CONSUMER ARBITRATION CLAUSES: AN INFORMAL SURVEY OF THEIR PREVALENCE IN 2014 FOR AN AVERAGE AMERICAN CONSUMER

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INTRODUCTION

This paper attempts to uncover the extent to which commercial arbitration clauses exist in the life of an average American consumer and to what extent an average American consumer agrees to binding arbitration without their knowledge. The author believes that this study, while unscientific and anecdotal, can be generalized to understand the extent to which arbitration clauses have seeped into everyday contracts for a significant proportion of the population. This assumption rests on the author's belief that he has chosen a sample — himself — that exhibits "typical" consumer behavior. This typical behavior involves everyday-type shopping and contracting for ongoing services (i.e. cell phone plans) without perusing the agreement between the provider and himself.

The author's curiosity is fueled by several factors. One, since the passage of the Federal Arbitration Act, and in particular during the past several decades, the courts have consistently upheld the enforceability of arbitration clauses in commercial contracts.[1] Thus, understanding the recourse available in the event of a dispute is important.

Secondly, the author, while not commercially sophisticated, is educated and is a law student. Unfortunately, it would be incorrect to always assume that such a person would carefully screen each contract that he signs. Sadly, the author admits that he does not and that he believes this behavior to be common amongst his peers. One survey showed that only seven percent of people read the full terms when they make an online purchase for goods or services.[2] The author is interested in uncovering what many Americans have agreed to, perhaps without their knowing or understanding.

Finally, the author is curious to understand whether or not he could try to negotiate an agreement to arbitrate with a commercial entity. He does not intend to initiate an actual suit, but simply wants to gauge whether he could succeed based on the use of these clauses throughout an industry. The author believes that it is fair to assume that if arbitration clauses were ubiquitous in an industry, then it would be impossible to negotiate against these terms. This is because there would be few, if any, alternative companies to whom he could take his business, the threat of which could be used as negotiating leverage.

I. AUTHOR'S USE OF HIMSELF AS THE SAMPLE SET

The author used himself as an illustration of this typical consumer in the United States in 2014. The author believes that his personal commercial activities and contracting behaviors are representative of a significant proportion of the population for the purpose of this exercise. The demographic in which he falls is commonly identified and targeted by commercial entities.[3]

The author is male, aged 35, and resides in Northern California. He is single, college educated, has an income between $37,450 and $90,750,[4] and English is his first language. He displays behavioral characteristics of both Generation Y and of the Millennial generation: he makes purchases online and in brick and mortar stores; he uses the internet as his primary source for news and research but also reads news magazines; he owns a vehicle but uses mass transit

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[1] For a brief history of the court's treatment of commercial arbitration clauses in the U.S., see Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 699-704 (2001).

[2] Article finding that in a survey only 7% of people read the full terms when buying a product or service online. Rebecca Smithers, *Terms and Conditions: Not Reading the Small Print Can Mean Big Problems*, THE GUARDIAN (Dec. 4, 2014, 5:00 PM), http://www.theguardian.com/money/2011/may/11/terms-conditions-small-print-big-problems.

[3] ROBERT D. REID & DAVID C. BOJANIC, HOSPITALITY MARKETING MANAGEMENT 139 (5th ed. 2009).

[4] This range is used because it is an identified income range for individual taxpayers for income tax purposes by the IRS for 2015. *See* 26 C.F.R. § 601.602 (2014).

and non-motorized means of travel when feasible; he owns a smartphone and uses it to communicate, watch media, and to play games; he has agreed to employment at a large multi-national firm after graduation but does not expect to be CEO within five years.[5] Overall, his use of multiple channels for purchasing goods and services provides a well-rounded sample of commercial contracting behavior that is flexible enough to be generalized to the population at large.

II. EXAMINATION METHODOLOGY

To begin, the author reviewed all of his on-going commercial contracts. These include contracts with financial-service institutions, telecommunications companies, and Internet service providers. The author included these contracts because they are the types of commercial relationships that many if not most U.S. consumers have with businesses in their everyday lives.[6]

The author tracked these commercial activities — both routine and irregular — for a period of two weeks and reviewed each unique transaction to see if he had agreed to mandatory arbitration. The author also reviewed a few contracts that were made outside of the two-week window but were deemed to be significant. These transactions were deemed significant due to their cost (greater than $500) or because they occur regularly, albeit infrequently. Some of these transactions include the purchase of investment vehicles and entertainment event ticket purchases.

