FORCED REMOTE ARBITRATION

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Courts responded to COVID-19 by going remote. In early 2020, as lockdown orders swept through the country, virtual hearings—which once were rare—became common. This shift generated fierce debate about how video trials differ from in-person proceedings. Now, though, most courts have reopened, and the future of remote trials is unclear.

However, the pandemic also prompted a sea change in alternative dispute resolution. Arbitration providers pivoted away from in-person adjudication and heard cases online. Yet unlike virtual trials, which coexist uneasily with norms in the court system, remote hearings fit snugly within arbitration's tradition of procedural and evidentiary informality. Thus, while virtual trials may prove to be temporary, virtual arbitration is gaining steam. Online-only arbitration startups have emerged, established providers are marketing their virtual options, and businesses are mandating that plaintiffs resolve disputes without setting foot in the same room as the decision-maker. This trend threatens to make the controversial topic of forced arbitration even more fraught. Nevertheless, we do not know how remote procedures impact win rates, case length, and arbitration fees.

This Article shines light on these issues by conducting an empirical study of forced remote arbitration. It analyzes 70,150 recent filings and reaches three main conclusions. First, from July 2020 to November 2021, roughly 67% of all evidentiary hearings were held virtually. Even though this figure will likely decline as the pandemic recedes, online arbitration has become entrenched. Second, plaintiffs who participated in virtual proceedings generally won less often and recovered lower damage awards than individuals who arbitrated in person. This "remote penalty" exists in some settings even after controlling for variables such as claim type, pro se status, and the experience of the defendant, the lawyers, and the arbitrators. Third, even though proponents of forced remote arbitration contend that it streamlines cases, the data only partially support this claim. Some remote modes, such as documents-only proceedings, seem to save time and money,

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while others, like video hearings, do not. Finally, the Article explains how its findings can help lawmakers and judges regulate and monitor forced remote arbitration.

INTRODUCTION

In 2017, Constantine Cristo filed a pro se complaint in federal court alleging that his investment advisor, Charles Schwab, had illegally disclosed his financial records.[1] Yet when Cristo had opened his accounts, he had signed two contracts in which he "agree[d] to settle by arbitration any controversy between [him]self and Schwab."[2] Thus, the judge ordered Cristo to arbitrate his claims.[3]

In this way, Crito's case was unremarkable. Forced arbitration has long been a hallmark of the American civil justice system. In 1925, Congress passed the Federal Arbitration Act (FAA) to erase the ancient hostility to extrajudicial dispute resolution.[4] In the 1980s, the Supreme Court began to expand the statute, holding that it applies in state court,[5] preempts

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1 *See* Complaint ¶¶ 33–34, Cristo v. Charles Schwab Corp., No. 17-cv-1843-GPC-MDD (S.D. Cal. Sept. 12, 2017) (on file with author).

2 Cristo v. Charles Schwab Corp., No. 17-cv-1843-GPC-MDD, 2018 WL 1737544, at *1 (S.D. Cal. Apr. 11, 2018).

3 *See id.* at *8.

4 Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16).

5 Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

state law,[6] and expresses a "liberal federal policy favoring arbitration."[7] Private judging changed from "a tool for resolving commercial disputes" into "a phenomenon that pervade[s] virtually every corner of the daily economy."[8] Indeed, recent studies have found forced arbitration provisions in 81% of Fortune 100 businesses' consumer agreements[9] and approximately two-thirds of large companies' employment agreements.[10] Likewise, in the financial services industry—the setting for Cristo's claims—"[a]lmost every brokerage contract has a mandatory arbitration clause."[11]

But in early 2020, Cristo's seemingly routine case veered an unexpected direction. As COVID-19 spread, major arbitration providers suspended in-person proceedings.[12] The Financial Industry Regulatory Authority (FINRA), which was handling Cristo's arbitration, was no exception.[13] The arbitrators in Cristo's matter announced that they would hold their evidentiary hearing (the arbitration equivalent of a trial) over Zoom.[14] Cristo objected.[15] He filed a motion to enjoin the arbitration in federal court, arguing that the hearing would be unfair:

> Plaintiff has not agreed to participate in a virtual . . . hearing of any kind . . . . Given his lack of experience in the medium, and his unfamiliarity with much of the virtual technologies developed in the last decade, Plaintiff is at an extreme disadvantage against a seasoned attorney . . . .[16]

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6 *Id.* at 11.

7 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

8 Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1428-29 (2008).

9 Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) (also estimating that, as of 2018, there were at least 826,537,000 consumer arbitration agreements in effect).

10 ALEXANDER J.S. COLVIN, ECON. POL'Y INST. THE GROWING USE OF MANDATORY ARBITRATION 1–2 (2017), https://www.epi.org/files/pdf/135056.pdf [https://perma.cc/HE56-SJEA].

11 Mark Schoeff Jr., *FINRA Postpones In-Person Arbitration Hearings until May 1 due to COVID-19*, INV. NEWS (Mar. 16, 2020), https://www.investmentnews.com/finra-postpones-in-person-arbitration-hearings-until-may-1-due-to-covid-19-190084 [https://perma.cc/7GT4-J3BS].

12 *See infra* text accompanying notes 126–127.

13 *See* Schoeff, Jr., *supra* note 11.

14 Cristo v. Charles Schwab Corp., No. 17-cv-1843-GPC-MDD, 2021 WL 2633624, at *3 (S.D. Cal. June 25, 2021).

15 *Id.* at *2.

16 Plaintiff's Ex Parte Application for a Temporary Restraining Order; Motion for Preliminary Injunction; Memorandum of Points and Authorities in Support

Yet because judges rarely interfere with pending arbitrations, his request was denied.[17] Thus, in June 2021, Cristo tried to prove his claims by teleconference.[18] Two months later, the arbitrators issued their award.[19] As Cristo had predicted, he lost.[20]

Virtual adjudication has been a hot topic since the beginning of the pandemic. For decades, federal courts have only allowed witnesses to testify remotely "[f]or good cause in compelling circumstances."[21] However, in 2020, health concerns transformed this rarely invoked exception into the de facto rule. Forced to choose between postponing cases indefinitely or going remote, scores of judges conducted trials online.[22] This development provoked intense speculation about how virtual proceedings differ from their in-person counterparts. Some commentators argued that videoconferencing makes court more accessible and efficient.[23] But others worried that the format burdens the technologically naïve, drives a wedge

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Thereof at 9, Cristo v. Charles Schwab Corp., No. 17-cv-1843-GPC-MDD (S.D. Cal. June 21, 2021), ECF No. 40 (on file with author).

17 *See Cristo*, 2021 WL 2633624, at *3–4.

18 Cristo v. Charles Schwab & Co., Inc., FINRA No. 19-02822, at *3 (Aug. 5, 2021) (Rosen, Williams & Marshall, Arbs.) (on file with author).

19 *Id.* at *5.

20 *Id.* at *3.

21 FED. R. CIV. P. 43(a).

22 *See* Madison Alder, *More U.S. Courts Plan Virtual Jury Trials to Move Civil Cases*, BLOOMBERG L. (Feb. 10, 2021), https://news.bloomberglaw.com/us-law-week/more-u-s-courts-plan-virtual-jury-trials-to-move-civil-cases [https://perma.cc/Y5JW-3U38] (mentioning virtual jury trials in federal courts in Florida, Kansas, Minnesota, Rhode Island, Washington); Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, THE ATLANTIC (Apr. 13, 2021), https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/ [https://perma.cc/3DM7-RXWC].

23 *See* Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 338 (2021) (observing that virtual trials can "enable remote appearances of those who cannot otherwise appear at proceedings"); Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L. (July 30, 2020), https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change [https://perma.cc/KSL7-X5T2] ("Litigants in virtual hearings don't have to take time off from work or arrange for child care to come to court."); Thomas S. Zilly & Marsha J. Pechman, *What the Public Gains by Remote Trials in Federal Court*, SEATTLE TIMES (June 8, 2021), https://www.seattletimes.com/opinion/what-the-public-gains-by-remote-trials-in-federal-court/ [https://perma.cc/6NHZ-G3KJ] ("In recent virtual trials, individuals located in Jordan, Yemen and even on a ship in the Caribbean Sea were able to testify without diminishing the integrity of the proceedings."). *But see* Pamela Gates, Jeffrey Frederick & Karen Lisko, *Virtual Juries: We Can, But Should We? And If So, How?*, LITIG., Summer 2021, at 12–13 (noting factors that might prevent prospective jurors from serving virtually, such as lack of access to the necessary technology or to "a private space or a space free from interruptions").

between attorneys and clients, and impairs the factfinder's ability to assess the credibility of witnesses.[24]

Recently, though, this debate has lost some of its urgency. Vaccination rates have risen, schools and public spaces have reopened, and the pace of life has accelerated.[25] Although some state courts are continuing to explore remote trials[26] and the Omicron surge in early 2022 introduced fresh uncertainty,[27] federal courts and other jurisdictions have reverted to in-person hearings.[28] Thus, "[t]he long-term role of electronic court proceedings remains unclear."[29]

But in a parallel procedural universe, remote adjudication continues to gain steam. As Cristo's case reveals, courts were not the only tribunals that COVID forced online. Arbitration providers such as FINRA, the American Arbitration Association (AAA), JAMS, and Kaiser's Office of Independent Administrator (Kaiser) also went remote.[30] And unlike courts, which often struggled with the transition,[31] most of these entities did not

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24 *See* Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1305 (2020) (observing that physical separation "can impair judges' and jurors' ability to empathize with a witness or party"); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. U.L. REV. 1875, 1895, 1889 (2021) (citing problems with "assessing credibility, cross-examining, [and] impeaching" and parties who do not have "access to and comfort with the required remote technologies").

25 Editorial, *We Can Live Better Lives While Being Smart About Covid*, N.Y. TIMES (Dec. 11, 2021), https://www.nytimes.com/2021/12/11/opinion/covid-vaccine-omicron-booster.html [https://perma.cc/3KNL-CK3K].

26 *E.g.*, Lyle Moran, *California Is Poised to Permit Remote Court Hearings Through At Least Mid-2023*, AM. BAR ASS'N J. (Sept. 16, 2021), https://www.abajournal.com/web/article/california-to-permit-remote-court-hearings-through-at-least-mid-2023 [https://perma.cc/NNE6-YUZL] (explaining that the California legislature recently passed a bill that authorizes courts to continue hearing cases remotely).

27 Holly Yan & Aya Elamroussi, *Between Christmas and New Year's, Doctors Expect the US Omicron Surge to Grow*, CNN (Dec. 28, 2021), https://www.cnn.com/2021/12/27/us/us-coronavirus-monday/index.html [https://perma.cc/A565-TMZ6].

28 *See infra* text accompanying note 96.

29 *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology [https://perma.cc/FN5N-95K9] [hereinafter *Pandemic Lingers*].

30 Kristen M. Blankley, *FINRA's Dispute Resolution Pandemic Response*, 13 PENN. ST. ARB. L. REV., at 9 (2021); Amy J. Schmitz, *Arbitration in the Age of COVID: Examining Arbitration's Move Online*, 22 CARDOZO J. CONFLICT RESOL. 245, 269 (2021).

31 *See Pandemic Lingers*, *supra* note 29 (describing how technology failed during one high-profile remote hearing); Carolina Rabinowicz, *Covid-19 and the Online Courtroom: Benefits and Drawbacks*, JOLT DIG. (Mar. 4, 2021), https://jolt.law.harvard.edu/digest/covid-19-and-the-online-courtroom-benefits-and-

even need to adapt. Instead, long before COVID, they had permitted parties to request decisions on the papers or hold evidentiary hearings over phone or video.[32] In the "wild west" of arbitration, these remote formats were just another shortcut, like limited discovery, loose evidentiary rules, unwritten awards, and the lack of robust appellate rights.[33] Now that virtual arbitration has been further normalized, it appears to be here to stay. Indeed, new remote arbitration administrators have opened for business,[34] established providers are marketing their online hearing capacities,[35] and businesses are drafting contracts that require plaintiffs to arbitrate by videoconference.[36] This fusion of fraught issues—remote hearings and forced arbitration—will likely be polarizing as it continues to spread.

Yet this movement is taking place in an empirical void. The problem is two-fold. For starters, although the legal system has been using remote procedures in various settings since the mid-1990s, almost no "research has directly tested how—or even whether—[they produce] results that differ from those produced by live hearings."[37] The few studies that exist are tremendously valuable, but they focus on two discrete areas: bail hearings and immigration matters.[38] Otherwise, this ter-

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drawbacks [https://perma.cc/4495-ESH6] (reporting that in one remote trial, "jurors had a limited ability to properly use Zoom, which was exacerbated by connectivity issues and freezing screens").

32 *See Virtual Hearings*, AM. ARB. ASSOC., go.adr.org/covid-19-virtual-hearings.html [https://perma.cc/5ZY2-HBRY] (last visited Oct. 6, 2022) ("Virtual hearings are not a new concept—the [AAA] has supported the option to parties for years."); Jill I. Gross, AT&T Mobility *and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 60–65 (2012) (surveying documents-only proceedings employed by the AAA, JAMS, and FINRA).

33 Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 U. KAN. L. REV. 925, 964 (2012) (noting that arbitration "has a reputation as being a 'wild west' or 'no rules' type of forum").

34 *E.g.*, *Tech Startup* New Era ADR *Aims to Disrupt Traditional Litigation and Dispute Resolution with New Technology Platform*, BUSINESSWIRE (Apr. 20, 2021), https://www.businesswire.com/news/home/20210420005495/en/Tech-Startup-New-Era-ADR-Aims-to-Disrupt-Traditional-Litigation-and-Dispute-Resolution-with-New-Technology-Platform2 [https://perma.cc/9QY4-GV2D].

35 *E.g.*, *Setting the Industry Standard: Virtual Mediation and Arbitration*, JAMS, https://www.jamsadr.com/online [https://perma.cc/9Z4G-WMRN] (last visited Oct. 4, 2022).

36 *E.g.*, *Terms of Use*, TICKETMASTER https://help.ticketmaster.com/s/article/Terms-of-Use?language=en_US [https://perma.cc/FC2B-9HCU] (last updated July 2, 2021) (requiring arbitration administered by an online-only provider) [hereinafter TICKETMASTER].

37 Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 883 (2010).

38 *See infra* text accompanying notes 84–87.

rain remains unexplored. In addition, arbitration is private and "has a reputation as a black box, from which scant information escapes about parties' experiences and proceedings' outcomes."[39] To be sure, this lack of evidence is not as glaring as it was a decade ago. Several states have passed laws that require providers to report details about cases they have recently handled, and authors have used this data to peek behind the curtain.[40] Yet this work precedes COVID and does not address remote hearings.

This Article sheds light on forced remote arbitration by analyzing 70,150 recent filings and 10,085 awards from FINRA, JAMS, Kaiser, and the AAA. It reaches three main conclusions. First, virtual proceedings have become arbitration's leading format. Indeed, between the summer of 2020 and the fall of 2021, about two-thirds of all evidentiary hearings in the providers I studied have been held online. Although this volume will probably drop as the pandemic ebbs, the seeds have been sown for the mass use of remote arbitration.

Second, plaintiffs who arbitrated online or submitted matters on the papers generally prevailed less often and received lower damage awards than those who appeared in person. The

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39 Charlotte S. Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1701 (2021).

40 *E.g.*, Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 4 (2011) (analyzing 1,213 AAA employment awards); Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. RELS. REV. 1019, 1026–35 (2015) (analyzing 2,802 AAA employment awards); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63 (2015) (analyzing 4,839 AAA consumer cases) [hereinafter Horton & Chandrasekher, *Consumer Arbitration*]; David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 461–62 (2016) (analyzing 5,883 AAA employment cases) [hereinafter Horton & Chandrasekher, *Employment Arbitration*]; Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 9 (2019) (analyzing 40,775 filings from the AAA, JAMS, Kaiser, and ADR Services, Inc.) [hereinafter Chandrasekher & Horton, *Arbitration Nation*]. For studies that rely on research methods other than disclosures under state transparency laws, see Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 206 (1997) (analyzing 270 AAA employment arbitrations) [hereinafter Bingham, *Repeat Player Effect*]; Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 236 (1998) (analyzing 203 AAA employment awards); CHRISTOPHER R. DRAHOZAL, HENRY N. BUTLER, JUDYTH W. PENDELL & SAMANTHA ZYONTZ, SEARLE CIV. JUST. INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 2 (2009), https://www.adr.org/sites/default/files/document_repository/Searle%20Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf [https://perma.cc/5U6E-QDTT] (analyzing 301 AAA consumer awards).

Article calls this phenomenon the "remote penalty." The Article then performs multivariate regression analyses to control for the impact of variables like the claims asserted, whether the plaintiff has counsel, and the previous arbitration experience of the business and the plaintiff's law firm. It discovers that, in some settings, the mere fact that a case was adjudicated remotely correlates with a statistically significant drop in the probability of a plaintiff win. Yet it also finds that the remote penalty is relatively mild, and that other factors—such as arbitration experience—affect outcomes more.

Third, although some commentators argue that eliminating the time and hassle of in-person hearings is an "efficiency bonanza," my data is inconclusive.[41] Documents-only hearings seem to save the parties time and reduce arbitration costs, but videoconferencing largely does not—or, at least, did not during COVID.

The Article then explains how its findings inform several open doctrinal issues. For one, most contracts say nothing about whether remote procedures are permissible. It is unclear whether these "silent" agreements authorize the arbitrator to go remote.[42] The FAA generally allows arbitrators to resolve procedural questions about the case.[43] Thus, even when a contract does not mention how to conduct the hearing, arbitrators enjoy discretion to fill these gaps.[44] However, the Court has held that some procedures "change[ ] the nature of arbitration to such a degree" that they cannot be implied.[45] According to some commentators, virtual evidentiary hearings fall into

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41 Victoria Hudgins, *Zoom Reigns Supreme in Virtual Arbitrations, but Legal's Nuances Leaves Room for Startups*, LAW.COM (Apr. 21, 2021), https://www.law.com/legaltechnews/2021/04/21/zoom-reigns-supreme-in-virtual-arbitrations-but-legals-nuances-leaves-room-for-startups [https://perma.cc/YP7S-R89V].

42 *See* Theodore K. Cheng, *Can and Should Arbitrators Compel Parties to Participate in Remote Arbitration Hearings?*, LEXISNEXIS PRACTICAL GUIDANCE, available at https://theocheng.com/wp-content/uploads/2020/09/Can-and-Should-Arbitrators-Compel-Parties-to-Participate-in-Remote-Arbitration-Hearings.pdf [https://perma.cc/A52V-XGJ2] (last visited Oct. 4, 2022) ("[T]here is little authority concerning the propriety of an arbitrator ordering parties to conduct a remote hearing.").

43 Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002).

44 *See* WeWork Cos. v. Zoumer, No. 16-cv-457 (PKC), 2016 WL 1337280, at *5 (S.D.N.Y. Apr. 5, 2016) ("[A]spects of the arbitration's procedure, such as discovery and costs, can be decided by the arbitrator") (citing 9 U.S.C. § 7).

45 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019).

this camp.[46] Seen through this prism, because online adjudication is "fundamentally different" from its in-person counterpart, it can only occur if the parties expressly consent to it.[47] Nevertheless, my data does not support this extreme position. Although the remote penalty is troubling, it is less consequential than other factors that impact case results. In turn, this means that arbitrators have the inherent power to decide that a particular dispute should be heard by videoconference.

The Article then considers arbitration provisions that *require* remote procedures. Although these clauses have started to emerge, their "enforceability . . . is an untested question."[48] Courts usually police unfair arbitration agreements through the unconscionability doctrine. Although this rule is unpredictable, judges apply it most often to fine print that alters the norms of litigation in a way that disadvantages plaintiffs.[49] Measured by this yardstick, remote arbitration mandates may be unconscionable. For starters, as in-person trials resume, virtual hearings are increasingly available only in arbitration.[50] Thus, drafters are using private dispute resolution to delete a right that individuals possess in court. In addition, my research suggests that this gambit systematically favors businesses.

