable to provide the parties with an effective mechanism because they are governmentally supervised and because they are compulsory. Because the hearings are not privately operated, the parties are not free to select the procedures they will use or the arbiter whom they wish to hear their case. One of the key attractions of consumer arbitration is the expectation that the parties will be free to engage an arbiter who has sufficient expertise in the area in which the dispute arose.[86] Instead, the parties must be satisfied with a court-appointed attorney. A study of the Pennsylvania program indicated that:

> Attorney-arbitrators tend to become overly involved in the case before them, are ill-equipped to handle cases out of their fields, are fearful of retribution when roles are reversed, tend to give compromise awards, and generally lack either the sense of public interest or the judicial training needed to reach a proper determination.[87]

The compulsory nature of these proceedings has also been criticized. To the extent that the parties feel they were forced into such a process they will not, particularly if they lose their case, attach much credence to the system. Indeed, these compulsory programs are not properly denominated as "arbitration" at all. As the New York Court of Appeals said in *Mt. St. Mary's Hosp. v. Catherwood*:[88] "At the inception it should be observed that the essence of arbitration, as traditionally used and understood, is that it be voluntary and on consent. The introduction of compulsion to submit to this informal tribunal is to change its essence."[89]

B. Small Claims Court Arbitration

Many small claims courts offer to those invoking its machinery an opportunity to have their claim resolved by arbitration rather than by the small claims court judge.[90] This form of judicially supervised voluntary arbitration is

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advertising, sale, delivery, and installation of carpets to reimburse those injured and to arbitrate any disputed claims); State of Washington v. Dare to be Great, Inc., No. 203543 (Super. Ct., Spokane County, Wash., filed Sept. 24, 1971) (promoter involved in pyramid sales was required to arbitrate any consumer claims arising after entry of consent decree); People v. Koscott Interplanetary Inc., No. 112912 (Super. Ct., Kern County, Calif., filed Feb. 16, 1971) (required arbitration of any controversy which arose out of a court-ordered refund); People v. Koscott Interplanetary, Inc., No. 71 C.H. 1942 (Cir. Ct. Cooke County, Ill., filed Aug. 17, 1971) (same).

85. King, *Realism in Rochester: The Pilot Arbitration Program*, 43 N.Y. ST. B. J. 489 (1971). Rosenberg & Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961).

86. *See* text accompanying note 59 *supra*.

87. Rosenberg & Schubin, *supra* note 85, at 457.

88. 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970).

89. 26 N.Y.2d at 500, 260 N.E.2d at 511, 311 N.Y.S.2d at 867.

90. *E.g.*, D.C. CODE ENCYCL. § 11.1342 (West 1975); MINN. STAT. ANN. § 491.01 (West Supp. 1976).

unique, and falls somewhere between compulsory and voluntary arbitration. The most developed program is found in the Small Claims Court of New York City.[91] A majority of the cases received by that court are resolved through arbitration.[92]

Small claims arbitration is conducted pursuant to rules promulgated by the courts.[93] The parties cannot choose to send their case to arbitration until their case is called by the judge.[94] Therefore the procedure up to the hearing stage is the same as that followed in small claims court litigation. The consumer is protected by the simplified filing procedure,[95] by the special consumer notice utilized,[96] and by the stringent service requirements.[97] Furthermore, the arbitration hearing is conducted at the small claims court, during usual court hours. The hearing, on the other hand, differs significantly from small claims court litigation. The hearing is conducted in a private and conciliatory atmosphere rather than the public and adversarial manner found in the small claims courtroom.[98] Hearings are conducted by attorneys rather than judges.[99] Yet many of the benefits of the small claims courts are retained. Flexible rules of procedure and evidence are used, and consumers are encouraged to represent themselves.[100] Decisions are usually issued at the hearing or shortly thereafter, and are not appealable. The costs are minimal, since the only expense entailed is the minimal filing fee that must be paid by the party initiating the proceeding.[101]

Small claims arbitration, while possessing all the positive aspects of the legislative compulsory arbitration programs, as well as the benefits peculiar to the small claims court system, has been attacked for its compulsory nature. Studies have shown that small claims arbitration is not, in fact, consensual. Although the parties in small claims court have the choice of having their case brought before the judge or an arbitrator, there is an element of involuntariness about the proceeding: "The fact that court personnel do urge the parties to select the arbitration process, and the fact that waiting for a hearing before a

91. The N.Y. Small Claims Court is part of the Civil Division of the New York State Supreme Court.

92. The New York City Small Claims Court handles approximately 70,000 consumer complaints per year. Of the 70,000, a large portion are arbitrated. *See* Determan, *Arbitration of Small Claims*, 10 THE FORUM 831, 833 (1975).

93. N.Y.C. CIV. CT. RULES 2900.33 (1972).

94. The Small Claims Court begins the process with a roll call of cases to be heard that evening. When their names are called, the litigants must agree to a hearing before an arbitrator or have the case tried before the judge. *See* Determan, *supra* note 92, at 833.

95. *See* note 41 *supra*.

96. *See* notes 42-43 *supra*.

97. *See* note 44 *supra*.

98. Unlike the court, there are no spectators, recorders, or other personnel present who could inhibit the parties.

99. Usually there will be from five to fifteen volunteer lawyers available for each session to conduct the arbitrations. The arbitrators are all lawyers who have gone through a screening process by Supreme Court judges to determine whether or not their experience warrants them to be arbitrators. *See* Determan, *supra* note 92, at 833.

100. Indeed, the parties are provided with literature and/or information describing the arbitration proceeding, thus making them more comfortable and more familiar with arbitration. *See* Determan, *supra* note 92, at 834.

101. *See* note 39 *supra*.

judge can result in long delays, both can result in forcing into arbitration people who might not otherwise select this process."[102] Moreover, the arbitration is not private. The parties cannot choose their arbitrator, they simply accept whomever is next in line. The result, described by one observer of this arbitration program, is that "The loser in an arbitration case where he has had no choice over his judge, may lose faith and credibility in this system of justice."[103] Nor can the parties choose a time and place for the hearings that is convenient for them. Arbitrations are only conducted during court hours in the courthouse.

C. Voluntary Consumer Arbitration Programs

Consumer arbitration is more often the product of a consensual agreement between the parties to the consumer transaction. While the parties in such a case are free to structure the arbitration as they wish,[104] they most frequently simply refer in their agreement to the consumer arbitration rules of the American Arbitration Association (AAA)[105] or the Better Business Bureau (BBB).[106] The American Arbitration Association has been in the forefront of the movement to encourage the widespread use of voluntary arbitration.[107] In 1968, the National Center for Dispute Settlement (NCDS), a division of the AAA, was established by a grant from the Ford Foundation to develop new resolution techniques.[108] The NCDS, pursuant to this mandate, developed rules of consumer arbitration.[109] In addition, the NCDS established several pilot consumer arbitration projects.[110] The Better Business Bureau has developed an extensive nationwide program of voluntary consumer arbitration.[111] These programs are designed and administered uniformly, with some local variations in procedure and rules as required by state law.[112]

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102. Determan, *supra* note 92, at 834-35.

103. *Id.* at 835.

104. M. DOMKE, *supra* note 66, at 1.

105. *See, e.g.*, NATIONAL CENTER FOR DISPUTE SETTLEMENT, CONSUMER ARBITRATION RULES OF THE NATIONAL CENTER FOR DISPUTE SETTLEMENT OF THE AMERICAN ARBITRATION ASSOCIATION FOR THE MONTGOMERY AWARD ALBANY AREA PILOT PROJECT (1974) [hereinafter cited as NCDS, CONSUMER ARBITRATION RULES].

106. *See, e.g.*, THE BETTER BUSINESS BUREAU OF N.Y., INC., ARBITRATION RULES OF THE CONSUMER-BUSINESS ARBITRATION TRIBUNAL OF THE BETTER BUSINESS BUREAU OF METROPOLITAN NEW YORK, INC. (1974) [hereinafter cited as BBB, CONSUMER ARBITRATION RULES]. The parties are certainly not limited to these organizations and can set up their own program, as long as it is conducted pursuant to the appropriate statutory law.

107. *See generally* McGonagle, *supra* note 10.

108. The purpose of the NCDS was "to test the theory that proven dispute settlement techniques such as mediation, fact-finding and arbitration could be modified and adapted to . . . new areas of conflict in communities, on campuses and in public employment." *Id.* at 68.

109. *See* note 105 *supra*.

110. Two major projects are in Albany, N.Y. and Harrisburg, Pa.

111. *See generally* Determan, *supra* note 92. Local arbitration programs have existed in some cities for over twenty years. These programs became a nationwide effort in 1970 after the creation of the Council of Better Business Bureaus Inc. [CBBB]. Creation of consumer arbitration panels was one of the Council's fourteen declared major goals. As of 1975 approximately 90 of the 140 BBB's throughout the country had set up programs.

112. *Id.* at 834.

1. Voluntary Programs Based on the Commercial Arbitration Model

It is customary to classify arbitration into two categories: labor and commercial.[113] Consumer and commercial transactions have many common elements, including the nature of the goods transferred and the market in which the transactions occur.[114] They also, until recently, were governed by the same substantive law.[115] Therefore it seemed natural to regulate consumer arbitration by the well developed rules of commercial arbitration.

a. Arbitration Statutes—Until this century, voluntary arbitration was governed by the common law.[116] Statutory regulation of arbitration began in 1920 with the enactment of an arbitration act in New York.[117] Since that time a majority of the states have enacted arbitration statutes, most modeled after the Uniform Arbitration Act.[118] The federal government has also enacted a federal arbitration act.[119] These statutes regulate commercial and in some states labor arbitration. They deal generally with the initial agreement to arbitrate, the relationship of the judicial process to arbitration, the conduct of the arbitration proceeding, and enforcement of the arbitration award. The arbitration statutes do not expressly abolish the common law. Thus the common law prevails except to the extent superceded by statutory regulation.

Under the arbitration statutes, a written agreement between the parties to arbitrate existing or future disputes arising between them is valid and irrevocable.[120] This rule of irrevocability did not exist at common law[121] and its inclusion in the arbitration statutes reflects a legislative policy that the parties to an arbitration contract are absolutely bound by their agreement.[122] To implement this rule of irrevocability the arbitration statutes allow either one of the parties to the arbitration agreement to compel the other, by court order, to

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113. M. DOMKE, *supra* note 66, at 4.

114. Both involve fungible goods transferred in the commercial marketplace.

115. *I.e.*, common law contract law and the Uniform Commercial Code adopted by most states.

116. Commercial arbitration goes back at least to the 13th century. *See generally* Metschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

117. 1920 N.Y. Laws ch. 275, §§ 803-807.

