Opportunity Knocking?

Is Online Binding Arbitration a Viable Solution to Consumer Claim Preclusion Resulting from the Supreme Court's Endorsement of Class Arbitration Waivers in Consumer Contracts of Adhesion?*

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Abstract

Arbitration is an important feature of the American justice system, providing numerous benefits, such as flexible dispute resolution, efficiency, privacy and avoidance of unwarranted punitive damages, while significantly reducing cases on overloaded court dockets. Its success, however, is not without criticism; and in the case of class arbitration waivers, as this article suggests, that criticism is well founded.

Since the enactment of the Federal Arbitration Act (FAA) in 1925, the United States Supreme Court has pronounced a sweeping policy in favour of arbitration. More recently, the Court has made significant pronouncements in favour of class arbitration waivers, overruling a lower-court trend towards refusing to enforce such waivers.

The Supreme Court's endorsement of class arbitration waivers unfortunately results in claim preclusion of consumer claims for relatively small amounts of money. Stuck in this relatively inequitable playing field, there exists an opportunity to design innovative solutions to protect consumers from claim preclusion. Online binding arbitration, OArb, offers numerous benefits that offset its drawbacks, and it provides an accessible forum for some consumers to effectuate small claims. While OArb has failed to gain traction as an alternative dispute resolution process, it seems likely that a private, properly administered OArb programme could succeed and provide benefits to companies and consumers alike. OArb, however, is not a complete substitute for class arbitration, especially because numerous consumers are probably unaware of their claims. OArb, nevertheless, is a step in the right direction, and consumers are sure to benefit if it is implemented on a wider scale.

Keywords: online binding arbitration, class arbitration waiver.

* I would like to thank Professor David Allen Larson for his guidance on the subject matter. All errors are my own.

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1 Introduction

In the middle of every difficulty lies opportunity
---Albert Einstein

Arbitration is an important feature of the American justice system, providing numerous benefits, such as flexible dispute resolution, efficiency, privacy and avoidance of unwarranted punitive damages, while significantly reducing cases on overloaded court dockets. Its success, however, is not without criticism; and in the case of class arbitration waivers, as this article suggests, that criticism is well founded.

Since the enactment of the Federal Arbitration Act (FAA) in 1925, the United States Supreme Court has pronounced a sweeping policy in favour of arbitration.[1] More recently, the Court has made significant pronouncements in favour of class arbitration waivers, overruling a lower-court trend towards refusing to enforce such waivers.

In *Stolt-Nielson v. Animal Feeds Int'l Corp*., the Supreme Court held that class arbitration is impermissible absent contractual language explicitly authorizing such procedures.[2] Since then, the Court has given no indication that it intends to let up, even in compelling factual situations. For example, in *Discover Bank v. Superior Court*, the California Supreme Court refused to enforce a class arbitration waiver when it was impracticable to pursue claims individually.[3] The court reasoned that class arbitration waivers in adhesion contracts are "clearly meant to prevent customers … from seeking redress for relatively small amounts of money … [f]ully aware that few customers will go to the time and trouble of suing in small claims court".[4] Not long after, in *Laster v. AT&T Mobility, LLC*, the Ninth Circuit Court of Appeals, relying on *Discover Bank*, refused to enforce class arbitration waivers in adhesion contracts.[5] The Supreme Court, however, granted certiorari, overruled *Laster* and abrogated *Discover Bank*.[6] The practical effect of the Supreme Court's decision, as some suggest, is consumer claim preclusion.[7]

Given the Supreme Court's endorsement of class arbitration waivers that make it impracticable for consumers to seek redress for small claims, a natural question arises – are there alternative measures that make it practical for consumers to seek redress for relatively small claims? Is there an opportunity for an innovative redesign of arbitration that makes use of modern technology?

1 *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 396 (1967); *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp*., 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).
2 *See Stolt-Nielson v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010).
3 *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005).
4 *Id*.
5 *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009) *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
6 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
7 *See* Section 2.2 (discussing claim preclusion resulting from the Supreme Court's decision in *AT&T Mobility*).

It has been suggested that a potential solution to consumer claim preclusion may lie in the emerging field of online binding arbitration (OArb).[8] Proponents of OArb tout its wide reach, efficiency and effectiveness, which may incentivize consumers to seek redress for their relatively small claims.[9] OArb, however, raises a number of concerns that require careful consideration.[10] This article outlines the Supreme Court jurisprudence regarding class arbitration waivers that results in claim preclusion.[11] Next, the article briefly touches on online dispute resolution (ODR) and proceeds to discuss OArb specifically, including its benefits and drawbacks,[12] and whether OArb is viable and may effectively resolve the claim preclusion.[13] The article concludes by addressing the best way to implement OArb, and looking ahead at unresolved issues.[14]

2 Background

2.1 Class Arbitration Waiver Jurisprudence

2.1.1 Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)*

The Supreme Court's jurisprudence with regard to class arbitration waivers spurred the exploration of ODR, specifically OArb, to address the resulting claim preclusion. As such, this section illustrates some of the more significant decisions in that area.