Finally, the Article urges state legislators to amend their disclosure statutes. Four jurisdictions require arbitration providers to divulge information about forced arbitration.[51] But these laws do not create incentives for providers to distinguish between hearing types. In fact, I found that neither JAMS nor the AAA identify cases that were heard online.[52] Thankfully, I was able to pinpoint "suspected" video matters in these venues. Yet the AAA and JAMS should not be able to profit from remote arbitration while refusing to report how it functions on the ground. Thus, I suggest a way for lawmakers to bring them into compliance.

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46 *E.g.*, Chris Dove & Christian Perez, *Can an Arbitrator Require Arbitration by Videoconference?*, JDSupra (May 6, 2020), https://www.jdsupra.com/legalnews/can-an-arbitrator-require-arbitration-56344/[https://perma.cc/58S9-UU3L].

47 *Id.*

48 Caleb Gerbitz, *Are Pre-Dispute Agreements to Arbitrate Online Enforceable?*, 7 ARB. BRIEF, at 16 (2021).

49 *See infra* subpart III.B.

50 *See infra* text accompanying note 96.

51 *See* CAL. CIV. PROC. CODE § 1281.96(a) (West 2021); D.C. CODE ANN. § 16-4430 (West 2021); ME. REV. STAT. ANN. tit. 10, § 1394 (West 2021); MD. CODE ANN., COM. LAW § 14-3903 (West 2021).

52 *See infra* sections II.A.2, II.A.4.

At the outset, I should clarify my goals and terminology. First, I will focus on full-fledged trials and evidentiary hearings. Other kinds of remote proceedings in both arbitration and the judicial system are common and relatively uncontroversial. Indeed, judges and arbitrators hold status conferences remotely,[53] appellate panels decide matters on the briefs,[54] and even the Court heard oral argument by telephone in 2020.[55] But trials and evidentiary hearings are distinctive because they involve factfinding and cross-examination, which may be less accurate when not done face-to-face.[56]

Second, my paper raises slippery questions about what counts as "forced remote" arbitration. All of the cases I studied qualify as forced arbitrations: they arose from a contract that required a consumer, employee, or medical patient to arbitrate rather than go to court. But some of the plaintiffs in my data, like Constantine Cristo, were *also* compelled to arbitrate *remotely*. That is, although they preferred to wait for in-person hearings to resume, the arbitrator ordered them to use a format like Zoom. Conversely, as I discuss below, other individuals were eager to resolve their disputes and therefore *agreed* to remote procedures. I will be sensitive to this distinction when it becomes relevant.

Third, by "remote," I mean any proceeding in which the parties do not appear in person. Of course, this umbrella term covers three very different types of proceedings: those held via webcam, those conducted over the phone, and those resolved on the papers. I will try to be sensitive to these distinctions when they become relevant.

Fourth, for simplicity's sake, I will sometimes refer to individuals as "plaintiffs" and businesses as "defendants" even though a handful of cases in my data were filed by companies against people. In addition, to avoid confusion about compari-

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53 *See* Blankley, *supra* note 30, at 6 (noting that, in FINRA, "pre-hearing conferences nearly always occur by telephone"); Lederer, *supra* note 23, at 317 (describing the use of telephone services such as CourtCall and CourtScribes for remote appearances).

54 Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 319, 322–23 (2011).

55 Adam Liptak, *The Supreme Court Will Hear Arguments by Phone. The Public Can Listen In.*, N.Y. TIMES, https://www.nytimes.com/2020/04/13/us/politics/supreme-court-phone-arguments-virus.html [https://perma.cc/436A-R87K] (last updated Nov. 1, 2021).

56 *See* Bannon & Keith, *supra* note 24, at 1913–14 ("[H]olding a status conference by video or phone, or a hearing where purely legal questions are at issue, raises different considerations than using the same technology for an evidentiary hearing.").

sons between arbitration and litigation, I will not use the arbitration-specific terms "claimant" and "respondent."

The Article contains three Parts. Part I surveys the past, present, and future of remote adjudication. It explains that although remote trials may prove to be a passing fad, remote arbitration is ascendant. Part II presents my empirical study. It first reviews my research methodology and then explains what I unearthed about plaintiff win rates, damage recoveries, case length, and arbitration fees in remote and in-person matters. Part III uses these insights to address unsettled doctrinal issues and propose reforms.

I
REMOTE JUSTICE

This Part provides background about remote procedures in the U.S. legal system. It starts by describing the use of documents-only, telephonic, and video trials in court. It reveals that these once-rare measures became more common during COVID but that this shift was likely only temporary. This Part then examines remote arbitration. It reveals that the coronavirus also caused arbitration providers to go remote and that—unlike virtual trials—this trend will probably survive the pandemic.

A. Remote Court

In the past two years, an unprecedented number of litigants have presented their cases without setting foot in court. This section explores the rise of remote litigation.

Interest in remote trials began in the 1970s. During this era, concern mounted that America was experiencing a "litigation explosion."[57] Supposedly, lawmakers had created too many rights and plaintiffs were flooding courts with minor grievances.[58] As one author warned, by the early 21st century, 5,000 federal appellate judges would be needed to handle the 1,000,000 annual cases.[59] Technology seemed like a way to alleviate this burden. VCRs, video cassettes, and recording

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57 Warren E. Burger, *Isn't There a Better Way?*, 68 AM. BAR ASS'N J. 274, 275 (1982).

58 *See* Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1350 (1972).

59 John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975).

equipment had just become widely available.[60] Lawyers were videotaping depositions—rather than just having them transcribed—and showing them to juries.[61] Thus, a handful of states went further and allowed parties to streamline the adversarial process by displaying edited clips of witnesses testifying and being crossed-examined.[62] *Time* magazine called this technique "[t]rialevision."[63]

Trialevision never caught on in the federal system. Federal Rule of Civil Procedure 43(a) states that "[i]n all trials the testimony of witnesses shall be taken orally in open court."[64] This principle ensures that judges and juries can freely "observe the appearance and demeanor of the witnesses."[65] Trialevision, which inherently limits a decision-maker's line of sight, seemed inconsistent with this principle. In fact, in the late 1980s and early 1990s, federal courts refused to allow witnesses to testify by telephone[66] or to submit affidavits in lieu of direct examination.[67]

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60 Roger Kenneth Field, *In the Sixties, It Was TV; In Seventies, Video Cassette*, N.Y. Times (July 5, 1970), https://www.nytimes.com/1970/07/05/archives/in-the-sixties-it-was-tv-in-seventies-video-cassette-cassettes-to.html [https://perma.cc/VP3X-FYSN].

61 James L. McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DENV. L.J. 463, 465 (1973).

62 *E.g.*, OHIO R. CIV. PROC. 40 (1972); State v. Moffitt, 340 A.2d 39, 39, 41 (Vt. 1975); Charles E. Stiver, Jr., Note, *Video-Tape Trials: A Practical Evaluation and a Legal Analysis*, 26 STAN. L. REV. 619, 619–20 (1974).

63 *The Law: Trialevision*, TIME (Dec. 17, 1973), http://content.time.com/time/subscriber/article/0,33009,908345,00.html [https://perma.cc/B2BP-8WRQ].

64 Kilgore v. United States, 467 F.2d 22, 26 (5th Cir. 1972) (quoting FED. R. CIV. P. 43(a)). Similarly, Federal Rule of Civil Procedure 77(b) states that "[e]very trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom." FED. R. CIV. P. 77(b). Yet as judges have observed, the safety valve provided by "so far as convenient" allows non-traditional trials "[i]n times of crises." Goldstine v. FedEx Freight Inc., No. C18-1164 MJP, 2021 WL 952354, at *10 (W.D. Wash. Mar. 11, 2021).

65 *In re* Adair, 965 F.2d 777, 780 (9th Cir. 1992).

66 *See* Murphy v. Tivoli Enters., 953 F.2d 354, 359 (8th Cir. 1992) ("The federal rules strongly favor the testimony of live witnesses wherever possible, so that the jury may observe the demeanor of the witness to determine the witness's veracity."). *But see* Off. Airline Guides, Inc. v. Churchfield Publ'ns, Inc., 756 F. Supp. 1393, 1398–99 n.2 (D. Or. 1990), *aff'd*, Off. Airline Guides, Inc. v. Goss, 6 F.3d 1385 (9th Cir. 1993) (allowing telephone testimony from witnesses who were out of the state or country).

67 *E.g.*, *In re* Burg, 103 B.R. 222, 225 (B.A.P. 9th Cir. 1989) (reasoning that "essential rights of the parties may be jeopardized by a procedure where the oral presentation of evidence is not allowed [on direct examination and] where the bankruptcy court's ability to gage the credibility of a witness or evidence is questionable"). *But see Adair*, 965 F.2d at 779–80 (noting that the affidavit procedure still allows for in-person cross-examination and disagreeing with the *Burg* court that it "raises significant due process concerns").

However, in 1996, the Rules Advisory Committee deleted Rule 43(a)'s bright-line prohibition on witnesses testifying by phone or video.[68] The internet and compression software had vastly improved videoconferencing,[69] and lawmakers were allowing remote appearances in criminal arrangements,[70] bail hearings,[71] and immigration cases.[72] To keep pace, Rule 43(a) was revised to permit remote testimony provided that there are "compelling circumstances" and "appropriate safeguards."[73]

Crucially, Rule 43(a) does not give remote hearings a full-throated endorsement. Instead, its comments are a veritable paean to in-person procedures:

> The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. [Remote t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.[74]

Thus, most federal courts viewed requests to proceed remotely with suspicion. They were especially hostile to motions to allow telephonic testimony because the trier of fact would not be able to observe a witness' facial expressions or body language.[75]

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68 *See* FED. R. CIV. P. 43 advisory committee's note to 1996 amendment.

69 *See* MICHAEL G. NEIMON, NAT'L CTR. FOR STATE CTS., CAN INTERACTIVE VIDEO WORK IN WAUKESHA COUNTY?: AN ANALYSIS AND SURVEY 3 (2001), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTR=120 [https://perma.cc/4C6W-BDT5]; Jim Poniente, *The History of Videoconferencing*, EZINEARTICLES.COM (Aug. 28, 2007), http://ezinearticles.com/?The-History-of-Videoconferencing&id=707634 [https://perma.cc/VXC2-FGGX].

70 *See* Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL'Y 211, 214 (2006)

71 *See* Diamond, Bowman, Wong & Patton, *supra* note 37, at 869.

72 *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589 (codified at 8 U.S.C. § 1229a(b)(2)(A)(iii) (2021). Similarly, the U.S. Supreme Court upheld a state statute that allowed victims of child abuse to testify against their assailants by closed-circuit television. *See* Maryland v. Craig, 497 U.S. 836, 841, 854–58 (1990).

73 FED. R. CIV. P. 43(a). In general, "[a]ppropriate safeguards exist where the opposing party's ability to conduct cross-examination is not impaired, the witness testifies under oath in open court, and the witness's credibility can be assessed adequately." Warner v. Cate, No. 1:12-cv-1146-LJO-MSJ (PC), 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015).

74 FED. R. CIV. P. 43 advisory committee's note to 1996 amendment; *see also* Obrey v. England, 215 F. App'x 621, 624 (9th Cir. 2006) (describing Rule 43(a) as "express[ing] our strong preference for oral testimony in open court").

75 *E.g.*, Eller v. Trans Union, LLC, 739 F.3d 467, 477–79 (10th Cir. 2013) (affirming district court's refusal to permit telephonic testimony even though one witness "submitted an affidavit stating that he would be in Turkey for court

Likewise, they only permitted testimony by video "in special circumstances, such as where a vital witness would be endangered or made uncomfortable by appearing in a courtroom."[76] As the Seventh Circuit once put it, a screen "is rarely a substitute for actual presence."[77]

Scholars were also wary of trial-by-video. In the late 1990s and early 2000s, a wave of law review articles condemned the legal system's nascent use of teleconferencing.[78] These critics often conceded that remote hearings were convenient, cheap, and fast.[79] However, they also argued that videoconferencing disadvantages some litigants. For one, they hypothesized that

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martial proceedings during trial"); Constantino v. STP Rest., Inc., No. 1:09 cv 1531, 2012 WL 13148743, at *3 (N.D. Ohio Mar. 1, 2012) (denying request for telephonic testimony due to "[t]he inability of the jury to observe the witness' physical demeanor"); Gulino v. Bd. of Educ. of City Sch. Dist. of New York, No. 96 Civ. 8414(CBM), 2003 WL 1191349, at *1 (S.D.N.Y. Mar. 13, 2003) (denying request to have witness testify by telephone rather than traveling from California to New York for the trial); *In re* MH, 120 P.3d 210, 214 (Ariz. Ct. App. 2005) (collecting cases from state court). *But see* Dagen v. CFC Grp. Holdings Ltd., No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003) (remarking that "the court is not persuaded that allowing telephonic testimony is so extraordinary" and citing cases from before the amendment to Rule 43(a) in which courts allowed witnesses to appear remotely); Bd. of Educ. of Montgomery Cnty. v. Griffin, No. PJM 06-169, 2007 WL 9782558, at *6 (D. Md. June 11, 2007) (upholding an administrative law judge's use of telephonic testimony because "good cause was shown").

76 *Eller*, 739 F.3d at 478; *see also* El-Hadad v. United Arab Emirates, 496 F.3d 658, 668-69 (D.C. Cir. 2007) (holding that district court properly allowed a witness to testify by "Internet video" when he "had pursued and repeatedly been denied a visa to the United States"); Adam v. Carvalho, 138 F. App'x 7, 8 (9th Cir. 2005) (holding that videoconferencing was permissible for "a sworn, out-of-state witness" whose "testimony was subject to cross-examination"); Sallenger v. City of Springfield, No. 03-3093, 2008 WL 2705442, at *1 (C.D. Ill. July 9, 2008) (permitting an emergency room doctor to testify remotely given the fact that his "employment presents a very unique need for his presence at work"). *But see* FTC v. Swedish Match N. Am., Inc., 197 F.R.D. 1, 2 (D.D.C. 2000) (criticizing revised Rule 43(a) on the grounds that "there is no practical difference between live testimony and contemporaneous video transmission").

77 Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005) (citing United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001)).

78 Perhaps because remote procedures in civil cases were both rare and generally involved lower stakes, these pieces invariably focused on either criminal or immigration law. *See* Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U.L. REV. 63 (2002); Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805 (1994).

79 *See* Ashdown & Menzel, *supra* note 78, at 65 ("For attorneys and witnesses, video teleconferencing reduces the inconvenience associated with appearing in the courtroom."); Raburn-Remfry, *supra* note 78, at 811 ("[C]ourt administrators have discovered that video production improves court security, cuts court costs, expedites arrest processing, and provides an accurate and instantaneous record.").

the format diminishes the quality of legal representation.[80] Unlike a normal trial, where a lawyer can whisper or pass a note, a televised hearing separates attorneys and clients.[81] Commentators also questioned whether judges and juries can reliably gauge witnesses remotely.[82] They cited a small but alarming body of laboratory research that "suggest[s] that factfinders evaluate televised testimony as less credible than in-court testimony, and that 'testify[ing] through a video monitor is less persuasive because it is a less direct form of communication.'"[83]

Three empirical papers reinforced these concerns. First, Shari Diamond and several co-authors examined bonds in felony bail hearings from Cook County, Illinois.[84] Using interrupted time series analysis, they found that average bond amounts jumped by 51% when judges began conducting the proceedings over closed-circuit television.[85] Second, Frank Walsh and Edward Walsh determined that asylum applicants in 2005 and 2006 were about twice as successful when they appeared in person than when they were remote.[86] Third, in a similar but more sophisticated piece, Ingrid Eagly discovered that noncitizens facing deportation were less likely to hire counsel or pursue particular avenues of relief when their cases were heard by teleconference.[87] Eagly also conducted site visits and interviewed participants.[88] She attributed the disengagement of aliens in remote cases to their perception that the dehumanizing process was "rigged," technical difficulties, and "the impossibility of confidential attorney-client communication."[89] Thus, although these studies dealt with discrete areas

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80 *See* Diamond, Bowman, Wong & Patton, *supra* note 37, at 899.

81 Douglas Keith & Alicia Bannon, *Principles for Continued Use of Remote Court Proceedings*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/principles-continued-use-remote-court-proceedings [https://perma.cc/DV2P-MDLK].

82 *See Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1184–87 (2009).

83 *Id.* at 1185 (quoting David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW & HUM. BEHAV. 553, 565 (1994)).

84 Diamond, Bowman, Wong & Patton, *supra* note 37, at 887.

85 *Id.* at 892.

86 Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008).

87 Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U.L. REV. 933, 969 (2015).

88 *Id.* at 939–40.

89 *Id.* at 941.

of law, they raised the disquieting possibility that certain people fare worse when they do not appear in person.

This was the backdrop in March 2020, when the coronavirus materialized. In the early days of the pandemic, some federal judges found that the dangers of in-person gatherings were "compelling circumstances" under Rule 43(a) that justified switching to video.[90] Later, as shelter-in-place orders closed government buildings, courts faced a choice between holding video trials or pausing litigation for the near future.[91] In the federal system, judge after judge held that going remote was the lesser of two evils.[92] Similarly, state lawmakers passed a flurry of emergency measures that permitted courts to hear cases via "remote electronic means."[93] By the summer, Texas courts had used videoconferencing in 160,000 cases and Michigan judges had presided over 500,000 hours of Zoom hear-

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90 *See In re* RFC & ResCap Liquidating Tr. Action, 444 F. Supp. 3d 967, 971 (D. Minn. 2020) ("COVID-19's unexpected nature, rapid spread, and potential risk establish good cause for remote testimony.").

91 *See* Daniel Attaway, Mary Bourke, Jennifer Collins & Nikku Khalifian, *Trial and Error: The Future of Remote Litigation*, JDSUPRA (Feb. 24, 2021), https://www.jdsupra.com/legalnews/trial-and-error-the-future-of-remote-9686001/ [https://perma.cc/Q4X9-8ZNG] (describing how "[t]hroughout 2020, courts nationwide were shut down, reopened, and shut down again").

92 *E.g.*, Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n, 470 F. Supp. 3d 735, 741 (E.D. Mich. 2020) (noting that it was "uncertain when the courthouse will reopen to staff members, let alone resume public proceedings"); Argonaut Ins. Co. v. Manetta Enters., Inc., No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033, at *2 (E.D.N.Y. June 11, 2020) ("The Court finds that the COVID-19 pandemic, and the months' long delay it has caused—indeed, continues to cause—in all court proceedings, constitutes 'good cause and compelling circumstances' to hold the bench trial in this matter via video-conference."); Liu v. State Farm Mut. Auto. Ins. Co., 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) (observing that the plaintiff "has already waited more than five years for his day in court" and should not need to "wait another unknown number of months (possibly years) until it is safe to resume in-person civil jury trials"); *cf.* Union Pac. R.R. Co. v. Winecup Ranch, LLC, No. 3:17-cv-00477-LRH-CLB, 2020 WL 7125918, at *15 (D. Nev. Dec. 4, 2020) (offering "to presid[e] over a bench trial via ZOOM video conferencing if the parties are amendable to such a solution"). In addition, to satisfy the "appropriate safeguards" prong of Rule 43(a), some courts dictated codes of conduct for remote proceedings, such as providing "that all parties would use the same court-provided blue background; that all witnesses must be visible from the waist up; and documents, notes, and electronic devices were forbidden in the room from which the witness was testifying." *In re* Alle, No. 2:20-cv-11116-MCS, 2021 WL 3032712, at *5 (C.D. Cal. July 19, 2021).

