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AT&T MOBILITY AND THE FUTURE OF SMALL CLAIMS ARBITRATION

Jill I. Gross*

I. INTRODUCTION

Like many other cellular service customers in 2002, Vincent and Liza Concepcion bought what they thought was a free cell phone, but were charged \$30.22 in taxes; so they brought a class action against AT&T Mobility LLC (“AT&T”) to recoup those undisclosed fees.¹ Because the Supreme Court upheld the class action waiver in the pre-dispute arbitration clause in the Concepcions’ cell phone contract,² if they choose to go forward,³ they will have to bring their individual claim of \$30.22 in small claims arbitration.⁴

Like other unsophisticated investors, Ella B.⁵ lost most of her modest \$20,000 inheritance when a securities broker at her local bank branch unsuitably recommended she purchase a risky mutual fund instead of the Certificate of Deposit she had requested. Due to the arbitration clause in

* Professor of Law, Director of Legal Skills, and Director of Investor Rights Clinic, Pace Law School. I am grateful for the able research assistance of current or former Pace Law students Joan O’Connor Archer, JennyLynn Carey, Christopher Lufrano, Joshua Loring, Joelle Morabito, and Stella Diez.

1. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

2. See *id.* at 1746, 1753.

3. The *AT&T Mobility* dissent asked, “[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?” *Id.* at 1761 (Breyer, J., dissenting) (citing *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”)).

4. *Id.* at 1740, 1744-45, 1753.

5. Ella B. was a client of the Pace Investor Rights Clinic, in which students, under faculty supervision, represent investors of modest means in their arbitrable securities disputes. Her name has been changed to maintain confidentiality. See *Investor Rights Clinic Brochure*, PACE LAW SCHOOL, <http://www.law.pace.edu/lawschool/files/publications/investorrightsclinic.html> (last visited Sept. 19, 2012).

her customer account agreement⁶ and the fact that her damages claim was lower than \$50,000, any claim against the broker and the bank's broker-dealer affiliate would proceed as a Simplified Arbitration before the dispute resolution arm of the Financial Industry Regulatory Authority ("FINRA").⁷

What kind of small claims arbitration process do both the Concepcions and Ella B. face? Dispute system designers have struggled for centuries to provide an alternative to time-consuming and costly litigation for small claims.⁸ This struggle is equally challenging if the parties have agreed to arbitration as the means of dispute resolution. Commercial arbitration forums, such as the American Arbitration Association ("AAA"), JAMS, The Resolution Experts, and FINRA Dispute Resolution, have designed a small claims arbitration process to provide a lower cost and more expeditious alternative to a live arbitration hearing when the dollar value of the dispute does not financially justify the cost of a protracted arbitration process, including multiple live hearing sessions.⁹ In small claims arbitration, parties present their claims and/or defenses to an arbitrator *in writing* only.¹⁰ In lieu of hearing live testimony from witnesses, and following a truncated discovery process, the arbitrator reads written submissions from both parties and renders an award solely based on those submissions, or a "paper hearing."¹¹

6. Virtually all broker-dealers include a pre-dispute arbitration clause in their customer agreement. See Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1182 (2010). The Supreme Court has held that brokerage firms can enforce pre-dispute arbitration agreements in brokerage account customer agreements even as to federal securities claims. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989); *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 242 (1987). For a description of the most common claims brought by customers against their brokers, see Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1008-12 (2002).

7. *Code of Arbitration Procedure for Customer Disputes*, FINRA, Rule 12800 (July 23, 2012), <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p117546.pdf> [hereinafter "FINRA Customer Code"]. FINRA administers virtually all arbitrations of securities disputes. See *Arbitration and Mediation*, FINRA, <http://www.finra.org/ArbitrationAndMediation/index.htm> (last visited Sept. 19, 2012).

8. See Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 221-22 (1975).

9. See *Consumer-Related Disputes Supplementary Procedures*, AAA (Sept. 15, 2005), <http://www.adr.org/aaa/faces/aoc/gc/consumer?> (follow "Supplementary Procedures for Consumer-Related Disputes" hyperlink); *JAMS Streamlined Arbitration Rules & Procedures*, JAMS, THE RESOLUTION EXPERTS (July 15, 2009), <http://www.jamsadr.com/rules-streamlined-arbitration/>; *Simplified Arbitrations*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/SpecialProcedures/SimplifiedArbitrations/index.htm> (last visited Sept. 19, 2012); FINRA Customer Code, *supra* note 7, Rule 12800.

10. See, e.g., FINRA Customer Code, *supra* note 7, Rule 12800.

11. See, e.g., *id.*

Small claims arbitration has not received much attention from dispute system designers and scholars. Several coalescing developments require a reassessment of the small claims arbitration process: (1) the Supreme Court's strong endorsement of the Federal Arbitration Act ("FAA")¹² and arbitration as a favored dispute resolution mechanism,¹³ (2) the proliferation of pre-dispute arbitration clauses in consumer products and services agreements,¹⁴ (3) the judicialization of arbitration,¹⁵ and, (4) most recently, the Court's condemnation of class arbitration as a procedural device to resolve aggregable yet arbitrable low dollar value claims.¹⁶ By inserting a class action waiver clause in their consumer contracts, companies can prevent consumers from aggregating small claims, forcing them to pursue small claims individually.¹⁷ Arbitration law expert Professor Sarah Cole recently wrote that "the most pressing issue in consumer arbitration, in the wake of recent Supreme Court decisions, is the lack of a viable forum for consumers with low value claims."¹⁸

The funneling of low dollar value claims into simplified arbitration has serious implications for consumers and investors of modest means seeking substantive and procedural justice in a forum in which their claim is heard solely on the papers.¹⁹ Substantively, *pro se* parties may not have the education, training, or ability to effectively communicate their complex arguments in writing.²⁰ Moreover, "where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision."²¹

12. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011); 9 U.S.C. § 2 (2006).

13. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 462-63 (2011).

14. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 116 (2010) ("Companies increasingly include arbitration clauses among the 'modular' terms cobbled into boilerplate contracts.").

15. See Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 8-9, 11-16, 19, 21, 24 (describing transformation of arbitration to more court-like litigation process).

16. *AT&T Mobility*, 131 S. Ct. at 1750-52 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-76 (2010).

17. Cole, *On Babies and Bathwater*, *supra* note 13, at 463.

18. *Id.* at 464.

19. *Id.* at 465-66; see also *Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970).

20. *Goldberg*, 397 U.S. at 269-70 ("Written submissions are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important.").

21. *Id.* at 269.

Procedurally, studies show that disputants perceive a dispute resolution process as unfair if they have not been given a “voice,” an ample opportunity to be heard.²²

Empirical evidence suggests that when stakeholders believe a system is procedurally just, they are more likely to buy into the result and the process, comply with the outcome, comply with the law in the future, increase commitment to the organization, accord respect and loyalty to the institution, and perceive the system to be legitimate.²³

In turn, stronger perceptions of procedural fairness impact a disputant’s perception of substantive fairness.²⁴

This article focuses on small claims arbitration and examines the impact of *AT&T Mobility* on the legitimacy of the process. Part II of the article describes the Supreme Court’s *AT&T Mobility* decision,²⁵ which held that the FAA preempts a California rule that declared a class arbitration waiver in a consumer contract unconscionable.²⁶ Part III describes the primary features of the two options remaining for the Concepcions—small claims court and small claims arbitration, as well as their perceived advantages and disadvantages. Part IV demonstrates that courts have endorsed simplified arbitration. Part V examines whether simplified arbitration is a fair method of resolving small arbitration claims. Part VI

22. See Douglas Denton, *Procedural Fairness in the California Courts*, 44 CT. REV. 44, 44-46 (2007-08) (surveying 2,400 members of the public with direct experience in high volume court and finding that disputants’ “procedural fairness concerns outweighed winning or losing a case” and that a “common sentiment . . . was a strong desire to ‘tell my story directly to the judge.’”); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (theorizing importance of procedural justice for legitimacy of dispute resolution processes).

23. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute System Design*, 92 MINN. L. REV. 161, 214-15 (2007); see also Deborah R. Hensler, *Judging Arbitration: The Findings of Procedural Justice Research*, in AAA HANDBOOK ON COMMERCIAL ARBITRATION 41, 48 (Thomas E. Carbonneau & Jeanette Jaeggi eds., 2006) (stating that “arbitration litigants will be satisfied with arbitration if they think the process is fair and will be dissatisfied if they think the process is unfair”); Nancy A. Welsh, *Perceptions of Fairness*, in THE NEGOTIATOR’S FIELDBOOK 165, 170 (Andrea K. Schneider & Christopher Honeyman eds., 2006) (“people who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, even if that outcome is unfavorable”); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134 (2011) (“Research has suggested that procedural justice is an important component of individuals’ judgments about whether to comply with legal rules and authorities, as well as whether legal systems are legitimate. When people feel that they have received fair treatment, they are more likely to adhere to, accept, and feel satisfied with a given outcome, and to view the system that gave rise to that outcome as legitimate.”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN L. REV. 1631, 1666-67 (2005) (citing studies).

24. Welsh, *Perceptions of Fairness*, *supra* note 23, at 170.

25. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011).

26. *Id.* at 1746, 1753.

explores other dispute resolution models for resolving small dollar value commercial disputes, including on-line dispute resolution, telephonic arbitration, and a small claims arbitrator. Part VII concludes by urging dispute system designers to consider changing the default mechanism of arbitrating small claims cases from paper or “desk” arbitration to a live hearing before a small claims arbitrator.

II. AT&T MOBILITY AND CLASS ARBITRATION

Congress enacted the FAA in 1925 “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”²⁷ The Supreme Court has interpreted the FAA to embody a strong national policy favoring arbitration as an alternative dispute resolution mechanism.²⁸ Although the FAA does not create federal subject matter jurisdiction,²⁹ its only substantive provision (section 2)—which declares that agreements to arbitrate are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”³⁰—applies in both state and federal court.³¹ As a result, the FAA governs virtually every arbitration clause arising out of a commercial transaction,³² and “create[s] a body of federal substantive law of arbitrability, applicable to any arbitration

27. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

28. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (recognizing a “liberal federal policy favoring arbitration agreements”).

29. *Valden v. Discovery Bank*, 556 U.S. 49, 59 (2009); *Hall Street Assoc. LLC v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 26-27, n. 34.

30. 9 U.S.C. § 2 (2006). The latter phrase of this section is known as the FAA’s “saving clause.” *AT&T Mobility*, 131 S. Ct. at 1746.

31. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (“The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts.”).

32. 9 U.S.C. § 2. By its terms, the FAA governs agreements to arbitrate “transactions involving commerce.” *Id.* The Supreme Court has interpreted this phrase very broadly to include any transaction that *in fact* involves interstate commerce, even if the parties did not anticipate an interstate impact. *See Citizens Bank v. Alfabco, Inc.*, 539 U.S. 52, 57 (2003) (applying FAA to “debt restructuring agreements” as “involving commerce”); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 81 (2002) (applying FAA to securities arbitrations); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 281 (1995) (interpreting the reach of the FAA broadly to all transactions “involving commerce” and stating that “‘involving’ is broad and is indeed the functional equivalent of ‘affecting’”).

agreement within the coverage of the Act.”³³ Under that substantive law of arbitrability, most federal statutory claims are arbitrable.³⁴

Additionally, the Supreme Court has consistently held that the FAA preempts state laws that treat arbitration agreements differently from other contracts and that “stand as an obstacle to the accomplishment of the FAA’s objectives.”³⁵ Where a state law prohibits the arbitration of a particular type of claim, courts readily find that the FAA preempts that state law.³⁶ More recently, the Court ruled that the FAA preempted California’s contract defense of unconscionability—which on its face was not anti-arbitration—because California state courts were applying it in a manner that was *de facto* disfavoring arbitration.³⁷

In its cellular phone service contracts, AT&T included a pre-dispute arbitration agreement which, *inter alia*, prohibited plaintiffs from bringing class action arbitrations, instead requiring claims to be arbitrated on an individual basis.³⁸ In 2006, the Concepcions sued AT&T in district court,

33. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24. The Court defined arbitrability in this context as “the duty to honor an agreement to arbitrate.” *Id.* at 26.

34. *E.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669, 673 (2012) (claims arising under the Credit Repair Organizations Act are arbitrable); *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 238 (1987) (claims arising under the Securities Exchange Act of 1934 are arbitrable).

