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ONLINE DISPUTE RESOLUTION PART II

Note from the General Editor — *Nassib G. Ziadé* — 1

ARTICLES

The Evolution and Impact of Online Dispute Resolution: Drivers, Advantages, Challenges, and Future Prospects — *Guy Pendell & Iain Quirk KC* — 5

Navigating the Frontier: Assessing the Benefits and Limitations of AI Integration in International Arbitration — *Priyanka Shetty & Aditya Singh Chauhan* — 23

Navigating the Intersection of AI and ADR: Opportunities, Challenges, and Legal Implications — *Ryan Abbott* — 59

Expanding Access to Justice through ODR, and the "Digital Divide": Is ODR the Cause of, or the Solution to the Inequality of Arms? — *Samaa Haridi & Kateryna Frolova* — 65

The Metaverse and Arbitration: A Peek into a Possible Future — *Ana Lombardía Villalba & Rafael Carlos del Rosal Carmona* — 73

An Introduction to Blockchain-based Dispute Resolution: The Emergence of New Procedural Designs — *Sara Hourani* — 89

Online Filings in BCDR Arbitrations — *Fatema Al Zayed Al Jalahma* — 111

Navigating Conflict in the Digital Age: Virtual ADR — *Kim Taylor & Clifford Bloomfield* — 121

AI-enhanced Arbitration: An Analysis of the Guidelines of the Silicon Valley Arbitration and Mediation Centre (SVAMC) — *Soham Panchamiya, Pankhuri Malhotra & Subha Chugh* — 133

Digital Readiness and Online Mediation: Dedicated Online Dispute Resolution and General Social Communication Platforms Compared — *Clarissa Chern & Nadja Alexander* — 147

Crowdsourcing Arbitration: Using Technology to Leverage Collective Intelligence — *Chen Chen, Colin Rule & Sharon Mathew* — 167

Navigating Conflict in the Digital Age: Virtual ADR

Kim Taylor* & Clifford Bloomfield**

This article outlines the benefits and essential components of virtual ADR offered by third-party arbitration providers such as JAMS, with an emphasis on security and privacy. We conclude by addressing the extent to which virtual arbitration creates due process concerns or concerns about violating a potential non-contractual right to an in-person hearing.

1 INTRODUCTION

The term "ADR" is used here broadly to refer to both (a) nonbinding settlement processes, such as direct negotiation, mediation, neutral evaluation, facilitation and forms of nonbinding trial and judicial arbitration, and (b) adjudicative processes, including traditional, bracketed and final offer arbitration; various non-judicial hearing regimes;[1] and private judging. The use of various forms of technology – email, computers, telephones, videoconferencing, document review platforms, etc. – in commercial ADR is, of course, not new.[2]

What is new is that there is far more use and far less hesitancy to use these technologies for completely virtual and hybrid sessions. Traditionally, there has been a great deal of skepticism about remote ADR and a strong preference for in-person hearings and mediations. As a result of the necessity of using videoconferencing platforms such as Zoom, Microsoft Teams, GoToMeeting

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1 This includes, for example, hearing programs under Title IX of the U.S. Code. *See, e.g.*, JAMS, "JAMS Solutions for Higher Education," https://www.jamsadr.com/highereducation, last visited June 8, 2024.

2 The use of "commercial" here is meant to identify a dispute arising out of a contractual relationship, whether between two businesses, a consumer and a business, or an employee and employer. Likewise, our discussion of arbitration in this article typically refers to binding, private, contract-based arbitration in commercial transactions.

Taylor, Kim & Bloomfield, Clifford. 'Navigating Conflict in the Digital Age: Virtual ADR'. *BCDR International Arbitration Review* 10, no. 1 (2023): 121–132.

and WebEx during the pandemic, and because these technologies have worked and practitioners became adept at using them, there is now widespread acceptance among parties, counsel and neutrals that virtual ADR is here to stay. While there are still skeptics and those who will always prefer in-person proceedings – no doubt because they find them to be more effective – virtual ADR is now commonly used and is often the best option.