In the 2005 case of *Discover Bank*, the California Supreme Court granted certiorari from the California Court of Appeals, which held that the FAA preempts California's state law rule that class arbitration waivers are unenforceable.[15] The case involved a plaintiff who obtained a credit card from Discover Bank.[16] The parties' credit card agreement did not contain a class arbitration waiver, but Discover Bank subsequently added the waiver pursuant to a change-of-terms provision in the agreement, which stated, "Neither you nor we shall be entitled to join or consolidate claims in arbitration ... or arbitrate any claim as a representative or

8 *See, e.g.*, A.J. Schmitz, '"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers through Binding Odr', 62 *Baylor Law Rev*, 2010, p. 178 ("OArb helps address concerns regarding companies' use of arbitration clauses to curb consumers' access to remedies on their typically small claims."); J.R. Sternlight, 'Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims', 42 *Southwestern University Review*, 2012, pp. 87, 104 (suggesting that arbitration redesign, including online arbitration suggested by Professor Amy J. Schmitz, may alleviate some of the problems consumers subject to class arbitration waivers are subject to).

9 *See* Section 2.3.2 (highlighting the benefits of OArb)

10 *See* Section 2.3.3 (highlighting the drawbacks of OArb).

11 *See* Section 2.1 (discussing class arbitration waiver jurisprudence).

12 *See* Section 2.3.1 (discussing ODR and OArb); Section 2.3.2-2.3.3 (highlighting the benefits and drawbacks of OArb).

13 *See* Section 2.2 (discussing claim preclusion resulting from the Supreme Court's decision in *AT&T Mobility*).

14 *See* Section 3.2.

15 *Discover Bank*, 113 P.3d at 1103 (discussing procedural history).

16 *Id*.

member of a class ....”[17] The plaintiff later filed a class action complaint against Discover Bank, claiming damages for the bank's deceptive practices.[18] Specifically, the plaintiff alleged that the bank represented to customers that it would not assess late payment fees if payment was received by a certain date, when in reality late fees were assessed if received after 1:00 p.m. on the specified date.[19] The late payment fees led to damages that were relatively small to individuals, but large in the aggregate.[20]

After the plaintiff filed the class action, Discover Bank moved to compel arbitration and to dismiss the class action, citing the class arbitration waiver in the parties' agreement.[21] The plaintiff opposed Discover Bank's motion, arguing that the class arbitration waiver was unconscionable and therefore unenforceable under California law.[22] Discover Bank argued that the FAA requires strict enforcement of arbitration clauses, including the class arbitration waiver.[23] Discover Bank averred that Section 2 of the FAA forbade state laws applicable only to arbitration agreements.[24]

The California Supreme Court began its opinion by discussing the justifications for class action lawsuits.[25] The court reviewed a number of its previous decisions, as well as United States Supreme Court decisions, discussing class action lawsuits and found that class actions play an important role in providing redress for consumers with relatively small claims:

> Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct.

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> A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation. The problems which arise in the management of a class action involving numerous small claims do not justify a judicial policy that would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity.

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17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Discover Bank*, 113 P.3d at 1104.
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*, p. 1105.

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

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> We have observed that the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to 'retain[ ] the benefits of its wrongful conduct.

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> [The class arbitration waiver] is clearly meant to prevent customers ... [from] seeking redress for relatively small amounts of money.[26]

In light of these findings, the California Supreme Court held that while not all class arbitration waivers are unconscionable, when the waiver is found in consumer contracts of adhesion, in disputes that predictably involve small damage claims, and it is alleged that the party with "superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money", such waivers are unconscionable.[27] With regard to the FAA's preemptive scope, the court noted that Section 2 of the FAA permitted "state courts to refuse to enforce arbitration agreements or portions thereof based on general contract principles", such as unconscionability.[28]

2.1.2 Stolt-Nielson v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010)*

In 2010, the United States Supreme Court addressed class arbitration when the agreement is 'silent' with regard to class arbitration.[29] The Court noted that while contract interpretation is a matter of state law, the FAA imposes general principles, specifically that arbitration "is a matter of consent, not coercion"[30] and that the "primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms".[31] The Court held that a party may not be compelled to submit to a class action unless the agreement provides for class arbitration explicitly.[32] The Court reasoned that an arbitrator cannot infer an agree-

26 *Discover Bank*, 113 P.3d at 1105-1106 (internal citations and quotations omitted).
27 *Id*., p. 1110.
28 *Id*.
29 *Stolt-Nielsen*, 559 U.S. at 668.
30 *Id*., p. 681.
31 *Id*., p. 682 (internal quotations omitted).
32 *Id*., p. 684.

ment to arbitrate on a class-wide basis based solely on the agreement to arbitrate because class arbitration proceedings change the very nature of arbitration to such a degree that it cannot be presumed the parties agreed to it simply by agreeing to arbitrate.[33] Thus, at least between merchants, as was the case in *Stolt-Nielson*, class arbitration is not available unless explicitly provided for in the agreement.