35. *AT&T Mobility*, 131 S. Ct. at 1748. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202-04 (2012) (preempting a West Virginia Supreme Court ruling that voided as against public policy pre-dispute arbitration clauses in nursing home contracts with respect to negligence claims); *Preston v. Ferrer*, 552 U.S. 346, 349-50, 356, 359 (2008) (preempting a California law granting exclusive jurisdiction to Labor Commissioner to decide disputes arising under the Talent Agencies Act); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-46, 449 (2006) (preempting a Florida judicial rule that precluded arbitrators from deciding the legality of an allegedly usurious contract containing an arbitration agreement); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (preempting a Montana statute requiring specific type of notice in contract containing arbitration clause); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 53-54, 56, 63-64 (1995) (preempting a New York law precluding arbitrators from awarding punitive damages); *Allied-Bruce Terminix Cos.*, 513 U.S. at 275 (preempting an Alabama statute invalidating pre-dispute arbitration agreements in consumer contracts).

36. *See, e.g., Marmet Health Care Ctr.*, 132 S. Ct. at 1203-04 (preempting a West Virginia Supreme Court rule voiding as against public policy pre-dispute arbitration clauses in nursing home contracts with respect to negligence claims); *Southland Corp.*, 465 U.S. at 8 (preempting a provision of the California Franchise Investment Law that required judicial, not arbitral, resolution of claims brought under the statute).

37. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746-48 (2011).

38. *Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS (AJB) 2008 WL 5216255 *2 (S.D. Cal. Aug. 11, 2008), *aff’d sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom. AT&T Mobility*, 131 S. Ct. 1740, *amended in part*, 06CV676 DMS (NLS), 2012 WL 1681762 (S.D. Cal. May 9, 2012). Notably, the arbitration clause also stated: “[f]or claims of \$10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a telephonic hearing, or a ‘desk’ arbitration wherein the arbitration is conducted ‘solely on the bases of documents submitted to this arbitrator.’” *Id.*

alleging that AT&T's practice of charging sales tax on a phone advertised as "free" was fraudulent.³⁹ In December 2006, after the Concepcions filed their claim, AT&T revised the arbitration agreement to provide that AT&T would pay a customer \$7,500 if an arbitrator found in favor of a California customer on the merits of a customer dispute, and awarded more than the last AT&T settlement offer.⁴⁰

Two years later, after the Concepcions' case was consolidated with a putative class action alleging, *inter alia*, identical claims of false advertising and fraud, AT&T moved to compel arbitration under the revised agreement.⁴¹ After both the district court and the Ninth Circuit refused to enforce the arbitration agreement on the ground that the class action waiver was unconscionable because it had a deterrent effect on class actions and the efficient resolution of third party claims, AT&T sought review in the Supreme Court.⁴²

On April 27, 2011, the Supreme Court, in a 5-4 decision authored by Justice Scalia (joined by Justices Roberts, Kennedy, Thomas, and Alito), held that the FAA preempts California's *Discover Bank* rule, which "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable."⁴³ The Court concluded that the *Discover Bank* rule created a different law of unconscionability for class action waivers in adhesive arbitration contracts.⁴⁴ Thus, the FAA preempts the rule because "[r]equiring the availability of classwide arbitration interferes with

39. See *Laster v. AT&T Mobility LLC*, 584 F.3d at 853, *rev'd sub nom. AT&T Mobility*, 131 S. Ct. 1740 (*Concepcion* was consolidated with *Laster* in September 2006).

40. *Id.*

41. *Id.* The agreement also had an opt-out provision permitting either party to initiate a claim in small claims court in lieu of arbitration. *Laster*, 2008 WL 5216255, at *2.

42. *AT&T Mobility*, 131 S. Ct. at 1745.

43. *Id.* at 1743, 1746, 1753.

44. *Id.* at 1746. The Supreme Court noted that, under California law, a court may refuse to enforce a contract that it finds "to have been unconscionable at the time it was made, or [it] may limit the application of any unconscionable clause. A finding of unconscionability requires a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Id.* (citations omitted) (internal quotation marks omitted). In *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740, the California Supreme Court applied this unconscionability law to class-action waivers in arbitration agreements and held:

when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Id. at 1110 (citation omitted).

fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁴⁵ The Court noted that, although California’s “rule does not require class-wide arbitration, it allows any party to a consumer contract to demand it *ex post*,” thus defeating the purposes of the FAA.⁴⁶

Justice Scalia’s majority opinion exhibited the Court’s disdain for class arbitration.⁴⁷ The Court discussed three characteristics of class arbitration that it concluded defeat the purposes of the FAA and hinder the flexible party-driven process of arbitration: (1) sacrifice of informality and speed; (2) a requisite increase in procedural formality; and (3) an increase in risks to defendants due to the lack of judicial review.⁴⁸ In contrast, the *AT&T Mobility* dissent claimed that class proceedings are necessary to protect against small-value claims falling through the cracks of the legal system.⁴⁹ Justice Scalia responded to the dissent’s concern by stating that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”⁵⁰ Thus, the Court went so far as to characterize class arbitration as not arbitration at all within the meaning of the FAA, but a process that alters the fundamental attributes of arbitration.⁵¹

Academics and the media viewed *AT&T Mobility* as signaling the death of class arbitration as a method to redress small dollar value claims.⁵² The

45. *AT&T Mobility*, 131 S. Ct. at 1748, 1755. The majority was persuaded by research that demonstrated that state courts had become more likely to find an arbitration agreement unconscionable as opposed to other contracts. *Id.* at 1747. For a more complete analysis of the impact of the case on the FAA preemption doctrine, see Jill Gross, *AT&T Mobility and FAA Preemption*, 4 Y.B. ON ARB. & MEDIATION (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033248.

46. See *AT&T Mobility*, 131 S. Ct. at 1750.

47. *Id.* at 1750-53. The Court manifested this disdain one year earlier in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775-76 (2010).

48. *AT&T Mobility*, 131 S. Ct. at 1751-52. Although the majority expressly included the procedural expediency of arbitration as one of the FAA’s purposes with which the *Discover Bank* rule interferes, the dissent referred to the Court’s *Dean Witter* decision in which it specifically “reject[s] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims.” *Id.* at 1758 (Breyer, J., dissenting) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

49. *Id.* at 1760-61 (Breyer, J., dissenting).

50. *Id.* at 1753.

51. *Id.* at 1750-1753.

52. See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704-05 (2012) (“It is highly ironic but no less distressing that a case with a name meaning ‘conception’ should come to signify death for the legal claims of many potential plaintiffs.”); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?* *Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1791928>; Sarah Cole, *Continuing the Discussion of the AT&T v. Concepcion Decision: Implications for the Future*, ADR Prof Blog, (Apr. 27, 2011), <http://www.indisputably.org/?p=2312> (“It would thus appear that the era of class arbitration is over before it really ever began—unless Congress can be persuaded to amend the

dissent cautioned that “nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the \$30.22 were to involve filling out many forms that require technical knowledge or waiting at great length while a call is placed on hold).”⁵³ Commentators agreed with the dissent that many consumers would not be able to pursue their claims, and thus vindicate their statutory rights,⁵⁴ if they could not consolidate their claims with others into larger groups.⁵⁵

Post-*AT&T Mobility*, will claimants pursue low dollar-value claims?⁵⁶ If so, what forum would hear those claims? Would those forums enable

FAA to permit class arbitration, at least in cases involving low value claims, where consumers are unlikely to have practical recourse to a remedy through traditional bilateral arbitration.”); Marcia Coyle, *Divided Justices Back Mandatory Arbitration for Consumer Complaints*, N.Y. L.J. (Apr. 28, 2011), <http://www.law.com/jsp/article.jsp?id=1202491963074&slreturn=1> (LEXIS account required) (quoting lawyer for Concepcions as stating “[t]he decision will make it harder for people with civil rights, labor, consumer and other kinds of claims that stem from corporate wrongdoing to join together to obtain their rightful compensation.”).

53. *AT&T Mobility*, 131 S. Ct. at 1761 (Breyer, J., dissenting).

54. The Court has suggested, but not expressly held, that a disputant could claim that an arbitration agreement is unenforceable because an unfair aspect of the arbitration process precludes that party from vindicating his statutory rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (“so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute [providing that cause of action] will continue to serve both its remedial and deterrent function.”); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000) (suggesting that excessive or overly burdensome forum fees, if proven, might bar a court from enforcing an arbitration agreement on the grounds that one party cannot vindicate its statutory rights); see Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 269–73 (2006) (describing the “effectively vindicate” doctrine and noting that “[t]he Supreme Court has yet to flesh out the . . . doctrine”). The Court recently granted certiorari in a case in which the Second Circuit Court of Appeals, post *AT&T Mobility*, invalidated a class arbitration waiver under the “vindicating rights” doctrine. *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 206 (2d Cir. 2012), cert. granted, *Am. Express Co. v. Italian Colors Rest.*, No. 12-133, 2012 WL 3096737 (U.S. Nov. 9, 2012). A decision in this case to reverse the Second Circuit could be the death-knell for the doctrine.

55. See, e.g., Myriam Gilles, *AT&T Mobility vs. Concepcion: From unconscionability to vindication of rights*, SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), <http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights> (“[T]he *AT&T* ruling is the real game-changer for class action litigation, as it permits most of the companies that touch consumers’ day-to-day lives to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts.”).

56. Evidently, the Concepcions continued to challenge the validity of their arbitration clause, but lost; on remand from the Supreme Court, the district court held a status conference, issued an Order to Show Cause (why it should not grant *AT&T Mobility*’s motion to compel arbitration in light of the Supreme Court’s decision) and set up a briefing schedule. *Laster v. T-Mobile USA, Inc.*, 05CV1167 DMS (WVG), 2012 WL 1681762 at *1 (S.D. Cal. May 9, 2012). On May 9, 2012, the United States District Court for the Southern District of California granted *AT&T Mobility*’s motion to compel arbitration. *Id.* The court reasoned that, apart from the now FAA-preempted *Discover Bank* doctrine, the arbitration agreement was still valid under California’s

claimants to vindicate their statutory rights? Answers to these questions depend on an examination of the most likely forums to hear small claims, both of which are options available to the Concepcions: small claims court and small claims arbitration.

III. FORUMS FOR SMALL CLAIMS

Because the Concepcions' arbitration agreement with AT&T had a small claims court optional carve out (as do some consumer pre-dispute arbitration clauses), allowing them to opt out of arbitration and pursue their dispute in small claims court, they could elect to proceed with their \$30.22 claim in small claims court in California.⁵⁷ This section of the article explores the origins and process of small claims courts.

A. *Small Claims Court*

The need for a simple and efficient mechanism for the resolution of garden-variety, low dollar value disputes has plagued the Anglo-American justice system for centuries, dating back to the creation of a small debt court in England in 1606.⁵⁸ In the early twentieth century, legal scholars began to recognize the inability of the American court system to handle the volume and type of litigation produced by rapidly growing cities.⁵⁹ They identified procedural technicalities as the cause of high costs and delays in the administration of justice, which prevented ordinary citizens from accessing the courts.⁶⁰ They sought to streamline due process to give wage earners access to the courts.⁶¹ Roscoe Pound wrote:

[a] . . . problem is to make adequate provision for petty litigation, to provide for disposing quickly, inexpensively, and justly of litigation of the poor, for the collection of debts in a shifting population, and for the great

general unconscionability principles. *Id.* at *4. The court concluded that, while it was “on the low end of the spectrum of procedural unconscionability,” it was not substantively unconscionable. *Id.* Thus, the court ordered Vincent and Liza Concepcion to arbitrate their claims according to the terms of the December 2006 version of the arbitration agreement (which the parties agreed was the controlling version). *Id.* at *5.

57. *AT&T Mobility*, 131 S. Ct. at 1744. Some arbitration forums have required small claims court carve-outs as part of their Consumer Due Process Protocols. *E.g.*, *Consumer Due Process Protocol*, AAA, Principle 5 (Apr. 17, 1998), <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow “Consumer Due Process Protocol” hyperlink) (“Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.”).

58. Yngvesson & Hennessey, *supra* note 8, at 223.

59. *Id.* at 221.

