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# THE USE OF ARBITRATION CLAUSES BY SOCIAL MEDIA WEBSITES: A CRITIQUE

Kavya Jha & Ananya Singh

## ABSTRACT

The arbitration clauses contained in the Terms of Services (ToS) of most social media websites mandate arbitration and the waiver of class arbitration.<sup>1</sup> In light of this reality, this article seeks to analyze the legal position with respect to mandatory arbitration and class arbitration waiver in the United States, India, and European Union (EU). It compares and juxtaposes the respective positions in these three jurisdictions to find that whereas the United States has been pro-arbitration to the extent of being detrimental to consumer interest, India has adopted an overly protectionist approach, while the EU has adopted an effective model to balance the interests of corporations and consumers. In light of these findings, this article provides general and jurisdiction-specific recommendations to make arbitration clauses compatible with the interests of both parties involved.

## I. INTRODUCTION

“I can imagine no society which does not embody some method of arbitration” -Herbert Read.<sup>2</sup>

Alternate dispute resolution (ADR) processes are steadily gaining popularity.<sup>3</sup> Many view ADR as more convenient and

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<sup>1</sup> See generally Kelsey L. Swaim, *Alternative Dispute Resolution and Social Media: How Mandatory Arbitration Clauses Impact Social Networking*, 5 Y.B. ARB. & MEDIATION 356 (2013).

<sup>2</sup> HERBERT READ, *SELECTED WRITINGS: POETRY AND CRITICISM* 43 (Allen Tate, Salma M. Ghana & Philip Ward eds., 1963).

<sup>3</sup> *Alternative Dispute Resolution*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) (last visited Feb. 9, 2023).

effective conflict resolution processes than traditional litigation.<sup>4</sup> Despite its advantages, ADR processes—such as arbitration—can deprive one or more parties of the right to approach a court if that option is not voluntarily and mutually agreed upon beforehand.<sup>5</sup> This is often the case in arbitration clauses provided in the terms and conditions on the websites of multinational corporations.<sup>6</sup> Mandatory arbitration clauses require parties to resolve their disputes through the arbitration process.<sup>7</sup> These clauses are generally latent in the Terms of Service (ToS) that users agree to before creating an account on the website.<sup>8</sup> Further, these clauses often also contain a class arbitration waiver.<sup>9</sup> Through such clauses, the agreement prohibits users from consolidating claims that can be brought by more than one claimant.<sup>10</sup> Mandatory arbitration clauses are notoriously known for being pervasive, binding parties to arbitration and depriving unsuspecting consumers—who may not have read the fine print of the ToS in question—of their right to resort to court to resolve their respective disputes.<sup>11</sup>

In this context, this article aims to critically analyze arbitration clauses in social media websites. Part II contains an empirical study of dispute clauses in ten of the most popular social media websites. These websites were chosen through a simple random sampling process.<sup>12</sup> Part III discusses the advantages and disadvantages of mandatory arbitration clauses and class arbitration waivers. Part IV comprises a study of jurisprudence in the United States, India, and European Union (EU). This part also provides a

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<sup>4</sup> *ADR Types & Benefits*, CAL. CTS., <https://www.courts.ca.gov/3074.htm> (last visited Feb. 9, 2023).

<sup>5</sup> *Mandatory Clauses Are Discriminatory and Unfair*, PUB. CITIZEN, <https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/> (last visited Feb. 9, 2023).

<sup>6</sup> James R. Bucilla II, *The Online Crossroads of Website Terms of Service Agreements and Consumer Protection: An Empirical Study of Arbitration Clauses in the Terms of Service Agreements for the Top 100 Websites Viewed in the United States*, 15 WAKE FOREST J. BUS & INTELL. PROP L. 102, 104 (2014).

<sup>7</sup> *Mandatory Clauses Are Discriminatory and Unfair*, *supra* note 5.

<sup>8</sup> Bucilla, *supra* note 6, at 105.

<sup>9</sup> *Id.* at 106.

<sup>10</sup> Hagit M. Elul & Hughes Hubbard & Reed LLP, *Class Arbitration Waiver (US)*, THOMAS REUTERS PRAC. L. ARB., [https://uk.practicallaw.thomsonreuters.com/3-518-9047?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-518-9047?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited Feb. 9, 2023).

<sup>11</sup> Emily Canis, *One “Like” Away: Mandatory Arbitration for Consumers*, 26 GEO. MASON U. C.R.L.J. 127, 139 (2015).

<sup>12</sup> KENNETH D. BAILEY, *METHODS OF SOCIAL RESEARCH* 89 (4th ed. 1994).

comparative analysis of the stance of the three jurisdictions regarding mandatory arbitration and class action waivers. Finally, Part V offers general and jurisdiction-specific suggestions to ameliorate the problems caused by the mandatory arbitration and class arbitration waivers.

The article emphasizes the need for informed consent and the provision of opt-out clauses in the ToS of social media websites. It additionally explores the possibility of an increased role of online dispute resolution (ODR) in disputes between websites and their users. Thereafter, it provides specialized suggestions to address the lacunae present in the laws of the three above-mentioned jurisdictions. The article ultimately aims to provide balanced solutions by analyzing the mandatory arbitration clauses from the lens of consumer protection laws. Broadly, the objective of this research is to assess arbitration clauses in social media websites.

## II. AN EMPIRICAL STUDY OF ARBITRATION CLAUSES IN SOCIAL MEDIA WEBSITES

Social media users seldom have time to read the ToS of the apps they use daily.<sup>13</sup> These ToS often contain a binding arbitration clause and a class arbitration waiver.<sup>14</sup> Considering the effect that mandatory arbitration clauses and class arbitration waivers can have on the constitutional rights of users, we provide an assessment of mandatory arbitration clauses of some of the most popular social media websites.

For purposes of comparison, certain important features of the respective arbitration clauses of these social media platforms have been summarized in Table 1 below.

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<sup>13</sup> Jessica Guynn, *What You Need to Know Before Clicking “I Agree” on that Terms of Service Agreement or Privacy Policy*, USA TODAY (Jan. 29, 2020, 2:21 PM ET), <https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002/>.

<sup>14</sup> Bucilla, *supra* note 6, at 128.

Table 1: Characteristics of Arbitration Clauses in Social Media Websites

Social Media Site	Mandatory Arb. Clause	Class Action Waiver	Specifies Rights Waived	Addresses Cost of Arbitration	Conspicuous Arbitration Clause	Opt-Out Clause	Comments
Facebook <sup>15</sup>	No	No	N/A	N/A	N/A	N/A	Due to widespread criticism of its dispute resolution mechanism, Facebook was compelled to alter its dispute settlement clause in 2009 and remove the arbitration clause. <sup>16</sup>
YouTube <sup>17</sup>	No	No	N/A	N/A	N/A	N/A	Exclusive jurisdiction for all disputes is given to the federal or state courts of Santa Clara County. <sup>18</sup>
WhatsApp <sup>19</sup>	Yes	Yes	Yes	Yes	Yes	Yes	WhatsApp has a binding individual arbitration clause for its U.S.- and Canada-based users. <sup>20</sup> A disclaimer provided in capital letters at the beginning of the Special Arbitration Provision section makes the clause conspicuous. <sup>21</sup> However, the location of the arbitration may not be based on consumer convenience as the ToS stipulate this shall be determined according to the AAA's <i>Commercial</i>

<sup>15</sup> *Terms of Service*, FACEBOOK (July 26, 2022), <https://www.facebook.com/terms.php>.

<sup>16</sup> Greg Beck, *Facebook Dumps Binding Mandatory Arbitration*, PUB. CITIZEN (Feb. 26, 2009), <https://pubcit.typepad.com/clpblog/2009/02/facebook-dumps-binding-mandatory-arbitration.html>.

<sup>17</sup> *Terms of Service*, YOUTUBE (Jan. 5, 2022), <https://www.youtube.com/static?template=terms>.

<sup>18</sup> *Id.*

<sup>19</sup> *WhatsApp Terms of Service*, WHATSAPP (Jan. 4, 2021), <https://www.whatsapp.com/legal/terms-of-service/?lang=en#terms-of-service-dispute-resolution> [hereinafter *WhatsApp Terms of Service*].

<sup>20</sup> *WhatsApp Terms of Service: Special Arbitration Provision for United States or Canada Users*, WHATSAPP (Jan. 4, 2021), <https://www.whatsapp.com/legal/terms-of-service?eea=0#terms-of-service-special-arbitration-provision-for-united-states-or-canada-users>.

<sup>21</sup> *See id.*

							<i>Arbitration Rules</i> , which simply state that the place shall be determined by the sole arbitrator and does not specify the considerations involved. <sup>22</sup> Further, the arbitration clause also provides a limitation period for bringing the arbitration suit as well as for opting out of the arbitration clause. <sup>23</sup>
Instagram <sup>24</sup>	No	No	N/A	N/A	N/A	N/A	Instagram added a mandatory arbitration clause in 2013. <sup>25</sup> However, Instagram does not have a mandatory arbitration clause in its current Terms. <sup>26</sup>
Pinterest <sup>27</sup>	Yes	Yes	Yes	Yes	No	No	Pinterest's mandatory arbitration clause is consumer-friendly, inasmuch as it allows arbitration in the consumer's country of residence and provides the option of document-only or telephonic hearings for claims of less than \$10,000. <sup>28</sup>

<sup>22</sup> See *id.*; *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (AAA), R-25, at 23 (Sept. 1, 2022), [https://www.adr.org/sites/default/files/CommercialRules\\_Web\\_0.pdf](https://www.adr.org/sites/default/files/CommercialRules_Web_0.pdf).

<sup>23</sup> *WhatsApp Terms of Service: Special Arbitration Provision for United States or Canada Users*, *supra* note 20.

<sup>24</sup> *Terms of Use*, INSTAGRAM: HELP CTR. (July 26, 2022), <https://help.instagram.com/581066165581870> [hereinafter *Terms of Use* (INSTAGRAM)].