In addition, the author selected corporate websites to review to see if they contained arbitration clauses that the website's parent company would attempt to enforce in the event of a dispute between the website visitor and the parent company. For example, the author was curious to know if a purchase from Amazon.com bound him to arbitration as a term of the purchase. Also, more traditional website only businesses such as news and entertainment sites were examined to see if they subjected their visitors to arbitration clauses. However, this specific study was limited to a few select websites because the author visited a copious amount of unique websites in the two-week period. With the exception of these website-only businesses and news and entertainment outlets, the author did not examine the terms and conditions for use of a company's public website. These websites, whose purpose is to provide information to consumers about a company, usually have their own conditions for use that focus on copyright issues and liability limits stemming from use of the website itself. For example, on the Chevron Corporation's website, individual consumers cannot make purchases for

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[5] Rob Asghar, *Gen X is from Mars, Gen Y is from Venus: A Primer on How to Motivate a Millennial*, FORBES (Jan. 14, 2014, 12:24 PM), http://www.forbes.com/sites/robasghar/2014/01/14/gen-x-is-from-mars-gen-y-is-from-venus-a-primer-on-how-to-motivate-a-millennial/.

[6] Vikas Bajaj, *Ready to Cut the Cord?*, THE NEW YORK TIMES (Apr. 6, 2013, 11:00 AM), http://www.nytimes.com/2013/04/07/opinion/sunday/ready-to-cut-the-cord.html?_r=1&.

goods or services. Rather, consumers can visit the website only to learn about the company's operations. Similarly, the study excluded an examination of user agreements for use of mobile applications that are used only for information or entertainment purposes, such as the Instagram or Snapchat mobile applications. Finally, the author frequented a great many restaurants in the two-week period of examination. From these, he chose a sample mix of franchises and locally owned establishments to examine.

The study was limited to an examination of the contracts that the author personally entered into. Therefore, a comprehensive examination of an industry was not performed, but rather just the experiences of one typical consumer. For example, the author has only one contract with one cell phone service provider. Therefore, he did not attempt to examine all of the contracts available to individual consumers from all cell phone providers.

This focus on personal contracts was done for two reasons. One, the commercial contracts under review for the purposes of this paper are private contracts. Thus, it would be difficult if not impossible to obtain copies of contracts for review from sources other than the author. Two, as noted by other researchers, even when a private agreement exists between an individual and a commercial entity it can be difficult to extract information from the commercial entity.[7] Despite these factors, other resources (articles, law review notes, etc.) were consulted to supplement the following data and analysis.

The author used the Internet heavily to search for evidence of consumer agreements that would bind consumers to arbitration. If one was found, then it was copied and pasted into one of the Attachments. If one could not be found, then the author noted that there was no arbitration agreement. The author attempted to make an exhaustive search for each company he investigated, but recognizes that just because he could not find an arbitration clause that would apply to individual consumers making purchases or using services from a firm, that it is not proof of the clause's nonexistence. In addition to using these formal methods, the author personally interviewed proprietors of businesses in Davis, California to uncover whether they would attempt to force their clients into arbitration if a dispute arose.

III. WHICH COMPANIES WERE EXAMINED

The author categorized the companies examined into seven categories: services, retail goods, entertainment, transportation, housing, health, and food. All of the categories have sub-categories, as can be seen in Table 1. The author chose to divide the companies examined in this manner for two reasons. One, it

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[7] Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 60-61 (Winter 2004).

aligns with other similar studies.[8] Two, it also aligns with how the author budgets his personal finances. Table 1 also shows which companies were examined within each subcategory.

Table 1: Companies Examined By Category

Category	**Type**	**Company(ies) examined**
Services	Cell Phone	Verizon Wireless
Services	Credit Cards	USAA Mastercard; DiscoverCard
Services	Financial Management; Investments; Banking	USAA Savings and Loan; USAA Brokerage Services
Services	Internet and Cable TV	Comcast Xfinity; Netflix; HBO
Services	News Website	CNN; NPR; The Wall Street Journal; Business Insider; Drudge Report; FOX News
Services	Laundromat	The Laundry Lounge
Retail goods	Brick and Mortar	Marine Corps Exchange; Big 5 Sporting Goods; Petco; Target; The UPS store
Retail goods	Online purchase	Amazon.com; Overstock.com
Entertainment	Event ticket	Ticketmaster; Regal Movie Theater
Entertainment	Website	ESPN.go.com; Reddit.com
Transportation	Airline ticket	Hawaiian Airlines; American Airlines
Transportation	Hotel	Marriott
Transportation	Gas Station	Chevron/Texaco
Transportation	Auto Insurance	USAA Auto Insurance
Housing	Apartment Rental	Private agreement between me and owner using the "Davis Model Lease"
Housing	Rental Insurance	USAA Rental Insurance
Health	Health Club	Davis Cross Fit

8 *See Id*. At 55-74.

