

ARBITRATION IN THE AGE OF COVID: EXAMINING ARBITRATION'S MOVE ONLINE

Amy J. Schmitz*

Arbitration has been moving online over time with the growth of the Internet and Online Dispute Resolution (“ODR”), which includes use of technology to assist online negotiation, mediation, arbitration, and variations thereof. Online Arbitration (“OArb”) is nonetheless a unique subset of ODR because it usually culminates in a final and binding award by a neutral third party that is enforceable under the Federal Arbitration Act (“FAA”). Indeed, I have written about OArb on prior occasions, due to its unique status under the FAA and other arbitration laws. However, OArb was relatively limited until the COVID-19 pandemic sparked the acceleration of arbitration’s move online. At the same time, jurisprudence around the FAA has sent various signals that both help and hinder the growth of OArb. Furthermore, the 1925 FAA was not built to address innovations like virtual hearings, creating a need for policies that adapt for technological progress. Accordingly, this Article discusses how recent jurisprudence and institutional promulgations may impact OArb and offers considerations for courts, policymakers, and practitioners shepherding OArb development.

I. INTRODUCTION

Companies have increasingly included arbitration clauses among the form terms in their boilerplate contracts.¹ This has been the case for a long time in commercial business-to-business contracts and is now standard in business-to-consumer (“B2C”) and employment contracts as well.² Arbitration makes sense in com-

* Elwood L. Thomas Missouri Endowed Professor of Law, University of Missouri School of Law. I thank Richard Bales, Sarah Rudolph Cole, Sam Halabi, Dennis Crouch, Paul Litton, Lyrissa Lidsky, and Ben Trachtenberg for their comments. I thank Claire Mendes and Bradley Isbell for their research assistance.

¹ “Boilerplate” has taken on its own cultural meaning in today’s society. See Todd D. Rakoff, *The Law and Sociology of Boilerplate*, in OMRI BEN-SHAHAR, *BOILERPLATE: THE FOUNDATIONS OF MARKET CONTRACTS* 204 (2007).

² Of the 100 largest U.S. companies (as listed in Fortune), many have had arbitration agreements since 2010, including class arbitration waivers. Imre Stephen Szalai, *The Prevalence of*

mercial agreements, especially when there is need for a specialist arbitrator(s) or protection of business secrets. Indeed, this need for an expert decision maker has been a harbinger in construction arbitration for decades, and parties to intellectual property disputes benefit from arbitration's privacy. Arbitration is also robust for international parties who seek a neutral forum not wed to any jurisdiction, as well as an enforceable award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").³

Nonetheless, consumer and employment arbitration have drawn criticism. Consumers and employees, already skeptical of the market, assume that non-negotiable boilerplate arbitration clauses are skewed toward the companies' interests. Commentators and policymakers worry that pre-dispute arbitration clauses rob underdog consumers and employees of their judicial recourse rights without knowing consent. There is also a concern that these clauses unfairly advantage corporate "repeat players" who routinely include arbitration clauses due to informational asymmetries.⁴ Critics add that companies use these clauses to curb consumer remedies; bar class actions; and shield the public from information regarding safety, disclosure, and other statutory violations.⁵ Some also argue that this essentially allows companies to create private law.⁶

Consumer Arbitration Agreements by America's Top Companies, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019). The data shows that 81 of the 100 companies have used arbitration agreements, and 78 of those 81 companies use class waivers. A majority of U.S. households (it could be 2/3 of U.S. households) are covered by consumer arbitration agreements. In 2018, there were at least 826,537,000 consumer arbitration agreements in force, and the actual number is probably higher considering this only takes a look at some companies. *Id.*

³ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 9 U.S.C. §§ 201–08; *Id.* 9 U.S.C. §§ 301–07 (implementing the Inter-American Convention on International Commercial Arbitration (Panama Convention)).

⁴ See JEAN R. STERNLIGHT ET AL., *Consumer Arbitration, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT*, at 127, 129–40 (2006) (highlighting American law's enforcement of mandatory consumer arbitration under pre-dispute form contracts); See also Richard Frankel, *Corporate Hostility to Arbitration*, 50 SETON HALL L. REV. 707, 710–11, 731–35, or 742–45 (2020).

⁵ See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1236–40 (2006) (discussing privacy in arbitration).

⁶ See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704–12, 754 (1999) (discussing how arbitration privatizes the creation of law). See also Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 313–15, 371 (2005) (discussing how manufacturers' use of form arbitration agreements has privatized dispute resolution in the mobile home industry).

Still, United States courts usually enforce these clauses under the Federal Arbitration Act (“FAA”)⁷, efficiency-focused arbitration, and contract jurisprudence.⁸ Proponents of this regime highlight how arbitration clauses can be “fair” and foster satisfactory proceedings for companies and individuals. In addition, some arbitration-administering institutions have taken steps toward protecting procedural fairness for consumers and employees who often lack the resources of their corporate opponents.⁹ Still, strong arguments remain for regulating consumer and employment arbitration.¹⁰ Pre-dispute arbitration clauses are especially concerning where they cut off access to remedies in small dollar claims and squelch the efficiencies of aggregated proceedings litigated in open court, both of which help spark necessary policy changes.¹¹

Putting aside arguments for or against pre-dispute arbitration clauses, the fact remains that individuals and companies will continue to arbitrate. Again, arbitration makes sense for many types of claims due to its efficiency and flexibility, and arbitration clauses are enforceable under the FAA and the New York Convention.¹²

⁷ Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1–16 (covering domestic arbitration), §§ 201–08 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)), §§ 301–07 (implementing the Inter-American Convention on International Commercial Arbitration (“Panama Convention”)). *See also* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2001) (emphasizing the “liberal federal policy favoring arbitration agreements”).

⁸ *See generally* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 812–13 (2004) (highlighting restrained application of unconscionability in the wake of rising formalism).

⁹ *Consumer Due Process Protocol*, AM. ARB. ASS’N, [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) (last visited Jan. 6, 2021).

¹⁰ I have been among those that have critiqued harsh consumer arbitration provisions and have proposed that the existing dispute resolution template of the Magnuson Moss Warranty Federal Trade Commission Improvement Act (“MMWA”) should incorporate consumer arbitration reforms to protect consumers’ access to warranty remedies and clarify how MMWA claims may be arbitrated fairly. *See* Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627–32, 661–86 (2008) [hereinafter *Warranty Woes*] (discussing need for procedural protections in consumer arbitration proceedings); *See also* Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 37–55 (2007) [hereinafter *Dangers of Deference*] (advancing procedural regulation of arbitration in lieu of precluding arbitration).

¹¹ Sarah R. Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011).

¹² FAA, 9 U.S.C. §§ 1–16 (covering domestic arbitration); *Id.* §§ 201–08 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)); *Id.* §§ 301–07 (implementing the Inter-American Convention on International Commercial Arbitration (Panama Convention) (2006)).

This is true even if arbitration clauses are included in e-contracts per the Electronic Signature Act (“ESign”).¹³ Moreover, the U.S. Supreme Court has continued to strengthen and expand a “pro-enforcement” glaze on arbitration agreements under the FAA.¹⁴

At the same time, “arbitration” as it existed in 1925, when the FAA became law, has changed. Growing use and reliance on the Internet has led to growth of *online* arbitration (what I have termed “OArb” in prior articles).¹⁵ Such OArb includes use of technology and digital tools to facilitate and execute processes ending in a final determination of a dispute by a neutral third party. For example, such OArb may use asynchronous or synchronous communications. It also may involve text-only hearings, virtual hearings, and mixtures thereof. OArb’s use of technology allows parties to upload and submit all supporting documentation to support their claims at times that suit their schedules. Online hearings also save the time, cost, and stress of traveling to and attending in-person processes, which is especially important in a pandemic. Such OArb systems may even provide more accurate and complete redress for consumers; for example, consumers may obtain more accurate redress through OArb than class actions—which have been criticized for providing insufficient and inequitably distributed relief in some cases.¹⁶

OArb is just one example of online dispute resolution (“ODR”), which more generally encompasses use of technology to assist prevention and resolution of disputes. Most ODR, however, is not OArb because it involves facilitation of communications aimed to spark voluntary settlement.¹⁷ Most ODR is thusly not binding and relies on the parties’ later agreement on a resolution. OArb is a distinct subset of ODR because it culminates in a final award rendered by a third-party neutral under the FAA. The binding nature has caused many to shy away from OArb, even as they

¹³ Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2006) (making electronic contracts enforceable to the same extent as written contracts; effective October 1, 2000).

¹⁴ AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1743–56 (2011).

¹⁵ Amy J. Schmitz, ‘Drive-Thru’ Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR, 62 BAYLOR L. REV. 178, 178–244 (2010) (proposing “OArb” as a distinct type of online dispute resolution).

¹⁶ See generally Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014).

¹⁷ See generally AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* (2017); See also AMY J. SCHMITZ, *Building on OArb Attributes in Pursuit of Justice*, in *ARBITRATION IN THE DIGITAL AGE: THE BRAVE NEW WORLD OF ARBITRATION* 182 (Maud Piers & Christian Aschauer eds., 2018).

have embraced other types of ODR. This is due to attorneys and parties fearing a binding award without a chance to present their cases in person—especially where large dollar amounts are at stake.

Nonetheless, interest in OArb has spiked in the COVID-19 pandemic.¹⁸ Virtual meeting technology such as Skype, Google Meet, WebEx, and Zoom have made virtual hearings relatively cheap and easy, and individuals have become accustomed to online communications in the lock-down.¹⁹ Indeed, in larger dollar claims and areas traditionally wed to arbitration such as labor and construction, in-person arbitration has long been the norm and there was not great movement toward OArb until COVID-19 forced wider adoption.²⁰ Even in the beginning of the pandemic, most parties stated an intention to wait to arbitrate until they could do so in person because of inexperience with using virtual platforms or long-held beliefs that in-person hearings are always the best method for resolution.²¹ Furthermore, parties who benefit from delay presumably benefitted from the “COVID excuse” for putting off litigation or arbitration. As the pandemic continued, however, parties grew eager to resolve their disputes and arbitrators warmed up to virtual arbitration.²² All have increasingly embraced virtual platforms as their best and safest means for moving forward—especially with uncertainty as to when courts will fully reopen or function in an efficient and safe manner.²³

¹⁸ Melody Alger, *Conducting Arbitrations and Mediations Remotely During the Covid-19 Crisis and Beyond*, 68 R.I. B.J. 15 (2020).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Andrey Panov, *Post-COVID-19 World and the Duty to Conduct Arbitrations Efficiently and Expeditiously*, THOMSON REUTERS (Aug. 13, 2020), <http://arbitrationblog.practicallaw.com/post-covid-19-world-and-the-duty-to-conduct-arbitrations-efficiently-and-expeditiously/>; Mark Shope, *International Arbitral Institution Response to COVID-19 and Opportunities for Online Dispute Resolution*, 13 CONTEMP. ASIA ARB. J. 67, 77 (2020).

²² Karen Maxwell, *Could Arbitration Support Courts During the COVID-19 Crisis?*, THOMSON REUTERS (May 27, 2020), <http://arbitrationblog.practicallaw.com/could-arbitration-support-courts-during-the-covid-19-crisis/>.

²³ E-mail from Svetlana Gitman, Esq., Vice President, AM. ARB. ASS’N/INT’L CTR. FOR DISP. RESOL., to Amy J. Schmitz, Professor, Univ. of Missouri-Columbia L. Sch. (June 30, 2020) (on file with author). Generally, labor unions and employers have also been slow to embrace OArb. Their reasoning seems to be that they believe (1) they need an in-person hearing for their grievant to “tell her/his story,” and (2) it is easier to adjust the presentation of their case on the fly to respond to the employer’s presentation of its case in an in-person hearing with paper documents that need not be disclosed before the hearing. E-mail from Richard Bales, labor arbitrator and scholar, Ohio Northern Univ. Coll. of L., to Amy J. Schmitz, Professor, University of Missouri-Columbia L. Sch. (July 1, 2020) (on file with author).

As more arbitrations move online, parties and arbitrators are learning firsthand what many of us in ODR have been saying for some time: OArb and ODR provide efficiency, convenience, and room for innovation. As noted above, online communications may provide time and cost savings for all involved, while virtual hearings offer safety and comfort that have become critical in the wake of the pandemic. International OArb may also gain prominence, as it eliminates the need for expensive and especially dicey—and in many cases impossible—international travel, while preserving the benefits of creating awards that, under the New York Convention, are more enforceable than court judgments. Also, parties can select the expert arbitrators with attention to cross-cultural and neutrality concerns.²⁴

Meanwhile, the law and jurisprudence around the FAA has continued to develop toward a pro-enforcement and pro-efficiency bent. New cases have come down from the U.S. Supreme Court calling for strict enforcement of individualized arbitration, even in employment and consumer cases, and the Court has opened the door to application of estoppel with respect to third parties to the arbitration agreement.²⁵ Nonetheless, new wrinkles have percolated with respect to third-party discovery from non-parties to the arbitration when virtual hearings are involved. Moreover, the 1925 FAA was not built to address the complexities of the digital world, leaving questions for policymakers and courts regarding application of arbitration law to OArb. This Article hopes to shed light on OArb's evolution, and how FAA developments may impact OArb in practice. It also offers suggestions for policy going forward.

