

# POST-PANDEMIC FINRA ARBITRATION: TO ZOOM OR NOT TO ZOOM?

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## I. INTRODUCTION

The COVID-19 pandemic has raised serious questions about disputants' access to justice. Early on in the pandemic, in March 2020, U.S. courts shut down jury trials, judges conducted almost all appearances and arguments on videoconference, and clerks placed many civil cases on hold.<sup>1</sup> Similarly, alternative dispute resolution (“ADR”) forums shut down their in-person services, pivoting like the rest of the business world to videoconference technology to replace in-person meetings such as mediation sessions and arbitration hearings.<sup>2</sup>

This ADR pivot, while of course necessary due to the lack of any COVID-19 vaccine or reliable treatments through 2020, led to rapid innovations and creativity almost overnight in the provision of dispute resolution services without any face-to-face interactions. Observers remarked on the efficiencies both in terms of time and

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1. See Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of Covid: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 362–63 (2021) (reporting that “[o]verall judicial responses [to the pandemic] were decentralized, but best practices . . . beginning around early March 2020, included, but were not limited to, closing courthouses to the general public, suspending jury trials, delaying filing requirements, adapting rules that normally apply to pro se litigants, hearing oral arguments and conducting judicial conferences by telephone or virtually, and suspending paper filing requirements”).

2. See Sukhsimranjit Singh, *In the Shadow of the Pandemic: Unearthing Unequal Access to Justice Vis-à-Vis Dispute Resolution*, 68 WASH. UNIV. J.L. & POL'Y 95, 101 (2022).

cost savings by proceeding entirely remotely.<sup>3</sup> Even the court system reaped some benefits by proceeding remotely.<sup>4</sup>

At the same time, the pivot posed many challenges to ADR disputants, especially in a binding process like arbitration.<sup>5</sup> Critics wrote about the difficulties in providing arbitration services in a new way,<sup>6</sup> ensuring parties have an adequate opportunity to be heard,<sup>7</sup> and adapting the technology to the forum under an overarching statute—the Federal Arbitration Act (“FAA”)<sup>8</sup>—which was enacted long before legislators could envision virtual

3. See Noel Rhys Clift, *The Impact of Covid-19, Facilitative Mediation, Early Intervention and the New Visual Online Dispute Resolution-Part 1*, 27 J. OF INT’L MAR. L. 189, 196 (2021) (noting that the Covid-19 pandemic has sparked innovation in online dispute resolution in the United Kingdom); Joshua Karton, *Covid-19 & The Law: The (Astonishingly) Rapid Turn to Remote Hearings in Commercial Arbitration*, 46 QUEEN’S L.J. 399, 405–09 (2021) (exploring the durability of what were emergency adaptations to remote commercial arbitration but recommending ways to make virtual hearings accessible, effective and fair); Kristi J. Paulson, *Mediation in the Covid Era: Is Online Mediation Here to Stay?*, 51 SW. L. REV. 142, 148 (2021) (examining benefits of online mediation).

4. See, e.g., Edwina G. Mendelson et. al., *Reimagining ADR in New York Courts*, 22 CARDOZO J. CONFLICT RESOL., 521, 522–27 (2021) (exploring ways that New York is planning to reimagine the future of the court system based on experiences during the pandemic); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. UNIV. L. REV. 1875, 1879 (2021) (“Remote court has brought benefits to many court users, most notably in time savings and convenience for those who are able to access and use the required technology.”); Elizabeth G. Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181, 182 (2020).

5. Arbitration is an alternative dispute resolution process in which parties agree to submit their dispute to a third-party neutral who hears from all parties and imposes a binding decision, or award, on the disputants. See IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 7 (2013). Arbitration is based on the theory that parties agree to trade the more formal process of court-based adjudication for efficiency and equity. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate . . . , [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”); see also Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOKLYN L. REV. 111, 116–17 (2015) (explaining that arbitration is generally considered a speedy and inexpensive form of dispute resolution as compared to litigation, as it uses streamlined procedures to reach an outcome based on principles of law, equity, and custom, and practices unique to a particular industry).

6. Kristen Blankley, *FINRA’s Dispute Resolution Pandemic Response*, 13 PENN STATE ARB. L. REV. 27, 33 (2021) (“During the pandemic, the default [at the Dispute Resolution Services arm of the Financial Industry Regulatory Authority (“FINRA DRS”)] was to *postpone* hearings, rather than provide an alternate type of forum.”); Valentina Vadi, *Crisis, Continuity and Change in International Investment Law and Arbitration*, 42 MICH. J. INT’L L. 321, 324–67 (2021) (examining whether international investment arbitration can address the challenges posed by COVID-19).

7. Alex Lo, *Virtual Hearings and Alternative Arbitral Procedures in the Covid-19 Era: Efficiency, Due Process and Other Considerations*, 13 CONTEMP. ASIA ARB. J. 85, 87, 91–93 (2020).

8. 9 U.S.C. §§ 1–16 (2012).

hearings.<sup>9</sup> Scholars also considered the psychological impacts of online processes<sup>10</sup> and the overall impact on the disabled.<sup>11</sup> Notably—and perhaps overlooked by observers—in largely unregulated private dispute resolution processes, process administrators had no obligation to meet procedural due process requirements.<sup>12</sup>

Empirical studies of arbitration experiences and outcomes during the first year of the pandemic have followed.<sup>13</sup> One article described the results of a survey of users' experiences with remote hearings.<sup>14</sup> The authors found primarily that videoconferencing platforms and other related technology have been largely beneficial in supporting remote access but that the lack of in-person interaction created new challenges in terms of both connectedness and data security.<sup>15</sup> Other analyses have revealed a “remote penalty” imposed on claimants—a lower chance of prevailing in an arbitration when the hearing proceeds on videoconference as opposed to in person.<sup>16</sup>

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9. Amy J. Schmitz, *Arbitration in the Age of Covid: Examining Arbitration's Move Online*, 22 CARDOZO J. CONFLICT RESOL. 245, 248, 250 (2021).

10. Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DEPAUL L. REV. 701, 752–55 (2021); Derick H. Lindquist & Yili Dauta, *AI in International Arbitration: Need for the Human Touch*, 2021 J. OF DISP. RESOL. 39, 41–42 (2021) (examining the impact of incorporating artificial intelligence as well as a virtual component into dispute resolution).

11. David Larson, *Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR For Everyone*, 34 OHIO J. DISP. RES. 431, 443 (2019) (pre-pandemic, noting that, if participants are using a videoconferencing platform in a dispute resolution process, “[c]areful attention must be paid to ensure that everyone has an equal opportunity to participate in video or audio-only conferences”).

12. *See* *Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 138 (2d Cir. 2002) (“It is clear that NASD [FINRA’s predecessor] is not a state actor and its requirement of mandatory arbitration is not state action.”); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (stating “the state action element of a due process claim is absent in private arbitration cases” and holding the Due Process Clause of the U.S. Constitution does not apply to arbitration at FINRA’s predecessor, NASD).

13. *See, e.g.*, David Horton, *Forced Remote Arbitration*, 108 CORNELL L. REV. (forthcoming 2022) (manuscript at 1); Richard A. Bales, *Novel Issues in Canadian Labor Arbitration Related to Covid-19*, 13 ARB. L. REV. 1 (2021) (examining Canadian labor awards that have been decided through arbitration since COVID began).

14. Gary B. Born, Anneliese Dat & Hafez Virjee, *Videoconferencing Technology in Arbitration: New Challenges for Connectedness*, KLUWER ARB. BLOG (July 8, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/07/08/videoconferencing-technology-in-arbitration-new-challenges-for-connectedness-2020-survey/>.