60. *Id.*

61. *Id.* at 221-22.

volume of small controversies which a busy, crowded population, diversified in race and language, necessarily engenders. It is here that the administration of justice touches immediately the greatest number of people.”⁶²

This scholarship led to debates and proposals about ways to reform the justice system.⁶³ Discussions centered around the concept of “informal justice,” which recognizes the need to offer disputants “simplified procedures, reduced costs and delay, limitations on the right [to] appeal, and, above all, the chance to appear in court without a lawyer” to air their low dollar value grievances.⁶⁴ Policymakers stressed the importance for a new forum to be without the “formal civil adjudicative process, [which] was so complex, cumbersome, and expensive that it had become largely unusable by wage-earners or small business men who had wages or accounts to collect that were too small to justify the expense and delay of a formal civil proceeding.”⁶⁵

The first small claims court in the United States was established in Cleveland, Ohio in 1913.⁶⁶ A short time later, “the first statutory small debtor’s court began operating in Kansas.”⁶⁷ The small claims court movement in the United States gained momentum in the 1920s and 1930s, with more and more states setting up small claims courts as an adjunct to their regular court systems.⁶⁸ Small claims courts emerged throughout the United States, some by rule of court and others by statute.⁶⁹

For example, the present day New York City Small Claims Court originated in 1917 with a series of rules created by the Justices of the Municipal Court of the City of New York to allow for arbitration and conciliation.⁷⁰ Due to continued delays in the City Court of New York that ranged from two to four years,⁷¹ in 1934, the legislature established a Small

62. Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 315 (1913).

63. Yngvesson & Hennessey, *supra* note 8, at 223.

64. John M. Conley & William M. O’Barr, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 24 (1990).

65. Christopher J. Whelan, SMALL CLAIMS COURTS: A COMPARATIVE STUDY 5 (1990).

66. See Yngvesson & Hennessey, *supra* note 8, at 224; Alexander Domanski, *Small Claims Courts: An Overview and Recommendation*, 9 U. MICH. J.L. REFORM 590, 591 (1976).

67. Domanski, *supra* note 66, at 591.

68. See Yngvesson & Hennessey, *supra* note 8, at 223-24.

69. Domanski, *supra* note 66, at 591-92.

70. Debra Ruth Wolin, *How to Defeat the Jurisdiction (and Purpose) of Small Claims Court For Only Fifteen Dollars*, 44 BROOK. L. REV. 431, 431 (1978).

71. These delays caused then Governor Lehman to declare “that such delays in effect amounted to a denial of justice.” ‘Poor Man’s Court’ Urged by Lehman; 7 Reforms Asked, N.Y. TIMES, Mar. 7, 1934, at 1.

Claims Part of the Municipal Court which is still an integral part of the court today.⁷² This court has been regarded as one of the most effective small claims court in the country due to convenient features such as holding evening sessions to accommodate working people, prohibiting the use of the court by corporations, businesses, and assignees, and establishing a local neighborhood court to serve the community.⁷³

The United States' small claims court model initially had five major components: (1) court costs were minimized; (2) pleadings were simplified; (3) trial judges had discretion in fashioning trial procedures, and rules of evidence were eliminated; (4) representation by counsel was not needed because judges and court clerks were expected to assist litigants both in trial preparation and at trial; and (5) judges could direct judgments to be paid in installments.⁷⁴ The initial model was modified in response to the consumer advocacy movement of the 1960s to bar collection agencies as plaintiffs and ban attorneys from appearing on behalf of either party.⁷⁵

Today, every state in the country has some form of a small claims court.⁷⁶ While the jurisdictional amount varies by state or municipality, typically small claims courts hear claims of under \$10,000 in damages.⁷⁷ Filing fees are modest.⁷⁸ The process also varies by state, but most systems

72. *New York City Civil Court Small Claims Part, Civil Court History*, NEW YORK STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/courts/nyc/smallclaims/civilhistory.shtml> (last visited Sept. 19, 2012).

73. *Id.*; *Davis v. City of New York*, 148 Misc.2d 422, 423. (N.Y. Civil Ct. 1990); U.S. Chamber of Commerce, MODEL CONSUMER JUSTICE ACT: A PROPOSED MODEL SMALL CLAIMS COURT ACT FOR STATE LEGISLATURES 45 (1976). In 1991, a separate commercial small claims division was created to serve corporations and businesses. *New York City Civil Court Small Claims Part, Civil Court History*, NEW YORK STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/courts/nyc/smallclaims/civilhistory.shtml> (last visited Sept. 19, 2012).

74. Whelan, *supra* note 65, at 5.

75. *Id.* at 6-7.

76. Bruce Zucker & Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 317 (2003); Domanskis, *supra* note 66, at 591.

77. For example, in California and Illinois, small claims courts hear claims up to \$10,000, and in New York City and North Carolina the damages cap is \$5,000. *See, e.g., Basics*, CALIFORNIA COURTS, <http://www.courts.ca.gov/1256.htm> (last visited Sept. 19, 2012); *Small Claims Court*, ILLINOIS ATTORNEY GENERAL, <http://www.ag.state.il.us/consumers/smlclaims.html> (last visited Sept. 19, 2012); *New York City Civil Court Small Claims Part*, NEW YORK STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/courts/nyc/smallclaims/general.shtml> (last visited Sept. 19, 2012); *About Small Claims Court*, THE NORTH CAROLINA COURT SYSTEM, <http://www.nccourts.org/Courts/Trial/Scliams/> (last visited Sept. 19, 2012).

78. For example, California charges a \$30 filing fee (up to \$75 for larger claims); New York City charges a \$15-\$25 filing fee depending on the type of claimant and the size of the claim. *See Basics*, CALIFORNIA COURTS, <http://www.courts.ca.gov/1256.htm> (last visited Sept. 19, 2012); Jonathan Lippman et al., *Your Guide to Small Claims and Commercial Small Claims*, NEW YORK STATE UNIFIED COURT SYSTEM (Aug. 22, 2011), <http://www.nycourts.gov/courts/nyc/civil/pdfs/>

share the characteristics of a face-to-face interaction with a judge, and a rapid oral hearing at which the parties can present witnesses and documents.⁷⁹ Parties are rarely represented by a lawyer, and some courts even bar them.⁸⁰

Litigant challenges to the small claims court model have fallen short.⁸¹ Virtually all courts that have considered constitutional due process challenges to small claims court have rejected them.⁸² As one lower court stated, “[t]his is a system which balances the poor litigant’s right to a day in court, with the constitutional right of defendants not to be deprived of property without due process of law.”⁸³ The Supreme Court of California traced the history of small claims court back to England and concluded that it was rooted in the common law to “provide practical, useful remedies for persons with very small claims.”⁸⁴ As a result, because the constitutional right to a jury trial exists only to the extent it existed at common law at the time of the state constitution’s adoption, the court reasoned that there is no right to a jury trial for small claims.⁸⁵

Scholars note that small claims courts provide a sense of procedural justice by treating litigants with respect, giving them an opportunity to be heard by an impartial decision-maker, and providing them with an opportunity to tell their side of the story.⁸⁶ “A belief in the trustworthiness of officials is perhaps the strongest contributor to a perception of procedural fairness. . . . Trustworthiness also is enhanced to the extent that judges explain to defendants the basis for their decisions.”⁸⁷

On the other hand, small claims courts have been subject to much scrutiny for failing to achieve their original goal of making courts more

smallclaims.pdf. Obviously, it is not cost-effective for a litigant to bring a claim that is smaller than the filing fees. Ironically, the Concepcions’ \$30.22 damages claim in California exceeds the filing fee by twenty-two cents. So at least a full recovery wouldn’t occur at a loss.

79. *Crouchman v. Superior Court*, 755 P.2d 1075, 1076 (Cal. 1988).

80. *Whelan*, *supra* note 65, at 11.

81. *See, e.g., Crouchman*, 755 P.2d at 1075-76.

82. *See, e.g., id.* at 1077 (concluding that there is no constitutional or statutory right to a jury trial “at any point in a small claims proceeding.”)

83. *City & County of San Francisco v. Small Claims Court*, 190 Cal. Rptr. 340, 343 (Ct. App. 1983).

84. *Crouchman*, 755 P.2d at 1080.

85. *Id.* at 1080-81.

86. David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?*, 37 CT. REV. 22, 26 (2000).

87. *Id.* at 26-27 (“It has been suggested . . . that small claims courts ‘probably work a therapeutic effect, at least when black-robed judges take the time to listen to plaintiffs and defendants explain their sides of a dispute.’”) (citation omitted); *see also Zucker & Herr, supra* note 76, at 324.

accessible to people of modest means with modest claims.⁸⁸ One influential article from 1975 questioned the basic premise of small claims courts that low dollar value claims are inherently “simple.”⁸⁹ The authors questioned the effectiveness of small claims proceedings to hear even basic fraud claims, and suggested, ironically enough, increased use of arbitration and mediation as an adjunct to the small claims court.⁹⁰ Small claims courts also have been chastised for, among other things, being collection agencies, issuing numerous default judgments, issuing unenforceable judgments, allotting insufficient time for litigants to present their cases due to court congestion and other time constraints, favoring, in some instances, the self-represented and, in others, favoring those represented by an attorney, and failing to publicize the court.⁹¹

While dispute systems designers generally view small claims courts as effective,⁹² their drawbacks could prompt the Concepcions to choose not to exercise their small claims opt-out right. Their only other option is to proceed with small claims arbitration.⁹³ The next section of the article describes that process.

B. Small Claims Arbitration in Commercial Forums

Virtually every major arbitration forum prescribes a small claims arbitration process for any arbitration case in which the claimant seeks damages below a certain threshold, and that process varies from the default arbitration process for commercial disputes.⁹⁴

88. See Robert J. Hollingsworth et al., Note, *The Ohio Small Claims Court: An Empirical Study*, 42 U. CIN. L. REV. 469, 469-70 (1973); *Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts*, 28 VAND. L. REV. 711, 723-729 (1975) (studying the deficiencies of small claims courts); Yngvesson & Hennessey, *supra* note 8, at 236, 240.

89. Yngvesson & Hennessey, *supra* note 8, at 225-26.

90. *Id.* at 258-61.

91. *Id.* at 228-29; see also Suzanne E. Elwell & Christopher D. Carlson, *Contemporary Studies Project: The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 441-51 (1990).

92. Elwell & Carlson, *supra* note 91, at 434, 446, 452.

93. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

94. E.g., *Commercial Arbitration Rules and Mediation Procedures*, AAA, Rule E-1 to E-10 (June 1, 2010), <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow “Commercial Arbitration Rules and Mediation Procedures” hyperlink).

1. American Arbitration Association⁹⁵

Pursuant to Rule 1 of the AAA's Commercial Arbitration Rules, "Expedited Procedures" are employed when no party's claim exceeds \$75,000, exclusive of costs and interest, or when the parties agree.⁹⁶ However, the Expedited Procedures will not apply in disputes involving more than two parties, unless the parties agree otherwise.⁹⁷ Rule E-6 of the Expedited Procedures provides that if no party brings a claim of more than \$10,000 (exclusive of interest and costs), or if the parties agree, the dispute will be resolved on the written submissions.⁹⁸ However, the parties have the right to request an oral hearing, and the arbitrator may also determine that such a hearing is necessary.⁹⁹

To assist the parties and neutrals in fashioning procedures for paper cases, the AAA has established Guidelines for Written Arbitration, "as a suggested method for resolving disputes by submission of documents."¹⁰⁰ The Guidelines caution the parties that "the arbitrator may amend these procedures by the parties' agreement or at the arbitrator's initiative based on the unique needs of each case."¹⁰¹ Under the Guidelines, "the parties submit in writing to the AAA any documents pertaining to the arbitration, including a statement of facts together with any briefs, written arguments or other evidence they wish to submit."¹⁰² Each party is given a right to one

95. The AAA "is a not-for-profit organization with offices throughout the U.S. AAA has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court." *About American Arbitration Association*, AAA, <http://www.adr.org/> (follow "About" hyperlink) (last visited Sept. 19, 2012).

96. *Commercial Arbitration Rules and Mediation Procedures*, AAA, Rule R-1(b) (June 1, 2010), <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow "Commercial Arbitration Rules and Mediation Procedures" hyperlink) ("Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.").

97. *Id.*

98. *Id.* Rule E-6.

99. *Id.* ("Where no party's claim exceeds \$10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.").

100. *Guidelines for Written Arbitration*, AAA, <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow "Guidelines for Written Arbitration" hyperlink) (last visited Sept. 19, 2012).