2.1.3 AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011)*

In 2011 in *AT&T Mobility v. Concepcion*,[34] the Supreme Court of the United States considered a Ninth Circuit Court of Appeals decision, previously named *Laster v. AT&T Mobility*,[35] addressing the same issue in *Discover Bank*. In *Laster*, the Ninth Circuit held class arbitration waivers were unconscionable and therefore unenforceable.[36] The Supreme Court reversed the Ninth Circuit, which relied in large part on the *Discover Bank* holding.[37]

In *AT&T Mobility v. Concepcion*, the Concepcions, representing a class of consumers, alleged that AT&T's offer of a 'free' phone to anyone that signs up for service was fraudulent in that it required the new subscriber to pay tax on the retail value of each phone.[38] The Concepcions filed a complaint against AT&T in a federal court in the Southern District of California.[39] AT&T moved to compel arbitration and dismiss the class action, citing the terms of its service contract, which contained an arbitration clause and a class arbitration waiver.[40] In its reversal of the Ninth Circuit decision, the Court acknowledged that arbitration agreements may be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract", such as unconscionability, but reiterated its strong "policy favoring arbitration".[41] The Court then illustrated the nature of class action lawsuits and their frustration of the fundamental attributes of arbitration.[42] Accordingly, the Court expressly abrogated the California Supreme Court's decision in *Discover Bank*.[43]

2.2 The Supreme Court's Class Arbitration Waiver Jurisprudence Results in Consumer Claim Preclusion

Corporations have responded to Supreme Court arbitration jurisprudence in kind. In a study undertaken by law professors Theodore Eisenberg, Geoffrey Miller and Emily Sherwin, corporations included arbitration agreements in over three-quar-

33 *Id*., p. 685.
34 *AT&T Mobility*, 131 S. Ct. 1740.
35 *Laster v. AT&T Mobility* underwent a name change before reaching the Supreme Court, to *AT&T Mobility v. Concepcion*.
36 *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009) *rev'd sub nom. by AT&T Mobility*, 131 S. Ct. 1740 (2011).
37 *Id*.
38 *AT&T Mobility*, 131 S. Ct. at 1744.
39 *Id*., pp. 1744-1745.
40 *Id*.
41 *Id*., pp. 1745-1746.
42 *Id*., p. 1748.
43 *Id*., p. 1742.

ters of their consumer contracts, but less than 10% of their negotiated, non-consumer and non-employment contracts.[44] Eisenberg, Miller and Sherwin suggest that this practice casts doubt on corporations' asserted beliefs in arbitration, and the inclusion of arbitration agreements in consumer and employment contracts may be explained by claim preclusion:

> One plausible hypothesis is that these provisions are intended to preclude aggregate dispute resolution by remitting the consumer to an individual action before an arbitrator. The strategy of precluding aggregate treatment of consumer grievances is potentially beneficial to corporations because few individual consumers will find it worthwhile to pursue their claims on an individual basis, either in litigation or in arbitration.[45]

The California Supreme Court reached the same conclusion as professors Eisenberg, Miller and Sherwin, noting that class arbitration waivers result in claim preclusion because individual actions by each defrauded consumer are often impracticable due to the small amount of recovery relative to the time, cost and effort required to seek redress.[46]

2.3 Online Dispute Resolution: A Possible Solution to the Supreme Court's Endorsement of Class Arbitration Waivers?

Given the Supreme Court's endorsement of class arbitration waivers in consumer contracts of adhesion, the concern remains that class arbitration waivers result in claim preclusion. Proponents of OArb have suggested that it may cure this problem, at least to a certain extent.[47] This section provides a brief review of ODR in order to assess whether ODR, specifically OArb, effectively alleviates consumer claim preclusion.

2.3.1 ODR and OArb

ODR is a broad term that encompasses multiple forms of dispute resolution that utilize modern technology, such as the Internet, websites, e-mail and streaming media, to streamline proceedings.[48] Parties do not meet face to face when participating in ODR, but communicate solely through the use of technology.[49] In fact,

44 *See* T. Eisenberg, G.P. Miller & E. Sherwin, 'Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts', 41 *University of Michigan Journal of Law Reform*, 2008, pp. 871, 876.

45 Eisenberg *et al*., 2008, p. 876.

46 *Discover Bank*, 113 P.3d at 1105.

47 *See, e.g.*, Schmitz, 2010, p. 178 (suggesting that OArb may provide effective access to remedies for consumers); Sternlight, 2012, p. 104 (suggesting that arbitration redesign, including online arbitration suggested by Professor Amy J. Schmitz, may alleviate some of the problems consumers subject to class arbitration waivers are subject to).

48 The American Bar Association's Task Force on Electronic Commerce *et al*., 'Addressing Disputes in Electronic Commerce: Final Recommendations and Report', 58 *The Business Lawyer*, 2012, pp. 415, 419.