Part II of the Article provides legal background with discussion of the law, theory, and policy guiding current enforcement of arbitration agreements and awards under the FAA. Part III further paints the picture by explaining the evolution and current expansion of OArb in the wake of the pandemic. Part IV then brings law and practice together and analyzes how this recent arbitration law may impact OArb. Additionally, it sheds light on issues not covered by the FAA and offers insights for courts, practitioners, and policymakers going forward. Part V concludes with the hope that these insights will spark further developments, considering

²⁴ Craig R. Tractenberg, *Nuts and Bolts of International Arbitration*, 38 *FRANCHISE L.J.* 451–52 (2019).

²⁵ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019); *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020).

that OArb and virtual arbitration hearings have become the new normal and will almost certainly continue expansion post-pandemic.

II. SYNOPSIS OF ARBITRATION LAW, THEORY, AND POLICY

Arbitration law in the U.S. emanates from the FAA, which was adopted in 1925 to support commercial and trade arbitration.²⁶ Since that time, the U.S. Supreme Court has expanded the jurisprudence around the FAA to embrace enforcement of arbitration in employment and consumer contexts.²⁷ Recent jurisprudence further supports this trend, which will likely extend to promote OArb's enforcement. Nonetheless, the drafters of the FAA in 1925 could not have conceptualized virtual arbitrations, and therefore it is unsurprising that questions remain regarding issues such as the power to subpoena individuals to appear online. The following sets forth the evolution of the law, with an emphasis on questions that impact OArb.

A. *Arbitration Jurisprudence Toward Strict Enforcement*

International and domestic arbitration laws generally require enforcement of valid agreements to arbitrate, which often incorporate rules such as those promulgated by the American Arbitration Association (“AAA”) or the International Chamber of Commerce (“ICC”).²⁸ This relegates enforcement analysis to contract formation and validity issues, which courts have mainly approached in an efficiency-focused manner.²⁹ Proponents of arbitration argue that enforcement results in cost and time savings, while critics complain that it impairs consumer remedies and essentially allows companies

²⁶ STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 250 (3d ed. 1999).

²⁷ Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195, 206 (2017).

²⁸ RICHARD E. SPEIDEL ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 29, 31–34 (2006).

²⁹ See Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, *supra* note 10, at 635–36 (discussing preemption and its impact on arbitration challenges).

to privatize law and avoid regulation through their arbitration programs.³⁰

On the international level, the widely adopted New York Convention generally mandates summary enforcement of arbitration agreements and awards.³¹ The United States has implemented this Convention through Chapter Two of the FAA,³² which U.S. courts have applied with a pro-enforcement glaze aimed to promote both arbitration and international comity.³³ This glaze has also led U.S. courts to narrowly read the Convention's allowance for public policy review of arbitration awards and to curtail judicial power to mandate arbitration procedures or contract formation standards.³⁴

U.S. courts similarly enforce domestic arbitration agreements under the FAA³⁵ and its state counterpart, the Uniform Arbitration Act ("UAA").³⁶ These laws require courts to specifically enforce domestic arbitration agreements and augment this mandate with provisions for liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators if parties cannot do so by agreement, limited review of arbitration awards, and treatment of awards as final judgments.³⁷ Furthermore, the Su-

³⁰ See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 637–38 (1996) (critiquing companies' inclusion of arbitration clauses in consumer and employment contracts); Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 Hous. L. REV. 327 (1996) (discussing the mandatory nature of arbitration under NASD or NYSE rules in broker-dealer securities contracts).

³¹ ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INT'L COMMERCIAL ARBITRATION* 67 (3rd ed. 1999); The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Arts. 1–16 (1958), *reprinted in id.* at 491–94 (including Appx.) [hereinafter NY CONVENTION]; *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Feb. 3, 2021) (noting 166 countries have adopted the Convention).

³² 9 U.S.C. §§ 201–08 (1970) (implementing the New York Convention), §§ 301–07 (1990) (implementing the Panama Convention).

³³ Kenneth F. Dunham, *International Arbitration Is Not Your Father's Oldsmobile Convention*, 2 J. DISP. RESOL. 323, 326–27 (2005) (discussing the development of international commercial arbitration and noting the importance of the New York Convention in that development).

³⁴ NY CONVENTION, *supra* note 31, at Arts. 1–16; Dunham, *supra* note 33, at 330–31 (discussing importance of contract terms and rules incorporated therein in dictating the arbitration procedures).

³⁵ FAA, 9 U.S.C. §§ 1–16.

³⁶ UNIF. ARB. ACT, 7 U.L.A. § 1 et seq. (1997). The UAA is model legislation nearly all states have adopted to require the same basic enforcement for local arbitration agreements and awards beyond the purview of the FAA. *Id.*

³⁷ See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124–35 (2002) (discussing the FAA's pro-efficiency remedial provisions).

preme Court has held that the FAA preempts states from singling out arbitration for special treatment or otherwise hindering the enforcement of arbitration in contracts affecting interstate commerce. This importantly leaves states with little power to regulate arbitration provisions beyond application of general contract defenses.³⁸

The U.S. Supreme Court has fortified strict enforcement of arbitration in the U.S.³⁹ This was solidified in cases including *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, *AT&T Mobility, LLC v. Concepcion*, and *Rent-A-Center v. Jackson*.⁴⁰ The Court significantly narrowed arbitrators' power to order class arbitration in *Stolt-Nielsen SA*, greatly limited application of contract defenses to void arbitration clauses in *AT&T*, and confirmed arbitrators' power to determine the scope of their own jurisdiction in *Rent-A-Center*.⁴¹

The Court has bolstered this enforcement, even where statutory claims are at stake. In *American Express v. Italian Colors Restaurant*, a would-be class of small businesses asserted antitrust violations against the credit card company for allegedly charging excessive fees and claimed that the class waiver in their arbitration agreements made it too expensive for them to vindicate their statutory rights.⁴² The businesses argued that they could not pay the expert fees and related costs of proving antitrust violations unless they banded together.⁴³ However, the Court denied the class consolidation, emphasizing that complainants have no right to an economical or streamlined means for asserting antitrust violations.⁴⁴

³⁸ See *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (holding that the FAA applies in federal and state court); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration); *Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (finding the FAA preempted state notice requirements for arbitration clauses).

³⁹ FAA, 9 U.S.C. §§ 201–08, 301–07 (2012) (implementing the New York Convention under §§ 201–08 and the Panama Convention under §§ 301–07).

⁴⁰ *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1743–56 (2011); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010); *Rent-A-Center, W, Inc. v. Jackson*, 130 S. Ct. 2772, 2777–80 (2010).

⁴¹ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2304–10 (2013) (enforcing a class waiver in arbitration clauses with respect to anti-trust claims). See also *AT&T Mobility*, 131 S. Ct. at 1748–53 (stating that class wide arbitration is inconsistent with the FAA); *Stolt-Nielsen*, 130 S. Ct. at 1773–76 (holding that a party cannot be compelled to class arbitration unless there is a clear contractual basis for it); *Rent-A-Center, W., Inc.*, 130 S. Ct. at 2777–80 (finding that a clause in employment contract delegating to the arbitrator exclusive authority to decide enforceability of the arbitration agreement was a valid delegation under the FAA).

⁴² *Am. Express Co.*, 133 S. Ct. at 2304–10.

⁴³ *Id.*

⁴⁴ *Id.*

The Court also indicated a distaste for class arbitrations, which it saw as frustrating the efficiency goals of the FAA.⁴⁵

Additionally, most business-to-consumer contracts expressly preclude class proceedings in the wake of *AT&T*, which narrowed consumers' power to challenge class waivers based on traditional contract defenses.⁴⁶ The Supreme Court, under *AT&T*, held that the FAA preempts a court from using state contract law to condition enforcement of an arbitration clause on preserving consumers' ability to bring class-wide arbitration.⁴⁷ Consumers in that case filed a class action in contravention of the arbitration clause in *AT&T*'s contract, alleging that the clause's class waiver effectively precluded vindication of their rights.⁴⁸ Although the California court agreed with the consumer, the U.S. Supreme Court reversed and enforced the class waiver. The Court held that the FAA preempted California's use of unconscionability to strike the clause as the contract allowed for small claims court actions, the recovery of double attorney fees if an award exceeded the company's settlement offer, and payment of arbitration costs by the company.⁴⁹

Scholars have argued that subsequent arbitration jurisprudence has gone too far in enforcing arbitration clauses, especially in employment and consumer cases.⁵⁰ They contend that Congress should consider enacting a law that guarantees certain consumer protections in arbitration, like a fair location for the hearings, prohibition against abbreviated statutes of limitations, prohibitions against damage limitations, class procedures in some circumstances, requirement for public proceedings and filings, and heightened judicial review of arbitral awards for certain types of claims.⁵¹ There have also been proposals for laws to ban pre-dispute arbitration clauses altogether in consumer, employment, and civil rights cases.⁵² Nonetheless, such proposals have not made it very far to-

⁴⁵ *Id.*

⁴⁶ Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 *BYU L. REV.* 1, 38 (2013) (finding that 93.6% of the agreements studied waived any right to class arbitration).

⁴⁷ *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1743–56 (2011).

⁴⁸ *Id.*

⁴⁹ *See id.* at 1748–55, which emphasized that class action arbitration sacrifices informality; Cole, *supra* note 11 at 481–91 (highlighting how recent Supreme Court opinions curtail class action relief).

⁵⁰ Szalai, *supra* note 2, at 234–48.

⁵¹ *Id.*

⁵² *H.R. 1423—Forced Arbitration Injustice Repeal Act*, CONGRESS.GOV (Sept. 24, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/1423/text>. The bill passed in the House, was received in the Senate on September 24, 2019, read twice, and referred to the Senate Judiciary Committee.

ward enactment, and thus the FAA and its jurisprudence remain our legal touchstone.

B. *Supreme Court Pronouncements in the Last Five Years*

The opinions over the past five years are obviously important for traditional in-person arbitration, but they may apply differently and have special import for OArb. The Court's message with respect to arbitration has remained steady: The FAA requires strict enforcement of arbitration agreements and awards and preempts states from stepping in to limit that enforcement. This remains true in most employment and consumer cases and has the power to cut off access to class actions. Nonetheless, the FAA does not apply with respect to transportation workers, regardless of whether they are independent contractors or in a traditional employment relationship. These issues are again important for traditional arbitration, but the Court's opinions provide insights on how the FAA applies for OArb as well.

1. Class Proceedings

The Supreme Court, under *Epic Sys. Corp. v. Lewis*, held that arbitration agreements calling for individualized proceedings are enforceable per not only the FAA, but also the Fair Labor Standards Act ("FLSA") and National Labor Relations Act ("NLRA").⁵³ It thus endorsed "pre-dispute" arbitration clauses, even when they would arguably hinder collective action under labor laws.⁵⁴ The Supreme Court's reasoning was two-fold: (1) the FAA only recognizes generally applicable contract defenses, like fraud, duress, or unconscionability, so the argument around indi-

⁵³ 138 S. Ct. 1612, 1632 (2018).

⁵⁴ *Id.* at 1616. There were three cases involved. In the first of consolidated cases, an employee brought a class action against an employer, alleging that he violated the FLSA and Wisconsin law, and the Court of Appeals for the Seventh Circuit affirmed an order denying the employer's motion to dismiss and compel individual arbitration. In the second case, employees brought similar class action claims against an employer under the FLSA and California law, and the Court of Appeals for the Ninth Circuit reversed an order granting the employer's motion to compel individual arbitration. In the third case, the employer filed a petition for a review of the National Labor Relation Board's finding that it was unlawful for the employer to require employees to sign an agreement waiving their right to pursue class and collective actions. The Court of Appeals for the Fifth Circuit held that the employer's arbitration agreement compelling individual arbitration was fair. The Supreme Court reversed and remanded the two cases that ruled for the employees, and affirmed the case upholding the individualized arbitration agreements.

vidualized proceedings failed;⁵⁵ and (2) § 7 of the NLRA, which guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection,” does not clearly express congressional intention to displace the FAA with the NLRA and make these individualized arbitration agreements unenforceable.⁵⁶ Moreover, the Supreme Court rejected the employees’ argument that *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, supports deference to the National Labor Relation Board’s 2012 interpretation of federal statutes outlawing class and collective action waivers by employees.⁵⁷

Another case dealing with questions around class proceedings in employment cases is *Lamps Plus, Inc. v. Varela*, wherein the question was whether a court could order class-wide, rather than individualized, arbitration proceedings when the arbitration agreement was ambiguous about whether class arbitration was available.⁵⁸ The Supreme Court held that the arbitration agreement’s ambiguity on the subject did not provide sufficient basis for compelling class-wide arbitration.⁵⁹ This was consistent with the Court’s prior ruling that silence on the subject is not sufficient to provide basis for an arbitrator to order class proceedings and seemed to add an exclamation point on the Court’s distaste for class arbitration.⁶⁰ Chief Justice Roberts, writing for the majority, eschewed arguments that some phrases in the agreement seemed to allow for class arbitration.⁶¹ Instead, the Court noted that class-wide arbitration sacrifices the informality, speed, and low cost that are the primary benefits of arbitration. Accordingly, the Court

⁵⁵ *Id.* at 1622. Of course, not all agree with the Court’s analysis. Arguments remain that a state court decision saying it is unconscionable under state contract law to insert a class-action waiver in any contract would seem to be a generally applicable contract defense. However, the Court in *Italian Colors* eschewed that argument; see Schmitz, *supra* note 15.