<sup>25</sup> Nicole Cocozza, *Instagram Sets a Precedent by an Insta Change in Social Media Contracts and Users' Ignorance of Instagram's Terms of Use May Lead to Acceptance by a Simple Snap*, 15 J. HIGH TECH. L. 363, 386 (2014).

<sup>26</sup> See generally *Terms of Use* (INSTAGRAM), *supra* note 24.

<sup>27</sup> *Terms of Service*, PINTEREST (May 1, 2018), <https://policy.pinterest.com/en/terms-of-service> [hereinafter *Terms of Service* (PINTEREST)].

<sup>28</sup> See *id.*

TikTok <sup>29</sup>	Yes	Yes	Yes	Yes	Yes	Yes	The mandatory arbitration clause contained in the terms for U.S.-based users provide an opt-out procedure for individuals, but this is time-barred. <sup>30</sup> Further, the clause can be construed to be conspicuous, as a disclaimer in capital letters is provided at the beginning. <sup>31</sup> However, the mandatory arbitration clause for users based anywhere outside the United States, European Economic Area (EEA), United Kingdom, Switzerland, and India is far less detailed than the one provided for U.S.-based users, as it does not address costs of arbitration, specify rights waived, or provide an opt-out clause. <sup>32</sup> Further, there is no disclaimer for the clause. <sup>33</sup>
U.S.	No	No	N/A	N/A	N/A	N/A	
EEA	Yes	No	No	No	No	No	
Other							
Twitter <sup>34</sup>	No	No	N/A	N/A	N/A	N/A	Claims can be brought in the federal or state courts in California. <sup>35</sup>
LinkedIn <sup>36</sup>	No	No	N/A	N/A	N/A	N/A	The ToS stipulate California courts shall resolve disputes involving users living outside the “Designated Countries” (i.e., countries in the EU, EEA, and Switzerland), which in turn defer to Irish courts while allowing for local mandatory consumer protections and also allow for flexibility in

<sup>29</sup> *Terms of Service (U.S.)*, TIKTOK, <https://www.tiktok.com/legal/terms-of-service?lang=en> (Feb. 2019) [hereinafter *Terms of Service (U.S.)* (TIKTOK)].

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Terms of Service (Other Regions)*, TIKTOK, <https://www.tiktok.com/legal/page/row/terms-of-service/en> (Feb. 2021) [hereinafter *Terms of Service (Other Regions)* (TIKTOK)].

<sup>33</sup> *Id.*

<sup>34</sup> *Terms of Service*, TWITTER, (June 10, 2022), <https://twitter.com/en/tos>.

<sup>35</sup> *Id.*

<sup>36</sup> *User Agreement: Governing Law and Dispute Resolution*, LINKEDIN (Feb. 1, 2022), <https://www.linkedin.com/legal/user-agreement#dispute>.

							terms of deciding questions of jurisdiction. <sup>37</sup>
Snapchat <sup>38</sup>	Yes	Yes	Yes	Yes	Yes	Yes	The binding arbitration clause for U.S.-based users is more consumer-inclined, as it provides an option of non-appearance-based arbitration for claims of less than \$10,000 and is also conspicuously placed. <sup>39</sup>
Reddit <sup>40</sup>	No	No	N/A	N/A	N/A	N/A	Disputes will be resolved in federal or state courts in California. <sup>41</sup>

Table 1 demonstrates that four out of ten platforms (40%) have mandatory arbitration clauses, with TikTok having two separate clauses: one for users based in the United States, and another for users based in other countries. While WhatsApp, Pinterest, TikTok, and Snapchat specify the rights waived by submitting to arbitration, mention costs of arbitration, have opt-out clauses, and are conspicuous, TikTok's ToS for users based in countries other than the United States, United Kingdom, Switzerland, India, or in the EEA fail to check all these boxes. Thus, out of five mandatory arbitration clauses, three (60%) can be construed as user-friendly in terms of being informative and conspicuous.

In 2012, Michael L. Rustad, Richard Buckingham, Diane D'Angelo, and Katherine Durlacher conducted the first empirical study on the use of pre-dispute mandatory arbitration clauses by social media websites.<sup>42</sup> They sampled 157 social networking sites and concluded these arbitration clauses contravene the basic principles deemed indispensable for a fair process by barring civil

<sup>37</sup> *Id.*

<sup>38</sup> *Snap Inc. Terms of Service: Arbitration, Class-Action Waiver, and Jury Waiver*, SNAP INC. (Nov. 15, 2021), <https://www.snap.com/en-US/terms#arbitration>.

<sup>39</sup> *Id.*

<sup>40</sup> *Reddit User Agreement if You Live Outside the EEA, United Kingdom, or Switzerland, Including if You Live in the United States*, REDDIT, <https://www.redditinc.com/policies/user-agreement-september-12-2021#US> (Aug. 12, 2021).

<sup>41</sup> *Id.* at *Governing Law and Venue*.

<sup>42</sup> *See generally* Michael L. Rustad, Richard Buckingham, Diane D'Angelo & Katherine Durlacher, *An Empirical Study of Pre-dispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 UALR L. REV. 643 (2012).



recourse for tortious claims and contractual disputes.<sup>43</sup> The study found nearly one in four websites samples incorporated some form of arbitration clause.<sup>44</sup> Two years later, in 2014, James Bucilla conducted a similar study.<sup>45</sup> This study found that out of the seventeen social networking sites, only five (constituting 16.67% of the total number) had arbitration clauses.<sup>46</sup>

The above studies by Rustad, D'Angelo, and Durlacher and Bucilla, and their findings, indicate that mandatory arbitration is the most common form of arbitration found in arbitration clauses.<sup>47</sup> Findings common to the 2014 study and the present study, but not to the 2012 study, demonstrate that most arbitral clauses present themselves in a conspicuous manner and specify the rules that apply to a potential arbitration situation.<sup>48</sup> Although the samples of all three studies vary, a general, visible trend is that websites are moving toward making their arbitration clauses more informative. However, popular websites such as WhatsApp, Snapchat, and TikTok continue to use mandatory arbitration clauses, making the present discourse relevant today.<sup>49</sup>

### III. MANDATORY ARBITRATION CLAUSES—THE GOOD, THE BAD & THE UGLY

Multinational corporations often prefer mandatory arbitration clauses because of the confidentiality and cost- and time-effectiveness offered by the arbitration process.<sup>50</sup> These clauses are, however, more detrimental than beneficial to customers—in this case social media users. These users' experiences strongly exemplify the imbalance in bargaining power between corporations and consumers. Mandatory arbitration clauses dilute the very essence of arbitration: There is no party autonomy in these cases and a single party—the corporation—often solely decides the terms, such as place of arbitration.<sup>51</sup>

The social media website clauses often practice a “take it or leave it” policy of the companies' design.<sup>52</sup> Users have no option

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<sup>43</sup> *Id.* at 661.

<sup>44</sup> *Id.* at 653.

<sup>45</sup> Bucilla, *supra* note 6, at 102.

<sup>46</sup> *Id.* at 112.

<sup>47</sup> *See id.* at 114; Rustad, Buckingham, D'Angelo & Durlacher, *supra* note 42, at 654.

<sup>48</sup> Bucilla, *supra* note 6, at 121.

<sup>49</sup> *See infra* Table 1.

<sup>50</sup> Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J. L. REFORM 783, 784 (2008).

<sup>51</sup> Coccozza, *supra* note 25, at 392.

<sup>52</sup> Bucilla, *supra* note 6, at 130.

but to accept the company's terms if they want to access the site.<sup>53</sup> Further, even if the terms include an opt-out clause, users do not have a real, effective choice to opt out.<sup>54</sup> As Part II demonstrates, these opt-out clauses are generally time-bound.<sup>55</sup>

The mandatory arbitration clause divests users of their right to present their respective matters before a court of law and take civil recourse.<sup>56</sup> For instance, in the United States, mandatory arbitration clauses lead to users foregoing their Seventh Amendment constitutional right to a jury trial.<sup>57</sup> In contrast to arbitration, jury trials are open proceedings, and can exist as a more transparent process.<sup>58</sup> Consumers also have recourse to appeal a trial court's decision.<sup>59</sup>

In the majority of the cases observed in Rustad, Buckingham, D'Angelo, and Durlacher's study, arbitration clauses are in the middle or toward the end of the "Terms of Use or Privacy" policy of the social networking site in question.<sup>60</sup> This makes the clause inconspicuous.<sup>61</sup> A Deloitte survey of 2,000 U.S. consumers in 2017 found that 91% of people consent to ToS without reading them.<sup>62</sup> Thus, many users effectively acquiesce to the terms and waive their rights unknowingly.<sup>63</sup>

Even if an arbitration clause is conspicuous, it may not explain the intricacies of the arbitration process.<sup>64</sup> A study conducted by Linda J. Demaine and Deborah Hensler found that consumers do not realize the implications of arbitration clauses

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<sup>53</sup> *Id.* at 143.

<sup>54</sup> *Id.* at 144.

<sup>55</sup> *See, e.g., Terms of Service (U.S.) (TIKTOK)*, *supra* note 29.

<sup>56</sup> Omri Ben-Shahar, *How Bad are Mandatory Arbitration Terms?*, 41 U. MICH. J.L. REFORM 777, 777 (2008).

<sup>57</sup> Rustad, Buckingham, D'Angelo & Durlacher, *supra* note 42, at 645.

<sup>58</sup> *Types of Juries*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/types-juries#:~:text=Trials%20are%20generally%20public%20but,guilty%20in%20a%20criminal%20case> (last visited Feb. 12, 2023).

<sup>59</sup> Rustad, Buckingham, D'Angelo & Durlacher, *supra* note 42, at 668.

<sup>60</sup> *Id.* at 656.

<sup>61</sup> *See id.*

<sup>62</sup> *2017 Global Mobile Consumer Survey: U.S. Edition*, DELOITTE (2017) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf> (last visited Feb. 12, 2023).