Health	Medical	Kaiser Permanente (CA)
Food	Grocery Store	Whole Foods; Safeway
Food	Restaurant	Burgers and Brew; Thai Canteen; El Burrito; McDonalds; Taco Bell; Ruth's Chris; Starbucks

IV. RESULTS

In total, forty-four companies were researched to discover whether they required individual consumers to be bound by arbitration in the event of a dispute as a condition to transacting with the business. Six of the companies were private companies operating out of only one location. The rest were public companies or wholly-owned subsidiaries of public companies.

The results of the survey are presented in Tables 2.1 and 2.2. Sixteen of the forty-four (36%) businesses reviewed contained arbitration clauses in their commercial contracts with individual consumers. Fourteen of the sixteen (88%) contracts contained a class action waiver. Three of the sixteen (19%) contracts allowed consumers to "opt out" of arbitration if they notified the business of their desire to do so. However, this option must typically be chosen within a short time from the initiation of the agreement (typically 30 days) or the right to do so would be permanently waived. Some of the contracts even contained continuation clauses that bound the consumer to arbitration even after the termination of the agreement. For example, section "13.k." of Comcast's Terms of Service states, "This Arbitration Provision shall survive the termination of your Service(s) with Comcast."

The data for Tables 2.1 and 2.2 was aggregated from the arbitration clauses found in commercial contracts between the author and a firm. The clauses are included in Attachments A through G. Table 2.1 identifies how many contracts by subcategory were reviewed to see if they contained arbitration clauses. Among the contracts with arbitration clauses, it was recorded whether or not a class action waiver was a term within the clause. An option to opt out was also recorded if one existed. Increased focus was placed on these two conditions within the arbitration clauses because of their significance to this exercise. Some academics have made clear their contempt for class action waivers because of their unconscionable abuse of corporate power over consumers.[9] Indeed, many

[9] Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004), ; Jean R. Sternlight, *Should an Arbitration Pro- vision Trump the Class Action? No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise,* DISP. RESOL. MAG. (Spring 2002).

lawyers have argued on behalf of their clients in trial that class action waivers should not be permitted.[10]

Table 2.1: Frequency of Arbitration Clauses, Class Action Waivers, and "Opt Out" Options Within Contracts Examined

Contract		Arbitration Clause	Class Action Waiver	Opt Out Available
Category	**Type**			
Services	Cell Phone	1 of 1	1 of 1	0 of 1
Services	Credit Cards	2 of 2	2 of 2	1 of 2
Services	Financial Management; Investments; Banking	1 of 2	1 of 1	0 of 1
Services	Internet and Cable TV	3 of 3	3 of 3	0 of 3
Services	News Website	3 of 6	3 of 3	1 of 3
Services	Laundromat	0 of 1	--	--
Services Subtotal		**10 of 15 67%**	**10 of 10 100&**	**2 of 10 20%**
Retail goods	Brick and Mortar	0 of 5	--	--
Retail goods	Online purchase	2 of 2	2 of 2	0 of 2
Retail Goods Subtotal		**2 of 7 29%**	**2 of 2 100%**	**0 of 2 0%**
Entertainment	Event ticket	1 of 2	1 of 1	0 of 1
Entertainment	Website	1 of 2	1 of 1	0 of 1
Entertainment Subtotal		**2 of 4 50%**	**2 of 2 100%**	**0 of 2 0%**
Transportation	Airline ticket	0 of 2	--	--
Transportation	Hotel	0 of 1	--	--
Transportation	Gas Station	0 of 1	--	--
Transportation	Auto Insurance	1 of 1	0 of 1	0 of 1

[10] *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)