118. UNIFORM ARBITRATION ACT §§ 1-25, 7 UNIFORM LAWS ANN. 1 (West 1970). Thirty-one states now have modern arbitration statutes. One other state has adopted the basic premise of the modern arbitration statutes—irrevocability—by judicial decision. Ezell v. Rocky Mountain Bean & Elevator Co., 76 Colo. 409, 232 P. 680 (1925). This Note will use the Uniform Arbitration Act and the New York Arbitration Act, N.Y.C.P.L.R. §§ 7501-7514 (McKinney 1963) as examples.

119. UNITED STATES ARBITRATION ACT, 9 U.S.C. §§ 1-14 (1970). The Act is applicable to maritime transactions and to a "contract evidencing a transaction involving commerce." *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) which broadly defines this latter clause.

120. UNIFORM ARBITRATION ACT § 1, 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7501 (McKinney 1963).

121. At common law, a contractual agreement to arbitrate future disputes was unenforceable in court. This rule dates back to dictum in Vynor's case, 8 Co. 80a, 81b (K.B. 1609) decided by Lord Coke. This rule was justified under the "ousting of the courts" theory—that the courts would not allow private parties to "oust the courts" of their jurisdiction. There thus developed the doctrine of "revocability" of executory arbitration agreements. Each party could refuse arbitration at any time prior to rendition of the award. The other party could only get nominal damages for breach of contract. The primary goal of the arbitration statutes was to eliminate the doctrine of "revocability" and encourage the development of arbitration.

122. UNIFORM ARBITRATION ACT § 2, 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7501 (McKinney 1963).

proceed with the arbitration.[123] The statutes also allow either party to stay any attempted legal action by his opponent that would effectively negate the agreement to arbitrate.[124] The only time a judicial action will be allowed before the arbitration proceeding is if it is demonstrated to the court that there has been no agreement to arbitrate.[125]

The scope of the arbitration agreement, with minor exceptions, is within the discretion of the parties. In their approach to the definition of the kinds of controversies which may be submitted to arbitration, the statutes are designed broadly to make controversies of any kind "arbitrable."[126]

The arbitrators are ordinarily selected by the parties.[127] The statute defines the powers and duties of the arbitrator. The arbitrator must set the time and place of the hearing and must notify the parties of the arrangements made.[128] The arbitrator must take an oath of office before conducting the hearing.[129] The arbitrator has the power to subpoena witnesses and administer oaths.[130]

Other provisions deal with the manner in which the arbitration hearing is to be conducted. The hearing will be held in the jurisdiction agreed upon by the parties.[131] The statutes require that some form of notice be sent to the opposing party.[132] The law guarantees to the parties the right to be heard, to present evidence, and to cross-examine witnesses.[133] The parties also have a right to counsel.[134] Arbitrators are not bound to apply strict rules of law or evidence.[135] The arbitrator must reach a decision[136] based on the evidence pro-

123. UNIFORM ARBITRATION ACT § 2(a), 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7503(a) (McKinney 1963).

124. UNIFORM ARBITRATION ACT § 2(d), 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7503(a) (McKinney 1963).

125. UNIFORM ARBITRATION ACT § 2(b), (c), 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7503(b) (McKinney 1963).

126. *E.g.*, In New York the only limitation is that found in N.Y.C.P.L.R. § 7502(b) (McKinney 1963) which provides that a claim will be barred if it would have been barred by the statute of limitations had it been asserted in the state courts.

127. When the parties have failed to designate the arbitrator, a court of competent jurisdiction is authorized to appoint the arbitrator. UNIFORM ARBITRATION ACT § 3; N.Y.C.P.L.R. § 7504 (McKinney 1963).

128. UNIFORM ARBITRATION ACT § 5(a), 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7506(b) (McKinney 1963).

129. N.Y.C.P.L.R. § 7506(a) (McKinney 1963) ("sworn to hear and decide the controversy faithfully and fairly").

130. UNIFORM ARBITRATION ACT § 7, 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7505 (McKinney 1963).

131. N.Y.C.P.L.R. § 7501-2(a) (McKinney 1963). Under these provisions a nonresident of New York who agrees to arbitrate in New York subjects himself to the personal jurisdiction of the New York courts to enforce the agreement and enter judgment on the resulting award.

132. N.Y.C.P.L.R. § 7503(c) (McKinney 1963). Notice may be sent to the opposing party "in the same manner as a summons or by registered or certified mail, return receipt requested." Failure to give notice in this manner, however, will only affect the permissible time limits for applying to the courts for a stay of arbitration. Thus notice by ordinary mail is not prohibited. If ordinary mail is specified in the agreement, the parties must comply with its terms.

133. UNIFORM ARBITRATION ACT § 5(b), 7 UNIFORM LAWS ANN. 1 (West 1970); N.Y.C.P.L.R. § 7506(c) (McKinney 1963). These rights can be waived, however, either by written consent of the parties of if the parties continue with an arbitration not conducted in compliance with this section, if done without objection. N.Y.C.P.L.R. § 7506(f) (McKinney 1963).

134. N.Y.C.P.L.R. § 7506(d) (McKinney 1963).

135. Lentine v. Fundaro, 29 N.Y.2d 382, 278 N.E.2d 633, 328 N.Y.S.2d 418 (1972). This doctrine grew from the realization that businessmen, among others, often distrust the law and judges.

136. The arbitrator decides questions of law and questions of fact.

duced[137] and must then issue an award to be given within a designated time period.[138] In the award the arbitrator formulates an appropriate remedy[139] and allocates the arbitrator's expenses and fees.[140]

Finally, the arbitration statutes deal with the judicial confirmation,[141] vacation,[142] or modification[143] of arbitration awards. The statute restricts the substantive scope of review of the awards.[144] An arbitrator's award will be vacated when there is a showing of fraud (or similar misconduct),[145] partiality,[146] action taken by the arbitrator in excess of his authority,[147] the lack of an arbitration agreement,[148] or conduct on the part of the arbitrator which in other ways has substantially prejudiced the rights of a party.[149] In the absence of such a showing in court, the court will confirm the award.[150]

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137. N.Y.C.P.L.R. § 7506(c) (McKinney 1963).

138. *Id.* §§ 7507-7508.

139. Arbitrators may grant awards in the form of damages, Bruno v. Pepperidge Farm, 256 F. Supp. 865, 869 (E.D. Pa. 1966) (liquidated damages); United Buying Service Int'l Corp. v. United Buying Service of Northeastern N.Y., Inc., 3 App. Div. 2d 75, 327 N.Y.S.2d 7 (Sup. Ct. 1st Dep't 1971) (consequential damages), or specific relief. Under modern statutory provisions the award may provide for a remedy even if a competent court could not grant the same relief. Staklinski v. Pyramid Elec. Co., 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959); Grayson-Robinson Stores, Inc. v. Iris Constr. Corp., 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

140. UNIFORM ARBITRATION ACT § 10, 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7513 (McKinney 1963) (fees are allocated unless otherwise provided in the agreement to arbitrate).

141. UNIFORM ARBITRATION ACT § 11, 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7510 (McKinney 1963).

142. UNIFORM ARBITRATION ACT § 12, 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511(a), (b) (McKinney 1963).

143. UNIFORM ARBITRATION ACT § 13, 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511(c) (McKinney 1963).

144. N.Y.C.P.L.R. §§ 7501, 7510-7511 (McKinney 1963); Grayson-Robinson Stores, Inc. v. Iris Constr. Corp., 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960) (held that the court could not use equity power to go beyond statutory basis for refusing enforcement of an award).

145. UNIFORM ARBITRATION ACT § 12(a)(1), 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511(b)(1)(i) (McKinney 1963). This includes "corruption, fraud or misconduct in procuring the award," and is intended to include improper activity by the arbitrators, by a party to the arbitration, or by a third party.

146. UNIFORM ARBITRATION ACT § 12(a)(2), 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511(b)(1)(ii) (McKinney 1963). The arbitrator is to be impartial if "appointed as a neutral." If the arbitrator is to be appointed by a disinterested third party or organization, it may be assumed that they are all to be impartial; but if the parties simply agree to select an arbitrator, he may be partisan unless the parties have indicated a contrary intention by the terms of the agreement or understanding. Moreover, "partiality" is not defined in the statutes and is difficult to delineate.

147. UNIFORM ARBITRATION ACT § 12(a)(3), 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511(b)(1)(iii) (McKinney 1963).

148. UNIFORM ARBITRATION ACT § 12(a)(5), 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511(b)(2)(ii) (McKinney 1963). Conditions are put on this ground for vacation. *E.g.*, the Uniform Act will allow vacation only if "the issue was not adversely determined" to the party raising the objection and "the party did not participate in the arbitration hearing without raising the objection." The New York law requires that the party has neither participated in the arbitration nor been served with notice of intention to arbitrate.

149. UNIFORM ARBITRATION ACT § 12(a)(4), 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511(b)(2)(i) (McKinney 1963).

150. N.Y.C.P.L.R. §§ 7510, 7514 (McKinney 1963). The court may also modify and confirm the award, UNIFORM ARBITRATION ACT § 13, 7 UNIFORM LAWS ANN. 2 (West 1970); N.Y.C.P.L.R. § 7511. The arbitrator can also modify his own award. N.Y.C.P.L.R. § 7509 (McKinney 1963).

Thus the arbitration statutes call for a broad, flexible, and remedial mechanism, under which a final and binding decision may be issued. Arbitration is capable of resolving a great variety of disputes. The only jurisdictional limits are those established by the parties themselves.[151] The evidentiary rules are flexible, allowing the arbitrators to admit and hear all the evidence necessary to reach a proper determination. Furthermore, the arbitrator is free to consider the equities of the case in issuing an award. The decision reached is final and binding and is enforceable by the courts.

b. Commercial Arbitration Rules—The American Arbitration Association has developed Commercial Arbitration Rules[152] for the conduct of commercial arbitration proceedings under the state arbitration acts. These rules are binding on all parties who have provided for arbitration either by the AAA or pursuant to its rules.[153] The AAA by that designation becomes the administrator of the arbitration.[154]

Under the AAA Rules, the method of initiating an arbitration depends upon the arbitration agreement. If an agreement was made prior to the time the dispute arose the aggrieved party must file a claim with the AAA along with a copy of the agreement. General notice is then served upon the opposing party.[155] If the parties agreed to arbitration only after the dispute arose, the parties must submit the claim to the AAA jointly.[156] An impartial arbitrator[157] is then selected by the parties, usually by drawing upon a list provided by the AAA.[158] The parties also determine the locale of the hearing, but the arbitrator selects the actual time and place.[159] The AAA Rules defer to the state statutes in delineating the powers and duties of the arbitrator.[160]

Hearing procedures are also established.[161] Hearings may be held even though a party does not appear at the hearing, so long as that party received the notice prescribed by the state statute.[162] Flexible rules of procedure and

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151. *See* text accompanying note 126 *supra*. Thus the parties can use this mechanism to settle almost all disagreements between them, legal and non-legal.

