

ARE PRE-DISPUTE AGREEMENTS TO ARBITRATION ONLINE ENFORCEABLE?

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ABSTRACT

Arbitration is a favored adjudicatory mechanism because it is efficient, effective, and informal compared to judicial litigation.² Scholar Thomas Carbonneau has noted that arbitration is “America’s optimal trial procedure.”³ The ubiquity of pre-dispute agreements to arbitrate in consumer contracts makes arbitration the dominant method to resolve such disputes.⁴ Yet, despite its hallmarks of accessibility and informality, arbitration’s reliance on face-to-face proceedings limits its benefits

Online dispute resolution (ODR) has grown in popularity among e-commerce retailers over the last two decades—and more recently within court systems.⁵ However, ODR’s rise has not meaningfully affected how pre-dispute agreements to arbitrate are drafted or enforced.⁶

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² See THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF UNITED STATES ARBITRATION* xiii–xv (6th ed. 2018).

³ *Id.* at xv (citing Warren F. Burger, *The State of Justice, Report to the American Bar Association*, 70 A.B.A. J. 62 (1984)).

⁴ See *id.* at 372–73 (noting that agreements to arbitrate “are present in all sectors of the economy” and that it “is virtually impossible to avoid arbitration in the American marketplace”).

⁵ *Infra* Part I(A).

⁶ *Infra* Part I(C).

In this article, I prospectively explore the intersection of mandatory arbitration and ODR by considering whether agreements to arbitrate online would be enforceable. I conclude that such agreements would be enforced by U.S. courts and that ODR's benefits may make this a favorable outcome.

It is worth noting at the outset that while my analysis could be applied broadly, I chose to focus on pre-dispute agreements to arbitrate in the consumer context. Business-to-business contracts could just as easily include pre-dispute agreements to arbitrate online,⁷ but as courts are less likely to view those agreements with suspicion, they warrant little consideration here. Employment contracts also frequently include agreements to arbitrate, but parties are less likely to prefer online arbitration in those cases because parties are more likely in geographical proximity with one another and their chosen arbitration venue, minimizing the desire for an online forum.⁸ Thus, by focusing on arbitration of consumer disputes, I can test the validity of pre-dispute agreements in the context they are most likely to be implemented and challenged.⁹

In Part I, I begin by surveying the current use of ODR and arbitration in consumer disputes and studying why pre-dispute agreements to arbitrate online are not yet

⁷ See, e.g., *Volt Info. Scis, Inc. v. Bd. Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 470 (1989) (interpreting an arbitration agreement between a company and university).

⁸ CARBONNEAU, *supra* note 2 at 410-25.

⁹ In his book on arbitration, Carbonneau discusses analogous forum-selection clauses solely in the context of agreements to arbitrate consumer disputes as forum-selection clauses. See *id.* at 387. His treatment of forum-selection clauses in the consumer context is fitting as those clauses are unlikely to appear in employment settings and unlikely to be seriously challenged when agreed to by sophisticated parties.

in use. Next, in Part II, I consider the ultimate question of whether pre-dispute agreements to arbitrate online are enforceable. Finally, in Part III, I explore several considerations stemming from the conclusion that agreements to arbitrate online are enforceable.

I. CURRENT USE OF ODR AND ARBITRATION IN CONSUMER DISPUTES

Online dispute resolution and arbitration have both become common—perhaps even fundamental—features of the U.S. system of justice. In this part, I open by exploring two parallel upward trends: (1) expanding ODR use to settle consumer disputes, and (2) growing dependence on pre-dispute arbitration agreements in consumer contracts. Finally, I conclude by observing that these upward trends have not yet intersected in the form of a pre-dispute agreement to arbitrate online.

A. Expanding Use of ODR in Consumer Disputes

ODR took hold of dispute resolution in e-commerce two decades ago and is now the hottest trend in court systems infrastructure.¹⁰ Initially developed by e-commerce platforms such as eBay and Amazon, scholars quickly embraced ODR, recognizing its potential as a tool for consumer protection.¹¹ Characteristically late to the party, a

¹⁰ Ayelet Sela, *e-Nudging Justice: The Role of Digital Choice Architecture in Online Courts*, 2019 J. DISP. RESOL. 127, 131–32 (2019) (identifying that courts’ recent launches of online proceedings are built on early ODR systems that “were instituted primarily for disputes in e-commerce, e-services and virtual communities”).

¹¹ See *id.* at 133 (describing eBay’s Resolution Center as “paradigmatic” of ODR’s success); see also Amy J. Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 BUFFALO L. REV. 89, 91 (2019).

rapidly growing number of courts are now implementing ODR systems to mediate and resolve cases.¹²

The explanation for ODR's meteoric rise is an oft-heard refrain to this century's technology enthusiasts. ODR capably resolves e-commerce claims more quickly and affordably than courts, where filing fees alone may render a small-dollar claim worthless.¹³ Moreover, while face-to-face dispute resolution typically requires coordinating schedules and travel, ODR lends itself to asynchronous resolution of disputes without leaving one's home.¹⁴ Finally, the user-friendly nature of most ODR platforms makes dispute resolution more accessible to consumers who might otherwise be overwhelmed by the formality and cumbersome process that courts demand.¹⁵

Companies engaged in e-commerce are often among the first to adopt new technologies, and ODR is no exception. In March 1999, eBay launched a mediation platform to resolve disputes between buyers and sellers using its website.¹⁶ In the years that followed, eBay automated many of its processes, enabling it to resolve most disputes without human intervention and faster than

¹² Sela, *supra* note 10, at 133 (“[ODR] schemes now inspire online court designers, to streamline the process and encourage independent settlement.” (citation omitted)).

¹³ Schmitz, *supra* note 11, at 94.

¹⁴ *See id.* at 95- 96. ODR provides the benefit, not only of asynchronous communications, but also the ability to integrate translation programs to expand access to dispute-resolution processes.

¹⁵ *See id.*

¹⁶ Ethan Katsh, Janet Rifkin, & Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “eBay Law”*, 15 OHIO ST. J. ON DISP. RESOL. 705, 709 (2000) (noting that eBay's dispute-resolution platform launched quietly as a link buried two levels down on its website).

conventional dispute-resolution processes.¹⁷ Amazon and Etsy, among others, also developed similar, self-contained ODR platforms.¹⁸ More recently, at least 53 courts systems (and counting) have implemented full-service ODR platforms designed to facilitate the resolution of disputes ranging from family law to conciliation court claims.¹⁹

It is worth noting that ODR platforms to date have relied most heavily on mediation-based platforms, rather than arbitration.²⁰ Early adopters of ODR platforms recognized that arbitration's relative simplicity compared to mediation would minimize the challenges associated with developing software for online mediation.²¹ Nevertheless, concerns about whether consumers would voluntarily opt

¹⁷ See AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* 37–49 (2017) (describing eBay's 100 percent automation objective in mediating consumer disputes).

¹⁸ See Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEG. L. REV. 107, 120 (2015) (describing self-contained ODR platforms as those that “resolve disputes within a community”).

¹⁹ See *id.* (noting that Modria, a service by Tyler Technologies, is a popular example of a full-service platform currently being integrated into court systems). Matterhorn by Court Innovations is another ODR service being rapidly implemented in court systems across the United States. MATTERHORN BY COURT INNOVATIONS, <https://getmatterhorn.com/> (last visited Nov. 30, 2019). According to the The National Center for Technology & Dispute Resolution, 53 court systems are now using ODR to resolve disputes. *Courts Using ODR*, NAT'L CENTER FOR TECH. & DISP. RESOL., odr.info/courts-using-odr/ (last visited Nov. 29, 2019).

²⁰ See Katsh et al., *supra* note 16, at 709 (explaining why eBay chose to rely on mediation rather than arbitration when it launched its Dispute Resolution Center, noting that early voluntary online arbitration systems such as the Virtual Magistrate project failed to attract users).