49 *Id*.

even if a dispute is resolved primarily through online processes, but eventually concludes with even a brief in-person meeting, it is not considered ODR.[50]

ODR can be traced back to approximately 1996.[51] Fueled by law review articles, the National Center for Automated Information Research (NCAIR) sponsored the first conference devoted to ODR, and funded some of the first significant ODR projects.[52] At its inception, many were skeptical as to the need and potential for ODR,[53] but that soon changed due to ever-increasing e-commerce and ODR's potential to streamline proceedings in a cost-effective manner, which comports with alternative dispute resolution's (ADR) overall desire of efficient dispute resolution.[54] Since its humble beginnings in 1996, ODR has slowly expanded, moving its concentration from solely online disputes to now include both on- and offline disputes,[55] with the goal of "providing cheaper, faster, and less intrusive avenues for dispute resolution" than traditional dispute resolution processes.[56]

ODR generally refers to the integration of technology into all types of dispute resolution.[57] For instance, one might fairly characterize American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services (JAMS) proceedings as ODR because they permit electronic filing, scheduling and third-party neutral selection.[58] This article, however, focuses on a subset of ODR known as online binding arbitration (OArb), which is still relatively uncommon, as most online arbitration is optional.[59] OArb proceedings permit the parties to present their cases while focusing on evidentiary submissions and conclude in a final, third-party determination that provides finality and quick access to remedies.[60] As such, at least in the abstract, OArb proceedings foster cost-effective, efficient proceedings in which consumers harmed by the Supreme Court's endorsement of class arbitration waivers may ultimately seek redress.

50 Telephone interview with Colin Rule, COO, Modria (20 April 2015). Modria is a cloud-based platform that provides technological services for companies to implement their own dispute resolution system. *Id. See, e.g.*, Modria, <http://modria.com/product/> (last visited 2 May 2015). Mr. Rule designed the ODR programmes for eBay and PayPal. Mr. Rule also designed one of the first ODR platforms, Online Resolution, among many other ODR systems, including property tax assessment appeals, family and insurance, which are in operation at home and abroad.

51 E. Katsh & L. Wing, 'Ten Years of Online Dispute Resolution (Odr): Looking at the Past and Constructing the Future', 38 *The University of Toledo Law Review*, 2006, pp. 19, 19-20.

52 *Id.*

53 *Id.*, p. 21.

54 Schmitz, 2010, p. 181.

55 Katsh & Wing, 2006, p. 21 ("ODR is no longer solely focused on disputes related to online activities and it is now employed in some offline dispute").

56 Schmitz, 2010, p. 181.

57 *See* text accompanying note 48 (broadly defining ODR).

58 Schmitz, 2010, p. 187 (discussing online administration of traditional ADR).

59 *Id.*, p. 209 (noting that most OArb is optional).

60 *Id.*, p. 193.

2.3.2 OArb Benefits

OArb proponents claim that it provides numerous benefits to consumers and companies alike, touting its low-costs and efficiencies.[61] If the foregoing is true, OArb may provide an adequate and more accessible forum for individual consumers with relatively small claims, thereby alleviating to a certain extent small claim preclusion.

OArb is convenient and cost-efficient. As opposed to traditional, in-person litigation and arbitration, parties to OArb immediately save travel expenses, and may conveniently communicate over the Internet according their own schedules.[62] The convenience becomes especially important when considering the fact that arbitration clauses frequently call for a distant venue located in the companies' home state or country.[63] The Supreme Court, furthermore, has ruled that this is an acceptable practice, permitting companies to force consumers to travel to a distant forum to litigate, despite the hardship it may cause.[64] As law professor Amy J. Schmitz notes in her extensive article on the subject, OArb "allows consumers to forego having to travel, miss work, 'dress up', or arrange for child care to attend [face-to-face] hearings and meetings".[65]

Moreover, online portals that facilitate OArb allow parties to submit evidence in a transparent manner, and permit all involved parties to conveniently review documents according to their own schedules.[66] As Professor Schmitz notes, the very nature of OArb, given its anonymity and lack of face-to-face interaction, may empower consumers that feel more at ease from the comfort of their computers, especially noting the stress involved in adversarial proceedings, whether in a courtroom or in in-person arbitration.[67] Professor Schmitz also notes that consumers might also save costs by forgoing attorneys due to the lack of formality and the relative simplicity of participating in OArb proceedings.[68]

Importantly, OArb also produces speedy and final awards. As opposed to in-person proceedings, OArb proceedings are not delayed by travel concerns or schedule coordination.[69] Moreover, arbitration, as opposed to mediation or case evaluations, does not require adversarial parties to reach a mutual agreement.[70] Rather, a third-party neutral administers a final, binding determination after the

61 *Id*., p. 200. A large share of information provided in this section is based on the splendid work undertaken by Professor Amy J. Schmitz, who has taken a leading role on scholarship related to OArb. *See* Schmitz, 2010; A.J. Schmitz, 'Access to Consumer Remedies in the Squeaky Wheel System', 39 *Pepperdine Law Review*, 2012, pp. 279, 327. In fact, scholarship related to OArb is relatively sparse apart from Professor Schmitz's articles, which explains the heavy concentration in this article on Schmitz's research and findings.