93 Administrative Order at 3–4, *In re* COVID-19 Emergency Procs. in the Fla. State Cts., No. AOSC20-13 (Fla. Mar. 13, 2020), https://www.floridasupremecourt.org/content/download/631744/file/AOSC20-13.pdf [https://perma.cc/K234-STEZ]; First Emergency Order Regarding the COVID-19 State of Disaster at 1, Misc. Docket No. 20-9042 (Tex. Mar. 13, 2020), https://www.txcourts.gov/media/1446056/209042.pdf [https://perma.cc/QKU7-8D5P]. Likewise, the CARES Act authorized remote hearings for a variety of criminal matters (but not trials). CARES Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 528 (2020).

ings.[94] The judiciary—like countless schools and businesses—had migrated online.

However, this change is unlikely to be permanent. To be sure, a few states are continuing to experiment with virtual trials.[95] But in the federal system, the current is flowing in the opposite direction. As vaccinations rolled out and courthouses reopened, most judges started to reject Rule 43(a) motions to present evidence by video.[96] Although there is vast uncertainty—which, in January 2022, was compounded by the Omicron surge[97]—it appears that hearings are returning to the in-person default.

In sum, remote trials began as curated clips of witness testimony and evolved into virtual proceedings. But even during the pandemic, courts tried "to ensure what is typically an exception (live testimony by contemporaneous transmission) d[id] not swallow the rule (live in-person testimony)."[98] Nevertheless, as I explain next, online adjudication has set down deeper roots in private dispute resolution.

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94 David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISC. 246, 250–51 & 51 n.9 (2020).

95 *See* Moran, *supra* note 26; *Court Operations During COVID-19: 50-State Resources*, JUSTIA, https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/ [https://perma.cc/4DY3-T3TG] (last undated Dec. 2021) (summarizing the current status of virtual proceedings in state courts); *cf.* Reed & Alder, *supra* note 23 (quoting Texas Supreme Court Chief Justice Nathan Hecht as saying "[w]e're going to be doing court business remotely forever").

96 *See* Complete Med. Sales, Inc. v. Genoray Am., Inc., No. 8:20-cv-01277-SB (DFMx), 2021 WL 4439095, at *1 (C.D. Cal. Aug. 10, 2021) ("Plaintiff apparently proceeded on the assumption that, despite the roll out of vaccinations, courthouses would remain closed for the indefinite future."); Kelly v. Peerstar LLC, No. 3:18-cv-126, 2021 WL 4312703, at *6 (W.D. Pa. Sept. 22, 2021) (denying motion for remote testimony without mentioning the pandemic); Stone Tech. (HK) Co. v. Global Geeks, Inc., No. 1:20-cv-23251, 2021 WL 4206655, at *1 n.1 (S.D. Fla. Aug. 10, 2021), *report and recommendation adopted sub nom.*, 2021 WL 4206608 (S.D. Fla. Aug. 25, 2021) (mentioning that the court had previously rejected a pandemic-based request for remote testimony); Novello v. Progressive Express Ins. Co., No. 8:19-cv-1618-KKM-JSS, 2021 WL 1751351, at *2 (M.D. Fla. May 4, 2021) (allowing an immunocompromised witness to testify remotely but not one whose health and vaccination status were unknown). *But see* VMX-Glob. USA, LLC v. Noble Env't Tech, 339 F.R.D. 690, 691 (S.D. Fla. 2021) (allowing an out-of-state witness to testify over Zoom because the of the "unnecessary risks of out-of-state travel at this time").

97 *See supra* text accompanying note 27.

98 *In re:* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-2885, 2021 WL 2605957, at *2 (N.D. Fla. May 28, 2021).

B. Remote Arbitration

This section discusses the explosive growth of forced remote arbitration. It first describes the long-running debate over whether arbitration dilutes plaintiffs' rights or is an economical alternative to litigation. It then explains why virtual arbitration is the "wave of the future."[99]

Arbitration gained a firm foothold in the U.S. in 1925, when Congress passed the FAA.[100] Previously, courts had been suspicious of private dispute resolution. They had invented special doctrines known as ouster and revocability that made it hard for parties to obtain specific performance of a predispute agreement to arbitrate.[101] The FAA overrides those principles through its centerpiece, section 2, which makes arbitration clauses "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[102]

The FAA was a minor part of the civil justice landscape for about half a century. For one, the statute seemed to be a procedural rule passed under Congress's Article III powers to control federal courts.[103] As a result, it neither applied in state court nor preempted state law.[104] In addition, arbitration's growth was stunted by the view that its lax standards and lay decisionmakers generated different outcomes than the procedures employed at trial.[105] For instance, in 1956, the Court

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99 Dove & Perez, *supra* note 46.

100 Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14).

101 *See, e.g.*, Kill v. Hollister (1746) 95 Eng. Rep. 532, 532 (KB); Vynior's Case (1609) 77 Eng. Rep. 597, 599 (KB).

102 9 U.S.C. § 2.

103 Although the FAA's legislative history is not crystal clear, it suggests that the statute "relate[s] solely to procedure of the [f]ederal courts" and "is no infringement upon the right of each [s]tate." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924) [hereinafter Joint Hearings] (brief of Julius Henry Cohen); *see also* H.R. Rep. No. 68-96, at 1 (1924) ("The bill declares that [arbitration] agreements shall be recognized and enforced by the courts of the United States.") (statement of Rep. Graham).

104 *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 286 (1995) (Thomas, J., dissenting) ("[N]ot until 1959—nearly 35 years after Congress enacted the FAA—did any court suggest that § 2 applied in state courts.").

105 *See* Note, *Predictability of Result in Commercial Arbitration*, 61 HARV. L. REV. 1022, 1026 (1948) (finding that arbitrators often based their damage calculations on emotionally appealing but legally irrelevant factors); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961) (polling AAA arbitrators and determining that "almost 90 percent believed that they were free to ignore [legal] rules whenever they thought that more just decisions would be reached by so doing").

remarked that "[t]he change from a court of law to an arbitration panel may make a radical difference in ultimate result."[106] Likewise, other judges exempted federal statutory claims from the FAA's scope, reasoning that Congress could not have intended for plaintiffs to vindicate important rights in a forum that did not follow "technical rules of law and procedure."[107]

But in the 1980s, the pendulum swung in the other direction. Led by Chief Justice Warren Burger, a vocal proponent of alternative dispute resolution, the Court declared that the FAA embodies "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[108] The Court held that section 2's enforcement mandate applied in state court and preempted state rules that resurrected the ouster and revocability doctrines by "singling out arbitration provisions for suspect status."[109] Finally, the Court repudiated its view that arbitration is inferior to litigation and required alleged violations of federal antitrust, antidiscrimination, racketeering, and securities laws to be arbitrated.[110]

The Court's FAA jurisprudence sparked fierce debate. Some scholars saw private dispute resolution as an upgrade over litigation. This cohort contended that arbitration is "inexpensive, confidential, and fast"[111] and "makes it easier for indi-

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106 Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956).

107 Wilko v. Swan, 107 F. Supp. 75, 78 (S.D.N.Y. 1952) (quoting CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, HANDBOOK AND GUIDE TO ARBITRATION UNDER THE NEW YORK AND UNITED STATES ARBITRATION STATUTES 3–4 (1932)), *rev'd*, 201 F.2d 439 (2d Cir. 1953), *rev'd*, 346 U.S. 427 (1953).

108 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *see also* Burger, *supra* note 57, at 276 (arguing that arbitration could reduce the burden on the court system).

109 Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (holding that the FAA preempts a Montana statute that invalidates arbitration clauses unless they are conspicuous); Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (holding that the FAA preempts the California Supreme Court from holding that a state statute invalidated an arbitration clause); Perry v. Thomas, 482 U.S. 483, 492 (1987) (holding that the FAA preempts a California statute that exempts claims for lost wages from arbitration).

110 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (compelling arbitration of claim under the Sherman Act); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991) (compelling arbitration of claim under the Age Discrimination in Employment Act); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 237–38, 242 (1987) (compelling arbitration of claims under § 10(b) of the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (compelling arbitration of claims under the § 12(2) of the Securities Act of 1933).

111 David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water,*

viduals to find an attorney willing to take their case or, alternatively, to represent themselves."[112] But for most academics, the Justices' expansion of the FAA was a slow-motion trainwreck. Some accused the Court of ignoring that arbitration often arises out of fine print that nobody reads.[113] Others argued that the Court's permissive stance towards arbitration has allowed companies to engage in "do-it-yourself tort reform" by shortening statutes of limitation, selecting biased decisionmakers, and precluding the award of certain remedies.[114]

As arbitration went mainstream, handling cases became a lucrative endeavor. The AAA, which had enjoyed a monopoly in this sector since it opened in 1927, eventually found itself competing with new providers.[115] For instance, former trial judge H. Warren Knight created JAMS, which cast itself as the forum of choice for high-stakes cases.[116] Kaiser Permanente, one of the nation's biggest health maintenance organizations, built its own arbitration system for medical malpractice cases.[117] And more recently, the New York Stock Exchange and National Association of Securities Dealers merged and created FINRA, a

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and Constructing a New Sink in the Process, 2 U. PA. J. LAB. & EMP. L. 73, 105 (1999).

112 PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS 6 (2008); *see also* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) ("A properly designed arbitration system, I submit, can do a better job of delivering accessible justice for average claimants than a litigation-based approach.").

113 *See* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1249 (2001) ("[I]t is safe to assume that pre-dispute mandatory arbitration has been imposed on the consumer with an absence of any meaningful choice."); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1419 (1996) (asserting that the Court has "negated the enacting Congress' concern that the Act not lead to enforcement of arbitration agreements through contracts of adhesion").

114 David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249 (2009) (calling arbitration "do-it-yourself tort reform"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1641 (2005) ("[C]ompanies are increasingly using their arbitration clause[s] not only to require arbitration but also to further limit consumers' procedural and even substantive rights.").

115 *See* David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 635–37 (2020) (tracing the history of the AAA).

116 Anne S. Kim, *Rent-A-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166, 175–76 (1994) (describing JAMS' origins); *JAMS Fact Sheet*, JAMS, https://www.jamsadr.com/files/uploads/documents/corporate-fact-sheet.pdf [https://perma.cc/VRZ2-M9LB] (last updated Feb. 2017) ("JAMS panelists resolve multiparty, complex cases.").

117 *See* David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error*, 89 N.Y.U. L. REV. 1806, 1826–27 (2014).

self-regulated organization overseen by the Securities and Exchange Commission, which resolves "99% of all securities disputes."[118]

Capitalizing on arbitration's flexibility, providers started offering remote options. For example, in the 1990s, the AAA pioneered the use of "desk arbitrations."[119] In a maneuver that its rivals later borrowed, the AAA created a presumption that low value claims will be resolved on the papers unless one of the parties requests a hearing.[120] This documents-only avenue seeks "to provide a lower cost and more expeditious alternative to a live arbitration."[121] Then, about a decade later, the AAA amended its procedural code to allow arbitrators to hear cases by video.[122] JAMS quickly followed suit, declaring that "[t]he [a]rbitrator has full authority to determine that the [h]earing, or any portion thereof, be conducted in person or virtually by conference call, videoconference or using other communications technology."[123]

With this infrastructure in place, providers had little trouble going remote in 2020. In mid-March, FINRA, JAMS,

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118 Blankley, *supra* note 30, at 27 nn.2 & 4.

119 Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 344 n.151 (1998) (discussing desk arbitrations in AAA construction cases).

120 *See* AM. ARB. ASS'N, CONSUMER ARBITRATION RULES, R. 1(G) (2014), https://www.adr.org/sites/default/files/Consumer%20Rules.pdf [https://perma.cc/DZ96-EZEU] ("Where no disclosed claims or counterclaims exceed $25,000, the dispute shall be resolved by the submission of documents only/desk arbitration . . . . Any party, however, may ask for a hearing."); FINRA, CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES, R. 12800(a) (2017), https://www.finra.org/arbitration-mediation/printable-code-arbitration-procedure-12000#12800 [https://perma.cc/U6TW-3AKW] (stating that in cases involving $50,000 or less, matters "will be decided on the pleadings . . . unless the customer requests a hearing"). JAMS has no claim threshold for desk arbitrations, but instead allows parties to "agree to waive [an] oral [h]earing and submit the dispute to the [a]rbitrator for an [a]ward based on written submissions." JAMS, STREAMLINED ARBITRATION RULES AND PROCEDURES, R. 18 (2021), https://www.jamsadr.com/rules-streamlined-arbitration/#Rule-18 [https://perma.cc/SQH3-Z7YQ] [hereinafter JAMS STREAMLINED RULES]; JAMS, COMPREHENSIVE ARBITRATION RULES, R. 23 (2021) [hereinafter JAMS COMPREHENSIVE RULES], https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-23 [https://perma.cc/C2ZR-VC2Q].

121 Gross, *supra* note 32, at 48.

122 *See* AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R. 32(b) (2016); https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [https://perma.cc/GNC6-CV4G]; AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, R. 28 (2017), https://www.adr.org/sites/default/files/employment_arbitration_rules_and_mediation_procedures_0.pdf [https://perma.cc/3Q3K-X4RC].

123 JAMS COMPREHENSIVE RULES, *supra* note 120, at R. 22(g).

Kaiser, and the AAA suspended in-person hearings[124] but announced that arbitrators could order stalled arbitrations to proceed virtually.[125] At first, parties were cautious. Some insisted on waiting due to their unfamiliarity with videoconferencing.[126] In addition, others recognized that asking the arbitrator to compel online arbitration is risky. Because arbitrators draw their legitimacy from mutual consent, it is not clear that they can properly overrule a party's objection to a remote proceeding.[127] Thus, any award generated after a battle over the hearing format might not withstand judicial review. Yet as the pandemic dragged on, the tide began to turn. In growing numbers, parties either stipulated to going remote or filed motions for video hearings.[128] Soon the virtual arbitration machine was humming. For example, FINRA arbitrators granted 266 of the 439 contested requests for Zoom hearings in cases featuring investors,[129] and the AAA recently announced that it has resolved 11,372 cases featuring a "virtual event."[130]

Observers expect virtual arbitration to last "long after COVID-19 subsides."[131] For starters, private dispute resolution has a history of procedural experimentation. Arbitration is infinitely pliable: "at bottom[,] little more than 'the parties'

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124 *See* Schoeff, Jr., *supra* note 11 (noting that FINRA postponed in-person hearings on March 10); AM. ARB. ASS'N, TRUSTED IN TIMES OF CRISIS 4–9, 26–27 (2020), https://www.adr.org/sites/default/files/document_repository/AAA_2020_AnnualReport_and_Financial_Statements.pdf [https://perma.cc/WV6N-8MNG] (explaining that the American Arbitration Association (AAA) stopped holding in-person hearings on March 16); ANNUAL REPORT OF THE OFFICE OF THE INDEPENDENT ADMINISTRATOR OF THE KAISER FOUNDATION HEALTH PLAN, INC. MANDATORY ARBITRATION SYSTEM FOR DISPUTES WITH HEALTH PLAN MEMBERS 4–5 (2020), https://www.oia-kaiserarb.com/pdfs/2020-Annual-Report.pdf [https://perma.cc/JDL9-GRDR] (mentioning that Kaiser took similar measures about a week later); *COVID-19 Update*, JUDICATE W. (Mar. 20, 2020), https://www.judicatewest.com/Newsroom/NewsroomArticle/169 [https://perma.cc/3PG7-PFRY] ("[W]e are postponing live attendance in all of our offices.").

125 *See* Legaspy v. FINRA No. 20 C 4700, 2020 WL 4696818, at *3 (N.D. Ill. Aug. 13, 2020) (explaining that FINRA made "virtual hearing services (via Zoom and teleconference) available to parties in all cases by joint agreement or by [arbitrator] order") (internal quotation marks omitted); Schmitz, *supra* note 30, at 269.

126 *See* Schmitz, *supra* note 30, at 249.

127 *See* Cheng, *supra* note 42.

128 *See* Schmitz, *supra* note 30, at 249.

129 *See Dispute Resolution Statistics*, FINRA, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#virtual [https://perma.cc/H2SG-YMZD] (last visited Mar. 15, 2022) [hereinafter FINRA Dispute Resolution Statistics].

130 *See Virtual Events*, AM. ARB. ASS'N, https://go.adr.org/virtual-hearing-statistics.html [https://perma.cc/4LPJ-NJ82] (last visited Oct. 6, 2022).

131 Hudgins, *supra* note 41.

dream."[132] Indeed, disputants can engage in "baseball arbitration" (where they each propose an award and the arbitrator must pick one of them) and "bracketed arbitration" (in which they stipulate to minimum and maximum damage amounts).[133] Abandoning in-person hearings seems like no more of a departure than these innovations.

Also, for better or for worse, arbitration is not constrained by the rules that make virtual trials problematic. Judicial procedures need to satisfy the Due Process Clause of the Fourth Amendment, but arbitration rules need not.[134] Likewise, courts must remain open to the public, which can be difficult over Zoom.[135] Conversely, arbitration is private and usually confidential, and thus faces no such obstacles.[136]

Finally, remote arbitration is riding the wake of the larger online dispute resolution (ODR) movement. In the 1990s, technology companies like Amazon and eBay created Internet platforms to encourage their customers to settle disagreements voluntarily.[137] These ODR systems involved "assisted storytelling and joint problem solving[,]"[138] not arbitration, which occurs when an impartial third party renders a binding decision.[139] But eventually, this line blurred, and ODR providers

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132 Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 449 (2005) (quoting HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 336 (tent ed. 1958)).

133 *See* JAMS STREAMLINED RULES, *supra* note 120, at R. 27, 28.

134 *See* FDIC v. Air Fla. Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987) (honoring an arbitrator's decision not to hold a hearing because it "was private, not state, action"); Murillo v. A Better Way Wholesale Autos, Inc., No. 3:17-CV-1883 (VLB), 2019 WL 3081062, at *9 (D. Conn. July 15, 2019) ("[T]he state action element of a due process claim is absent in a private arbitration case.").

135 *See Pandemic Lingers*, *supra* note 29.

136 *See* Schmitz, *supra* note 30, at 264. On the other hand, there is tension between one aspect of the FAA and virtual hearings. FAA section 7 allows arbitrators to summon third parties "to attend before them . . . as a witness." 9 U.S.C. § 7. Some courts have interpreted this language as "requiring summonsed nonparties to appear in the physical presence of the arbitrator as opposed to a video conference or teleconference." Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1161 (11th Cir. 2019).

137 *See generally* Amy J. Schmitz & Colin Rule, The New Handshake: Online Dispute Resolution and the Future of Consumer Protection 33–46 (2017) (describing eBay's ODR system); *see also* Colin Rule, *Online Dispute Resolution and the Future of Justice*, 16 ANN. REV. L. & SOC. SCI. 277, 281 (2020) ("Initially ODR was designed to resolve disputes that arose online between two strangers who probably would never meet face-to-face.").

138 Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 329–30 (2016).

139 Schmitz, *supra* note 30, at 248 ("Most ODR . . . is not [online arbitration] because it involves facilitation of communications aimed to spark voluntary settlement."); *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "arbitra-

also began to handle arbitrations involving specific issues, like whether a negative review violates a website's policies.[140]

Now, several new providers have taken the next step and are "challeng[ing] JAMS and the AAA head on" by administering consumer and employment cases virtually.[141] One such entity, New Era ADR, was founded in 2020, and boasts that it can "resolve disputes within 100 days and save clients up to 90% in litigation time and expenses."[142] A few businesses have already signed up for its services. For instance, in July 2021, Ticketmaster and Live Nation dropped JAMS from their forced arbitration agreements and selected New Era ADR instead.[143] Ticketmaster and Live Nation are not alone: companies "have designated New Era ADR as the forum 'in nearly 700 con-

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tion" as "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute"); *see also* Rory Van Loo, *The Corporation As Courthouse*, 33 YALE J. ON REGUL. 547, 551–52 (2016) ("Because [ODR] involves an intermediary with an interest in preserving the relationship with both sides, it raises a distinct set of questions from those raised by arbitration . . . .").