²¹ *Id.* at 721 (“Arbitration is a much less complex communications process than mediation, and therefore, development of software to arbitrate online disputes is much less of a challenge than developing software that would support mediation.”).

into an online arbitration proceeding prompted eBay and others to develop mediation-based ODR systems rather than arbitration-based systems.²² At that time, binding, mandatory ODR was not seriously considered.²³ Today, the likely enforceability of pre-dispute agreements to arbitrate online mitigates the question of whether customers would voluntarily opt into an ODR process.²⁴ Moreover, consumers' comfort with e-commerce today likely makes them less hesitant to engage in online arbitration proceedings.²⁵ This is especially true after e-commerce's supercharged growth as a result of the Covid-19 pandemic.

Without question, ODR represents the future of dispute resolution and likely many judicial processes.²⁶ In the consumer context, however, ODR is already the venue of choice for most consumers, even where participation in the process is merely voluntary.²⁷ Mandatory ODR is ODR's next major hurdle.

B. Near-Ubiquitous Use of Binding Arbitration Clauses in Consumer Contracts

The near-uniform use of binding arbitration clauses

²² *See id.* at 709.

²³ SCHMITZ & RULE, *supra* note 17, at 45 (describing the disagreement between U.S. and European legal experts regarding whether ODR should be binding and explaining that eBay's process is not binding on the parties that used the Dispute Resolution Center).

²⁴ *See infra* Part II (evaluating the enforceability of pre-dispute agreements to arbitrate online).

²⁵ Schmitz, *supra* note 11, at 98 (noting that, not only are customers generally comfortable online, "customers seek ODR . . . to cheaply and easily obtain redress").

²⁶ *See id.* at 90 (outlining why individuals have come to prefer ODR systems over face-to-face dispute resolution).

²⁷ *See id.*; *see also* SCHMITZ & RULE, *supra* note 17, at 45.

in U.S. consumer contracts is well-documented.²⁸ In short, most written consumer contracts contain pre-dispute agreements to arbitrate that are readily enforced by U.S. courts under the Federal Arbitration Act (FAA).²⁹ Furthermore, class-action waivers within arbitration agreements most often preclude joinder of parties' claims in arbitration.³⁰

In February 2019, Professor Imre Stephen Szalai, writing in the *U.C. Davis Law Review Online*, surveyed the expansive use of arbitration clauses by Fortune 100 companies.³¹ Szalai examined court opinions, pleadings, and publicly accessible websites to determine whether each of the top 100 U.S. companies or their subsidiaries employed consumer arbitration agreements.³² He discovered that 81 of the Fortune 100 companies or their subsidiaries used arbitration agreements for consumer

²⁸ For extended treatment of the expansive use of arbitration agreements in consumer disputes, *see generally* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019); *see also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2019); *see also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

²⁹ Szalai, *supra* note 28, at 234 (noting that a majority of U.S. households "are covered by broad consumer arbitration agreements"); *see also* Gilles, *supra* note 28, at 390–95 (describing the Supreme Court's shift during the 1980s and 1990s regarding the interpretation of the FAA to enforce most arbitration agreements).

³⁰ *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 815–23 (2013) (discussing how class-action waivers in arbitrations contribute to the diminishing number of class-action litigations).

³¹ Szalai, *supra* note 28.

³² *See id.* at 236–37. Szalai's methodology focused not only on the existence of arbitration agreements in consumer contracts, but also noted the form the agreements took, including the scope of each agreement and whether it incorporated a class-action waiver.

transactions, covering between a majority and two-thirds of U.S. households.³³ In total, Szalai conservatively estimated that at least 826,537,000 consumer arbitration agreements were in force in the United States in 2018.³⁴

Consumer arbitration agreements are most frequently found in relatively low-value transactions and paired with class-action waivers.³⁵ Disputes arising from low-value transactions tend to produce “negative-value suits” in which damaged consumers would incur more in costs to pursue individual claims than they would gain from damages awarded in the suit.³⁶ The only practical remedy for these consumers is a class-action lawsuit.³⁷ By attaching class-action waivers to consumer arbitration agreements, sellers foreclose the only remedy available to economically rational consumers.³⁸ In *AT&T Mobility LCC v.*

³³ See *id.* at 234.

³⁴ See *id.* (noting that Szalai’s estimate of 826,537,000 consumer arbitration agreements was especially noteworthy when compared to the U.S. population of about 328,000,000).

³⁵ See *id.* at 238 (identifying that, of the 81 Fortune 100 companies to use consumer arbitration agreements, 78 included class-action waivers that explicitly prohibited class wide or collective actions).

³⁶ Klonoff, *supra* note 30, at 815 (citing *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (describing why class plaintiffs seek to aggregate claims to avoid the problem of the negative-value suit)).

³⁷ See *id.* Klonoff notes that the Court has, on several occasions, recognized that class actions are the only economically feasible avenue of relief for many injured consumers. See *id.* at 815–16 (citing *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 617 (1997); *Deposit Guaranty Nat’l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326 (1980)).

³⁸ See *id.* (citing Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375–76 (2005) (explaining that class-action waivers have, since the late 1990s, worked “in tandem with standard arbitration provisions to ensure any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding”)).

Concepcion,³⁹ the Supreme Court held that inclusion of class-action waivers in consumer arbitration agreements is not unconscionable under the FAA's savings clause.⁴⁰ Since then, the Court has broadly applied *Concepcion*'s holding, enforcing consumer arbitration agreements with class-action waivers over lower courts' attempts to limit and distinguish *Concepcion*.⁴¹

Businesses have taken note of the Court's class-action-waiver jurisprudence and responded by including waivers in nearly every consumer contract containing an arbitration agreement. According to Szalai's research of Fortune 100 companies, of the 81 companies employing pre-dispute arbitration agreements, 78 included class-action waivers of consumers' claims.⁴² Moreover, at least one court has interpreted an arbitration clause that was silent regarding class standing as implicitly prohibiting class actions.⁴³ Of the more than 826 million consumer

³⁹ 563 U.S. 333 (2011), *infra* note 76.

⁴⁰ *See id.* at 352 (holding that California's common law rule that class-action waivers in consumer arbitration agreements were unconscionable was preempted by the FAA).

⁴¹ Klonoff, *supra* note 30, at 819–23 (citing *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (holding that a class-action waiver in an arbitration agreement was enforceable even in the context of antitrust claims)); *see also CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (holding that claims brought under the Credit Repair Organization Act are subject to the FAA, so class-action waivers in consumer arbitration agreements were enforceable).

⁴² Szalai, *supra* note 28, at 238.

⁴³ *See id.* at 238 n.11 (“Even if an arbitration clause does not contain an explicit class waiver, companies may argue that such ‘silent’ clauses still nevertheless prohibit class proceedings.”) (citing *Myers v. TRG Customer Sols., Inc.*, No. 1:17-CV-00052, 2017 WL 3642295, at *2 (M.D. Tenn. Aug. 24, 2017) (holding that a silent arbitration clause implicitly barred class proceedings)). It is uncertain to what extent the district court's holding in *Myers* will be accepted; however, frequent delegation of arbitrability to the arbitrator has likely and will likely continue to preclude review of this question. *See also* David Horton,

arbitration agreements currently in force in the United States, the vast majority preclude class litigation.⁴⁴

Having examined the parallel upward trends of ODR use and consumer arbitration agreements, we next explore the interaction between the trends.

C. Absence of Mandatory and Binding ODR in Consumer Contracts

With the near-ubiquity of mandatory arbitration clauses in consumer disputes and the expanding use of ODR generally, collision in the form of a pre-dispute agreement to arbitrate online seems inevitable. Yet, despite discussion of this concept during the infancy of the alternative dispute resolution (ADR) and ODR movements,⁴⁵ parties have not readily entered these types of agreements and courts have not passed upon their enforceability.

Since the late 1990s and early 2000s, scholars have contemplated the use of binding ODR in consumer disputes.⁴⁶ Most notably, in 2004, Aashit Shah discussed

Arbitration About Arbitration, STANFORD L. REV. 363, 395–99 (2018) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010)) (discussing the Court’s reading of a delegation clause as presumptively valid).