⁵⁶ *Epic Sys. Corp.*, 138 S. Ct. at 1624. The Court surmised that there is a strong presumption that disfavors repeal by implication. Section 7 of the NLRA focuses on the right to organize unions and bargain collectively and doesn’t reference an intention to displace the FAA. Using *eiusdem generis*, Congress probably did not intend class and collective arbitration actions to be included as “concerted activities” under § 7, because the general phrase should be considered to mean other activities similar to the specific ones listed before: activities that relate to exercising the right to free association in the workplace, not issues of litigation.

⁵⁷ *Id.* at 1618.

⁵⁸ 139 S. Ct. 1407, 1412 (2019).

⁵⁹ *Id.* at 1415.

⁶⁰ Chief Justice Roberts wrote the majority opinion, while Justices Ginsburg, Breyer, Sotomayor, and Kagan filed dissenting opinions. *Id.*

⁶¹ *Id.*

opined that courts may not infer consent to participate in class-wide arbitration without an affirmative contractual basis.⁶²

2. FAA Interpretation

Despite cases seeming to endorse arbitration of employment claims, the Court nonetheless narrowed the FAA's coverage of employment cases in applying the FAA's exclusion of "other workers" in *New Prime Inc. v. Oliveira*. There, the question was whether a court decides disputes over the application of § 1 of the FAA's exception for "contracts of employment," and whether this exclusion covers independent contractors.⁶³ Speaking for the Court, Justice Gorsuch wrote that a court should decide for itself whether FAA's exclusion for "contracts of employment" of certain transportation workers applies before ordering arbitration. Justice Gorsuch also opined that the exclusion removes both employer-employee contracts as well as contracts involving independent contractors from the Act's coverage.⁶⁴ Accordingly, the opinion effectively broadens the § 1 exclusion to cover transportation workers of all types and kinds.⁶⁵

The case involved former truck drivers against an interstate trucking company, alleging that the company's failure to pay its drivers minimum wage violated Missouri and Maine labor laws.⁶⁶ The plaintiff worked under an agreement that called him an independent contractor, and the defendant used that fact to argue that § 1 of the FAA did not except him from coverage. The defendant also argued that the question of whether the plaintiffs fall within the § 1 exclusion was for the arbitrator, not the court, but the Supreme Court denied these arguments.⁶⁷

The importance of the case stems from Justice Gorsuch's rationale. He focused on the language in stating that the FAA states that "nothing" in the act "shall apply" to "contracts and employment of . . . any other class of workers engaged in foreign or interstate commerce."⁶⁸ This means that even if the contract has a delegation clause delegating arbitrability questions to the arbitra-

⁶² *Id.* at 1416. An important principle of the FAA is parties must consent to arbitration, and silence is not enough. Ambiguity should be treated the same way because it also does not provide a sufficient basis to conclude that the parties consented to class-wide arbitration.

⁶³ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (2019).

⁶⁴ *Id.* at 544.

⁶⁵ This has particular import for Uber, Lyft, and other drivers in the sharing economy.

⁶⁶ *Oliveira*, 139 S. Ct. at 536.

⁶⁷ *Id.* at 537.

⁶⁸ *Id.*

tor, a court should first decide whether the § 1 “contracts of employment” exclusion applies. In other words, a court must decide if § 1 applies before it has authority to use its statutory powers in §§ 3 and 4 to enforce arbitration.⁶⁹ At the same time, the opinion harkens back to the text as it was understood at the FAA’s enactment in 1925 to hold that “employment” should include independent contractors. Specifically, the Court reasoned that “employment” as a synonym for “work” would have been understood to include independent contractors in 1925 and did not have the “term of art” meaning of today that implies an employer-employee relationship.⁷⁰

3. Support for Arbitration Agreements and Awards

Despite this somewhat anti-enforcement glimmer, the Supreme Court further solidified broad support for enforcement of arbitration agreements under *Henry Schein, Inc. v. Archer and White Sales, Inc.*⁷¹ There, the Court held that when the parties’ contract delegates the question of arbitrability to an arbitrator, a court may not decide arbitrability—even if the court thinks that the arbitration agreement applies to a wholly groundless dispute.⁷² The Court, therefore, placed in bold its endorsement of delegation clauses which allow arbitrators to decide their own jurisdiction. Furthermore, the Court eschewed the “wholly groundless” exception used by some courts of appeals to promote efficiency by denying motions to compel arbitration where the case appears to lack any merit.⁷³ Instead, the Court opined that the “wholly groundless” exception is not necessary to deter frivolous motions to compel arbitration.⁷⁴

At the same time, the Supreme Court broadened the FAA’s reach in allowing for application of equitable estoppel to enforce arbitration awards against non-parties. In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*,⁷⁵ the Court held that the New York Convention does not conflict

⁶⁹ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (2019). This is a very strict textual reading of the FAA, meaning that even if it seems obvious that a case should go to arbitration, a court must make the § 1 determination to decide if the FAA authorizes a court to send the case to arbitration.

⁷⁰ *Id.* at 540.

⁷¹ 139 S. Ct. 524 (2019).

⁷² *Id.* at 528.

⁷³ *Id.* at 529.

⁷⁴ *Id.*

⁷⁵ 140 S. Ct. 1637 (2020).

with domestic equitable estoppel doctrines that permit the enforcement of arbitration by non-signatories.⁷⁶ In this case, a steel manufacturing plant and a contractor entered three contracts with arbitration clauses.⁷⁷ The contractor entered into a subcontractor agreement with GE to provide certain equipment.⁷⁸ The equipment that GE made failed, so Outokumpu, who now owned the manufacturing plant, sued GE in state court.⁷⁹ GE removed the case to federal court, then moved to dismiss and compel arbitration based on the arbitration clauses in the original contracts between the plant and the contractor.⁸⁰ The district court granted the motion, concluding that both Outokumpu and GE were subject to arbitration.⁸¹ The Eleventh Circuit reversed.⁸² The court concluded that the New York Convention only allows enforcement of an arbitration agreement by the parties who actually signed it, and GE is not included in that descriptor.⁸³

The Supreme Court reversed and remanded the case to the Court of Appeals to determine whether GE “can enforce the arbitration clauses under equitable estoppel principles.”⁸⁴ The Court explained that traditional principles of state law that apply under the FAA include doctrines like equitable estoppel. This can permit a non-signatory to enforce an arbitration agreement, even under the Convention.⁸⁵ The Court also noted that the FAA will apply to

⁷⁶ *Id.* at 1645.

⁷⁷ *Id.* at 1642.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1642 (2020).

⁸² *Id.* at 1643.

⁸³ *Id.* The Court went through several arguments supporting the Court of Appeals but concluded again that nothing in the Convention precludes application of state equity doctrines. It also notes that this interpretation is confirmed by looking at negotiating and drafting history. It dismisses Outokumpu’s argument that the Convention has a “rule of consent” that allows some domestic law doctrines and not others. The Court says the drafting history just shows that the drafters wanted to impose baseline requirements on contracting states to ensure mutually binding agreements, not that they wanted to prevent states from applying domestic law to allow non-signatories to enforce arbitration agreements in additional circumstances. Nonetheless, because the Court of Appeals concluded that the Convention prohibits enforcement by non-signatories, it did not actually address whether GE could enforce the arbitration clauses under equitable estoppel. The Court does not determine this issue, only that the Convention does not conflict with the enforcement of arbitration agreements by non-signatories under domestic-law equitable estoppel doctrines.

⁸⁴ *Id.* at 1643.

⁸⁵ *Id.* at 1645.

the extent it is not in conflict with the Convention, and doctrines like estoppel promote fairness and efficiency.⁸⁶

In sum, the U.S. Supreme Court has continued to send a message of arbitration enforcement and seems primed to find ways to enforce arbitration agreements and awards whenever possible. This same enforcement would presumably flow for OArb, especially where it will promote efficiency. The Court also has shown distaste for class arbitration, indicating a need for low-cost means for individually seeking remedies on claims where class relief is not available. Nonetheless, the Court has also shown inklings toward textual readings of the FAA, such as it signaled in the *New Prime, Inc.* case. There, the Court read the FAA as it would be understood in 1925. Such a temporal-textual reading may have far-reaching implications, as cases involving virtual hearings reach the Court.

C. *Court of Appeals Cases Impacting Virtual Hearings*

OArb often includes virtual hearings, which were obviously not around when the FAA was passed in 1925. It is therefore unsurprising that courts have struggled with how to apply various provisions of the FAA to cases involving online hearings. For example, should FAA § 7, which allows courts to order attendance of witnesses in arbitration hearings, also support orders for witnesses to appear in online hearings? These issues are important for OArb because parties will face major obstacles in presenting their cases online without such FAA support for ordering witnesses.

Furthermore, FAA authority is particularly important when addressing need for third party discovery. An institution's rules generally cover hearing location, arbitrator appointment, discovery, fees and costs, and other such basics, and may provide for special procedures allowing for virtual hearings and online submissions.⁸⁷ However, these rules incorporated into parties' agreements are only applicable to the parties to the agreement (the parties to the arbitration). Any power to order testimony or docu-

⁸⁶ *Id.* at 1641–42.

⁸⁷ *See, e.g.*, AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (Oct. 1, 2013), https://www.adr.org/sites/default/files/CommercialRules_Web.pdf; *see also* AM. ARB. ASS'N, CONSUMER-RELATED DISPUTES: SUPPLEMENTARY PROCEDURES (Sept. 15, 2005), <https://adr.org/sites/default/files/Consumer-Related%20Disputes%20Supplementary%20Procedures%20Sep%2015%2C%202005.pdf>.

ments from third parties must come from a statute, namely FAA § 7. That makes interpretation of § 7 especially important with respect to virtual arbitration.

Accordingly, cases regarding FAA § 7 such as *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, have special import for OArb.⁸⁸ In that case, the Court of Appeals held that the district court did not have the authority to force non-parties to arbitration to comply with the summons and provide testimony that would be transmitted via videoconference. The court relied on a literal reading of § 7 of the FAA, which provides that arbitrators “may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”⁸⁹ The Eleventh Circuit found that in this case, since the testimony would be taken via videoconference, the arbitrator was not technically compelling the witness “to attend before” the arbitrator.⁹⁰ Therefore, there was no authority under § 7 to order a witness to participate in a video hearing, cutting off access to testimony from third parties unless there is an in-person hearing.

This case provides another branch within a circuit split on interpretation of § 7. The Second, Third, Fourth, and Ninth Circuits all have cases holding that § 7 does not provide for pre-hearing discovery from non-parties to the arbitration agreement, due to a strict reading of § 7, like that under *Managed Care Advisory Group, LLC*.⁹¹ These courts interpret “to attend before them . . . and in a proper case to bring with him or them any book, record, document, or paper”⁹² to limit arbitrators’ power to ordering non-parties to bring documents with them to a hearing before the arbitrators. Although these courts do not address the issue of video or teleconferencing directly, they do seem to emphasize the impor-

⁸⁸ 939 F.3d 1145, 1160 (11th Cir. 2019).

⁸⁹ FAA, 9 U.S.C. § 7.

⁹⁰ *Managed Care Advisory Group, LLC*, 939 F.3d at 1159.

⁹¹ See *Life Receivables Tr. v. Syndicate 102 at Lloyds*, 549 F.3d 210, 216 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisitions Corp.*, 360 F.3d 404, 407 (3d Cir. 2004); *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275–76 (4th Cir. 1999) (allowing an exception upon a showing of “special need or hardship”); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 708 (9th Cir. 2017). See also Frances C. Slusarz, *No Nonparty Discovery in Arbitration: Workarounds to the Rule can be Limited and Costly*, A.B.A. (Apr. 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2020/no-nonparty-discovery-in-arbitration/> (last visited Dec. 24, 2020).

⁹² FAA, 9 U.S.C. § 7.

tance of the witnesses being in the physical presence of the arbitrators when bringing documents.

In contrast, the Sixth and Eighth Circuits have held that there is implicit arbitral power per § 7 to authorize subpoenas for pre-hearing discovery from third parties. This means that arbitrators have the power to order production of documents before an arbitration, without the witness having to be present at a hearing.⁹³ This seems to be a more functional approach, recognizing that it is often necessary to have documents in advance in order to allow for meaningful testimony with respect to the materials. Consider: it would be a waste of time if an attorney would have to start a hearing in order to get the documents, and then pause the hearing to review documents before questioning a witness on the documents. It is much more efficient for the attorney to see the documents before the hearing.⁹⁴

While this circuit split continues to percolate, new cases are coming down the pipeline with varying views of virtual hearings. Under *Dodson Int'l Parts, Inc. v. Williams Int'l Co., Inc.*, an arbitrator issued a subpoena commanding a third party to appoint a representative to testify by video from a different state.⁹⁵ The court here held that testifying and transmitting documents by “remote uplink” from Connecticut was not the type of presence required by the FAA.⁹⁶ Remote attendance was not the same as appearing before the arbitrator in Michigan.⁹⁷ Because of this, the court dismissed the petition to enforce the subpoena under § 7 of the FAA.⁹⁸

A court in Kentucky similarly applied a strict reading of the FAA, and even seemed to ignore its Circuit precedent, in *Westlake Vinyls, Inc. v. Cooke*.⁹⁹ In this case, arbitrators served subpoenas on non-parties to appear at a hearing from Massachusetts, with the arbitrator attending by telephone or video.¹⁰⁰ The non-parties refused to comply, and the petitioner asked the Court to enforce the

⁹³ See *Am. Fed'n of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1109 (6th Cir. 1999); See also *In re Sec. Life Ins. Co. of Am. v. Duncanson & Holt* 228 F.3d 865, 870–71 (8th Cir. 2000).