62 Schmitz, 2010, p. 200.

63 *Id*.

64 *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596 (1991).

65 Schmitz, 2010, p. 200.

66 *Id*., pp. 200-201.

67 *Id*., pp. 202-203.

68 *Id*., p. 204.

69 *Id*., p. 205.

70 *Id*.

parties present all evidence.[71] Assuming the FAA applies to OArb, enforcement of such awards is not a high hurdle.[72] The Court's recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* also bolsters the finality of arbitral awards by precluding parties from contractually altering the FAA's judicial review standards.[73]

2.3.3 OArb Drawbacks

OArb has drawn its fair share of opposition. Perhaps the most obvious concern with OArb is the lack of face-to-face interaction. As Professor Schmitz aptly notes in her article:

> Human interaction is often very important for building trust and facilitating productive and satisfying dispute resolution processes. [Face-to-face] discussions, body language, and other nonverbal cues, play an important role in creating comfort and sparking frank discussions that lead to mutually beneficial, or at least tolerable, settlements.[74]

Indeed, the elimination of face-to-face interaction can result in serious miscommunication and misunderstandings. Furthermore, nonverbal cues and communication play an important role in persuading factfinders.[75] Beyond persuasive techniques, an arbitrator or attorney conducting cross-examination loses an important aspect of determining witness credibility when unable to pick up on nonverbal cues.[76]

Opponents also criticize OArb for its uncertainty with regard to convoluted choice of law, jurisdictional and enforcement issues.[77] Indeed, the Supreme Court has yet to rule on the enforceability of OArb. The lack of judicial guidance is likely due to OArb's relative scarcity, given that the most widely used OArb clauses in contracts are optional.[78] This uncertainty is amplified when considered in an international context. The involvement of parties from differing nations makes it difficult to determine the law governing the parties' claims and the enforcement of the arbitration agreements, generally.[79] For example, the European Union (EU) prohibits e-merchants from including mandatory OArb clauses in consumer contracts, although they may do so as an option.[80]

71 *See* Schmitz, 2010, p. 205.
72 *Id.* (citing FAA §§ 9, 16).
73 *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).
74 Schmitz, 2010, pp. 220-221.
75 *See* Am. L. Prod. Liab. 3d § 74:8 (noting that "nonverbal communication makes up 93% of the impact of a communicated message"); La. Prac. Civ. Trial § 12:60 ("It is essential that advocates understand and make effective use of nonverbal communication, recognizing the importance of body language and mannerisms.")
76 Am. L. Prod. Liab. 3d § 74:8 (noting that witnesses communicate nonverbally in numerous ways).
77 *See* Schmitz, 2010, pp. 207-208.
78 *Id.*, p. 209 (discussing eBay's optional OArb provision in its User Agreement).
79 *Id.*, p. 211.
80 *Id.* (citing P. Gilliéron, 'From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?', 23 *Ohio State Journal on Dispute Resolution*, 2008, pp. 301, 322).

Another concern with OArb stems from a general distrust in computers and their security, safety and reliability. Any one of a number of things can go wrong with a computer – it can crash, contract a virus, be hacked or the software may simply be difficult to operate.[81] While computer safety has improved, privacy concerns remain a large problem today.[82] In the context of arbitration, privacy is especially important because it encourages full and frank discussions designed to resolve disputes.[83]

Moreover, a so-called 'digital divide' regarding access to technological resources and skills may raise legitimate due process concerns. Effective participation in and representation of each party's interests in OArb requires access to a computer, the Internet, e-mail and perhaps teleconferencing capabilities.[84] Indeed, due to financial restraints, parties to arbitration may not have equal access to, much less experience with, the aforementioned technologies, which may result in unfairness.[85] For instance, one party may have access to a specific, persuasive technology, while the other may not.[86] These problems may be more widespread, and difficult to discover, in the international context.[87]

Finally, despite the aforementioned benefits of OArb, it has not been embraced to a great extent. A number of OArb providers have failed to gain traction and have fallen by the wayside.[88] The lack of ubiquity leaves an air of uncertainty as to the viability of these dispute resolution processes. Those ODR programmes that have gained acceptance are provided by companies directly involved in the dispute or by an outside administrator that naturally favours the company.[89] Professor Schmitz characterizes the problem as "fear regarding the 'unseen' nature and neutrality of OArb providers".[90] Another explanation for the scarcity of OArb may be opposition from attorneys representing plaintiffs, whether individually or in class action lawsuits.[91] As noted earlier, OArb might

81 *Id*., p. 214 (citing Hon. F.G. Evans *et al*., 'Enhancing Worldwide Understanding through ODR: Designing Effective Protocols for Online Communications', 38 *University of Toledo Law Review*, 2006, pp. 423, 426-427).