15. *Id.*

16. *See* Horton, *supra* note 13 (manuscript at 7) (studying 2020–21 outcomes of pandemic arbitration at AAA, FINRA, JAMS, and Kaiser and finding that “plaintiffs who arbitrated online or submitted matters on the papers generally prevailed less often and received lower damage awards than those who appear in person”); Craig McCann & Chuan

This Article contributes to the literature exploring the impact of the pandemic on arbitration and explores whether parties arbitrating their disputes during the pandemic have had access to justice equivalent to the justice that was available pre-pandemic. Though it is difficult to draw any conclusions about FINRA arbitration due to the confidential and non-reasoned nature of awards,<sup>17</sup> the Article focuses on arbitration of securities industry disputes at one forum, FINRA DRS.<sup>18</sup> In particular, the Article analyzes data about FINRA customer arbitrations over the course of the pandemic, from onset in March 2020 through mid-2022, when most municipalities had lifted COVID-19 restrictions.

This Article proceeds in six parts. Part II briefly describes FINRA arbitration. Part III describes how the forum responded to the pandemic for its arbitration docket, including its pivot to Zoom hearings,<sup>19</sup> and also discusses the pros and cons of proceeding with an arbitration hearing via Zoom. Part IV relates empirical data on the outcome of FINRA customer arbitration during the pandemic. Part V offers some analysis of the data and explores whether Zoom arbitration at FINRA impedes access to justice. Part VI concludes.

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Qin, *The Impact of Zoom on FINRA Arbitration Hearings*, SLCG ECON. CONSULTING (Jan. 22, 2021), <https://www.slcg.com/files/research-papers/Impact%20of%20Zoom%20on%20FINRA%20Claimants.pdf> (finding that “investor Claimants are far less likely to win and, on average, they recover substantially less of their requested compensatory damages when they do prevail at Zoom final hearings than at in-person final hearings”); *Forced Arbitration in a Pandemic: Corporations Double Down*, AM. ASS’N FOR JUST. (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic> (reporting lower win rates for consumers and employees in “forced arbitration” during pandemic).

17. 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, 355–56 (2008).

18. FINRA DRS provides some transparency in its arbitration activity by publishing useful statistics related to arbitration filings, processes and outcomes, and thus its arbitrations are easier for researchers to examine. See *Dispute Resolution Statistics*, FINRA (June 26, 2022), <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics> [<https://web.archive.org/web/20220626125836/https://www.finra.org/arbitration-mediation/dispute-resolution-statistics>].

19. This Article will use the terms “videoconference” and “Zoom” interchangeably. FINRA uses the product “Zoom” as its videoconference platform for arbitrations, while other ADR forums may use other platforms, but they are all very similar in functionality.

## II. WHAT IS FINRA ARBITRATION?

Because virtually all securities broker-dealers<sup>20</sup> include a pre-dispute arbitration clause in their retail customer and employment agreements, arbitration is the primary process securities firms use to resolve disputes with their customers and employees, as well as with other FINRA member firms.<sup>21</sup> The Financial Industry Regulatory Authority (“FINRA”) is the primary self-regulatory organization in the U.S. securities industry<sup>22</sup> and administers ninety-nine percent of all securities arbitrations in the country.<sup>23</sup>

The forum handles both intra-industry disputes (disputes between two brokerage firms or between employees of brokerage firms and their employers) as well as customer disputes (disputes between a customer of a broker-dealer and the firm or its associated persons). Common intra-industry disputes include wrongful termination and other employment matters, raiding and unfair competition, collection on a broker’s promissory note, and contract claims stemming from acquisitions.<sup>24</sup> Common customer disputes include claims that a broker made unsuitable recommendations to an investor, fraudulently or negligently

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20. The Securities Exchange Act of 1934 (“Exchange Act”) defines “broker” as “any person engaged in the business of effecting transactions in securities for the account of others.” Exchange Act § 3(a)(4), 15 U.S.C. § 78c(a)(4) (2018). The Exchange Act defines a “dealer” as “any person engaged in the business of buying and selling securities for such person’s own account, through a broker or otherwise.” Exchange Act § 3(a)(5), 15 U.S.C. § 78c(a)(5). Since most securities industry firms act as both brokers and dealers, they are commonly referred to as “broker-dealers.”

21. See Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 172 (2016). Even absent a pre-dispute arbitration agreement, a customer or employee has the right to demand arbitration of a dispute with a member firm and its associated persons. See FINRA, RULE 12200 (2022) (applying to customer disputes); FINRA, RULE 13200 (2022) (applying to industry disputes).

22. For background on the regulatory structure of the securities industry, see Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 159–70 (2008).

23. The American Arbitration Association (“AAA”) used to handle a small docket of securities disputes, but even that docket has steadily dwindled, owing largely to the fact that the standard-form arbitration agreements that brokerage firms require their customers to sign usually do not designate the AAA as a forum for customer/broker disputes. In addition, the AAA repealed its separate Securities Arbitration Rules in 1999, which it originally had adopted just after the Supreme Court’s decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (holding that claims arising under the Exchange Act are arbitrable). Today, the AAA applies its standard commercial arbitration rules to any securities arbitration filed there. See *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS’N (Oct. 1, 2013), [https://adr.org/sites/default/files/CommercialRules\\_Web-Final.pdf](https://adr.org/sites/default/files/CommercialRules_Web-Final.pdf).

24. Karmel, *supra* note 22, at 21–36.

misrepresented an investment, engaged in unauthorized trading in customer accounts, and similar allegations of sales practice violations.<sup>25</sup>

FINRA maintains two sets of arbitration rules for these two categories of disputes: the Code of Arbitration Procedure for Customer Disputes (“Customer Code”),<sup>26</sup> and the Code of Arbitration Procedure for Industry Disputes (“Industry Code”).<sup>27</sup> The Codes provide detailed procedures for parties in the arbitration process, including rules governing the pleading, arbitrator selection, pre-hearing dispositive motion, discovery, and hearing phases.<sup>28</sup>

Under relevant federal securities laws, any revisions to those Codes must be approved by the Securities and Exchange Commission (“SEC”) following a notice and public comment period.<sup>29</sup> In addition, the SEC’s oversight of the forum and other structural characteristics of FINRA arbitration add a level of protection to investors and employees who are mandated to arbitrate their broker-dealer disputes there.<sup>30</sup>

However, even with that level of regulatory protection, because FINRA arbitration is not subject to the Due Process Clause of the U.S. Constitution,<sup>31</sup> the forum has been scrutinized for fairness and subject to intense criticism by interest groups who believe that investors do not get a fair share in FINRA customer arbitration.<sup>32</sup> Nevertheless, the U.S. Supreme Court has concluded three times that FINRA (or its predecessor NASD) arbitration is a fair forum and that agreements to arbitrate federal statutory

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25. Jill Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 HARV. NEGOT. L. REV. 185, 203–05 (2019).

26. See generally FINRA, RULE 12000 (2022) (each individual FINRA rule within the 12000 series applies to customer disputes).

27. See generally FINRA, RULE 13000 (2022) (each individual FINRA rule within the 13000 series applies to industry disputes).

28. See, e.g., FINRA, RULE 12000 (2022); FINRA, RULE 13000 (2022).

29. Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 5 (2012) (detailing process for regulatory approval of FINRA rules).

30. See Nicole Iannarone, *Post-Pandemic Remote Arbitration*, 52 STETSON L. REV. 393 (2023) (discussing characteristics of FINRA customer arbitration that distinguish it from arbitration at other forums that handle mandatory commercial arbitration claims).

31. See *Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 138 (2d Cir. 2002); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995).