	Transportation Subtotal	**1 of 5 20%**	**0 of 1 0%**	**0 of 1 0%**
Housing	Apartment Rental	0 of 1	--	--
Housing	Rental Insurance	0 of 1	--	--
	Housing Subtotal	**0 of 2**	**--**	**--**
Health	Health Club	0 of 1	--	--
Health	Medical	1 of 1	0 of 1	1 of 1
	Health Subtotal	**1 of 2 50%**	**0 of 1 0%**	**1 of 1 100%**
Food	Grocery Store	0 of 2	--	--
Food	Restaurant	0 of 7	--	--
	Food Subtotal	**0 of 9**	**--**	**--**
	GRAND TOTAL	**16 of 44 36%**	**14 of 16 88%**	**3 of 16 19%**

Table 2.2 shows the amount of times a "consumer favorable" term was in the arbitration provision. These consumer favorable terms are defined generally as terms that make it easier for the consumer to file and proceed through arbitration. Ostensibly, these terms are included in the arbitration clauses to allow the companies to defend against any claims of "unconscionability" against the arbitration clause. After all, if arbitration is actually easier, faster, and cheaper for the claimant, then attempting to hold the clause unconscionable seems like a failing enterprise.

For the purposes of this report, "more award" means that in the event that a claimant wins the arbitration after an offer to settle has been made, the claimant will receive an award greater than the original offer if she prevails (up to a certain amount). "Small claims court" means that the claimant has the option to file a claim in small claims court. The arbitration clause usually places a cap on the amount in dispute if this option is elected. "Fees and costs" means that the company will at least front the costs of filing and proceeding through arbitration if the claimant needs help or will pay for all of the incurred fees and costs associated with the arbitration if the claimant prevails. "Location or phone" means that the location of the arbitration will take place near the claimant (typically within the bounds of the federal jurisdiction where the claimant would be able to file a claim in court or within the claimants billing zip code) or can be done over the phone or by mail only.

Table 2.2: "Consumer Favorable" Terms in the Arbitration Provision						
Contract		**More Award**	**Small Claims Court**	**Fees and Costs**	**Location / Phone**
Category	**Type**				
Services	Cell Phone	1 of 1	1 of 1	1 of 1	0 of 1
Services	Credit Cards	0 of 2	2 of 2	2 of 2	2 of 2
Services	Financial Management; Investments; Banking	0 of 1	0 of 1	0 of 1	0 of 1
Services	Internet and Cable TV	0 of 3	0 of 3	2 of 3	3 of 3
Services	News Website	0 of 3	0 of 3	0 of 3	0 of 3
Services	Laundromat	--	--	--	--
	Services Subtotal	**1 of 10 10%**	**3 of 10 30%**	**5 of 10 50%**	**5 of 10 50%**
Retail goods	Brick and Mortar	--	--	--	--
Retail goods	Online purchase	0 of 2	0 of 2	1 of 2	1 of 2
	Retail Goods Subtotal	**0 of 2 0%**	**0 of 2 0%**	**1 of 2 50%**	**1 of 2 50%**
Entertainment	Event ticket	0 of 1	0 of 1	0 of 1	1 of 1
Entertainment	Website	1 of 1	0 of 1	1 of 1	1 of 1
	Entertainment Subtotal	**1 of 2 50%**	**0 of 2 0%**	**1 of 2 50%**	**2 of 2 100%**
Transportation	Airline ticket	--	--	--	--
Transportation	Hotel	--	--	--	--
Transportation	Gas Station	--	--	--	
Transportation	Auto Insurance	0 of 1	0 of 1	0 of 1	1 of 1
	Transportation Subtotal	**0 of 1 0%**	**0 of 1 0%**	**0 of 1 0%**	**1 of 1 100%**
Housing	Apartment Rental	--	--	--	--
Housing	Rental Insurance	--	--	--	--
	Housing Subtotal	**--**	**--**	**--**	**--**

Health	Health Club	--	--	--	--
Health	Medical	0 of 1	1 of 1	1 of 1	0 of 1
	Health Subtotal	**0 of 1 0%**	**1 of 1 100%**	**1 of 1 100%**	**0 of 1 0%**
Food	Grocery Store	--	--	--	--
Food	Restaurant	--	--	--	--
	Food Subtotal	**--**	**--**	**--**	**--**
	GRAND TOTAL	**2 of 16 13%**	**4 of 16 25%**	**8 of 16 50%**	**9 of 16 56%**

V. TRENDS

A. Service Providers

Although the sample sets within each category and subcategory are small, trends can easily be seen. By far, the businesses that most often include arbitration clauses in their contracts are service providers. Removing the websites and the Laundromat from the category, the use of arbitration clauses rises to 89%. It is also noteworthy that of the companies that include arbitration, 100% of them require class waivers and only 20% allow consumers to opt out of mandatory arbitration (and only if certain terms are met).