82 *Id*., p. 215 (noting that Internet reliability has continually improved); E.A. Harris *et al*., 'A Sneaky Path into Target Customers' Wallets', *New York Times*, 17 January 2014, available at <www.nytimes.com/2014/01/18/business/a-sneaky-path-into-target-customers-wallets.html?_r=0> (reporting that in the fall of 2013, a group of cybercriminals successfully infiltrated Target customers' data, which included credit and debit card information).

83 Schmitz, 2010, p. 215.

84 *Id*., pp. 218-219.

85 T.D. Halket, 'The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties', 81 *St. John's Law Review*, 2007 pp. 269, 271.

86 *Id*.

87 *Id*.

88 For instance, the *Virtual Magistrate*, the first ODR provider, was by all accounts a failure. Gilliéron, 2008, pp. 301, 308. Moreover, a former ODR provider, *CyberSettle*, ceases to exists. *See* <www.cybersettle.com/> (cite no longer available).

89 *See* Schmitz, 2010, p. 217 (citing PayPal's ODR system).

90 *Id*., p. 216.

91 Telephone interview with Colin Rule, COO, Modria (20 April 2015).

actually allow consumers to proceed unrepresented, which naturally results in opposition from the plaintiff's bar.[92]

Overall, the criticism surrounding OArb consists in placing efficiency, as opposed to justice, at the forefront of dispute resolution.[93]

3 Analysis

As noted, *supra*, the California Supreme Court, and other scholars, have found that class arbitration waivers result in nothing short of consumer claim preclusion in cases involving relatively small monetary claims due to the time, effort and cost of seeking redress on an individual basis.[94] In the wake of the Supreme Court's decision in *AT&T Mobility*, this problem for consumers lingers.

This article set out to review whether ODR, specifically OArb, is a viable means to address this problem. The short answer to this question is yes. If properly administrated, the benefits of OArb outweigh its drawbacks. There may, however, still be unresolved issues going forward.[95]

3.1 The Benefits of OArb Outweigh Its Drawbacks, and OArb Is a Better Alternative than Individual, In-Person Arbitration

While OArb is imperfect, its benefits outweigh its drawbacks. Furthermore, wider availability of OArb is certainly better than the status quo, in which consumers cannot consolidate claims and may only seek redress on an individual basis, which is often cost-prohibitive. OArb allows consumers to pursue claims otherwise precluded by impracticability.

While a lack of face-to-face interaction is indeed a legitimate concern, it is less controversial in the context of OArb. OArb is heavily dependent on case presentations and less so on interactive dialogue.[96] Indeed, OArb's forms and automated systems may even address resource and skills imbalances between consumers and larger businesses.[97] Any lingering issues may be addressed with increasing viability of live-streaming or teleconferencing.[98] Issues relating to choice of law, jurisdiction and enforcement of OArb may pose some risks and uncertainty. However, these issues may be solved if expressly addressed in the contract, and otherwise filled in by common law, or *lex mercatoria*.[99] The general enforcement of arbitration clauses under the FAA and New York Convention also promotes the likelihood that OArb agreements will be enforced.[100]

92 *Id. See also* text accompanying note 68 (noting that consumers might save costs by forgoing the use of attorneys).
93 AH. Raymond & S.J. Shackelford, 'Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?', 35 *Michigan Journal of International Law*, 2014, pp. 485, 487.
94 *See generally* Section 2.2.
95 *See* Section 3.2 (outlining, going forward, issues that are unresolved by OArb).
96 Schmitz, 2010, p. 221.
97 *Id.*
98 *Id.* (citing programs such as Skype and LiveOffice)
99 *Id.*, pp. 211.
100 *Id.*, pp. 209-210.

While computer security, safety and reliability give rise to legitimate apprehension by consumers, Internet safety has continued to improve.[101] Moreover, consumers have become more willing to operate personal matters online.[102] With time, as technologically inclined generations make up a larger percentage of consumers, technological concerns will become less and less concerning.[103] Remaining concerns should be addressed with encryption and anti-virus and malware programs that are widely available, while OArb providers can take special measures to ensure the security of their programs.[104]

With regard to the "unseen nature and neutrality", Professor Schmitz suggests the implementation of 'trustmark' programmes to instil consumer confidence in OArb programmes.[105] A reputable trustmark logo can ensure a commitment to fair consumer dealings, and bolster an OArb programme's credibility.[106] Furthermore, a trustmark programme provides a regulatory forum to ensure compliance with standards of transparency required for membership in the trustmark programme.[107]

Finally, admittedly, a 'digital divide' does exist with regard to technological resources and skills, but there is evidence that the divide is shrinking.[108] As Professor Schmitz notes, consumers have increasingly gained access to computers and the Internet at public libraries, schools and universities, while at the same time the price of the minimal technology required for OArb has decreased.[109] Additionally, the problem with limited resources, technology and skills is not confined to OArb, as this problem inheres in litigation and other forms of alternative dispute resolution.[110] Policymakers and OArb providers should address these concerns on the macro level as well as on a case-by-case basis in order to ensure due process.[111]

Importantly, any concerns with regard to OArb should also be weighed against the status quo. When consumers are subject to arbitration as a part of a standard adhesion contract that includes a class arbitration waiver, the only means of redress consists of individual, in-person arbitration.[112] However, the

101 *Id*., p. 215.