32. See Jill I. Gross, *The End of Mandatory Securities Arbitration?* 30 PACE L. REV. 1174, 1179 (2010) (gathering studies analyzing fairness of securities arbitration).

claims in the forum are enforceable because the forum provides a fair opportunity to vindicate rights.<sup>33</sup>

FINRA Codes guarantee disputants' right to a "hearing," with a few exceptions.<sup>34</sup> The exceptions are contained in Rules 12600(a)/13600(a), which provide:

Hearings will be held, unless:

- (1) The arbitration is administered under Rule 12800(c) or Rule 12801;
- (2) The parties agree otherwise in writing; or
- (3) The arbitration has been settled, withdrawn or dismissed.<sup>35</sup>

The first exception is a cross-reference to arbitrations filed under the rules for Simplified Arbitration, Rules 12800/13800, which is prescribed for claims of less than \$50,000.<sup>36</sup> In Simplified Arbitration, the arbitrator holds no live, in-person hearings unless a customer or the arbitrator requests one.<sup>37</sup> Instead, the arbitrator bases the award on the pleadings and other materials submitted by the parties (a "paper case").<sup>38</sup> If the claimant elects a hearing in a Simplified Arbitration case, the claimant must select one of two hearing options: either a live, in-person hearing as for non-Simplified Arbitration, or a "Special Proceeding," involving a telephonic hearing (or other agreed-upon method) of limited duration, with limited evidentiary presentations.<sup>39</sup>

The second exception is for default proceedings under Rules 12801/13801,<sup>40</sup> where arbitrators can decide disputes based only on the paper submissions.<sup>41</sup> And, of course, if the claim was settled, withdrawn, or dismissed, no hearing is required.<sup>42</sup> Finally, the

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33. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (claims of age discrimination); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485–86 (1989) (claims arising under the Securities Act of 1933); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987) (claims arising under the Securities Exchange Act of 1934).

34. FINRA, RULE 12600(a) (2022); FINRA, RULE 13600(a) (2022).

35. FINRA, RULE 12600(a) (2022); FINRA, RULE 13600(a) (2022).

36. FINRA, RULE 12800 (2022); FINRA, RULE 13800 (2022).

37. FINRA, RULE 12800(c)(1) (2022); FINRA, RULE 13800(c)(1) (2022).

38. FINRA, RULE 12800(c)(2) (2022); FINRA, RULE 13800(c)(2) (2022).

39. FINRA, RULE 12800(c)(3) (2022); FINRA, RULE 13800(c)(3) (2022).

40. FINRA, RULE 12801 (2022); FINRA, RULE 13801 (2022).

41. FINRA, RULE 12801(c) (2022); FINRA, RULE 13801(c) (2022).

42. FINRA, RULE 12600(a)(3) (2022); FINRA, RULE 13600(a)(3) (2022).

Rules expressly provide that the parties can agree that no hearing is required.<sup>43</sup>

Notably, the Codes are ambiguous as to whether an in-person hearing is required or whether a hearing via another modality meets the requirement of the Rule.<sup>44</sup> The Rules discussed above provide exceptions where no “hearing” is required, and those exceptions do provide for a telephonic or paper hearing, so arguably it means that the overwhelming majority of cases are entitled to an *in-person* hearing.<sup>45</sup> On the other hand, the Rules do not explicitly state that, nor do they expressly authorize or preclude hearings by videoconference. Indeed, pre-pandemic, for convenience or scheduling reasons occasionally a few witnesses testified via videoconference, either by party agreement or arbitrator’s order.<sup>46</sup>

That being said, before the pandemic, FINRA arbitrations rarely took place *entirely* via videoconference. Rather, as a matter of practice, when a hearing was required and the Codes did not expressly authorize a paper or telephonic hearing, FINRA arbitrators held hearings in-person at one of FINRA’s hearing locations for any filed arbitration.<sup>47</sup> The Codes empower either the Director of arbitration or the arbitration panel to decide the “location” of the hearing and also to consider a party’s motion to change hearing location.<sup>48</sup> Historically, FINRA and the parties

43. FINRA, RULE 12600(a)(2) (2022); FINRA, RULE 13600(a)(2) (2022).

44. Neither the FAA—the primary statutory scheme governing agreements to arbitrate commercial disputes—nor the U.S. Supreme Court address what kind of hearing is required for courts to deem arbitration fundamentally fair. See Jill Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISP. RESOL. 329, 350, 355–56 (2006). Indeed, many courts have found that an arbitration process with a telephonic or documents-only hearing satisfies the fairness requirement. Jill I. Gross, *AT&T Mobility and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 62 (2012).

45. FINRA, RULE 12600(a) (2022); FINRA, RULE 13600(a) (2022); FINRA, RULE 12800(c) (2022); FINRA, RULE 13800(c) (2022); FINRA, RULE 12801(e) (2022); FINRA, RULE 13801(c) (2022).

46. See FINRA DISP. RESOL. TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE FINRA DISPUTE RESOLUTION TASK FORCE 33 (2015) (recommending there be a final prehearing conference to address, among other things, “[a]vailability of witnesses and method of testimony (e.g., live, video, or telephonic)").

47. FINRA, RULE 12213 (2022); FINRA, RULE 13213 (2022).

48. FINRA, RULE 12213(a) (2022) provides:

- (1) The Director will decide which of FINRA’s hearing locations will be the hearing location for the arbitration. Generally, the Director will select the hearing location closest to the customer’s residence at the time of the events giving rise to the dispute, unless the hearing location closest to the customer’s



interpreted that provision to address the geographic location of an in-person hearing, not whether the hearing would be in person or on videoconference.<sup>49</sup>

Nevertheless, an overwhelming majority of FINRA arbitration filings do not get resolved by arbitrators after a hearing. In the last decade, anywhere from a low of 2,893 (2021) to a high of 4,325 (2018) arbitration cases have been filed at FINRA each year, but a small percentage of them proceed to any kind of hearing.<sup>50</sup> The table below illustrates how filed cases have been resolved in recent years, both overall and by type of hearing:

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residence is in a different state, in which case the customer may request a hearing location in the customer's state of residence at the time of the events giving rise to the dispute.

(2) Before arbitrator lists are sent to the parties . . . , the parties may agree in writing to a hearing location other than the one selected by the Director.

(3) The Director may change the hearing location upon motion of a party, . . . .

(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing location.

49. See *Legaspy v. Fin. Indus. Regul. Auth., Inc.*, No. 20 C 4700, 2020 WL 4696818, at \*3 (N.D. Ill. Aug. 13, 2020), for discussion surrounding whether an in-person hearing could even be rescheduled as a remote hearing.

50. See *Dispute Resolution Statistics*, *supra* note 18.

Year:	All Cases	“Regular” Hearings	Special Proceeding	Paper Case
2022 (as of May)	18%	16%	1%	2%
2021	15%	12%	1%	2%
2020	13%	9%	0%	3%
2019	16%	13%	0%	2%
2018	17%	14%	N/A	4%

**Table 1:** Percentage of FINRA Arbitration Filings Decided by Arbitrators<sup>51</sup> (as opposed to resolved after direct settlement or mediation, or withdrawn)

As the table shows, historically, FINRA arbitrators decided only about fifteen to eighteen percent of cases closed during any given year. The remaining cases were settled either through negotiation or mediation (around seventy percent), or withdrawn. In contrast, in 2020, the percentage of FINRA arbitrations decided by arbitrators dipped to thirteen percent, likely a pandemic anomaly, climbed back a little in 2021 to fifteen percent, and recovered to pre-pandemic levels by mid-2022.

The next section explores how FINRA arbitration hearings proceeded during the pandemic, especially in the early days when the country was shut down and virtually no indoor, in-person activities took place.

### III. FINRA ARBITRATION DURING COVID

When the COVID-19 pandemic began, FINRA DRS (along with all other arbitration services providers) had to wrangle with the difficult issue of how to hold arbitration hearings that were supposed to be in person during a public health emergency.