101. *Id.*

102. *Id.*

reply submission, due fourteen days after the initial submission.¹⁰³ The AAA then transmits all of the parties' written submissions to the arbitrator for a decision within fourteen days.¹⁰⁴

The AAA's Consumer Due Process Protocol also addresses paper cases.¹⁰⁵ Principle 12 provides, "[i]n some cases, such as some small claims, the requirement of fundamental fairness may be met by hearings conducted by electronic or telephonic means or by a submission of documents. However, the Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party."¹⁰⁶ To implement this principle in the consumer dispute context, AAA has enacted supplementary procedures.¹⁰⁷ These procedures clarify that, for claims of \$10,000 or less, the dispute will be resolved through Desk Arbitration, unless either party or the arbitrator requests a hearing.¹⁰⁸ As to Desk Arbitration procedures, the AAA simply states that "[t]he arbitrator will establish a fair process for submitting the documents."¹⁰⁹

Finally, under these supplementary procedures, the AAA allocates the cost burden to the business rather than the consumer.¹¹⁰ Thus, under the fee schedule effective January 1, 2010, the consumer pays a maximum fee of only \$125 for a Desk Arbitration, and it is refunded if "not used" to pay the arbitrator.¹¹¹ In contrast, the business pays \$775 for a Desk Arbitration and a "Case Service Fee" of \$200 if a hearing is held.¹¹²

2. JAMS

Like the AAA, JAMS (which claims to be "the largest private alternative dispute resolution ("ADR") provider in the world"¹¹³) has a separate set of Streamlined Arbitration Rules and Procedures for smaller

103. *Id.*

104. *Id.* Before deciding, the arbitrator can "request further evidence from any party(s), if necessary." *Id.*

105. *Consumer Due Process Protocol*, AAA, Principle 12 (Apr. 17, 1998), <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow "Consumer Due Process Protocol" hyperlink).

106. *Id.*

107. *Consumer-Related Disputes Supplementary Procedures*, AAA (Sept. 15, 2005), <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow "Supplementary Procedures for Consumer-Related Disputes" hyperlink).

108. *Id.* Rule C-5.

109. *Id.*

110. *See id.* Rule C-8.

111. *Id.*

112. *Id.*

113. *About JAMS*, JAMS: THE RESOLUTION EXPERTS, <http://www.jamsadr.com/aboutus> (last visited Sept. 19, 2012).

claims, although the monetary cap is much higher at JAMS.¹¹⁴ These rules are used when the parties agree or when no claim or counterclaim exceeds \$250,000, excluding interests and costs.¹¹⁵ Both sets of rules contain a provision for an award based on written submissions (Rule 18 in the Streamlined Rules¹¹⁶ and Rule 23 in the Comprehensive Rules).¹¹⁷ The wording in both is identical: “[t]he Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.”¹¹⁸

3. FINRA

The securities industry has been utilizing arbitration as an alternative dispute resolution mechanism for both intra-industry and customer-broker disputes since the 1800s.¹¹⁹ Today, virtually all customers’ disputes with their brokers are administered by FINRA Dispute Resolution.¹²⁰

It wasn’t until the 1970s that the industry focused on designing an arbitration procedure specifically to administer investors’ small claims.¹²¹ As I have previously written:

114. *JAMS Streamlined Arbitration Rules and Procedures*, JAMS: THE RESOLUTION EXPERTS, Rule 1 (July 15, 2009), <http://www.jamsadr.com/rules-streamlined-arbitration/>.

115. *Id.* If the dispute exceeds this amount, JAMS Comprehensive Arbitration Rules and Procedures are used. *JAMS Comprehensive Arbitration Rules and Procedures*, JAMS: THE RESOLUTION EXPERTS, Rule 1 (Oct. 1, 2010), <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

116. *JAMS Streamlined Arbitration Rules and Procedures*, JAMS: THE RESOLUTION EXPERTS, Rule 18 (July 15, 2009), <http://www.jamsadr.com/rules-streamlined-arbitration/>.

117. *JAMS Comprehensive Arbitration Rules and Procedures*, JAMS: THE RESOLUTION EXPERTS, Rule 23 (Oct. 1, 2010), <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

118. *Compare id.*, with *JAMS Streamlined Arbitration Rules and Procedures*, JAMS: THE RESOLUTION EXPERTS, Rule 18 (July 15, 2009), <http://www.jamsadr.com/rules-streamlined-arbitration/>.

119. See Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISP. RESOL. 329, 336 (2006).

120. *Arbitration and Mediation*, FINRA, <http://www.finra.org/ArbitrationAndMediation/index.htm> (last visited Sept. 19, 2012). Until mid-2007, the National Association of Securities Dealers, Inc. (“NASD”) and the New York Stock Exchange (“NYSE”) ran separate arbitration forums that handled a combined 99% of all securities arbitrations in the country; but on July 30, 2007, NASD and NYSE, including their respective arbitration forums, consolidated and formed the Financial Industry Regulatory Authority (“FINRA”). *NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority—FINRA*, FINRA (July 30, 2007), <http://www.finra.org/Newsroom/NewsReleases/2007/P036329>. FINRA now “operates the largest dispute resolution forum in the securities industry.” *Arbitration and Mediation*, FINRA, <http://www.finra.org/ArbitrationAndMediation/index.htm> (last visited Sept. 19, 2012).

121. Jill I. Gross & Stefanie Shabman, *A Primer on FINRA Simplified Arbitration in SECURITIES ARBITRATION IN THE MARKET MELTDOWN ERA: ACHIEVING FAIRNESS IN PERCEPTION AND REALITY* 351, 351 (2009).

[i]n April 1977, the Securities and Exchange Commission established the Securities Industry Conference on Arbitration (“SICA”), comprised of representatives of various securities self-regulatory organizations, the public, and the Securities Industry Association . . . to develop a uniform arbitration code and the means for establishing a more efficient, economic, and appropriate mechanism for resolving investor disputes involving small sums of money. SICA was charged with the responsibility of promulgating a plan which allowed the self regulatory organizations to provide a public customer with a relatively simple procedure for resolving disputes without the aid of an attorney or the need to appear at a hearing. The proposed plan, which applied to claims of damages of \$2,500 or less, provided that the arbitrator will decide the dispute on the basis of the documents submitted, unless the customer requests a hearing or the arbitrator believes that a hearing is necessary or appropriate.

To initiate the arbitration, a claimant was required to file a single typewritten or printed letter explaining the basis of the claim and to pay a \$25 filing fee. . . . Within one year of the issuance of the 1977 SICA Report, ten stock exchanges and two self-regulatory organizations (“SROs”) adopted these procedures.

In 1978, SICA first proposed its Uniform Code of Arbitration to provide a model code of arbitration procedure for securities arbitrations taking place at the various stock exchanges and SROs. This proposed Uniform Code included the small claims procedures . . . and was adopted by the participating exchanges and SROs in 1979 and 1980. By 1980, SICA reported that on the basis of the number of small claims arbitrations received as well as the speed with which they are resolved it would appear that the Small Claims Procedure has been a great success.¹²²

Since 1979, SICA has raised the dollar value threshold for a dispute to qualify for simplified arbitration four times, the most recent of which took place in 2012, when FINRA obtained SEC approval to raise the limit to \$50,000, exclusive of interest and expenses.¹²³ Today, Rule 12800 of FINRA’s Code of Arbitration Procedure for Customer Disputes codifies the simplified arbitration process, which remains consistent with SICA’s original streamlined approach to resolving customers’ low value disputes.¹²⁴

122. *Id.* at 351-52 (2009) (original alterations omitted) (footnotes omitted) (citations omitted) (internal quotation marks omitted).

123. *Id.*; Securities and Exchange Commission, Order Approving a Proposed Rule Change Raising the Limit for Simplified Arbitration from \$25,000 to \$50,000, 77 Fed. Reg. 27262 (May 9, 2012). The jurisdictional cap is codified in FINRA Customer Code, Rule 12800(a). FINRA Customer Code, *supra* note 7, Rule 12800(a).

124. FINRA Customer Code, *supra* note 7, Rule 12800(a).

Under Rule 12800, a single public arbitrator, who is FINRA Chair-qualified, decides the parties' dispute, unless the parties agree otherwise.¹²⁵ "Simultaneous with and after arbitrator selection, the parties may request documents and other information from each other."¹²⁶ "The arbitrator holds no live hearings unless a customer [or the arbitrator] requests one. . . . The arbitrator bases the award on the pleadings and other materials submitted by the parties. FINRA pays the arbitrator an honorarium of \$125 for each case administered under this rule."¹²⁷

4. Advantages of Simplified Arbitrations

Simplified arbitrations have numerous advantages to parties when compared to arbitrations with live hearings. Turnaround time is faster than non-simplified cases because pre-hearing conferences or live hearings are not needed, and the parties typically spend less time on discovery and motions.¹²⁸ Process costs are also lower because only one arbitrator, not three, hears the dispute, and the parties generally do not incur forum fees stemming from pre-hearing conferences (unless requested by one party) and evidentiary hearing sessions.¹²⁹ In addition, because filing fees are based on the amount in dispute, fees for simplified cases are lower.¹³⁰ Parties also avoid costs typically associated with extensive discovery as well as in-person appearances by third-party witnesses and experts.¹³¹ As I previously posited:

simplified arbitration . . . provides access to justice for *pro se* claimants, as well as the elderly and disabled. These claimants may be unable or unwilling to pursue their [meritorious low dollar value] claims if they had the burden of traveling to a hearing [location], testifying in person against a broker [or a company salesperson], or arguing the facts and the law to [a professional] arbitrator [who may be intimidating to them].¹³²

125. Gross & Shabman, *supra* note 121, at 353.

126. *Id.* at 354 (original alterations omitted) (footnotes omitted) (citations omitted) (internal quotation marks omitted).

127. *Id.* at 353-54 (footnotes omitted) (citations omitted).

128. See *Dispute Resolution Statistics*, FINRA, <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/> (last updated Sept. 19, 2012). For example, for simplified decisions, recent turnaround times were 6.4 months in 2010, 6.3 months in 2011, and 7.4 months in 2012 (through August). For awards after a live hearing, the turnaround time was substantially longer: 14.7 months in 2010, 15.8 months in 2011, and 16.8 months in 2012 (through August). *Id.*

129. Gross & Shabman, *supra* note 121, at 356.

130. *Id.* at 355.

131. *Id.* at 356.

132. *Id.* at 356 (footnote omitted) (citation omitted).

5. Disadvantages of Paper Hearings

Paper hearings also have some disadvantages. Since documentary evidence usually is the strongest proof of commercial transactions, the process disadvantages the party who has access to fewer documents.¹³³ It has been my experience that, typically, consumers or customers do not have copies of their own documents, including customer agreements, account statements, bills, invoices, etc. Furthermore, I have observed that these documents need testimonial proof when they do not exist. However, in simplified arbitrations where witness testimony is submitted only via affidavit, “an arbitrator may find it difficult to assess the credibility [or veracity] of a witness without oral testimony and the benefit of cross-examination.”¹³⁴ Furthermore, basic commercial arbitrator training courses do not cover paper arbitrations, “leaving a less-experienced arbitrator with little guidance as to how to decide cases based on paper submissions.”¹³⁵ Parties are less likely to have legal representation in small claims arbitration, yet I would argue that legal representation is even more needed because of the decision-maker’s reliance on writings. Absent a lawyer’s unique ability to present facts and law persuasively, an arbitrator may have a hard time parsing through the facts and claims as presented by a non-lawyer.¹³⁶

Moreover, in a customer or consumer dispute, not requiring a personal appearance from a representative of the party with the stronger bargaining power, such as the brokerage house or consumer services company, may deter settlement.¹³⁷ Also, many claimants seek their “day in court” so they can tell their story and be heard.¹³⁸ In fact, academic research shows that participants perceive a dispute resolution process as more fair if they believe they have been heard.¹³⁹ If a claimant requests an in-person hearing, the claimant will then lose the advantages of speed and cost.¹⁴⁰ In the end, under the current system design, being heard in person may prove too costly for small dollar value disputants.¹⁴¹

133. *Id.* at 357.

134. *Id.* at 356.

135. *Id.*

136. *See* Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (stating that “written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important.”).

137. Gross & Shabman, *supra* note 121, at 356.

138. *Id.*

139. *Id.* at 356-57.

140. *Id.* at 357.