152. RULES OF AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, [hereinafter cited as AAA, COMMERCIAL ARBITRATION RULES].

153. *Id.* § 1.

154. *Id.* § 3. The role of the AAA in these arbitrations is to act as an agent for both parties. For each case filed with it, the AAA provides a Tribunal Administrator who examines the arbitration agreement to make certain that all procedures specified in that agreement are followed. The Administrator generally relieves the parties of administrative details.

155. *Id.* § 7. The notice, called a "Demand," must contain a statement setting forth the nature of the dispute, the amount involved, and the remedy sought. The party initiating the proceeding may, but is not required to, send the Demand to his opponent. The AAA will also notify the opponent of the filing of the Demand. Notice may be served upon the opposing party by mail addressed to such party or upon his attorney at his last known address.

156. *Id.* § 9. Initiation is by a "submission."

157. An arbitrator is impartial if he has no "financial or personal interest in the result of the arbitration." *Id.* § 9. The parties can waive the arbitrator's disqualification in writing.

158. *Id.* §§ 5, 12. The parties can also appoint the arbitrator directly. *Id.* § 13.

159. *Id.* §§ 10, 20.

160. Duties: *e.g.*, oath of the arbitrator, *id.* § 26. Powers: administer oaths, *id.* § 26; subpoena witnesses or documents, *id.* § 30; and issue orders to conserve property, *id.* § 33.

161. The rules set out the order the proceedings must take. *Id.* § 28. The proceedings are opened by recording certain formalities and by receipt of the claim which formulates the issue. The complainant presents his evidence first, followed by the defending party.

162. *Id.* § 29.

evidence are used.[163] Thus on-site inspections are permitted when necessary for a proper resolution of the case.[164] Persons not parties to the dispute may be excluded from the hearing.[165] Hearings are concluded ("closed") after all the evidence has been presented and after the parties have submitted any necessary briefs.[166] The arbitrator must issue an award within thirty days of closing the hearing.[167] The arbitrator may grant any remedy or relief which he deems just and equitable and which is within the scope of the agreement of the parties.[168] Arbitration fees are also assessed in the award. The general cost of the hearing and the arbitrator are shared by the parties.[169] The costs for additional personnel such as stenographers and interpreters are borne by the parties requesting them.[170]

c. Consumer Arbitration Rules—The NCDS Consumer Arbitration Rules[171] were modeled on traditional commercial arbitration rules. The BBB adopted the NCDS Rules with slight modification.[172] The typical consumer arbitration hearing is conducted by the Better Business Bureau. The Bureau will arbitrate a claim in one of three cases: the merchant, in agreement with the BBB has precommitted itself to arbitration;[173] both parties, by contractual agreement between themselves, have precommitted all future disputes to BBB arbitration;[174] or both parties, at the time the dispute arose, agreed to submit their dispute to BBB arbitration.[175]

Initiation of the proceeding is the same as in commercial arbitration. If the parties are submitting the claim to arbitration solely because of the merchant's BBB membership, however, the Rules provide that only the consumer may initiate the proceedings.[176] A list of five arbitrators, selected from a pool of volunteers, is then sent to each party with a request that each party cross off the names of any arbitrator who is unacceptable, and that each number the remaining arbitrators according to preference.[177] The volunteer pool of arbitrators includes not only lawyers, but also senior citizens, academicians, technical experts in various fields, and representatives from various community organizations.[178] Virtually all of these volunteer arbitrators go through a four and one-half hour training session conducted by the Bureau staff.[179] Accordingly, the arbitrators are often familiar with the nature of the controversy and are able to intelligently reach an equitable decision. Once the parties have

163. *Id.* §§ 30, 31.
164. *Id.* § 32.
165. *Id.* § 24.
166. *Id.* § 34.
167. *Id.* § 40.
168. *Id.* § 42.
169. *Id.* §§ 47, 50, 51.
170. *Id.* §§ 22, 23. The expenses of witnesses for either side must be paid by the party producing the witness. *Id.* § 49.
171. *See* note 105 *supra*.
172. NICJ, ARBITRATION, *supra* note 10, at 92.
173. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 9-C.
174. *Id.* § 9-A.
175. *Id.* § 9.
176. *Id.* § 9-C.
177. *Id.* § 12.
178. Determan, *supra* note 92, at 836.
179. *Id.*

selected an arbitrator, a time and place for the arbitration is established at the convenience of the parties, usually in the early evening or on weekends.[180] If not designated by the parties, the BBB makes the appropriate assignments.[181] An attempt is made to schedule the hearing at a time and location convenient for the parties to reduce such incidental costs as time lost from work.

Flexible rules of procedure and evidence are utilized in the hearings.[182] The arbitrator may conduct on-the-spot inspections of evidentiary items that cannot be presented in the hearing room. Moreover, under well established case law, the arbitrator is not bound to substantive rules of law which, if applied in a consumer case, would lead to an unjust result.[183] The arbitrator can also provide the aggrieved party with a broad range of relief, and is often free to formulate novel remedies.[184] Either party may be represented by counsel upon giving notice to his opponent.[185] Interpreters will be provided to either party, but the party requesting such assistance must bear the expenses involved.[186] If the case involves quality of workmanship or any other issues which might require personal inspection, the arbitrator or either party may request that the inspection be made a part of the arbitration proceeding.[187] Outside parties may not attend the hearings unless both parties agree.[188] The arbitrator has thirty days to issue a written award.[189] The arbitrator's award may be issued with or without an opinion.[190] The award is final and enforceable by the courts, usually without a rehearing.[191] Arbitration costs and expenses are shared by the parties.[192] Arbitrators themselves receive no fee for their services.[193]

The NCDS programs conducted under the AAA consumer arbitration rules are similar to the BBB proceedings described above.[194] There are, however, some differences. The NCDS Rules, limit the types of claims which are "arbitrable"—that is, subject to the arbitration agreement—to disputes involving warranties, defective goods or services, misrepresentation with regard to goods or services, billing errors, and late delivery.[195] Claims such as personal injury or intentional torts claims, claims where the sole issue is the purchase

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180. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 10.

181. *Id.*

182. *Id.* § 27.

183. *See* text accompanying note 135 *supra*. One of the reasons for adopting the commercial arbitration rules seems to have been that the programs could rely on well-litigated and long established procedures.

184. *See* note 139 *supra*.

185. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 17.

186. *Id.* § 19.

187. *Id.* § 29.

188. *Id.* § 20.

189. *Id.* § 37.

190. *Id.* § 38.

191. *Id.* § 43.

192. *Id.* §§ 44, 45.

193. *Id.* § 45.

194. A few parallel provisions in NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, are: a) Initiation of proceedings— § 5; b) Selection of arbitrators— § 9; c) Time and Place— § 12; d) Rules of evidence— § 17; e) Representation by counsel— § 13; f) Interpreters— § 22; g) Inspection or investigation— § 18; h) Attendance at hearings— § 14; and i) Time of Award— § 32.

195. NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, § 2-B.

price, or claims of criminal violation, such as criminal fraud, are expressly excluded.[196] Another difference should be noted. As in the Better Business Bureau Rules, if the retailer unilaterally precommits itself to arbitration, only the consumer can initiate the proceeding.[197] There is no provision in the NCDS Rules, however, for the method of initiation of a proceeding where both parties have contractually precommitted themselves to arbitration. Presumably traditional commercial rules, as followed by the BBB, apply.[198] Finally, the NCDS programs differ in that they utilize professionally trained arbitrators[199] and are conducted by the AAA—a completely neutral administrative body.[200] The cost of the AAA arbitration proceeding is relatively high.[201]

d. Analysis—Viewed against the resolution model, these programs, modeled on traditional principles of commercial arbitration, offer the consumer many of the features essential for an effective mechanism.[202] There are, however, significant differences between consumer and commercial transactions that make the commercial arbitration model inappropriate for the resolution of consumer disputes. Commercial transactions are often conducted between equally informed and equally powerful parties. Consumer transactions, on the other hand, involve parties with notably unequal financial resources and educa-

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196. *Id.*

197. *Id.* § 5(b).

198. *See* text accompanying notes 155, 174 *supra*.

199. McGonagle, *supra* note 10, at 74 n.8.

200. *Id.* at 71.

201. Arbitration costs range from $3.00 for cases under $5.00 in the Albany program, to a splitting of a $25.00 fee in other programs, to a minimum $50.00 charged in several projects.

202. Thus many commentators have unequivocally and uncritically endorsed these arbitration programs. At first glance these programs seem to meet the criteria set out in the resolution model developed above. The commentators have taken the position that arbitration is generally inexpensive: a) because arbitration is so fast, business-related expenses, such as repeated collection efforts, up to and including the hiring of an attorney to bring a lawsuit to obtain the purchase price, are reduced; b) because arbitrators may frequently be expert regarding the product in dispute, the expense of obtaining expert witnesses to appear in court is often eliminated; and c) because arbitrators are in many cases volunteers who offer their services without pay, the costs of the arbitration hearing need not reflect this expense. NICJ, ARBITRATION, *supra* note 10, at 58-59. It has been pointed out that hearings should be short because they demand "a minimum of briefs and assorted papers, while the local rules of evidence are relaxed in the interests of speed." Lippman, *supra* note 10, at 218. Moreover, the use of arbitrators with knowledge of the particular trade or industry minimizes the possibility that an award will be rendered without regard to the goods or services involved, or the special nature of the industry itself. NICJ, ARBITRATION, *supra* note 10, at 61. It has also been contended that arbitration is desirable because it allows the parties to resolve their disputes privately. The interest in privacy lies primarily with the merchant, who is concerned with his reputation. For consumers, privacy may be desirable in some cases: "In addition, a low income or other consumer who may feel intimidated in a courtroom, with many unknown persons looking on, may be more relaxed and be more capable of presenting his or her case effectively in the private atmosphere of an arbitration hearing." NICJ, ARBITRATION, *supra* note 10, at 63. Thus one commentator, proposing a comprehensive state-wide arbitration program, concluded:

> A mediative-arbitration model is deemed the best solution to the consumer protection problem because such a model exhibits the flexibility of an informal proceeding while maintaining the potential for rendering final binding determinations. Further, the importance of providing a private, nonjudicial, and informal setting to minimize inhibitions of the parties at the hearings militates against using the more restrictive small claims court model.

Comment, *Nontraditional Remedies*, *supra* note 3, at 420 n.219.

tional backgrounds.[203] Furthermore, the transactions differ in the size and nature of the sales. While commercial transactions involve the purchase of large quantities of goods for business purposes, consumer transactions often entail the purchase of small quantities of goods for personal needs.[204] Finally, the transactions no longer share a common substantive law. Recent consumer protection legislation has afforded additional substantive protection to consumer transactions.[205] Thus the commercial arbitration model is no longer adequate for the resolution of consumer disputes and that model is not able to produce fair and efficient results in consumer conflicts.