#### A. The Shutdown

In early March of 2020, when most of the country shut down, FINRA administratively postponed all hearings until May 1 (with

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51. *See id.*

all other case-related deadlines remaining in place), then until May 31, and then again through the end of July 2020.<sup>52</sup> At the end of summer 2020, FINRA optimistically announced that “if all parties and arbitrators agree to proceed in-person based on their own assessment of public health conditions, the case may proceed provided that the in-person hearing participants comply with all applicable state and local orders related to the COVID-19 pandemic.”<sup>53</sup> FINRA provided guidelines it would follow to determine when it might be safe to resume in-person hearings, procedures for the parties to follow before a hearing would be held in person, and safety protocols to follow once in-person hearings resumed.<sup>54</sup>

However, as the pandemic wore on through the latter half of 2020 and into 2021, every few months FINRA extended the postponement, unless the parties stipulated to proceed telephonically or by Zoom or the panel ordered hearings to take place telephonically or by Zoom. Ultimately, the postponement extended through the summer of 2021.<sup>55</sup> For those cases that did not pivot to remote hearings, in-person hearings resumed in some locations in July 2021, and in all locations by August 2, 2021.<sup>56</sup>

For the first sixteen months of the pandemic, health and safety considerations eliminated in-person FINRA DRS activity.<sup>57</sup> All pre-hearing activities went forward, such as pre-hearing conferences (which took place on the telephone even pre-COVID), dispositive motion practice, and discovery, as those activities did

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52. George H. Friedman, *FINRA ODR In-Person Hearings Postponed Again, and AAA Follows Suit. Have We Seen the First FINRA Award with a Virus-Related Virtual Hearing?*, SEC. ARB. ALERT (Apr. 27, 2020), <https://www.secarbalert.com/blog/finra-odr-in-person-hearings-postponed-again-and-aaa-follows-suit-have-we-seen-the-first-finra-award-with-a-virus-related-virtual-hearing/>; *Coronavirus Update (March 30)*, SEC. ARB. ALERT (Mar. 30, 2020), <https://www.secarbalert.com/blog/coronavirus-update-march-30/>; *Coronavirus News on SCOTUS & Arbitration*, SEC. ARB. ALERT (Mar. 17, 2020), <https://www.secarbalert.com/blog/coronavirus-news-on-scotus-arbitration/>.

53. *FINRA DRS Postpones In-Person Hearings Through December 4, but Posts Info on Reopening Plans*, SEC. ARB. ALERT 2020-34 (Sept. 11, 2020), <https://www.secarbalert.com/blog/finra-drs-postpones-in-person-hearings-through-beginning-of-april/>.

54. *Id.*

55. *FINRA Dispute Resolution Services and FINRA News*, 4 THE NEUTRAL CORNER, 2020, at 9 (noting how FINRA waived all postponement fees when parties stipulated to postpone in-person hearing dates).

56. *Coronavirus Impact on Arbitration and Mediation Hearings*, FINRA, <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation> (last visited Nov. 14, 2022).

57. *FINRA Dispute Resolution Services and FINRA News*, *supra* note 55, at 9.

not need in-person meetings.<sup>58</sup> Thus, even during the period of administrative postponement of hearings, many arbitration filings moved their way through the process.<sup>59</sup>

### B. Virtual Hearings During the Pandemic

During the COVID postponement period, some parties were willing to proceed with their hearings via videoconference.<sup>60</sup> In fact, since FINRA first postponed in-person hearings in March 2020, and as of the end of June 2022, parties filed 620 total joint motions for virtual hearings (263 in customer cases and 357 in industry cases).<sup>61</sup> As a result, FINRA rapidly rolled out guides for arbitrators on how to conduct hearings on Zoom<sup>62</sup> as well as training videos for virtual hearings.<sup>63</sup>

However, some disputants disagreed about whether to proceed on Zoom for the merits hearing. Parties reluctant to proceed on Zoom argued that a plain reading of Rules 12600/13600 is that FINRA guarantees an *in-person* hearing for all non-Simplified, non-default cases.<sup>64</sup> Parties also argued that FINRA arbitrators do not have the authority to mandate that parties proceed with a merits hearing on Zoom (i.e., the hearing “location” is on Zoom).<sup>65</sup> While the language of the relevant Code provision suggests that arbitrators should conduct all non-Simplified hearings in person, at least two lower courts have held that FINRA has the power to order remote hearings pursuant to Rule 12213.<sup>66</sup>

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58. Blankley, *supra* note 6, at 33.

59. For a thoughtful discussion of FINRA DRS’s response to the pandemic, see *id.*

60. For purposes of full disclosure, the author was a panelist on one of the first FINRA arbitrations to proceed with one hearing session remotely due to the onset of the pandemic in early March 2020. All parties and arbitrators consented to the remote hearing session. See *Dominick & Dickerman, LLC v. Wunderlich Securities, Inc.*, FINRA No. 17-01930 (April 7, 2020) (Hollyer, Gross & Finard, Arbs.) (reporting hearing session on Zoom).

61. *Dispute Resolution Statistics*, *supra* note 18.

62. *Arbitrator Resource Guide for Virtual Hearings*, FINRA, <https://www.finra.org/arbitration-mediation/case-guidance-resources/arbitrator-resource-guide-virtual-hearings> (last visited Nov. 14, 2022).

63. *Arbitrator Training Videos for Virtual Hearings*, FINRA, <https://www.finra.org/arbitration-mediation/case-guidance-resources/virtual-hearings-videos> (last visited Nov. 14, 2022).

64. See *supra* notes 35–44 and accompanying text.

65. See *Legaspy v. Fin. Indus. Regul. Auth., Inc.*, No. 20 C 4700, 2020 WL 4696818, at \*3 (N.D. Ill. Aug. 13, 2020).

66. See *Cristo v. Charles Schwab Corp.*, No. 17-CV-1843-GPC-MDD, 2021 WL 2633624, at \*3 (S.D. Cal. June 25, 2021) (stating that “FINRA Rule 12213(a) gives FINRA the authority to determine the hearing location”); see also *Legaspy*, 2020 WL 4696818, at \*4

As a result, some parties filed a “contested motion” for a Zoom hearing. If the arbitration panel ordered the parties to proceed on Zoom, then parties would be compelled to prove or defend their merits case remotely. As shown in Table 2 below, 582 arbitration cases were subject to a contested motion for a virtual arbitration hearing (414 of which were in a customer case, whereas only 168 were in an intra-industry case). In cases already decided, panels granted sixty-five percent of the contested motions (sixty-two percent in customer cases and seventy-four percent in industry cases).

<b>Contested Motions for Virtual Hearings</b>	<b>Granted</b>	<b>Denied</b>	<b>Open</b>	<b>Total</b>
Customer	252 (62%)	155 (38%)	7	414
Intra- Industry	123 (74%)	43 (26%)	2	168
<b>Total Customer &amp; Intra-Industry</b>	<b>375 (65%)</b>	<b>198 (35%)</b>	<b>9</b>	<b>582</b>

Table 2: FINRA DRS Contested Motions for Virtual Hearings<sup>67</sup> March 2020–June 2022

These statistics suggest that parties in intra-industry cases are more willing to agree to proceed virtually than in customer cases, whereas in many cases, industry parties had to file motions to compel customer parties to proceed virtually. While it is hard to know why this is, the fact that many intra-industry cases are simple collection actions on a promissory note could explain why parties in intra-industry cases were more agreeable to proceeding on Zoom.

The next Part explores whether parties benefit or are harmed when merits hearings proceed on videoconference.

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(refusing to issue injunction precluding FINRA from administering arbitration hearing remotely); see also Schmitz, *supra* note 9, at 277–88 (discussing *Legaspy*).

67. *Dispute Resolution Statistics*, *supra* note 18.

### C. Pros and Cons of Zoom Arbitration

Overall, since the beginning of the pandemic and through the end of June 2022, whether on consent or by order of the panel, 850 arbitration cases have conducted one or more hearings via Zoom (356 customer cases and 494 intra-industry cases).<sup>68</sup> Because there is no consensus as to whether arbitration hearings on Zoom provide parties with access to justice equivalent to what was available pre-pandemic, this Part explores the pros and cons of Zoom arbitration.