⁹⁴ *In re Sec. Life Ins. Co. of Am.*, 228 F.3d at 870–71 (taking a functional approach).

⁹⁵ 2019 WL 5680811 (E.D. Mich. June 26, 2019).

⁹⁶ *Id.* at *2.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Westlake Vinyls, Inc. v. Cooke*, CV318MC00018DJHLLK, 2018 WL 4868993, at *3 (W.D. Ky. Aug. 21, 2018).

¹⁰⁰ *Id.* at *3.

subpoenas under § 7 of the FAA.¹⁰¹ The court acknowledged that the Sixth Circuit has ruled that arbitrators have the power to order pre-hearing discovery, but nonetheless concluded that the subpoena did not meet the minimum requirements for a hearing per § 7. They ruled that presence “telephonically or videographically” is not sufficient,¹⁰² as “[p]hysical presence of the arbitrator(s) at the arbitration hearing is required.”¹⁰³

In contrast, a New York federal court, under *Sexton v. Le-cavalier*, seemed to diverge from the position of the Second Circuit.¹⁰⁴ This case focused on the production of e-mails in “native format” under a third-party subpoena, which required a non-party to the arbitration agreement to testify via video as part of this subpoena.¹⁰⁵ Specifically, the Arbitral Tribunal of the International Centre for Dispute Resolution ordered the non-party to produce certain documents, and any copies in electronic format were to be produced in native format.¹⁰⁶ The Tribunal also ordered the third party to appear at a merits hearing “via video-link.”¹⁰⁷ There seemed to be no objections with respect to this video-link, and therefore no discussion of § 7 limitations in the opinion.

In another case, *Moyett v. Lugo-Sánchez*, the Financial Industry Regulatory Authority’s (“FINRA”) securities arbitrators issued subpoenas against third parties to testify in San Juan, Puerto Rico.¹⁰⁸ The non-parties to the arbitration agreement argued that the court lacked jurisdiction to order the subpoenas and that testifying before the arbitration panel was unduly burdensome.¹⁰⁹ Specifically, they noted that the arbitrators were physically in Georgia, so they would be hearing testimony via videoconference.¹¹⁰ The court denied this argument, holding that, despite the physical distance between the arbitrators in Georgia and the parties in Puerto Rico, the arbitrators can “sit” in Puerto Rico through videoconfer-

¹⁰¹ *Id.* at *2.

¹⁰² *Id.* at *3.

¹⁰³ *Id.*

¹⁰⁴ 11 F. Supp. 3d 439, 441 (S.D.N.Y. 2014).

¹⁰⁵ *Id.* at 441.

¹⁰⁶ *Id.* at 440.

¹⁰⁷ *Id.*

¹⁰⁸ *Moyett v. Lugo-Sánchez*, 321 F. Supp. 3d 263, 265 (D.P.R. 2018).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 266.

encing.¹¹¹ Accordingly, the court had the authority to enforce the subpoenas under § 7 of the FAA.¹¹²

III. OARB DEVELOPMENT INTO MAINSTREAM

The idea of OArb is not entirely new. In fact, e-commerce providers such as eBay have been using OArb for customer claims for some time.¹¹³ Nonetheless, there are now many OArb providers who provide text-only arbitration with no in-person hearings. Moreover, traditional arbitration providers, such as the American Arbitration Association (“AAA”) and others, now provide virtual hearings in the wake of the pandemic. Indeed, evidence suggests that OArb has expanded significantly due to COVID-19 shutdowns and health restrictions. Moreover, the trend toward OArb and virtual hearings is likely to continue post-pandemic as parties embrace the efficiencies and conveniences OArb offers.

A. *Evolution of OArb Providers*

1. eBay

ODR has been developing slowly over the past twenty-five or more years. In the U.S., eBay is seen as an early example of a company employing ODR to promote efficient claims resolution and build goodwill with consumers. Indeed, eBay learned that it could retain loyal customers and even inspire them to make more purchases if customers trust that they will get a remedy if a purchase goes awry. For example, eBay encourages users to attempt to work out the problem on their own in the first instance.¹¹⁴ If unsuccessful, the buyer can file an online claim in the eBay Resolution Center.¹¹⁵ This will inform the seller that there has been an issue, which will prompt negotiations between the seller and the

¹¹¹ *Id.* at 267.

¹¹² *Id.* The court also noted that FINRA allows for the submission of testimony via videoconference, although the FINRA rules would only apply to the parties to the arbitration agreement incorporating them.

¹¹³ Schmitz, *supra* note 15, at 178–244.

¹¹⁴ *Resolution Center*, EBAY, <https://resolutioncenter.ebay.com> (last visited Mar. 1, 2020).

¹¹⁵ *Using the Resolution Center as a Buyer*, EBAY, <https://www.ebay.com/help/buying/resolving-issues-sellers/using-resolution-center-buyer?id=4636&st=3&pos=2&query=Using%20the%20Resolution%20Center%20as%20a%20buyer&intent=dispute%20resolution&lucenceai=lucenceai> (last visited Mar. 1, 2020).

buyer.¹¹⁶ If the buyer is satisfied with the seller's solution, the buyer can close the case.¹¹⁷ If unsatisfied with the seller's response, or the seller has not responded in three days, the buyer has twenty-one days to report it to eBay to continue the process.¹¹⁸

At this point, eBay helps resolve the issue, typically within forty-eight hours.¹¹⁹ If the goods did not arrive or are not as promised, the buyer usually gets her or his money back. A losing buyer has thirty days to appeal that decision.¹²⁰ When appealing, a buyer can submit information to support the claim, such as photos of the item, tracking and shipping information, proof that the item was sent to the wrong address, or police reports.¹²¹ All told, this is OArb. The dispute may be resolved along the way through online negotiation, but if negotiation does not end the issue, then a third party decides the claim.

2. NetNeutrals

Related to eBay is another ODR service, NetNeutrals. NetNeutrals was designed for eBay as an independent feedback review process.¹²² It focuses only on questions relating to negative feedback for products sold on eBay, an important consideration for eBay sellers.¹²³ NetNeutrals offers a free direct negotiation forum for sellers to communicate directly with buyers to resolve conflicts over product reviews.¹²⁴ It also offers OArb, for a fee, which employs a neutral third party to review the case and determine if clear and convincing evidence exists to show that a review violates eBay's policies.¹²⁵ This one-week process hides the review from the public until a determination is made.¹²⁶

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Ask eBay to step in and help for buyers*, EBAY, <https://www.ebay.com/help/buying/returns-refunds/ask-ebay-step-help-buyers?id=4701> (last visited Mar. 1, 2020).

¹²⁰ *Id.*

¹²¹ *Appeal eBay's decision about a return or missing item for buyers*, EBAY, <https://www.ebay.com/help/buying/returns-refunds/handling-disputes?id=4039> (last visited Mar. 1, 2020).

¹²² *An Innovative Approach to Dispute Resolution*, NETNEUTRALS, <https://netneutrals.com/About-Us> (last visited June 5, 2020).

¹²³ *Id.*

¹²⁴ *Learn More about IFR*, NETNEUTRALS, <https://netneutrals.com/Learn-More> (last visited June 5, 2020).

¹²⁵ *Id.*

¹²⁶ *Id.*

3. Modria

The creators of eBay’s ODR process branched off as Modria, which Tyler Technologies acquired for resolving disputes online.¹²⁷ Modria is a flexible software that allows direct negotiation and supports the inclusion of a mediator or an arbitrator.¹²⁸ Modria is “modular” in that companies and courts can adapt the ODR software for disputes, including business to consumer, employee complaints, small claims, family conflicts, traffic disputes, and more.¹²⁹ While OArb is not its main functionality, the program allows for a neutral to make a final determination.¹³⁰

4. Matterhorn

Matterhorn is another company that provides ODR mainly within the courts.¹³¹ Matterhorn is capable of handling disputes such as small claims cases, family court compliance, traffic court, civil infractions, and misdemeanors.¹³² For small claims disputes, Matterhorn allows online negotiation between parties, as well as mediation or arbitration by an appointed third party.¹³³ It is generally connected to traditional court proceedings.¹³⁴ The program is highly streamlined and especially effective to facilitating easy payment of fines, as well as OArb where appropriate.¹³⁵

5. FairClaims

In contrast, FairClaims is an ODR provider that focuses on OArb.¹³⁶ The process involves the claimant signing in and providing information about the dispute and the other party.¹³⁷ FairClaims then contacts the other party and requests that they upload

¹²⁷ *Modria: Deliver Fast and Fair Online Dispute Resolution*, TYLER TECHNOLOGIES, <https://www.tylertech.com/products/Modria> (last visited June 5, 2020).

¹²⁸ *Id.* (Mediator and arbitrator services do not seem to be included.).

¹²⁹ *Id.*

¹³⁰ *Courts & Justice: Integrated Software for Courts & Justice Agencies*, TYLER TECHNOLOGIES, <https://www.tylertech.com/solutions/courts-public-safety/courts-justice#DisputeResolution> (last visited June 5, 2020).

¹³¹ *What is Matterhorn*, MATTERHORN, <https://getmatterhorn.com/tour/what-is-matterhorn/> (last visited June 6, 2020).

¹³² *Id.*

¹³³ *Small Claims*, MATTERHORN, <https://getmatterhorn.com/odr-solutions/civil/small-claims/> (last visited June 6, 2020).

¹³⁴ *Id.*

¹³⁵ *What is Matterhorn*, *supra* note 131.

¹³⁶ *How It Works*, FAIRCLAIMS, https://www.fairclaims.com/how_it_works (last visited June 6, 2020).

¹³⁷ *Id.*

all documentary evidence. After all parties agree on a date and time, a hearing is held which consists of a thirty-minute telephone call or video chat.¹³⁸ During the hearing, each side has a brief opportunity to state their case, and then the arbitrator will ask specific questions to both sides based on the statements and evidence.¹³⁹ At the conclusion of the hearing, the arbitrator may ask for additional evidence from either or both parties, who will then have four days to upload the additional evidence.¹⁴⁰ The arbitrator will render a decision within eight days of the hearing, and if an award of payment is granted, it must be made within fourteen days.¹⁴¹ FairClaims handles any claim that would otherwise be adjudicated in small claims court, including loan payments, service contracts, and security deposits.¹⁴²

6. FORUM

Another ODR provider that focuses on OArb is FORUM. This provider specializes in “[b]usiness-to-[b]usiness, [e]mployment, [f]ranchise, [i]ntellectual [p]roperty” and domain name dispute resolution.¹⁴³ The process again requires the claimant to file a claim using FORUM’s online portal.¹⁴⁴ FORUM then appoints an arbitrator or panel of arbitrators who handles scheduling hearings and ultimately makes a binding ruling issuing an award, which can be entered in any court of competent jurisdiction.¹⁴⁵ Preliminary scheduling hearings can be conducted via telephone, online, email, or in person, depending on the parties’ agreement.¹⁴⁶ Many cases are handled solely on the documents, meaning that the parties do not attend hearings in the case.¹⁴⁷ Par-

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *What Types of Cases Does FairClaims Handle?*, FAIRCLAIMS (May 20, 2020) <https://fair-claimshelp.zendesk.com/hc/en-us/articles/230918147-What-types-of-cases-does-FairClaims-handle->.

¹⁴³ *About Us*, FORUM, <https://www.adrforum.com/about> (last visited June 6, 2020).

¹⁴⁴ *Business-to-Business Arbitration*, FORUM, <https://www.adrforum.com/arbitration/b2b> (last visited June 6, 2020) [hereinafter *Business-to-Business Arbitration*]. Employment and intellectual property arbitration seem to be handled through a very similar set of rules and procedures. See *Employment Arbitration*, FORUM, <https://www.adrforum.com/arbitration/employment> (last visited June 6, 2020); see also *Intellectual Property (IP) Arbitration*, FORUM, <https://www.adrforum.com/arbitration/ip> (last visited June 6, 2020).

¹⁴⁵ *Business-to-Business Arbitration*, *supra* note 144.

¹⁴⁶ FORUM, CODE OF PROCEDURE FOR RESOLVING BUSINESS-TO-BUSINESS DISPUTES 45, https://www.adrforum.com/assets/resources/Arbitration/Rules/Forum.B2B_Rules.v2.3.pdf.