⁴⁴ Szalai, *supra* note 28, at 238.

⁴⁵ For examples of early ODR scholars discussing the prospect of pre-dispute agreements to arbitrate online, see *infra* note 46 (listing examples of early ODR scholars discussing the prospect of pre-dispute agreements to arbitrate online).

⁴⁶ See, e.g., Aashit Shah, *Using ADR to Resolve Online Disputes*, RICH. J. L. & TECH. 25 (2004); see also Katsh et al., *supra* note 16, at 709 (describing eBay’s choice to employ online mediation instead of online arbitration because parties would be less likely to voluntarily submit their cases on online arbitration); see also Alejandro E. Almaguer & Roland W. Baggott III, OHIO ST. J. ON DISP. RESOL. 711, 743,747

prospective use of ODR for internet-related disputes in the *Richmond Journal of Law and Technology*.⁴⁷ Shah recognized that the “inherent nature of . . . online disputes makes them amenable to online ADR.” At the time of Shah’s writing, however, a major drawback of ODR was “the inability of parties to enforce their decisions.”⁴⁸ Shah’s proposed solution typified a pre-dispute agreement to arbitrate online:

A proposal for e-commerce disputes would be the insertion of a clause in an online user agreement whereby the parties, or at least the online business, agree to be bound by the decision of the online ADR provider. If the online business does not cooperate in enforcing the online decision, the aggrieved consumer may be able to sue in court for breach of contract.⁴⁹

Yet, 16 years after Shah proposed the pre-dispute agreement to arbitrate online, parties still have not entered such agreements. Surprised by this finding, I scoured Westlaw for court opinions passing upon the validity of such an agreement but found no opinions touching on the

(1998) (discussing that while “[t]oday [in 1998], there are no viable mechanisms for online alternative dispute resolution,” a promise “to arbitrate online disputes arising out of an online transactions would ‘create a duty . . . to perform the promise’” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981))).

⁴⁷ Shah, *supra* note 46, at 13 (identifying specifically that e-commerce disputes, domain-name disputes, intellectual-property disputes, and some monetary disputes are especially well-suited for ODR).

⁴⁸ See *id.* at 51.

⁴⁹ See *id.* But see *id.* at 51 n.195 (qualifying that “this option may not be economically feasible for the aggrieved consumer and it would entail more costs and attorney’s fees for litigation, which may not be recouped even if the outcomes were favorable”).

subject.⁵⁰ Turning next to the arbitration agreements themselves, I reviewed publicly available agreements to arbitrate in consumer contracts but found none calling for online arbitration.⁵¹ Thus, while proving a negative is always an uncertain proposition, it is reasonable to conclude that pre-dispute agreements to arbitrate online are not presently in use and their validity has never been ruled upon.⁵²

⁵⁰ The author used terms and connectors to search for cases in which the terms “arbitrat!” and “online” were used in the same sentence. The search produced 684 results, nearly all of which discussed arbitration agreements that were agreed to via online contracts, but that did not require online arbitration proceedings. While these cases raise noteworthy issues—typically regarding notice—they are not relevant to the scope of this essay. *See, e.g., Moore-Dennis v. Franklin*, 201 So. 3d 1131 (Ala. 2016) (holding that a bank’s posting of an arbitration provision on an online banking profile was insufficient notice to bind the consumer); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 104 (E.D.N.Y. 2015) (enforcing an agreement to arbitrate that was entered via registration of a video game).

⁵¹ While a sampling of every consumer arbitration agreement is impossible, none of the several dozen surveyed by the author contemplated online arbitration. Moreover, the author also reviewed secondary authorities that featured broader surveys of arbitration agreements in consumer contracts and found none that noted the existence of an agreement to arbitrate online. *See, e.g., Imre Stephen Szalai, The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019) (examining arbitration agreements in use by the 100 largest U.S. companies and concluding that at least 826,537,000 consumer arbitration agreements were in force in 2018, yet noting none that stipulated to arbitration online).

⁵² While “it’s never easy to prove a negative,” *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 745 (2011) (Roberts, C.J.), evidence of absence is a permissible means to do so. *See* T. EDWARD DAMER, ATTACKING FAULTY REASONING: A PRACTICAL GUIDE TO FALLACY-FREE ARGUMENTS 17 (2009). Here, the absence of pre-dispute agreements to arbitrate online in the author’s search results supports the conclusion that such agreements are not used to any noteworthy extent.

At first blush, it seems odd that pre-dispute agreements to arbitrate online have not worked their way into consumer arbitration agreements. After all, consumers have flocked to online commerce at a breakneck pace, and companies have been happy to meet them in that virtual space.⁵³ Why is it that businesses and their consumers have not agreed to the binding resolution of disputes in the same space in which they do business? The following are two possible explanations.

First, the infrastructure for online arbitration proceedings is largely non-existent. To be effective, an arbitration process must be viewed by the parties as legitimate.⁵⁴ As Professor Orna Rabinovich-Einy astutely noted, “Legitimacy is what makes disputants trust a process, what stimulates complainants to bring their disputes before a particular dispute resolution mechanism, and what makes the parties accept and respect resolutions reached through a given dispute resolution avenue.”⁵⁵

Today, longstanding organizations such as American Arbitration Association (AAA) and JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.) provide the infrastructure for face-to-face arbitration and the neutrals to serve as arbitrators.⁵⁶ Disputants’ confidence in these organizations gives them a

⁵³ See *Monthly Retail Trade*, U.S. CENSUS BUREAU (Nov. 19, 2019), <https://www.census.gov/retail/index.html> (last visited Nov. 28, 2019) (cataloging in a time series that e-commerce sales accounted for 11.2 percent of retail sales in the third quarter of 2019, up from 4.6 percent in the third quarter of 2010, and up from 1.0 percent in the third quarter of 2000).

⁵⁴ Orna Rabinovich-Einy, *The Legitimacy Crisis and the Future of the Courts*, 17 CARDOZO J. OF CONFLICT RESOLUTION 23, 24 (2015) (“Legitimacy is the lifeblood of dispute resolution.”).

⁵⁵ *Id.*

⁵⁶ *Arbitration*, 28 No. 6 BUS. TORTS REP. 137, 138 (2016).

badge of legitimacy.⁵⁷ AAA and JAMS, however, have few online counterparts to facilitate online arbitration proceedings, and none of the private online providers of arbitration that do exist can yet definitively claim the mantle of legitimacy.⁵⁸ While companies such as eBay have long employed ODR solutions for consumer disputes,⁵⁹ and courts are quickly implementing online platforms to mediate and decide cases,⁶⁰ respected private providers of online arbitration services have not yet emerged.⁶¹ It may be that agreements to arbitrate online are not in use simply because there is no readily available infrastructure to resolve disputes that do arise.⁶²

⁵⁷ *See id.*

⁵⁸ Online providers certainly exist. *See, e.g.,* ARBITRATION RESOLUTION SERVICES, INC. (2019), <https://www.arbresolutions.com/> (last visited November 28, 2019). However, such providers are not yet well-known or widely trusted. *See* Noam Ebner & John Zeleznikow, 36 *Fairness, Trust and Security in Online Dispute Resolution*, 36 HAMLINE J. OF PUB. L. & POL’Y 143, 148 (2015) (noting that the three critical components for a successful ODR platform are “fairness, trust and security”).

⁵⁹ SCHMITZ & RULE, *supra* note 17, AT 33-46 (describing eBay’s early implementation of a constantly evolving ODR platform to resolve disputes between buyers and sellers using eBay’s platform).

⁶⁰ For a regularly updated list of courts now using ODR, see *Courts Using ODR*, NAT’L CENTER FOR TECH. & DISP. RESOL., odr.info/courts-using-odr/ (last visited Nov. 29, 2019). *See also* David Allen Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2019 J. DISP. RESOL. 77 (2019) (explaining the years-long project to design and implement an ODR platform for the New York State Unified Court System).