The arbitration rules, designed for commercial disputes, lack many safeguards necessary for the resolution of consumer disputes. For the consumer invoking the arbitral process, arbitration as presently designed is complicated, costly, time consuming, and inconvenient. It lacks the special consumer safeguards that are found, for example, in small claims court adjudication.

Arbitration requires a high degree of skill and legal knowledge. The claim must be presented in a specific manner. The manner of formulation of the issue to be arbitrated is often outcome determinative.[206] In a small claims court, a court clerk would be available free of charge to assist the consumer in drawing up his complaint.[207] The consumer is provided with no such assistance by the private arbitration organizations. Expertise is also required during the course of the proceedings, in the presentation of opening arguments, in examining the witnesses, and in introducing evidence. The consumer must also be careful not to waive the procedural safeguards that have been granted to him.[208] Expertise is also required at the conclusion of the hearing when post-hearing briefs are filed.[209]

Arbitration may also be costly for the consumer. The consumer may be required to have his claim heard by an organization that charges relatively high fees.[210] Small claims courts, on the other hand, require the consumer to pay, in all cases, only a minimal filing fee.[211] The consumer will be obliged to incur a further sizeable expense if he must retain counsel because of his lack of familiarity with arbitration or because of the complexity of the proceeding. The consumer must also pay the costs of witnesses and of an interpreter if one is necessary.[212]

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203. Comment, *Nontraditional Remedies*, *supra* note 3, at 387-88.

204. D. CAPLOVITZ, *supra* note 2, at 34, 40, 60.

205. *See* notes 4, 5 *supra*.

206. Thus, if the issue is formulated too narrowly the consumer may be prevented from introducing evidence relevant to his case but which is not relevant to the issue presented; if the issue is formulated too broadly, the arbitrator may be given unfettered license to review any matter he wishes.

207. *See* note 47 *supra*.

208. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 34; NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, § 28. For the statutory provisions authorizing such a waiver, see note 133 *supra*.

209. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 31; NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, § 25.

210. *See* note 201 *supra*.

211. *See* note 39 *supra*.

212. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, §§ 19, 44; NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, §§ 22, 38.

The period of time before the claim is heard depends upon the arbitrator's workload. Arbitrators with heavy workloads may be able to set a date for the hearing only after a considerable period of time. Statutory time limitations apply only to the issuance of the award after the hearing is held.[213] The filing of briefs or of other legal papers lengthens the hearing. Parties are usually given a period of time after the hearing to file briefs, and may be allowed to file rebuttals after the opponent's brief has been submitted.[214] A court challenge to the arbitration proceeding will further lengthen the process. Once relegated to the courts, a claim will be affected by the lengthy delays and other problems which plague the judicial system.[215]

Finally, arbitration proceedings may be conducted at an inconvenient time and location. Arbitrators tend to prefer hearings conducted during ordinary working hours and tend to hold them in the organizational offices or hearing rooms.[216] Organizational offices are often even more inconveniently located than the courts.[217]

Nor are the safeguards adequate when the consumer is the non-initiating party, primarily because of the inadequate notice procedures utilized in commercial arbitration. Where arbitral notice is utilized in consumer arbitration service by regular mail is sufficient.[218] Since consumers frequently move, and often do not leave forwarding addresses, the result is that the consumer will often not be notified of the proceeding, and will lose the case because of his failure to attend and present his case.[219] Moreover, the notice sent is insufficient in content. Small claims court notice, designed for the consumer, often includes warnings about the consequences of not appearing in court on the date assigned, and further advises the consumer to obtain legal assistance.[220] Notification of a pending arbitration hearing does not mention the need for a lawyer, nor what might happen if the consumer does not appear at the hearing.[221] Small claims notice may also be bilingual;[222] arbitral notice is not.

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213. *See* note 138 *supra*.

214. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 31; NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, § 25.

215. *See* text accompanying note 29 *supra*.

216. Lippman, *supra* note 10, at 239.

217. For example, in New York City, the only American Arbitration office is in the borough of Manhattan. For the consumer living in Queens or Staten Island the trip to this office would probably be longer than the trip to the local court. Furthermore, the consumer may not even be able to find the organizational office. *E.g.*, in the New York City area, the American Arbitration Association is listed in only two out of eight telephone books.

218. A consumer will be the recipient of arbitral notice only when the agreement to arbitrate is contained in a precommitment clause and either party may initiate the proceeding (thus allowing the merchant to initiate and to send the notice to the consumer). *See* text accompanying notes 173-76, 197 *supra* and note 264 *infra*.

219. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 26; NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, § 20. It should be noted that there is no such thing as a "default judgment" in arbitration. If a party fails to attend, the arbitrator will conduct the hearing in his absence and theoretically could find in favor of the absent party. Such a result, however, is unlikely. For the commercial arbitration rule see note 162 *supra*.

220. *See* note 42 *supra*.

221. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 9-A. For the commercial arbitration rule see note 155 *supra*.

222. *See* note 43 *supra*.

The flexibility and informality of the arbitration hearing may work to the disadvantage of the consumer, whether or not that consumer is the initiator. The arbitrator's freedom to disregard substantive legal rules may harm the consumer when the legislature has enacted protective legislation.[223] The problem is particularly acute when non-lawyer arbitrators are used, since nonadherence to the substantive law may be the result of ignorance rather than of a conscious determination that the substantive law is inapplicable to the particular case. The arbitrator's right to ignore procedural formalities can harm the consumer when extraneous, prejudicial evidence is introduced by the merchant. Evidence of poor credit rating or prior dealings, when not relevant to the case, can seriously harm the position of the consumer.

The privacy element of arbitration, while encouraging conciliation, may also be detrimental to the interests of the consumer. Arbitrators are not required to write formal opinions.[224] This practice makes the task of challenging an award much more difficult. Moreover the opinions, when written, are not reported. Reporting, in the context of consumer arbitration, is important for several reasons. While the most important function of reporting, *stare decisis*, is not applicable, because arbitrators are not bound by prior decisions,[225] the opinions can be referred to by other arbitrators for guidance in reaching their decision. Moreover, publication of opinions notifies the public of any improper activities engaged in by the litigating parties.[226] This has an important public educational effect, and an important protective function, that is, warning the public to be on guard against similar improper practices. Publication may also have a deterrent effect, since an expression of public displeasure may dissuade potential violators from engaging in this conduct. Reporting is also important because the opinions, as a whole, will indicate recurring problems. Reported opinions are often the source of new substantive legislation.

The limited scope of judicial review,[227] and thus of judicially imposed safeguards, may also harm the consumer. Although limiting judicial appeals shortens the resolution process, it also denies review of meritorious claims that have been overlooked by the arbitrator. Insulating the arbitral award from judicial scrutiny gives the arbitrator relatively unrestrained authority. Virtually all the conventional forums have some method of oversight to correct errors and prevent abuse of power.[228]

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223. *E.g.*, if the claim involved a billing error, a dispute which is "arbitrable" under both the BBB, CONSUMER ARBITRATION RULES, *supra* note 106, §§ 9- 9-C and the NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, § 2, the arbitrator may reach a determination that is in conflict with protective provisions of the FAIR CREDIT BILLING ACT, 15 U.S.C. § 1666 (1974) and thus in conflict with the public policy expressed in that legislation.

224. The rules require only that the award, not the decision, be in writing. BBB, CONSUMER ARBITRATION RULES, *supra* note 106, § 38; NCDS, CONSUMER ARBITRATION RULES, *supra* note 105, § 33.

225. M. DOMKE, *supra* note 66, at 286-89.

226. Public notification is usually done by the media, which gains access to these reported decisions and republishes them in language comprehensible to the public.

227. *See* text accompanying notes 141-50 *supra*. The restrictions on judicial review are statutorily imposed.

228. This is true for virtually all judicial and administrative forums.

2. *Voluntary Programs Conducted Pursuant to the Magnuson-Moss Warranty Act*

The federal government recently enacted the Magnuson-Moss Warranty Act.[229] The Act regulates goods sold under a written warranty in transactions affecting interstate commerce.[230] One of the goals of the Act is to encourage warrantors to voluntarily establish mechanisms to resolve consumer disputes.[231] This goal finds expression in Section 110 of the Act.[232] The Federal Trade Commission (FTC) is authorized to promulgate consumer rules for such mechanisms[233] and to monitor their performance.[234] The focus here is on arbitrational mechanisms established under the statute.

The most important innovation in this program is that the arbitrational settlement is no longer binding on the parties, but rather, is only advisory.[235] As a result, a dissatisfied party can obtain broad judicial review of the award. This does not mean, however, that the arbitrator's award can be disregarded by the parties. Under the regulations the award is admissible in any subsequent judicial hearing.[236] Unless the losing party can provide the court with persuasive grounds for not abiding by the decision, the court will adopt the arbitrator's award as its own. Thus the arbitration proceeding retains some modicum of finality.

The establishment of such a mechanism on the part of the merchant is voluntary, but, once established, it is subject to FTC regulation.[237] Merchants can establish their own programs or use the facilities of existing arbitration organizations.[238] The FTC has developed detailed regulations relating to the creation, membership, procedure, and general operation of such programs. The program must be adequately funded and staffed, and must be made available to consumers free of charge.[239] The arbitration panel must be staffed by impartial personnel.[240]

The regulations seek to ensure that the consumer is aware of the existing mechanism and understands how it operates. The warrantor must disclose clearly and conspicuously on the face of the warranty a statement regarding the availability of the arbitration program, a statement informing the consumer how he may contact those in charge of the program free of charge, and a statement that the consumer must by law resort to the mechanism before taking his claim to court.[241] The warrantor also has an independent duty to make the consumer

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229. 15 U.S.C. §§ 2301-2312 (Supp. 1975). Congress enacted this law because of a "concern with bolstering the bargaining position of the consumer, placing him in a position similar to one in a traditional arms length commercial transaction." S. Rep. No. 93-151, 93d Cong., 1st Sess. 3 (1973).

230. 15 U.S.C. § 2301(6), (14) (Supp. 1975).

231. *Id.* § 2310(a)(1).

232. *Id.* § 2310.

233. *Id.* § 2310(a)(2). The rules and regulations are set out in 16 C.F.R. Part 703 (1975).

234. 15 U.S.C. § 2310(a)(4).

235. 16 C.F.R. § 703.5(j) (1975).

236. *Id.* § 703.5(g)(2).

237. *Id.* § 703.2(a).

238. *Id.* § 703.3(b). Thus the warrantor could seek the use of the facilities of the AAA or BBB.

239. *Id.* § 703.3(a).

240. *Id.* § 703.3(b), .4.