<sup>63</sup> *Id.*

<sup>64</sup> Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62 (2004).

because of the inadequate information provided to them.<sup>65</sup> Most websites fail to disclose the arbitral rules that govern proceedings, or the estimated costs of arbitration.<sup>66</sup> They also fail to explain the rights that users are waiving or provide additional information related to the process.<sup>67</sup> In the study undertaken in Part II, 40% of the clauses do not mention the rights the users waived.<sup>68</sup> Thus, it cannot be said that they have made an informed choice.<sup>69</sup>

Additionally, the place of arbitration is often decided by the social networking site and the user has no room to negotiate.<sup>70</sup> For instance, WhatsApp's arbitration clause arguably does not set the place of arbitration based on consumer convenience.<sup>71</sup> This could result in consumers having to travel long distances and pay exorbitant travel fares from their own pockets.<sup>72</sup>

Many arbitration clauses also mandate parties to waive their right to join class actions or class arbitrations.<sup>73</sup> Through clever use of these Terms of Use, the sites have been successful in shunting disputes and creating a "no liability zone" for themselves.<sup>74</sup> All of the arbitration clauses in Part II also include class action or class arbitration waivers.<sup>75</sup> This may be detrimental in cases where the damages are nominal compared to the cost of the arbitration proceedings. Class actions are specifically preferred when claims are procedurally difficult, and in cases where many people are aggrieved.<sup>76</sup> These small claims get amalgamated under the umbrella of representative actions, keeping a check on the practices of the social networking sites.<sup>77</sup> A class action or class arbitration

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<sup>65</sup> *Id.* at 74.

<sup>66</sup> Rustad Buckingham, D'Angelo & Durlacher, *supra* note 42, at 667.

<sup>67</sup> *Id.* at 682.

<sup>68</sup> See discussion *supra* Section II.

<sup>69</sup> Bucilla, *supra* note 6, at 122.

<sup>70</sup> Coccozza, *supra* note 25, at 393–94.

<sup>71</sup> *WhatsApp Terms of Service*, *supra* note 19, at *Dispute Resolution*; see *supra* text accompanying note 22.

<sup>72</sup> Rustad, Buckingham, D'Angelo & Durlacher, *supra* note 42, at 669.

<sup>73</sup> Kelsey L. Swaim, *Alternative Dispute Resolution and Social Media: How Mandatory Arbitration Clauses Impact Social Networking*, 5 Y.B. ARB. & MEDIATION 356, 365–66 (2013).

<sup>74</sup> Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341, 372 (2014).

<sup>75</sup> See *infra* Table 1.

<sup>76</sup> Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 49 (2012).

<sup>77</sup> *Id.* at 75.

waiver strategically succeeds in suppressing a significant number of claims.<sup>78</sup>

Thus, instead of providing justice in a more accessible form, mandatory arbitration clauses deny it. Mandatory arbitration clauses are heavily skewed to favor social media websites.<sup>79</sup> These “take it or leave it” policies leave consumers with no other option but to accept the terms.<sup>80</sup> However, they fail to provide consumers with a fair process of dispute resolution in the case of social media contracts, which have proven to be of more harm than good.

#### IV. CRITICAL/COMPARATIVE ANALYSIS OF JURISPRUDENCE

##### A. UNITED STATES

##### 1. LEGISLATION

##### a. THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act (FAA) was enacted on February 12, 1925, “in response to widespread judicial hostility to arbitration agreements.”<sup>81</sup> Section 2 of the FAA covers arbitration agreements and permits agreements to be invalidated through a savings clause.<sup>82</sup> The savings clause has been contentious, and the U.S. Supreme Court held arbitration agreements can be rendered invalid by common contract defenses such as fraud and unconscionability; however, a defense applicable only to arbitration will not render an agreement invalid.<sup>83</sup>

##### b. THE AAA’S CONSUMER DUE PROCESS PROTOCOL

The American Arbitration Association (AAA), which was founded following the enactment of the FAA, is the most common provider in the arbitration clauses analyzed.<sup>84</sup> The AAA has various rules and procedures for different types of ADR.<sup>85</sup> The relevant

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<sup>78</sup> David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 261 (2012).

<sup>79</sup> *Id.* at 240; see also Koenig & Rustad, *supra* note 74, at 644.

<sup>80</sup> Cocozza, *supra* note 25, at 372.

<sup>81</sup> AT&T Mobility v. Concepcion, 563 U.S. 333, 339 (2011).

<sup>82</sup> Federal Arbitration Act, 9 U.S.C. § 2 (1925).

<sup>83</sup> Concepcion, 563 U.S. at 339.

<sup>84</sup> *Our Mission*, AAA, <https://www.adr.org/mission> (last visited Feb. 11, 2023).

<sup>85</sup> *See Rules, Forms & Fees*, AAA, <https://www.adr.org/Rules> (last visited Feb. 11, 2023).

rules here are the Consumer Due Process Protocol because social media website users are consumers of services.<sup>86</sup> “The goal of the Protocol . . . is to ensure fairness and even-handedness” in arbitration.<sup>87</sup>

The Protocol consists of fifteen principles.<sup>88</sup> Principle 2 states that providers of goods or services should take reasonable measures to provide consumers with “full and accurate information regarding Consumer ADR Programs,” such as clarifying whether participation in the ADR Program is compulsory or optional.<sup>89</sup> Principle 11 specifies that consumers should be given: (1) “clear and adequate notice of the arbitration provisions”; (2) “reasonable access to information about the arbitration procedure” (for example, including the basic difference between arbitration and court proceedings); (3) notice they have the option to approach a small claims court; and (4) clarity regarding the means by which the consumer may submit the dispute to arbitration or court.<sup>90</sup>

These principles make it clear that arbitration proceedings between a provider and a consumer should not be tilted to favor the former. Interestingly, most of the arbitration clauses assessed in Part II lack a reasonable means of allowing users to obtain information about the ADR Program as mandated by Principle 2. Further, they do not provide reasonable access to information about the arbitration procedure and thus violate Principle 11.<sup>91</sup>

### c. ATTEMPTS AT LEGISLATING MANDATORY ARBITRATION CLAUSES FOR CONSUMERS

As a response to *AT&T Mobility v. Concepcion*,<sup>92</sup> Senator Al Franken and fellow Members of Congress introduced the Arbitration Fairness Act in 2011 to restore consumer rights.<sup>93</sup> It was further stated that the FAA’s scope was intended to be limited to disputes between commercial entities of similar sophistication and

<sup>86</sup> See generally *Consumer Due Process Protocol*, AAA: NAT’L CONSUMER DISPS. ADVISORY COMM. (Apr. 17, 1998), [https://www.adr.org/sites/default/files/document\\_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf) [hereinafter AAA, *Consumer Due Process Protocol*].

<sup>87</sup> *Consumer Arbitration Fact Sheet*, AAA, <https://go.adr.org/consumer-arbitration> (last visited Feb. 11, 2023).

<sup>88</sup> See generally AAA, *Consumer Due Process Protocol*, *supra* note 86.

<sup>89</sup> *Id.* at Principle 2.

<sup>90</sup> *Id.* at Principle 11.

<sup>91</sup> See *id.*

<sup>92</sup> *Concepcion*, 563 U.S. at 333.

<sup>93</sup> Arbitration Fairness Act, S. 987, 112th Cong. (2011); Rustad, Buckingham, D’Angelo & Durlacher, *supra* note 42, at 646.

bargaining power.<sup>94</sup> However, due to the plethora of Supreme Court judgements (discussed later in this part), the legislative intent of the Act now extends to include consumer and employment disputes as well.<sup>95</sup> This position is precarious, as more often than not, consumers either are unaware of conditions mandating binding arbitration or do not have equal bargaining power with a corporation in question.<sup>96</sup>

This bill was never passed.<sup>97</sup> Nevertheless, Congress made numerous efforts to legislate mandatory arbitration clauses.<sup>98</sup> Currently, the Arbitration Fairness Act of 2018, which renders a pre-dispute arbitration agreement unenforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute,<sup>99</sup> is pending in the Senate. This bill specifies arbitration is an acceptable alternative to litigation only when “consent to the arbitration is truly voluntary, and occurs after the dispute arises.”<sup>100</sup> The Forced Arbitration Injustice Repeal (FAIR) Act, which aims to prohibit pre-disputed arbitrations that force consumers, employees, and others into arbitration, was re-introduced in the 117th Congress in 2021.<sup>101</sup> On similar grounds, the Arbitration Fairness Act for Consumers was also introduced in the Senate in 2022 to prohibit pre-dispute consumer arbitration or class action waivers.<sup>102</sup>

If implemented, these bills would bring about major changes to the consumer arbitration landscape. However, given the current composition of Congress, it is unlikely that the bills will pass into law.<sup>103</sup>

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<sup>94</sup> Rustad, Buckingham, D’Angelo & Durlacher, *supra* note 42, at 664.

<sup>95</sup> *Id.* at 681.

<sup>96</sup> *Id.* at 677.

<sup>97</sup> See Arbitration Fairness Act, S. 987, 112th Cong. (2011).

<sup>98</sup> See generally Arbitration Fairness Act, S. 2591, 115th Cong. (2018); Forced Arbitration Injustice Repeal Act, S. 505, 117th Cong. (2021).

<sup>99</sup> Arbitration Fairness Act, S. 2591, 115th Cong. § 402(a) (2018).

<sup>100</sup> *Id.* § 2(5).

<sup>101</sup> Forced Arbitration Injustice Repeal Act, S. 505, 117th Cong. (2021).

<sup>102</sup> See Arbitration Fairness for Consumers Act, S. 3755, 117th Cong. (2022).

<sup>103</sup> Davis & Kuelthau, *Supreme Court Upholds Individual Proceedings in Arbitration Agreements—Hindering Class Actions*, NAT’L L. REV. (June 19, 2018) <https://www.dkattorneys.com/publications/supreme-court-upholds-individual-proceedings-in-arbitration-agreements-hindering-class-actions/> (discussing outcome of *Epic Systems Corp v. Lewis*, where Supreme Court ruled to affirm Federal Arbitration Act in 5–4 opinion).