And why not? As one court put it in the throes of the pandemic, "Sure to be one of the enduring lessons of the ongoing COVID-19 pandemic is that we can accomplish far more remotely than we had assumed previously."[3] Concerns about limitations and uses of technology in ADR are, as a general matter, overblown – not a surprising result in the digital age – and the benefits are hard to deny.[4] The ability to convene a hearing by sending a Zoom link to an email list creates clear efficiencies and cost benefits; chief among those are the elimination of travel times and expenses, not to mention the associated scheduling difficulties that arise as a result of traveling. It is also possible to get far more done by virtue of that saved time and the flexibility the technology affords.

Having defined virtual ADR, we now turn briefly to ODR, or online dispute resolution, because it too has played an important role in the development of virtual ADR. ODR has been around for roughly three decades and is now used not just by private companies, but also by court systems and arbitration providers.[5] In contrast to virtual ADR, ODR originally grew out of the sharp increase in people going online in the 1990s. This led to a dramatic growth in online disputes. eBay, a popular example for reasons that will soon become clear, has an ODR platform that "handles over 60 million disputes annually."[6] To put this in perspective, JAMS, the largest private alternative dispute resolution provider in the world, has around 450 neutrals. It would take 450 neutrals several lifetimes to handle 60 million disputes.

These numbers in part say something about the nature of online disputes and the reasons for the development and use of ODR platforms by businesses. As explained in one article, "eBay learned that it could retain loyal customers and

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3 *Petersen Energia Inversora S.A.U. v. Argentine Republic & YPF S.A.*, No. 15 Civ. 2739, 2020 WL 3034824 (S.D.N.Y. June 5, 2020).

4 Concerns about confidentiality and privacy, while valid, can be addressed through adoption of secure technology, the use of hearing protocols and compliance with the strictest possible privacy laws. Section 3 herein discusses such measures.

5 Our discussion is limited to briefly addressing ODR's development for use by businesses and ODR and virtual ADR as provided by arbitration administrators. As noted, our focus in the latter regard is with respect to commercial disputes. For an interesting discussion of the use of ADR in non-commercial and court-related contexts, *see*, generally, Amy J. Schmitz and John Zeleznikow, "Intelligent Legal Tech to Empower Self-Represented Litigants," Columbia Science & Technology Law Review, vol. 23 (2021).

6 Ayelet Sela, "The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions," Lewis & Clark Law Review, vol. 21, no. 3 (2017) p. 635, 638.

even inspire them to make more purchases if customers trust that they will get a remedy if a purchase goes awry."[7] Online disputes can arise between users of online marketplaces and/or users and companies offering online products and services. They are likely to arise among consumers who have not had meaningful personal interactions and, significantly, who are spread across the country or the world. They typically concern relatively small amounts. In addition, the parties will almost always be self-represented. These factors led to the development of online mechanisms – beyond call centers – aimed at leveraging technology to efficiently and cost-effectively resolve disputes of this nature.

ODR systems incorporate online platforms and software that permit the secure sharing of documents and other information, including asynchronous content and/or real time communication. ODR may initially include unassisted user-to-user negotiation. The most well-known early example of a company using an ODR system is eBay. Under eBay's ODR regime,

> eBay encourages users to attempt to work out the problem on their own in the first instance. If unsuccessful, the buyer can file an online claim in the eBay Resolution Center. This will inform the seller that there has been an issue, which will prompt negotiations between the seller and the buyer. If the buyer is satisfied with the seller's solution, the buyer can close the case. If unsatisfied with the seller's response, or the seller has not responded in three days, the buyer has twenty-one days to report it to eBay to continue the process.
>
> At this point, eBay helps resolve the issue, typically within forty-eight hours. If the goods did not arrive or are not as promised, the buyer usually gets her or his money back. A losing buyer has thirty days to appeal that decision. When appealing, a buyer can submit information to support the claim, such as photos of the item, tracking and shipping information, proof that the item was sent to the wrong address, or police reports.[8]

While ODR systems primarily focus on case management and virtual communications, they may also include automated decision-making, AI, predictive analytics and agreement drafting technologies, or a combination thereof. To the extent that AI and predicative analytics can help parties with decision-making analyses, such technology may significantly change the landscape of dispute resolution in positive ways. This is particularly true for unrepresented parties. It is unclear, however, whether current technologies have been designed with the latter goal in mind, and there are ethical issues that arise with such use; certainly, as many have recognized, care must be taken when implementing such systems to eliminate bias and to ensure understanding of how the systems reach their results.[9]

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[7] Amy J. Schmitz, "Arbitration in the Age of Covid: Examining Arbitration's Move Online," Cardozo Journal of Conflict Resolution, vol. 22, no. 2 (2021) p. 245, 264.