140 For example, a provider called NetNeutrals once facilitated negotiations between eBay sellers and buyers, but recently established a process in which a neutral outsider conclusively determines whether a negative product review violates eBay's policies. *See* Schmitz, *supra* note 30, at 265. Other hybrid ODR/online arbitration providers include Modria and Matterhorn. *Id.* at 266.

141 Bob Ambrogi, *Online Dispute Resolution Service FairClaims Takes on AAA and JAMS with New Offering*, LAWSITES (Apr. 26, 2021), https://www.lawsitesblog.com/2021/04/online-dispute-resolution-service-fairclaims-takes-on-aaa-and-jams-with-new-offering.html [https://perma.cc/ADX4-82FF]. The National Center for Technology and Dispute Resolution lists dozens of ODR providers on its website (although it is unclear how many of them offer arbitration). *See Provider List*, NCTDR, https://odr.info/provider-list/ [https://perma.cc/5UH8-YQWM] (last visited Oct. 6, 2022).

142 Brian Baxter, *Tech Upstart Seeks New Era with Dispute Resolution Shakeup*, BLOOMBERG L. (Apr. 20, 2021), https://news.bloomberglaw.com/business-and-practice/tech-upstart-seeks-new-era-with-dispute-resolution-shakeup [https://perma.cc/JEN6-BN3Y]. In 2021, New Era ADR was named a Chicago Innovation Award winner as one of "the most innovative new products or services brought to market each year." *New Era ADR Named Winner of 20th Annual Chicago Innovation Awards Up-and-Comer Award*, BUSINESSWIRE (Dec. 13, 2021), https://www.businesswire.com/news/home/20211213005691/en/New-Era-ADR-Named-Winner-of-20th-Annual-Chicago-Innovation-Awards-Up-and-Comer-Award [https://perma.cc/ELM2-WBMM].

143 *See* Complaint at 1, Heckman v. Live Nation Ent., Inc., No. 2:22-cv-00047 (C.D. Cal. Jan. 4, 2022) (on file with author) [hereinafter Heckman Complaint]. Because New Era ADR is remote-only, this maneuver was the functional equivalent of waiving consumers' rights to an in-person hearing. *See* NEW ERA ADR, RULES AND PROCEDURES, R. 1(c)(i) (2022), https://www.neweraadr.com/wp-content/uploads/2022/03/rules-and-procedures.pdf [https://perma.cc/9ZN7-WHU8] ("All Arbitration products are conducted virtually on the New Era ADR platform.").

tracts.'"[144] Similarly, in 2021, remote-only provider FairClaims unveiled its FastTrack Arbitration service, which operates via "email, Dropbox, and . . . Zoom."[145]

But as with virtual trials, we know next to nothing about how remote arbitration functions. In fact, the little information available is wildly contradictory. For example, FINRA publishes aggregate statistics about awards issued in 2020-21.[146] As of November 2021, FINRA reported no meaningful difference between the outcomes of virtual and in-person arbitrations.[147] Conversely, two members of Securities Litigation and Consulting Group (SLCG), an economics consulting firm, performed their own analysis and found that plaintiff win rates and damage awards were lower between May 1 and December 31, 2020 (after FINRA had postponed in-person hearings) than they had been between those dates in each of the preceding four

144 Heckman Complaint, *supra* note 143, at 1 (quoting Jim Dallke, *This Startup Is Helping Businesses Settle Legal Disputes Completely Online*, CHI. INNO (May 3, 2021), https://www.bizjournals.com/chicago/inno/stories/profiles/2021/05/03/online-arbitration-mediation-startup-new-era-adr.html [https://perma.cc/K6GT-VMXJ]).

145 Ambrogi, *supra* note 141. Car-sharing website Turo selects FairClaims to handle its cases and takes the extra precaution of specifying that evidentiary hearings will occur "by video or phone." *Legal Matters*, TURO, https://turo.com/us/en/policies/terms [https://perma.cc/MF6H-5882] (last visited Oct. 5, 2022) [hereinafter TURO]. FairClaims began as an online alternative to small claims court. *See* Jonathan Shieber, *FairClaims Raises $1.8 Million to be a Virtual 'Judge Judy,'* TECH CRUNCH (July 12, 2017), https://techcrunch.com/2017/07/12/fairclaims-raises-1-8-million-to-be-a-virtual-judge-judy/ [https://perma.cc/6FMQ-3XYA]. Thus, many companies select FairClaims for low-value complaints. *E.g.*, *TIDY Affiliate Agreement*, TIDY, https://www.tidy.com/legal/tidy-affiliate-agreement [https://perma.cc/K97E-9TSL] (last updated Aug. 1, 2021) (requiring FairClaims for complaints of $50,000 or less); *Terms of Service*, GETAROUND.COM, https://www.getaround.com/terms/terms-of-service [https://perma.cc/XC58-Y4WH] (last updated Sept. 6, 2022) (same for claims under $25,000); *EagleShare Terms of Service*, EAGLESHARE, https://support.eaglerider.com/eagleshare-terms-of-service [https://perma.cc/8BKK-6RRH] (last updated Feb. 4, 2021) (same); *Terms of Service*, CRUISE, https://cruiselabs.co/terms/ (last visited Oct. 6, 2022) (same); *Outdoorsy Terms and Conditions*, OUTDOORSY, https://www.outdoorsy.com/help/outdoorsy-terms-and-conditions [https://perma/cc/5UJ6-PF2D] (last updated Sept. 1, 2022) (making FairClaims default provider of arbitration services); *Peerspace Services Agreement*, PEERSPACE, https://www.peerspace.com/legal/terms [https://perma.cc/2J6R-DKXE] (last updated Apr. 25, 2022) (requiring FairClaims for complaints of $25,000 or less); *Terms of* Use, THUMBTACK, https://www.thumbtack.com/terms/ [https://perma.cc/D98J-RLHF] (last updated Sept. 16, 2020) (selecting FairClaims for claims under $10,000); *Terms and Conditions*, TWIN VEE, https://twinvee.com/terms-and-conditions/ [https://perma.cc/2UWT-AVBL] (last updated Feb. 14, 2020) (same for matters under $15,000).

146 *See* FINRA Dispute Resolution Statistics, *supra* note 129.

147 *See id.* Customers had won damages in 67 of 150 (44.6%) matters with at least one Zoom evidentiary hearing and 34 of 72 (47.2%) of in-person hearings. *See id.*

years.[148] As a result, they argued that Zoom "is not giving [i]nvestors a level playing field on which to present the merits of their cases."[149]

It is hard to know what to take away from these studies. One explanation for their dueling views is methodological divergences. For one, because FINRA's data starts in 2020 and extends nearly through the end of 2021—whereas the SLCG authors focused on the last eight months of 2015 through 2020—they cover different periods. FINRA also excluded cases that were dismissed before the evidentiary hearing, but the SLCG authors do not mention whether they did so.[150] Finally, as Kristen Blankley has noted, SLCG's "services primarily resolve[ ] around calculating investor losses, which raises some questions about the objectivity demonstrated in the report."[151]

In any event, both analyses only capture the tip of the remote arbitration iceberg. First, although they focus exclusively on disputes filed by investors, FINRA oversees other kinds of cases, such as employment disputes.[152] Second, neither use econometric tools to estimate the impact of other variables on awards, such as the claims asserted, the number of arbitrators, and the background of the parties and their counsel. Third, because they deal with win rates and damage amounts, they do not test the commonly voiced assertion that

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148 *See* CRAIG MCCANN & CHUAN QIN, SLCG, THE IMPACT OF ZOOM ON FINRA ARBITRATION HEARINGS, https://www.slcg.com/pdf/sampleresults/Impact%20of%20Zoom%20on%20FINRA%20Claimants%20Final.pdf [https://perma.cc/2SP8-WJK5] (last visited Oct. 5, 2022). The authors assembled their dataset by downloading awards from the FINRA website in early January 2021. *Id.* at 1. They discovered that investors received some compensation in 43.7% of the decisions in 2015 through 2019 but only in 28.8% of the decisions in 2020. *Id.* at 2. They also found that the mean sum awarded when customers prevailed fell from 65% to 33.3%. *Id.*

149 *Id.* at 4.

150 *See* FINRA Dispute Resolution Statistics, *supra* note 146.

151 Blankley, *supra* note 30, at 21 (footnote omitted).

152 *See* FINRA, CODE OF ARBITRATION PROCEDURES FOR INDUSTRY DISPUTES, R. 13200 (last amended 2008), https://www.finra.org/rules-guidance/rulebooks/finra-rules/13200 [https://perma.cc/HB6D-ZUAQ] (requiring arbitration for cases that stem from "the business activities of a member or an associated person and is between or among [m]embers; [m]embers and [a]ssociated [p]ersons; or [a]ssociated [p]ersons"); FINRA, GENERAL STANDARDS, R. 0160(b)(11) (last amended 2020), https://www.finra.org/rules-guidance/rulebooks/finra-rules/0160 [https://perma.cc/NK2C-XU6E] (defining individual brokers as "associated persons"). However, FINRA only permits parties to arbitrate employment discrimination claims if both parties voluntarily agree after the dispute arises. *See* FINRA, CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES, R. 13201(a) (last amended 2022), https://www.finra.org/rules-guidance/rulebooks/finra-rules/0160 [https://perma.cc/NKZ6-PWYD].

virtual hearings reduce case length and expenses.[153] And fourth, they shed no light on the many remote arbitrations held by JAMS, Kaiser, the AAA, and other providers.

To conclude, remote hearings are the next battleground in the "arbitration war,"[154] but there is little hard evidence about how they compare to face-to-face proceedings. The next Part starts to fill this gap.

II
EMPIRICAL STUDY

This Part reports findings from my empirical study. It first describes my methods and then presents my results.

A. Methodology and Caveats

Four datasets underlie this project. I assembled the first by reading and coding twenty-eight months of FINRA awards.[155] For the others, which cover JAMS, Kaiser, and the AAA, I gathered information from state disclosure statutes. California, the District of Columbia, Maryland, and Maine have passed laws that require providers to publish spreadsheets that detail every forced arbitration they have administered within the last five years.[156] These reports must list the dispute type, the individual's role as claimant or respondent, the filing and closing dates, the company, the individual's law firm, the disposition, the prevailing party, the damages awarded,

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153 *E.g.*, Schmitz, *supra* note 30, at 264 (predicting that "the trend toward [online arbitration] and virtual hearings is likely to continue post-pandemic as parties embrace the efficiencies and conveniences [online arbitration] offers").

154 Editorial, *The Arbitration War*, N.Y. TIMES (Nov. 26, 2010), https://www.nytimes.com/2010/11/27/opinion/27sat1.html [https://perma.cc/3JEY-BQ8V].

155 Unlike other providers' disclosures, which report about twenty variables per case, FINRA posts every arbitrator's ruling on its website. *Arbitration Awards Online*, FINRA, https://www.finra.org/arbitration-mediation/arbitration-awards [https://perma.cc/ZLG3-UE7D] (last visited Oct. 5, 2022). Thus, by examining each award, I collected granular information about both in-person and remote arbitrations.

156 CAL. CIV. PROC. CODE § 1281.96(a) (West 2021); D.C. CODE ANN. § 16-4430 (West 2021); ME. REV. STAT. ANN. tit. 10, § 1394 (West 2021); MD. CODE ANN., COM. LAW § 14-3903 (West 2021). Although these statutes only apply to "consumer" arbitrations, CAL. CIV. PROC. CODE § 1281.96(a), they have been interpreted broadly to include all forced arbitrations. *See* CAL. CTS., ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, STANDARD 2(e)(4) (2003), http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf [https://perma.cc/3373-4SCY] (defining "[c]onsumer party" to include not only individuals who by goods or services, but also medical malpractice claimants and employees).

and the arbitrator.[157] Critically, in 2015, California mandated that providers divulge "whether the hearing was conducted in person, by telephone or video conference, or by documents only."[158] Therefore, subject to exceptions that I will discuss below,[159] I was able to differentiate remote and in-person arbitrations.

I adopted three different measures of success on the merits. I started with the orthodox definition of a "win" in the empirical arbitration literature, which is a case in which the plaintiff obtains either $1 or more in damages or equitable relief.[160] This crude metric deems nominal recoveries to be victories.[161] Thus, to add nuance, I capitalized on the rich detail of the FINRA files to generate a variable called "success rate": the sum of "total damages"[162] divided by the claim

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157 *See* Ramona L. Lampley, *"Underdog" Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727, 1763–64 (2015) (summarizing the disclosure statutes). For the JAMS and Kaiser webpages, see *Consumer Case Information*, JAMS, http://www.jamsadr.com/consumercases [https://perma.cc/XD2J-HKE6] (last visited Oct. 6, 2022); *Sortable Disclosure Table,* OFF. INDEP. ADM;R, http://www.oia-kaiserarb.com/51/consumer-case-information/disclosure-table-about-arbitrations-received-in-past-five-years-sortable/sortable-dislosure-table [https://perma.cc/T434-6YWP] (last updated July 1, 2022). I used the second quarter spreadsheet from JAMS, the October 2021 disclosures from Kaiser, and the third quarter spreadsheet from the AAA. After I downloaded the files, I dropped duplicates and cleaned the data.

158 2014 Cal. Legis. Serv. Ch. 870 (A.B. 802).

159 *See infra* text accompanying note 193.

160 *See* Bingham, *Repeat Player Effect*, *supra* note 40, at 208–10; Colvin, *supra* note 40, at 5. State disclosure statutes require arbitrators to name a "prevailing party." *See* CAL. CIV. PROC. CODE § 1281.96(a)(4). This variable was once impressionistic: arbitrators had the discretion to decide whether the plaintiff or the defendant ultimately carried the day. *See* 2014 Cal. Legis. Serv. Ch. 870 (A.B. 802). However, in 2015, the California legislature changed this subjective standard into an objective one by defining "prevailing party" to mean "the party with a net monetary recovery or an award of injunctive relief." *Id.* Because this tracks the traditional definition of a plaintiff "win," I relied on it to flag individual victories in JAMS, Kaiser, and the AAA. However, about ten percent of FINRA cases and a handful of matters from other providers featured individuals who were, in effect, *defendants*: they had been sued by a company and they did not assert a counterclaim. I treated these individuals as having "won" if the company recovered neither $1 or more in damages nor equitable relief. Occasionally, arbitrators either omitted the prevailing party variable or reported the prevailing party as "both." For these matters, I filled the gap by looking to the remedies section of the disclosure to see which party recovered damages or equitable relief and then applying the definitions of a "win" mentioned above.

161 *See* Alexander & Iannarone, *supra* note 39, at 1700 ("[C]lassify[ing] the outcome of an arbitration as a binary win or loss based solely on whether any monetary sum has been recovered tells us little about what happened or whether the forum is fair . . . .").

162 "Total damages" is the sum of compensatory damages, punitive damages, exemplary damages, attorneys' fees, and costs. It excludes reimbursement for arbitration fees.

amount.[163] Finally, for all providers, I analyzed remedies by calculating "total damages conditional on win," which isolates the discrete issue of how plaintiffs perform *when* they win.[164]

I also paid close attention to repeat player status. Critics have long asserted that forced arbitration favors serially-arbitrating businesses over one-shot plaintiffs.[165] The concern here is that arbitrators are selected by the parties and charge by the hour, and thus have incentives "to build a 'track record' of decisions that corporate repeat-users will view approvingly."[166] In addition, the argument continues, even if arbitrators do not intentionally skew their awards, companies that arbitrate often will gain insight into arbitral decision-making.[167] But defenders of forced arbitration have parried this thrust by observing that it applies equally well to repeat-playing plaintiffs' law firms.[168] And indeed, both sides appear to be correct: previous work has found a statistically significant cor-

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163 For example, an individual who sought $100,000 in damages and recovered $25,000 would have a success rate of .25. FINRA plaintiffs sometimes request a range of damages or change their claim amounts as the case progresses. I solved these problems by using the average of a range of damages and the last claim amount before the evidentiary hearing. I could not calculate the "success rate" for JAMS, Kaiser, or the AAA because too many cases were missing claim amounts.

164 Including individual losses when quantifying damage recoveries would be misleading. After all, a loss is a matter in which the individual receives $0. Thus, failing to drop these cases would conflate success on the merits with success at the remedial stage. Individuals that rarely won but recovered handsomely when they *did* win would seem to have low average damage awards because of all the arbitrations in which they came away empty-handed.

165 *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60–61; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH U. L.Q. 637, 685 (1996); *cf.* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 32–34 (1999) (noting "the many ways in which there may be repeat players in the use of alternative justice systems"). For the classic article distinguishing between repeat players and one-shotters, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

166 Schwartz, *supra* note 165, at 60–61; Sternlight, *supra* note 165, at 685 ("An arbitrator who issues a large punitive damages award against a company may not get chosen again by that company or others who hear of the award."); *cf.* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 33 (1998) (observing that an employer "is likely to be a repeat player, with the opportunity to reject arbitrators whose previous rulings displeased it").

167 Sternlight, *supra* note 165, at 685–86.

168 *See* Estreicher, *supra* note 112, at 566 ("[T]he emergence of an organized plaintiff's bar . . . should drive down considerably any claimed systematic advantage for [defendants]."); W. Mark C. Weidemaier, *Arbitration and the Individuation*

relation between win rates and the number of times a business or plaintiffs' law firm has arbitrated.[169] Thus, to take this key variable into account, I sorted companies and law firms into tiers based on their experience within a provider.[170] Similarly, I flagged "repeat pairs": matters in which a companies or law firms arbitrated more than once with the same arbitrator.

Finally, I should mention that studying arbitration awards may be less probative than one would imagine. In a famous article, George Priest and Benjamin Klein argued against trying to calibrate legal rules based on trial results.[171] Priest and Klein observed that the parties can value—and thus settle—most complaints.[172] Only matters that are so close that the plaintiff and defendant disagree about the range of potential outcomes should proceed to a verdict.[173] Thus, because most fully-litigated disputes will be coin flips, each side should prevail in about 50% of trials.[174] Priest and Klein then explained

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Critique, 49 ARIZ. L. REV. 69, 75 (2007) ("By informally aggregating claims . . . the [plaintiff's] firm may confer repeat-player benefits on its clients.").

169 *See* Colvin, *supra* note 40, at 17–18, 21; Colvin & Gough, *supra* note 40, at 1032–34; Horton & Chandrasekher, *Consumer Arbitration*, *supra* note 40, at 110–11; Horton & Chandrasekher, *Employment Arbitration*, *supra* note 40, at 487–88; Chandrasekher & Horton, *Arbitration Nation*, *supra* note 40, at 58–59.

170 I first determined each entity's "raw repeat player score," which is the number of times that a company, company's law firm, or plaintiff's law firm appeared in each provider's awards. This technique differs from other articles that use all arbitrations within an institution—including those that settled or were abandoned or withdrawn—when calculating the raw repeat player score. *Cf.* Horton & Chandrasekher, *Consumer Arbitration*, *supra* note 40, at 110; Horton & Chandrasekher, *Employment Arbitration*, *supra* note 40, at 463; Chandrasekher & Horton, *Arbitration Nation*, *supra* note 40, at 28 n.216. I made this change to align JAMS, Kaiser, and the AAA with FINRA, which is an awards-only sample. Next, I used the raw repeat player score to divide businesses and law firms into the following camps: (1) pro ses (for unrepresented parties), (2) one-shotters (who arbitrate once), (3) low-level repeat players (who arbitrate more than once but fewer times than the median raw repeat player score), (4) mid-level repeat players (who arbitrate a number of times that is between the median raw repeat player score and the seventy-fifth percentile, inclusive), (5) high-level repeat players (who arbitrate a number of times that is between the seventy-fifth percentile and the ninetieth percentile of raw repeat-player scores, inclusive), and (6) super repeat players (who arbitrate a number of times that exceeds the ninetieth percentile raw repeat player score). For example, example, in FINRA, 169 brokerages popped up once (and thus are one-shotters), whereas UBS Financial Services, Inc. participated in fifty-four cases (and therefore qualifies as a super repeat player). If a case involved multiple law firms, I used the highest of the raw repeat player scores under the assumption that the party would enjoy the benefits of its attorneys' experience.