This finding is on par with other studies that have looked more broadly at industry trends. One study in 2004 found that in the financial sector — including credit cards, banking, and investment services — 18 of the 26 contracts (69%) examined included arbitration clauses.[11] However, a preliminary yet comprehensive 2013 report by the Consumer Financial Protection Bureau found that only 17% (67 of 393) of credit card issuers in 2012 included arbitration provisions.[12] The same report found that 62% the 50 largest banks used arbitration clauses in their savings and checking account agreements, but only 7% of small to mid-sized banks and only 8% of the 50 largest credit unions did the same.[13]

USAA can be properly categorized as a mid-sized bank. The exception is the USAA savings and checking account, but in all of the other areas that the author uses USAA, arbitration is mandatory (investments, insurance). As noted above, it is not common for mid-sized banks to use arbitration clauses so it is no

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[11] Demaine/Hensler, *Volunteering, Supra* note 7, at 63.

[12] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS (2012).

[13] *Id*.

surprise that USAA did not. However, USAA is the only company that the author found that explains its inclusion of arbitration clauses in its commercial contracts with consumers (in areas other than banking).

USAA first tempers the situation with an introduction that can only be read as a desire for the company to be viewed as "good" and would not use arbitration to strong arm a client:

> USAA has included arbitration provisions in a number of its product agreements for many years. But, not all arbitration provisions – and not all companies that use them – are the same. Recently, some banks were challenged for their use of arbitration, particularly in collection matters – a practice that USAA has never engaged in.[14]

The company goes on to inform the consumers why it chooses to include the clauses. This includes the usual reasons promulgated by defenders of such clauses: faster, cheaper, and with savings passed on to the consumers. It does not, however, explain its inclusion of class action waivers in the arbitration clauses that it does include in its contracts:

> Arbitration is beneficial to both USAA and to its members, as it provides quicker resolution than traditional court cases, which often can take 15-18 months to complete versus the average 3-6 months in arbitration. It also reduces litigation costs for both members and USAA. Because USAA is member owned, when litigation costs are reduced, the entire membership benefits.[15]

B. Retail Goods

Both of the examined online retailers (Amazon and Overstock) include arbitration clauses, but none of the examined brick and mortar stores do. This finding is also in-line with a previous study that found that of five department stores, none of them required arbitration, but three of five online retailers did.[16] The author can only assume that online retailers prefer arbitration because of the nature of the exchange.

In brick and mortar stores, retailers and customers can not only examine the product before purchase to assess its quality and features, but they can also interact with each other. The ability to examine the product in person ensures that

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[14] USAA Bank, *Why USAA Includes an Arbitration Option to Resolve Some Disputes,* USAA (Sep. 2, 2009), https://www.usaa.com/inet/pages/arbitration_option?akredirect=true (last visited Dec. 4, 2014).
[15] *Id.*
[16] Demaine/Hensler, *Volunteering*, *supra* note 7, at 63.

the retailer sets out the product that meets its standards and likewise consumers are free to examine the product to make sure that it is the item that they want. The personal interaction between customers and retail staff likely influences how a customer would handle a dispute. If the customer believes that an issue will be resolved because she can approach the retailer in person and speak with a representative that will be helpful, then it makes sense that she would do that. It is then in the retailer's interest to resolve the issue in the customer's favor to ensure repeat visits. The decline of sales in "brick and mortar" stores over the past ten years in the emergence of online commerce strongly reinforces the need for physical stores to earn repeat customers. Using the local policies in favor of the customer saves the customer time and expense.

On the other hand, while online retailers also have customer-friendly return policies, they are less in control of the purchase process. Online retailers such as Amazon and Overstock often use third-party retailers to make goods available while reducing their own overhead. This often leads to a lack of control in the quality of the product, especially when the third-party bypasses the retailer in the distribution chain. Also, if an online customer has an issue after attempting to use the retailer's dispute resolution process, she cannot drive back to the store and complain to the manager. The recourse would be a suit, but it makes sense that online retailers would want to avoid that burden. While it may be possible for consumers to return their product by mail with certain retailers, this step is not practical or simple for every consumer. It makes sense, then, that the online retailers do not include a small claims court provision like other institutions. For example, Verizon's arbitration provision states "For claims of $10,000 or less, the party bringing the claim can choose either the AAA's rules for consumer disputes or the BBB's rules for binding arbitration or, alternatively, can bring an individual action in small claims court." Discover Card and USAA also allow small claims court filings under certain conditions.