## 2. COURT DECISIONS

### a. MANDATORY ARBITRATION

Analyzing U.S. case law along with present legislation is pivotal as, despite legislation, trends indicate that while the consumer is favored when online mandatory arbitration clauses come before state courts, decisions are often subsequently overturned by federal courts.<sup>104</sup> As Justice Ginsburg opined, the U.S. Supreme Court has “veered away from Congress’ intent simply to afford merchants a speedy and economical means of resolving commercial disputes.”<sup>105</sup>

As early as 2000, in *Green Tree Fin. Corp. Ala. v. Randolph*, the Supreme Court, while recognizing an agreement silent regarding arbitration costs may fail to protect a party from potentially substantial arbitration costs, held the agreement would not be rendered unenforceable simply for its silence on that issue.<sup>106</sup> Furthermore, in her dissenting opinion, Justice Ginsburg stated that the “court has reached out prematurely to resolve the matter in the lender’s favor.”<sup>107</sup> Thus, the empirical study conducted in Part II is highly pertinent, finding that 40% of mandatory arbitration clauses do not contain arbitration cost specifications.<sup>108</sup>

In 2010, a Seventh Circuit court held that the terms in a box of software, which included a mandatory arbitration agreement, would bind the customer even if the latter did not read the terms before entering the contract.<sup>109</sup> This ruling indicates that a social media user in the United States would be bound by the mandatory arbitration clause contained in the ToS of the social media website even if the user did not read the arbitration clause latent in the ToS.<sup>110</sup>

In *CompuCredit Corp. v. Greenwood*, the Supreme Court held that “[b]ecause the Credit Repair Organizations Act [(CROA)] is silent on whether claims under the Act can proceed in an arbitrable forum,” consumer claims arising under the CROA are subject to binding arbitration if that arbitration agreement says so.<sup>111</sup> Justice Ginsburg, dissenting, stated that the Court has held credit repair organizations can escape litigation by mandating arbitration as the

<sup>104</sup> Canis, *supra* note 11, at 135.

<sup>105</sup> *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting).

<sup>106</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000).

<sup>107</sup> *Id.* at 96 (Ginsburg, J., dissenting).

<sup>108</sup> See discussion *supra* Section II.

<sup>109</sup> *Hill v. Gateway 2000*, 105 F. 3d 1147, 1150 (7th Cir. 1997).

<sup>110</sup> *Gateway*, 105 F. 3d at 1150.

<sup>111</sup> *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012).

sole dispute resolution process in their take-it-or-leave-it contracts.<sup>112</sup> This defeats the purpose of the CROA, the enactors of which had the most vulnerable consumers in mind and who would likely understand the words “right to sue” to mean the right to sue in court rather than engage in binding arbitration.<sup>113</sup>

### b. CLASS ARBITRATION WAIVERS

Similarly, the Supreme Court tends to favor corporations on the question of class arbitration waivers. In 2010, the Supreme Court held that “imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the FAA.”<sup>114</sup> The majority opined that one must find a contractual basis demonstrating the parties had agreed to submit to class arbitration before administering a class arbitration.<sup>115</sup> Justice Ginsburg, dissenting again, stated that courts should adhere to the strict limitations placed by the FAA on judicial review of arbitral awards.<sup>116</sup> Following the majority in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, the Court found that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.<sup>117</sup>

In its landmark judgment, *Concepcion*, the Supreme Court overruled the earlier decision in *Discover Bank v. Superior Court* that had held class action waivers in consumer contracts to be unconscionable.<sup>118</sup> The Court stated such a clause would interfere with fundamental features of arbitration, such as speedy dispute resolution, and would, as a result, be inconsistent with the FAA.<sup>119</sup> In his dissent, Justice Breyer opined that the majority erred in its idea that an individual arbitration, rather than a class arbitration, is a “fundamental attribute” of arbitration.<sup>120</sup> *Concepcion* has been rightly slated as “a tsunami that is wiping out existing and potential consumer and employment class actions.”<sup>121</sup> Again, in *American Express v. Italian Colors Restaurant*, the Supreme Court upheld

<sup>112</sup> *Id.* at 110 (Ginsburg, J., dissenting).

<sup>113</sup> *Id.* at 103.

<sup>114</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 666 (2010).

<sup>115</sup> *Id.* at 684.

<sup>116</sup> *Id.* at 688 (Ginsburg, J., dissenting).

<sup>117</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019) (quoting *Stolt-Nielsen*, 559 U.S. at 648).

<sup>118</sup> *Concepcion*, 563 U.S. at 339; see *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 153 (2005).

<sup>119</sup> *Concepcion*, 563 U.S. at 344.

<sup>120</sup> *Id.* at 362 (Breyer, J., dissenting).

<sup>121</sup> Jean Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 704, 708 (2012).



class arbitration waivers while expressing that the cost of individual arbitration exceeding potential recovery is not a valid ground for invalidating a contractual waiver of class arbitration.<sup>122</sup> Justice Kagan's dissent stated that "[w]hat the FAA prefers to litigation is arbitration, not *de facto* immunity."<sup>123</sup>

More recently, the Supreme Court in a 5–4 decision held arbitration agreements providing for individualized proceedings must be enforced.<sup>124</sup> Referring to *Concepcion*, the Court stated that "by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes."<sup>125</sup>

When the FAA was first enacted, it manifested a "liberal federal policy favoring arbitration."<sup>126</sup> However, recently, the Court's decisions relating to arbitration seem to have taken several wrong turns. Justice Ginsburg remarked that the Court's recent decisions would inevitably result in the under-enforcement of legislation "designed to advance the well-being" of the vulnerable.<sup>127</sup> The Court's decisions appear detrimental to consumers, including social media website users who are unable to bring class action or arbitration claims against powerful multinational corporations that include class arbitration waivers in their respective ToS, such as WhatsApp and Snapchat.

## B. INDIA

### 1. ARBITRABILITY OF CONSUMER DISPUTES

India has adopted a protectionist approach to the issues arising from consumer arbitration.<sup>128</sup> The Indian courts have held consumer interests to be sacrosanct.<sup>129</sup> The pro-consumer stance can be traced back to 1996.<sup>130</sup> In *Fair Air Engineers Pvt. Ltd. and Anr v. N.K. Modi*, the Supreme Court of India gave precedence to

<sup>122</sup> 570 U.S. 228, 232–39 (2013).

<sup>123</sup> *Id.* at 244 (Kagan, J., dissenting) (emphasis in original).

<sup>124</sup> Lewis, 138 S. Ct. at 1629–31.

<sup>125</sup> *Id.* at 1622.

<sup>126</sup> *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

<sup>127</sup> Lewis, 138 S. Ct. at 1646 (Ginsburg, J., dissenting).

<sup>128</sup> Pavitra Naidu & Shreya Jain, *Arbitration of Consumer Disputes in India: A Need for Reform*, INDIA CORPLAW (Mar. 18, 2021), <https://indiacorplaw.in/2021/03/arbitration-of-consumer-disputes-in-india-a-need-for-reform.html>.

<sup>129</sup> *Id.*

<sup>130</sup> *See, e.g., Fair Air Engineers Pvt. Ltd. and Anr. v. N.K. Modi*, (1996) 6 SCC 385 (India).

the interests of consumers over a mandatory arbitration clause.<sup>131</sup> In the above-mentioned case, the Apex Court relied on the maxim *lex specialis derogat legi generali*<sup>132</sup> and upheld the superiority of the Consumer Protection Act, 1986 (CPA) over the Arbitration and Conciliation Act, 1996 (the Arbitration Act), categorizing it as *lex specialis*.<sup>133</sup> This approach of promoting welfare legislation provided consumers with the option of either choosing the consumer forum or arbitration for dispute resolution.<sup>134</sup> This was also reiterated in *Vidya Drolia and Ors v. Durga Trading Corporation*.<sup>135</sup>

In *Magma Leasing & Finance Ltd. v. Potluri Madhavalata*, the Supreme Court adhered to the plain meaning of the arbitration clause and upheld that “in the presence of a valid arbitration agreement, the Court is mandated to refer the matter for arbitration.”<sup>136</sup> However, the essence of this judgment was diluted with the subsequent introduction of the “arbitrability test” developed by the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*<sup>137</sup> The Court held that if the subject matter of a case falls within the realms of certain categories involving a right in rem, it becomes non-arbitrable.<sup>138</sup> The underlying rationale was that these cases constitute and shape public policy, and thus the subject matter falls within the jurisdiction of public fora.<sup>139</sup>

In *Skypak Couriers Ltd. v. Tata Chemicals Ltd*, the Supreme Court enunciated that for consumer disputes, the existence of an arbitration clause will not bar the consumer because remedies under the CPA add to the provisions of any other law.<sup>140</sup> In this regard,

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<sup>131</sup> *Id.*

<sup>132</sup> *Lex specialis derogat legi generali*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1303> (last visited Feb. 9, 2023).

<sup>133</sup> Kashish Sinha & Manisha Gupta, *Arbitrability of Consumer Disputes: Excavating the Hinterland*, 7(1) INDIAN J. ARB. L.120, 126 (2018).

<sup>134</sup> Chakrapani Misra, Sairam Subramaniam & Rajeswari Mukherjee, *Supreme Court Rules on the Arbitrability of Consumer Disputes*, MONDAQ (Jan. 4, 2019), <https://www.mondaq.com/india/arbitration-dispute-resolution/769412/supreme-court-rules-on-the-arbitrability-of-consumer-disputes>.

<sup>135</sup> 2020 SCC OnLine SC 1018, 17.

<sup>136</sup> (2009) 10 SCC 103, 112 (India).