⁶¹ *See supra* note 58 and accompanying text. Only one litigated matter available on Westlaw has considered a dispute in which an award was made by Arbitration Resolution Service, Inc. *See Ronald J. Palagi, P.C., LLC v. Prospect Funding Holdings (NY), LLC*, 925 N.W.2d 344, 347–49 (Neb. 2019). But even there, arbitration by an online provider was not agreed to before the dispute arose.

⁶² It bears noting that the Internet Corporation for Assigned Names and Numbers (ICANN) established a type of ODR that resembled online arbitration proceedings. Developed to resolve disputes between

However, a second explanation is perhaps more compelling. It may be that pre-dispute agreements to arbitrate online would unnecessarily jeopardize the class-action waivers paired with most arbitration agreements.⁶³ Under the Supreme Court precedent discussed above, drafters of arbitration agreements can be reasonably certain the inclusion of a class-action waiver will not be ruled unenforceable for unconscionability.⁶⁴ Furthermore, for most businesses, class-action waivers are more valuable than agreements to arbitrate standing alone; the agreement to arbitrate operates as a risk-free vehicle to obtain an enforceable class-action waiver.⁶⁵ Thus, savvy drafters may be unwilling to risk a court concluding an agreement to arbitrate online is unconscionable when doing so might also invalidate the class-action waiver.⁶⁶

registrants for domain names based on others' trademarks, ICANN's Uniform Dispute Resolution Policy featured a compulsory online process whereby a complainant seeking to use or cancel another's domain name registration could file a complaint with one of five online dispute-resolution providers for non-binding resolution. ICANN's form of dispute resolution, while a pre-dispute agreement to use ODR, is distinguishable from the pre-dispute agreement to arbitrate online that is the subject of this essay because ICANN's dispute-resolution process relied solely on written submissions and was non-binding. For a summary of ICANN's ODR process, see Rabinovich-Einy, *supra* note 54, at 50–55.

⁶³ *Supra* Part I(B) (discussing the near-ubiquitous nature of arbitration clauses paired with class-action waivers).

⁶⁴ *See id.*

⁶⁵ *See generally* Jacqueline Prats, *Are Arbitration Agreements Necessary for Class-Action Waivers to Be Enforceable?*, 92 FLA. BAR J. 64 (2018) (noting that while companies have a need for class-action waivers, arbitration agreements may be less desirable, and arguing for the enforceability of stand-alone class-action waivers).

⁶⁶ *See id.*

Assuming the latter explanation, I next reach the titular question of this article by evaluating whether pre-dispute agreements to arbitrate online are enforceable

II. ENFORCEMENT OF PRE-DISPUTE AGREEMENTS TO ARBITRATE ONLINE

I have already noted that the enforceability of pre-dispute agreements to arbitrate online is an untested question.⁶⁷ Indeed, I found no case touching upon this question, nor any evidence that such agreements are now in use.⁶⁸ In this section, I explain why courts would enforce pre-dispute agreements to arbitrate online and the limits courts would likely place on such agreements.

A. Principles of Contract Freedom Support Enforcement

Otherwise known as party autonomy, freedom of contract is the primary legal concept governing arbitration in the United States.⁶⁹ It enables parties to bind themselves to a form of dispute resolution and agree upon the rules that will govern any disputes that arise between them.⁷⁰ Courts, meanwhile, are simply “to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”⁷¹ Relying on freedom of contract, courts

⁶⁷ *Supra* Part I(C).

⁶⁸ *Supra* note 50 and accompanying text.

⁶⁹ CARBONNEAU, *supra* note 2, at 10 (noting that freedom of contract governs arbitration in “the vast majority of countries”).

⁷⁰ *See id.* (“Freedom of contract allows arbitrating parties to write their own rules of arbitration—in effect, it permits them to establish the law of arbitration for their transaction.”). Carbonneau also notes that this party-directed approach depends on the parties identifying their adjudicatory needs before a dispute arises, thereby “front load[ing]” the parties’ dealings. *Id.* at 11.

⁷¹ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *see also* Federal Arbitration Act, 9 U.S.C.

generally enforce agreements to arbitrate in whatever form they take, provided the parties have agreed to those terms.⁷² But can the principle of contract freedom carry the day for a pre-dispute agreement to arbitrate a consumer dispute online? Jurisprudence supporting the enforceability of forum-selection provisions suggests it can.⁷³

Before analyzing agreements to arbitrate online through the lens of forum-selection jurisprudence, there must be a justification for doing so. In 1974, the Supreme Court in *Scherk v. Alberto-Culver Co.*⁷⁴ articulated, “An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.”⁷⁵ In *Scherk*, the Court enforced an international arbitration agreement, concluding that such an agreement was merely a type of forum-selection clause, akin to those the Court had upheld previously.⁷⁶ While contemporary Supreme Court decisions regarding arbitration agreements have focused more on

§ 5 (2018) (recognizing the principle of contract freedom in the FAA by specifying that agreements providing “for the method of naming or appointing an arbitrator” must be enforced).

⁷² *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (“Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.....”).

⁷³ For a survey of the jurisprudence enforcing forum-selection provisions in consumer arbitration contracts, see CARBONNEAU, *supra* note 2, at 387.

⁷⁴ 417 U.S. 506 (1974).

⁷⁵ *Id.* at 519.

⁷⁶ *See id.* at 518–19 (citing *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)) (“Rather, we concluded that a ‘forum clause should control absent a strong showing that it should be set aside.’”).

statutory analysis under the FAA,⁷⁷ *Scherk*'s theoretical analysis of arbitration agreements as a subset of forum-selection clauses remains compelling.⁷⁸

The Supreme Court has held that only "under extraordinary circumstances unrelated to the convenience of the parties" will a forum-selection clause go unenforced.⁷⁹ Relying on the Court's forum-selection-clause analysis, courts have readily enforced agreements to arbitrate at a particular location, absent evidence of unconscionability.⁸⁰ For example, in *Elf Atochem North America, Inc. v. Jaffari*,⁸¹ the Delaware Supreme Court enforced an agreement that arbitration would take place in California, even though the underlying suit could have been brought in Delaware absent the arbitration agreement.⁸² Similarly, in *Polimaster Ltd. v. RAE Systems, Inc.*,⁸³ the Ninth Circuit strictly enforced a contract containing an agreement to arbitrate all claims at the defendant's

⁷⁷ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

⁷⁸ The Court has repeated *Scherk*'s conclusion that agreements to arbitrate are a type of forum-selection clause. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 698, 130 S. Ct. 1758, 1783, 176 L. Ed. 2d 605 (2010) (Ginsburg, J., dissenting); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 482–83 (1989); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 36 (1988) (Scalia, J., dissenting); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 255 n.1 (1987) (Blackmun, J., concurring).

⁷⁹ *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 62 (2013) (reversing and remanding the lower court's refusal to dismiss or transfer the case pursuant to a forum-selection clause); see also *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (holding that a forum-selection clause on cruise tickets was not prohibited).

⁸⁰ See CARBONNEAU, *supra* note 2, at 387.

⁸¹ 727 A.2d 286 (Del. 1999).

⁸² See *id.* at 287.

⁸³ 623 F.3d 832 (9th Cir. 2010).

principal place of business.⁸⁴

In its *Polimaster* decision, the Ninth Circuit demonstrated the strength of contract freedom principles as applied to arbitration. There, Polimaster (a company based in Belarus) and RAE (based in California) agreed to the following arbitration provision: “In case of failure to settle the mentioned disputes by means of negotiations they should be settled by means of arbitration at the defendant’s [site].”⁸⁵ After Polimaster submitted a demand for arbitration to take place at RAE’s headquarters, it objected to RAE’s subsequent counterclaims, arguing that because Polimaster was the defendant for the counterclaims, RAE could only pursue those claims through arbitration at Polimaster’s location.⁸⁶ Interpreting the term “dispute” in the contract to encompass both claims and counterclaims, the court concluded the counterclaims could only be arbitrated at Polimaster’s headquarters in Belarus because Polimaster was the defendant for those claims.⁸⁷

Although efficiency concerns typically justify resolving claims and counterclaims in the same proceeding,

⁸⁴ See *id.* at 837 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (“The requirement of arbitration at the defendant’s site is effectively a forum-selection clause, in which the parties agreed to arbitrate at the location of the defendant’s principal place of business.”)).