141. *Id.*

Given some of this criticism, parties have, on occasion, challenged the fairness and/or validity of the simplified arbitration process.¹⁴² The next section of the article explores how the courts have ruled on these various challenges.

IV. COURTS' ENDORSEMENT OF SIMPLIFIED ARBITRATION

As noted above, the Supreme Court, through decades of FAA decisions, has held that the FAA establishes a strong national policy favoring arbitration.¹⁴³ Legal challenges to the process of arbitration face many hurdles, as courts are eager to enforce arbitration agreements, and the recognized grounds to challenge awards are very narrow.¹⁴⁴ While several legal doctrines serve to police the fairness of arbitration, recent court decisions have rendered them more and more toothless.¹⁴⁵

Before Congress enacted the FAA, the federal common law of this country, while acknowledging the general principle that courts should intervene only sparingly in arbitration matters, imposed a "fundamental fairness" requirement on commercial arbitration.¹⁴⁶ However, the FAA does not contain or mention the words "fair" or "fairness" because it is primarily a procedural gap-filling statute.¹⁴⁷ The only reference to a "hearing" is found in FAA section 10(a)(3), which provides that the court can vacate an award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in

142. *Id.*

143. See *supra* notes 28-34 and accompanying text.

144. Hall Street Assoc., LLC v. Mattel, Inc., 552 U.S. 576, 588 (2008) (tolerating only "limited re-view [] to maintain arbitration's essential virtue of resolving disputes straightaway"). Section 10 of the FAA provides the sole grounds on which a court can set aside or vacate an arbitration award. See 9 U.S.C. § 10 (2010). These grounds focus on the arbitration process, not the merits and judicial review of arbitration awards under these grounds is extremely narrow. See Margaret L. Moses, *Arbitration Law: Who's In Charge?*, 40 SETON HALL L. REV. 147, 152-53, 168 (2010).

145. See Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 495-96 (2008).

146. See *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349-50 (1854) (confirming award in a commercial dispute between a retailer and two wholesalers and stating that "after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact"); *Citizens Bldg. of W. Palm Beach, Inc., v. Western Union Tel. Co.*, 120 F.2d 982, 984 (5th Cir. 1941) ("The universal rule in common-law arbitrations is that the parties are entitled to be heard, after reasonable notice, upon the subject matter in dispute."). See generally Gross, *McMahon Turns Twenty*, *supra* note 145, at 503-08. Courts reasoned that, if asked to set aside an arbitration award, the court was sitting in equity, and no court of equity could deny relief from a proceeding demonstrated to be fundamentally unfair. *Burchell*, 58 U.S. at 349-50.

147. See 9 U.S.C. §§ 3-16 (2006). FAA Sections 3-16 largely specify procedures for enforcing arbitration agreements and awards in the federal courts. See *id.*

refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”¹⁴⁸

As a result, after the passage of the FAA, courts struggled to balance the common law need for fairness with the plain meaning of the FAA, which did not appear to mandate sufficient hallmarks of fairness and private due process.¹⁴⁹ Some early post-FAA courts continued to impose the common law fairness requirement on arbitration hearings arising out of FAA-governed contracts.¹⁵⁰ More recently, courts seem to have reached a consensus that an arbitration hearing arising under the FAA must include the classic hallmarks of fairness: notice, a right to be heard, and a neutral decision-maker.¹⁵¹ Thus, courts have vacated awards where the arbitrators refused to hear pertinent evidence¹⁵² or barred testimony of a witness.¹⁵³

148. 9 U.S.C. § 10(a)(3).

149. *Compare* *Seldner Corp. v. W.R. Grace & Co.*, 22 F. Supp. 388, 391-92 (D. Md. 1938) (concluding that Congress did not intend to abandon essential safeguards absent clear language in the FAA to the contrary), *with* *Catz Am. Co. v. Pearl Grange Fruit Exchange, Inc.*, 292 F. Supp. 549, 551 (S.D.N.Y. 1968) (recognizing courts’ “limited” role in reviewing an arbitral award so as not to frustrate the objectives of the FAA in promoting arbitration as a means of “reduc[ing] cost and delay frequently encountered in the courts”).

150. *E.g.*, *Seldner Corp.*, 22 F. Supp. at 391-92 (vacating award due to lack of notice and opportunity to be heard and noting that these requirements deeply ingrained in English and American jurisprudence, and absence of these essential safeguards in the FAA did not indicate Congressional intent to abolish them in the arbitral setting).

151. *See* *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994) (gathering cases). *Cf.* *Sroka Family LLC v. Prudential Sec., Inc.*, 176 Fed. App’x 766, 767 (9th Cir. 2006) (affirming district court’s dismissal of petition to vacate securities arbitration award due to lack of subject matter jurisdiction because “review of the fairness of arbitration proceedings does not involve a substantial question of federal law where petitioners were not denied adequate notice, a hearing on the evidence and an impartial decision by the arbitrator.”).

152. *E.g.*, *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (vacating award for arbitrator’s refusal to hear material evidence constituting misconduct); *LJL 33rd St. Associates v. Pitcairn Properties, Inc.*, No. 11 Civ. 6399(JSR), 2012 WL 613498, at *7 (S.D.N.Y. Feb. 15, 2012) (same); *Bell Packaging Corp. v. Graphic Commc’ns Int’l Union Local 415-S*, No. 98 C 4316, 1998 WL 748270, at *4 (N.D. Ill. Oct. 22, 1998) (vacating award for fundamental unfairness where arbitrator allowed new allegation to be raised during hearing); *Dover Elevator Sys., Inc. v. United Steel Workers of Am.*, No. 2:97CV101-B-B, 1998 WL 527290, at *2 (N.D. Miss. July 2, 1998) (vacating award because arbitrator acted in a “fundamentally unfair” manner by preventing party from submitting rebuttal evidence); *Home Indemnity Co. v. Affiliated Food Distribs., Inc.*, No. 96 Civ. 9707(RO), 1997 WL 773712, at *3 (S.D.N.Y. Dec. 12, 1997) (vacating award because “touchstone” of fundamental fairness was absent in arbitrator’s decision). Some states’ arbitration law also permits vacatur of an award where the arbitrator refused to hear material evidence. *See, e.g.*, *Burlage v. Super. Ct.*, 100 Cal. Rptr. 3d 531, 535-36 (Ct. App. 2009).

153. *E.g.*, *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 21 (2d Cir. 1997) (vacating award for arbitrator’s refusal to postpone hearings so as to allow a material witness to testify); *Kaplan v. Alfred Dunhill of London, Inc.*, No. 96 Civ. 0258 (JFK), 1996 WL 640901, *6 (S.D.N.Y. Nov. 4,

At the same time, courts give wide latitude to arbitrators in meeting these fairness hallmarks and require nothing more. Courts have approved the fairness of telephonic hearings in lieu of in-person hearings.¹⁵⁴ Indeed, the FAA's reference to a "hearing" does not require that a hearing be live, and courts approve arbitral resolutions of disputes based solely on paper submissions.¹⁵⁵ For example, in *Air Florida System*, where the only issue decided by the arbitrator was a business valuation, the Ninth Circuit held that:

the failure to hold an oral hearing cannot be deemed misbehavior that prejudiced the FDIC's rights because the FDIC has not shown that its evidence was not amenable to presentation in written form. Admittedly, a 'paper hearing' often will be an inadequate means to determine the facts upon which an arbitration decision must rely. In this case, however, the nature of the decision to be made leads us to conclude that the 'paper hearing' was adequate.¹⁵⁶

Additionally, courts find that arbitrators have the authority to decide pre-hearing motions to dismiss and summary judgment motions, as long as the arbitrator's refusal to hold a full evidentiary hearing is not fundamentally unfair.¹⁵⁷

1996); *Harvey Aluminum v. United Steelworkers of Am.*, 263 F. Supp. 488, 495 (C.D. Cal. 1967) (vacating award under 10(a)(3) for refusal to hear testimony of a rebuttal witness).

154. *Knight v. Merrill, Lynch, Pierce, Fenner & Smith*, 350 Fed. App'x 119, 120 (9th Cir. 2009) (concluding that "[t]he arbitration panel did not exceed its authority in determining the manner in which it conducted the hearings on [claimant's] claims"); *Berkley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1:06CV606, 2008 WL 755875, *5 (S.D. Ohio Mar. 19, 2008) ("Because Plaintiffs responded to the motions to dismiss and participated in oral arguments at the telephonic hearing, this Court cannot find that Plaintiffs were denied fundamental fairness.").

155. *E.g.*, *FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 (9th Cir. 1987) (finding that paper hearing can, in certain cases, satisfy the FAA); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) (arbitration does not require an evidentiary hearing); *Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 74 (S.D.N.Y. 1993) (paper hearing is fundamentally fair); *see also Gray Panthers v. Schweiker*, 652 F.2d 146, 149 n.3 (D.C. Cir. 1980) ("A 'hearing' means any confrontation, oral or otherwise, between an affected individual and an agency decisionmaker [sic] sufficient to allow the individual to present his case in a meaningful manner. Hearings may take many forms, including a 'formal,' trial-type proceeding, an 'informal discuss[ion]' . . . or a 'paper hearing,' without any opportunity for oral exchange.") (alteration in original) (emphasis added).

156. *Air Fla. Sys.*, 822 F.2d at 842.

157. *E.g.*, *Wise v. Wachovia Sec. LLC*, 450 F.3d 265, 268 (7th Cir. 2006) (affirming denial of motion to vacate award where arbitrators granted respondent's motion for summary judgment before a live hearing); *Vento v. Quick & Reilly, Inc.*, 128 Fed. App'x 719, 723 (10th Cir. 2005) (stating that "we hold that a NASD arbitration panel has full authority to grant a pre-hearing motion to dismiss with prejudice based solely on the parties' pleadings"); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *Campbell v. Am. Family Life Assur. Co.*, 613 F. Supp. 2d 1114, 1119-21 (D. Minn. 2009); *Tricome v. Success Trade Sec.*, No. 05-4746, 2006 WL 1451502, at *4 (E.D. Pa. May 25, 2006) (denying motion to vacate arbitrators' pre-hearing dismissal); *Allen*

In the few reported cases arising out of simplified or desk arbitrations,¹⁵⁸ lower courts have held that the procedure is fundamentally fair.¹⁵⁹ For example, in *Papayiannis v. Zelin*, the court confirmed the simplified arbitration award and found the procedure was fair where the losing party had ample notice of, as well as an opportunity to participate in, the arbitration.¹⁶⁰ However, in these cases, the courts' analysis is quite cursory, with only a few sentences dedicated to the summary conclusion that the procedures are fair.¹⁶¹ None of the cases reflect a detailed analysis of the procedural shortcuts of a document-only arbitration and the impact of those shortcuts on the fairness of the process.¹⁶²

v. RBC Dain Rauscher, Inc., No. C06-5163 RJB, 2006 WL 1303119, at *5 (W.D. Wash. May 9, 2006) (refusing to vacate arbitrators' pre-hearing dismissal); *Warren v. Tacher*, 114 F. Supp. 2d 600, 602–03 (W.D. Ky. 2000); *Max Marx Color & Chem., v. Barnes*, 37 F. Supp. 2d 248, 250–51 (S.D.N.Y. 1999) (recognizing authority of NASD arbitrators to grant pre-hearing dismissal); *Griffin Indus., Inc. v. Petrojam, Ltd.*, 58 F. Supp. 2d 212, 219–20 (S.D.N.Y. 1999) (noting that “arbitrators are not compelled to conduct oral hearings in every case”); *Reinglass v. Morgan Stanley Dean Witter, Inc.*, No. 86407, 2006 WL 802751, *3 (Ohio Ct. App. Mar. 30, 2006) (confirming award where the panel dismissed the investor's claims on ground that claimant failed to plead fraud with the specificity required by Federal Rule of Civil Procedure 9(b)); *Patton v. J.P. Morgan Chase & Co.*, No. 104939/04, 2004 N.Y. Misc. LEXIS 3135, at *2-3 (N.Y. Sup. Ct. Aug. 23, 2004) (denying motion to vacate award that dismissed arbitration claim without a hearing, finding that such a dismissal does not deny a party fundamental fairness when arbitrator determines there is no relevant or material evidence to present at a hearing). *Contra Prudential Sec. Inc. v. Dalton*, 929 F. Supp. 1411, 1418 (N.D. Okla. 1996) (vacating award as fundamentally unfair where panel granted summary judgment denying a party an opportunity to present material evidence).