[8] *Ibid.*, pp. 264-265.

[9] For a detailed discussion of the possibility of using ODR systems to improve dispute resolution of different types of disputes among unrepresented parties, *see*, generally, Amy J. Schmitz and John Zeleznikow, *op. cit.*, fn 5, p. 142.

2 EXAMPLES OF VIRTUAL ADR COMBINING ASPECTS OF ODR OFFERED BY ADR PROVIDERS

Arbitration providers are now combining aspects of ODR with traditional ADR. Traditional ADR providers will offer virtual and hybrid services for higher-value claims, using the arbitration providers' panel of third-party neutrals, while ODR programs will continue to be used for discreet matters. While the two programs described below are primarily designed to deal with lower-value claims rather than the larger value claims that arise in complex commercial litigation, there is no reason that aspects of ODR that enhance such virtual ADR cannot be used in the latter context as well.

One example of a virtual ADR program that has also been referred to as an ODR platform is Endispute™. Endispute – designed for personal injury disputes – is described by JAMS as "an efficient mediation alternative when the value or complexity of claims do not warrant a traditional, in-person mediation session."[10] Endispute uses CourtCall to provide a browser-based video and/or audio connection that allows for (a) real-time streaming video; (b) virtual caucus rooms for private conversations with the mediator; (c) online chat functionality; (d) document sharing, including the sharing of settlement papers; (e) electronic signature capability; and (f) operator support in case it is needed. Parties benefit from mediators chosen from JAMS' highly experienced panel of neutrals along with JAMS' world-class case management and state-of-the-art technology.

JAMS neutrals also take part in company-specific virtual ADR programs under the JAMS Solutions umbrella. These programs are likely to involve large-volume customer claims arising from past company practices. In one program, JAMS and the company use a third-party claims administration platform as a centralized database. The platform securely stores customer information and documents so that they can be accessed by the company and JAMS neutrals. As an additional layer of security, mediators in the program are issued a laptop by the third-party claims administrator for the purpose of accessing this database.[11] The platform also permits neutrals to enter the results of mediations – both monetary and nonmonetary relief – or, if a settlement is not reached, a mediator's proposal. The platform then generates a letter, either a cover letter for disbursement of the settlement relief or the mediator's proposal.

Each mediation session is limited to two hours and takes place over an audio-only Zoom conference with breakout room capability that is hosted by CourtCall. The use

[10] JAMS, Endispute™ Online Dispute Resolution (ODR), https://www.jamsadr.com/endispute/, last visited June 9, 2024.

[11] Mr. Bloomfield occasionally serves as a mediator in this program.

of audio can allow the customer, company representative and mediator to meet and discuss a resolution to the dispute regardless of geographic location. Audio-only mediations have the added benefit of avoiding video-specific technical issues. In addition, audio-only sessions allow greater flexibility for customers to participate in the sessions with minimal disruption to the customer's work or personal schedule. Indeed, Mr. Bloomfield has successfully mediated disputes through this program where a customer participated from their work vehicle and while other customers tended to their childcare needs.

3 KEY BENEFITS AND FEATURES OF A VIRTUAL ADR PROGRAM[12]

Whether or not it incorporates aspects of ODR, virtual ADR should be efficient, cost-effective and accessible. With regard to the latter, virtual ADR can offer significant cost savings compared to litigation or traditional ADR, making ADR available to anyone with a computer (or even a phone). As already discussed, cost-effectiveness is due in part to reduced travel expenses. There are also savings inherent in reduced physical document production and related costs, such as shipping and reproduction. Depending on the context, the streamlined proceedings themselves will contribute to overall affordability.

Virtual ADR programs must also prioritize security and confidentiality, together with compliance with applicable privacy laws. Such programs will typically need some sort of non-asynchronous virtual conferencing capability, as well as digital documentation and evidence management capabilities that allow the sharing and displaying of evidence and documents.