¹⁴⁷ *Id.* at 17, 80.

ticipatory hearings are typically reserved for larger claims, and parties retain power to decide if these hearings are conducted by telephone, videoconference, or in person.¹⁴⁸

7. ARS

Another example of a OArb provider is Arbitration Resolution Services (ARS). This provider offers online arbitration services for both business-to-individual and business-to-business disputes.¹⁴⁹ The process is much the same as the prior providers noted, with all documents handled through an online portal.¹⁵⁰ ARS assigns a neutral arbitrator who reviews the evidence, communicates with the parties, and renders a binding decision.¹⁵¹ The business-to-business arbitration service is limited to agreements under U.S. law.¹⁵² The decisions can be appealed through ARS, again online.¹⁵³ As is usual with arbitration, parties may enforce awards by having them entered as court judgments under the FAA.¹⁵⁴

With respect to procedure, ARS arbitrators usually decide cases on the documents, without a formal hearing.¹⁵⁵ This means that after the parties upload their documents and other discovery materials through the online document portal, the matter is referred to an arbitrator who renders a decision without hearing from the parties directly.¹⁵⁶ However, parties who wish to have a formal hearing can give notice of such intent at least three weeks prior to the scheduled hearing date and receive a formal hearing either via telephone or videoconferencing software.¹⁵⁷ The goal is to further efficiency and fairness in a flexible manner, which is a hallmark of OArb.¹⁵⁸

¹⁴⁸ *Id.* at 17–18.

¹⁴⁹ *Alternative Dispute Resolution through Online Arbitration and Mediation*, ARB. RESOL. SERV., <https://www.arbresolutions.com/about/> (last visited June 6, 2020).

¹⁵⁰ *How It Works*, ARB. RESOL. SERV., <https://www.arbresolutions.com/how-it-works/> (last visited June 6, 2020).

¹⁵¹ *Id.*

¹⁵² Rules & Regulations Business to Business Program, ARB. RESOL. SERV., <https://www.arbresolutions.com/rules-regulations-business-to-business-program/> (last visited June 6, 2020) [hereinafter *Rules & Regulations*].

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Rules & Regulations*, *supra* note 152.

B. Institutionalization of OArb

As OArb evolves, it has become among the offerings of traditional dispute resolution institutions, such as the American Arbitration Association (“AAA”), the Judicial Arbitration and Mediation Service (“JAMS”), and the International Institute for Conflict Prevention & Resolution (“CPR”). All of these organizations have long histories of offering in-person arbitration, but they are now offering virtual hearings and allowing for OArb. Notably, this new institutionalization of OArb focuses mainly on virtual hearings, while the prior OArb providers mainly utilize text-based dispute resolution processes. Indeed, the pandemic has raised the appetite for virtual hearings within the spectrum of traditional ODR offerings.

1. AAA

For example, the AAA offers a secure portal for parties to disputes to file claims, upload and manage their claim-related documents and files, schedule case-specific tasks, and view and rank potential arbitrators for selection.¹⁵⁹ It offers a similar portal for arbitrators to access and manage their cases and review related files and documents.¹⁶⁰ In addition, the AAA offers an online arbitration clause-building tool called ClauseBuilder.¹⁶¹

Traditionally, AAA hearings have been in-person with occasional use of video. However, the AAA has moved quickly in the wake of the pandemic to build and fortify its virtual hearing capacity and guidance.¹⁶² The AAA’s virtual hearing guide for arbitrators and parties provides tips for people using videoconferencing software to conduct arbitrations.¹⁶³ Tips include using a service, such as Zoom, that allows for private meetings protected by a password and to enable “waiting rooms” to allow the administrator to monitor who joins the meeting.¹⁶⁴

¹⁵⁹ AAA-ICDR *Technology Services*, AM. ARB. ASS’N, <https://www.adr.org/TechnologyServices/aaa-icdr-software-and-online-tools> (last visited June 18, 2020).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Amy J. Schmitz, *Arbitration Conversation No. 1 - Amy Chats with Svetlana Gitman*, ARBITRATE.COM, <https://arbitrate.com/article.cfm?zfn=arbconv1.cfm> (last visited June 30, 2020).

¹⁶³ AAA-ICDR *Virtual Hearing Guide for Arbitrators and Parties*, AM. ARB. ASS’N 1, https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf (last visited June 29, 2020).

¹⁶⁴ *Id.*

Security remains paramount for OArb. The AAA's panelist resource guide emphasizes that any software used for virtual hearings must have security features to safeguard the confidentiality of the process.¹⁶⁵ The software must also provide the capability to sequester witnesses during proceedings.¹⁶⁶ Further, if the parties decide to record the proceedings, the arbitrator or platform manager should store the file behind encrypted cloud storage and be careful when giving parties power to download and store the file for themselves.¹⁶⁷ This AAA guide also warns arbitrators to ensure that all involved parties feel comfortable in using the technology so that all parties have a fair and equal right of access to an online hearing.¹⁶⁸ Additionally, the AAA suggests that parties practice with the software before an online hearing, use stable connections, and have a backup plan in place if the technology fails.¹⁶⁹

Through AAA's website, you can also access an online arbitration portal for the State of New York's no-fault auto-insurance claims website. This ODR portal is powered by Modria's online dispute resolution software, although it is administered by the AAA.¹⁷⁰ This software allows users to upload and manage their documents, make settlement offers with their insurance companies, and negotiate a dispute.¹⁷¹ Parties are also able to make or receive payments and submit New York's arbitration request form, AR-1, all online.¹⁷²

2. JAMS

Similarly, JAMS also offers a variety of teleconferencing and videoconferencing options to assist in arbitration, including Microsoft Teams, Skype, GoToMeeting, and WebEx; their website encourages the use of Zoom in both arbitration and mediation.¹⁷³ JAMS also offers a checklist for the process that includes guidelines for preparing for the session, technical requirements, and an

¹⁶⁵ *AAA-ICDR Panelist Resource Guide for Virtual Hearings*, AM. ARB. ASS'N 5 (on file with author).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 6.

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *Id.* at 16–17.

¹⁷⁰ *Modria Resolution Center for the American Arbitration Association*, AM. ARB. ASS'N, <https://aaa-nynf.modria.com/> (last visited June 18, 2020).

¹⁷¹ *Id.*

¹⁷² *Id.* at 11, 34, 36, & 52.

¹⁷³ *Virtual Mediation & Arbitration*, JAMS, <https://www.jamsadr.com/online> (last visited June 18, 2020).

explanation of how the process works.¹⁷⁴ To prepare, parties need to agree to arbitrate online, determine how and where they will access the videoconference, and determine what documents they will share with the arbitrator.¹⁷⁵ The actual arbitration hearing consists of the arbitrator sending a Zoom meeting invitation to the parties and then proceeding with a normal arbitration, with special precautions for safety and security due to the use of an online communication mechanism.¹⁷⁶

3. CPR

Finally, CPR offers an array of arbitration services available to clients online.¹⁷⁷ They offer full-service administered arbitration that proceeds according to rules created by CPR.¹⁷⁸ CPR provides a list of experienced arbitrators to the parties, who are in control of selecting the arbitrator or panel of arbitrators, unless all parties agree to CPR appointing the arbitrator.¹⁷⁹ Arbitrations with CPR have traditionally been in-person hearings, especially perhaps because many claims involve disputes that may be worth upwards of \$500 million.¹⁸⁰

However, CPR's administered arbitration rules allow the arbitrator to conduct the arbitration in such a manner as he or she shall deem appropriate, which includes online mechanisms.¹⁸¹ It is therefore no surprise that in the wake of the pandemic, CPR has offered online training sessions to help neutrals and advocates learn how to use Zoom to effectively arbitrate online.¹⁸² CPR also released an annotated model procedural order for remote video arbitration proceedings: A guide for anyone interested in con-

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Arbitration*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/dispute-resolution-services/services-offered/arbitration> (last visited June 6, 2020).

¹⁷⁸ *Administered Arbitration*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/dispute-resolution-services/services-offered/arbitration-additional/administered-arbitration> (last visited June 6, 2020).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *2019 Administered Arbitration Rules: Rule 9: General Provisions*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 1, 2019), <https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019>.

¹⁸² *ADR in the Time of COVID-19: How Neutrals & Advocates Can Use Zoom for Mediations & Arbitrations*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 30, 2020), <https://www.cpradr.org/news-publications/videos/zoom-for-mediations-arbitrations-covid19>.

ducting a remote arbitration proceeding.¹⁸³ The order also provides instructions for security requirements for any potential video software being used, as well as desirable features of software.¹⁸⁴ This document also states that arbitrators should run a test or orientation session before the formal hearing and provides guidelines for what to do if software or equipment is not functioning properly.¹⁸⁵ Further, it provides guidelines, or proposed policies, on (1) an arbitration agreement; and (2) how to conduct the proceedings, including document examinations, witness examinations, and swearing in of witnesses.¹⁸⁶

4. Ad Hoc

At the same time, and along with institutions' adoption of OArb, ad hoc arbitrators are also using virtual hearings—especially in the wake of the pandemic.¹⁸⁷ Many arbitrators are using Zoom, although they must be careful with privacy and protocols.¹⁸⁸ The arbitration package should be emailed to the arbitrator and other parties before the hearing, and attorneys should talk to their clients about its substance and how the videoconference will be conducted.¹⁸⁹ It is important to be attentive to professionalism with clothes, video background, and use of “waiting rooms” and passwords to safeguard privacy.¹⁹⁰ Lawyers may be resistant to change, but the popularity and efficiency of virtual conferencing probably means people will continue to use it even after the pandemic is over.¹⁹¹ The option of having witnesses, clients, and adjusters appearing remotely reduces travel time and the likelihood of cancellations in general, which will continue to prove important as litigants aim to save money and courts face backlogs.¹⁹²

¹⁸³ NEW: CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings> (last visited June 18, 2020).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Alger, *supra* note 18, at 15–16.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 16.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 17.

IV. NEW QUESTIONS FOR OARB

The benefits of OArb are great, and there is no question that we will see more OArb and virtual hearings as the pandemic continues. We will also see a continued interest in OArb and virtual hearings after the pandemic subsides, as many have become accustomed to the time, cost, and “stress” savings of avoiding travel and in-person meetings.¹⁹³ At the same time, the law around the FAA continues to call for enforcement of arbitration agreements and awards on an individualized basis, even in employment and consumer cases.¹⁹⁴ It is nonetheless unclear where the law will land with respect to a need for specific consent for virtual hearings, allowance for third party discovery in virtual hearings, or the possibility for class arbitration online. Meanwhile, the usual concerns regarding ODR security, neutrality, training, and technological and other resource imbalances remain important. Policymakers, OArb providers, and other stakeholders should be cognizant of how legal and policy developments impact OArb and stand ready to champion policies that promote fairness and establish best practices.¹⁹⁵

A. *Enforcement of OArb Agreements and Awards*

The FAA provides for enforcement of arbitration agreements and awards. It does not speak to virtual arbitration, as the idea would have been inconceivable at the time of the Act’s passage in

¹⁹³ The same has been true with the use of Zoom and similar platforms to foster work-from-home. Katherine Guyot & Isabel V. Sawhill, *Telecommuting will likely continue long after the pandemic*, BROOKINGS (Apr. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/> (noting that 1 in 5 chief financial officers surveyed in spring 2020 said they planned to keep at least 20% of their workforce working remotely to cut costs); Maria Cramer & Mihir Zaveri, *What if You Don’t Want to Go Back to the Office?*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/05/business/pandemic-work-from-home-coronavirus.html> (a Gallup poll found a majority of adults working from home in the U.S. would prefer to continue working from home as much as possible after the pandemic). *But see* Greg Rosalsky, *COVID-19 Forces More People to Work from Home. How’s it Going?*, NPR (May 8, 2020, 5:04 AM), <https://www.npr.org/2020/05/08/852527736/covid-19-forces-more-people-to-work-from-home-hows-it-going> (noting that according to the Society of Human Resource Management, over 70% of employers report struggles with shifting to remote work).

¹⁹⁴ See *supra* text accompanying notes 53-62.

¹⁹⁵ See, e.g., *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 751 (E.D. Va. 2001) (holding that certain aspects of UDRP render the FAA provisions for judicial review of arbitration award inapplicable).

1925. Nonetheless, most have endorsed the enforcement of electronically created agreements and electronically submitted awards.¹⁹⁶ Indeed, parties continually click accept and become subject to arbitration agreements.¹⁹⁷ Courts have said that an electronic click can signify acceptance of a contract, and there is nothing inherently offensive about a web-based contract.¹⁹⁸ An agreement to arbitrate exists in a web contract where the notice of the arbitration provision was reasonably conspicuous, which is not a very high bar.¹⁹⁹ This is fortified by the E-Sign act, which “prohibits any interpretation of the FAA’s ‘written provision’ requirement that would preclude giving legal effect to an agreement solely on the basis that it was in electronic form.”²⁰⁰

That does not mean that concern for consent is thrown out the window. Contract law still governs whether one has consented to arbitration. For example, it was not enough in *Campbell v. General Dynamics Government System Corp.* that a company stuffed an arbitration agreement in a mass email, where the message did not put the employees on sufficient notice that they were bound by arbitration simply by receiving an email.²⁰¹ In contrast, courts have held that an employer binds an employee to arbitration where there is evidence that the employee logged into an online HR system with a unique login/password and pressed “accept” on the agreement.²⁰² These cases confirm caselaw enforcing “click-wrap” e-contracts that require one to affirmatively “click” on an “accept” button.