⁸⁵ See *id.* at 834. While the text of the contract literally prescribed that arbitration must occur at “the defendant’s side,” the parties agreed it meant the “defendant’s site”—specifically, its principal place of business.

⁸⁶ See *id.* at 835.

⁸⁷ See *id.* at 837. Although the Ninth Circuit evaluated the arbitration agreement under the New York Convention, it noted that the grounds for confirming an award under the Convention “generally track” those under the FAA. See *id.* at 836 (citing *Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int’l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987)).

the Ninth Circuit openly admitted it “interpreted the parties’ arbitration clause so as to permit an inefficient result: parallel arbitrations in distant fora regarding similar and/or related topics and disputes.”⁸⁸ Yet, the court insisted that principles of contract freedom demanded this result.⁸⁹ “It is true that it may be inefficient to have multiple arbitrations regarding the parties’ dealings in different fora before different arbitrators. But we cannot override the express terms of the parties’ agreement, because parties are free to agree to inefficient arbitration procedures.”⁹⁰ Indeed, the court concluded, freedom of contract principles demanded “adherence to the parties’ agreed-upon procedures.”⁹¹

Polimaster’s contract freedom principles readily permit the conclusion that an agreement to arbitrate online would also be enforceable. After all, if courts will enforce such an inefficient agreement that requires the parties to arbitrate the same matter in multiple proceedings an ocean apart, it stands to reason they would also readily enforce an agreement to arbitrate online, an undeniably efficient venue. Admittedly, *Polimaster* considered two sophisticated parties engaged in international commerce, but case law supports application of its contract freedom

⁸⁸ *Id.* at 840.

⁸⁹ *See id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)) (“First, the policy favoring arbitration ‘is at bottom a policy guaranteeing the enforcement of private contractual arrangements.’”).

⁹⁰ *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217–21 (1985) (requiring arbitration where it resulted in inefficient procedures and demanding that courts “rigorously enforce agreements to arbitrate”).

⁹¹ *Id.* at 841; *see also In re Hops Antitrust Litigation*, 655 F. Supp. 169 (E.D. Mo. 1987) (enforcing an arbitration clause with a German forum-selection clause in a contract between German hops sellers and a U.S. hops purchaser).

principles in the consumer context as well.

For example, in *Jones v. Genus Credit Management Corp.*,⁹² decided by the federal court for the District of Maryland, the plaintiffs were consumers who enrolled in a debt-management plan with a credit management company.⁹³ The agreed-to debt-management plan incorporated by reference an arbitration clause requiring that arbitration proceedings take place in Columbia, Maryland.⁹⁴ The court evaluated the agreement to arbitrate in a particular forum to determine whether it was unconscionable.⁹⁵ Initially, the court agreed with the plaintiffs that there was procedural unconscionability because the plaintiffs were heavily indebted individuals who had no choice but to agree to the arbitration agreement presented to them on a take-it-or-leave-it basis.⁹⁶ However, the court refused to find substantive unconscionability in the adhesion contract on the basis that it required that indebted plaintiffs travel to Maryland to arbitrate any disputes with the company.⁹⁷ Relying on the Supreme

⁹² 353 F. Supp. 2d 598 (D. Md. 2005).

⁹³ *See id.* at 600.

⁹⁴ *See id.* at 600-02. The agreement was not in the “EasyPay Client Agreements” signed by the plaintiffs, but rather in a document titled “Terms of Debt Management”—a document the parties disputed whether the defendants ever provided to the plaintiffs.

⁹⁵ *See id.* at 601-02. The court analyzed the agreement to arbitrate by applying the common-law rule for unconscionability, under which an agreement will be invalidated only if there is both procedural unconscionability and substantive unconscionability. *Id.* (citing 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 2004)).

⁹⁶ *See id.* at 601 (finding procedural unconscionability because plaintiffs were “consumers suffering from the burden of heavy debt, and Genus is a sophisticated business entity”).

⁹⁷ *See id.* at 601-02 (rejecting the plaintiffs’ arguments for substantive unconscionability based on the agreements requirement that arbitration proceedings comply with the AAA rules and take place in Columbia, Maryland).

Court's enforcement of a forum-selection clause in *Carnival Cruise Lines*, the court noted that "the mere fact that the arbitration clause requires that the arbitration proceedings be held at a location distant from plaintiffs' residences is not a sufficient basis for invalidating them."⁹⁸ Without a showing of substantive unconscionability, the court enforced the consumers' agreement to arbitrate in a particular place.⁹⁹

Application of *Jones* to agreements to arbitrate online strongly suggests a court would enforce such agreements, even in the consumer context. Like forum-selection clauses, agreements to arbitrate online direct consumers where to go to present their claims to a neutral decision maker.¹⁰⁰ The difference, however, is that the place to go is online. If a court is willing to compel consumers to arbitrate in distant geographic locations, as it was in *Jones*, it likely would also be willing to compel consumers to arbitrate when the chosen venue can be accessed via a smartphone or computer.

Countless other cases could be discussed here to support extending the application of contract freedom principles to pre-dispute agreements to arbitrate consumer disputes online. Recognizing, however, that all legal conclusions have limits, I turn next to circumstances where courts may refuse to enforce pre-dispute agreements to arbitrate online.

B. Limits on Enforceability

⁹⁸ *Id.* at 602 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991)).

⁹⁹ *See id.*

¹⁰⁰ *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (noting that agreements to arbitrate are a type of forum-selection clause).

In this section, I consider closely the three theories most likely to be asserted by consumers seeking to avoid mandatory online arbitration. They include (1) unconscionability, (2) the requirement for a *bona fide* adjudicatory process, and (3) the prospect of states prohibiting compelled online arbitration by statute. Each theory is considered in turn.

C. Unconscionability

Contract freedom principles do not lend legitimacy to unconscionable agreements—especially in the consumer context.¹⁰¹ Courts have, at times, refused to enforce forum-selection clauses as unconscionable where they were not effectively communicated or where they were clearly used to discourage customers from pursuing legitimate claims.¹⁰² Applied to pre-dispute agreements to arbitrate online, courts may invalidate agreements when presented with evidence of procedural and substantive unconscionability.¹⁰³ Procedural unconscionability could be based on severe power imbalances between the parties paired with insufficient notice in a click-wrap style

¹⁰¹ In addition to unconscionability, several other theories may void a forum-selection clause in an arbitration agreement, including impossibility, impracticability based on changes in the applicable arbitration system, and vital change in circumstances. Jay E. Grenig, *Checklist of Theories Overriding Forum Selection Clause*, 26A WEST'S LEGAL FORMS, ALT. DISP. RES. § 6:10 (4th ed. 2018).

¹⁰² CARBONNEAU, *supra* note 2, at 387 (citing *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (finding unconscionability in an auto-purchase agreement that required Missouri residents who purchased their cars in Missouri to arbitrate their claims in another state but severing the venue provision and enforcing the remainder of the agreement)).