To ensure the security of its virtual ADR proceedings, JAMS uses Zoom, which is compliant with the Health Insurance Portability and Accountability Act (HIPAA). Although JAMS is not itself subject to HIPAA, the platform incorporates certain key security features, such as requiring all devices that access the platform to connect via strong encryption and blocking recording to the Zoom cloud. Additional security steps include:

- Assigning a unique meeting ID for each session
- Employing a waiting room feature so that only participants invited to the proceeding are granted access to the actual meeting
- Having a JAMS moderator control the entry of the participants into the proceeding and facilitate the use of breakout rooms

[12] Those interested in best practices for an ODR program should consider UNCITRAL's Technical Notes on Online Dispute Resolution (2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

- Locking the meeting to prevent anyone else from joining
- Disabling the recording function
- Controlling the screen sharing function
- Providing ongoing training to neutrals and associates on best practices for virtual proceedings using Zoom and other platforms
- Using the JAMS IT department to monitor security developments regarding virtual platforms and updating JAMS' processes as needed

Further, with respect to privacy, JAMS has been approved through the Data Privacy Framework and complies with the U.K. and EU General Data Protection Regulation (GDPR), California's Consumer Privacy Act, the Texas Privacy Law and all other applicable privacy laws.

In addition, in August 2020, JAMS launched JAMS Access, an online case management portal that can be used across ADR types. Access has multiple security layers, including strong encryption. For arbitrations, JAMS Access operates like an electronic court docket, allowing case participants to securely upload and export case documents while also providing a means for users to send secure emails and messages (through a case message board). The platform also allows users to pay invoices and access case calendars.

The main obstacle to virtual ADR continues to be lack of party, counsel and neutral buy-in. For many, an in-person meeting is always preferable to appearing virtually. In section 4 below, we address concerns about due process in the context of virtual arbitration.

Another issue that can impact the use of virtual ADR is the unavailability of high-speed internet or other required technology. One way of avoiding this issue is to use audio-only sessions where appropriate. Overall, however, fears about technological issues impeding parties from access to virtual proceedings may be overblown. Although taken from a different context, the following example highlights the utility of online access: "Arizona courts found that the participation of defendants in eviction hearings rose from only 10% to 80% after hearings moved to remote platforms, and the statewide default rate dropped by 8%."[13] Finally, the ability to sign documents was an issue for ODR and virtual ADR programs. With the loosening of laws around digital signatures and advances in signature technology, virtual platforms can often be used for signing documents with a verified electronic signature.

[13] Sarah R. Cole, *et al.*, "Mediation: Law, Policy and Practice, January 2024 Update," § 15:16 (noting further that "failure to appear rates in New Jersey criminal cases dropped from 20% to 0.3%, appearance rates for North Dakota criminal courts rose from 80% to nearly 100%, and the failure to appear fell from 10.7% to 0.5%").

4 SPECIAL CONSIDERATIONS FOR VIRTUAL ARBITRATION

The increased use of virtual arbitration raises questions as to whether virtual arbitration compromises due process rights or takes away from the right to an in-person hearing. At the outset of the pandemic, many argued that virtual arbitration impedes the ability of the arbitrator to assess witness credibility and that cross-examination is less effective. Another argument that is often advanced is that a party's case is more effective because of the human element associated with actual presence. This simply has not been the experience of many who have participated in virtual arbitrations over the past four years, but the more important point is that the two opposing views represent a disagreement over preferences, not standards of due process or a violation of rights. As to the former point, in the words of one judge almost 25 years ago,

> Many practitioners are mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are a) equivalent to his presence in court and b) preferable to reading his deposition into evidence. To prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other. *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000).

Others may, of course, be equally "mystified" by the view that testimony over video-conference is equivalent to an in-person hearing. Indeed, at the outset of the pandemic, many argued that virtual arbitration impedes the ability of the arbitrator to assess witness credibility and that cross-examination is less effective. Another argument that is often advanced is that a party's case is more effective because of the human element associated with actual presence. This has not been the experience of many who have participated in virtual arbitrations over the past four years, but the more significant point is that the two opposing views represent a disagreement over preferences, not standards of due process.