Nonetheless, these cases do not address enforcement of OArb per se. They simply speak to enforcement of arbitration e-contracts. Still, most surmise that courts would enforce OArb, with limits.²⁰³ This would comport with jurisprudence comparing arbitration agreements to forum-selection clauses.²⁰⁴ The U.S. Supreme Court in *Scherk v. Alberto-Culver Co.* stated “an agreement to arbitrate before a specified tribunal is, in effect, a specialized

¹⁹⁶ Caleb Gerbitz, *Are Pre-Dispute Agreements to Arbitrate Online Enforceable?*, 7 *ARB. BRIEF* 1 (Jan. 25, 2020), <https://ssrn.com/abstract=3561674>.

¹⁹⁷ *Meyer v. Uber Tech., Inc.*, 868 F.3d 66, 67–71 (2d Cir. 2017).

¹⁹⁸ *Id.* at 75.

¹⁹⁹ *Id.* at 76.

²⁰⁰ *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 407 F.3d 546, 547–79 (1st Cir. 2005).

²⁰¹ *Id.* at 559.

²⁰² *Holmes v. Air Liquide USA LLC*, 2012 WL 267194, at *2–3 (S.D. Tex. 2012), *aff’d*, 498 Fed. Appx. 405 (5th Cir. 2012). *See also*, *In re Holl*, 925 F.3d 1076 (9th Cir. 2019) (enforcing an arbitration clause in an e-contract).

²⁰³ Gerbitz, *supra* note 196, at 19.

²⁰⁴ *Id.*

kind of forum-selection clause.”²⁰⁵ Furthermore, most courts otherwise enforce forum-selection clauses in arbitration, even if it is inefficient, thereby placing contractual freedom at the forefront.²⁰⁶ Indeed, courts have enforced arbitration agreements that require a party to travel far from home, arguably supporting the notion that moving arbitration online simply moves the venue for the hearing.²⁰⁷ Still, as the next section notes, assent remains an essential element of an enforceable arbitration agreement under the FAA, and questions remain as to whether an agreement to arbitration includes assent to an online hearing.

In sum, the law has developed in directions suggesting that electronically created arbitration agreements and awards are enforceable under the FAA and the E-Sign Act. The law has accepted transactions’ move online, along with our burgeoning virtual marketplace. Furthermore, it is noteworthy that mediation legislation has begun to embrace online mediation throughout the world, especially in the wake of the pandemic.²⁰⁸ We live in an age of an arguable *lex virtualoria*, which embraces online transactions.²⁰⁹ Nonetheless, that is not to say that this embrace is limitless.

B. *Consideration of Contract Defenses*

Introducing technology into arbitration contracting and proceedings is not itself offensive under the FAA and E-Sign Act. Nonetheless, a precondition to application of the FAA is an enforceable arbitration contract complete with offer, acceptance, and consideration. Accordingly, one may ask whether parties to an arbitration agreement have assented to online hearings simply by

²⁰⁵ 417 U.S. 506, 510 (1974). *See also* Gerbitz, *supra* note 196, at 20.

²⁰⁶ Gerbitz, *supra* note 196, at 21.

²⁰⁷ *Id.* at 26.

²⁰⁸ Singapore Mediation Act 2017, § 3 (No. 1 of 2017), <https://sagemediation.sg/wp-content/uploads/2019/08/Singapore-Mediation-Act-2017.pdf> (allowing for online mediation); G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation, at Art. IV (Dec. 20, 2018) (allowing for online mediation); Angela, *Ministry of Justice Allows Virtual Mediation*, LERMAN & SZLAK (May 5, 2020), <https://lermanszlak.com/ministry-of-justice-allows-virtual-mediation/>; Angela, *Guide for Virtual Mediations*, LERMAN & SZLAK (May 27, 2020), <https://lermanszlak.com/guide-for-virtual-mediations/>.

²⁰⁹ Arbitration developed within commercial development, and establishment of a “*lex mercatoria*,” or law of the merchant, which was the governing principle in commercial arbitrations. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 144 (1934) (quoting GERARD MALYNES, *LEX MERCATORIA* 303 (1622)).

agreeing to “arbitration” in their contract. Does such blanket assent to “arbitration” include agreement to online hearings? For example, one can envision that a party bound to a pre-dispute arbitration clause in a form contract could resist OArb, arguing that they agreed to the traditional notion of in-person arbitration, but not online arbitration.

This question of assent emanates from a recent National Arbitration Academy (“NAA”) Opinion. On April 1, 2020, the NAA issued Advisory Opinion No. 26 regarding whether an arbitrator may order a video hearing over a party’s objection.²¹⁰ The NAA found that the need to “provide a fair and adequate hearing” and to “provide effective service to the parties” would allow an arbitrator to issue such an order without mutual consent in certain extraordinary circumstances.²¹¹ For example, it may be proper for an arbitrator to order virtual hearings over a party’s objection where the “hearing has been postponed previously, a party in opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time-sensitive matters.”²¹²

The NAA advisory opinion stresses that before issuing such an order, an arbitrator should be confident that he or she, as well as the parties and counsel, are familiar with the video platform to be used.²¹³ Still, the opinion says that if one party does not agree to a virtual hearing, the arbitrator or panel may order that the hearing be conducted via videoconference, provided it will give the parties “a fair and reasonable opportunity to present their case and will allow the hearing to move forward on the dates previously scheduled.”²¹⁴

Again, that brings us back to whether the original agreement to “arbitration” would support this action. A court could find that assent is lacking because “arbitration” and online arbitration are fundamentally different, or it could conclude that movement of the forum from in-person to online is nothing more than a change of venue that is enforceable as long as it does not deny reasonable

²¹⁰ COMM. ON PRO. RESP. & GRIEVANCES, NAT’L ACAD. OF ARBITRATORS, FORMAL ADVISORY OPINION NO. 26: VIDEO HEARINGS (Apr. 1, 2020), <https://naarb.org/wp-content/uploads/2020/04/CPRG-Opinion-Summaries-4.13.2020.pdf>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ P. Jean Baker, *Utilizing Virtual Arbitration during the Pandemic*, A.B.A. (May 26, 2020), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/articles/2020/spring2020-utilizing-virtual-arbitration-during-the-pandemic/>.

²¹⁴ *Id.*

access to an adequate hearing in the arbitrators' judgment. With these questions unresolved, it seems that online proceedings per the NAA opinion, without assent of both parties, could make an award vulnerable to challenge.

At the same time, unconscionability remains a viable defense to enforcement of an arbitration agreement where procedural and substantive unconscionability exist.²¹⁵ Procedural unconscionability may exist where a party has no choice but to accept online arbitration, and substantive unconscionability could be an issue if the agreement unfairly narrows the online platform or allows for mischief around arbitrator selection.²¹⁶ Such a finding would depend on the facts and circumstances and the parties' reasonable access to technology.

At the time of this article, the caselaw around online arbitration is lacking. However, cases are starting to appear. In *Legaspy v. Fin. Indus. Reg. Auth., Inc.*, Legaspy asked for a temporary restraining order and injunctive relief against FINRA to stop them from holding a virtual arbitration hearing, and the district court denied his motions.²¹⁷ The parties signed an agreement saying that the hearing would be held at a time and place designated by the director of FINRA, and that it would be conducted in accordance with FINRA's Code of Arbitration Procedure.²¹⁸ The arbitration was scheduled on August 17, 2020 in Florida, but because of COVID-19, FINRA told the parties on June 23, 2020 that the hearing was canceled and would be either rescheduled or held electronically (through Zoom or telephone conference).²¹⁹ Legaspy argued that the proceedings would be difficult and irregular, especially because the other parties need an interpreter (they are from Argentina) and the cost will exceed his insurance coverage.²²⁰

Nonetheless, the court found that the parties agreed to abide by FINRA rules, which allow for remote hearings and the power to decide the propriety of remote hearings in each case. Accordingly, the court rejected Legaspy's arguments that "attending a hearing" meant it had to be in person, and Legaspy did not provide evidence to show why he could not present an effective defense over Zoom.

²¹⁵ Gerbitz, *supra* note 196, at 21–30.

²¹⁶ *Id.*; See also Amy J. Schmitz, Dangers of Deference to Form Arbitration Provisions, 9 NEV. L.J. 37–57 (2007).

²¹⁷ 2020 WL 4696818, at *1–5 (N.D. Ill. Aug. 13, 2020).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

It is not enough that Zoom may be “clunkier than in-person hearings,” as this does not prevent parties from presenting defenses.²²¹

Similarly, in *In re Online Travel Co.*, the court held that an arbitration agreement requiring non-class arbitration was enforceable, noting that the clause also prohibited in-person arbitration without the company’s permission.²²² Notably, the court did not have to directly address the issue of in-person hearings because the company agreed post-dispute to arbitrate in person, but the opinion seems to endorse the idea that arbitration “forum” provisions, including elimination of in-person hearings, are *prima facie* valid and should be enforced unless they are unreasonable.²²³

Still, even using the forum selection analogy, an arbitration clause calling for a virtual “location” could be unreasonable where a party lacks access to required technology.²²⁴ In *Nagrampa v. MailCups, Inc.*, the Ninth Circuit ruled that the arbitration agreement’s forum selection clause was unconscionable because it was a part of a contract of adhesion, and the place and manner were unduly oppressive.²²⁵ In particular, the claimant would have had to travel to Boston, Massachusetts from California, which would have been unduly oppressive and harsh considering the circumstances of the parties.²²⁶ Again, the court did not deny that forum selection clauses are generally valid, but a forum is unreasonable where it would be unduly oppressive or shield the stronger party from liability.²²⁷ Accordingly, it would be unreasonable to force a party to arbitrate online where the party lacked access to and/or comfort with the required technologies.

Some also argue that states may be able to limit enforcement of online arbitration if they do not single arbitration out for special treatment.²²⁸ The state would have to promulgate the rule as a

²²¹ *Id.* at 4.

²²² 953 F. Supp. 2d 713, 723 (N.D. Tex. 2013).

²²³ *Id.* at 720–24. The court notes that the prohibition of live appearances at arbitration was essentially “mooted” because Travelocity agreed to submit to in-person arbitration, but the comparison to forum selection clauses seems apt and suggests that they may view online as just another forum. Again, the court did not directly address this issue, but it warrants noting, especially due to the void one finds in seeking cases dealing with online arbitration.

²²⁴ Gerbitz, *supra* note 196, at 27.

²²⁵ 469 F.3d 1257, 1293 (9th Cir. 2006).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Gerbitz, *supra* note 196, at 31–32. For example, a Montana statute that limits forum-selection clauses that call for a forum outside Montana has survived FAA preemption, and could even be taken to prohibit online arbitration if one of the parties accesses a platform outside of the state.

state policy against virtual hearings in general—in court or in arbitration. Such a uniformly and generically applied rule would comport with decisions allowing for such blanket “procedural” rules. However, such a ban on virtual hearings of all types would be a surprising move, as the pandemic has moved many courts to use virtual hearings. Moreover, allowing online court and arbitration hearings has been a means for generally expanding access to remedies, for all of the reasons noted above and discussed in prior works.²²⁹

C. *Discovery from Third Parties*

The *Managed Care Advisory Group* case noted above raises important questions regarding discovery by third parties in virtual hearings. The circuit split regarding the interpretation of FAA § 7 may reach the Supreme Court, as district courts struggle with questions surrounding third-party discovery under the FAA. As the above discussion demonstrates, there are different ways to read § 7 with respect to virtual hearings: (1) literally as “before them” was understood in 1925; or (2) functionally as it would comport with modern times and understandings of “attend” given the virtual world we have seemingly embraced. As the court in *Managed Care Advisory Group* highlighted, the plain letter of the statute empowers arbitrators’ power to “summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”²³⁰ In 1925, this would have only given power to order third party witnesses to attend physically, not virtually.

With this reading, § 7 does not allow for third party discovery, testimony, or documents in OArb where there are no in-person hearings. This creates a real issue for any party who will need testimony or documents from third parties, whether they are using one of the OArb providers above or simply incorporating Zoom or another virtual hearing format into their proceedings. Taken further,

²²⁹ *Id.* at 37–38. See also Amy J. Schmitz, *Measuring “Access to Justice” in the Rush to Digitize*, 88 *FORDHAM L. REV.* 2381 (2020); Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67 *BUFFALO L. REV.* 89, 101–73 (2019) [hereinafter *Expanding Access to Remedies*]; Amy J. Schmitz, *A Blueprint for Online Dispute Resolution System Design*, 21 *J. INTERNET L.* 3, (2018); SCHMITZ & RULE, *supra* note 17.

²³⁰ 9 U.S.C. § 7 (1947); *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019).

this means that all the arbitrations during a lockdown in the pandemic must strictly rely on party-to-party evidence, or wait until they can be in person in those jurisdictions following *Managed Care Advisory Group*. Again, arbitration contracts providing for hearings, depositions, other pre-hearing discovery by video, have no bearing on non-parties to the arbitration agreement.