171 George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14–15 (1984).

172 *Id.* at 14–15.

173 *Id.* at 14–15.

174 *Id.* 15–17.

that this evenhanded distribution of wins should hold no matter whether the relevant standards are pro-plaintiff or pro-defendant.[175] Indeed, even if the applicable doctrines or procedures are slanted in one direction, settlement will weed out all but the toughest cases.[176] Thus, Priest and Klein concluded, because both parties should be victorious about half the time, tallying outcomes may not reveal whether a particular regime leans one way or the other.[177]

Nevertheless, lopsided win ratios can still be helpful to policymakers and courts. For example, they can be a sign that one party enjoys access to better information.[178] If, say, plaintiffs prevail in only 25% of cases, it might be because defendants are better at predicting outcomes and therefore settle most disputes that they are likely to lose.[179] In turn, the existence of this tactical advantage would be problematic in a forum that is supposed to be scrupulously neutral.

Moreover, the Priest-Klein theory may not apply in arbitration. Indeed, Priest and Klein assume that both sides can foresee the result of most cases. Yet private dispute resolution has a reputation for being unpredictable.[180] And as scholars have noted in the litigation context, if no one can read the tea leaves, "any case might be litigated," and asymmetrical win rates can be evidence of a lopsided venue, rule, or procedure.[181]

1. *FINRA*

Between July 1, 2019 and October 31, 2021, FINRA issued 3,202 awards. I read them and excluded decisions that were irrelevant for my purposes, such as those that ended before the evidentiary hearing[182] or only resolved a request for expunge-

175 *Id.* at 15–19.
176 *Id.*
177 *Id.* at 4–5.
178 *Id.* at 19.
179 *See id.*; *see also* Steven Shavell, *Any Frequency of Plaintiff Victory at Trial is Possible*, 25 J. LEGAL STUD. 493, 500 (1996) ("[T]he Priest-Klein assumptions rule out a situation where, for example, defendants have superior knowledge of trial outcomes.").
180 *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002) (claiming that arbitrators "neither follow the law, nor contribute to it"). *But see* Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 203 (2006) (acknowledging that "the evidence on whether arbitrators follow the law in their awards is inconclusive").
181 Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 212 (2014).
182 These cases involved defaults, motions to dismiss, settlements, and stipulated judgments.

ment.[183] After cutting an additional twenty rulings that did not involve an individual,[184] I ended up with 685 cases.[185]

About 60% of these matters involved remote proceedings. Two hundred and seventy-two were heard in person, 190 were conducted by video, 185 were documents-only, and 38 did not fall into these categories.[186] Figure 1 breaks down the number of awards in each format per month. It exposes a decline in traditional hearings (the line marked with circles) and rise in video hearings (the line marked with squares) in mid-2020.[187]

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183 Expungement is the process by which brokers initiate "arbitration proceedings to remove customer complaints from readily accessible public records." Benjamin P. Edwards, *Adversarial Failure*, 77 WASH. & LEE L. REV. 1053, 1065 (2020). I cut cases in which expungement was the only issue presented for two reasons. First, the process has no analogue in the court system and thus does not bear on the forced arbitration controversy. Second, expungement claims are often uncontested. Thus, they can be analogous to default judgments.

184 By "individual," I mean a person (such as an investor or employee) or an entity that is a surrogate for an individual (such as an IRA or a deceased investor's estate).

185 For cases with counterclaims, I included the individual's allegations against a brokerage and omitted the brokerage's allegations against the individual. I did this to avoid double counting these matters, and because criticism of forced arbitration focuses more on individual plaintiffs than individual defendants. *See Developments in the Law—Access to Courts*, *supra* note 82, at 1171. However, fifty-nine arbitrations featured individuals who were defendants and did not file counterclaims. I used these disputes in my "individual win rate" calculation but not my "individual success rate" or "total damages conditional on win" variables. This ensured that I excluded recoveries by businesses from these damages-based equations.

186 More specifically, these thirty-eight miscellaneous proceedings broke down into nineteen hybrid video/in-person hearings, fourteen telephone hearings, one hybrid telephone/in-person hearing, and one unknown hearing.

187 Conversely, the number of documents-only proceedings remained relatively constant after the pandemic began.

Figure 1: FINRA Awards

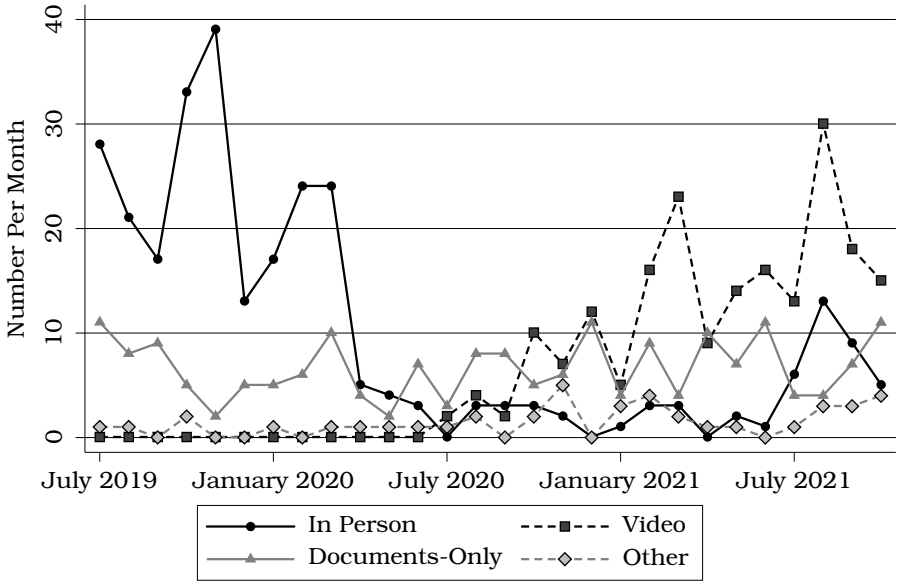


Table 1 surveys the bivariate data and reveals that plaintiffs performed worse by every metric when they went remote. First, the mean win rate is higher for in-person cases (46%) than video hearings (36.3%) and documents-only proceedings (24.9%). Second, the average success rate in person (27.1%) exceeds the mean success rate for video cases (16.1%) and documents-only proceedings (16.7%). Third, the mean total damages conditional on a win is $816,306 in person, which eclipses the $396,281 average in video hearings and the $21,750 mean in documents-only matters. Each of these differences is statistically significant (except for the success rate for documents-only cases, which falls exactly on the cutoff ($p = 0.05$)).

In addition, remote arbitration only sometimes reduces disposition times and fees. In-person hearings set the benchmark by concluding in an average of 620 days and incurring a mean of $24,178 in fees. Desk arbitrations came in well under those amounts by wrapping up in an average of 210 days and generating a mean of $2,707 in fees—both statistically meaningful gaps. But despite sunny claims about video arbitration's efficiency,[188] its statistics are indistinguishable from in-person hearings: the average video case length is 614 days, and its mean fees are $23,703.

188 *See supra* text accompanying notes 41, 153.

Table 1: FINRA Awarded Cases: Bivariate Analysis

Type of Proceeding	N	Plaintiff Win Rate	Success Rate	Total Damages Conditional on Win	Case Length (Days)	Total Fees	Plaintiff Fees
In-Person Hearing	272	46.0%	27.1%	$816,306	620	$24,178	$7,094
Video Hearing	190	36.3%* (p=0.04)	16.1%* (p=0.04)	$396,281* (p=0.04)	614 (p=0.89)	$23,703 (p=0.79)	$7,810 (p=0.33)
Docs-Only Proceeding	185	24.9%*** (p<0.00)	16.7% (p=0.05)	$21,750*** (p<0.00)	210*** (p<0.00)	$2,707*** (p<0.00)	$721*** (p<0.00)
Other Proceeding	38	38.9% (p=0.42)	15.1% (p=0.26)	$2,473,607* (p<0.01)	644 (p=0.74)	$25,392 (p=0.75)	$7,816 (p=0.58)
Total	685	37.2%	20.5%	$659,216	509	$18,278	$5,594

Notes:

(1) Due to missing data, I could not determine whether two "other proceedings" were individual wins and I could not calculate the success rate for nine in-person hearings, ten video hearings, and two documents-only proceedings.

(2) I based success rate and total damages conditional on win on the 249 cases in which the individual filed a claim or counterclaim and recovered damages.

(3) I use t-tests to compare each variable to in-person hearings.

(4) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Although I do not know precisely why individuals struggle in remote arbitrations, the FINRA files hold a tantalizing clue. As noted above, a major concern about virtual trials is that witnesses seem less trustworthy when they do not personally appear.[189] In particular, this may hamstring lawsuits against brokerages, which rely heavily on an investor's testimony.[190] Thus, as Table 2 illustrates, it is notable that the chasm between win rates in video and in-person cases is especially wide when investors allege fraud, suitability, negligence, breach of fiduciary duty, and breach of contract.

189 *See supra* text accompanying notes 82–83.

190 *See* Joel Wiesenfeld, Afshan Ali & Erin Bobkin, *The Issue of Credibility in Investor Loss Litigation*, 90 CAN. BAR REV. 129, 134–35 (2011) ("Credibility determinations factor into all aspects of litigation between investor clients and their dealers and sales representatives . . . ."); McCann & Qin, *supra* note 148 ("ZOOM may make it more difficult for [c]laimants to carry their burden of proof at a contested hearing or to present the full personal impact of the alleged financial misconduct.").

Table 2: FINRA Win Rates by Proceeding Type and Claim

Type of Proceeding	Fraud	Suitability	Negligence	Breach of Fiduciary Duty	Breach of Contract
In-Person Hearing	59.2%	58.5%	64.3%	65.4%	57.4%
Video Hearing	41.9%* (p=0.01)	36.7% (p=0.06)	47.1%* (p=0.01)	46.0%** (p<0.01)	44.0%* (p=0.03)

Notes:
(1) I use t-tests to compare each variable to in-person hearings.
(2) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Table 3 reports the results of two linear probability model regression analyses. One looks at wins and the other examines success rates. They estimate the link between each dependent variable and a host of independent variables, such as hearing type, whether the individual was claimant or respondent, the claims asserted, the repeat player status of the company, the company's law firm, the individual's law firm, the existence of a repeat pairing, and the composition of the arbitral panel.[191] They find that the mere fact that a hearing takes place by Zoom is correlated with a 12.3 percentage point decrease in the probability of an individual win and a 12.2 percentage point drop in the success rate relative to in-person proceedings. Both results are statistically significant.[192]

191 FINRA arbitrators can be "public" (which means that they "never have been affiliated with a broker or dealer or with other financial industry entities") or "private" (which indicates that they do have such ties). *Arbitrator Appointment FAQ*, FINRA, https://www.finra.org/arbitration-mediation/overview/additional-resources/faq/arbitrator-appointment [https://perma.cc/4KGS-5Z5B] (last visited Oct. 6, 2022). Depending on the claims presented, cases may involve one public arbitrator, three public arbitrators, two public arbitrators and one private arbitrator, or (rarely) some other combination of arbitrators. *See id.*

192 The data also underscore the importance of repeat player status in FINRA. For example, hiring a lawyer increases the probability of a win for individuals by between 20.6 percentage points (for one-shot firms) and 33.2 percentage points (for super repeat players). And on the opposite side of the ledger, the fact that a company is either a mid-level or high-level repeat player—rather than a one-shotter—lowers the probability of a win for individuals by about 17 percentage points. The repeat playing status of the businesses' law firm does not affect either the win rate or the success rate in a statistically significant fashion. This is consistent with previous work on employment awards in FINRA. *See* J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113, 130 (2014) (finding little support for a repeat-player effect for companies in employment arbitration).

Table 3: FINRA Regression Analyses
Linear Probability Model
(Robust Standard Errors in Parentheses)

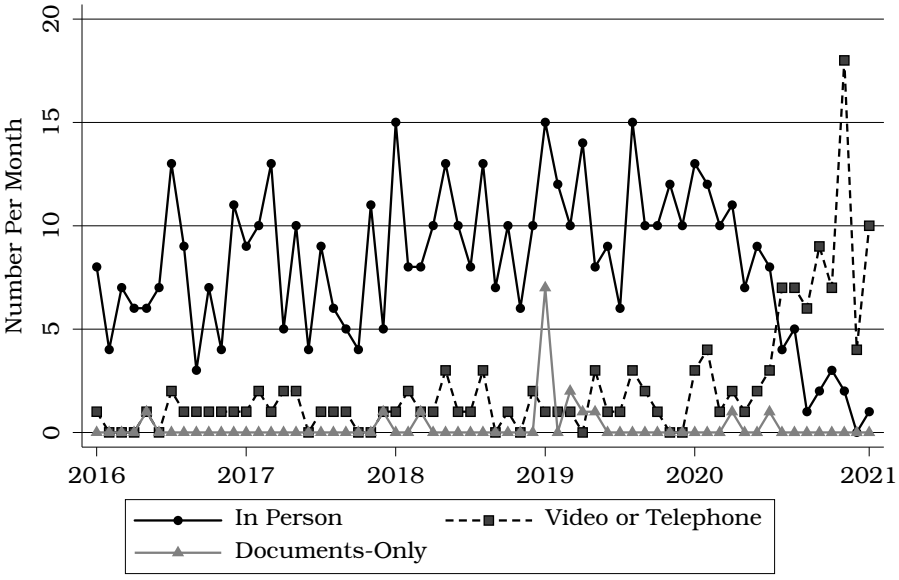
	Individual Win	Success Rate
Hearing Type *(Reference Category is In-Person)*		
Video Hearing	-0.123** (0.042)	-0.122* (0.048)
Documents-Only Hearing	-0.112* (0.054)	-0.111 (0.058)
Other Type of Proceeding	-0.026 (0.079)	-0.106 (0.073)
Case Type *(Reference Category is Employment)*		
Investor	0.050 (0.061)	-0.050 (0.067)
Individual's Role (*Reference Category is Cases in Which Individual Did Not Assert a Claim or Counterclaim*)		
Asserted Claim or Counterclaim	-0.284*** (0.070)	††
Claims†		
Breach of Contract	0.106* (0.041)	-0.043 (0.056)
Fraud	0.017 (0.041)	0.020 (0.034)
Promissory Note	0.128 (0.084)	0.013 (0.113)
Wrongful Termination	-0.100 (0.084)	-0.155* (0.064)
Statutory Violations	-0.024 (0.046)	0.017 (0.068)
Unsuitability	-0.077 (0.051)	-0.028 (0.055)
Churning	-0.038 (0.087)	-0.105 (0.071)
Negligence	0.011 (0.046)	0.007 (0.036)
Breach of Fiduciary Duty	0.113* (0.050)	0.114** (0.043)

2. *JAMS*

My JAMS sample consists of 16,414 cases that were filed between August 2009 and March 2021. These matters yielded 1,560 awards. To maintain consistency with the FINRA files, I focused on the 674 decisions that followed evidentiary hearings.

JAMS' disclosures are deficient in an important respect. As noted, California requires providers to declare whether a hearing was held in person, over the phone, or by video.[193] In defiance of this command, JAMS lumps video and telephonic proceedings into a single category. As a result, my JAMS data contains 517 in-person awards, 16 documents-only awards, and 135 "telephone or videoconference" awards. My best guess is that most "telephone or videoconference" hearings were held online. Figure 2, which tracks decisions by type of medium each month, shows a dramatic increase in "telephone or videoconference" rulings in July 2020: exactly when video-based proceedings skyrocketed in FINRA.

Figure 2: JAMS Awards



Overall, the JAMS files render a split verdict on forced remote arbitration. As Table 4 elucidates, the bivariate data show that individuals won 38.1% of conventional hearings. Conversely, in video/telephonic hearings, individuals prevailed 25.2% of the time, which is a statistically meaningful drop.

193 *See supra* text accompanying note 158.

Surprisingly, individuals were victorious in 68.8% of documents-only proceedings, which is *higher* than the in-person win rate by a statistically significant degree. But this result may be misleading. Nine of the eleven individual wins in desk arbitrations are, essentially, the same case: employment claims filed against the same defendant by the same plaintiffs' law firm and heard by the same arbitrator. Because this one outcome exerts such a strong gravitational pull in Table 4, its depiction of plaintiff success in documents-only matters may be exaggerated.[194]

Table 4 also suggests that remote options can be efficient. The mean in-person case spanned 526 days and racked up $36,366 in fees. Conversely, video/telephonic hearings (422 days, $7,134 in fees and documents-only proceedings (353 days, $4,377 in fees) were faster and cheaper on average by statistically significant degrees.

Table 4: JAMS Awarded Cases: Bivariate Analysis

Type of Proceeding	N	Plaintiff Win Rate	Total Damages Conditional on Win	Case Length (Days)	Total Fees	Plaintiff Fees
In-Person Hearing	517	38.1%	$454,617	526	$36,366	$853
Video or Telephone	135	25.2%** (p=0.00)	$234,701 (p=0.27)	422*** (p=0.00)	$7,134*** (p=0.00)	$0 (p=0.30)
Docs-Only Proceeding	16	68.8%* (p=0.01)	$962,889 (p<0.22)	353** (p<0.01)	$4,377* (p<0.05)	$0 (p=0.72)
Total	668	35.9%	$475,529	500	$29,434	$654

Notes:
(1) Six cases are missing information about the type of proceeding.
(2) I based the total damages conditional on win variable on the 177 cases in which the individual both initiated the arbitration and was named as the prevailing party.
(3) I use t-tests to compare each variable to in-person hearings.
(4) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

194 On average, individuals recovered more in damages when they appeared in person ($454,617) than when they participated by video or telephone ($234,701). Counterintuitively, the mean award in desk arbitrations—$962,889—dwarfed the other figures. Yet none of these divergences were statistically significant.

Table 5 displays the output of a linear probability regression analysis that uses individual win as the dependent variable. It suggests that the main determinant of success in JAMS is the repeat-player statuses of the plaintiff's law firm and the defendant. For instance, an individual hiring a super repeat-playing lawyer increases the probability of their victory by 41.2 percentage points relative to representing oneself. On the flip side, suing a super repeat-playing business lowers the probability of plaintiff success by 28.1 percentage points when compared to facing a one-shot company. The video/telephonic and documents-only coefficients are not statistically significant, which implies that going remote does not influence outcomes in JAMS.

Table 5: JAMS Regression Analyses
Linear Probability Model
(Robust Standard Errors in Parentheses)

	Individual Win
Hearing Type *(Reference Category is In-Person)*	
Video or Telephonic Hearing	-0.033 (0.044)
Documents-Only Hearing	0.208 (0.112)
Case Type *(Reference Category is Employment)*	
Consumer	0.046 (0.070)
Tort	0.114 (0.080)
Other	0.021 (0.690)
Which Party Filed Case *(Reference Category is Business Filed Case)*	
Individual	0.101* (0.049)
Individual's Law Firm-Arbitrator Familiarity *(Reference Category is Businesses Not Facing Repeat Pairs)*	
Repeat Pair	0.121 (0.100)
Individual's Law Firm Sophistication *(Reference Category is* Pro Se *Individuals)*	
One-Shot Law Firm	0.198*** (0.047)
Low-Level Repeat Player	†
Mid-Level Repeat Player	0.179* (0.076)
High-Level Repeat Player	0.279** (0.081)
Super Repeat Player	0.412*** (0.085)
Business-Arbitrator Familiarity *(Reference Category is Individuals Not Facing Repeat Pairs)*	
Repeat Pair	0.069 (0.076)

	Individual Win
Business Sophistication *(Reference Category is One-Shot Businesses)*	
Low-Level Repeat Player	†
Mid-Level Repeat Player	-0.140** (0.046)
High-Level Repeat Player	-0.212*** (0.051)
Super Repeat Player	-0.281* (0.111)
Panel Type *(Reference Category is One Arbitrator)*	
Two Arbitrators	0.066 (0.160)
Three Arbitrators	0.091 (0.504)
Constant	0.143* (0.061)
N	654
adj. R^2	0.109

Notes:

(1) "Consumer" matters include cases coded as following by JAMS: credit, debt collection, goods, telecommunications, and other Banking or Finance.