¹⁰³ RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (stating the law of unconscionability).

agreement.¹⁰⁴ Substantive unconscionability could arise if the drafter of the agreement to arbitrate online narrowed the choice of online arbitration providers to those favorable to it or where the selected provider's online arbitration platform is unusable without special expertise.¹⁰⁵ Yet, pre-dispute agreements to arbitrate online are not likely to be often struck down for unconscionability.¹⁰⁶ Cases finding unconscionability in forum-selection provisions of arbitration clauses are outliers that typically involve surprise or deceit and substantially impair the plaintiff's ability to pursue a claim.¹⁰⁷ Moreover, a properly communicated agreement to arbitrate online is unlikely to raise questions regarding conscionability, as an online dispute-resolution platform likely enhances, rather than restricts, a plaintiff's ability to pursue a claim.¹⁰⁸

D. Requirement of a Bona Fide Adjudicatory Process

¹⁰⁴ See *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 731 (Tex. Ct. App. 2015) (citing *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002)) ("Procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration provision—the bargaining process—whereas substantive unconscionability refers to the fairness of the arbitration provision itself.").

¹⁰⁵ See *id.*

¹⁰⁶ Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 778 n.117 (2014) ("There were seventeen unconscionability cases involving arbitration agreements in 2009, fourteen in 2010, fifteen in 2011, and twelve in 2012.").

¹⁰⁷ See CARBONNEAU, *supra* note 2, at 387 (noting that courts have "lessened or ignored" *Carnival Cruise Lines* when forum-selection clauses "are not effectively communicated or calculated to discourage consumers from 'pursuing legitimate claims'").

¹⁰⁸ *Supra* Part II(A).

Arbitration agreements are not enforceable when the weaker party is forced into an adjudicatory process that lacks fundamental characteristics to make it a suitable alternative to judicial justice.¹⁰⁹ Arguments under this theory take one of two forms: either (1) the arbitration agreement fails because it calls for a process that unconscionably favors the drafting party, or (2) the agreement fails as a breach of contract based on the drafting party's failure to provide for a true arbitral process. Plaintiffs seeking to avoid enforcement of an agreement to arbitrate online might rely on either of these arguments to invalidate the agreement for lack of a *bona fide* adjudicatory process.

In the *Ryan's Family Steak Houses* cases,¹¹⁰ employees agreed to an arbitration agreement as a condition of employment that essentially called for "sham proceedings" that unconscionably favored the drafting party.¹¹¹ The arbitration agreements in these employment cases failed on two fronts. First, the agreement committed the employee to an arbitration process provided by the employer but merely committed the employer to provide an arbitration forum, rules, procedures, and a hearing, without articulating any standards the selected process must satisfy.¹¹² The contract's failure to articulate standards was a failure on the face of the contract to provide a *bona fide*

¹⁰⁹ CARBONNEAU, *supra* note 2, at 54–55.

¹¹⁰ *See Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005); *see also Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001).

¹¹¹ CARBONNEAU, *supra* note 2, at 55.

¹¹² *See Penn*, 269 F.3d at 759 ("Nothing in the contract provides any details about the nature of the forum that EDS will provide or sets standards with which EDS [Ryan's contracted provider for arbitration services] must comply; EDS could fulfill its promise by providing Penn and Ryan's with a coin toss.").

adjudicatory process.¹¹³ Second, the process that the employer provided was not, in fact, neutral, so the contract failed to provide a *bona fide* adjudicatory process as applied.¹¹⁴ To avoid the outcome in the *Ryan's Family Steak Houses* cases, prudent drafters of agreements to arbitrate online must provide a *bona fide*, neutral process to consumers and should include in the agreement detailed descriptions of the process provided.

*Hooters of America, Inc. v. Phillips*¹¹⁵ demonstrates the second basis to invalidate an arbitration agreement for lack of a *bona fide* adjudicatory process—breach of contract.¹¹⁶ There, the Fourth Circuit held that Hooters created a dispute resolution that was so biased in its favor that it was “a sham system unworthy even of the name of arbitration.”¹¹⁷ Severely biased aspects of the process included a mechanism for selecting arbitrators that ensured a biased decision maker;¹¹⁸ limiting the scope of the arbitration for the employee, but not the employer;¹¹⁹ and permitting Hooters to cancel the arbitration agreement on 30 days’ notice, but binding the employee to the arbitration agreement indefinitely.¹²⁰ Concluding that the process Hooters provided could not fairly be considered arbitration,

¹¹³ *See id.*

¹¹⁴ *See Walker*, 400 F.3d at 385–86 (“The Arbitration Agreements and related rules and procedures at issues in this case demonstrate that EDSI’s arbitral forum is not neutral and, therefore, the agreements are unenforceable.”).

¹¹⁵ 173 F.3d 933 (4th Cir. 1999).

¹¹⁶ *See id.* at 938–40.

¹¹⁷ *Id.* at 940.

¹¹⁸ *See id.* at 938–39 (noting that Hooters’ process gave “Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list”).

¹¹⁹ *See id.* at 939 (noting also that Hooters, but not the employer, may seek summary dismissal before a hearing is held).

¹²⁰ *See id.* (noting also that Hooters reserved the right to modify the rules without notice whenever it wanted).

the court held it had “completely failed in performing its contractual duty” to provide an arbitral process for resolving disputes with its employees, and rescinded the agreement to arbitrate.¹²¹

Applying *Hooters* to agreements to arbitrate online simply requires that the online process provided be truly neutral and that the decision makers provided are unbiased.¹²² Very likely, it also means—at least for now—that the neutral decision maker must be a person rather than an automated process. The requirement for a *bona fide* adjudicatory process is not a major hurdle to the enforceability of pre-dispute agreements to arbitrate online. But, to avoid such a challenge, drafters should articulate in clear terms the specific, neutral, arbitral process that will be provided.

E. States’ Authority to Limit Enforceability Via Statute

The final limit that may be placed on the enforceability of agreements to arbitrate online stems from an uncertain portion of preemption law under the FAA. Although the FAA broadly preempts state laws that would treat arbitration clauses differently than other contract terms, states might retain authority to regulate aspects of arbitration proceedings once commenced.¹²³ State legislatures might enact legislation prohibiting online

¹²¹ *Id.* at 940 (“[Hooters’] performance under the contract was so egregious that the result was hardly recognizable as arbitration at all.”).

¹²² *See id.*

¹²³ *See* Kristen Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 759–63 (2015). For a summary of the federalism principles underlying the Supreme Court’s FAA jurisprudence, see CARBONNEAU, *supra* note 2, at 281–314.

arbitration proceedings based on concerns about the fairness of online proceedings.¹²⁴

Several states currently regulate aspects of arbitration proceedings without limiting the enforceability of agreements to arbitrate. For example, a Kentucky law grants parties to arbitration the unwaivable right to be represented by an attorney in arbitration.¹²⁵ In another example, a Florida statute allows a court to consolidate separate arbitration proceedings into one proceeding notwithstanding a class-action waiver.¹²⁶ Finally, a Montana statute limits the enforceability of arbitral forum-selection clauses that call for an arbitral forum outside Montana.¹²⁷ As Kristen Blankley noted, these statutes may be suspect under the Supreme Court's current FAA preemption jurisprudence,¹²⁸ but for now they are presumably valid.

For our purposes, Montana's limitation on forum-selection clauses in arbitration agreements is especially noteworthy.¹²⁹ If a state may limit where arbitration may take place, it follows that a state may prohibit online

¹²⁴ *But see id.* at 760 (noting that state laws regulating virtually any aspect of arbitration could be preempted under what Blankley refers to as the Court's "impact preemption" analysis under the FAA).

¹²⁵ KY. REV. STAT. ANN. § 417.100 (West 2019) ("A party has the right to be represented by an attorney at any [arbitration]. A Waiver thereof prior to the proceeding or hearing is ineffective.").

¹²⁶ FL. STAT. ANN. § 682.033 (West 2019).

¹²⁷ MONT. CODE ANN. § 27-5-323 (West 2019) ("An agreement concerning venue involving a resident of this state is not valid unless the agreement requires that arbitration occur within the state of Montana. This requirement may only be waived upon the advice of counsel as evidenced by counsel's signature on the agreement.").

¹²⁸ Blankley, *supra* note 123.