<sup>137</sup> (2011) 5 SCC 532, 273 (India).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> (2000) 5 SCC 294, 296; Y.G. Muralidharan, *CPA Comes to Home Buyers Help*, DECCAN HERALD (Sept. 26, 2022), <https://www.deccanherald.com/content/635104/cpa-comes-home-buyers-help.html>.

the Court relied on § 3 of the CPA, which stipulates its provisions will be in addition to other provisions of law.<sup>141</sup>

Thus, in the above-mentioned cases, the Court clarified that even in the presence of a mandatory arbitration clause, the same cannot be given precedence over consumer interests.<sup>142</sup> The Arbitration Act cannot be placed over the CPA, and as a result, it cannot curtail the application of the same.<sup>143</sup>

The Supreme Court took a relatively balanced approach in *National Seeds Corporation Ltd. v. M. Madhusudhan Reddy* by finding an equilibrium between the application of the Arbitration Act and consumer interests.<sup>144</sup> The Court provided the consumer with the choice of opting for either an arbitration tribunal or a consumer dispute resolution forum, all while making it clear that the choice could not be reversed.<sup>145</sup> However, in *A. Ayyasamy v. A. Paramasivam and Ors*, the Supreme Court held that consumer disputes are non-arbitrable.<sup>146</sup> They form part of the public policy, and hence cannot be adjudged by private tribunals.<sup>147</sup> In this case, the Supreme Court missed the opportunity to grant recognition to the arbitrability of consumer disputes.

Finally, in *M/s Emaar MGF Land Limited v. Aftab Singh*, the Court crystallized its approach that the consumer forum has the authority to adjudicate consumer disputes that emerge from agreements containing an arbitration clause.<sup>148</sup> Here, the Supreme Court again highlighted the public nature of consumer disputes.<sup>149</sup> It clarified that the 2015 Amendment Act, which had limited the scope of judicial authorities to refuse to refer a dispute arising out of an arbitration clause to arbitration, does not prevent the consumer forum from refusing the disputes to be addressed via arbitration.<sup>150</sup> The Supreme Court substantiated its decision by emphasizing § 2(3) of the Arbitration Act, which establishes that part 1 of the Act “shall not affect any other law for the time being in force, by virtue of

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<sup>141</sup> Muralidharan, *supra* note 140.

<sup>142</sup> Skypak Couriers Ltd. v. Tata Chemicals Ltd, (2000) 5 SCC 294, 296.

<sup>143</sup> Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE, §3 (1996).

<sup>144</sup> (2012) 2 SCC 506, 511 (India).

<sup>145</sup> *Id.*

<sup>146</sup> (2016) 10 SCC 386, 410 (India).

<sup>147</sup> Naidu & Jain, *supra* note 128; Ayyasamy v. A. Paramasivam and Ors., (2016) 10 SCC 386, 410 (India).

<sup>148</sup> Emaar MGF Land Ltd. v. Aftab Singh, 2018 SCC OnLine SC 2378, 770.

<sup>149</sup> *Id.* at 771.

<sup>150</sup> Naidu & Jain, *supra* note 128.

which certain disputes may not be submitted to arbitration.”<sup>151</sup> The CPA cannot be overridden by the 2015 Amendment Act.<sup>152</sup>

Thus, in *Aftab Singh*, the Supreme Court took a consumer-friendly approach.<sup>153</sup> Specifically, the Court understood the difference in the bargaining power between a trader and a consumer and took steps to protect the interests of the consumer.<sup>154</sup>

The Indian jurisprudence dealing with the mandatory arbitration clauses present in the ToS of social networking sites has not particularly developed.<sup>155</sup> However, the courts’ perspective regarding mandatory arbitration clauses can be inferred from the landmark judgments discussed above, where the courts have held that the jurisdiction of the consumer forum cannot be ousted.<sup>156</sup> As observed earlier, TikTok’s Terms of Use include a mandatory arbitration clause according to which consumers are to bring disputes in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996.<sup>157</sup> As consumer disputes essentially involve rights in rem,<sup>158</sup> the future of arbitrability of consumer disputes is hazy. Indian jurisprudence implies that mandatory arbitration clauses do not hold much significance and that consumers have the option of choosing to bring their disputes in the consumer forum.<sup>159</sup>

## 2. CLASS ACTIONS IN INDIA

The 1993 Amendment to the CPA, which broadened the definition of consumer to include a complaint filed by “one or more consumers,” introduced the concept of class action to India.<sup>160</sup> In 2019, India passed a new consumer law.<sup>161</sup> Prior to the 2019 CPA, consumers had to file complaints before the consumer courts directly.<sup>162</sup> With the introduction of the new law, a Central

<sup>151</sup> Arbitration and Conciliation Act, *supra* note 143, at § 2(3).

<sup>152</sup> *Emaar MGF Land Ltd. v. Aftab Singh*, 2018 SCC OnLine SC 2378, 764.

<sup>153</sup> Naidu & Jain, *supra* note 128.

<sup>154</sup> *Emaar MGF Land Ltd. v. Aftab Singh*, 2018 SCC OnLine SC 2378, 764.

<sup>155</sup> *See generally* Naidu & Jain, *supra* note 128 (discussing need for reform in Indian consumer arbitration jurisprudence).

<sup>156</sup> Sinha & Gupta, *supra* note 133, at 125.

<sup>157</sup> *Terms of Service (U.S.) (TIKTOK)*, *supra* note 29.

<sup>158</sup> Naidu & Jain, *supra* note 128 (explaining in rem consumer disputes are non-arbitrable in India).

<sup>159</sup> *See id.*

<sup>160</sup> The Consumer Protection Act, 1993, §2.

<sup>161</sup> *See* The Consumer Protection Act, 2019.

<sup>162</sup> IANS, *Consumers Cheer the Introduction of Class Action Suits*, FREE PRESS J. (July 23, 2020, 12:10 AM IST),

Consumer Protection Authority (CCPA) was created and has been assigned the function of initiating class action suits on behalf of the consumers if it finds a prima facie case to be made.<sup>163</sup>

In 2021, the CCPA initiated a class action against nine firms—primarily including online travel companies—for their failure to issue refunds during COVID-19.<sup>164</sup> The CCPA's efficiency is yet to be assessed.<sup>165</sup> However, one can see it as an additional step in the initiation of a class action.<sup>166</sup> This may discourage consumers from filing a class action. Thus, the 2019 Act will play an instrumental role in shaping the future of class actions in India.<sup>167</sup>

### C. THE EUROPEAN UNION

In the EU, national laws govern domestic arbitration, and thus yield varying perspectives.<sup>168</sup> However, the EU countries' approach has been uniform in dealing with consumer arbitration clauses, as consumer protection issues are dealt with at the Union level.<sup>169</sup>

The EU has taken a pro-consumer approach.<sup>170</sup> The EU Council Directive 93/13 on Unfair Terms in Consumer Contracts (the Directive) recognized the need to safeguard consumers from one-sided mandatory arbitration clauses.<sup>171</sup> The Directive acknowledges the difference between the bargaining power of the

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<https://www.freepressjournal.in/business/consumers-cheer-the-introduction-of-class-action-suits>.

<sup>163</sup> The Consumer Protection Act, 2019, §10(1), §19(1).

<sup>164</sup> BS Web Team, *In a First, CCPA Initiates Class Action Proceedings Against 9 Companies*, BUS. STANDARD (Aug. 21, 2021), [https://www.business-standard.com/article/economy-policy/in-a-first-ccpa-initiates-class-action-proceedings-against-9-companies-121082100201\\_1.html](https://www.business-standard.com/article/economy-policy/in-a-first-ccpa-initiates-class-action-proceedings-against-9-companies-121082100201_1.html).

<sup>165</sup> *See id.*

<sup>166</sup> IANS, *supra* note 162.

<sup>167</sup> *See generally* The Consumer Protection Act, 2019.

<sup>168</sup> Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. 357, 362 (2002).

<sup>169</sup> *Id.*

<sup>170</sup> *EU Consumers Will Soon Be Able to Defend Their Rights Collectively*, EUR. PARLIAMENT NEWS (Nov. 24, 2020), <https://www.europarl.europa.eu/news/en/press-room/20201120IPR92116/eu-consumers-will-soon-be-able-to-defend-their-rights-collectively>.

<sup>171</sup> OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, COUNCIL DIRECTIVE 93/13, art. 3, O.J. (L 95) 29 (1993) [hereinafter COUNCIL DIRECTIVE 93/13].

parties<sup>172</sup> and vitiates arbitration clauses that are “not individually negotiated” if they are detrimental to consumers’ rights.<sup>173</sup> Article 3 enunciates that the phrase “not individually negotiated” deals with contracts in which consumers do not have power to influence or affect the terms thereof.<sup>174</sup> This provision is specifically relevant in the case of standard contracts, where the terms are pre-formulated, including those found in the ToS of social media websites.<sup>175</sup> To determine whether there is an imbalance between the parties, the circumstances of the case, subject matter of the agreement, and different terms of the contract must be closely scrutinized.<sup>176</sup> The Act clearly states that the stipulation that a consumer can take disputes exclusively to arbitration not covered by legal provisions in a consumer contract will prima facie be considered unfair.<sup>177</sup>

Thus, as per the Directive, there is a negative presumption that mandatory arbitration clauses are prima facie unfair because these clauses force consumers to submit their respective cases before an arbitral tribunal.<sup>178</sup> Moreover, these clauses preclude consumers from exercising their legal right to resort to the courts.<sup>179</sup> In common law countries, under traditional law, a contractual clause that attempts to prohibit the option of approaching the courts is considered void because it violates public policy.<sup>180</sup>

All in all, European courts have adopted a protectionist approach.<sup>181</sup> The aforementioned provisions imply the invalidity of the pre-dispute mandatory arbitration clause.<sup>182</sup> The Directive considers these clauses to be prima facie unfair and places the burden of proof on the other party (i.e., the company).<sup>183</sup> So, it is

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<sup>172</sup> Walter D. Kelley Jr., *Mandatory Arbitration in the United States and Europe*, LEXOLOGY (Feb. 29, 2016), <https://www.lexology.com/library/detail.aspx?g=55e3ffe2-4176-4dac-9e76-31bd93da9be7>.

<sup>173</sup> COUNCIL DIRECTIVE 93/13, *supra* note 171, art. 3.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Drahozal & Friel, *supra* note 168, at 364.

<sup>177</sup> COUNCIL DIRECTIVE 93/13, *supra* note 171, Annex 1(q).