102 *See, e.g*., 'Convenient, but How Secure', *New York Times*, Opinion Pages, 16 January 2012, available at <www.nytimes.com/2012/01/17/opinion/banking-online-is-convenient-but-how-secure.html> (citing a study by the American Bankers Association that 62% of Americans preferred to bank online).

103 *See generally* D.A. Larson, '"Brother, Can You Spare a Dime?" Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes', 11 *Nevada Law Journal*, 2011, pp. 523, 532 (discussing the technology revolution in the context of technologically inclined generations).

104 Schmitz, 2010, pp. 215-216.

105 *See id*., pp. 217-218.

106 *See id*., p. 218.

107 *Id*.

108 *Id*., p. 219.

109 *Id*.

110 Schmitz, 2010, p. 219.

111 *Id*.

112 *See, e.g., AT&T Mobility*, 131 S. Ct. at 1753 (noting that claims should be prosecuted individually because proceeding as a class "stands as an obstacle" to the FAA).

inexpensive nature and efficiency of arbitration may have been oversold to a certain extent. In fact, arbitration can be devastatingly expensive.[113] To begin with, filing fees are expensive: AAA requires plaintiffs to pay an initial filing fee, which is $775 for claims less than $10,000.[114] Arbitration agreements may call for a panel of one to three arbitrators that are paid hourly for their preparatory work as well as the arbitration itself, the costs of which are borne by the parties.[115] In some instances, the costs of arbitration exceed the entire claim for relief.[116] This is sure to happen in the scenarios addressed in the cases in *AT&T Mobility* and *Discover Bank*.[117] Consumers are likely to forgo pursuing claims for relatively small amounts of money when considering the inconvenience of attending face-to-face proceedings in a distant venue and the attendant costs.[118] Based on the foregoing, consumers and courts alike should favour the enforcement of OArb over traditional, in-person arbitration because of its unique benefits that can vastly increase the cost-savings, efficiency and accessibility to remedies for consumers with relatively small claims.[119]

3.2 Increasing the Use of OArb on a Larger Scale in Consumer Arbitration Agreements

Ideally, given its benefits, offering OArb would be a requirement for all companies including class arbitration waivers in consumer adhesion contracts when the claims involve relatively small monetary damages, such that pursuing claims individually is impracticable. Such a unique requirement is unlikely to be imposed judicially, especially given the Supreme Court's interpretation of the FAA.[120] While an amendment to the FAA requiring OArb in these scenarios could accomplish this goal, it seems unlikely. Legislative efforts to amend the FAA for the benefit of consumers with the Arbitration Fairness Act have been overwhelmingly unsuccessful.[121]

113 *See* R. Griffitts, 'Steering Clear of the Runaway Jury', 68 *Texas Bar Journal*, 2005, pp. 320, 321 ("arbitration has downsides . . . [f]irst, it is not cheap"); *e.g. Clark v. Renaissance W., LLC*, 307 P.3d 77, 78 (2014) (holding that an arbitration clause was invalid because plaintiff demonstrated that arbitration would be prohibitively expensive).

114 'Fee Schedules', *American Arbitration Association* (last modified June 2010), <www.adr.org/aaa/ShowPDF?doc=ADRSTG_012009>.

115 *See* 'The Costs of Arbitration', *Public Citizen*, April 2002, pp. 16, 44, available at <www.citizen.org/documents/ACF110A.PDF> (reporting JAMS' estimate that its arbitrators charge between $150 and $300 per hour, in addition to a daily $250 case management fee).

116 *In re Am. Exp. Merchants' Litig.*, 681 F.3d 139, 148 (2d Cir. 2012) (holding that despite the cost of arbitration, "[t]he ability to spread costs among a class is only a procedural right, the absence of which cannot render arbitration costs prohibitive").

117 *See* Sections 2.1.1, 2.1.3 (discussing the facts of *Discover Bank* and *AT&T Mobility*, which involved relatively small monetary claims for late fees and excessive taxes, respectively).

118 *See* Schmitz, 2010, pp. 201-202.

119 *See* Section 2.3 (outlining the benefits of OArb).

120 *See generally* Section 2.1 (discussing class arbitration waiver jurisprudence).

121 Repeated efforts at amendments to the FAA have failed to pass the House and Senate. *See, e.g.*, Arbitration Fairness Act, HR 815, 107th Cong. (2001); HR 2282, 107th Cong. (2001); S. 2435, 107th Cong. (2002); HR 3809, 108th Cong. (2004); HR 2969, 109th Cong. (2005); HR 3010, 110th Cong. (2007); HR 5129, 110th Cong. (2008); S. 931, 111th Cong. (2009); HR 1873, 112th Cong. (2011); S. 878, 113th Cong. (2013).