As a preliminary matter, in the first year of the pandemic, the alternative to a Zoom arbitration would have been months and perhaps even years of adjournment. Starting in mid-2021, the alternative would have been either continued delay or proceeding in person—if allowed by local health authorities. Even if allowed, in-person hearings in some locations would have included mandatory face coverings on all participants, which limits the arbitrators' ability to observe facial expressions of testifying witnesses.<sup>69</sup> When considering the pros and cons of Zoom arbitration, it is important to note that these alternatives (postponing indefinitely or proceeding in person with COVID protocols in place) also had significant disadvantages to the parties.

#### 1. *Advantages of Zoom Arbitration During the Pandemic*

Observers and lawyers have noted some advantages to Zoom arbitration hearings. By proceeding on Zoom, parties are able to move their cases forward and maintain the expediency of arbitration.<sup>70</sup> Indeed, if FINRA DR had not offered disputants the virtual hearing alternative, extended hearing adjournments of more than one year due to COVID-19 would have converted a

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68. *Id.*

69. For a listing of which states had mask requirements during the pandemic and when they were lifted, see Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. NEWS & WORLD REP. (Mar. 28, 2022), <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates>.

70. See Richard Bales, *Zoom vs. In-Person Arbitration Hearings*, A.B.A. (June 3, 2021), [https://www.americanbar.org/groups/labor\\_law/publications/labor\\_employment\\_law\\_news/winter-spring-2021-issue/zoom-vs-inperson/](https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/winter-spring-2021-issue/zoom-vs-inperson/) (listing the convenience and practicalities of the online arbitration format).

dispute resolution mechanism that is supposed to be speedy and efficient into a protracted, unwieldy process.<sup>71</sup>

In addition, proceeding on Zoom saves time and expenses of the parties, witnesses and lawyers, as none of them need to travel to a hearing location that could be far away.<sup>72</sup> Parties can join Zoom from either their home or their lawyer's office; likewise, lawyers can join from their office or residence. Witnesses do not have to be inconvenienced or waste time waiting for their turn to testify in a common area at the hearing location. Moreover, witnesses who have spent an unreasonable amount of time waiting to testify will likely be more annoyed when they are finally called to testify.<sup>73</sup> Instead, they just log on to Zoom from wherever they are when the panel is ready to take their testimony. Parties, particularly the elderly or disabled who cannot travel to an in-person hearing location, gain access to the hearing. Overall, all participants can spend less time at the hearing as they need be available only for a shorter window of time.

The videoconference format also can ease non-lawyer participant apprehensions about the formality of hearings. A hearing on screen is less likely to be intimidating to a party unfamiliar with legal proceedings or skittish about appearing in a quasi-legal forum. In addition, all participants can practice using the technology in advance of the hearing, leading to a greater sense of comfort and breeding familiarity.<sup>74</sup> Some lawyers believe it is easier to handle documentary evidence when presenting a case on Zoom.<sup>75</sup> FINRA staff members act as the host of the hearing, so they can more readily join any hearing session and offer

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71. *But see* Horton, *supra* note 13, at 7 (questioning the view that Zoom arbitration reduced costs and increased efficiencies and stating that, “although some commentators argue that eliminating the time and hassle of in person hearings is an ‘efficiency bonanza,’ my data is inconclusive”).

72. Bales, *supra* note 70.

73. *See* Blankley, *supra* note 6, at 42 (discussing how virtual arbitration “may ease or eliminate the problems associated with witnesses’ [availability, or] unavailability” to testify).

74. *See* P. Jean Baker, *Utilizing Virtual Arbitration During the Pandemic*, A.B.A. (May 26, 2020), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/articles/2020/spring2020-utilizing-virtual-arbitration-during-the-pandemic/> (advising arbitrators to discuss a number of key issues with the parties, including technical issues and logistics, prior to embarking on a virtual arbitration).

75. *Zoom Arbitration One Year Later: Lessons Learned, Tips for Practitioners and the Road Ahead*, FINRA (May 18, 2021), <https://www.finra.org/media-center/finra-unsigned/zoom-arbitration> [hereinafter FINRA Unscripted].

administrative support to the arbitrators.<sup>76</sup> In turn, arbitrators are more incentivized to be engaged in the hearing, as it is easily noticeable by FINRA staff and counsel when a participant on screen is not paying attention.<sup>77</sup>

Finally, counsel will have an easier time securing the voluntary appearance and testimony of out-of-state witnesses, including experts who otherwise would not be able to appear due to the geographic distances.<sup>78</sup> Indeed, the elimination of travel to the hearing location and the decreased need to print and use as many hard copies of documents means that Zoom arbitration has a lower carbon footprint than in-person hearings.<sup>79</sup>

At least one survey of participants' experiences with FINRA Zoom arbitration confirms some of these advantages. At the end of 2021, FINRA DRS' Zoom Task Force ("ZTF") surveyed arbitrators and participants about their experiences with Zoom hearings.<sup>80</sup> The ZTF sought feedback about their overall satisfaction with Zoom hearings as well as their support for conducting prehearing conferences by Zoom. The ZTF surveyed arbitrators and participants who had at least one Zoom hearing from March 2020 through August 2021 and received responses from 492 arbitrators and 117 participants.<sup>81</sup>

The responses were very positive. A stunning ninety-one percent of arbitrators reported an "exceptional" or "good" experience with Zoom hearings, nine percent reported a

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76. See *Arbitrator Resource Guide for Virtual Hearings*, *supra* note 62 ("If an arbitrator chooses to retain the Host function, a FINRA staff member will be available during the virtual hearing for technical support."); see also Blankley, *supra* note 6, at 39.

77. See *Arbitrator Resource Guide for Virtual Hearings*, *supra* note 62 (listing "effective practices" that arbitrators should follow for a successful virtual hearing).

78. See Henry R. Chalmers, *Arbitrating in the Age of Zoom*, A.B.A. (Aug. 2, 2020), <https://www.americanbar.org/groups/litigation/committees/corporate-counsel/practice/2020/arbitrating-in-the-age-of-zoom/> (recommending virtual hearings when coordinating travel schedules for out-of-state parties, attorneys, witnesses, or arbitrators).

79. Chiraag Shah & Stephanie Pong, *Remote Hearings: The New Normal for Greener Arbitration?*, THOMSON REUTERS: PRAC. L. ARB. BLOG (Dec. 3, 2021), <http://arbitrationblog.practicalaw.com/remote-hearings-the-new-normal-for-greener-arbitration/>; see also Joe Tirado, *Remote Hearings: A New Dawn or a Reawakening?*, ADR TIMES (Dec. 20, 2021), <https://www.adrtimes.com/remote-hearings/> ("[T]he move to virtual or remote hearings ha[s] considerable benefits in terms of convenience, cost, environment, and the administration of justice.").

80. Shannon Bond, *Pilot Program: Pre-Hearing Conferences by Zoom*, 1 THE NEUTRAL CORNER, 2022, at 1 (reporting results of FINRA's Zoom Task Force Survey); see Iannarone, *supra* note 30, at 410–12 (explaining the formation and work of the Zoom Task Force).