241. *Id.* § 703.2(b).

aware of the program.[242] The consumer must also be provided with literature that describes the program, including the procedures followed, the time limits adhered to, and the types of information that should be submitted to the panel.[243]

It appears that either party may initiate a claim.[244] When the dispute is received by the arbitration organization (referred to in the regulations as the "Mechanism"[245]) both the warrantor and the consumer are notified.[246] The mechanism has general investigatory powers which it may employ upon receiving a complaint.[247] Hearings are not held unless consented to by both parties.[248] Rather, the mechanism does its own research and may supplement this with written submissions sent to it by the parties.[249] The mechanism must issue an award and an opinion[250] within forty days after the initiation of the process.[251] The merchant is bound by the award unless he can give good faith reasons for not abiding by it.[252] The consumer is free to reject the decision.[253] If the award is rejected by either party the dispute may be pursued in the courts. The award is admissible as evidence.[254] It should be noted that the consumer may resort to the courts only after the arbitration process has been exhausted.[255] The only exception to this rule is if the consumer wishes to initiate a class action against the merchant.[256] Although arbitrators are not required to write opinions, the law requires that the mechanism keep records and statistics of its performance.[257] The FTC has authority to review these documents from time to time.[258] Furthermore, arbitration hearings must be opened to the public, and all records, except statistics, are to be made available to the public at a reasonable charge.[259]

The federal law preempts similar state legislation unless the state petitions the FTC for permission to enforce its own laws, and the FTC finds that such laws afford the consumer equal or greater protection without unduly burdening interstate commerce.[260]

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242. *Id.* § 703.2(d).
243. *Id.* § 703.2(c), .5(a).
244. The regulations are silent on this matter. *See* § 703.5(b).
245. *Id.* § 703.1(e).
246. *Id.* § 703.5(b).
247. *Id.* § 703.5(e).
248. *Id.* § 703.5(f).
249. Supplementary evidence will be requested only if there is contradictory information. *Id.* § 703.5(c).
250. *Id.* § 703.5(d)(2), (4) ("its decision and the reasons therefor").
251. *Id.* § 703.5(d). Delays are allowed in only a very limited number of circumstances. § 703.5(e).
252. *Id.* § 703.2(g).
253. *Id.* § 703.5(g)(1).
254. *Id.* § 703.5(g)(2).
255. 15 U.S.C. § 2310(d) (Supp. 1975).
256. *Id.* § 2310(e).
257. 16 C.F.R. § 703.6 (1975). Under these regulations the arbitrator must keep on record, *inter alia*, the names of the parties, the product involved, the evidence received, and the decision made. Records are to be kept under the product's brand name, allowing even a casual observer to note recurring violations.
258. *Id.* § 703.7.
259. *Id.* § 703.8.
260. 15 U.S.C. § 2311 (Supp. 1975).

The Magnuson-Moss program thus has several features besides advisory arbitration that are uniquely appropriate for the resolution of consumer disputes. The required disclosures in the warranty make the consumer more familiar with arbitration. The maximum forty day period between initiation and completion of the procedure, irrespective of written submissions, insures speed. Requiring the merchant to bear the cost of arbitration makes the procedure inexpensive to the party frequently less able to afford it—the consumer. The requirement, enforced by the FTC, that impartial decision-makers be utilized, eliminates some of the actual or perceived bias presently thought to exist in consumer arbitration proceedings, while still allowing experts to be part of the panel. Finally, the Act protects the public's right to know about merchants who consistently violate market ethics by opening up the proceedings to the public and allowing the public access to the arbitration records.

The consumer arbitration program in Magnuson-Moss, however, does not meet all the needs of the consumer. The most disturbing feature of the Magnuson-Moss program is its substitution of written submissions for oral hearings. Such a practice places the consumer at a disadvantage. Consumers rarely retain written documentation of their transactions.[261] The merchant, on the other hand, must often keep extensive records as a result of governmental regulations, and may selectively submit documents to the arbiter. Nor is the consumer notified of the documents submitted by his opponent, or given an opportunity to rebut them. Furthermore, reliance on written submissions favors the more experienced party and/or the party who can afford to retain an attorney to draft the written submissions. The answer to the problem of unfair hearings is not to eliminate oral hearings altogether, but rather to conduct such hearings under adequate procedural safeguards. For example, the problem of unequal experience and resources could be resolved by having the forum supply legal assistance to parties unable to obtain it by themselves. This procedure has been adopted by at least one small claims court in New York.[262] Law students provide a potential source of personnel for such a program.

IV

THE SPECIAL PROBLEM OF PRECOMMITMENT ARBITRATION CLAUSES

A. The Nature of the Problem

Arbitration precommitment clauses, usually part of larger sales contracts,[263] are contractual agreements by which the parties consent to the submission of all future disputes to arbitration.[264] Under the typical precommitment clause, the parties are required to submit their claims to arbitration

261. *See* note 33 *supra*.

262. *See* note 47 *supra*.

263. These clauses are often found on standard contract forms and on the backs of receipts and invoices. They often appear as one of a number of provisions crowded on the back of the document.

264. This analysis focuses only on those contract clauses in which both parties have precommitted themselves to submitting all future disputes to arbitration. It does not consider agreements in which the merchant has unilaterally committed itself to arbitration at the option of the consumer. *See* text accompanying notes 173, 197 *supra*.

whenever a dispute arises.[265] Problems occur when a consumer has unwittingly signed a contract that precommits all future disputes to arbitration. The consumer, in any particular case, may wish to bring his claim to court rather than have the matter resolved by arbitration. Consumers are not familiar with arbitration, and may be reluctant to have their disputes resolved in this forum.[266] Precommitment also precludes resort to a class action or a suit in small claims court, even though such action may offer the consumer a more desirable remedy, or greater protection of his due process rights to adequate notice and a fair hearing. Moreover, by signing the contract, the consumer binds himself to all the terms of the precommitment clause, regardless of their content. A series of cases involving Aaacon Transport Co. highlight both the possible misuse of the precommitment clause that can result from this, and the judicial reluctance to invalidate these clauses despite the obvious hardships that are caused.[267]

Aaacon supplied drivers to persons seeking to have their cars transported. In the bill of lading signed by the customer (which was given in the form of a receipt) Aaacon included a mandatory precommitment clause calling for arbitration in New York City. Many of these customers lived outside New York, some as far away as California. While in transit, vehicles were occasionally damaged or lost. The dissatisfied car owners sued Aaacon in their own jurisdictions for damages. In these cases Aaacon was able to stay the court proceedings pending arbitration in New York, thereby effectively terminating the consumer's cause of action.[268] The courts consistently rejected arguments that the arbitration provision in the bill of lading was unconscionable and that the

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265. The typical clause provides that: "Any controversy or claim arising out of or relating to this contract, or any breach thereof, *shall* be settled by arbitration in accordance with the [designated arbitration rules] [emphasis added]. Section 9-B of the BBB, CONSUMER ARBITRATION RULES, *supra* note 105, recommends the adoption of this version of the precommitment clause.

266. "Attorneys and others involved with arbitration often assume that consumers are as familiar and secure with the arbitration process as they themselves are. This assumption is largely unfounded. Most consumers approach arbitration with little knowledge about the procedure and, as a result, demonstrate some anxiety." Wexler, *Court Ordered Consumer Arbitration*, 28 ARB. J. 175, 178 (1973). Members of the public are acquainted with the more conventional forums of resolution, such as the courts, either directly, through their own experience with them, or indirectly, through the experiences of friends and family.

267. A case involving the Aaacon Auto Transport Co. also demonstrates why a consumer may not find arbitration the most desirable method of dispute resolution. In Aaacon Auto Transport, Inc., v. Proctor & Gamble Co., N.Y.L.J. Aug. 2, 1973, p. 11, Col. 1M (Sup. Ct., N.Y.) (per Judge Tierney) an objection was made by the respondent, in an attempt to vacate the arbitrator's award, that the arbitrator failed to apply the appropriate substantive law which would have resulted in a determination that Aaacon's claim was time-barred. The court held that this error was not sufficient to vacate the award.

268. *See, e.g.*, Aaacon Auto Transport, Inc., v. American States Insurance Co., N.Y.L.J. March 18, 1975, p. 2, Col. 5T (Sup. Ct., N.Y.) (per Judge Korn). In that case Aaacon transported the consumer's camper from Texas to Ohio pursuant to a bill of lading agreement never seen by the consumer. Prior to transporting the goods, Aaacon gave the consumer a freight bill order form which incorporated by reference the bill of lading (that provision was on the reverse side of the order form). The camper was delivered to the consumer's home in damaged condition. The consumer and his insurer commenced an action in Ohio against Aaacon for damage to the camper. Aaacon subsequently gave notice to the consumer and the insurer of its intention to arbitrate pursuant to the bill of lading agreement. The court held that the consumer was bound by the bill of lading agreement which provided for arbitration in New York. The court restrained the consumer from proceeding with his action in Ohio.

provision deprived the consumer of his right to a judicial determination of his controversy.[269] These "defenses" will be reviewed in more detail below.

B. The Inadequacy of Traditional Defenses

Under the state arbitration acts, the courts will extricate a consumer from a precommitment clause only if he successfully pleads one of the following four defenses:[270] (1) that there was no agreement to arbitrate because there was no meeting of the minds; (2) that if there was an agreement to arbitrate, it did not contemplate this type of dispute; (3) that the agreement to arbitrate was unconscionable; or (4) that the agreement to arbitrate was an unknowing waiver of the consumer's due process rights.[271] The courts have not been sympathetic to any of these claims.

1. Lack of Contractual Assent

A consumer may be able to avoid a precommitment clause if he proves that there was no "meeting of the minds" as to that clause because he was unaware of the presence of the provision in the contract and hence could not have intended to agree to it.[272] Creation of the obligation to arbitrate is governed by traditional common law.[273] It has been held that failure to read an

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269. The Second Circuit rejected these arguments in Aaacon Auto Transport, Inc. v. Levine, 456 F.2d 1335 (2d Cir. 1971), affirming the order of Judge Ryan, 71 Civ. 4004 (S.D.N.Y. 1971). *See also* Aaacon v. Boldt, 71 Civ. 3710 (S.D.N.Y. 1971) in which Judge Tyler ordered arbitration in New York although the claimants were California residents who had commenced litigation in California; Aaacon Auto Transport, Inc. v. Gevertz, 71 Civ. 3778 (S.D.N.Y. 1971). The defendant alleged the arbitration provision was unconscionable because Aaacon had presented the bill of lading as a "harmless delivery receipt." The court did not find this argument persuasive. The validity of the provision was upheld and arbitration was ordered in New York. The Third Circuit reached the same conclusion, on the same results, in Aaacon Auto Transport, Inc. v. Jacobson, 475 F.2d 1394 (3d Cir. 1973). Lower federal courts in other circuits also seem unpersuaded by these arguments. *See* Bruno v. Aaacon Auto Transport, Inc., 71 Civ. 147 (M.D. Fla. 1971) (per Leib, J.) (Litigation in federal district court in Florida, commenced by a Florida resident, stayed pending arbitration in New York because precommitment clause called for arbitration in New York. No transactions were conducted in New York); Sogelin v. Aaacon Auto Transport, Inc., 71 Civ. 40 (N.D. Ohio 1971) (per Lambros, J.) (Precommitment clause called for arbitration in New York, claimant an Ohio resident. Held: litigation pending in federal district court stayed until arbitration was held in New York); Mayer v. Aaacon Auto Transport, Inc., 72 Civ. 546 (N.D. Ohio) (per Thomas, J.) (Precommitment clause called for arbitration in New York, claimant was a California resident. Litigation commenced in Ohio stayed pending arbitration in New York).