(2) "Tort" matters include cases coded as following by JAMS: health care, insurance, and personal injury.

(3) "Other" matters are coded by JAMS as "other."

(5) † Some tiers of repeat players do not appear in all samples.

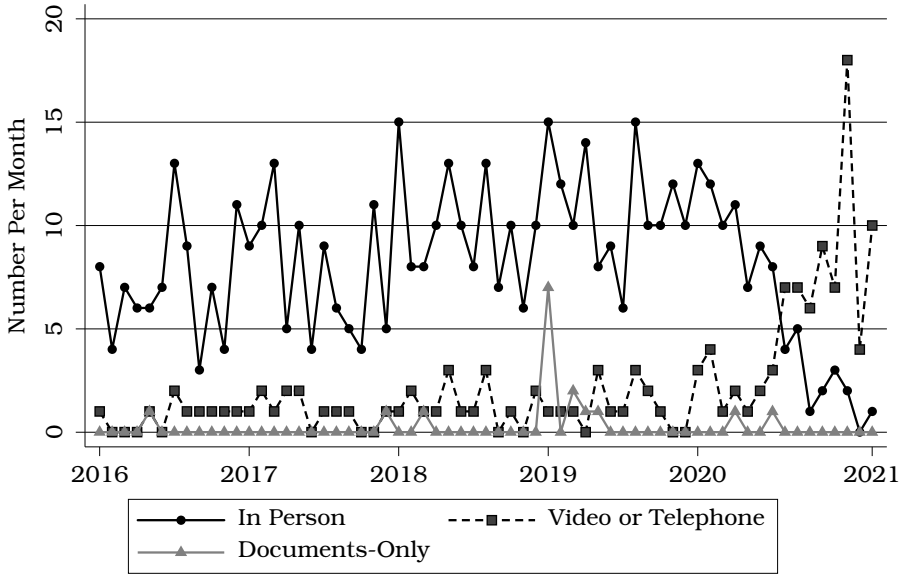
(4) Six cases are missing data on the type of the proceeding and fourteen cases are missing data about which party filed the arbitration.

(5) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

3. *Kaiser*

Kaiser reported 3,336 filings between January 1, 2016 and October 1, 2021. Of these, only 165 cases progressed to an evidentiary hearing. One hundred and twenty-two of these matters were adjudicated in person, 31 took place over video, and 12 fell into a miscellaneous category that I will call "other remote."[195] Figure 3, which traces awards by medium over time, highlights the now-familiar pattern of videoconferencing eclipsing in-person proceedings over the past two years.

Figure 3: Kaiser Awards



Although the Kaiser dataset is small, it contains two salient points. First, once again, individuals seem to enjoy better results in person. Although neither of these differences is statistically significant, the win rate is higher for in-person arbitrations (35.2%) than it is for video hearings (25.8%) and individuals recovered larger average damage awards in person ($887,286) than they did over Zoom ($241,935). Second, bucking the received wisdom that remote arbitration moves quickly, the mean length of video hearings (730 days) was longer by a statistically meaningful measure than the average duration of in-person proceedings (600 days).[196]

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195 Two "other remote" were hybrid in person/video matters, eight were argued over the telephone, and two were submitted on the documents.

196 For reasons that are hazy, individuals performed especially poorly in the "other remote" category. Table 6 reveals that they won only 8.3% of these cases,

Table 6: Kaiser Awarded Cases: Bivariate Analysis

Type of Proceeding	N	Plaintiff Win Rate	Total Damages Conditional on Win	Case Length (Days)	Total Fees	Plaintiff Fees
In-Person Hearing	122	35.2%	$887,286	600	$35,864	$342
Video	31	25.8% (p=0.32)	$241,935 (p=0.43)	730* (p=0.02)	$39,288 (p=0.49)	$0 (p=0.41)
Other Remote	12	8.3% (p=0.06)	†	420* (p=0.02)	$8,958*** (p=0.00)	$206 (p=0.85)
Total	165	31.5%	$786,054	611	$34,830	$270

Notes:

(1) I based total damages conditional on win variable on the 51 cases in which the individual filed a claim and was the prevailing party.

(2) † No individual recovered damages in an "other remote" proceeding.

(3) Four cases are missing data on the arbitrator's fees.

(4) I use t-tests to compare each variable to in-person hearings.

(5) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

and Table 7 estimates that proceeding in one of these formats diminishes the probability of a victory by 24.9 percentage points.

Table 7: Kaiser Regression Analyses
Linear Probability Model
(Robust Standard Errors in Parentheses)

	Individual Win
Hearing Type *(Reference Category is In-Person)*	
Video or Telephonic Hearing	-0.091 (0.092)
Other Hearing	-0.249** (0.083)
Case Type *(Reference Category is Healthcare)*	
Debt Collection†	-0.046 (0.136)
Personal Injury	-0.213 (0.126)
Insurance	-0.314** (0.118)
Individual's Law Firm-Arbitrator Familiarity *(Reference Category is Kaiser Not Facing Repeat Pairs)*	
Repeat Pair	0.098 (0.263)
Individual's Law Firm Sophistication *(Reference Category is* Pro Se *Individual)*	
One-Shot Law Firm	0.059 (0.116)
Low-Level Repeat Player	††
Mid-Level Repeat Player	††
High-Level Repeat Player	††
Super Repeat Player	0.034 (0.137)
Constant	0.314** (0.118)
N	165
adj. R^2	-0.008

Notes:
(1) † Some tiers of repeat players do not appear in all samples.
(2) †† Every debt collection action was filed by Kaiser and every personal injury, insurance, and healthcare claim was filed by individuals. As a result, I omitted the "individual filed" variable.
(3) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

4. *AAA*

The AAA's disclosures are both useful and frustrating. On the one hand, because the AAA does such brisk business, its files include a whopping 47,198 arbitrations and 6,044 awards after evidentiary hearings. But on the other hand, this material contains a glaring ambiguity: it does not expressly pinpoint video or telephonic proceedings. Although one of the AAA's variables is "type of hearing," it merely reports 2,734 "in person" awards and 3,310 awards in which the field is blank. Similarly, a separate column entitled "documents-only proceeding" consists of 5,154 awards marked "yes" and 890 awards labeled "no." At first, it is unclear how these pieces fit together.[197]

Yet the AAA spreadsheet may implicitly identify telephonic or video proceedings. Two thousand four hundred and thirty-seven awards are neither designated "in person" nor "documents-only." Arguably, if these cases were both remote and not submitted on the papers, they were tried by phone or screen. Figure 4 reinforces this conclusion by charting awards by hearing type each month. It reveals that arbitral decisions in the "not in person/not documents-only" camp behave like telephonic and video-based hearings in other institutions by skyrocketing halfway through 2020. I will call these matters "unknown/suspected telephone or video."

197 Compounding the confusion, the AAA codes seventeen cases as *both* in-person and documents-only, which seems like an inherent contradiction. I treated these matters as involving an "unknown" hearing type.

Figure 4: AAA Awards

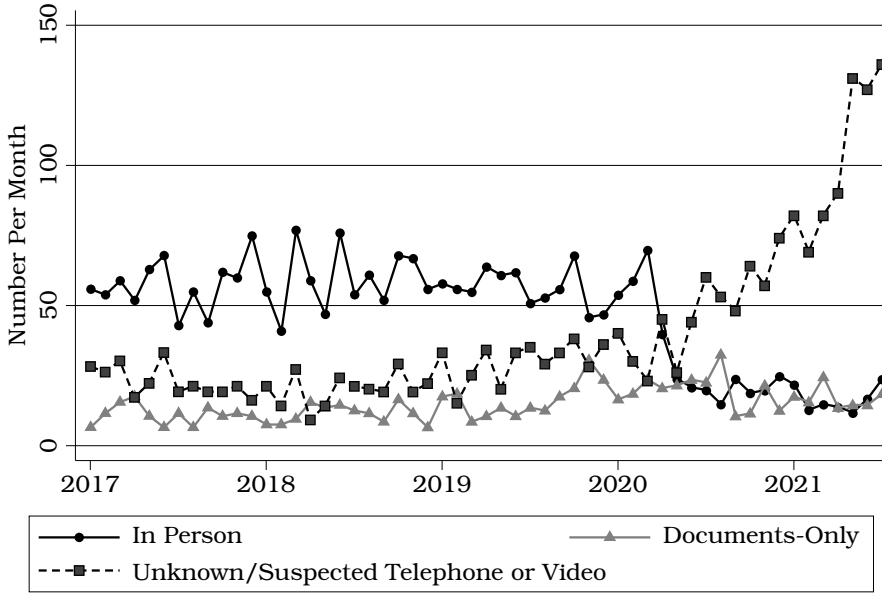

Table 8, the bivariate AAA data, draws an unflattering picture of remote hearings. For starters, the win rate in unknown/suspected telephone or video cases (43.2%) and documents-only proceedings (25.9%) falls far short of the in-person mark (50.4%). Both differences are statistically significant. In addition, the average case length for unknown/suspected telephone or video cases (424 days) is longer by a statistically significant degree than the mean duration of in-person hearings (383 days).

Table 8: AAA Awarded Cases: Bivariate Analysis

Type of Proceeding	N	Plaintiff Win Rate	Total Damages Conditional on Win	Case Length (Days)	Total Fees	Plaintiff Fees
In-Person Hearing	2,734	50.4%	$149,287	383	$12,160	$1,699
Unknown/ Suspected Telephone or Video	2,437	43.2%*** (p=0.00)	$119,977 (p=0.42)	424*** (p=0.00)	$12,197 (p=0.93)	$799*** (p=0.00)
Docs-Only Proceeding	873	25.9%*** (p<0.00)	$14,275* (p=0.02)	225*** (p<0.00)	$1,579*** (p<0.00)	$111*** (p<0.00)
Total	6,044	43.9%	$126,093	358	$9,427	$1,204

Notes:

(1) I based total damages conditional on win on the 2,166 cases in which the individual sought monetary damages and was the prevailing party.

(2) I use t-tests to compare each variable to in-person hearings.

(3) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

The results of Table 9's regression is more complicated. Because the AAA dataset is so large, I was able analyze consumer, employment, and construction cases separately. Doing so indicates that the remote penalty exists only in consumer matters. Indeed, in those disputes, unknown/suspected telephone or video hearings correlate with a 5.1 percentage point decline in the probability of an individual win, and documents-only proceedings are associated with a 9.2 percentage point drop in the win rate.

Table 9: AAA Awarded Cases: Regression Analysis

	Consumer	Employment	Construction
Hearing Type *(Reference Category is In-Person)*			
Unknown/Suspected Telephone or Video	-0.051* (0.021)	-0.042 (0.030)	0.009 (0.022)
Documents-Only	-0.092*** (0.026)	-0.103 (0.174)	-0.046 (0.036)
Which Party Filed Case *(Reference Category is Business Filed Case)*			
Individual	0.108*** (0.028)	0.060 (0.050)	0.479*** (0.023)
Business Sophistication *(Reference Category is Individuals Facing One-Shot Business)*			
Low-Level Repeat Player	†	†	†
Mid-Level Repeat Player	-0.083*** (0.025)	-0.081* (0.032)	-0.095*** (0.026)
High-Level Repeat Player	-0.049 (0.031)	-0.099 (0.055)	-0.291* (0.134)
Super Repeat Player	-0.130** (0.040)	0.172* (0.081)	†
Business-Arbitrator Familiarity *(Reference Category is Individuals Facing Non-Repeat Pairs)*			
Repeat Pair	0.039 (0.025)	-0.049 (0.052)	0.0096 (0.052)
Individual's Law Firm Sophistication *(Reference Category is* Pro Se *Individuals)*			
One-Shot Law Firm	0.170*** (0.026)	0.177*** (0.033)	0.092*** (0.023)
Low-Level Repeat Player	†	†	†
Mid-Level Repeat Player	0.105** (0.034)	0.213*** (0.048)	0.165*** (0.036)
High-Level Repeat Player	0.106* (0.052)	0.383*** (0.091)	0.040 (0.057)
Super Repeat Player	0.151*** (0.023)	0.424*** (0.058)	0.082* (0.040)

	Consumer	Employment	Construction
Individual's Law Firm-Arbitrator Familiarity *(Reference Category is Businesses Not Facing Repeat Pairs)*			
Repeat Pair	0.118*** (0.024)	-0.034 (0.054)	0.038 (0.032)
Dispute Subtype *(Reference Category is Cases Coded as "Other")*††			
Accounting	-0.054 (0.070)	-0.031 (0.109)	†††
Automotive	†††	0.031 (0.066)	†††
Car Sale/Lease	0.055 (0.038)	†††	†††
Car Warranty	0.350*** (0.079)	†††	†††
Condo/Apartment	†††	†††	0.111 (0.166)
Construction	†††	-0.0013 (0.098)	†††
Dating Services	0.081 (0.087)	†††	†††
Debt Collection	-0.148** (0.050)	†††	†††
Education	0.0914 (0.061)	-0.002 (0.059)	†††
Energy	†††	-0.095 (0.073)	†††
Entertainment/Media/ Publishing	†††	0.006 (0.130)	†††
Financial Services	-0.037 (0.035)	0.047 (0.060)	†††
Healthcare	-0.0170 (0.116)	-0.167** (0.054)	†††
Home Warranty	†††	†††	0.026 (0.111)
Hospitality/Travel	0.011 (0.052)	-0.024 (0.069)	†††
Insurance	0.297*** (0.067)	-0.048 (0.078)	0.032 (0.264)
Legal Services	-0.055 (0.064)	0.154 (0.182)	†††

	Consumer	Employment	Construction
New Home Construction	†††	†††	0.083 (0.074)
Nursing Home	-0.152 (0.103)	†††	†††
Pest Control	0.509*** (0.052)	†††	†††
Pharmaceuticals/Medical Devices/Biotechnology	†††	-0.227** (0.085)	†††
Real Estate	†††	0.192 (0.139)	0.133 (0.156)
Renovation/Addition/ Home Improvement	†††	†††	0.075 (0.072)
Restaurant/Food Service	†††	0.120 (0.065)	†††
Retail	†††	-0.085 (0.056)	†††
Staffing/Employment Agencies	†††	-0.110 (0.116)	†††
Standardized Testing	-0.034 (0.048)	†††	†††
Technology	†††	0.108 (0.068)	†††
Telecommunications/ Wireless/Cable/Satellite	0.012 (0.039)	-0.059 (0.086)	†††
Transportation	†††	-0.042 (0.095)	†††
Warranties (Other than Car)	0.560*** (0.093)	†††	†††
Constant	0.203*** (0.044)	0.122* (0.058)	0.188* (0.076)
N	2955	1161	1928
adj. R^2	0.142	0.252	0.230

Notes:
(1) † Some tiers of repeat players do not appear in all samples.
(2) †† The "other" category includes cases coded by the AAA as "other" and any case type with ten or fewer observations.
(3) ††† Not all case types are present in both the consumer and employment samples.
(4) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

5. *Summary*

My research reveals two main points. First, during the heart of the pandemic, arbitration became practically synonymous with remote hearings. Between July 2020 and November 2021, 1,575 of the 2,355 awards (66.9%) in my data featured either video proceedings (in FINRA and Kaiser) or suspected video proceedings (in JAMS and the AAA). An additional 380 awards were documents-only (16.1%) and 33 fell into a miscellaneous remote category, like hybrid video/in-person or telephone (1.4%). Although these numbers will decline as normalcy returns, companies and providers have laid the groundwork for the widespread use of remote arbitration.

Second, for plaintiffs, the costs of going remote may outweigh the benefits. This appears to be especially true in online arbitrations. On one side of the scale is the remote penalty. For video (or presumed video) cases, looking at the bivariate data, the plaintiff win rate in all four providers is seven to ten percentage points lower than it is for in-person arbitrations. These results are statistically significant except for Kaiser, which is not surprising considering that dataset's small size.[198] On the other side of the scale, there is little proof that virtual arbitration is efficient. To be sure, JAMS' "telephone or videoconference" cases were shorter and cheaper than in-person cases.[199] But in Kaiser and the AAA, virtual and "unknown/suspected telephone or video" matters took longer than in-person matters by a statistically significant degree. Likewise, the total amount of arbitrator's fees in FINRA, Kaiser, and the AAA were basically the same in both procedural modes. Thus, the downsides of arbitrating by Zoom are easier to see than the upsides.

Documents-only proceedings seem like less of a raw deal. Admittedly, the remote penalty in this rough and tumble context is even starker. Setting aside the outlier of JAMS,[200] indi-

198 Admittedly, in the regressions, the remote penalty only exists in the FINRA and AAA consumer settings. This suggests that variables other than hearing format are driving the lower plaintiff win rate in other remote contexts. Nevertheless, it is also possible that the regression results reflect flaws in the data, such as JAMS and the AAA's conflation of online and telephonic hearings.

199 In addition, the mean AAA arbitrator's fees borne by plaintiffs in "unknown/suspected telephone or video" hearings was lower than the average bill paid by plaintiffs in person by $900. Yet the fact that these rays of sunshine come from the flawed data reported by the JAMS and the AAA makes them less reliable. For example, because telephone is likely to be an especially fast-moving medium, conflating it with video matters might skew the figures on case length and expense.

200 *See supra* text accompanying note 194.

viduals prevailed on the papers about half as often as they did in person. Likewise, the regressions imply that in desk arbitrations in FINRA and AAA consumer cases, the format alone is responsible for between a nine and twelve percent drop in the probability of a plaintiff victory. Nevertheless, foregoing a hearing also pays dividends. Indeed, documents-only proceedings blazed through the system and cost less in FINRA, JAMS, and the AAA. Desk arbitrations thus seem offer plaintiffs a tradeoff: a diminished chance of winning at a fraction of the time and expense.

Admittedly, cases decided during the chaos of the pandemic might not be representative of forced remote arbitration in the future. As mentioned, when COVID hit, some individuals chose to postpone their hearings, but others volunteered to go online.[201] Perhaps plaintiffs who were willing to roll the dice in an unfamiliar format had weaker allegations and thus little to lose. Likewise, individuals who select the abbreviated desk arbitration process typically have lower value claims than those who proceed in person. Finally, any delays in remote cases in my research might reflect the fact that arbitration ground to a halt in spring 2020 before resuming online. In these ways, my data might suffer from selection bias.

Nevertheless, these caveats do not dispel my pessimism about forced remote arbitration. For one, it seems equally conceivable that the remote penalty will get worse over time in virtual hearings. Consider again the fact that some plaintiffs in my data agreed to web-based procedures. Some of them must have felt that they could prove their allegations without coming eye-to-eye with the arbitrator. For example, their claims might have depended on documentary evidence, rather than testimony, or they could have been comfortable with Zoom. However, these "voluntary" forced remote arbitrations are going to become less common. Indeed, as companies increasingly use fine print to delete the right to an in-person hearing, fewer plaintiffs in video cases will have made the tactical choice to be there. In turn, the pool of online matters may contain a higher proportion of claims that are unsuitable for the format, driving down the win rate.

Moreover, companies, not plaintiffs, stand to reap the rewards of remote procedures. Suppose virtual hearings ultimately prove to be cheaper than in-person arbitrations. This procedural corner-cutting will largely benefit businesses. In-

201 *See supra* text accompanying notes 126–128.

deed, most providers have already enacted rules that cap an individual's liability for arbitrators' fees and require in-person hearings to take place in a convenient location.[202] These principles explain why mean in-person arbitration expenses in Kaiser exceeded $35,000 but plaintiffs paid an average of just $342. Likewise, it is no accident that 2,495 of the 2,734 (91%) in-person arbitrations in the AAA occurred in the home state of the plaintiff's law firm. Accordingly, even if remote arbitration reduces costs and travel expenses, the savings will flow disproportionately to corporations.