81. Bond, *supra* note 80, at 1.



“satisfactory” experience, and less than one percent reported an “unsatisfactory” experience.<sup>82</sup> A similar, although not quite as strong a percentage of participants reported an “exceptional” or “good” experience (seventy-four percent), fifteen percent reported a “satisfactory” experience, and twelve percent reported an “unsatisfactory” experience.<sup>83</sup> Similar positive levels of satisfaction were reported by both arbitrators and participants with DRS staff support of Zoom hearings.<sup>84</sup> And, when asked, both arbitrators and participants expressed strong interest in expanding the use of Zoom for both the initial pre-hearing conference with the panel and subsequent discovery conferences with the Chair.<sup>85</sup>

## 2. *Disadvantages of Zoom Arbitration During the Pandemic*

Arbitrating a case at FINRA DRS on Zoom also has drawbacks relative to in-person hearings.<sup>86</sup> First, all participants have a “learning curve” to get used to the videoconference platform, examining witnesses remotely, and introducing documents on a screen.<sup>87</sup> This was especially true early in the pandemic, when Zoom was still very new to many people.<sup>88</sup>

In addition, there can be little doubt that overuse of Zoom during the heart of the pandemic led to “Zoom fatigue.”<sup>89</sup> People in general became weary using Zoom for most of the day, and this led to eye strain, attention deficits, and overall impatience with the format.<sup>90</sup> It certainly can be challenging for anyone, including arbitrators, to maintain the requisite level of attention and concentration during a Zoom hearing. Thus, more breaks may be needed, slowing down the hearings. If the arbitrators do not set

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See generally Miriam Rozen, *Lawyers Just Say ‘No’ to Zoom for FINRA Arbitration Hearings*, ADVISORHUB (Aug. 31, 2021), <https://www.advisorhub.com/lawyers-just-say-no-to-zoom-for-finra-arbitration-hearings/> (cataloguing reasons lawyers do not like FINRA arbitration hearings on Zoom).

87. FINRA Unscripted, *supra* note 75. The “learning curve” hypothesis is supported by some of the customer “win rate” data during the early months of the pandemic. See *infra* note 101 and accompanying text.

88. *Id.*

89. JEREMY N. BAIENSON, *NON-VERBAL OVERLOAD: A THEORETICAL ARGUMENT FOR THE CAUSES OF ZOOM FATIGUE* 5 (2021); Liz Fosslien & Mollie West Duffy, *How to Combat Zoom Fatigue*, HARV. BUS. REV. (Apr. 29, 2020), <https://hbr.org/2020/04/how-to-combat-zoom-fatigue>.

90. See BAIENSON, *supra* note 89, at 2–5.

ground rules, parties and/or arbitrators may turn their cameras off during portions of the hearing.<sup>91</sup>

Attorney-client communications are also more challenging, unless the attorney is in the same room with the client.<sup>92</sup> Parties without experience or sophistication in using the technology may also be intimidated or outright disadvantaged. Also, parties without reliable technology or WiFi may have limited access to Zoom. Participants may be concerned about confidentiality and/or privacy, with the risk of strangers hacking into or “Zoombombing” a hearing.<sup>93</sup>

Additionally, it might be more challenging to assess a witness’s credibility from Zoom testimony, as most body language as well as other non-verbal cues are not visible or perceptible.<sup>94</sup> It may also be more challenging to work with and present documentary evidence digitally, rather than having it handed to you in a neat and organized binder through which one can flip easily.<sup>95</sup> During testimony, unlike in person, Zoom will only convey one person speaking at a time, and the Zoom platform will silence the speaker who is interrupted.<sup>96</sup> While interruptions are disfavored, of course, the act of interrupting has a “chilling effect” more pronounced than in person, when more than one person can speak at a time.<sup>97</sup> As a result, it may be more difficult to prove a case on Zoom.

Finally, by proceeding remotely, arbitrators may lose the ability to compel unwilling third party witnesses to testify, as section 7 of the FAA gives arbitrators subpoena power over third parties to appear only “before them.”<sup>98</sup> Some courts have held that

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91. INT’L CTR. FOR DISP. RESOL., AM. ARB. ASS’N, VIRTUAL HEARING GUIDE FOR ARBITRATORS AND PARTIES 3 (2021) (urging arbitrators to document and communicate any ground rules, such as camera use, in advance).

92. See FINRA Unscripted, *supra* note 75.

93. Taylor Lorenz, *Zoombombing: When Video Conferences Go Wrong*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html>.

94. See Kayla Higgins, *Zoom Arbitrations: The Good, the Bad, and the Leveling Effect*, CORR CRONIN LLP (Dec. 22, 2020), <https://www.correronin.com/2020/12/22/zoom-arbitrations-the-good-the-bad-and-the-leveling-effect/>; Bales, *supra* note 70 (noting how an in-person format makes it easier for advocates to “read the room” and pick up on nonverbal cues).

95. See Bales, *supra* note 70 (mentioning how exchanging electronic copies of exhibits “may make it more difficult for advocates to adjust their strategy on the fly”).

96. See *id.*

97. See *id.*

98. 9 U.S.C. § 7 (“The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of

Zoom hearings do not qualify under this section, as the witnesses are not technically appearing in person “before them.”<sup>99</sup> As long as this legal issue is left unsettled, uncertainty and litigation challenges will interfere with the expediency of the process.

Ultimately, however, none of these disadvantages really matter in the end if they do not impede substantive and procedural justice. On the other hand, if Zoom arbitration leads to consistently worse outcomes for those forced into the process, then distributive justice in remote arbitration may be unattainable, and the videoconference format should be eliminated when the FINRA Codes would have called for in-person hearings. The next section explores whether there is any evidence that Zoom arbitration at FINRA does in fact impact justice.

#### IV. ARBITRATION AWARDS DURING PANDEMIC

##### A. Previous Empirical Studies

Scholars largely agree that arbitration awards are not good sources of data to study whether outcomes provide distributive justice because awards do not typically include any legal reasoning or explanation of outcomes.<sup>100</sup> That being said, a few researchers

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them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”)

99. See *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.”); see also *Schottenstein v. J.P. Morgan Sec., LLC*, No. 21-CV-20521, 2022 WL 1450026, at \*3 (S.D. Fla. May 9, 2022) (confirming FINRA award and denying motion to vacate on grounds that, *inter alia*, arbitrators had reasonable ground to grant request for videoconference arbitration rather than postpone the hearing indefinitely, even though losing party was not able to subpoena third parties to testify as a result). See generally *Schmitz*, *supra* note 9, at 263–64 (discussing issue); Latoya C. Brown, *Bad Law or Just Bad Timing?: Post-Pandemic Implications of Managed Care Advisory Group LLC v. CIGNA Healthcare, Inc.’s Ban on the Use of Virtual Technology for Taking Non-Party Evidence Under Section 7 of the Federal Arbitration Act*, 75 U. MIA. L. REV. 1037, 1041–42 (2021). But see *Moyett v. Lugo-Sánchez*, 321 F. Supp. 3d 263, 267 (D.P.R. 2018) (pre-COVID, enforcing third party subpoena in FINRA arbitration under § 7 of the FAA even though arbitrators were sitting in Puerto Rico while participating in Georgia through videoconferencing).

100. Gross & Black, *supra* note 17, at 355–56. Indeed, there is little consensus in the securities industry as to how to define a “win” for purposes of measuring justice in outcomes. See Charlotte S. Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1699–700 (2021); see also Gross & Black, *supra* note 17, at 391–93 (discussing difficulty of interpreting FINRA customer “win” rates). The Supreme Court has long held that “[a]rbitrators have no obligation to the court to give

have published empirical analyses of arbitration awards during the pandemic, attempting to discern some meaning from them. For example, one empirical study demonstrated that, during the first year of FINRA remote hearings, customers recovered less frequently and for a lower percentage of damages claimed than in previous years when hearings were held in person.<sup>101</sup> However, this study included awards that resulted from the kinds of dispositions that do not require an in-person hearing, such as those from a dispositive motion or an expungement claim.<sup>102</sup> Thus, the awards studied were not a representative sample and it is difficult to draw any conclusions about the results.