VI. "CONSUMER FAVORABLE" TERMS

A. More Awards

Two of the companies that require arbitration put incentives into the terms for consumers to proceed to arbitration even if the company has offered a settlement. In these cases, if the consumer believes that she has been more severely wronged, she can be awarded more damages than she originally sought and have all of her attorney and arbitration fees paid for. The two companies that provide these terms are large, multinational corporations: Verizon and The Walt Disney Company (ESPN.go.com). Verizon's clause is included below (emphasis added):

> We may, but are not obligated to, make a written settlement offer anytime before arbitration begins. The amount or terms of any settlement offer may not be disclosed to the arbitrator until after the arbitrator issues an award on the claim. *If you don't accept the offer and the arbitrator awards you an amount of money that's more than our offer but less than $5,000, or if we don't make you an offer, and the arbitrator awards you any amount of money but less than $5,000, then we agree to pay you $5,000 instead of the amount awarded. In that case we also agree to pay any reasonable attorneys' fees and expenses*, regardless of whether the law requires it for your case. If the arbitrator awards you more than $5,000, then we will pay you that amount.

B. Fees and Costs

Nine of the businesses that mandate arbitration in the event of a dispute offer to cover the fees and expenses of the arbitration. These nine include the cell phone provider, the credit card companies, and the Internet service provider. Among all of these offers, at least two conditions must be met: (1) the customer must request that the company do so, and (2) the customer must prevail in the arbitration or else all of the paid fees and expenses must be reimbursed back to the company. The Discover Card Agreement provides an example of one of these offers:

> If you wish to begin an arbitration against us but you cannot afford to pay the organization's or arbitrator's costs, we will advance those costs if you ask us in writing. Any request like this should be sent to Discover, PO Box 30421, Salt Lake City, UT 84130-0421. If you lose the arbitration, the arbitrator will decide whether you must reimburse us for money we advanced for you for the arbitration. If you win the arbitration, we will not ask for reimbursement of money we advanced.

In some cases, the company will cover all costs. This is the case for ESPN.go.com (owned by Disney):

"Unless the arbitrator finds the arbitration was frivolous or brought for an improper purpose, Disney Interactive will pay all filing, AAA, and arbitrator's fees and expenses."

C. Location of Arbitration

Nine of the companies provide that arbitration can take place either over the phone or at a physical location that is convenient to the consumer. In some instances, if the claim is for a small amount of money, the arbitration must be done by mail. For example, Netflix states that "If your claim is for US$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules." Comcast simply requires that "The arbitration will take place at a location convenient to you in the area where you receive the service from us."

VII. CLAUSE LENGTH AND COMPLEXITY

Table 3 shows the length of each clause and the Flesch readability score. Credit card arbitration clauses are almost always more complex and are written at a higher grade level than the rest of the credit card contract.[17] The higher an excerpt places on the Flesch readability score, the easier it is to read.[18] For example, Florida requires that life insurance policies have a Flesch Reading Ease score of 45 or greater.[19]

Conversely, the lower the Flesch-Kincaide grade level, the easier it is to read. The Flesch-Kincaide grade level corresponds to the grade level at which a U.S. student should be able to easily grasp the meaning of the words. Scores can be interpreted with the below chart.

Score	Notes
90.0 – 100.0	Easily understood by an average 11-year-old student
60.0 – 70.0	Easily understood by 13- to 15-year-old students
00.0 – 30.0	Best understood by university graduates

Table 3: Arbitration Clause Length and Readability

Company	Arbitration Clause Word Length	Flesch reading ease	Flesch-Kincaide grade level
Verizon	1064	40.5	12.0
DiscoverCard	901	41.3	12.0
USAA Mastercard	2337	41.1	12.0

[17] Consumer Financial Protection, *supra* note 12, at 28.
[18] P. Fishburne Kincaid, *et.al.*, *Derivation of New Readability Formulas (Automated Readability Index, Fog Count, and Flesch Reading Ease formula) for Navy Enlisted* Personnel, RESEARCH BRANCH REPORT 8-75. CHIEF OF NAVAL TECHNICAL TRAINING: NAVAL AIR STATION MEMPHIS (1975).
[19] FLA. STAT. § 627.4145(1)(a) (2014).