<sup>178</sup> Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights* (Econ. Pol’y Inst., Dec 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.

<sup>179</sup> *Id.*

<sup>180</sup> See generally David Beckstead, *Substantive Unfairness of Pre-Dispute Arbitration Clauses in Consumer Contracts: The Argument for the Unconscionability Doctrine*, SSRN (2011), <https://ssrn.com/abstract=2355838>.

<sup>181</sup> See generally *id.*

<sup>182</sup> See generally *id.*

<sup>183</sup> COUNCIL DIRECTIVE 2020/1828 [2020] O.J. (L 409/1) (EEC).

unlikely for one-sided mandatory arbitration clauses to pass the test of fairness.

The pro-consumer approach displayed by the EU is relevant concerning the number of standard arbitration clauses present in social media website contracts. European legislation has recognized the nuances involved in the exploitation of consumers through these mandatory arbitration clauses and has appositely stepped in.<sup>184</sup>

However, with the increase in intercontinental commercial transactions, it may become increasingly difficult for the EU to maintain its current position. There may be added pressure by corporations to adopt a more liberal stand, such as in the United States, when it comes to mandatory arbitration clauses. Therefore, the EU has its own share of challenges in this area.

## 1. CLASS ACTIONS IN EUROPE

In 2020, the European Parliament endorsed a new law enabling consumers to initiate class actions to advance the collective interests of consumers.<sup>185</sup> The 2020 Directive aims to provide effective and efficient procedural mechanism for representative actions among the EU's Member States.<sup>186</sup> Instead of law firms, only certain qualified entities, supported by third-party funders, would be permitted to represent consumers in such suits.<sup>187</sup> The 2020 Directive also strives to provide better protection to consumers in instances of cross-border consumer harm.<sup>188</sup> Criteria exist at the Union level to determine if an entity is a "qualified entity" for cross-border cases.<sup>189</sup> Finally, the 2020 Directive establishes a mechanism to enable qualified entities to bring actions in instances of consumer rights violations.<sup>190</sup> The EU may exercise its discretion and set criteria to determine whether an entity is "qualified" for this purpose.<sup>191</sup> Ultimately, time will tell how effectively the 2020 Directive shapes the jurisprudence of class actions in the EU.

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<sup>184</sup> Beckstead, *supra* note 180, at 1–2.

<sup>185</sup> 2020 O.J. (L 409/1) (EEC).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Bryony Hurst, *A New EU Directive Signals the Start of Collective Actions on Behalf of the EU Consumer*, BIRD & BIRD (Dec. 15, 2020), <https://www.twobirds.com/en/insights/2020/global/a-new-eu-directive-signals-the-start-of-collective-actions-on-behalf-of-the-eu-consumer>; *see* 2020 O.J. (L 409/1) (EEC).

<sup>191</sup> Hurst, *supra* note 190; *see* 2020 O.J. (L 409/1) (EEC).

**D. COMPARATIVE ANALYSIS**

It can be inferred that there is a vast difference between the United States, India, and EU in interpreting mandatory arbitration clauses.

U.S. courts have taken a consistent stand, holding that both mandatory arbitration clauses and class action waivers enforceable.<sup>192</sup> The court in *Epic Systems Corp. v. Lewis* refused to invoke the Savings Clause of the FAA for these clauses.<sup>193</sup> Notably, the landmark cases in this area have strong dissents, as in *Lewis*, demonstrating a divide among the justices.<sup>194</sup> Not only is there a divide among justices, there is also one among legislators, evident through the constant reintroduction of the Arbitration Fairness Act and similar legislation aiming to ban mandatory arbitration clauses.<sup>195</sup> Similarly, though the Consumer Due Process Protocol embodies certain principles for consumer protection in arbitration agreements, arbitration clauses contained in social media websites often violate these principles.<sup>196</sup> Therefore, additional efforts to protect consumers from arbitration has stalled in the United States.

Alternatively, Indian courts have adopted a protectionist approach.<sup>197</sup> They have almost eliminated the option of arbitration in consumer disputes.<sup>198</sup> Indeed, mandatory arbitration clauses in consumer contracts are not enforceable in India.<sup>199</sup> In recent judgments, the Indian Supreme Court has limited the scope of arbitration to a great extent, making India an unfavorable jurisdiction for arbitration.<sup>200</sup>

EU law, however, balances the interests of both corporations and consumers.<sup>201</sup> Like India, the EU legislature realized consumers may not have sufficient bargaining power and therefore require protection.<sup>202</sup> However, unlike the de facto elimination of arbitration clauses in India, arbitration remains an option in the EU, with measures such as the negative presumption clause to protect

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<sup>192</sup> See, e.g., *Lewis*, 138 S. Ct. at 1643.

<sup>193</sup> *Id.* at 1630.

<sup>194</sup> *Id.* at 1643; see Louis Gentilucci, *Looking Back: Famous Supreme Court Dissents*, NAT'L CONST. CTR. (July 29, 2015), <https://constitutioncenter.org/blog/looking-back-famous-supreme-court-dissents>.

<sup>195</sup> Davis & Kuelthau, *supra* note 103.

<sup>196</sup> See generally AAA, *Consumer Due Process Protocol*, *supra* note 86.

<sup>197</sup> Naidu & Jain, *supra* note 128.

<sup>198</sup> *Id.*

<sup>199</sup> *Emaar MGF Land Ltd v. Aftab Singh*, 2018 SCC 2378, 764 (India).

<sup>200</sup> *Id.*

<sup>201</sup> Kelley, *supra* note 172.

<sup>202</sup> See 2020 O.J. (L 409/1) (EEC).



interests within the ambit of arbitration.<sup>203</sup> This allows Europe to remain a favorable destination for arbitration while also ensuring consumer protection.

Indian jurisprudence on the enforceability of mandatory arbitration clauses is not as developed as it is in the other two jurisdictions. As mentioned in Part II, TikTok's Terms of Service for U.S. consumers include a notice of arbitration at the beginning, addressing details such as costs of arbitration, and explicitly state the rights that consumers waive by agreeing to the Terms.<sup>204</sup> Its Terms for other countries are not as conspicuous and specific as those for the United States because other jurisdictions—including India—do not have mandates such as the AAA's Consumer Due Process Protocol.<sup>205</sup>

There is a vast difference between the United States' and EU's respective approaches to handling consumer disputes.<sup>206</sup> The right to jury trials in the United States, absent in the EU, contributes to this difference.<sup>207</sup> As juries are usually sympathetic to buyers, companies may perceive that they are automatically placed in an unfavorable position in court.<sup>208</sup> Therefore, arbitration becomes the preferred dispute resolution process for companies, as it does not involve a jury.<sup>209</sup> On the other hand, it is easier to implement regulatory consumer-friendly laws in the EU because without juries, companies do not feel as threatened by regulatory legislation and have fewer reasons to oppose it.<sup>210</sup>

## V. THE WAY FORWARD

### A. GENERAL SUGGESTIONS

This section provides suggestions that are not specific to a particular jurisdiction, applying generally to social media websites that incorporate a mandatory arbitration clause into their respective ToS.

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<sup>203</sup> Kelley, *supra* note 172; Naidu & Jain, *supra* note 128; Council Directive 93/13, art. 3, O.J. (L 95) 29 (EEC).

<sup>204</sup> *Terms of Service (U.S.)* (TIKTOK), *supra* note 29.

<sup>205</sup> *Id.*; compare *Terms of Service (Other Regions)* (TIKTOK), *supra* note 32; see generally AAA, *Consumer Due Process Protocol*, *supra* note 86.

<sup>206</sup> Kelley, *supra* note 172.

<sup>207</sup> Drahozal & Friel, *supra* note 168, at 389.

<sup>208</sup> Bruce G. Merritt, *Does a Business Ever Want a Jury?* 16 LITIG. 3, 27 (1990), <http://www.jstor.org/stable/29759396>.

<sup>209</sup> *Id.*

<sup>210</sup> Merritt, *supra* note 208, at 27; Drahozal & Friel, *supra* note 168, at 389.

## 1. INFORMED CONSENT

Consent has always been considered the cornerstone of ADR processes such as arbitration.<sup>211</sup> It is important to ensure that powerful companies do not circumvent this essential component of a valid arbitration agreement to take advantage of unsuspecting consumers.<sup>212</sup> Thus, we offer three suggestions to establish informed consent.

First, companies with a mandatory arbitration clause and class arbitration waiver should be held to the highest degree of accountability when it comes to making these clauses conspicuous to consumers. For this to happen, any company employing such clauses should provide an effective disclaimer at the beginning of its terms.<sup>213</sup> This is especially important because the arbitration clause is usually present toward the end of the terms.<sup>214</sup> This disclaimer should stand out from the rest of the text, for instance by using different fonts, different colors, and larger font sizes. For example, in 2012, a court found a browse-wrap agreement was sufficiently conspicuous where a hyperlink to the agreement was included on multiple pages of the website in question in underlined, blue, and contrasting text.<sup>215</sup>

Second, the arbitration clause must provide users with adequate information to make an informed decision.<sup>216</sup> Specifically, the clause should: (1) mention that users would waive certain constitutional rights by agreeing to the terms; (2) explain the arbitration process; (3) describe how to initiate an arbitration; and (4) provide links to further information.

Third, after users agree to the terms and create an account on a social media website, they should be notified once again about the arbitration clause. Social media websites generally send an email to new users, welcoming them to the site.<sup>217</sup> This email should contain a disclaimer regarding a mandatory arbitration clause and class arbitration waiver. This will act as a personalized notice

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<sup>211</sup> Aanchal Gupta, *Treatment of Non-Signatory in An Arbitration—Did GE Energy Case Answer the Question?*, 15 INDIAN LEGAL IMPETUS 17, 17–20 (Nov. 28, 2022), <https://sandalawoffices.com/wp-content/uploads/2022/10/ILI-Oct-2022-Edition.pdf>.

<sup>212</sup> Canis, *supra* note 11, at 149.

<sup>213</sup> See, e.g., *WhatsApp Terms of Service*, *supra* note 19.