158. It is not surprising that there are so few reported cases in light of how little money is at stake, by definition. The costs of challenging the award would likely outweigh the value of even a full recovery.

159. *E.g.*, *Roberts v. A.G. Edwards & Sons, Inc.*, No. B-06-17, 2007 WL 597371, at *9–10 (S.D. Tex. Feb. 21, 2007) (granting motion to confirm NYSE simplified arbitration award and expressly concluding that simplified arbitration procedures were “fundamentally fair” under the FAA); *Dicalite Armenia, Inc. v. Progress Bulk Carriers, Ltd.*, No. 04 Civ. 9241(RCC), 2006 WL 453216, at *2 (S.D.N.Y. Feb. 23, 2006) (rejecting party's claim that a complex claim about cargo damage could not be arbitrated in simplified arbitration); *Bolick v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. Civ.A. 05-CV-4532, 2006 WL 229038, at *2-3 (E.D. Pa. Jan. 30, 2006) (confirming \$4,000 simplified arbitration award despite claimant's allegations of arbitrator bias and fraud); *Papayiannis v. Zelin*, 205 F. Supp. 2d 228, 234 (S.D.N.Y. 2002) (confirming award arising out of NASD simplified arbitration procedure and rejecting losing party's claim that he had no opportunity to be heard); *Warehall v. Pasternak*, No. 92 Civ. 9227 (PKL), 1993 WL 437784, at *2-3 (S.D.N.Y. Oct. 26, 1993) (confirming NASD simplified arbitration award and finding that simplified arbitration rules provide ample opportunity to be heard); *McLaughlin, Piven, Vogel, Inc. v. Gross*, 699 F. Supp. 55, 57 (E.D. Pa. 1988) (confirming simplified arbitration award and approving paper hearing). *But see Rini v. United Van Lines, Inc.*, 903 F. Supp. 234, 237 (D. Mass. 1995) (finding “desk” arbitration process with no opportunity to present witnesses “suffers from serious unfairness”), *rev'd on other grounds*, 104 F.3d 502 (1st Cir. 1997).

160. 205 F. Supp. 2d at 232.

161. *See, e.g., id.*

162. *See, e.g., id.*

One other doctrine could be used to challenge the fairness of small claims arbitration. If small claims disputants can show that they cannot vindicate their statutory rights in simplified arbitration because the forums do not provide an economically feasible opportunity for a live hearing, they could convince a court not to enforce the arbitration agreement.¹⁶³ For claims less than the minimum filing fee, it does not seem viable or sensible for a claimant to go forward. However, some arbitration forums cap fees a consumer must pay in small claims arbitration at only a few hundred dollars (e.g., in AAA, no more than \$125 for claims under \$10,000).¹⁶⁴ Some companies, like AT&T, provide in their pre-dispute arbitration clauses that they will pay a consumer's fee if he or she decides to go forward with small claims arbitration.¹⁶⁵ Also, many ADR forums will waive their filing fees upon a showing of financial hardship.¹⁶⁶ Thus, it may be difficult for consumer claimants to argue that they could not vindicate their statutory rights due to the costs of the forum.¹⁶⁷

V. IS SMALL CLAIMS ARBITRATION FAIR?

Given that the few courts that have addressed the fairness of simplified arbitration conducted a cursory analysis, and required only minimal indicia of due process,¹⁶⁸ it is worth revisiting whether the current model of small claims arbitration—a document-based process—is fair. Fairness can be measured, among other ways, substantively (distributive justice) and procedurally (procedural justice).¹⁶⁹ A process is substantively fair if equally situated disputants receive equal outcomes.¹⁷⁰ However, measuring outcomes of arbitration is virtually impossible because awards are often not

163. See *supra* note 54 and accompanying text.

164. See *supra* note 106-112 and accompanying text.

165. *Wireless Customer Agreement*, AT&T, § 2.2(c), <http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp> (last visited Aug. 24, 2012).

166. FINRA Customer Code, *supra* note 7, Rule 12900(a)(1).

167. Several courts have rejected challenges to arbitration clauses on precisely this basis. See, e.g., *Siebert v. Amateur Athletic Union of the U.S., Inc.*, 422 F. Supp. 2d 1033, 1043 (D. Minn. 2006) (plaintiffs' failure to seek fee waiver or consider desk arbitration negates their claim that arbitration costs render the arbitration clause substantively unconscionable); *In re Universal Serv. Fund Tel. Billing Litig.*, 300 F. Supp. 2d 1107, 1138 (D. Kan. 2003); *Ragan v. AT&T Corp.*, 824 N.E.2d 1183, 1196-97 (Ill. App. Ct. 2005).

168. See, e.g., *supra* note 158-162 and accompanying text.

169. See Sternlight, *Creeping Mandatory Arbitration*, *supra* note 23, at 1666 (defining substantive, or distributive, justice).

170. *Id.* (stating that “[i]f a single party or group were to win all disputes, if equally situated persons received disparate results, or if the ‘justice’ system led to increasingly unequal division of resources, few if any of us would feel that justice had been served.”).

published, and even if they are, they do not include analysis of fact and law to enable the necessary comparisons.¹⁷¹

The only empirical study of which I am aware that attempts to measure the substantive fairness of small claims arbitration was published by the *Securities Arbitration Commentator* in 2009.¹⁷² In that survey, the author reported the “win rates”¹⁷³ of small claims arbitration in FINRA Dispute Resolution from 2002-2008 and compared them to the “win rates” of “Customer/Member Awards,” where “claim amounts are greater than \$25,000.”¹⁷⁴ The survey reports that the small claims award win rate for the six year time span of the study was 37%.¹⁷⁵ This compares quite unfavorably with the 47% win rate for Customer/Member Awards during the same time period.¹⁷⁶ The survey shows that the relative win rates between the two categories ebbed and flowed for individual years during the time period, with the gap between the two the narrowest (only 2%) in the last year of the survey, 2008.¹⁷⁷

The survey also demonstrates that claimants do opt out of the default paper hearing and request an oral hearing periodically.¹⁷⁸ While the percentage varies, a live hearing was held in cases initially qualifying for Simplified Arbitration (i.e., damages of \$25,000 or less), on average, 15% of the time from 2002-2008.¹⁷⁹ The survey also breaks down the win rates for small claims awards between claimants who represent themselves and claimants represented by counsel.¹⁸⁰ For the six year time frame, claimants were *pro se* in 45% of small claims cases that proceeded to an award, and they prevailed in 37% of the awards.¹⁸¹ Notably, during the same time frame, claimants represented by counsel also prevailed in 37% of the awards,¹⁸² suggesting that having counsel had no impact on the customer’s likelihood of winning any monetary amount.

171. *Id.* at 1666 n.166.

172. *See generally* 2008 Award Survey: Perspective & Resurgence, SEC. ARB. COMMENTATOR, Oct. 2009, at 1.

173. The author defined a “win” as “[a]ny monetary award in favor of the Claimant.” *Id.* at 4 chart 1.

174. *Id.* at 3. Up until 2012, the monetary threshold for FINRA Simplified Arbitration claims was \$25,000. *See supra* note 123 and accompanying text.

175. 2008 Award Survey, *supra* note 172, at 4 chart 1.

176. *Id.*

177. *Id.*

178. *See id.* at 5 chart 2.

179. *Id.* During the time period, for individual years the rate varied from a low of 9% (2005) to a peak of 29% (2007). *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

The publisher updated its survey statistics in its 2009 and 2010 year-end volumes of *Securities Awards Monthly*.¹⁸³ The data shows that, in 2009, claimants prevailed in 40% of small claims securities arbitrations, whereas customers prevailed in 50% of regular Customer/Member awards.¹⁸⁴ In 2010, the gap was even larger: 28% for small claims as opposed to 53% for Customer/Member awards.¹⁸⁵

While the SAC Award Survey and its updates provide useful data, it is difficult to draw any conclusions from the data. The sample size is fairly small (only a few hundred small claims awards in any individual year), and “win rate” counts any recovery as a “win,” even if the customer, for example, asked for \$24,000 in damages but was awarded \$24.00.¹⁸⁶ In addition, the “win rates” varied greatly during the time period, with few other variables changing.¹⁸⁷ For example, in some years claimants who had an oral hearing recovered a higher percentage of the time than claimants who proceeded on the papers.¹⁸⁸ In other years, the opposite was true.¹⁸⁹ Moreover, most FINRA arbitration awards do not include an explanation as to the outcome, or any basis for the arbitrator’s award,¹⁹⁰ so it is difficult to determine the reasons for the “win.” Finally, because any measure of “win rates” in arbitration cannot account for differences in the type of claim, level of proof, and quality of evidence, as well as variations in the law across jurisdictions,¹⁹¹ the resulting comparisons have limited utility when assessing the substantive fairness of the process.

As a result of the difficulties in measuring the substantive fairness of arbitration outcomes, dispute resolution scholars study procedural justice as a more accessible predictor of parties’ assessment of the overall fairness of a process.¹⁹² Procedural justice scholars point to four key elements that

183. See Harry A. Jacobwitz, *2010: Year in Review*, SEC. AWARDS MONTHLY, May, 2011, at 9, 13 [hereinafter *2010 Awards Survey*]; *Contested Monetary Awards Chart – 2009*, SEC. AWARDS MONTHLY, 2009, at 16 [hereinafter *2009 Awards Survey*].

184. *2009 Awards Survey*, *supra* note 183, at 16.

185. *2010 Awards Survey*, *supra* note 183, at 13.

186. See *id.*; see also *2008 Award Survey*, *supra* note 172, at 4 chart 1 (“Any monetary award in favor of the Claimant is counted as a ‘win.’”).

187. See *2008 Award Survey*, *supra* note 172, at 5 chart 2.

188. *Id.*

189. *Id.*

190. See JILL I. GROSS & BARBARA BLACK, PERCEPTIONS OF FAIRNESS OF SECURITIES ARBITRATION: AN EMPIRICAL STUDY, REPORT TO THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 6 (2008).

191. See *2008 Award Survey*, *supra* note 172, at 4 chart 1.

192. See generally Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (theorizing importance of procedural justice for legitimacy of dispute resolution processes);

“reliably lead people to conclude that a dispute resolution process is procedurally fair”: (1) the process provides an opportunity for disputants to voice their concerns to a third party; (2) the disputants perceive that the third party actually considered these concerns; (3) the disputants perceive that the third party treated them in an “even-handed” way; and (4) the disputants feel that they were treated in a dignified and respectful manner.¹⁹³ These scholars have concluded that procedural fairness perceptions strongly impact substantive fairness perceptions, which, when favorable, can instill greater trust in and respect for the decision-maker and result in a greater willingness for disputants to comply with the outcome.¹⁹⁴

At least one empirical study has shown significantly decreased perceptions of fairness in small claims arbitration when compared to arbitration with an oral hearing.¹⁹⁵ In 2006-08, Professor Barbara Black¹⁹⁶ and I conducted a mailed survey of participants’ perceptions of fairness in recent securities arbitrations.¹⁹⁷ Our survey results demonstrated that: “(1) investors have a far more negative perception of securities arbitration than all other participants, (2) investors have a strong negative perception of the bias of arbitrators in the securities arbitration forum, and (3) investors lack knowledge of the securities arbitration process.”¹⁹⁸ While we contended

Jean R. Sternlight, *ADR Is Here: Preliminary Reflections Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 297 (2003).

193. See, e.g., Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52 (2004) (citing Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 820-26, 841-44 (2001)); see also Deborah R. Hensler, *Judging Arbitration: The Findings of Procedural Justice Research*, in AAA HANDBOOK ON COMMERCIAL ARBITRATION 41, 48-49 (Thomas E. Carbonneau et al. eds., 2006) (“[A]ny assessments of the procedural fairness of arbitration by arbitration litigants will depend on several variables: whether they are allowed to participate in, or at least observe, the process firsthand; and whether they believe the arbitrator is unbiased, gave fair consideration to their evidence, treated all parties equally, and treated them in a dignified fashion.”).

194. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 137-38 (2011) (“Simply put, the empirical evidence suggests that individuals value fairness of process, separate and apart from outcome, because of the special message that fairness of process sends to its recipients: an authority who acts in a fair manner is an authority who is legitimate and cares about the dignity and social standing of those who stand before it.”); Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors’ Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 356 (2008); Franck, *supra* note 23, at 214-15.