270. These defenses may be asserted only in court. They may be raised at two points: when the party seeks to bring an action in court and his opponent moves to stay the action pending arbitration; or when the party seeks to prevent judicial enforcement of the arbitration award. At the latter stage the defenses that may be asserted are limited by the arbitration statutes. At the former stage, defenses may be asserted that go to the arbitration agreement itself. Constitutional challenges presumably can be asserted at either point. This Note, whenever possible, will use cases arising under the New York Arbitration Act, N.Y.C.P.L.R. §§ 7501-7514 (McKinney 1963) as illustrations.

271. Similar defenses have been suggested as applicable to medical malpractice arbitration. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947 (1972).

272. The courts, not the arbitrator, rule on questions surrounding creation of the arbitration agreement. UNIFORM ARBITRATION ACT § 1(a), 7 UNIFORM LAWS ANN. 1 (West 1970); *see also* Gruen v. Carter, 173 Misc. 765, 766, 18 N.Y.S.2d 990, 991, *aff'd*, 259 App. Div. 712, 18 N.Y.S.2d 1023 (1st Dep't 1940) ("It is not for the arbitrators to decide on the validity of the very agreement upon which their own status as arbitrators is predicated").

273. It is governed by the common law because the arbitration statutes have no provisions relating to the creation of the arbitration agreement, except that it be in writing.

arbitration provision in a contract is no defense against enforceability.[274] But it has also been held that if the provision was read but was not understood there was no agreement as to that provision.[275] Agreements to arbitrate must reach a higher threshold of clarity than is required of other contract terms because by agreeing to arbitrate the parties waive their right to judicial resolution of disputes.[276]

Precommitment clauses usually set out the agreement of the parties to submit all future disputes to arbitration and then simply refer to the arbitration rules of a particular organization as the agreed upon procedures.[277] This method of designation of procedures, without further elaboration, is meaningless to a consumer who knows little about arbitration and knows even less about the arbitration rules of a particular organization.[278] The problem of finding meaningful consent is further complicated when the clause is hidden among other provisions on the back of a contract[279] or invoice.[280] In such circumstances it could be argued that precommitment clauses fail to meet the stricter test for meaningful contractual assent applied to arbitration agreements.

Although analytically sound, the defense of lack of assent to the precommitment clause is not likely to succeed. Judicial invalidation of arbitration clauses for lack of contractual assent has been limited to those cases in which the bargaining process was fragmentary—*i.e.*, where there were several different documents or negotiating sessions.[281] This situation is typical of commercial, rather than consumer, transactions.

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274. Frederico v. Frick, 3 Cal. App. 3d 872, 875, 84 Cal. Rptr. 74, 75 (2d Dist. 1970).

275. Riverdale Fabrics Corp. v. Tillinghast-Stiles Co., 306 N.Y. 288, 118 N.E.2d 104 (1954).

276. *Id. See also* Doughboy Industries, Inc. v. Pantasote Co., 17 App. Div. 2d 216, 218-19, 233 N.Y.S.2d 488, 492 (1st Dep't 1962); *In re* Silvers, 14 N.Y.S.2d 820, 822 (Sup. Ct. 1939).

277. *See* note 265 *supra*.

278. The consumer cannot be sufficiently informed if there is merely reference to the rules of the AAA or BBB, without detailed information about where hearings can be held, how much notice of the hearing the consumer is entitled to, and the extent of the consumer's right to bring a judicial action once he becomes party to such an agreement.

279. Arthur Philip Export Corp. v. Leathertone, Inc., 275 App. Div. 102, 105, 87 N.Y.S.2d 665, 667 (1st Dep't 1949). "A party should not be bound by clauses printed on the reverse side of a document unless it be established that such matter was properly called to its attention and that it assented to the provisions there stated."

280. Matter of Tananbaum Textile Co. v. Schlanger, 287 N.Y. 400, 40 N.E.2d 225 (1942). It was held that there was no binding agreement to arbitrate even though the purchaser of goods accepted and retained an invoice containing a statement that all controversies would be settled by arbitration:

> It is true that acceptance of a document which plainly purports to be a contract gives rise to an implication of assent to its terms despite ignorance of the content thereof. But that is not the case. An invoice, as such, is no contract. An invoice is a mere detailed statement of the nature, quantity and the cost or price of the things invoiced.

Id. at 403-04, 40 N.E.2d at 226 (citations omitted).

281. Albrecht Chemical Co. v. Anderson Trading Corp., 298 N.Y. 437, 84 N.E.2d 625 (1949) (Held: no agreement to arbitrate where the seller did not accept or adopt the purchaser's form of offer containing an arbitration provision but instead forwarded its own independent memorandum without reference to the purchaser's form); Pavia & Co., Inc. v. Fulton County Silk Mills, 284 App. Div. 391, 131 N.Y.S.2d 358 (1st Dep't 1954) (No binding arbitration contract found where arrangements for the sale of goods were completed over the telephone, and the seller mailed its standard form contract containing an arbitration clause to the buyer who did not sign or return the form).

2. Arbitrability

Assuming a valid agreement to arbitrate, the consumer might attempt to exclude his particular claim from the agreement by challenging the "arbitrability" of the dispute. Arbitrability is a concept based on the consensual nature of arbitration. Because the parties are free to contract for as much or as little arbitration as they desire, the courts, when they are called upon to enforce an arbitration agreement, will seek to give effect to the parties' expressed intention about the scope of arbitration.[282] Most arbitration clauses, however, are written very broadly. The typical precommitment clause provides that "any controversy or claim arising out of, or relating to this contract, or the breach thereof, shall be settled by arbitration."[283] The courts are unwilling to exclude any dispute from the arbitration agreement unless there is an explicit agreement to do so.[284] The New York Court of Appeals in *Marchant v. Mead-Morrison Mfg. Co.*[285] summarized the judicial approach to these agreements in the following manner: "Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention."[286]

3. Unconscionability

A consumer may assert that inclusion of the arbitration clause was unconscionable in light of the circumstances surrounding the transaction and that therefore the clause should be removed from the contract.[287] The consumer's position before the court[288] would have to be that the clause was both procedurally and substantively unconscionable[289] in that it was imposed upon him

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282. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). The Supreme Court stated that "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."; Perrin v. Stempinski Realty Corp., 15 App. Div. 2d 91, 92, 222 N.Y.S.2d 151, 152 (1st Dep't 1961), *appeal dismissed*, 11 N.Y.2d 931, 183 N.E.2d 84, 228 N.Y.S.2d 683 (1962).

283. *See* note 265 *supra*.

284. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). *E.g.*, *see also* Petoker v. Brooklyn Eagle, Inc., 286 App. Div. 733, 736, 146 N.Y.S.2d 616, 619 (1st Dep't 1955), *aff'd*, 2 N.Y.2d 553, 141 N.E.2d 841, 161 N.Y.S.2d 609 (1957). The question of arbitrability is for the courts, not the arbitrator, to decide. *See, e.g.*, Necchi v. Necchi Sewing Machine Sales Corp., 348 F.2d 693, 696 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

285. 252 N.Y. 284, 169 N.E. 386 (1929), *appeal dismissed*, 282 U.S. 808 (1930).

286. 252 N.Y. at 298, 169 N.E. at 391.

287. Unconscionability is primarily a legislative doctrine codified in § 2-302 of the Uniform Commercial Code. Where § 2-302 is inapplicable, or has not been adopted, contractual provisions may still be invalidated under the judicial doctrine of "contract of adhesion." *See* Frederico v. Frick, 3 Cal. App. 3d 872, 84 Cal. Rptr. 74 (Dist. Ct. App. 1970); Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (Dist. Ct. App. 1971).

288. It is the duty of the court, not the arbitrator, to rule on the unconscionability of the arbitration clause. Where the entire contract is alleged to be unconscionable, and the contract contains an arbitration clause, the courts have held the arbitration clause to be "separable," requiring the arbitrator to rule on the issue of unconscionability. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed per stipulation*, 364 U.S. 801 (1960). But that rule is not dispositive when the arbitration clause itself is challenged. Such a challenge goes to the very source of the arbitrator's authority, a question that has been relegated to the judicial process. *See* Gruen v. Carter, 173 Misc. 765, 18 N.Y.S.2d 990, *aff'd*, 259 App. Div. 712, 18 N.Y.S.2d 1023 (1st Dep't 1940).

289. Unconscionability is not defined in the Code (the commentary to the Code simply states

without meaningful choice,[290] and was unreasonably favorable to the merchant.[291]

Procedural unconscionability does not exist merely because the provision is found within a standardized contract.[292] There must be some showing of improper conduct on the part of the merchant,[293] coupled with a showing that the consumer did not have the resources to protect himself against such misconduct.[294] In only a few egregious cases does such a combination of circumstances exist.[295] Moreover, the consumer must show that the contract provision is substantively unconscionable. Substantive unconscionability has been held to exist when the weaker party has waived a valuable judicial right (or rights) by a clause which that party could not reasonably have expected to find in the contract.[296] These cases, however, involved disfavored contract provisions such as acceleration clauses and disclaimer clauses. Arbitration clauses are generally favored by the courts, and are the subject of a protective judicial policy.[297]

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that the doctrine of unconscionability was intended to prevent "oppression and unfair surprise." (U.C.C. § 2-302, Comment 1) and it has been left to the courts to give that term content. As developed by case law, unconscionability encompasses two concepts: procedural and substantive unconscionability. In the ordinary case both must be present before a contract, or a contract clause, will be reformed or invalidated.

290. Procedural unconscionability is the "absence of meaningful choice" as indicated by the presence of both unequal bargaining power and abusive bargaining conduct. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 762 (1969).

291. *See generally* Ellinghaus, *supra* note 290, at 775, who refers to this element as "overall imbalance." Ellinghaus borrows this term from Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 513 (1967).