¹²⁹ MONT. CODE ANN. § 27-5-323.

arbitration proceedings.¹³⁰ Indeed, Montana's statute as written could be construed as prohibiting online arbitration where one party or the arbitrator accesses an online arbitration platform from outside Montana.¹³¹ Once again, whether statutes like Montana's are preempted under the FAA is uncertain, but if they are not, states could prohibit online arbitration proceedings without running afoul of the FAA.

The three limitations presented in this section present surmountable hurdles to the enforcement of pre-dispute agreements to arbitrate disputes online. Unconscionability and the requirement for a *bona fide* adjudicatory process are unlikely to limit enforcement except in cases where bad faith is evident. Similarly, states are likely to enact statutes prohibiting online arbitration proceedings—assuming states have that power—only if online arbitration limits, rather than expands, consumer access to effective dispute resolution. Having concluded that pre-dispute agreements to arbitrate online are enforceable in the consumer context, I contemplate the implications in this article's final part.

III. IMPLICATIONS CONCERNING THE ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE ONLINE

It is challenging to predict the consequences of a new legal principle—and daunting to predict the trajectory

¹³⁰ *Supra* Part II(A) (concluding that agreements to arbitrate online are enforceable by comparing untested agreements to arbitrate online to enforceable forum-selection clauses).

¹³¹ An agreement that requires arbitration take place online may be read as not “requir[ing] that arbitration occur within the state of Montana.” MONT. CODE ANN. § 27-5-323.

of technology.¹³² Nevertheless, in this section, I discuss a few of the ways pre-dispute agreements to arbitrate online may impact consumers and businesses. My observations in this part consist of solely of policy analysis. Recognizing some readers may disagree with my thoughts on this matter, I encourage them to pen their disagreements for our benefit.

A. Consumer Protection and the FAIR Act

For as long as arbitration clauses have been in use, consumer protection advocates have decried their use in consumer contexts, especially when paired with class-action waivers.¹³³ The Supreme Court has regularly chastised circuit courts and state supreme courts for attempting to circumvent the Court's broad reading of the FAA's policy favoring arbitration.¹³⁴ For others, mandatory arbitration facilitates swift and effective relief that could not be easily obtained via a judicial process.¹³⁵

Pre-dispute agreements to arbitrate online would likely fail to mitigate consumer-protection advocates'

¹³² See James Brian Quinn, *Technological Forecasting*, HARV. BUS. REV. (Mar. 1967), <https://hbr.org/1967/03/technological-forecasting> (last accessed Dec. 3, 2019).

¹³³ See, e.g., Szalai, *supra* note 28 (collecting data regarding the use of arbitration agreements and class-action waivers and using it to argue against the enforceability of such agreements).

¹³⁴ See, e.g., *AT&T Mobility LLC v. Concepcion*, 536 U.S. 333 (2010) (holding that a state rule that arbitration clauses containing class-action waivers were unconscionable was preempted under Section 2 of the FAA); see also *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (striking down a Montana law that required arbitration agreements be printed in capital, underlined letters on the first page of franchising agreements).

¹³⁵ CARBONNEAU, *supra* note 2, at 2 ("By entering into an arbitration contract, the parties . . . create a private system of adjudication that presumably is better adapted to their transactional needs.").

concerns that businesses use arbitration agreements to preclude legitimate consumer claims. But perhaps the prospect of such agreements should ease fears to some extent. At worst, transitioning pre-dispute agreements to arbitrate from face-to-face to online forums simply moves online a resolution process that gives consumers at least as fair a process as they presently enjoy. At best, online arbitration proceedings will expand access to justice for consumers with limited means or mobility and for those in need of accommodations such as language services.

Indeed, in their book “The New Handshake: Online Dispute Resolution and the Future of Consumer Protection,” Professor Amy Schmitz and Colin Rule¹³⁶ discussed at length ODR’s potential to level the playing field for consumers.¹³⁷ They contemplated a third-party service, affectionately called Newhandshake.org, that businesses could employ for dispute resolution.¹³⁸ A business using the service would place a link to Newhandshake.org on its website where consumers can easily access the service.¹³⁹ If the consumer became unhappy with the company’s service, the consumer could submit a complaint via the link.¹⁴⁰ Newhandshake.org would then resolve the dispute online, giving the consumer and business a quick and satisfactory resolution.¹⁴¹

¹³⁶ SCHMITZ & RULE, *supra* note 17.

¹³⁷ *See id.* at 83–136 (describing a potential system of online dispute resolution to be employed in e-commerce).

¹³⁸ *See id.* at 95–106.

¹³⁹ *See id.* at 95–96.

¹⁴⁰ *See id.* at 97–98.

¹⁴¹ *See id.* at 113–28 (providing hypothetical case studies of the ODR platform in action).

Admittedly, Schmitz and Rule contemplated a non-binding resolution mechanism,¹⁴² but many of their arguments apply with nearly as much force to the prospect of online arbitration proceedings. Even in a mandatory setting, ODR stands to expand consumers' access to dispute-resolution services.¹⁴³ After all, consumers are more likely to seek the relief to which they are entitled when initiating the process requires only a few taps on their phone screen and when the claim can be pursued without taking time off work or traveling.¹⁴⁴ While arguing, "It's better than what we have now," is not particularly satisfying, marginal improvement is nonetheless a worthy cause.¹⁴⁵ After all, there are many consumers to be helped in the margins.

The prospect of online arbitration also has implications for legislation recently under consideration. In 2019, the House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act.¹⁴⁶ If adopted, the act would prohibit the use of pre-dispute arbitration agreements and class-action waivers in employment,

¹⁴² See *id.* at 87 (arguing that "ODR systems should not block access to the courts for consumers" even though the percentage of complainant consumers that will want to pursue a claim in court is likely to be 0.001 percent).

¹⁴³ See Brian A. Pappas, *Online Court: Online Dispute Resolution and the Future of Small Claims*, UCLA J.L. & TECH. 2, 18 (2008) (explaining how the benefits of ODR translate from non-mandatory private usage to mandatory usage in small claims court).

¹⁴⁴ See *id.* at 97–98 (explaining how a consumer could initiate a complaint via a simple online form).

¹⁴⁵ Michael B. Metzger, *Bridging the Gaps: Cognitive Constraints on Corporate Control & Ethics Education*, 16 U. FLA. J.L. & PUB. POL'Y 435, 554 (2005) ("But marginal improvement is probably attainable in many cases and, given the stakes, well worth pursuing.").

¹⁴⁶ Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

consumer, antitrust, and civil rights matters.¹⁴⁷ Proponents supporting the bill pointed to the consumer-protection concerns outlined above, arguing that pre-dispute arbitration agreements and class-action waivers rob consumers (and other vulnerable parties) of their right to legitimate relief.¹⁴⁸ The bill was dead on arrival in the Senate, where members opposed the bill's curtailment of contract freedom and free-market principles and expressed concerns that passage would flood the courts with claims now resolved privately.¹⁴⁹

A complete policy analysis of the FAIR Act is beyond the scope of this article, but the subject of this article may alleviate to some extent the concerns that prompted its introduction. Proponents of the FAIR Act fear that the process provided to consumers and others in arbitration is an insufficient substitute for judicial process.¹⁵⁰ While the prospect of consumers being bound to an out-of-court dispute-resolution forum via an adhesion contract troubles proponents of the FAIR Act, perhaps that concern can be ameliorated if the forum agreed to is demonstrably fair and effective.

Three considerations suggest online arbitration may assuage some of the concerns. First, online arbitration will

¹⁴⁷ See *id.* at § 2 (explaining the purposes of the FAIR Act).

¹⁴⁸ E.g., Alexia Fernández Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019, 11:30 a.m. EDT), <https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act> (last visited Dec. 3, 2019).

¹⁴⁹ See The Editorial Board, *The Lawyer Enrichment Act*, WALL ST. J. (Sept. 20, 2019, 6:52 PM ET), <https://www.wsj.com/articles/the-lawyer-enrichment-act-11569019965> (last visited Dec. 3, 2019) (arguing the FAIR Act would simply drive up lawyers' fees as disputes moved from private arbitrations to the courts).