195. Gross & Black, *When Perception Changes Reality*, *supra* note 194, at 354.

196. Charles Hartsock Professor of Law and Director, Corporate Law Center, University of Cincinnati College of Law.

197. Gross & Black, *When Perception Changes Reality*, *supra* note 194, at 354, 357-82 (detailing the survey’s development and design, methodologies, error structure and results).

198. *Id.* at 354.

that, at least in part, factors other than the substantive fairness of the forum are responsible for investors' negative perceptions of FINRA arbitration,¹⁹⁹ we also acknowledged that the survey's results clearly called for some type of reform.²⁰⁰

That survey and the resulting report did not, however, focus on simplified arbitration.²⁰¹ For purposes of this article, using the raw data from that study, I isolated responses from survey participants who reported that their most recent securities arbitration was a paper case as opposed to a live hearing to compare perceptions of fairness by participants in simplified arbitration to those of participants in arbitration with an oral hearing.²⁰² My analysis showed significant jumps in negative perceptions of fairness for survey participants whose most recent experience in securities arbitration was a simplified arbitration. For example, 38.1% of all survey participants either agreed or strongly agreed with the statement "the arbitration panel was impartial," and 35.1% of all survey participants either disagreed or strongly disagreed with that statement.²⁰³ After isolating the responses from survey participants whose most recent case was scheduled to proceed to a hearing or a paper case, the data tells an even more negative story.²⁰⁴ For survey participants whose case was scheduled to proceed to a hearing, 40.46% agreed with the statement that the panel was impartial. By contrast, only 25.97% of survey participants whose most recent securities arbitration was a paper case agreed with that statement.

199. *Id.* at 396-99.

200. *Id.* at 400. In direct response to the survey results, FINRA enacted several reforms of its arbitration procedures, including requiring arbitrators to write an "explained decision" if all parties request it. Order Approving Proposed Rule Change Relating to Requirement That Arbitrators Provide an Explained Decision, 74 Fed. Reg. 6928, 6928-29 (Feb. 11, 2009) (citing survey results as one catalyst for the revised rule change proposal). FINRA also changed the composition of a three-arbitrator panel in customer cases to provide an all-public panel. See Order Approving Proposed Rule Change Relating to Amendments to the Panel Composition Rule, 76 Fed. Reg. 6500, 6500 (Feb. 4, 2011) (acknowledging FINRA sought rule change "to address the perception that FINRA's mandatory inclusion of a nonpublic arbitrator (often referred to as the "industry" arbitrator) in the Majority Public Panel is not fair to customers.").

201. Gross & Black, *When Perception Changes Reality*, *supra* note 194, at 367; see also GROSS & BLACK, PERCEPTIONS OF FAIRNESS OF SECURITIES ARBITRATION, *supra* note 190, at 22.

202. That raw data is not published anywhere but is available in the final Codebook, and the statistician consultants also ran a statistical analysis of the Codebook data involving small claims disputes. Both of these documents are on file with the author.

203. GROSS & BLACK, PERCEPTIONS OF FAIRNESS OF SECURITIES ARBITRATION, *supra* note 190, at 30 (responses to Question 19). Another 12.6% of survey participants answered "do not know." *Id.* at 30 (responses to Question 19).

204. Since many survey participants reported that their most recent case was resolved before the hearing phase, the sample size of respondents to this question whose most recent arbitration was either resolved on the papers or scheduled for a hearing is much smaller.

Similarly, while 35% of total survey participants agreed with the statement “I am satisfied with the outcome” (and 55% disagreed),²⁰⁵ only 27% of survey participants whose cases were paper cases agreed with that statement (and 67% disagreed). Finally, 39% of survey participants agreed and 48% disagreed with the statement: “As a whole, I feel that the arbitration process was fair.”²⁰⁶ However, of respondents whose most recent arbitration was a small claims case, only 31% agreed with that statement whereas 61% disagreed. While 34% of all survey participants agreed with the general statement that “the securities arbitration process is conducted by the arbitrators in a way that is fair to all parties involved,”²⁰⁷ only 29.5% of respondents who had a recent paper case agreed with the statement.

This survey data demonstrates that participants in small claims arbitration have increased negative perceptions of the fairness of the process. Again, this data has limited value, because the sample size is much smaller than the sample size of the study as a whole.²⁰⁸ In addition, for some questions, survey participants were answering about their overall experiences as opposed to their recollection of their most recent experience.²⁰⁹ Survey research experts agree that responses based on the most recent experience are more reliable than overall impressions because they minimize recall bias (people’s ability to accurately recall details of past events declines over time).²¹⁰ Thus, the responses that purport to be about a simplified arbitration case could actually be about a combination of experiences in arbitration. However, it is hard to ignore the overall conclusion that participants in simplified arbitration at FINRA have more negative perceptions about the fairness of the process than participants in non-simplified arbitrations.

VI. ALTERNATIVES TO SMALL CLAIMS ARBITRATION

In light of lower “win rates” and more negative perceptions of fairness of small claims arbitration, why have all of the major arbitration service providers chosen to implement paper hearings for resolving small dollar value disputes, rather than a more traditional arbitration model or some

205. GROSS & BLACK, PERCEPTIONS OF FAIRNESS OF SECURITIES ARBITRATION, *supra* note 190, at 38 (responses to Question 27).

206. *Id.* at 45 (responses to Question 34).

207. *Id.* at 50 (responses to Question 38b).

208. *Id.* at 23.

209. *Id.* at 15.

210. *Id.* at 11.

other alternative? Court systems did not rely on paper hearings as the default method to resolve small claims lawsuits.²¹¹ Indeed, the history of the small claims court movement suggests that the impetus to develop the small claims court was crowded dockets and a need for individuals to be heard and air grievances in a quick, cost-effective, and fair process without the expense of lawyers.²¹²

One explanation may be the lack of alternatives. If the arbitration forums' current process for resolving small claims is not effective, then what process is a better alternative? The possibilities include on-line dispute resolution ("ODR"), telephonic arbitration, and a small claims arbitrator.

A. *On-Line Dispute Resolution*

Some ADR scholars have touted ODR as an effective mechanism to resolve small claims disputes, in particular low dollar-value consumer complaints.²¹³ ODR encompasses a variety of ADR mechanisms that have been adapted to the internet; the most widely used ODR processes are automated negotiation, mediation or conciliation, arbitration,²¹⁴ and chargebacks for fraudulent credit card transactions.²¹⁵

ODR providers have developed mechanisms for resolution that are a hybrid of ADR processes, a reflection of the flexibility and responsiveness of ODR.²¹⁶ Supporters of these mechanisms point to ODR's convenience,

211. See, e.g., *The Small Claims Court: A Guide to its Practical Use*, CAL. DEP'T OF CONSUMER AFFAIRS, *passim*, http://www.dca.ca.gov/publications/small_claims/small_claims.pdf (last visited Sept. 19, 2012).

212. See *supra* notes 63-65 and accompanying text.

213. E.g., Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, U. ILL. J.L. TECH. & POL'Y 1, 43 (2009); Orna Rabinovich-Einy, *Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1, 30 (2003/2004) (noting that "[c]onflicts that would have been weeded out of traditional mechanisms [such as low dollar-value consumer complaints] via a cost-benefit analysis may make sound financial sense if handled through ODR."). ODR may be particularly effective in resolving international consumer disputes because no mechanisms currently exist. See Ivonnely Colón-Fung, *Protecting The New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-To-Consumer Online Transactions*, 12 FORDHAM J. CORP. & FIN. L. 233, 245 (2007).

214. Concerns regarding the enforceability of on-line arbitration agreements are diminished because the FAA's strong pro-arbitration policy combined with the Electronic Signature Act ("ESign") make electronic contracts as enforceable as paper contracts. Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178, 184 (2010).

215. See Pablo Cortes, *The Potential of Online Dispute Resolution as a Consumer Redress Mechanism* pt. 4(iv) (July 6, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998865.

216. See *id.* at pt. 1.

low cost, speed, efficiency, predictability and security.²¹⁷ The “disputants’ ability to consult legal on- and off-line resources on their own . . . reduce[s] costs dramatically.”²¹⁸ The process takes less time, because steps such as traveling to a forum and the need to set up appointments are eliminated.²¹⁹ On-line arbitration also simplifies the third party neutrals’ “case management abilities,”²²⁰ such as the ability to use “computer facilitated charts, figures, graphs, scales, tables, and diagrams” in proceedings, which enhances otherwise static images.²²¹ In addition to more interactive data, moving these proceedings on-line allows the third party neutral to use computer technology to perform functions such as word or phrase searches and linking documents through hypertext technology.²²²

Detractors criticize ODR because it loses the emotional aspect of dispute resolution, it diminishes the value of lawyers, it is difficult to enforce mediated settlements, the process still has a lack of standards, guidelines, and regulations, parties may offer substandard presentations, it does not accommodate cultural diversity, and there is difficulty measuring success rates.²²³ In addition, some ODR processes take the form of adjudication by a third party neutral whose decisions are based on on-line written submissions without affording disputants the opportunity for an in-person hearing.²²⁴ As a result, current ODR mechanisms, while viable alternatives in certain cases, do not offer increased fairness when there are disputed issues of fact and witnesses’ credibility is important.²²⁵

217. Galves, *supra* note 213, at 42; Rabinovich-Einy, *supra* note 213, at 29.

218. Rabinovich-Einy, *supra* note 213, at 29.

219. *Id.*

220. Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 343 (2008).

221. *Id.*

222. *Id.* at 344. On-line arbitration has found success in resolving domain name disputes. Pursuant to the Uniform Domain Name Dispute Resolution Policy (“UDRP”), designed to protect trademarked businesses from cyber-squatting, users agree to settle any future disputes through on-line arbitration. Aashit Shah, *Using ADR To Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25, ¶ 8 (2004). Complaints that a domain name infringes on a trademark are heard before an on-line dispute resolution provider, such as the World Intellectual Property Organization (“WIPO”). WIPO assigns an arbitrator to resolve the dispute. While the process is typically resolved within two months and considered to be very “successful,” unlike off-line arbitration, it is not binding and either party can bring the case in court within ten days of the decision. *Id.*

223. Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 857-58 (2001).

224. See Cortes, *supra* note 215, pt. 4(vi).

225. See Haloush & Malkawi, *supra* note 220, at 343; see also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (“[W]here credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision.”).

Scholars insist that rapid technological development and internet capabilities allow for ODR to provide a forum for efficient resolution of disputes without sacrificing due process or legitimacy of results.²²⁶ A number of newer ODR processes provide disputants the opportunity to interact with opposing parties and the third party neutral in addition to written submissions.²²⁷ ODR providers utilize telephone and videoconferencing to allow for questioning of witnesses and presentation of oral arguments.²²⁸ In addition to evaluation of written submissions, ODR provider DotComJustice provides for examination and cross-examination of witnesses as well as oral arguments by telephone or videoconferencing upon the request of the parties and at the discretion of the third party neutral.²²⁹ The AAA now provides on-line mediation for claims under \$10,000 between two parties via on-line chat rooms and instant messaging.²³⁰ A mediator facilitates joint discussions between the parties and private discussions with each individual party in an on-line chat room.²³¹

Concilianet, an on-line dispute resolution system run by the Mexican Consumer Protection Federal Agency (“Profeco”), provides for a settlement hearing for consumers who have purchased goods or services from participating suppliers.²³² The consumer submits a complaint through the on-line system based on any allegation of non-compliance with terms agreed to in the sale or supply of the product or service.²³³ Once Profeco has determined that it is competent to hear the complaint, it will schedule the date and time for a settlement hearing.²³⁴ The settlement hearing takes place in Concilianet’s virtual courtroom, and the consumer, supplier, and a third party are present.²³⁵ Notably, consumers cannot seek monetary damages through Concilianet; the system provides only remedies of strict

226. See Galves, *supra* note 213, at 8.

227. *Id.* at 44.

228. *Id.*

229. *Id.* at 55-62.

230. AAA *Online Mediation for Claims under \$10,000*, AAA, http://services.adr.org/room/faces/welcome_and_steps.jsp (last visited Sept. 19, 2012).

231. *Id.*

232. Concilianet, *¿Que Es Concilianet?*, PROFECO, http://concilianet.profeco.gob.mx/concilianet/faces/que_es.jsp (What is Concilianet?) (last visited Sept. 19, 2012).