292. Slawson, *Standardized Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 562-63 (1971); Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1156 (1976); Comment, *Unconscionability and Standardized Contracts*, 5 N.Y.U. REV. L. & SOC. CHANGE 65 (1975). However, to the extent that the clause is in a standardized form and it is offered to the consumer on an essentially "take-it-or-leave-it" basis, unconscionability is more likely to be found. Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. Nassau County 1966), *rev'd on damages*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

293. *E.g.*, the merchant uses hidden or undisclosed terms. American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964). A precommitment arbitration clause, if not specifically pointed out to the consumer and explained to him, might constitute a hidden or undisclosed term.

294. The courts look to both the financial and educational resources of the imposed-upon party. Contracts have been found to be procedurally unconscionable: a) when the party contesting the agreement is financially handicapped because he has a limited income and because the goods or services purchased were necessities rather than luxuries; and b) when the party is unable to understand the contract terms either because of his limited education or because of the complexities of the contract terms. *See* Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. Nassau County 1966), *rev'd on damages*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967); Star Credit Corp. v. Molina, 59 Misc. 2d 290, 298 N.Y.S.2d 570 (Civ. Ct. New York County 1969); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

295. *See* the cases cited in notes 290, 294 *supra*.

296. In Nosse v. Vulcan Basement Waterproofing Co., 35 Ohio Misc. 1, 299 N.E.2d 703 (Mun. Ct. Euclid County 1973), a contract clause which on its face disclaimed a contractor's liability was held unconscionable since it violated the expectations of a reasonable consumer. In Fairfield Lease Co. v. Umberto, 7 U.C.C. REP. SERV. 1181 (Civ. Ct. New York County 1970), the court held unconscionable an acceleration clause because the consumer had no understanding of that clause.

297. Textile Workers v. Lincoln Mills, 353 U.S. 448, 458-59 (1957); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior &

Arbitration clauses will be found unconscionable only when they include terms which the courts have previously struck down as unconscionable. For example, a precommitment arbitration clause calling for arbitration in another state may be held to be unconscionable. The courts have held[298] that when unequal bargaining power was coupled with a contract clause calling for adjudication in a forum distant from the weaker party, and was inserted "for the purpose of harassing and embarrassing the defendants in the prosecution or defense of any action arising (under the contract),"[299] the clause would be considered unconscionable unless a bona fide reason were advanced for its inclusion.

4. Unknowing Waiver of Due Process Rights

Finally, the consumer might argue that the precommitment clause constitutes an unknowing waiver of his due process rights, and that therefore the courts should not enforce the agreement. Notice, and the opportunity for a full and fair hearing, are the fundamental requisites of due process.[300] It can be argued that the arbitration procedures utilized in the consumer arbitration programs do not adequately protect these rights.

Due process requires that the notice given be "reasonably calculated to give actual notice."[301] Such notice must apprise the recipient not only of the pendency of the action, but also of the reasons for the action, in order that he may contest its basis and produce evidence in rebuttal.[302] Clearly, the notice provided in the consumer arbitration rules is not designed to provide the consumer with "actual notice." Some commentators argue that due process requires that notice be given in the language spoken by the consumer.[303] The legal requirements for actual notice stated above seem to presuppose language comprehension and thus to require bilingual notice for non-English speaking consumers.

Gulf Navigation Co., 363 U.S. 574, 582 (1960). Although these are labor cases, they have served to sensitize innumerable federal and state court judges to doctrines that maximize the arbitrator's authority. The New York Court of Appeals has participated in this trend. *See, e.g.*, Grayson-Robinson Stores, Inc. v. Iris Constr. Corp., 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

298. Paragon Homes, Inc. v. Carter, 4 U.C.C. REP. SERV. 1144 (N.Y. Sup. Ct.), *aff'd without opinion*, 15 U.C.C. REP. SERV. 991 (N.Y. App. Div. 2d Dep't 1968). *See also* Paragon Homes of Midwest, Inc. v. Crace, 4 U.C.C. REP. SERV. 19 (N.Y. Sup. Ct. 1967); Paragon Homes of New England, Inc. v. Langlois, 4 U.C.C. REP. SERV. 16 (N.Y. Sup. Ct. 1967).

299. Paragon Homes, Inc. v. Carter, 4 U.C.C. REP. SERV. 1144 (N.Y. Sup. Ct.), *aff'd without opinion*, 5 U.C.C. REP. SERV. 991 (N.Y. App. Div. 2d Dep't 1968), quoting Paragon Homes of Midwest, Inc. v. Crace, 4 U.C.C. REP. SERV. 19 (N.Y. Sup. Ct. 1967).

300. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

301. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

302. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *see also* United States v. Tuteur, 215 F.2d 415, 418 (7th Cir. 1954).

303. Note, *El Derecho de Aviso: Due Process and Bilingual Notice*, 83 YALE L.J. 385 (1973). *But see* Guerrero v. Carleson, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied*, 414 U.S. 1137 (1974). There, Spanish-speaking plaintiffs sought an injunction prohibiting the California State Welfare Department from reducing or terminating benefits to recipients who read only Spanish until the welfare department provided written notice of such action in Spanish. Held: due process does not require notice to be provided in Spanish.

An aggrieved consumer also has a due process right to a hearing "granted at a meaningful time and in a meaningful manner."[304] This includes the right to a hearing before an impartial party.[305] Due process also includes the right to a jury trial.[306] These rights are not presently available to the consumer who has unwittingly become a party to a precommitment clause. Reliance by the arbitration organizations on former businessmen to act as arbitrators[307] because they are the only persons having the necessary technical expertise, lends at least a perceived bias to the proceeding. Allowing the consumer to strike off names from a list of arbitrators does not protect the consumer since he is usually unfamiliar with the names given, and cannot make an informed decision. If arbitration proceedings were conducted before a panel of the consumer's peers, the impartiality of the proceedings would be better protected.

The rule that the consumer must knowingly waive these due process rights is stated in *Overmyer v. Frick*[308] and *Swarb v. Lenox*.[309] These cases involved the constitutionality of the cognovit device[310] authorized by the laws of Pennsylvania and Ohio respectively. In *Overmyer*, the Court held that the corporate defendant, against whom the cognovit note procedure had been used, had "voluntarily, intelligently and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences."[311] This conclusion was based on the facts of the case, which included the bargaining equality of the contracting parties, lack of overreaching, and a course of meaningful negotiations between the parties. The court limited its holding to these facts, adding the proviso that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue."[312] A precommitment arbitration contract, entered into voluntarily by equally informed and equally powerful parties, clearly constitutes a knowing waiver of the parties' due process rights. These elements are not characteristic of the typical consumer transaction.

The consumer must also show that some state action is responsible for depriving him of his due process rights. This may be demonstrated by showing one of two things: by proving that judicial enforcement of the precommitment clause constitutes state action, or by proving that arbitration constitutes state action. The Supreme Court has held that in certain circumstances judicial enforcement of an agreement constitutes state action.[313] This rule, however, has been limited to the enforcement of agreements violating the civil rights of a

304. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

305. Arnett v. Kennedy, 416 U.S. 134, 197-98 (1974) (White, J., concurring in part and dissenting in part); Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972); Tumey v. Ohio, 273 U.S. 510, 512 (1927).

306. *See* Rosenberg & Schubin, *supra* note 85, at 452 n.28.

307. Determan, *supra* note 92, at 836.

308. 405 U.S. 174 (1972).

309. 405 U.S. 191, *rehearing denied*, 405 U.S. 1049 (1972).

310. A "cognovit" is "the written authority of the debtor and his direction . . . to enter judgment against him as stated therein." 405 U.S. at 176 n.2.

311. 405 U.S. at 187.

312. 405 U.S. at 188.

313. Shelley v. Kraemer, 334 U.S. 1 (1948).

particular group.[314] Consumer arbitration may also be found to constitute state action under the theory that in such a proceeding the government is directly involved in private activity.[315] The state arbitration statutes involve a legislative grant of judicial powers to private arbitrators which, because judicial review is effectively precluded, is virtually absolute. A statutory enactment granting a private person or organization governmental powers has been found to be sufficient for a finding of state action.[316] It should be noted, however, that such findings have been made only with regard to delegations of legislative, not judicial, powers.[317] The arbitration statutes, by adopting the rule of irrevocability, have also increased the powers of the arbitrators beyond those possessed at common law, and thus may constitute state action.[318] Whether the increase in authority here is sufficient to constitute state action, however, is unclear.[319] Finally, the arbitration statutes, by eliminating effective judicial review of arbitration, give coercive effect to the rules of the private arbitration organizations and may, in that manner, constitute state action.[320]

C. Summary

Consumers have been unable to extricate themselves from arbitration agreements that at times have become undesirable and even oppressive. Unaware of the implications, and sometimes even the presence, of arbitration clauses, consumers have bound themselves to a proceeding designed for commercial, not consumer, transactions. Not all courts have been unsympathetic to the plight of such consumers. The Civil Court of New York City, for example, in *Davis v. Dun-Right Movers, Inc.*,[321] invalidated a precommitment clause as unconscionable and as lacking a sufficient "meeting of the minds" to constitute an agreement. But such decisions are few and far between.

The Magnuson-Moss Warranty Act[322] calls for a program that could avoid some of the problems associated with precommitment clauses. The FTC has promulgated regulations intended to ensure that the consumer is aware of both

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314. *E.g.*, Bell v. Maryland, 378 U.S. 226 (1964).

315. Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 663 (1974).

316. *Id.* at 665.

317. *Id.*

318. *Id.* at 663.

319. *Id.* at 667.

320. Support for this conclusion can be drawn from the cases involving public utilities. There the courts have held that a governmental grant of monopoly powers, where that grant gives coercive effect to the rules of a public utility, constitutes state action for purposes of the fourteenth amendment. Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 163 (6th Cir. 1973).

321. N.Y.L.J., Aug. 27, 1975, at 8, col. 4F (N.Y. Civ. Ct. Small Claims Part) (per Judge Rubin). In this case the plaintiff, Dinah Davis, commenced a small claims proceeding against the defendant moving company upon defendant's refusal to compensate her for furniture damaged in the process of moving her belongings. She obtained a default judgment, but defendant sought to reopen it on the grounds that a contract signed by Ms. Davis on the day of the move called for arbitration. Held: judgment would not be reopened for two reasons: first, within the facts of this case there was no meeting of the minds (because the contract was signed on the moving day when everything was in disarray, and the clause was in very small print on the reverse side of the contract); and second, that the arbitration clause was unconscionable (because "a clause of this nature can only be placed into a contract to harass and discourage people from making legitimate claims").

322. 15 U.S.C. §§ 2301-2312 (Supp. 1975).

the presence of the arbitration clause in the warranty[323] and the implications of that provision.[324] Moreover, by eliminating the oral hearing and adopting procedures intended to make the mechanism accessible regardless of the location of the consumer,[325] the FTC obviated the problems presented by an arbitration clause that called for the oral hearing to be conducted in a distant forum.