In the first few months of the pandemic, Mr. Bloomfield and a colleague conducted a review of all U.S. state and federal cases on Westlaw to determine whether any awards had been vacated under section 10 of Chapter 1 of the FAA or analogous state law by virtue of an arbitrator allowing or requiring testimony by telephone, video, prerecorded deposition or other remote means.[14] No decisions vacating awards on this ground were found; in fact, courts specifically rejected such challenges.[15] A similar but more wide-ranging project was subsequently undertaken by the International Council for Commercial Arbitration, in a report titled "Does a Right to a Physical Hearing Exist in

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[14] *See*, Robert B. Davidson and Cliff Bloomfield, "Remote Hearings and Depositions in Commercial Arbitration" (Bloomberg Law, July 2020).

[15] *Ibid.* (citing *Nuyen v. Hong Thai Ly*, 74 F. Supp. 3d 474, 482 (D.D.C. 2014); *Trademark Remodeling, Inc. v. Rhines*, No. PWG-11-1733 (D. Md. Aug. 6, 2012); *Lunsford v. RBC Dain Rauscher, Inc.*, 590 F. Supp. 2d 1153, 1156–57 (D. Minn. 2008) and *Gedatus v. RBC Dain Rauscher, Inc.*, No. 07–1750 (D. Minn. Jan.23, 2008)).

International Arbitration?" The authors concluded that "a right to a physical hearing should be inferred by way of interpretation of the *lex arbitri*" only in a small minority of jurisdictions, viz., Ecuador, Tunisia, Venezuela (but only for the first procedural hearing), Vietnam, Zimbabwe and Sweden.[16]

In connection with the present article, we have updated the research on U.S. arbitrations decided under Chapter 1 of the FAA to June 2024, and have not identified any case where a court vacated an award on the basis of either a right to an in-person hearing or by virtue of the hearing being remote or hybrid rather than in person, but we have identified a case vacating an award that serves as a cautionary tale for those taking part in virtual arbitrations. As with the pre-pandemic cases, courts specifically rejected challenges to awards based on the virtual nature of the arbitration:

– *Jamison v. Harbor Freight Tools Inc*, No. 4:21-CV-171-DMB-JMV, 2024 WL 3217418, at *7 (N.D. Miss. June 27, 2024), holding that "[b]ecause an immaterial error cannot support vacatur and an award will be confirmed unless an error was material and caused substantial prejudice to the losing party, the arbitrator's decision will not be vacated simply because the hearing was conducted by video conference" (internal quotation marks omitted).

– *Goldman Sachs Tr. Co., N.A. v. J.P. Morgan Sec.*, LLC, No. 22-11835, 2024 WL 445571 (11th Cir. Feb. 6, 2024), rejecting challenge under section 10(a)(3) of the FAA – failure to postpone – even though (a) FINRA rules did not expressly allow for virtual hearings and (b) the Eleventh Circuit's holding in *Managed Care* meant that third-party summonses were unenforceable in a virtual hearing, concluding that the panel had reasonable bases for not postponing until an in-person hearing could be held, including: the expeditious resolution of the dispute, claimant was 94-years-old, the ongoing pandemic, and the availability of virtual hearings.[17]

– *Pipkin v. Nabors Indus., Ltd.*, No. 21-MC-156S, 2021 WL 9681373 (D. Wyo. Sept. 30, 2021), rejecting claim that arbitrator manifestly disregarded the law by permitting Zoom hearing during the pandemic even though applicable rules referred only to hearing on written submission, in-person, and by telephone.

– *Sanduski v. Charles Schwab & Co.*, No. 219CV01340JADBNW, 2020 WL 4905537 (D. Nev. Aug. 20, 2020), rejecting challenge under section 10(a)(3) where one arbitrator in tripartite FINRA panel appeared at hearing by telephone, finding that the panel's decision to continue with the "semi-virtual hearing" was reasonable and within the scope of the tribunal's authority over procedural matters.[18]

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[16] *See*, ICCA, *Does a Right to a Physical Hearing Exist in International Arbitration? The ICCA Reports No. 10* (ICCA 2022), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA_Reports_no_10_Right_to_a_Physical_Hearing_final_amended_7Nov2022.pdf, last visited June 2024.