Accordingly, it seems likely that implementing OArb on a wide scale will be accomplished, if at all, through the private sector.[122] According to Colin Rule, who designed the optional ODR programmes for eBay and PayPal, there may be a market for an improved online consumer arbitration process that allows consumers to present their claims effectively.[123] Indeed, Professor Schmitz has made the same claims in her scholarship on the subject.[124] OArb, if administered effectively, may ultimately become an enticing dispute resolution process for consumers and companies alike, providing an effective remedy for consumers, and saving on litigation expenses for companies.[125] Of course, given the resounding failure of OArb companies to gain traction,[126] private OArb must be demonstrably cost-effective for companies to begin implementing on a wide scale. Companies such as eBay and PayPal, by all accounts, seem to be paving the way. OArb, if available on a wider scale, should be modelled after eBay and PayPal's systems, which presumably provides a cost-effective dispute resolution process online for both companies and consumers. Accordingly, the wide availability of OArb will ultimately provide some relief for consumers who otherwise have no practical means of enforcing their claims.[127]

3.3 Moving Forward: OArb Is Not a Be-All End-All for Consumer Claim Preclusion

OArb should be commended for its potential to provide an accessible means to effectuate consumer claims. Indeed, as outlined, *supra*, OArb may provide access for consumers to seek redress that is otherwise unavailable.[128] However, OArb does not completely resolve all of the problems that class action lawsuits and arbitrations handle.[129] For instance, OArb is available only to consumers *aware* of their claims, whereas class action lawsuits and arbitration require reasonable efforts to notify potential claimants of their claims.[130] Jean R. Sternlight, in her discussion on the subject, provides an example in the context of consumer bank loans.[131] Take for instance a bank that practises racial discrimination in bank loans.[132] A minority applicant that the bank discriminates against with a higher interest rate than a similarly situated individual has no knowledge of the discrim-

122 Telephone interview with Colin Rule, COO, Modria (20 April 2015) (commenting on the likelihood of OArb being implemented on a wide scale).
123 *Id*.
124 *See* Schmitz, 2010; A.J. Schmitz, 'Access to Consumer Remedies in the Squeaky Wheel System', 39 *Pepperdine Law Review*, 2012, pp. 279, 327.
125 *See* Schmitz, 2010, pp. 243–44.
126 *See* text accompanying note 88 (noting that OArb has failed to gain traction in the private sector).
127 *See* text accompanying note 119 (arguing that OArb's unique benefits can vastly increase the cost-savings, efficiency and accessibility to remedies for consumers with claims for relatively small amounts of money in consumer contracts of adhesion).
128 *Id*.
129 *See* Sternlight, 2012 p. 105.
130 *See* Fed. R. Civ. P. 23(c)(2) (requiring that individual notice must be sent to all potential class members whose names and addresses may be ascertained through reasonable effort).
131 *See* Sternlight, 2012, pp. 108–09.
132 *Id*.

inatory practice.[133] The minority discriminated against has no knowledge of race or ethnicity, or interest rates of other applicants.[134] Thus, that person will have no knowledge that he or she has a legally cognizable claim.[135] A class action lawsuit, which requires reasonable efforts to notify potential claimants, may solve this problem.

The aforementioned example is the most apparent problem with eliminating class arbitration that OArb will not solve. Because these issues remain, it is incumbent upon policymakers and industry leaders to develop innovative solutions to replace the benefits that class arbitration offered but that are no longer available in the wake of Supreme Court jurisprudence on the subject.

4 Conclusion

Professor Amy Schmitz, in her extensive coverage of OArb, made a strong case for the implementation of OArb on a wider scale. This article, if nothing else, should bolster that sentiment. In light of the Supreme Court's recent endorsement of class arbitration waivers, which unfortunately results in claim preclusion of consumer claims for relatively small amounts of money, now is the time for change.[136] Stuck in this seemingly inequitable playing field, there exists an opportunity to design innovative solutions to protect consumers from claim preclusion.

Online binding arbitration, OArb, offers numerous benefits that offset its drawbacks, and it provides an accessible forum for some consumers to effectuate small claims.[137] While OArb has failed to gain traction as an alternative dispute resolution process, it seems likely that a private, properly administered OArb programme could succeed and provide benefits to companies and consumers alike.[138] OArb, however, is not a complete substitute for class arbitration, especially because numerous consumers may be unaware of their claims.[139] OArb, nevertheless, is a step in the right direction, and consumers are sure to benefit if it is implemented on a wider scale.

133 *Id.*
134 *Id.*
135 *Id.*
136 *See* Section 2.2 (noting that the Supreme Court's class arbitration waiver jurisprudence results in consumer claim preclusion).
137 *See* Section 2.3 (outlining the benefits and drawbacks of OArb and suggesting that it is a possible solution to consumer claim preclusion).
138 *See* text accompanying note 119 (arguing that OArb's unique benefits can vastly increase the cost-savings, efficiency and accessibility to remedies for consumers with claims for relatively small amounts of money in consumer contracts of adhesion).
139 *See* Section 3.2 (arguing that OArb is not a be-all and end-all for claim preclusion of consumer claims).