Ultimately, I find evidence that remote arbitration is less hospitable to plaintiffs than traditional arbitration. In turn, this raises the question I turn to next: what should courts and policymakers do about the rise of forced remote arbitration?

III
POLICY IMPLICATIONS

This Part uses my data to answer open doctrinal questions, propose reforms, and plant flags for further study. First, it considers arbitration clauses that do not mention the format of the proceeding. It explains why arbitrators—not courts—should decide whether these "silent" agreements permit remote hearings. It also debunks a theory that surfaced during the pandemic: that the Court's recent FAA jurisprudence prevents any decision-maker from finding that the parties implicitly assented to going remote. Second, this Part analyzes the gathering storm surrounding companies that require remote arbitration. It demonstrates that judges use the unconscionability doctrine to strike down fine print that creates an uneven playing field in arbitration. It then explains why courts in states that use unconscionability aggressively could find that remote arbitration mandates are unenforceable. Third, this Part suggests a way for state lawmakers to revise their disclosures statutes to keep tabs on this burgeoning form of dispute resolution.

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202 *See* Chandrasekher & Horton, *Arbitration Nation*, *supra* note 40, at 14–15; AGCS Marine Ins. Co. v. Hymel & Assocs., LLC, No. 1:16-cv-6899-GHW, 2017 WL 2729093, at *2 (S.D.N.Y. June 22, 2017) (mentioning that the AAA "requires a reasonably convenient location for in-person hearings" (internal quotation marks and citation omitted)).

A. Silent Contracts

Most arbitration clauses say nothing about the permissibility of remote hearings.[203] Thus, when COVID emerged, there was vast uncertainty about what happened when one party wanted to arbitrate virtually but the other did not.[204] This section fleshes out our understanding of this issue. It begins by analyzing whether courts or arbitrators should decide whether a silent contract allows remote procedures. Next, it considers—but rejects—the thesis that an agreement to go remote can never be implied.

1. *Who Decides?*

When the parties' contract does not address remote procedures, the mist descends at the first step: do courts or arbitrators have jurisdiction over a motion to go remote? The answer depends on how this issue is classified. Preliminary skirmishes about an arbitration take two forms. First, some raise questions of "substantive arbitrability." Matters of substantive arbitrability tend to be existential challenges to the propriety of arbitrating at all, such as when a plaintiff argues that an arbitration clause is invalid or is too narrow to apply to a specific claim.[205] Second, other kinds of conflict fall under the banner of "procedural arbitrability.[206] These clashes con-

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203 Alternatively, some contracts are facially silent about remote hearings but name JAMS or the AAA as the provider. As noted, these entities give arbitrators the authority to proceed by phone or video. *See supra* text accompanying notes 122–123. Thus, when parties agree to arbitrate in one of these venues, they consent—albeit in an attenuated fashion—to remote proceedings. Likewise, FINRA allows both its Director and arbitrators to set the "location" of the arbitration, and two federal courts have recently opined that the institution thereby authorizes online hearings. *See* Cristo v. Charles Schwab Corp., No. 17-cv-1843-GPC-MDD, 2021 WL 2633624, at *3 (S.D. Cal. June 25, 2021); Legaspy v. FINRA, No. 20 C 4700, 2020 WL 4696818, at *3 (N.D. Ill. Aug. 13, 2020).

204 *See* Cheng, *supra* note 42.

205 *See* James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76, 79 (Del. 2006) ("Substantive arbitrability issues are gateway questions about the scope of an arbitration provision and its applicability to a given dispute.").

206 *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) (referring to "'procedural' questions which grow out of the dispute and bear on its final disposition"). Confusingly, the Court refers to questions of substantive arbitrability as issues of "arbitrability" and issues of procedural arbitrability as *not* involving "arbitrability." *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (2002). I will follow the lead of most judges and scholars and use the substantive/procedural dichotomy. *E.g.*, Boys Club of San Fernando Valley, Inc. v. Fid. & Deposit Co. of Md., 8 Cal. Rptr. 2d 587, 589 (Cal. Ct. App. 1992); Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 835–36 (2003).

cern the mechanics of the arbitration, like whether to consolidate cases[207] or the proper number of arbitrators.[208]

The FAA establishes a presumption that courts entertain questions of substantive arbitrability and arbitrators hear matters of procedural arbitrability.[209] This default rule exists for four reasons. First, because decisions about substantive arbitrability affect the overarching duty to arbitrate, assigning them to arbitrators could create an unworkable paradox. Because arbitrators draw their power from the parties' consent, an arbitrator's ruling that a case is not arbitrable might undercut her authority to make such a judgment.[210] Second, arbitrators are familiar with arbitration's customs. Thus, they are better situated than judges to resolve nuts-and-bolts issues that arise as the dispute progresses.[211] Third, permitting arbitrators to resolve procedural conundrums is more efficient than making the parties obtain a court order every time they disagree about a technicality.[212] Fourth, giving arbitrators dominion over procedural arbitrability furthers the parties' probable expectations that "a forum-based decisionmaker [will] decide forum-specific procedural gateway matters."[213]

These considerations reveal that the format of the evidentiary hearing is a matter of procedural arbitrability. First, the issue of whether to go remote is far more limited than the

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207 *E.g.*, Emps. Ins. Co. of Wausau v. Century Indem. Co., 443 F.3d 573, 577 (7th Cir. 2006).

208 *E.g.*, Dockser v. Schwartzberg, 433 F.3d 421, 426 (4th Cir. 2006).

209 *See Howsam*, 537 U.S. at 84; McKesson Corp. v. Loc. 150 IBT, 969 F.2d 831, 834 (9th Cir. 1992) ("In the absence of an express agreement to the contrary, procedural questions are submitted to the arbitrator . . . along with the merits . . . ."). As I discuss in further depth *infra* notes 266–267, parties can also submit questions of substantive arbitrability to arbitrators if they clearly manifest their intent to do so. *See also* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

210 *See* Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 970 (8th Cir. 2017) (observing that questions of procedural arbitrability "do not challenge the arbitrator's underlying authority").

211 *See Howsam*, 537 U.S. at 85 (explaining that arbitrators are "comparatively more expert about the meaning of their own rule[s]"); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 446 (2003) (plurality opinion) (opining that "[a]rbitrators are well situated to answer [procedural] question[s]").

212 *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 558 (discussing how empowering arbitrators to decide procedural issues streamlines dispute resolution).

213 *Howsam*, 537 U.S. at 86. Reinforcing this conclusion, parties invariably cast a wide net by agreeing to arbitrate "[a]ny controversy arising out of, or relating to [a] contract." Futterman Indus., Ltd. v. Imptex Int'l Corp., 146 A.D.2d 520, 520 (N.Y. App. Div. 1989). Arguably, this sweeping language covers not only the merits of the case, but also conflict about the arbitration itself (which is a "controversy" that has "aris[en]" from the contract).

question of whether arbitration is warranted. Therefore, there is no danger that the arbitrator's decision about the hearing medium will uproot her own power. Second, like other procedural arbitrability topics, this inquiry allows arbitrators to use their expertise to discern "what kind of arbitration proceeding the parties agreed to."[214] Third, unlike judges, arbitrators can make this call without bringing the case to a halt. And fourth, given these advantages, allocating the subject to arbitrators dovetails with the parties' likely intent. These arrows point in this same direction: arbitrators should decide whether a silent contract permits remote proceedings.

2. *Implied Agreements*

However, even if the decision to go remote is a matter of procedural arbitrability, the FAA might preclude arbitrators from finding that the parties impliedly agreed to dispense with in-person hearings. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the Court held that a procedure—class-wide arbitration—is so aberrant that an "implicit agreement to authorize [it] is not a term that the arbitrator may infer."[215] A panel of veteran maritime arbitrators had construed a shipping contract that was silent about the permissibility of class proceedings to authorize them.[216] Speaking through Justice Alito, the Court took the extraordinary step of overriding the arbitrators' decision.[217] Justice Alito reasoned that because class arbitration can involve thousands of parties and bet-the-company stakes without meaningful review of the award, it "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[218]

Chris Dove and Christian Perez have argued that *Stolt-Nielsen*'s logic applies with equal force to virtual arbitration.[219]

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214 Ciccio v. SmileDirectClub, LLC, 2 F.4th 577, 587 (6th Cir. 2021) (quoting Dockser v. Schwartzberg, 433 F.3d 421, 426 (4th Cir. 2006)).

215 559 U.S. 662, 685 (2010).

216 *Id.* at 668–69. The parties had stipulated to the fact that their contract was "silent" not just in the sense that "the clause made no express reference to class arbitration," but rather that there had "been no agreement that has been reached on that issue." *Id.* at 668–69.

217 *Id.* at 687.

218 *Id.* at 685. More recently, the Court overturned a trial court order compelling class arbitration when the contract was ambiguous about the permissibility of aggregating claims. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

219 *See* Dove & Perez, *supra* note 46.

Dove and Perez assert that video-based evidentiary hearings are "fundamentally different from a traditional proceeding held in-person."[220] Therefore, they conclude that arbitrators cannot read silent contracts to allow remote arbitrations:

> [T]he authority to compel a videoconference hearing probably cannot be inferred solely from the fact that the parties entered into an agreement to arbitrate. This is because a videoconference arbitration may change the very nature of the arbitration to such a degree that it cannot be presumed that the parties consented to it simply by entering into an arbitration agreement.[221]

My data suggests that this argument is overstated.[222] Indeed, although the remote penalty is worrisome, it is comparatively mild. For example, in the FINRA regression, the pivot to Zoom correlated with a twelve percentage point drop in the probability of an individual win but suing a mid- or high-level repeat-playing brokerage—as opposed to a one-shot company—also reduced the likelihood of a victory by seventeen percentage points. Likewise, the AAA consumer regression links virtual hearings to a five percentage point dip in the chance of a plaintiff prevailing, which pales in comparison to the thirteen point decline that occurs when the defendant is a super repeat player. To be clear, as I will discuss in the next section, the remote penalty, like the repeat-player advantage, is problematic. Virtual arbitration should be regulated. Nevertheless, the move online is not the kind of molecular transformation that *Stolt-Nielsen* finds class arbitration to be. Indeed, going remote neither thrusts additional parties into the dispute nor magnifies the potential damages. Accordingly, even if it weakens plaintiffs' rights, it does not "fundamentally change[ ] the nature of the 'traditional individualized arbitration' envisioned by the FAA."[223]

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220 *Id.*

221 *Id.*

222 I am also not persuaded that the Court would deem any procedure other than class proceedings to "change the nature" of arbitration. As is well-known, the conservative Justices have long gone out of their way to encourage companies to use arbitration as a shield against class actions. *See* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 583–99 (2020). As a result, some circuit courts treat the Court's class arbitration opinions as *sui generis*. *See* Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 764 (3d Cir. 2016) ("[B]ilateral arbitration dispute case law is entitled to relatively little weight in the class arbitrability context." (internal quotation marks and citation omitted)).

223 *Lamps Plus, Inc.*, 139 S. Ct. at 1412 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).

In sum, there is no bright-line prohibition on arbitrators finding that the parties have implicitly agreed to hold the evidentiary hearing online. But as the next section explains, the issue of whether businesses can *forbid* in-person proceedings is different.

B. Remote Arbitration Mandates

A few companies already mandate remote arbitration, and there is little doubt that more will soon jump on the bandwagon.[224] However, no court has considered whether contractual waivers of the right to an in-person evidentiary hearing are enforceable. This section argues that these clauses may be unconscionable. It then grapples with some of the complexities that flow from this conclusion.

The FAA allows courts to invalidate all or part of an arbitration provision under traditional contract principles.[225] The unconscionability doctrine, which nullifies unfair fine print, has long been the weapon of choice against forced arbitration agreements.[226] The rule has two prongs: procedural and substantive.[227] Procedural unconscionability focuses on how the agreement was consummated, and exists where there is "inequality in bargaining power between the parties" or clauses that are "hidden or obscure."[228] Conversely, substantive un-

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224 *See supra* notes 143–145 and accompanying text.

225 *See supra* text accompanying notes 101–102. Because the FAA seeks to abolish hostility to arbitration, courts cannot treat arbitration agreements more harshly than other contracts. *See* Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). However, it is an open secret that some states police arbitration clauses more actively than others. *See* Brief of the Employers Group as Amicus Curiae in Support of Petitioners, MHN Gov't Servs., Inc. v. Zaborowski (No. 14–1458 (R46–024)), 578 U.S. 917 (2016), 2015 WL 7770253, at *2 (accusing California courts of impermissibly discriminating against arbitration). Nevertheless, the Court has only once found that the FAA preempts a state court decision on this ground. *See* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 55 (2015). Likewise, courts cannot use contract law to "interfere[ ] with fundamental attributes of arbitration," such as by insisting that class arbitration be available to facilitate the pursuit of small dollar claims. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011). Because nobody would suggest that remote hearings are a "fundamental attribute[ ]" of arbitration, this limitation is irrelevant for my discussion.

226 David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012).

227 *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 (1967) (making this distinction).

228 Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 35 (Or. 2014); Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 352 (Ct. App. 2007). Other courts use more holistic tests. *See, e.g.*, Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996) (articulating six factors to guide the procedural unconscionability analysis, including "whether there was a lack of opportunity for meaningful negotiation" and "whether the stronger party employed deceptive practices to obscure key contractual provisions"); Rent-A-Ctr., Inc. v. Ellis, 827 S.E.2d 605, 616–17 (W. Va. 2019)

conscionability hinges on the contract's real-world effect.[229] A term crosses this line if it is "unduly oppressive,"[230] "unexpectedly harsh,"[231] or "so one-sided as to shock the conscience."[232] In almost all states, "[b]oth components of unconscionability are required,"[233] but courts often employ a sliding scale in which a strong showing on one prong can cure weaker proof on the other.[234]

Many forced remote arbitration clauses seem to be procedurally unconscionable. First, they appear in standard forms drafted by powerful companies.[235] In some states, these "contracts of adhesion" contain at least some procedural unconscionability.[236] For instance, in 2017, a federal court in

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("[T]he age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.").

229 *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) ("In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made.").

230 Lenz v. FSC Sec. Corp., 414 P.3d 1262, 1277 (Mont. 2018).

231 De La Torre v. CashCall, Inc., 422 P.3d 1004, 1009 (Cal. 2018).

232 Butcher v. Butcher, 160 N.Y.S. 3d 130, 132 (App. Div. 2021).

233 Carr v. Heart of the N. Home Inspection, Inc., 2022 WI App 7. ¶ 15 (2021). *But see* Zuniga v. Major League Baseball, 2021 IL App (1st) 201264, ¶ 38 (opining that procedural unconscionability alone is sufficient).

234 *E.g.*, Dias v. Burberry Ltd., No. 21-cv-192-MMA (JLB), 2021 WL 2349730, at *13 (S.D. Cal. June 9, 2021) ("[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.") (quoting Armendariz v. Found Health Psychcare Servs., 6 P.3d 669, 690 (Cal. 2000)).

235 *See supra* notes 143–145 and accompanying text.

236 Quality Bank v. Cavett, 788 N.W.2d 629, 632 (N.D. 2010) (explaining that some courts "presume [that] adhesion contracts are procedurally unconscionable"); Totten v. Kellogg Brown & Root, LLC, No. 515-cv-01876-ODW-KKx, 2016 WL 9344021, at *3 (C.D. Cal. Feb. 16, 2016) ("[A]ny contract of adhesion is minimally procedurally unconscionable.") (quoting Brown v. DIRECTV, LLC, No. CV 12–08382 DMG (Ex), 2013 WL 3273811, at *8 (C.D. Cal. June 16, 2013)); McCann v. Neuronetics, Inc., No. CV 21-1132, 2021 WL 5441094, at *3 (E.D. Pa. Nov. 19, 2021) ("Adhesion contracts are procedurally unconscionable."); Moore v. Hovensa, LLC, 47 V.I. 104, 107 (Super. Ct. 2015) ("Generally, a contract or provision thereof is procedurally unconscionable if it constitutes a contract of adhesion."). *But see* Robbins v. Playhouse Lounge, No. 119-cv-08387-NLH-KMW, 2021 WL 2525709, at *8 (D.N.J. June 21, 2021) ("New Jersey courts have held that a finding that a contract is a contract of adhesion does not necessarily, on its own, serve as proof of unconscionability."). In addition, some courts hold that an agreement is not procedurally unconscionable if the individual had "market alternatives"—meaning that they could have found the same product or service from a different vendor "free of the terms claimed to be unconscionable." Dean Witter Reynolds, Inc. v. Superior Ct. of Alameda Cnty., 259 Cal. Rptr. 789, 798 (Ct. App. 1989). *But see* Fisher v. MoneyGram Int'l, Inc., 281 Cal. Rptr. 3d 771, 781 (Ct. App. 2021) (limiting the "market alternatives" exception to cases "where surprise

California found that the forced arbitration agreement in Ticketmaster's Terms of Use (TOU) was procedurally unconscionable.[237] There is no reason to believe that a judge would reach a different result now that the TOU contains a forced remote arbitration agreement.[238] Compounding this problem, some contracts say nothing about waiving the right to an in-person hearing. Instead, they achieve that result through the back door by naming a remote provider, such as New Era ADR and FairClaims.[239] Thus, the unconventional nature of the proceeding "is artfully hidden by merely referencing the [provider's] arbitration rules."[240]

Requiring remote arbitration also could be substantively unconscionable. Like all fairness tests, substantive unconscionability is notoriously vague, and courts disagree about how to apply it to arbitration clauses.[241] In general, though, it is trig-

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is not seriously in issue, and the plaintiff relies solely on the defendant's use of an adhesion contract to show procedural unconscionability").

237 *See* Nevarez v. Forty Niners Football Co., No. 16-cv-07013, 2017 WL 3492110, at *12 (N.D. Cal. Aug. 15, 2017). Admittedly, the court held that the degree of procedural unconscionability was "low." *Id.* However, a judge could find additional procedural unconscionability now that Ticketmaster attempts to incorporate a remote arbitration mandate by reference.

238 *See supra* notes 143–145 and accompanying text.

239 *See supra* notes 143–145 and accompanying text. As noted, the AAA and JAMS also allow arbitrators to receive evidence by phone or video. *See supra* text accompanying notes 122–123. Thus, any contract that selects one of these providers also grants arbitrators the freedom to dispense with in-person hearings in any particular case. But New Era ADR and FairClaims are more troubling because they *foreclose* the possibility of a plaintiff appearing in person.

240 Harper v. Ultimo, 7 Cal. Rptr. 3d 418, 422 (Ct. App. 2003). This principle is subject to two limits. First, defendants can overcome it by attaching the relevant arbitration rules to the contract. *See* Lane v. Francis Cap. Mgmt. LLC, 168 Cal. Rptr. 3d 800, 811 (Ct. App. 2014). However, no company of which I am aware does so. Second, the "plaintiff's unconscionability claim [must] depend[ ] in some manner on the arbitration rules in question" and not some external factor. Baltazar v. Forever 21, Inc., 367 P.3d 6, 12 (Cal. 2016) (rejecting argument that an employer's failure to provide an employee "with a copy of the AAA's rules for arbitration" amounted to procedural unconscionability); *cf.* Ali v. Daylight Transp., LLC, 273 Cal. Rptr. 3d 544, 556 (Ct. App. 2020). That would be precisely the case with an unconscionability challenge to a remote arbitration mandate that is incorporated by selecting a virtual-only provider.