233. Concilianet, *Preguntas Frecuentes*, PROFECO, http://concilianet.profeco.gob.mx/concilianet/faces/preguntas_frecuentes.jsp (FAQ) (last visited Sept. 19, 2012).

234. *Id.*

235. *Id.*

compliance with the contractual agreement between supplier and consumer.²³⁶

The United Nations Commission on International Trade Law (“UNCITRAL”) Working Group III on Online Dispute Resolution has been tasked with preparing a framework for a global system of ODR for cross-border electronic commerce transactions.²³⁷ Early on in its existence, the group recognized the limitations of arbitration for the settlement of consumer internet disputes, and purposed to find creative solutions for the development of on-line dispute resolution mechanisms.²³⁸ While the group’s attention is focused on resolution of disputes resulting from cross-border on-line transactions, its proposals nevertheless are relevant to resolution of small claims arising from transactions not necessarily involving the internet.²³⁹ The draft proposal rules for ODR which the working group has developed for low-value, high-volume transactions provide for written submissions by both parties, followed by a negotiation phase between the parties.²⁴⁰ If the parties are unable to come to agreement by themselves, a facilitated settlement phase follows in which a third party is appointed to facilitate communication between the parties in an attempt to reach agreement.²⁴¹ If this phase is also inconclusive, a third phase follows of final and binding arbitration by the third party.²⁴² Only when the first two phases—direct interaction and communication between the parties, and then interaction of the parties with the third party—have been unsuccessful does the dispute proceed to adjudication by arbitration.²⁴³ The working group is considering the use of emerging technology to utilize videoconferencing hearings in the on-line process.²⁴⁴

236. *Id.*

237. U.N. Comm’n on Int’l Trade Law, Working Grp. III (Online Dispute Resolution), Annotated Provisional Agenda on its 25th Sess., May 21-25, 2012, ¶¶ 5, 7, 9-10, 15, U.N. Doc. A/CN.9/WG.III/WP.111 (Mar. 2, 2012), available at <http://daccess-ods.un.org/TMP/2769836.48538589.html>.

238. *Id.* at ¶¶ 5, 7, 9-10.

239. *See id.*

240. U.N. Comm’n on Int’l Trade Law, Working Grp. III (Online Dispute Resolution), Online Dispute Resolution for Cross-Border Electronic Commerce Transactions; Draft Procedural Rules, Nov. 14-18, 2011, ¶¶ 6, 35, 51-52, U.N. Doc. A/CN.9/WG.III/WP.109 (Sept. 27, 2011), available at <http://daccess-ods.un.org/TMP/1556499.30238724.html>.

241. *Id.*

242. *Id.* ¶ 6. The working group continued its work on the preparation of legal standards on ODR for cross-border electronic transactions at its most recent meeting in New York on May 21-25 2012; the outcome documents have yet to be published. *See* Annotated Provisional Agenda, *supra* note 237.

243. *See* Draft Procedural Rules, *supra* note 240, ¶¶ 6, 55, 69-71.

244. *Id.* ¶ 68.

ODR may be well suited to provide for comprehensive and just resolution of small claims disputes. Technology such as videoconferencing and on-line chat rooms utilized by DotComJustice and the AAA provide low-cost and efficient means of communication among disputants and third parties.²⁴⁵ Concilianet's provision for settlement hearings via a virtual courtroom allows for real-time communication in order to facilitate resolution.²⁴⁶ The draft laws of the UNCITRAL Working Group highlight the increasing priority among international lawmakers on providing parties to consumer disputes the opportunity to communicate via ODR mechanisms in order to foster a more comprehensive and just process.²⁴⁷ The mechanisms and processes of ODR are flexible and ever-advancing and, provided they offer interpersonal communication with an arbitrator, offer a feasible alternative for the arbitration of small claims disputes.²⁴⁸

B. Telephonic Hearings

To address concerns about an arbitrator's ability to resolve fact-based disputes based solely on paper submissions and supporting documents, yet limit the costs and burdens of an in-person hearing, forums not yet utilizing it should consider offering a telephonic hearing option for small claims arbitrations.²⁴⁹ Disputants of lower dollar claims are afforded the option for telephonic hearings in AAA arbitration.²⁵⁰ In the securities context, "[c]ustomer disputes with their brokers, such as suitability, breach of fiduciary duty, and fraud claims, typically involve hotly-contested issues of fact and credibility determinations, which arbitrators are hard-pressed to resolve based solely on written submissions."²⁵¹ FINRA could offer similar procedural flexibility for disputants as is provided by AAA. In those disputes in which a customer-claimant may not prefer an in-person hearing, granting customers the option to elect a telephonic hearing would be a

245. See, e.g., Galves, *supra* note 213, at 43-44, 60.

246. Concilianet, *Preguntas Frecuentes*, *supra* note 233.

247. See Draft Procedural Rules, *supra* note 240 and accompanying text.

248. See Welsh, *Making Deals in Court-Connected Mediation*, *supra* note 193, at 822-23.

249. See Hang, *supra* note 223, at 857-60 (discussing telephonic and video-chat supplements to online dispute resolution).

250. See *Commercial Arbitration Rules and Mediation Procedures*, AAA, Rule E-6 (June 1, 2010), <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow "Commercial Arbitration Rules and Mediation Procedures" hyperlink); see also *Guidelines for Written Arbitration*, AAA, <http://www.adr.org/aaa/faces/aoe/gc/consumer?> (follow "Guidelines for Written Arbitration" hyperlink) (last visited Sept. 19, 2012).

251. Jill Gross, et al., *Comment Letter Concerning the Proposed Rule Change Relating to Raising the Limit for Simplified Arbitration*, SEC.GOV (Mar. 20, 2012), <http://www.sec.gov/comments/sr-finra-2012-012/finra2012012-5.pdf>.

welcomed improvement.²⁵² Because an arbitrator could listen to a witness tell a story and testify orally, telephonic hearings would presumably enhance fairness perceptions regarding the arbitration process for claimants and respondents alike.²⁵³

C. *Small Claims Arbitrator*

An additional option that the forums should consider is designing a small claims arbitration process that permits a low cost live hearing before a small claims arbitrator whose sole function is to arbitrate several small claims cases each day.²⁵⁴ Like a small claims court process, the parties would have the opportunity to present their case to an in-person arbitrator to air their grievances and tell their stories. They would not be represented by counsel, as the small claims arbitrator would be able to elicit the stories from the parties.²⁵⁵

A small claims arbitrator would adhere to the time-honored tradition of oral hearings in our legal system, which allows for interpersonal communication amongst the neutral and the disputants.²⁵⁶ This solution addresses the concerns about procedural justice, as each party would have an opportunity to tell his or her story to an actual human being, who can listen to the story, evaluate the evidence, decide issues of veracity and credibility, and resolve factual disputes based on live testimony.²⁵⁷

More than forty years ago, the Supreme Court, in its seminal decision, *Goldberg v. Kelly*,²⁵⁸ considered whether written submissions satisfy

252. See Galves, *supra* note 213, at 44-47.

253. See *id.* A related option could include videoconferencing hearings using available technology such as Skype.

254. Popular small claims court television shows such as “Judge Judy” or “The People’s Court” are actually small claims arbitrations, as the participants jointly agree to opt out of taking their case to small claims court and have it heard before a private neutral pursuant to procedures to which the parties consent. See *Arbitration TV Shows*, NET-ARB, http://www.net-arb.com/court_TV_shows.php/ (last visited Sept. 19, 2012).

255. Zucker & Herr, *supra* note 76, at 350 (“[S]mall claims court gives litigants the opportunity to simplify their legal disputes into one pre-printed form, exclude lawyers from the process, and discuss their problem with a neutral fact finder, all without the burdensome process of full-blown civil litigation.”).

256. Lewis v. Sup. Ct., 970 P.2d 872, 896 (Cal. 1999) (Kenndard, J., dissenting) (“When advocates appear in a courtroom to explain their positions to the judge or judges who decide their case, the judicial process loses its arid, abstruse, and remote character. A lively interchange between counsel and the bench, not possible by the submission of written briefs, may lead a judge to rethink his or her position and even alter the outcome of the proceeding.”).

257. See Welsh, *Remembering the Role of Justice in Resolution*, *supra* note 193, at 52.

258. 397 U.S. 254, 270-71 (1970) (procedural due process required before terminating welfare benefits).

requirements of procedural due process in a welfare benefits hearing.²⁵⁹ While the Court was applying constitutional requirements of procedural due process not applicable to arbitration,²⁶⁰ it also addressed the broader issue of what it means for a litigant to be heard.²⁶¹ The Court wrote:

[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. . . . Therefore a recipient must be allowed to state his position orally.²⁶²

The same considerations apply to the context of small claims arbitration, where the claimant frequently is a consumer, customer, or individual investor, who lacks the ability to present his or her case the way a trained lawyer could, with factual and legal analysis, arguments, and supporting evidence. In customer or consumer cases, where the consumer services company or brokerage firm has superior bargaining power and resources, depriving claimants of an oral hearing is stripping them of their only means to air their grievance: by telling their story and having an opportunity to be heard. In light of the effective loss of the class arbitration after *AT&T Mobility*, dispute systems designers should give serious consideration to offering an oral hearing alternative—whether telephonic, in-person, or via videoconference—to small claims disputants.

VII. CONCLUSION

A seasoned securities lawyer recently told me that *AT&T Mobility* is to consumers what the *McMahon* decision was to the securities industry in

259. *Id.* at 255.

260. It is well-settled that there is no state action in private arbitration proceedings. See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 109 (1992); Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. Rev. 1, 4 (2005); Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 Pace L. Rev. 73, 75 n. 10 (2005) (gathering cases); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 Ohio St. J. on Disp. Resol. 369, 393 (2004).

261. *Goldberg v. Kelly*, 397 U.S. at 268-69.

262. *Id.*

1987.²⁶³ By requiring investors to arbitrate their securities law disputes with their brokers, *McMahon* led to a sea change in the resolution of securities disputes.²⁶⁴ Because individual investors arbitrated most of their disputes with their brokerage firms, courts stopped deciding customer-broker disputes.²⁶⁵ Due to increased use of the process, the SEC had to step up its surveillance of the fairness of the securities arbitration process, and the forums, primarily FINRA, had to constantly evolve their rules and procedures to ensure a level playing field for investors.²⁶⁶

Yet no substantive changes have been made to the simplified arbitration process since *McMahon*. Investors still have no economically feasible way of being heard in person for their claims of \$50,000 or less.

In the realm of consumer disputes, commercial and consumer arbitration service providers similarly rely on desk arbitration to resolve small claims cases. The *AT&T Mobility* decision will lead to many more small claims commercial and consumer disputes being filed in small claims arbitration. Like in the securities industry however, document-based arbitration simply does not provide the requisite level of procedural justice to the party with the weaker bargaining power.

No forum is the panacea for resolving small claims disputes. However, according to the literature, small claims court is effective.²⁶⁷ This may be because it is inherently easier for decision-makers to resolve disputes fairly when they hear live testimony, thus offering substantive justice.²⁶⁸ It also may be because it provides disputants an opportunity to be heard in person, even if briefly, and thus offers procedural justice.²⁶⁹ I submit it is likely both. Dispute systems designers should look to the features of small claims court that provide enhanced fairness, and design an economically viable small claims arbitration process that offers both substantive and procedural

263. I credit the comment to Harry Walters, Esq.

264. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *see also* Gross, *McMahon Turns Twenty*, *supra* note 145, at 493-94.

265. *See* Gross, *McMahon Turns Twenty*, *supra* note 145, at 494.

266. *See id.* at 512-16 (detailing the SEC's robust oversight of the FINRA forum, including its arbitration rules).

267. *See* Zucker & Herr, *supra* note 76, at 348.

268. *See* Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837 (2011) ("[A] judge can best decide credibility by seeing the witness . . . it simply is not possible for the Court to make the credibility determinations the parties argue are necessary by reviewing only the paper record.") (internal quotation marks omitted).

269. *Id.* at 830 ("Live procedures also have 'softer' values that the legal system cannot afford to ignore: They are part of a process that signals to litigants that the legal system respects their dignity as persons even when it rejects their arguments. Such signals are an important way that the legal system projects an aura of legitimacy and thereby obtains public compliance with the law.").

justice by allowing disputants to air their grievances out loud to a third-party neutral. In other words, give them a voice.