USAA Brokerage	442	33.0	12.0
Comcast Xfinity	1393	30.5	12.0
HBO	1454	33.0	12.0
Netflix	781	34.8	12.0
CNN.com	1425	29.6	12.0
Foxnews.com	1487	31.1	12.0
Online.WSJ.com	494	25.9	12.0
Amazon.com	473	31.1	12.0
Overstock.com	174	14.2	12.0
Ticketmaster	760	20.3	12.0
ESPN.go.com	994	26.0	12.0
USAA Auto Insurance	320	41.2	11.7
Kaiser Permanente	1840	27.5	12.0
AVERAGE	**1021**	**31.3**	**11.98**
MEAN	**948**	**31.1**	**12.0**
STANDARD DEVIATION	**598**	**7.68**	**0.075**

Of the clauses, the average length was 1021 words and the average reading ease was 31.3. Per the Flesch scale, these clauses are really only understood by university graduates, yet their boring legalese tests the mettle of any reader.

The shortest clause was 174 words, but it was also the most complex. With a mere three sentences it scored a pitiful 14.2 on the Flesch readability scale. The longest clause was from a credit card with 2337 words, but scored second highest on the readability score with a 41.1. None of the clauses passed the Florida life insurance requirement. Only one of them did not max out the grade level scale.

VIII. PRIVATE BUSINESSES IN DAVIS, CA

Finally, the author asked two private business owners and two agents if their businesses would try to mandate arbitration if a customer wanted to sue them. The agents did not know and did not know how to find out. The author attempted to research the issue on the business' websites, but did not find anything substantial. There were no signs or literature at either location to indicate that arbitration would be used.

One owner that the author spoke with admitted that she had never heard of arbitration. The owner of this establishment — Davis CrossFit — makes customers sign an agreement for monthly service, but there was no arbitration clause in the terms. The other establishment owner — The Laundry Lounge — seemed to confuse arbitration with small claims court so the author assumes that he also does not know the meaning of arbitration. Both owners stated that if a customer had an issue, then they would first attempt to resolve the issue locally and informally. If, however, they were sued, then they would "lawyer up."

The fact that both business owners do not know what arbitration is reinforces the notion that most people do not read their commercial contracts and even if they do they may not understand all of the contents. Undoubtedly, these owners not only have businesses-to-business agreements, but also have commercial contracts in their personal lives similar to the ones that the author has.

CONCLUSION

There is some evidence that businesses may be shying away from the use of arbitration clauses.[20] However, as other studies show, the inclusion of these clauses in the financial services industry, particularly with credit cards, is high. The same is true for cell phone service and Internet and cable television providers. The distinguishing features of inclusion of arbitration clauses in consumer commercial contracts are that they are contracts for services for an on-going basis. In other words, one-time, retail goods transactions usually do not subject the buyers to arbitration clauses.

There are different theories as to why these types of service providers would want to enter into arbitration instead of a court trial. Chief among them is that these companies can include class action waivers in their arbitration clauses. Indeed, as this small study shows, 100% of the reviewed contracts contain these waivers and only one allows the user to opt out, but only if she does so within the first thirty days of establishing an account. If she does not, then her recourse is arbitration indefinitely due to the survivability clause.

To the author, the arbitration clauses do not seem particularly onerous. However, he has never attempted to use the arbitration process itself and therefore cannot comment on the speed, ease of use, or financial burden. In fact, he has never sued anyone so he could not compare the arbitration process to the court system. The author thinks that it is fair to assume that this is true of most

[20] Christopher R. Drahozal and Stephen J. Ware, *Article: Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 434 (2010).

Americans. Therefore, the primary concerns, at least for the author, are the neutrality of the arbiters and what discovery may be allowed.

Overall, because only sixteen of the forty-four businesses reviewed contain arbitration clauses in their commercial contracts, arbitration does not seem as widespread and pervasive as one might imagine. However, certain industries seem to favor them and thus the consumer should be mindful when entering into business with entities in these industries. The consumer should have a dictionary and a cup of coffee at the ready when reviewing these terms because of their length, complexity, and generally stale language.