241 For example, jurisdictions split over the issue of "mutuality": whether it is substantively unconscionable for a clause to mandate that an individual arbitrate her claims while exempting lawsuits that the drafter is likely to file. *Compare* Peavy by Peavy v. Skilled Healthcare Grp., 470 P.3d 218, 222 (N.M. 2020) ("[A]rbitration agreements [are] unfairly and unreasonably one-sided when they unjustifiably require the non-drafting party to arbitrate its likeliest claims, while allowing the drafting party to pursue its likeliest claims through litigation.") *and* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000) ("[I]t is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee . . . .") *with* Takiedine v.

gered when businesses create obstacles that plaintiffs would not face in the judicial system. As the Texas Supreme Court explained, "In applying the unconscionability standard, the crucial inquiry is whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, a forum where the litigant can effectively vindicate his or her rights."[242] Thus, judges often nullify aspects of the arbitral regime that give the drafter an "unfair advantage,"[243] including terms that mandate confidentiality,[244] slash discovery,[245] shorten the statute of limitations,[246] saddle the plaintiff with hefty costs,[247] eliminate the plaintiff's right to recover statutory attorneys' fees,[248] and require a pre-arbitration hearing that offers a "free peek" at the plaintiff's claims.[249]

Remote arbitration mandates are similar to these suspect provisions. For one, they sharply deviate from the norms of litigation. As mentioned, judges are reluctant to allow witnesses to testify from other locations:

7-Eleven, Inc., No. 17-4518, 2021 WL 3223070, at *8 n.10 (E.D. Pa. July 29, 2021) ("[T]he lack of mutuality in the arbitration agreement plays no role in this [c]ourt's analysis.").

242 *In re* Olshan Found. Repair Co., LLC, 328 S.W.3d 883, 894 (Tex. 2010); *see also* Prieto v. Healthcare & Ret. Corp. of Am., 919 So. 2d 531, 533 (Fla. Dist. Ct. App. 2005) (holding that an arbitration clause was unconscionable because it "appreciably diminish[ed] the [plaintiff's] rights").

243 Nino v. Jewelry Exch., Inc., 609 F.3d 191, 204 (3d Cir. 2010).

244 *E.g.*, Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004) ("As written, the [confidentiality] provision hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations.").

245 *E.g.*, Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 545 (E.D. Pa. 2006) ("Plaintiff's limited information [due to discovery limitations] will put her at a distinct disadvantage in arbitration . . . ."); *In re* Poly-Am., L.P., 262 S.W.3d 337, 357 (Tex. 2008) ("[C]ourts refuse to enforce [discovery] limitations when adequate evidence is presented that a plaintiff's ability to present his or her claims in an arbitral forum is thereby hindered.").

246 *E.g.*, De Leon v. Pinnacle Prop. Mgmt. Servs., LLC, 287 Cal. Rptr. 3d 402, 410 (Ct. App. 2021) (holding that arbitration clause that slashed limitations period to one year "is unconscionable because many of plaintiff's claims have longer statute of limitations").

247 *E.g.*, Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267, 277 (Ct. App. 2003) ("[W]here a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay.").

248 *E.g.*, Casa Ford, Inc. v. Armendariz, No. 08-20-00084-CV, 2021 WL 3721718, at *3 (Tex. App. Aug. 23, 2021) ("If we were to allow arbitration agreement provisions requiring each party to pay its own attorneys' fees without regard for a finding of liability against the employer, we would be undercutting the legislature's intent by allowing employers to simply move these claims to an arbitral forum.").

249 *E.g.*, Pokorny v. Quixtar, Inc., 601 F.3d 987, 998 (9th Cir. 2010) (quoting Nyulassy v. Lockheed Martin Corp., 16 Cal. Rptr. 3d 296, 307 (Ct. App. 2004)).

> Clearly, a jury trial conducted by videoconference is not the same as a trial where the witnesses testify in the same room as the jury. Videoconference proceedings have their shortcomings. "[V]irtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."[250]

Nevertheless, forced remote arbitration clauses institutionalize a procedure that judges permit only grudgingly.[251]

Moreover, my research reinforces the superiority of in-person adjudication. Indeed, plaintiffs win less often and yet obtain little benefit from virtual hearings. To be sure, these findings are only preliminary, and the remote penalty varies between providers and case types. Yet the substantive unconscionability inquiry usually revolves around nothing more than "context, common sense, and conscience."[252] Thus, when a court nullifies, say, a confidentiality provision, it relies on its *intuition* that "a lack of public disclosure may systematically favor companies over individuals."[253] My data goes beyond gut feelings and educated guesses by offering *concrete evidence* that arbitrating online in some settings weakens plaintiffs' substantive rights. Thus, in jurisdictions that have robust unconscionability doctrines, courts would be within the bounds of precedent to invalidate remote arbitration mandates. Such a holding would be particularly warranted in situations where

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250 Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005) (quoting United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001); *see also* Lopez v. NTI, LLC, 748 F. Supp. 2d 471, 479 (D. Md. 2010) ("[S]ubstitutes for live testimony are necessarily imperfect.").

251 Of course, one reason why arbitration is valuable is that it is *not* litigation: it is not encumbered by the formalities of the judicial system. Nevertheless, "an assessment of what a party has lost through an arbitration agreement often involves consideration of what specific rights, protections, or benefits would otherwise apply." Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 206 (Cal. 2013).

252 Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 75 (2006).

253 Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997). There is one exception to this "I know it when I see it" approach: judges usually enforce cost-splitting clauses unless the plaintiff proves that she cannot afford to pay arbitration fees. *E.g.*, Gabriel v. Island Pac. Acad., Inc., 400 P.3d 526, 538 (Haw. 2017); *cf.* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (refusing to invalidate an arbitration clause in the absence of such evidence). *But see* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687 (Cal. 2000) ("[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.").

the plaintiff is technologically unsophisticated or asserts claims that call for credibility assessments.[254]

A few complications deserve mention. First, some remote providers give plaintiffs a choice between virtual or desk arbitrations.[255] This is slightly less objectionable than insisting exclusively on video. Indeed, virtual hearings do not seem to benefit plaintiffs, but documents-only proceedings have a silver lining: they cut case durations and costs. However, courts should recognize that submitting on the papers also has a dark side. In the regressions, it reduces the likelihood of a plaintiff win in FINRA and AAA consumer matters.[256] Also, remote providers are using desk arbitrations in a novel way. Traditionally, this barebones format has been the default for small claims, but plaintiffs have been free to opt out by requesting an in-person hearing.[257] Yet remote providers do not handle conventional arbitrations, and therefore do not offer this safe harbor.[258] For these reasons, documents-or-video clauses are only marginally less unconscionable than virtual-only provisions.

Second, unconscionable remote arbitration mandates raise thorny remedial issues. Unless a contract is "'permeated' by

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254 *Cf.* Edwards v. Logan, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999) (reasoning that video hearings "may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion").

255 *See, e.g.*, FAIRCLAIMS, FASTTRACK RULES & PROCEDURES FOR CLAIMS OVER $25,000, R. 20.1 (2021), https://s3.amazonaws.com/arbi-website/faircla ims-rules/FairClaims-FastTrack-Rules.pdf [permalink forthcoming] [hereinafter FAIRCLAIMS FASTTRACK RULES & PROCEDURES] ("For disputes where no party's claim or counterclaim exceeds $250,000, the parties may agree to waive a live-hearing and have a document-only arbitration to resolve the entirety of the parties' dispute.").

256 My research can also inform how judges conceptualize documents-only proceedings in traditional providers. The caselaw on point is sparse, but it treats desk arbitrations as an elegant alternative to full-blown hearings. For example, some courts have rejected cost-based unconscionability challenges to clauses that select the AAA's rules on the grounds that the ability to obtain a ruling on the papers ensures that "expenses w[ill] be minimal." Gorman v. S/W Tax Loans, Inc., No. 1:14-cv-00089-GBW-KK, 2015 WL 12751710, at *5 n.10 (D.N.M. Mar. 17, 2015); *see also* Brooks v. Event Ent. Grp., Inc., No. 20-22495-Civ-Scola, 2020 WL 6882779, at *4 (S.D. Fla. Nov. 23, 2020) (reasoning that the availability of desk arbitration "eliminate[s] the Plaintiffs' concerns about travel costs"). But because I find that submitting a matter on the papers is correlated with a decrease in the probability of a win, this analysis is overly simplistic.

257 *See supra* text accompanying notes 120–121.

258 *See* FAIRCLAIMS FASTTRACK RULES & PROCEDURES, *supra* note 255, at R. 21.1 ("The live hearing may be conducted remotely via video or telephone conference by the agreement of the parties or at the arbitrator's discretion."); *How It Works*, NEW ERA ADR, https://www.neweraadr.com/adr-platform/e-arbitration/ [https://perma.cc/VQ7K-D9PP] ("[W]e made the entire process fully digital and fully virtual . . . .") (last visited Jan. 4, 2023).

unconscionability," courts sever unfair terms and enforce the remaining agreement to arbitrate.[259] As a result, if a company waives a plaintiff's right to appear in person but selects an old-school provider like JAMS or the AAA, the judge can delete the remote arbitration directive and compel an in-person hearing. But things get more complex when a drafter selects one of the new remote providers. Because these entities have no in-person options, they cannot administer the matter.[260] In turn, this triggers section 5 of the FAA, which governs when the parties' chosen provider is unavailable.[261] Most courts interpret section 5 to require them to invalidate the entire arbitration agreement if the provider is an "integral part" of the provision.[262] In general, selecting an institution by name—which most remote arbitration mandates do—makes it "integral."[263] Therefore, even if the rest of the arbitration clause is fair, simply designating a remote provider may be enough to sink the entire ship.[264]

Third, some businesses have begun trying to shield their remote arbitration mandates from judicial review. Recall that courts presumptively entertain matters of substantive arbi-

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259 Davis v. Kozak, 267 Cal. Rptr. 3d 927, 944 (Ct. App. 2020) (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 695 (Cal. 2000)); Gilbert v. Indeed, Inc., 513 F. Supp. 3d 374, 408 (S.D.N.Y. 2021) ("Because the arbitration provision can stand without the [unfair] provision, any defect in the [unfair] provision does not require the Court also to strike the arbitration provision.").

260 *See supra* text accompanying notes 141–145.

261 *See* 9 U.S.C. § 5 (regulating "a lapse in the naming of an arbitrator or arbitrators").

262 Flagg v. First Premier Bank, 644 F. App'x 893, 894 (11th Cir. 2016).

263 *See id.* at 896; Ranzy v. Tijerina, 393 F. App'x 174, 176 (5th Cir. 2010) ("[W]here the parties' agreement specifies that the laws and procedures of a particular forum shall govern any arbitration between them, that forum-selection clause is an 'important' part of the arbitration agreement."); Moss v. BMO Harris Bank, N.A., 114 F. Supp. 3d 61, 66 (E.D.N.Y. 2015), *aff'd*, Moss v. First Premier Bank, 835 F.3d 260 (2d Cir. 2016) ("[C]ourts have held that the unavailability of a designated arbitration forum will render an arbitration provision unenforceable, if the language of the contract makes clear that the designated forum was intended to be the 'exclusive' arbitral forum."); Carr v. Gateway, Inc., 944 N.E.2d 327, 335 (Ill. 2011) (declining to adopt a bright line rule but finding that the named provider was "integral" under the facts of the case). *But see* Green v. U.S. Cash Advance Ill., LLC, 724 F.3d 787, 793 (7th Cir. 2013) (rejecting this approach and reasoning that "[s]ection 5 allows judges to supply details in order to make arbitration work").

264 To try to avoid this result, some companies that select remote providers identify a fallback in-person provider. *See* TURO, supra note 145 ("In the event FairClaims declines to or is unable to adjudicate the claim, the arbitration will be conducted by the AAA . . . ."); TICKETMASTER, *supra* note 36 (selecting New Era ADR, then FairClaims, and then stating that if all else fails, "you and we will mutually select an alternative arbitration provider").

trability, such as whether an arbitration clause is invalid.[265] However, the Court has opened the door for drafters to use "delegation" clauses to displace this default rule.[266] A delegation clause entrusts arbitrators with deciding not just the merits of the dispute, but the gateway issue of whether the agreement to arbitrate the merits is enforceable.[267] The cynical logic behind these provisions is that because arbitrators only get paid if a case goes to arbitration, they are less likely than judges to conclude that the arbitral regime is unconscionable.[268]

The Court's cases on delegation clauses are a headache-inducing hall of mirrors. The point of departure is the separability doctrine: a legal fiction that treats arbitration provisions as their own independent contracts within larger "container" contracts.[269] Separability allows arbitrators to entertain most challenges to the container contract. When a party alleges that the container contract is unenforceable due to mistake, fraud, or duress, they have not attacked the freestanding agreement to arbitrate, which kicks in and sends their claim to arbitration.[270] The Court's approach to delegation clauses extends this "Russian nesting dolls" approach.[271] It conceptualizes delegation clauses as (1) agreements to arbitrate whether a case must be arbitrated within (2) agreements to arbitrate the plaintiff's causes of action within (3) the larger container contract.[272] As a result, to nullify a delegation provision, plaintiffs usually must prove that it would be unconscionable to arbitrate

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265 *See supra* text accompanying note 209.

266 *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370 (2018).

267 *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 66, 72 (2010) (enforcing a clause that tasked the arbitrator with deciding whether the agreement to arbitrate the plaintiff's race discrimination claim was unconscionable); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019) (holding that courts must honor delegation clauses even if they believe that there is no plausible argument that the underlying claim must be arbitrated). However, the parties must clearly and unmistakably manifest their intent to delegate substantive arbitrability to the arbitrator. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

268 *Cf.* David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1382 (2019) (finding that arbitrators are more likely than judges to interpret arbitration clauses to allow class actions, which permits them to preside over a long and lucrative dispute).

269 *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).

270 *See id.* (compelling arbitration of plaintiff's assertion that they were fraudulently induced to sign the container contract).

271 *Rent-A-Ctr.*, 561 U.S. at 85 (Stevens, J., dissenting).

272 *See id.* at 68 (majority opinion) ("The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.").

whether it would be unconscionable to arbitrate the underlying complaint.[273] This means that most defects in the agreement to arbitrate substantive claims cannot imperil a delegation clause. For example, discovery caps or waivers of the right to recover punitive damages might make an agreement to arbitrate the merits unfair, but do not speak to the razor-narrow issue of whether it is unfair to force a plaintiff to arbitrate *whether a case must be arbitrated*.[274] Thus, because delegation clauses insulate one-sided arbitral regimes, businesses are placing them in contracts that require remote arbitration.[275]

Time will tell whether this strategy will be successful. To overturn a delegation clause on the grounds that it mandates virtual arbitration, plaintiffs must show that it would be unconscionable to make them appear remotely *while* they try to persuade the arbitrator that it would be unconscionable to hold the evidentiary hearing remotely. Pro se individuals on the wrong side of the digital divide might be able to thread this needle. After all, if someone lacks access to the Internet or has little experience with videoconferencing, it would be perverse make them appear virtually to complain about the trouble of

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273 In most circumstances, a party who attacks the agreement to arbitrate the merits—and not the delegation clause specifically—has failed to contest the agreement to arbitrate about arbitration. *See id.* at 72 (enforcing delegation clause where the plaintiff "challenged only the validity of the [arbitration] contract as a whole"). However, there may be exceptions to this rigid pleading requirement when a plaintiff alleges that the container contract suffers from an extraordinary defect, such as lack of mutual assent. *See* MZM Constr. Co., Inc. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 406 (3d Cir. 2020) (refusing to enforce delegation provision when plaintiff alleged that the container contract was a product of fraud in the execution).

274 *Rent-A-Ctr.*, 561 U.S. at 74 (opining that it will be "much more difficult" for plaintiffs to demonstrate that discovery limitations and fee-sharing requirements are unfair "as applied to the delegation provision" (emphasis omitted)).

275 *E.g.*, TICKETMASTER, *supra* note 36 (giving the arbitrator "exclusive authority . . . to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability, or formation" of the arbitration clause). In addition, some remote-only providers give the arbitrator "the power to rule on his or her own jurisdiction, including objections regarding the existence, formation, enforceability, validity, or scope of an agreement to arbitrate." FAIRCLAIMS FASTTRACK RULES & PROCEDURES, *supra* note 255, at R. 4.2. This language also appears in the procedural codes of JAMS and the AAA, and most courts have held that incorporating those providers' rules functions as a delegation clause. *E.g.*, Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1075 (9th Cir. 2013); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005). However, other judges refuse to recognize these "ghost" delegation clauses in adhesion contracts. *E.g.*, Eiess v. USAA Fed. Sav. Bank, 404 F. Supp. 3d 1240, 1252 (N.D. Cal. 2019); Allstate Ins. Co. v. Toll Bros., 171 F. Supp. 3d 417, 427–29 (E.D. Pa. 2016). Thus, it remains to be seen whether any contract that selects a remote provider also contains a ghost delegation provision.

appearing virtually.[276] Yet it is anyone's guess how judges will respond to people who are technologically savvy or have counsel. We do not know whether the factors that cause the remote penalty in arbitrations on the merits also reduce the odds of a plaintiff win when arbitrating the discrete issue of whether to arbitrate.

To conclude, there is a colorable argument that drafters should not be able to delete the right to appear in person. Yet even if courts recognize that remote arbitration mandates are unconscionable, they will face a flurry of new questions. Accordingly, as I discuss next, it would be helpful if state legislatures improved our grasp of forced remote arbitration by adding teeth to their disclosure statutes.

C. Disclosure

Four states require providers to report information about forced arbitration.[277] This section briefly argues that lawmakers should revise these statutes to address the rise of remote arbitration.

As mentioned, neither the AAA nor JAMS divulge useful data about hearing type. Indeed, JAMS only distinguishes between in-person, documents-only, and "telephone or videoconference" proceedings, and the AAA merely identifies desk arbitrations.[278] This omission creates needless ambiguity about the effect of remote hearings.

Unfortunately, no disclosure law creates incentives for providers to fix this defect. Only California requires arbitration administrators to identify whether the hearing was in-person or remote.[279] Yet California's legislation lacks an enforcement mechanism.[280] In fact, just one jurisdiction—the District of Columbia—permits plaintiffs to sue and seek an injunction bringing providers into compliance.[281] Thus, entities like

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276 *Cf.* Lim v. TForce Logistics, LLC, 8 F.4th 992, 1003 (9th Cir. 2021) (holding that a delegation provision was unconscionable when it required the plaintiff to arbitrate far from home and pay half of the arbitrator's fees).

277 *See supra* text accompanying note 156.

278 *See infra* sections II.A.2, II.A.4.

279 *See supra* text accompanying note 158.

280 For a survey of how providers often flout the California law, see PUB. L. RES. INST., U.C. HASTINGS COLL. L., ARBITRATION REPORTING IN CALIFORNIA: COMPLIANCE WITH CCP § 1281.96, at 4 (2017), http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf [https://perma.cc/3UDN-5Q5U] (finding that just three of thirty-two arbitration providers are in "robust and full compliance with the statutory regime").

281 *See* D.C. CODE ANN. § 16-4430(i) (West 2021). The statute allows "any affected person or entity," including the District's Attorney General, to "request a

JAMS and the AAA can continue to trumpet their virtual capabilities without revealing what happens in online arbitrations.

To fill this regulatory gap, state lawmakers should revamp their disclosure statutes. Specifically, they should borrow from both the California and the D.C. approaches. First, they should mandate that providers publish the hearing type of each arbitration. And second, to give that directive bite, they ought to create a private right of action for injunctive relief against providers that flout the law. These changes would ensure that arbitration does not recede further from public view as it increasingly takes place in cyberspace.

CONCLUSION

During the pandemic, forced arbitration underwent a metamorphosis. Most consumers, employees, and medical patients found that when they had purchased goods or services, started a job, or sought healthcare, they had surrendered not just their ability to go to court, but their right to appear in person. Using data from their experiences, this Article has flagged reasons to be skeptical about the fairness and efficiency of forced remote arbitration.

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court to enjoin the arbitration organization from violating th[is] section . . . ." *Id.* Plaintiffs are entitled to recover their reasonable attorneys' fees and costs if they either win or the provider voluntarily complies after the filing of the lawsuit. *Id.*