Professor David Horton studied the outcomes of Zoom arbitration in four different forums (FINRA, JAMS, Kaiser, and AAA) from the summer of 2020 to the fall of 2021. His analysis concluded that “forced remote arbitration” results in what he terms the “remote penalty”—statistically significant worse outcomes for plaintiffs arbitrating the merits hearing via videoconference as opposed to in-person.<sup>103</sup> He also included pre-pandemic awards from July 1, 2019, through October 31, 2021, in his analysis. His study showed that, for cases with at least one Zoom hearing, plaintiffs’ “mean win rate,”<sup>104</sup> “average success rate,”<sup>105</sup> and the “mean total damages conditional on a win”<sup>106</sup> were

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their reasons for an award.” See *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

101. Craig McCann & Chuan Qin, *The Impact of Zoom on FINRA Arbitration Hearings*, SLCG (Feb. 2021), <https://www.slcg.com/pdf/sampleresults/Impact%20of%20Zoom%20on%20FINRA%20Claims%20Final.pdf>.

102. According to FINRA, “[e]xpungement, as an extraordinary remedy, should be recommended only in circumstances in accordance with FINRA rules to remove clearly inaccurate customer dispute information from the record of an individual broker that is associated with a broker-dealer firm.” *Expungement of Customer Dispute Information*, FINRA, <https://www.finra.org/rules-guidance/key-topics/expungement> (last visited Nov. 14, 2022) (describing expungement process).

103. David Horton, *supra* note 13 (manuscript at 1) (“[P]laintiffs who participated in virtual proceedings generally won less often and recovered lower damage awards than individuals who arbitrated in person. This ‘remote penalty’ exists in some settings even after controlling for variables such as claim type, pro se status, and the experience of the defendant, the lawyers, and the arbitrators.”).

104. Horton defined “win” as “a case in which the plaintiff obtains either \$1 or more in damages or equitable relief.” *Id.* (manuscript at 25). As Horton concedes, “[t]his crude metric deems nominal recoveries to be victories.” *Id.*

105. Horton defines “success rate” as “the sum of total damages divided by the claim amount.” *Id.* (manuscript at 26).

106. This final metric “isolates the discrete issue of how plaintiffs perform *when* they win.” *Id.*

all higher for in-person as opposed to remote or document-only merits hearings. And each of the differences was statistically significant.

However, for FINRA arbitration, Horton's study included all FINRA awards where an individual was the claimant, regardless of whether the individual was a customer or employee of a broker-dealer.<sup>107</sup> Below, because I am most concerned about justice in arbitration for investors who are required to arbitrate their disputes,<sup>108</sup> I focus on outcomes in cases where only customers (investors) were claimants and do not include intra-industry employment disputes.

#### B. More Recent Empirical Data Showing Impact of the Pandemic on Customer Win Rates

I have examined more recent and comprehensive data from FINRA representing not just the first few months of the pandemic, but a broader time period after FINRA introduced the option of one hundred percent remote hearings. That examination, which focused on customer arbitrations only, yielded some instructive results.<sup>109</sup>

Table 3 below shows customers' "win rates" in arbitrations over the past five years, broken down by type of hearing: regular in-person, pursuant to the special proceeding rules, and document-only cases.<sup>110</sup> FINRA defines a customer "win" as any award in which the arbitrators awarded at least one dollar in damages to a customer of a broker-dealer.<sup>111</sup>

As Table 3 shows, at FINRA, before the pandemic, customer "win" rates hovered between forty percent and forty-five percent

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107. *Id.* (manuscript at 25).

108. Industry employees are also required to arbitrate disputes with their employers, but those employees choose to work in the industry. *Arbitration Overview*, FINRA, <https://www.finra.org/arbitration-mediation/arbitration-overview> (last visited Nov. 14, 2022).

109. FINRA provides more data regarding customer arbitration because of its investor protection mission, *On the Front Lines of Investor Protection*, FINRA, <https://www.finra.org/rules-guidance/enforcement/customer-cooperation> (last visited Nov. 14, 2022), so it is more fruitful to study that data as opposed to outcomes from intra-industry arbitration.

110. All of the data in the table is drawn from *Dispute Resolution Statistics*, *supra* note 18.

111. See *Dispute Resolution Statistics: Results of Customer Claimant Arbitration Award Cases*, FINRA, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics> (last visited Nov. 14, 2022).

annually. In 2020 and 2021, for all customer cases that led to an award, those rates declined substantially to thirty-two and thirty-one percent respectively. The win rate measured thirty-five percent as of mid-2022.

<b>Year</b>	<b>“Regular” Process</b>	<b>Special Proceeding</b> [in effect Sept. 2018]	<b>Docs. Only</b>	<b>All Hearing Types</b>
2022 [through June 30]	37%	36%	26%	35%
2021	37%	13%	19%	31%
2020	34%	20%	29%	32%
2019	45%	13%	48%	45%
2018	42%		35%	40%
2017	45%		36%	42%
2016	42%		38%	41%

Table 3: Customer “Win” Rates When Case Decided by Arbitrators [includes cases dismissed prior to merits hearing]

Clearly, the pandemic adversely impacted outcomes in FINRA customer arbitration. The “win” rate for all arbitration cases decided by arbitrators, whether by pre-hearing dismissal or after a hearing on the merits, declined by thirteen percentage points (forty-five percent to thirty-two percent). Even as the rate recovered slightly midway through 2022 (back to thirty-five percent), it still shows a ten-point decline since 2019. This is even more striking given that the rate remained steady for many years between forty percent and forty-five percent.<sup>112</sup>

Though it is difficult to draw any conclusions about the steep decline in customer win rates during the pandemic, several theories exist. One explanation is crass, but possible: when people were dying of COVID-19, it was hard for arbitrators to have sympathy for investors who invested money in securities. While it seems unlikely, one cannot underestimate the impact of the grim mood of the country in 2020 and early 2021.

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112. See Gross & Black, *supra* note 17, at 392 (discussing win rates in this range in the first decade of the 2000s).

Another (and far more reasonable) explanation for the lower customer win rate is that many more cases in that time frame resulted in awards based on dismissals than based on merits hearings. And because dismissals are against the claimant, the overall win rate would be dragged down lower by cases that ended up dismissed by arbitrators moving through the system at a faster rate during the pandemic than those decided after a merits hearing. In other words, the percentage is more heavily weighted by pre-hearing dismissals—which are, by definition, a loss for the claimant—than pre-pandemic.

A third theory, explored below, is that arbitration hearings on videoconference are indeed inferior to hearings in person.

### C. The Impact of Zoom

The data reported above does not speak to whether a Zoom hearing impacted the win rate, which is the primary focus of this Article. Fortunately, FINRA has broken down the win rates further to consider the impact of hearings on Zoom since the pandemic made them more common.<sup>113</sup> As Table 4 below shows, in cases with at least one evidentiary hearing on Zoom, the win rates for customers in 2020 and 2021 were forty percent and forty-four percent, respectively. After the first six months of 2022, that number climbed up a little more to forty-five percent. In cases with all in-person hearings, the win rates were fifty percent and forty-eight percent in 2020 and 2021, respectively. After the first six months of 2022, that number declined to forty-six percent.

	<b>At least one Zoom session</b>	<b>All In-Person</b>
2022 [through June 30]	45%	46%
2021	44%	48%
2020 <sup>114</sup>	40%	50%

Table 4: Customer “Win” Rates after a Hearing

113. See *Dispute Resolution Statistics: Results of Customer Claimant Arbitration Award Cases*, *supra* note 111.

114. 2020 data includes January, February and early March outcomes, before the shutdown. See *Dispute Resolution Statistics*, *supra* note 18.

This data shows a smaller discrepancy in win rates for customers when at least one hearing session proceeded on Zoom as compared to when all hearing sessions proceeded in-person.

Second, as the pandemic wore on, the customer “win” rate in in-person hearings declined by four percentage points. Inversely, the customer “win” rate in cases where at least one session was held on Zoom increased by five percentage points. Thus, the so-called “remote penalty” on customers on Zoom narrowed to the point where it essentially ceases to be significant. And, as noted above, a far larger (and more concerning) discrepancy (ten or more percentage points) exists between customer win rates for all cases that proceeded to a merits hearing during the pandemic as opposed to pre-pandemic, regardless of hearing modality. The next section explores what this data means for FINRA arbitration.