<sup>214</sup> See, e.g., *Terms of Service* (PINTEREST), *supra* note 27.

<sup>215</sup> E.K.D. v. Facebook, Inc., 885 F. Supp. 2d 894, 901 (S.D. Ill. 2012).

<sup>216</sup> See, e.g., *Snap Inc. Terms of Service: Arbitration, Class-Action Waiver, and Jury Waiver*, *supra* note 38 (providing information on arbitration fees and waiver of rights).

<sup>217</sup> *Welcome to Snapchat*, INBOXFLOWS (2023), <https://inboxflows.com/email/welcome-to-snapchat-lets-get-started-f5b015/>.

distinguished from the disclaimer provided in the terms—which comprise a standard contract—and increase the chances of users being apprised of the terms they entered into.

## 2. OPT-OUT OPTION

Users should have an effective option to opt out of arbitration clauses. As seen in Part II, even where a clause contains an option to opt out, it is usually time-barred to a thirty-day limit.<sup>218</sup> This effectively nullifies the option of opting out, as most users are unlikely to notice a sub-clause in an arbitration clause at the end of the terms.<sup>219</sup> Users should be allowed to decide whether to pursue arbitration, depending on the nature of their respective claims or disputes. While some claims may be better suited for arbitration, users may want to preserve the option of resorting to court for other types of claims. Therefore, providing an opt-out clause without a time limit should be mandated in social media websites' one-sided arbitration clauses.

## 3. ONLINE DISPUTE RESOLUTION

Another important factor to consider is the location of proceedings when an arbitration mandates in-person arbitration.<sup>220</sup> The location of arbitration proceedings is not usually based on consumer convenience.<sup>221</sup> Therefore, when arbitration is not document-only, social media websites' respective arbitration clauses should incorporate the option of virtual or telephonic hearings to make participation easier for users, who may have limited means for travel.

Companies like eBay and PayPal have resolved disputes online using online dispute resolution (ODR) for several years.<sup>222</sup> Scholars have argued that ODR can serve as a superior mechanism to resolve claims.<sup>223</sup> The advent of the COVID-19 pandemic, which

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<sup>218</sup> See *id.*; sources *supra* note 205; *Terms of Service (PINTEREST)*, *supra* note 27.

<sup>219</sup> See Rustad, Buckingham, D'Angelo & Durlacher, *supra* note 42, at 656.

<sup>220</sup> See, e.g., *WhatsApp Terms of Service*, *supra* note 19.

<sup>221</sup> Rustad, Buckingham, D'Angelo & Durlacher, *supra* note 42, at 656.

<sup>222</sup> Indulekha Aravind, *Online Dispute Resolution Gaining Momentum in India*, ETGOVERNMENT.COM (Jan. 12, 2020), <https://government.economicstimes.indiatimes.com/news/digital-india/online-dispute-resolution-gaining-momentum-in-india/73211183>.

<sup>223</sup> Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 324 (2012) (discussing how ODR has been a superior mechanism as it is more cost-effective and provides flexible

led to in-person obstacles, has provided yet another boost for ODR mechanisms.<sup>224</sup> For instance, lockdown orders prevent in person proceedings, but ODR allows for remote hearing instead.<sup>225</sup> Several arbitral institutions have even established ODR guidelines to facilitate remote proceedings.<sup>226</sup> Further, specialized ODR platforms are available, including the Centre for Online Resolution of Disputes, which administers cases online.<sup>227</sup> Therefore, mandatory arbitration clauses should incorporate the option of ODR.

## B. SUGGESTIONS SPECIFIC TO THE UNITED STATES

### 1. THE FAA'S SAVINGS CLAUSE

The Supreme Court in *Concepcion* upheld that the savings clause provided in the FAA does not suggest an intent to preserve state-law rules that stand as an obstacle to the enforcement of arbitration agreements according to their terms.<sup>228</sup> However, some legal professionals, including Justice Ginsburg, disagree.<sup>229</sup> Similarly, Emily Canis argues that “the FAA should finally be narrowed in scope when and if a case involving an online mandatory arbitration clause comes before the Supreme Court.”<sup>230</sup>

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scheduling, asynchronous communication, and real-time dialogue); Sternlight, *supra* note 76, at 104.

<sup>224</sup> Kim M. Rooney, *The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Year*, INT’L BAR ASS’N (Jun. 2, 2021), <https://www.ibanet.org/global-impact-covid-19-pandemic-dispute-resolution>.

<sup>225</sup> *Id.*

<sup>226</sup> Kateryna Honcharenko & Mercy McBrayer, GUIDANCE NOTE ON REMOTE DISPUTE RESOLUTION PROCEEDINGS (CI Arb eds. 2020) <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>; *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, Practice Notes, Forms, and Checklists*, INT’L CHAMBER OF COM., <https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/> (last visited Feb. 14, 2023).

<sup>227</sup> Karan Singh, *Online Dispute Resolution (ODR): A Positive Contrivance to Justice Post Covid-19*, MONDAQ (May 17, 2020), <https://www.mondaq.com/india/arbitration-dispute-resolution/935022/online-dispute-resolution-odr-a-positive-contrivance-to-justice-post-covid-19> (discussing boom of ODR, especially during COVID-19 pandemic).

<sup>228</sup> *Concepcion*, 563 U.S. at 343.

<sup>229</sup> *Id.* at 357; see Stolt-Nielsen, 559 U.S. at 688–99 (Ginsburg, J., dissenting).

<sup>230</sup> Canis, *supra* note 11, at 150.

Historically, U.S. courts have stated that unconscionability includes “an absence of meaningful choice” and “contract terms which are unreasonably favorable to the other party.”<sup>231</sup> Therefore, courts should provide due consideration to a savings clause. The savings clause should be invoked for mandatory arbitration clauses on the grounds of unconscionability when the latter fail to provide adequate information to consumers, bind consumers without an option of opting out, or create a significant disparity in bargaining power over arbitration.<sup>232</sup>

## 2. PASSING PRO-CONSUMER LEGISLATION

After its initial introduction and failure to pass in 2011, the Arbitration Fairness Act was reintroduced multiple times; however, it was never approved.<sup>233</sup> Similarly, the FAIR Act has yet to be passed.<sup>234</sup> Implementation of these bills would make pre-dispute arbitration agreements in consumer disputes unenforceable.<sup>235</sup> This lack of enforceability would extend to mandatory arbitration clauses in social media websites’ terms of service.<sup>236</sup> This, in turn, would ensure that if a dispute arose, the user would have a choice as to how to handle it rather than be bound by terms he or she had agreed to involuntarily.

However, examining legislative trends, it seems unlikely that any kind of legislation completely banning pre-dispute arbitration agreements will be enacted anytime soon.<sup>237</sup> As James Bucilla suggests, it might be more feasible to enact slightly less drastic legislation that would still be capable of “reducing the harsh

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<sup>231</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445, 449 (D.C. Cir. 1965).

<sup>232</sup> Rustad, Buckingham, D’Angelo & Durlacher, *supra* note 42, at 665–70.

<sup>233</sup> See Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 987 (2011); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

<sup>234</sup> Forced Arbitration Injustice Repeal Act, S. 505, 117th Cong. § 505 Cong. (2021–2022).

<sup>235</sup> See Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 987 (2011) (invalidating pre-dispute arbitration agreements for consumer disputes); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017) (same).

<sup>236</sup> Alexia Fernandez Campbell, *The House Just Passed a Bill that Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sep. 20, 2019), <https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act>.

<sup>237</sup> Lisa Nagle-Piazza, *House Passes Bill to Ban Pre-dispute Employment Arbitration Pacts*, SHRM (Mar. 21, 2022), <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/House-Passes-Bill-to-Ban-Pre-Dispute-Employment-Arbitration-Pacts.aspx?loc=mena>.

effects” of mandatory pre-dispute arbitration clauses and would not completely ban pre-dispute arbitrations.<sup>238</sup> This is a more achievable goal and a step in the right direction.<sup>239</sup>

### 3. COMPLIANCE WITH THE CONSUMER DUE PROCESS PROTOCOL

As discussed in Part IV, social media websites’ mandatory arbitration clauses do not comply with several of the AAA’s Consumer Due Process Protocol principles.<sup>240</sup> These principles should be made legally binding, as they provide the basic minimum protection that consumers are entitled to.<sup>241</sup> Additionally, failure to comply with these principles should result in punitive action.

## C. SUGGESTIONS SPECIFIC TO INDIA

### 1. BALANCE BETWEEN CONSUMER INTERESTS & ARBITRATION

India has adopted a rigid pro-consumer approach to consumer arbitration.<sup>242</sup> The Indian courts need to realize that delegating consumer disputes exclusively to consumer fora defies the purpose of ADR mechanisms.<sup>243</sup> Instead, they should strive to create a framework that ensures the protection of consumers while maintaining arbitration as an option.<sup>244</sup> To support this goal, consumer disputes should be made arbitrable.<sup>245</sup>

Inspiration can be taken from the EU, which has a relatively balanced consumer protection framework.<sup>246</sup> Certain provisions of the Directive, like the rebuttable presumption that mandatory arbitration clauses are prima facie unfair,<sup>247</sup> can be incorporated into Indian law as well. Legislators can also refer to the AAA’s Consumer Due Process Protocol and draft similar binding principles on entities incorporating such clauses into their respective ToS.<sup>248</sup>

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<sup>238</sup> Bucilla, *supra* note 6, at 144.

<sup>239</sup> *Id.*

<sup>240</sup> See AAA, *Consumer Due Process Protocol*, *supra* note 86, Principles 2, 11.

<sup>241</sup> See *id.*, Principle 11.

<sup>242</sup> Sinha & Gupta, *supra* note 133, at 137.

<sup>243</sup> *Id.* at 140.

<sup>244</sup> *Id.* at 137–39.

<sup>245</sup> *Id.* at 139.

<sup>246</sup> Kelley, *supra* note 172.

<sup>247</sup> Council Directive 93/13, art. 3, O.J. (L 95) 29 (EEC).