[17] Although not raised on appeal, the lower court rejected respondents' argument that the arbitrators were "guilty of misbehavior prejudicial to Respondents" because "the arbitrators ignored the proceedings to sleep, text, talk on their phones or with others in their homes, and leave the camera frame altogether"; the lower court found that respondents had not shown prejudice. *Schottenstein v. J.P. Morgan Sec., LLC*, No. 21-CV-20521, 2022 WL 1450026, at *8 (S.D. Fla. May 9, 2022).

[18] *See*, *also*, *CFS 12 Funding LLC v. Wiesen*, No. 21-CV-9711 (PKC), 2023 WL 6458929 (S.D.N.Y. Oct. 4, 2023); *R.M.R. Elevator Co., Inc. v. Broad Atl. Assocs., LLC*, No. A-2406-20, 2022 WL 1926085, (N.J. Super. Ct. App. Div. June 6, 2022), *appeal dismissed*, 253 N.J. 267, 290 A.3d 612 (2023); *Alexander v. Davis Hotel Cap., Inc.*, 178 N.E.3d 827 (Ind. Ct. App. 2021) (Unpublished/

While a virtual hearing is unlikely to serve as grounds for vacatur, practitioners should be aware of potential issues. *First*, as an absolute arbitration first principle, if the parties' contract requires an in-person hearing, then absent subsequent agreement, the arbitration must proceed in person. It is likely, however, that express language beyond the typical venue provision would be required to trigger a right to an in-person hearing, particularly because arbitration provider rules, such as Rule 21(g) of the JAMS Comprehensive Arbitration Rules & Procedures (JAMS Rules) and Article 23.2 of the JAMS International Arbitration Rules, specify that arbitrators have discretion to hold hearings remotely.[19] Relatedly, one prior obstacle to virtual hearings in consumer arbitrations at JAMS was the JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness. This policy gave consumers a right to an in-person hearing in the consumer's hometown area. Recognizing that the purpose of this requirement was consumer convenience, not the in-person aspect, which to many seemed outdated, JAMS amended the applicable standard effective May 1, 2024, to provide, "The consumer's access to arbitration must not be precluded by the location of the arbitration."[20]

Second, as with any virtual ADR modality, it is imperative to have strong security, confidentiality and privacy measures. *Third*, with virtual arbitration, it is important to establish a protocol – in the form of an order – with clear instructions regarding the conduct of the proceeding, particularly with respect to witness testimony. This brings us to the cautionary tale: In one clear example of a party

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noncitable) ("MWA has failed to show a violation of its due process rights as a result of the Arbitrator's decision to conduct the proceedings virtually or in limiting the number of witnesses who were permitted to testify. Both parties presented a voluminous amount of written evidence including affidavits, exhibits, and depositions pursuant to the Arbitrator's order, as well as witness testimony at the Zoom hearing. As a result, we conclude that the arbitration award in Davis's favor was proper, and the trial court correctly confirmed the award."); *Legaspy v. Fin. Indus. Regul. Auth., Inc.*, No. 20 C 4700 (N.D. Ill. Aug. 13, 2020) (denying temporary restraining order to litigant seeking to avoid remote arbitration proceedings); *Cristo v. Charles Schwab Corp.*, No. 17-CV-1843-GPC-MDD (S.D. Cal. June 25, 2021); *Song v. Que*, No. 23-CV-02159-RFL, 2024 WL 2853983 (N.D. Cal. May 31, 2024) (confirming award under Chapter 2 of the FAA where one of three arbitrators appeared remotely).

[19] *See, e.g.*, *Neal Elec. Corp. v. Clark Constr. Grp. - CA, L.P.*, No. D082217, 2023 WL 6818656 (Cal. Ct. App. Oct. 17, 2023) (Unpublished/noncitable), *as modified on denial of reh'g* (Nov. 9, 2023), *review filed* (Nov. 27, 2023) (determining that because an arbitration agreement providing that "the arbitration shall be in Riverside, CA" did not include express language requiring an in-person hearing, an in-person hearing was not required where the applicable provider rules allowed for virtual proceedings). *But cf. Shaffer v. Wilmington Sav. Fund Soc'y, FSB*, No. 8:23-CV-571-SDM-AEP, 2023 WL 4549633 (M.D. Fla. July 14, 2023) (interpreting similar language differently).