V
DEVELOPING A MORE EFFECTIVE MODEL OF CONSUMER ARBITRATION

At the present time, with the exception of warranty arbitrations subject to the Magnuson-Moss Warranty Act,[326] private, voluntary arbitration programs are conducted pursuant to comprehensive, uniform arbitration acts and often pursuant to commercial arbitration rules. To effectively adapt arbitration to the resolution of consumer disputes, separate consumer arbitration statutes must be enacted on the state and federal levels and must be supplemented by special arbitration rules. These documents must contain provisions that will make arbitration accessible, comprehensible, and equitable to the consumer.

A. Consumer Arbitration Statutes

Many of the provisions of the existing arbitration statutes are appropriate for consumer arbitration. The provisions dealing with the scope of the arbitration agreement,[327] the powers and duties of the arbitrator,[328] and the rights guaranteed to the parties in arbitration hearings[329] should be retained. Other provisions, however, must be modified, and additional provisions must be included. The provisions dealing with the irrevocability of arbitration agreements[330] should be modified to the extent that they prevent the consumer from bringing a class action for either monetary or injunctive relief.[331] Often claims that cannot be proven on an individual basis can be proven when similar claims of other consumers are presented to the court. Moreover, a class action can be brought to enjoin improper activities that occur on a more widespread basis than the individual case. Changes must also be made with regard to the statutory provisions that require the arbitral award to be issued within a specified number of days after the hearing is closed.[332] To eliminate the delays that fre-

323. *See* text accompanying notes 241-42 *supra*.
324. *See* text accompanying note 243 *supra*.
325. *See* text accompanying note 248 *supra*.
326. 15 U.S.C. § 2301-2312 (Supp. 1975).
327. *See* text accompanying note 126 *supra*. This provision is desirable because it offers the consumer a single forum where he may bring all his consumer disputes. *See* text accompanying note 62 *supra*.
328. *See* text accompanying notes 128-30 *supra*. The arbitrator must have this authority if the arbitration mechanism is to be effective. The mediative mechanisms have been ineffective, in part, because the neutral parties have not had such authority. *See* text accompanying notes 53-55 *supra*.
329. *See* text accompanying notes 133-34 *supra*. The necessity for retaining this is self-evident.
330. *See* text accompanying notes 120-25 *supra*.
331. Only individual disputes are submitted to arbitration, since each contractual agreement to arbitrate is a separate and independent agreement.
332. N.Y.C.P.L.R. §§ 7507-7508 (McKinney 1963).

quently occur between the filing and the closing of a hearing, it is proposed that the new consumer arbitration statutes require that the award be issued within a specified number of days after the arbitration petition has been filed.

Broader judicial review should be provided by the arbitration statutes by allowing only advisory arbitration.[333] In this way, the courts can be sure that although the parties may have chosen as their arbiters persons not familiar with the substantive law, the consumer has been afforded the protections recently granted by the substantive legislation.[334] The courts can also oversee the impartiality of the proceeding.

The new consumer arbitration statutes should also contain provisions dealing with the allocation of arbitration costs. It is suggested that the Magnuson-Moss Warranty Act approach[335] requiring, in effect, that the merchant bear the cost of arbitration, is the most desirable one. This approach has been criticized by some who argue that the consequences of such a rule would be to discourage merchants from resorting to arbitration altogether.[336] For this reason, it is proposed that merchants establishing or resorting to such mechanisms be offered a tax deduction for the expense of arbitration. Society receives a financial benefit from the private resolution of disputes in the form of a decreased load on governmentally subsidized resolution mechanisms. This savings should be passed on to the parties responsible for it. There should also be a statutory provision requiring that oral hearings be held[337] and that they be conducted in a locale accessible to both parties.[338]

Finally, although the privacy of the arbitration hearing room should be maintained during the hearing, those conducting the hearings should be required to keep records of the hearing and to make them available to the public upon request.[339] This requirement ensures that there will be continued public scrutiny of the arbitration process. It also allows the public to keep itself informed about merchants who consistently and flagrantly violate the law.

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333. In the sense that arbitration is advisory under the Magnuson-Moss Warranty Act program, 15 U.S.C. §§ 2301-2312 (Supp. 1975). That is, the arbitrator's award should be admissible into evidence and have some type of presumptive effect. This type of hearing has its equivalent in the state compulsory arbitration programs, in the provision for de novo trials. *See* text accompanying note 81 *supra*. The state programs, however, have adopted certain undesirable procedures with regard to the de novo trials, such as the requirement that the consumer must pay all the costs of arbitration to obtain a trial de novo. *See* text accompanying note 82 *supra*. This discourages poorer consumers who have meritorious objections to the conduct of the arbitration hearing or to the resolution reached from bringing them to the attention of the courts.

334. *See, e.g.*, notes 4, 5 *supra*.

335. 16 C.F.R. § 703.3(a) (1975).

336. *E.g.*, Note, *Commercial Law-Consumer Protection: The Federal Trade Commission Rule For Informed Dispute Settlement Mechanisms, Promulgated Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Neglects the Commercial Incentive Necessary to Secure Adoption*, 49 TEMP. L.Q. 459 (1976).

337. *See* text accompanying note 343 *infra* for arbitration rules expanding upon this requirement.

338. This would avoid the problem of having the hearing held in a distant forum. *See, e.g.*, the *Aaacon* cases, text accompanying notes 267-69 *supra*.

339. This requirement was also incorporated into the Magnuson-Moss program, 16 C.F.R. § 703.6-7 (1975).

B. *Consumer Arbitration Rules*

Consumer arbitration rules should also reflect the unique nature of consumer disputes. Arbitration procedures must be simplified, yet must be capable of adequately protecting the rights and interests of all the parties.

Initiation of the arbitration proceeding should be simplified. The consumer should be able to initiate the process by making a toll-free phone call or by mailing in a pre-paid post card.[340] The consumer should be allowed to state his claim generally rather than having to formulate a specific arbitral issue. Moreover, consumer arbitration notice should be similar to that utilized in the small claims courts, both in content and in the method of service.[341] Arbitral notice should be bilingual in cases where the sale was conducted primarily in a language other than English. The notice should also inform the consumer as to the nature of arbitration and the implications of arbitration notice. Service should be made by registered mail.

The existing methods of arbitrator selection are inappropriate for consumer arbitration. Simply providing consumers with lists of arbitrators will not enable them to select the arbitrator intelligently. It is suggested that a tripartite board representing business, consumer, and community interests be established within the arbitration organizations, that will screen potential arbitrators and will then assign them to particular disputes.

The new rules should continue to provide for oral hearings and on-site inspections. Reliance on the submission of written arguments and written briefs should be minimized.[342] Hearings should be conducted at a time and place convenient to both parties. For this purpose, it is suggested that the parties have the option of holding the hearings in the store where the merchandise was purchased, or at the place where the services were rendered. Inasmuch as the initial transaction occurred in this location, it presumably would be convenient for both parties.[343] On-site inspections could be conducted simultaneously with the hearing, eliminating the delays incurred when such inspections must be arranged.

C. *Consumer Arbitration Programs*

Besides revising the arbitration statutes and rules, it is proposed that the programs themselves be upgraded to meet the needs of consumer arbitration. Two major projects are proposed: first, that the private arbitration organizations develop a publicity program to familiarize the public with the arbitration mechanism; and second, that these organizations make lay advocates available to the parties. Publicity is essential if arbitration is to be understood and accepted by the public. The public must be persuaded that arbitration is a desirable mechanism. This can be done by educating the public about arbitration and arbitration procedures. Publicity about consumer arbitration should be con-

340. A similar method of initiation is called for under the Magnuson-Moss program, *id.* at § 703.2.

341. *See* text accompanying notes 42-44 *supra*.

342. For the reasons cited in the text accompanying note 261 *supra*.

343. Hearings could be held, of course, after business hours.

ducted where consumers are found—in the stores.[344] A lay advocate system[345] is also recommended. Such a system equalizes the parties' positions by allowing the complaint to be presented fairly to the arbiter so that it may be decided on its merits.

VI
CONCLUSION

Arbitration offers the consumer a desirable alternative to existing methods of dispute resolution. The informality and flexibility of the arbitration proceeding permits the equitable and satisfactory settlement of disputes. The procedure is private and conciliatory and encourages the development of positive commercial relationships between the parties.

A variety of consumer arbitration programs have sprung up across the country. Some state legislatures have established compulsory arbitration programs for the resolution of small claim consumer disputes. Other communities offer arbitration to the parties as an alternative to small claims court adjudication, subject to that court's constant supervision. The vast majority of consumer arbitrations, however, are privately conducted pursuant to an agreement between the parties themselves. The parties often designate either the American Arbitration Association or the Better Business Bureau, organizations familiar with arbitration and consumer disputes respectively, to administer the arbitrations.

The governmentally conducted consumer arbitration programs have attempted to modify the arbitration process to make it more appropriate for the resolution of consumer disputes. To ensure impartiality, the government, not the parties, selects the arbiter. The government also bears the cost of the arbitration and assures the parties that the entire proceeding will be completed in a relatively short period of time. Nevertheless, the governmental programs have been inherently weak, primarily because they are publicly, not privately, operated. The government must approach the field of consumer arbitration broadly, developing general rules and procedures. The government often does not select the best possible arbiter or the best possible procedures for each particular dispute. Moreover, the key element of arbitration—voluntariness—is not present in governmentally operated programs, even in those nominally referred to as voluntary.

The private programs, rather than developing an independent consumer arbitration program, view consumer disputes as a subspecies of commercial disputes and thus rely on the well-developed rules of commercial arbitration. This shortsightedness imposes a mechanism on the parties, particularly the consumer, that is not sensitive either to their needs or to the nature of the disputes. This can easily lead to the unjust and therefore ineffective resolution of consumer disputes. The problem is particularly acute when the agreement to arbitrate is incorporated in a precommitment clause found in a standardized contract, where the possibility of an uninformed decision to arbitrate is most likely.

344. The Magnuson-Moss program therefore requires that the warranty itself include information telling the consumer where he can obtain more information about consumer arbitration. 16 C.F.R. § 703.2(b) (1975).

345. Similar, perhaps to that utilized in New York's Harlem Small Claims Court. *See* note 47 *supra*.

A special consumer arbitration model for private programs must be developed. This Note suggests that the model be incorporated in a consumer arbitration statute and that special consumer arbitration rules be promulgated pursuant thereto. An initial step in this direction was taken on the federal level with the enactment of the Magnuson-Moss Warranty Act. The Act provides for advisory rather than binding arbitration, and includes other provisions designed to ensure the fairness and impartiality of the arbitration proceeding. Yet that Act represents only a beginning. Other serious shortcomings of the commercial arbitration model must be eliminated and replaced with provisions tailored to the particular nature of consumer disputes.

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