<sup>248</sup> See generally AAA, *Consumer Due Process Protocol*, *supra* note 86.

As the option of choosing arbitration lies with consumers, they should be made aware of the nuances of arbitration clauses so that they can make informed decisions.<sup>249</sup> For this purpose, awareness campaigns can be carried out by the National and State Consumer Dispute Redressal Commissions.<sup>250</sup> These commissions may potentially implement a feature on their respective helplines that clearly explains the boons and banes of choosing arbitration and answers consumer queries.

The stance of Indian courts is paradoxical in nature, in that they aim to secure the interests of consumers by providing a remedy that may prove detrimental to those very individuals.<sup>251</sup> Arbitral tribunals are not allowed to adjudicate consumer cases, and therefore consumers are left with no choice but to opt for litigation—which can be expensive and time-consuming.<sup>252</sup>

Indian courts are heavily skewed toward consumers, and thus there is a need to strike a balance. To that end, the scope of arbitration needs to be widened to make India more arbitration-friendly.

## 2. EFFECTIVE ONLINE DISPUTE RESOLUTION MECHANISM

As previously discussed, ODR is emerging as an efficient method of resolving disputes.<sup>253</sup> Over the last decade, India has seen tremendous growth in technology.<sup>254</sup> India can work to create an integrated ODR model and facilitate its functionality at both the state and national levels. Additionally, the model should be available in all regional languages in order to be more accessible.<sup>255</sup>

## 3. EFFECTIVE IMPLEMENTATION OF THE CONSUMER PROTECTION ACT OF 2019

The Consumer Protection Act, 2019, was enacted to provide a more organized mechanism for the initiation of class actions.<sup>256</sup> It

<sup>249</sup> *What Is Arbitration?*, JAMS, <https://www.jamsadr.com/arbitration-defined/> (last visited Feb. 13, 2023).

<sup>250</sup> See Homepage, NAT'L CONSUMER DISPS. REDRESSAL COMM'N (NCDRC), <https://ncdrc.nic.in> (last visited Feb. 13, 2023).

<sup>251</sup> Sinha & Gupta, *supra* note 133, at 137.

<sup>252</sup> *Emaar MGF Land Ltd. v. Aftab Singh*, 2018 SCC OnLine SC 2378 (India).

<sup>253</sup> Singh, *supra* note 227.

<sup>254</sup> *Science and R&D Report*, INDIA BRAND EQUITY FOUND. (Aug. 2022), <https://www.ibef.org/industry/science-and-technology>.

<sup>255</sup> *Id.*

<sup>256</sup> Ankur Saha & Sri Ram Khanna, *Evolution of Consumer Courts in India: The Consumers Protection Act 2019 and Emerging Themes of*

strengthens the concept of class actions in India and shapes the consumer protection laws more in line with the U.S. and European laws.<sup>257</sup> However, it should be ensured that the CPA does not act as an additional hurdle in the initiation of class actions. Therefore, the CPA should be implemented effectively so that its legislative intent is not defeated.

#### D. SUGGESTIONS SPECIFIC TO EUROPE

The EU has established an exemplary model for catering to the interests of consumer arbitration.<sup>258</sup> However, this model can also be refined by incorporating certain additional suggestions.

##### 1. EFFECTIVE IMPLEMENTATION OF THE 2020 DIRECTIVE

In 2015, the Volkswagen “Dieselgate” emissions scandal exposed the shortfalls of the EU consumer regime.<sup>259</sup> In this case, U.S. consumers were able to claim damages via class action whereas European consumers were not, owing to the lack of a uniform legal framework on class actions.<sup>260</sup>

The 2020 Directive aims to address this issue.<sup>261</sup> However, its success would only be assessed based on its implementation.<sup>262</sup> As previously discussed, it allows EU Member States to establish their own criteria to determine the ambit of a “qualified entity[.]”<sup>263</sup>

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*Consumer Jurisprudence*, 9 INT’L J. CONSUMER L. & PRAC. 115, 125 (2021), <https://clap.nls.ac.in/wp-content/uploads/2021/09/EVOLUTION-OF-CONSUMER-COURTS-IN-INDIA-THE-CONSUMER-PROTECTION-ACT-2019-AND-EMERGING-THEMES-OF-CONSUMER-JURISPRUDENCE-ANKUR-SAHA-AND-SRI-RAM-KHANNA.pdf>.

<sup>257</sup> *Id.*

<sup>258</sup> Kelley, *supra* note 172.

<sup>259</sup> Rob Davis, *Volkswagen in “Dieselgate” Settlement Talks with 400,000 German Owners*, GUARDIAN (Jan. 2, 2020), <https://www.theguardian.com/business/2020/jan/02/volkswagen-in-dieselgate-settlement-talks-with-400000-german-owners>.

<sup>260</sup> *Id.*

<sup>261</sup> See COUNCIL DIRECTIVE 2020/1828 [2020] O.J. (L 409/1) (EEC).

<sup>262</sup> Martin Mekat, Jeroen van Hezewijk & Andrew Austin, *First EU “Collective Actions” Under the New Directive Likely in 2023*, LEXOLOGY (Nov. 24, 2022), <https://www.lexology.com/library/detail.aspx?g=20094d71-da57-4448-8d72-dd45c3cdf3a1>.

<sup>263</sup> Lianne Craig, Simon Bishop, Samantha Hewitt & Edward Nyman, *Champions of Collective Redress: Is Europe Catching Up with the US?*,



Therefore, Member States also have a substantial role to play in ensuring the efficacy of the new law.<sup>264</sup>

## 2. REDUCTION IN THE COST OF CROSS-BORDER ADJUDICATION

The 2020 Directive was introduced with the aim of facilitating cross-border class actions.<sup>265</sup> However, factors such as high cost and length of disputes might dissuade the designated entities from pursuing claims.<sup>266</sup> These designated entities might have to pay up-front costs despite funding that they will receive.<sup>267</sup> Member States should take active measures to ensure that the cost is kept at a minimum and that disputes are not unnecessarily drawn out.

## 3. EFFECTIVE ENFORCEMENT OF DECISIONS

Cross-border class actions may suffer the wrath of conflicting laws of various Member States, and therefore enforcing decisions in such cases may prove challenging.<sup>268</sup> Moreover, the Directive might open a Pandora's box of parallel litigation.<sup>269</sup> Thus, to tackle these problems, the EU should issue a clarification to avoid clashes between the laws of various Member States and private international law.

## 4. A HARMONIZED APPROACH FOR THE “OPT-IN” & “OPT-OUT” MECHANISM

The 2020 Directive allows Member States to choose between the “opt-in” and “opt-out” mechanism for claims.<sup>270</sup> These mechanisms determine whether consumers will be represented through a designated entity and bound by the outcomes of such proceedings.<sup>271</sup> Because Member States are free to decide on their

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INT'L BAR ASS'N, <https://www.ibanet.org/article/09C7C57F-169D-43D2-BDED-7FB802B907CC> (last visited Feb. 7, 2023).

<sup>264</sup> COUNCIL DIRECTIVE 2020/1828 [2020] O.J. (L 409/1) (EEC).

<sup>265</sup> Mekat, van Hezewijk & Austin, *supra* note 262.

<sup>266</sup> Craig, Bishop, Hewitt & Nyman, *supra* note 263.

<sup>267</sup> Mekat, van Hezewijk & Austin, *supra* note 262.

<sup>268</sup> Craig, Bishop, Hewitt & Nyman, *supra* note 263.

<sup>269</sup> *Id.*

<sup>270</sup> Julie Murphy-O'Connor & Michael Byrne, *EU-wide Representative Actions in Consumer Litigation—A Level Playing Field?*, MATHESON (May 5, 2021), <https://www.matheson.com/insights/detail/eu-wide-representative-actions-in-consumer-litigation-a-level-playing-field>.

<sup>271</sup> *Id.*

own, challenges might arise due to this discrepancy.<sup>272</sup> This may in turn further complicate the process of initiating cross-border claims. Thus, a harmonized approach should be followed and implemented across the board.

## VI. CONCLUSION

The findings of the empirical study in Part II demonstrate that the ToS of about 40% of social media websites include a mandatory arbitration clause, and about 30% of websites include a class arbitration waiver.<sup>273</sup> Such clauses are largely detrimental to these websites' users: Where a mandatory arbitration clause deprives unsuspecting users of their constitutional right to resort to court, a class action waiver makes it difficult to present small or procedurally complex claims.<sup>274</sup> However, completely excluding user disputes from the purview of arbitration is also detrimental, in that it renders users with no choice but to resort to court.<sup>275</sup>

It is of paramount importance to strike a balance between the two contrasting extremes seen in the United States and India, respectively. The EU has managed to do so to a large extent; however, as discussed previously, even its laws have certain lacunae that require fixing.<sup>276</sup> Implementation of even some of the suggested changes in Part V can go a long way toward achieving the goal described above. Legislators should be mindful of the fact that the bargaining power between a social media website with stupendous resources and its users will never be equal.<sup>277</sup> While social media website users should have the option to resort to court, they should also have the option to utilize ADR mechanisms to resolve disputes.<sup>278</sup> Even if social media websites do impose a mandatory arbitration clause and a class arbitration waiver, they must do so with due regard to the fact that users ought to be notified and given the option to opt out effectively.

As Samuel Gompers rightly remarked, "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion."<sup>279</sup>

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<sup>272</sup> Mekat, van Hezewijk & Austin, *supra* note 262.

<sup>273</sup> See discussion *supra* Section II.

<sup>274</sup> Mekat, van Hezewijk & Austin, *supra* note 262.

<sup>275</sup> See generally Rustad, Buckingham, D'Angelo & Durlacher, *supra* note 42.

<sup>276</sup> Kelley, *supra* note 172.

<sup>277</sup> See generally Beckstead, *supra* note 180.

<sup>278</sup> See generally *id.*

<sup>279</sup> SAMUEL GOMPERS, THE SAMUEL GOMPERS PAPERS, VOL. 2: THE EARLY YEARS OF THE AMERICAN FEDERATION OF LABOR, 1887–90 (1990).