Such a 1925 reading of § 7 seems to comport with the U.S. Supreme Court’s reasoning in *New Prime Inc.* The Court under *New Prime Inc.* read “contracts of employment” as it would be understood in 1925 when Congress passed the FAA.²³¹ Accordingly, the Court read the term to include independent contractors, as well as workers in traditional employment relationships with their employers.²³² This temporal, literal reading of the FAA provides a signal that the Supreme Court may decide the circuit split in line with *Managed Care Advisory Group*.

That said, one could read *New Prime Inc.* as supporting a functional reading of the FAA, in that the “function” of the word “workers” would include regular employees and independent contractors in 1925. Accordingly, the intent is to exclude all of these workers’ contracts from the FAA. Similarly, one could argue that the Court will read “attend before them” to allow arbitrators to order testimony in online hearings because video conferencing allows for meaningful “attendance”—which is what the FAA drafters intended per § 7. Arguably, Congress would have endorsed the power to subpoena video testimony, if video conferencing existed in 1925, in order to promote efficient dispute resolution, which lies at the heart of the FAA.

Furthermore, other recent U.S. Supreme Court pronouncements are quite “pro arbitration,” indicating a willingness to expand the scope of FAA enforcement. This would suggest that the Court would read § 7 to allow for broader discovery to promote arbitration’s functionality. As noted above, most circuits have not addressed the question of virtual hearings specifically. The circuits, other than the Eleventh, weighing in on the application of § 7 have mainly focused on whether the FAA allows for pre-hearing discovery by third parties. Again, the Eighth Circuit has specifically adopted a more functional reading of § 7 in stating that the FAA allows for pre-hearing discovery.²³³ The court used ideas reso-

²³¹ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

²³² *Id.* at 536.

²³³ *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 870–71 (As noted above, the circuit court held that “implicit in the arbitration panel’s power to subpoena relevant documents for production at

nating from the Supreme Court's pro-efficiency and pro-enforcement jurisprudence in finding that allowing pre-hearing discovery would further efficient resolution of disputes, thus promoting arbitration.²³⁴

As noted above, the court in *Moyett v. Lugo-Sanchez* also adopted this functional reading of § 7 wherein it found that the arbitrators still “sat” in Puerto Rico, even if by video, for the purpose of the hearings. This meant that the district court had the authority to enforce third-party subpoenas under the FAA. The court recognized that video hearings replicate in-person hearings and provide the same functions in arbitration proceedings. This seems especially logical in the wake of the pandemic, as proceedings have moved online en masse.

Again, parties to the arbitration agreement may allow for OArb and virtual hearings under their agreements, and most arbitral institutions allow for virtual hearings, as noted above. However, one must rely on a statute, namely § 7, to get the court to order testimony and/or documents *from third parties*. Accordingly, this will be an important issue going forward, and it would be wise for courts to read § 7 functionally in order to promote efficient dispute resolution. The *Managed Care* reading would render OArb impractical in many cases, as third-party discovery is often important. Furthermore, it seems unwise for courts to embrace Luddite statutory interpretation at a time when a pandemic has escalated a rush toward virtual proceedings in court and out.

D. Addressing Class Claims

As noted above, recent Supreme Court pronouncements have affirmed enforcement of arbitration clauses that cut off access to a class action in court. The Court also has disavowed class arbitration, making it only available where parties clearly allow for class arbitration in their contract. Per *Lamps Plus, Inc.*, it is not sufficient that an arbitration agreement is silent or ambiguous on the issue.²³⁵ Moreover, the view emanating from Supreme Court opinions suggests that the idea of class arbitration would thwart the efficiency of arbitration. In sum, Supreme Court jurisprudence

the hearing is power to order the production of relevant documents for review by a party prior to the hearing.”).

²³⁴ *Id.*

²³⁵ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019).

clears the path for companies to use arbitration clauses to cut off access to any sort of class proceedings, in court or arbitration.

At the same time, in-person arbitration is problematic for consumers and employees, which is why many critique pre-dispute arbitration clauses in these contexts.²³⁶ When consumers' only means to a remedy is in-person arbitration, they often forego remedies if the cost to arbitrate is too high when compared to the likely award. In fact, despite the prevalence of arbitration clauses in consumer contracts, not many consumers have pursued arbitration over the past ten years.²³⁷ Recently, researchers investigated data on single-file arbitrations from the AAA database within the last five years.²³⁸ They found that the numbers of consumer claims were small. Limited spikes in claims only appeared in relatively rare cases where lawyers brought multiple actions on similar claims—thus incentivizing respondents to settle these individual claims as a class.²³⁹

OArb adds a new wrinkle with respect to criticisms regarding arbitration clauses' power to cut off access to class actions. OArb arguably makes it easier to have individualized arbitrations at a low cost, thereby making it more palatable in some cases to eliminate access to class proceedings. In other words, OArb provides a response to the continued enforceability of class action waiver clauses by giving individuals a low-cost means for obtaining an evaluative determination on the merits of their claims.²⁴⁰ Furthermore, OArb has enforcement "teeth" because the FAA's enforcement procedures give parties access to remedies from final determinations.

Allowing for virtual hearings in arbitration may also benefit companies. Mass filing tactics used by plaintiffs' attorneys have overwhelmed some companies, forcing them to face the costs of defending many in-person arbitrations.²⁴¹ This has arguably happened with mass arbitrations against Uber, Lyft, and Chipotle.²⁴² For example, over 12,000 Uber drivers filed arbitration claims

²³⁶ Judith Resnik et al., *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 *LEWIS & CLARK L. REV.* 365 (2020).

²³⁷ *Id.* at 369.

²³⁸ *Id.* at 404–09.

²³⁹ See generally *id.* It was also in these cases that consumers had a better chance of success.

²⁴⁰ See SCHMITZ & RULE, *supra* note 17, at 100–87.

²⁴¹ Erin Mulvaney, *JPMorgan, Facebook Fight Mass Arbitration Legal Strategy*, *BLOOMBERG L.* (July 3, 2019, 5:58 AM), <https://news.bloomberglaw.com/daily-labor-report/jpmorgan-facebook-fight-mass-arbitration-legal-strategy>.

²⁴² *Id.*

against Uber in August 2018; it would have cost more than \$18.7 million for Uber to participate in all of the arbitration proceedings.²⁴³ These mass individual filings have become a strategy attorneys may employ to incentivize a settlement.²⁴⁴ Accordingly, companies may welcome OArb as a more efficient and less costly means for addressing such mass filings.

Claims management companies have already learned that use of technology promotes efficient resolution of mass claims. For example, a claims management company may use online forms and virtual hearings to determine how much each claimant should get from a class settlement. On April 16, 2020, the Federal Court of Australia denied Ford's request to adjourn proceedings until in-person hearings were possible under *Capic v. Ford Motor Company of Australia Ltd.*²⁴⁵ The Court decided that in order to provide consumers with access to remedies during the pandemic, they would use virtual video hearings for determining individual payouts. This would further the interest of efficiency for the courts as well, given that courts would face a daunting backlog if they continually delayed until the pandemic ends.²⁴⁶ The courts nonetheless acknowledged that there may be cases where technological difficulties provide a valid reason for rescheduling the hearings.²⁴⁷

Setting aside efficiency and cost benefits of OArb, valid reasons remain for class actions in court. Class actions shed public light on company misdeeds and issues of health and safety, which allows citizens to act as private attorneys general. Nonetheless, claimants often simply want a remedy and are less concerned with fulfilling this function, especially where it means that attorneys' fees may dilute individual payouts. With online platforms, individuals can easily file claims, execute agreements, upload documents regarding their individual claims, and stay informed with updates on their cases.²⁴⁸ Online databases also allow the use of key word

²⁴³ Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L. (Feb. 11, 2019, 6:06 AM), <https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in>.

²⁴⁴ *Id.*

²⁴⁵ Fiona Dernikovic & Marion Wright, *Adjournments and e-trials in the COVID-19 Context*, LSJ ONLINE (June 1, 2020, 8:55 AM), <https://lsj.com.au/articles/adjournments-and-e-trials-in-the-covid-19-context/>; *Capic v Ford Motor Company of Australis Ltd* [2020] FCA 486 (2020) (Austl.).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Peter Cashman & Eliza Ginnivan, *Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions*, 19 MACQUARIE L. J. 39, 42–65 (2019).

searches, which, if made public, could assist with transparency around consumer remedies. Furthermore, ODR developers will continue to devise ways for incorporating AI into OArb systems in order to simplify claims resolution and further boost its efficiency and cost-savings benefits.²⁴⁹

Again, it is more than virtual hearings that we should consider as arbitration moves online. The pandemic may have caused arbitrations to move online more quickly than expected, but this momentum is likely to continue as attorneys, arbitrators, and clients see the efficiencies of OArb. Using technology from the outset is significantly faster and more cost efficient than traditional methods used in class actions to evaluate and process individual claims.²⁵⁰ Of course, that does not mean that ODR should be the only door to remedies. Instead, this Article merely suggests consideration of how OArb may have special importance for opening access to remedies. An employee forced into individualized arbitration may well prefer the lower costs and time involved in OArb as compared with in-person arbitration, which often involves travel and time off work and away from family. Moreover, companies and employers may beg for consolidations and class-wide settlements when plaintiffs' counsel files hundreds of individual arbitration claims against them.²⁵¹

Nonetheless, concerns remain with respect to the loss of class actions due to arbitration agreements, especially in consumer and employment cases. This may undermine the enforcement of statutory consumer protections and other public rights. For example, enforcement of arbitration clauses has stopped class actions on consumer claims under the Truth in Lending Act in the U.S.²⁵² Likewise, class actions are important for protecting employees' rights, especially in discrimination and harassment claims.

²⁴⁹ *Id.* at 50–75. Shareholder cases provide an example of a case for electronic claims management. A sophisticated OArb platform can utilize multivariate statistical methods to determine an inflated price, for example, as well as market factors that may have had an impact in determining damages with respect to shareholder claims. The Merck shareholder settlement included an online platform with mathematical tables, enabling shareholders to calculate their estimated losses. Visa and Mastercard also utilized computer-based processing in their recent settlement for charging excessive fees. See also Amy J. Schmitz, *Addressing the Class Claim Conundrum with Online Dispute Resolution*, 2020 J. DISP. RESOL. 361 (2020).

²⁵⁰ Schmitz, *supra* note 249.

²⁵¹ *Id.*

²⁵² *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000) (finding that although Randolph had provided information regarding high AAA arbitration fees and costs, it was not clear that she could not pay them).

For these reasons, OArb should be more transparent. In other words, short of federal legislation to reverse the trend enforcing pre-dispute arbitration clauses in consumer and employment cases, policies could at least promote transparency with respect to arbitration. For example, an OArb system could include a “trip wire mechanism” that would alert regulators about recurring claims regarding a particular product or employer, especially where health or safety are at risk. This could “trip” public alerts and promote public awareness about a danger that may otherwise remain private without public action in the courts. The trip wire mechanism also would benefit regulators by helping them determine when to pursue enforcement actions, thus addressing under-enforcement of statutory and other public policy claims like that which has arguably occurred in the U.S. It also would augment efficiency by saving regulators the time and costs of launching broad investigations to learn about issues that may otherwise remain secret due to privatized processes.

In sum, the Supreme Court has signaled approval of arbitration clauses’ power to cut off access to class actions in court, while disapproving of class arbitration procedures. This is problematic for individuals with low-dollar claims who need to join forces in order to make it worthwhile to pursue in-person proceedings. OArb becomes important in these circumstances because it adds a new door to remedies that may please all parties by allowing individuals to access remedies without the cost and time of in-person proceedings and saving companies from the notorious fears of class proceedings. Nonetheless, ideas like adding a “trip wire” for repeated claims could help provide transparency around public policy issues.

E. *Continued Vigilance Regarding the Digital Divide*

OArb, and ODR more generally, empower marginalized groups by easing some of the social and power pressures of in-person communications. This is especially true for individuals who fear stereotypes or biases based on appearance, voice, or accent.²⁵³ Although social media is notoriously inflammatory and divisive, the fact remains that some individuals are less adversarial through

²⁵³ See Paul Stylianou, *Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border E-Commerce Disputes*, 36 SYRACUSE J. INT’L L. & COMM. 117, 125 (2008).

e-mail than in-person because asynchronous communications give them time to digest thoughts and dissipate anger before replying.²⁵⁴

Nonetheless, a “digital divide” persists in terms of consumers’ differential access to technology and the Internet.²⁵⁵ Income, age, and educational attainment remain considerable barriers to the use of technology, although smartphones have narrowed this divide with respect to race and ethnicity. This has become apparent in the wake of the pandemic, as families without adequate access to the Internet struggled to educate their children.²⁵⁶ Pew Charitable Trust reported that one in five parents with schoolchildren at home say it is very or somewhat likely their children will not be able to complete their work because of lack of access to a computer or Internet.²⁵⁷ Families reported having to use public Wi-Fi because they do not have Internet at home.²⁵⁸ Indeed, the pandemic has shined a light on technological disparity.²⁵⁹

²⁵⁴ See Susan C. Herring, *Computer-Mediated Communication on the Internet*, 36 ANN. REV. OF INFO. SCI. & TECH. 109, 144–45 (2002); David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution Can Improve the Registry of Interpreters for the Deaf Ethical Practices System: The Deaf Community Is Well Prepared and Can Lead by Example*, 10 CARDOZO J. CONFLICT RESOL. 131, 140–41 (2008) (explains evidence that less bullying occurs through online communication than F2F).