[20] Another significant consideration is whether arbitration agreements that permit or mandate remote hearings are enforceable, particularly in contexts where agreements are presented on a take-it-or-leave-it basis. Consistent with the decisions rejecting challenges to awards, the authors are not aware of any decisions holding that such arbitration agreements are unenforceable.

attempting to take advantage of the use of the virtual nature of the arbitration to game the system, an award was vacated under section 10(a)(1) – award procured by fraud or undue means – of the FAA where the moving party was able to show that a witness testifying by videoconference received text messages from counsel on how to respond to the questioning.[21]

Finally, as relates to U.S. domestic arbitrations, some courts have interpreted section 7 of the FAA, which empowers an arbitrator to summon a third-party witness to "attend before them" to testify, as requiring such attendance to be in person and therefore rendering summonses in connection with virtual arbitrations unenforceable.[22] While these rulings also create challenges in in-person and hybrid arbitrations, they clearly present challenges in virtual arbitrations when third-party witnesses refuse to appear and testify.[23] Thus, to the extent that a third-party witness can only be compelled to attend in person, this may require that at least some portion of the hearing takes place in person, and likely at a location that satisfies the 100-mile production limitation of Rule 45 of the Federal Rules of Civil Procedure.

Three final considerations: *First*, arbitrators should consider the possibility that the denial of a party's request to appear remotely or to have a witness appear remotely might itself give rise to possible grounds for vacatur under section 10(a) of the FAA or state arbitration law, particularly in situations where such exclusion precludes a party from presenting material and pertinent evidence. *Second*, even in cases where an arbitration agreement specifies that an in-person hearing is required, it is doubtful that such a provision would preclude arbitrator discretion to permit at least certain witnesses from appearing virtually or in person in different locations where

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[21] *See NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861 (11th Cir. 2023). As an additional caution, cases have addressed challenges to awards based on the failure of an arbitrator to record the hearing electronically after committing to do so. Compare *Waetzig v. Halliburton Energy Servs., Inc.*, No. 20-CV-00423-KLM, 2022 WL 3153909 (D. Colo. Aug. 3, 2022), *rev'd on other grounds*, 82 F.4th 918 (10th Cir. 2023) (certain arbitrator conduct "when combined with the failure to have the hearing recorded, exceeded [the] Arbitrator['s] powers within the meaning of 9 U.S.C. § 10(a)(4)") with *PhotoFixitPro, Inc. v. Costco Wholesale Corp.*, No. CV 22-8955 PA (PDX), 2023 WL 3432235 (C.D. Cal. Mar. 16, 2023), *appeal dismissed*, No. 23-55548, 2024 WL 2988222 (9th Cir. June 14, 2024) (arbitrator's failure to record the Zoom hearing did not constitute denial of a fundamentally fair hearing).

[22] *See, e.g., Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019); *Broumand v. Joseph*, 522 F. Supp. 3d 8, 25 (S.D.N.Y. 2021) ("[A]rbitral subpoenas, as modified to require video testimony, are unenforceable because they seek to compel respondents to produce documents without also requiring respondents to testify in-person at an evidentiary hearing.").

[23] Notably, in *Goldman Sachs Tr. Co., N.A. v. J.P. Morgan Sec.*, described above, the Eleventh Circuit found that the inability to secure a witness to appear by summons virtually by virtue of *Managed Care*, another Eleventh Circuit decision, did not, at least in that case, serve as grounds to vacate under § 10(a)(3).

needed, particularly where the governing rules afford such arbitrator discretion.[24] And *third*, it should be remembered that an arbitration hearing may not be required at all if the parties waive the hearing and proceed with written submissions and other evidence or if the arbitration agreement allows for dipositive motions and such motion is granted as to all claims.

[24] *See, e.g.*, JAMS Rule 22 (g) ("The Arbitrator has full authority to determine that the Hearing, or any portion thereof, be conducted in person or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places, or in a combined form. If some or all of the witnesses or other participants are located remotely, the Arbitrator may make such orders and set such procedures as the Arbitrator deems necessary or advisable."); JAMS Rule 19 (c) ("The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.").