¹⁵⁰ See Fernández Campbell, *supra* note 148.

expand consumers' access to dispute resolution by enabling them to pursue claims entirely online, without traveling to an arbitration proceeding, sometimes in distant jurisdictions.¹⁵¹ Second, online arbitration proceedings will be more affordable than face-to-face proceedings because there are no travel expenses and fewer formalities, making a low-value claim more likely to be worth pursuing.¹⁵² Finally, consumers engaged in e-commerce will be more likely to pursue their claims when they can interact with the arbitral process entirely online, absent the intimidating process of face-to-face adjudication.¹⁵³ Whether these marginal improvements should placate consumer protection concerns underlying the FAIR Act is a question for your own consideration, but I submit that these factors should weigh on your analysis of the FAIR Act.

In the final section, I move from the consumer perspective to that of businesses and providers of arbitration services to explore several considerations regarding the drafting of pre-dispute agreements to arbitrate online and the arbitral process provided.

B. Considerations for Businesses and Service Providers

Businesses and service providers must consider several factors before deciding to transition from face-to-face to online arbitration. These considerations fall into two categories: contract drafting and arbitral process. The contract-drafting considerations involve how a pre-dispute agreement to arbitrate online should be drafted to avoid

¹⁵¹ *Supra* Part I(A) (discussing the benefits of ODR).

¹⁵² *Supra* Part I(A) & I(B) (discussing the benefits of ODR and the nature of low-value claims that cost more to pursue than they are worth).

¹⁵³ *Supra* Part I(A) (explaining that online customers are generally more comfortable with online dispute resolution).

surprises. The arbitral process considerations involve due process concerns and best practices that should be applied in online arbitration proceedings.

C. Contract Drafting

The contract drafting precautions regarding pre-dispute agreements to arbitrate online are, in large part, the same as those for pre-dispute agreements to arbitrate generally.¹⁵⁴ For example, the consumer must have a reasonable opportunity to review the arbitration agreement before agreeing to it,¹⁵⁵ and the agreement must state with sufficient clarity the process the consumer must follow to bring a claim.¹⁵⁶ Three additional issues should be considered.

First, just as international law is often less friendly than U.S. law to pre-dispute agreements to arbitrate consumer disputes, international law will also likely be less friendly to mandatory and binding ODR.¹⁵⁷ In 2010, the United Nations Commission on International Trade Law (UNCITRAL) established a working group to develop standards for ODR.¹⁵⁸ The working group devoted a great

¹⁵⁴ For a collection of the drafting precautions applicable to standard arbitration agreements, see generally Elizabeth B. Bradley, *Lessons on Drafting Enforceable Arbitration Agreements*, 11 NO. 4 FED. EMP. L. INSIDER 8 (2013).

¹⁵⁵ See, e.g., *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017) (holding that an arbitration agreement on the Uber app was enforceable when it was included in the terms and conditions available via blue hyperlink right below the register button).

¹⁵⁶ Bradley, *supra* note 154 (recommending that arbitration agreements include a statement of the rules and procedures applicable to the arbitration).

¹⁵⁷ See Clara Flebus, *Report: UNCITRAL Working Group III on Online Dispute Resolution—A Change of Focus in the Outcome Document*, 29 NYSBA INTERNATIONAL L. PRACTICUM 60, 60 (2016).

¹⁵⁸ See *id.*

deal of attention to whether ODR outcomes should be binding.¹⁵⁹ Jurisdictions that permit pre-dispute arbitration agreements, such as the United States, were at odds with those, such as the European Union, that render pre-dispute agreements to arbitrate non-binding pursuant to consumer protection laws.¹⁶⁰ While the UNCITRAL working group reached a compromise that would enforce pre-dispute agreements to arbitrate in many settings, some foreign jurisdictions may view pre-dispute agreements to arbitrate online with hostility and refuse to enforce them.¹⁶¹ Despite the likely enforceability of pre-dispute agreements to arbitrate online in the United States, drafters should anticipate that enforcement will be less likely in international courts.

Second, drafters of pre-dispute agreements to arbitrate online should explicitly state the parties' choice of law. When a contract containing an arbitration agreement is silent as to choice of law, arbitrators, in their discretion, often apply the law of the forum in which the arbitration takes place.¹⁶² As applied to pre-dispute agreements to arbitrate online, choice of law is less certain because arbitrators must rely on factors other than geography to decide what law to apply. Thus, drafters should include clear choice-of-law provisions in pre-dispute agreements to arbitrate online to avoid uncertainty later.

Finally, not every dispute will be appropriate for online resolution. For example, disputes that require close

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² Thomas H. Oehmke, *Arbitration Highways to the Courthouse—A Litigator's Roadmap*, 86 AM. JR. TRIALS 111, §51 (2002) (“Where the parties are contractually silent on a choice of law, arbitrators are likely to rely upon the law of the forum state where the arbitration hearings are held.....”).

inspection of physical evidence cannot be easily decided via an online process. Thus, pre-dispute agreements to arbitrate online should limit the types of disputes that will be decided in online proceedings, reserving all other claims for face-to-face arbitration or judicial proceedings.

D. Arbitral Process Concerns

While online arbitration presents unique opportunities for improvements in fairness and efficiency of the arbitral process, it also presents due process concerns that online arbitration providers must consider. As Professor Schmitz noted, “Efficiency should not overshadow fairness. It is therefore essential to build ODR systems for particular contexts in consideration of due process standards.”¹⁶³

The International Council for Online Dispute Resolution (ICODR) articulated a set of nine standards that represent a starting point for online arbitration providers.¹⁶⁴ The ICODR’s list of standards requires that ODR systems be accessible, accountable, competent, confidential, equal, fair/impartial/neutral, legal, secure, and transparent.¹⁶⁵ These principles represent baseline standards for online arbitration proceedings.

Development of online arbitration also presents opportunities for improving arbitral processes beyond the due-process baseline. Providers should explore these opportunities. For example, online arbitration platforms can employ structural mechanisms to defeat biases, such as limiting the arbitrator’s access to irrelevant information that

¹⁶³ Amy J. Schmitz, *There's an "App" for That: Developing Online Dispute Resolution to Empower Economic Development*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 41 (2018).

¹⁶⁴ *ICODR Standards*, INTERNATIONAL COUNCIL FOR ONLINE DISPUTE RESOLUTION, <https://icodr.org/standards/> (last visited Dec. 3, 2019).

¹⁶⁵ *See id.*

could bias the result.¹⁶⁶ Online arbitration can also expand access to dispute resolution by incorporating language services and other accessibility features.¹⁶⁷ Opportunities such as these have the potential to make online arbitration a preferred form of dispute resolution for businesses and consumers.

The considerations presented in this section are merely those that are readily apparent. Additional considerations will certainly come into focus as online arbitration comes into use and precedents regarding its use evolve.

IV. CONCLUSION

The titular question of this article asks whether pre-dispute agreements to arbitrate online are enforceable, particularly in the consumer context. Although this question has not been explored at all by courts—and only in passing by scholars—application of the Supreme Court’s forum-selection-clause jurisprudence readily demonstrates that such agreements are enforceable. Moreover, this may be a good result, as enforcement of pre-dispute agreements to arbitrate online may expand businesses’ and consumers’

¹⁶⁶ See generally Sela, *supra* note 10 (proposing “an initial set of recommendations to reduce bias [in ODR systems] and encourage informed and deliberate decision-making”). Sela’s article proposes that the digital-choice architecture could be tailored to limit the influence of bias in online courts, but her recommendations have just as much merit in the context of online arbitration. See *id.* at 130 (“Digital choice architecture is a particularly relevant analytical framework for online courts (and for that matter, any ODR system).....”).

¹⁶⁷ In his recent paper, *Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone*, David Allan Larson lists best practices to assure digital accessibility in ODR. 34 OHIO ST. J. DISP. RESOL. (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3408885 (last visited Dec. 3, 2019).

access to efficient and effective resolution of e-commerce disputes.