²⁵⁵ Thom File, *Computer and Internet Use in the United States*, U.S. CENSUS BUREAU (May 2013), <https://www.census.gov/prod/2013pubs/p20-569.pdf>.

²⁵⁶ Suzanne Woolley et al., *U.S. Schools Trying to Teach Online Highlight a Digital Divide*, BLOOMBERG (Mar. 26, 2020, 7:00 AM), <https://www.bloomberg.com/news/articles/2020-03-26/covid-19-school-closures-reveal-disparity-in-access-to-internet> (noting that NYC has an estimated 300,000 students without access to electronics); Carrie Jung, *Without Internet Access, Students and Teachers In Rural Areas Struggle To Keep Up*, NPR (May 23, 2020, 5:17 PM), <https://www.npr.org/2020/05/23/861577381/without-internet-access-students-and-teachers-in-rural-areas-struggle-to-keep-up> (noting deficiencies for children in some rural communities); Lara Fishbane & Adie Tomer, *As classes move online during COVID-19, what are disconnected students to do?*, BROOKINGS (Mar. 20, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/20/as-classes-move-online-during-covid-19-what-are-disconnected-students-to-do/> (citing data in Internet disparities, suggesting that there are challenges faced by low-income students and their families).

²⁵⁷ Emily A. Vogels, et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.

²⁵⁸ *Id.* About one in three parents say that it is at least somewhat likely their children will have to do work on a cellphone (the likelihood increases for lower income families). Rural and urban children are more likely than suburban children to struggle with schoolwork because of lack of digital resources.

²⁵⁹ Dana Goldstein, *The Class Divide: Remote Learning at 2 Schools, Private and Public*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/05/09/us/coronavirus-public-private-school.html>. Students at private schools have had extra lessons via Zoom and resources sent to them, while there is less access to these resources at the public schools. This will have deep impacts on educational gaps overall.

The Internet has become a necessity, with Pew Research Center reporting in 2019 that 90% of U.S. adults used the Internet.²⁶⁰ This included 73% of adults over 65, versus 97% of adults 30–49 and 100% of adults 18–29.²⁶¹ Accordingly, age remains a factor in differential use of the Internet. The 2019 study also showed that 92% of white people used the Internet, versus 85% of Black and 86% of Hispanic people. Race therefore also remains a differentiating factor.²⁶² Income also remains an issue, as 98% of U.S. adults making over \$75,000 used the Internet, in contrast with 82% of adults making less than \$30,000.²⁶³

How one accesses the Internet is important when it comes to OArb, as those with broadband access on a computer often enjoy more facility with the process because it is generally easier for them to upload documents and engage with the proceedings. This is important in light of differentials within in-home broadband.²⁶⁴ Pew reported that as of February 2019, 73% of U.S. adults were home broadband users.²⁶⁵ However, only 59% of U.S. adults over 65 years old had home broadband, versus 79% of adults ages 50–64, 77% of adults ages 30–49, and 77% of adults ages 18–29.²⁶⁶ Additionally, 79% of white U.S. adults had home broadband versus 66% of Black and 61% of Hispanic adults.²⁶⁷ The largest differentiating factor is nonetheless economics, as 92% of U.S. adults making over \$75,000 a year had home broadband, while only 56% of adults making less than \$30,000 enjoyed the same home access.²⁶⁸

These numbers solidify the growing share of U.S. adults who use smartphones as their primary means of online access. The Pew Research Center reports that in 2019, 17% of U.S. adults are smartphone-only Internet users (meaning they use a smartphone, but do not have home broadband).²⁶⁹ Importantly, this segment is made up of individuals who disproportionately self-identify as non-

²⁶⁰ *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> [hereinafter *Internet/Broadband Fact Sheet*].

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Internet/Broadband Fact Sheet*, *supra* note 260.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

white and lower income.²⁷⁰ In 2019, 12% of white U.S. adults did not have home broadband, compared with 23% of Black and 25% of Hispanic adults.²⁷¹ At the same time, 6% of U.S. adults making over \$75,000 per year were smartphone-dependent, compared with 26% of adults making less than \$30,000.²⁷² Furthermore, only about 60% of people on Tribal lands have access to broadband Internet.²⁷³

The overall statistics indicate growing reliance on the Internet coupled with expanding reliance on mobile access.²⁷⁴ This means that processes like OArb and other forms of ODR must be mobile friendly to ensure equal access.²⁷⁵ Smartphones have helped narrow the digital divide among races and ethnicities, but a divide continues with respect to broadband access. Furthermore, policymakers and businesses must continue to work together to address the continuing divide based on age and education and consider ways to expand Internet access and education programs for vulnerable groups.²⁷⁶

Any use of virtual hearings should ensure parties have access to legal representation and ensure attorneys can participate fully with their clients. Administrators must also remain available to assist with technical issues, answer questions regarding arbitration procedures, and refer self-represented litigants to low-cost or free legal services. This could be developed with input from relevant stakeholders, such as legal aid organizations and private bar associations, to maximize engagement. The best OArb practices, es-

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Internet/Broadband Fact Sheet*, *supra* note 260.

²⁷³ *Bridging the Digital Divide for All Americans*, FED. COMM. COMM'N, <https://www.fcc.gov/about-fcc/fcc-initiatives/bridging-digital-divide-all-americans> (last visited June 6, 2020). According to the International Telecommunication Union, approximately 4.1 billion used the Internet in 2019 across the world (an 5.3% increase from 2018). INT'L TELECOMM. UNION, *MEASURING DIGITAL DEVELOPMENT: FACTS AND FIGURES* (2019), <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf>.

²⁷⁴ According to a June 2020 study by Statista, 61% of respondents said they mainly access the Internet at home by broadband, 17% said they mainly accessed it by mobile connection via smartphone/tablet, 4% said they accessed it by satellite, and 1% said they didn't have Internet access at home. Alexander Kunst, *Internet Access by Type in the U.S. 2020*, STATISTA (June 22, 2020), <https://www.statista.com/forecasts/997163/internet-access-by-type-in-the-us>.

²⁷⁵ John Busby et al., *FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access*, BROADBANDNOW RSCH. (Feb. 3, 2020), <https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent>.

²⁷⁶ See, e.g., Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES (May 28, 2015), <https://www.nytimes.com/2015/05/28/business/fcc-chief-seeks-broadband-plan-to-aid-the-poor.html> (discussing plans to expand access to the Internet for the poor).

pecially when connected with the court, must also include access to “kiosks” with free Wi-Fi for filing and managing OArb claims, along with human “helpers” to assist those who are not comfortable with technology.²⁷⁷

Moreover, OArb is not right for every person or every claim. Individuals should not be forced to sign an arbitration agreement that requires online hearings. Accordingly, clauses calling for mandatory OArb with no meaningful opportunity for consent should not be enforceable. The FAA only calls for enforcement of valid arbitration clauses complete with consent.²⁷⁸ As noted above, such clauses also may be unconscionable where the clause is hidden in an adhesion contract and when the process would not be fair due to one party’s lack of access to or comfort with technology.²⁷⁹

F. *Addressing Loss of In-Person Interactions*

Thus far, this Article has noted benefits of online communications, including cost savings and time savings of OArb due to its flexibility and elimination of travel needs. Some parties may also feel more confident or at ease when participating in an arbitration from the comfort of their own homes. However, this is not to discredit or ignore the importance of face-to-face interactions.²⁸⁰ Indeed, discussions around the importance of in-person interactions have been especially prevalent with respect to mediation and negotiation, especially when there is a need for “venting” and reliance on body language as part of the overall dialogue.

In-person interactions may also be important for arbitration. First, arbitrators have legitimate concerns about use of remote technology for obtaining and hearing evidence. This includes concerns about whether a witness has been given answers by someone else in the room or through a computer or telephone that is acces-

²⁷⁷ *Expanding Access to Remedies*, *supra* note 229, at 101–60.

²⁷⁸ See *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432 (Mo. Sup. Ct. 2020) (en banc). In this case, the court held that a party did not consent to arbitration where a former Dollar Tree employee who was legally blind was never provided with a reasonable means to read and understand a form arbitration provision included in hiring paperwork. *Id.*

²⁷⁹ *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1293 (9th Cir. 2006) (holding that the arbitration agreement’s forum selection clause was unconscionable because it was a part of a contract of adhesion, and the place and manner requirements (traveling to Boston from California) were unduly oppressive and harsh considering the circumstances of the parties).

²⁸⁰ Adam Samuel, *Now Plaguing Dispute Resolution Processes: Proceeding in ADR Without the Handshakes*, 38 ALTERNATIVES TO HIGH COST LITIG. 71 (2020).

sible, but discrete, in a remote setting.²⁸¹ Although witnesses may be clandestinely “coached” during in-person proceedings through inappropriate elevator conversations or secret notes, the online environment allows for greater leeway for inappropriate witness assistance.²⁸²

There is no perfect way to prevent witnesses from being able to covertly chat with counsel through texts out of the camera’s view or using an online chat function. Still, there are some precautions that arbitrators should take. For example, they should disable “chat” functions within conferencing software (such as Zoom) and warn witnesses of their duty to provide honest testimony based on the facts as they know them. Arbitrators may even require oaths under some arbitral rules. Furthermore, attorneys should understand that they violate ethical rules if they secretly “guide” witnesses to provide a certain response or clandestinely urge them to look at a particular document in response to a question.

The lack of in-person proceedings may also disproportionately harm those parties that are less technological savvy. For example, individuals comfortable with and knowledgeable about using Zoom have benefitted during the pandemic by understanding the importance of lighting and placement of a camera. Furthermore, those who live in spaces with fewer distractions may have an advantage over those stuck in a crowded environment where it is difficult to focus during an online hearing. Moreover, this all becomes especially important when an arbitrator is assessing the evidence as presented online in order to reach a binding decision.

Putting evidentiary issues aside, loss of in-person interaction in arbitration may also hinder settlement opportunities. In reality, “breaks” during an arbitration proceeding provide informal opportunities for the arbitrator to leave the parties alone in a room, long enough for them to discuss issues and sometimes settle the dispute on terms they feel comfortable with.²⁸³ When people have lunch together during face-to-face arbitration, they develop relationships and are encouraged to arrange to meet elsewhere and settle.²⁸⁴ Arguably, Zoom breakout rooms and intermittent phone discussions during a proceeding may be even better for fostering settlement, but in-person interactions continue to hold some importance.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

In sum, documents-only arbitration and virtual hearings have merit in many cases, especially in the pandemic, as health concerns around physical presence remain. Nonetheless, that does not mean that physical presence lacks value. Indeed, there are limitations of modern technology.²⁸⁵ In-person arbitration should remain an option, and arbitrators should take special care to ensure that all parties in OArb feel comfortable and have full ability to present their cases. In some cases, this may even mean that the arbitrator should call for a continuance amid a virtual hearing to allow for completion through in-person hearings to be sure all parties are adequately heard.

V. CONCLUSION

Technology has provided immense fuel for fashioning procedures to advance access to justice by adding a “virtual door” to the courthouse through ODR. At the same time, OArb has grown as a subset of ODR, and virtual hearings have become part of the new normal in the pandemic—a normal that is expected to continue post-pandemic. When properly designed, OArb may allow individuals to resolve disputes quickly and cheaply, without the cost or hassle of travel or time away from work. That is not to say that OArb is perfect or suited to every case or party. A digital divide persists, and policymakers must be careful as they digitize due process.²⁸⁶ Furthermore, we must consider the role of class actions and assess how U.S. Supreme Court jurisprudence around the FAA may impact OArb as it becomes mainstream. In fact, we may find that this jurisprudence may deserve reconsideration—or at least functional consideration—in order to protect fairness and comport with modern legal practice in the digital age.

Overall, putting the FAA aside, we should use the COVID-19 momentum toward creativity to advance online processes that foster access to justice. We have an opportunity to examine problems with procedures in traditional dispute resolution ecosystems, such as arbitration, in order to reimagine and not merely repeat those procedures in an online world. For example, we can imagine how problem diagnosis tools could be built into OArb programs to create new low-cost means for individuals to obtain remedies without

²⁸⁵ *Id.*

²⁸⁶ Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 *LOY. L.A. L. REV.* 949, 950–54 (2009).

the need to join class actions. Moreover, building in digital “trip wires” could shed light on important health, safety, and policy issues.²⁸⁷ In these ways, OArb need not be a digital replica of the old-fashioned and expensive traditional arbitration that has earned a bad reputation for underdogs everywhere. Instead, it could be a reimagined process that expands access to remedies.

²⁸⁷ See Schmitz, *A Blueprint for Online Dispute Resolution System Design*, *supra* note 229, at 3–11; Amy J. Schmitz, *There’s an “App” for That: Developing Online Dispute Resolution to Empower Economic Development*, 32 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 1, 1–45 (2018).