#### V. *DOES ZOOM ARBITRATION PROVIDE ACCESS TO JUSTICE?*

As shown above, since the pandemic caused FINRA to pivot to videoconference for many merits hearings, customers who proceeded with their FINRA arbitration hearing with at least one session on Zoom prevailed at a lower rate than customers who proceeded with their merits hearing entirely in-person.<sup>115</sup> This “win rate” gap was larger earlier in the pandemic and narrowed significantly by the midpoint of 2022.<sup>116</sup>

Why was there a meaningful gap in customer win rates during the pandemic? The only difference between an in-person and Zoom arbitration is the modality of the hearing, so theoretically at least, all else is the same. The procedural rules are the same, the parties, witnesses, and arbitrators are the same, and the substantive law that applies is the same. Is this a “remote penalty” in FINRA customer arbitration? This Part explores possible answers to these questions and identifies three categories of possible explanations: the Zoom format itself; psychological factors; and external forces.

##### A. Zoom Format

The use of Zoom itself may very well contribute to lower win rates for customer claimants in FINRA customer arbitration. As

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115. *Id.*

116. *Id.*



discussed above in Part III, the Zoom modality has some disadvantages for attorneys representing customers. Advocating for a client on Zoom may very well be harder. It may be harder to prove the merits of a claim on Zoom due to the pressures of what others have called “speed-lawyering.”<sup>117</sup> The so-called “burden of coordination” of the additional technological and organizational logistics falls on the advocates.<sup>118</sup> Lawyers lamented the steep learning curve, especially in the earlier months of the pandemic.<sup>119</sup> Indeed, the fact that the difference in win rates significantly narrowed later in the pandemic strongly supports this theory, as lawyers became more adept at Zoom and mounted the learning curve.

The Zoom format may also make it harder for arbitrators to rule in favor of the claimant, who, of course, has the burden of proof. On Zoom, it is easier for arbitrators to lose focus and harder for claimants to tell a persuasive story or narrative entitling them to relief. In addition, the dynamics of arbitrator deliberations may be different when panelists deliberate on Zoom rather than in the hearing room together.<sup>120</sup> Arguably, the equities of a claim are harder to convey and perceive via a screen.<sup>121</sup>

Finally, precisely because the participants are not physically together, lawyers are less likely to have organic, “hallway” settlement discussions, possibly leading to fewer settlements “on the courthouse steps” in cases that are hard to prove to a panel, but pre-COVID may have settled. Since it is not as costly to proceed with a hearing on Zoom as opposed to in-person, the claimant’s view of the settlement value may be higher.

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117. See, e.g., Higgins, *supra* note 94 (“Zoom makes everything in a hearing go a little faster, which highlights the need for aggressive representation and lawyers who can think quickly on their feet.”).

118. The term “adaptive advocacy” has been used to describe the changes and adjustments lawyers had to make to advocate for their clients in a new setting during a period of rapid change. FINRA Unscripted, *supra* note 75.

119. *Id.*

120. On the other hand, it is not clear that arbitrators deliberated in person even after an in-person hearing concluded. Rather, pre-pandemic, some may have gone home, waited for post-hearing submissions, and then called each other on the phone to deliberate. As a result, this may not be a big factor.

121. Equitable considerations are an important component of arbitrator decision-making. See Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 *FORDHAM L. REV.* 2319, 2320 (2020) (explaining that arbitration “uses streamlined procedures to reach an outcome based on principles of law, equity, custom, and practices unique to a particular industry”).

These factors all attributable to the Zoom format could all collectively explain the lower “win rate” for customers.

### B. Self-Selection/Confirmation Bias

Confirmation bias also plays a role in explaining the “remote penalty” in FINRA customer arbitration. “Confirmation bias refers to our inherent ease in seeing the validity and truth in that which supports our position and difficulty in seeing that which supports the position of our opponent.”<sup>122</sup> If counsel or disputants perceived that proceeding on Zoom was a “lesser” option, then those with strong cases would resist consenting to proceeding on Zoom and would oppose a motion for a Zoom hearing. Since some of those contested motions were denied, the confirmation bias would yield self-identified stronger cases proceeding in person.

In other words, counsel or parties with a “winning” case know it and want to preserve the case for an in-person hearing, to be sure of a win. Conversely, counsel or parties with a suspected “losing” case but who cannot settle the case do not want to “waste” the extra time and money conducting an in-person hearing but can justify shooting their shot on Zoom, when the costs to the client will be lower.

In addition, lawyers learned that less complex cases, such as requests for expungement or cases with little documentary evidence, are more suited for Zoom.<sup>123</sup> Moreover, it is reasonable to infer that *pro se* claimants were more likely to opt for a Zoom hearing if given the choice. These choices could also skew the data. As a result, the unproven belief that Zoom is an inferior modality became a self-fulfilling prophecy.

### C. External Forces

Finally, external forces might have contributed to the “remote penalty.” First, the way in which FINRA gathered the data may

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122. Graham Ward, *Conflict Management by Managing Cognitive Biases*, 98 MICH. BAR J. 32, 33 (2019); see also Leo Bisson, *Decision-Making at Mediation: Psychological Factors Influencing Outcomes*, 45 VT. BAR J. 36, 38 (2019) (“[C]onfirmation bias causes a party to latch onto evidence consistent with their view and ignore evidence to the contrary.”).

123. See Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L.: U.S. L. WEEK (July 30, 2020, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change>.

explain the lower win rates for customers. The empirical studies showing poor outcomes for claimants in FINRA arbitration include results from the spring and summer of 2020 when very few merits hearings went forward.<sup>124</sup> The awards issued in that time were mostly dismissals after a dispositive motion or expungement awards.<sup>125</sup> Most merits hearings were on hold, as parties still were uncertain how long the pandemic would last.

Second, since FINRA groups together all arbitrations as not “in-person” whether there was one session on Zoom or the entire case on Zoom, there is less likely to be a big gap. Cases that proceed mainly in person but with one or two witnesses testifying remotely is, for all practical purposes, the same as an in-person arbitration. So it is not surprising that by 2022, when parties proceeded with a variety of modalities, the remote penalty declined. Indeed, the fact that the win rate gap was larger earlier in the pandemic when virtually no cases proceeded in person in 2020 supports this conclusion.

Moreover, we cannot discount the uncertainty of living through the COVID-19 pandemic. For many Americans, proceeding as “normal” was close to impossible from 2020 to 2022, as lives were shattered, the economy fluctuated, and deep pessimism took hold. Pandemic fatigue was a real phenomenon and cannot be ignored as contributing to anomalous behaviors and outcomes in dispute resolution proceedings in this time period. Indeed, March 2020 through March 2022 was an extremely difficult time for everyone—arbitrators, parties, and lawyers alike.<sup>126</sup> Again, the narrowing gap in win rate by mid-2022 also supports this theory.

In the end, the data reveals the opposite of what I hypothesized: proceeding on Zoom did not appear to significantly impact distributive justice relative to proceeding in-person, and any impact it did have during the pandemic has largely been erased. In my view, the more important question to explore is why customers prevailed in fewer cases during the pandemic as

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124. See *Dispute Resolution Statistics: Results of Customer Claimant Arbitration Award Cases*, *supra* note 111.

125. See *Expungement of Customer Dispute Information*, FINRA, <https://www.finra.org/rules-guidance/key-topics/expungement> (last visited Nov. 14, 2022); see also *2020 Dispute Resolution Statistics*, FINRA, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2020#howcasesclose> (last visited Nov. 14, 2022).

126. FINRA Unscripted, *supra* note 75.

compared to pre-pandemic—regardless of hearing modality. What was it about 2020-22 that led arbitration panels to award damages to customers in a far lower percentage of cases than before the pandemic? Is it something about the state of the country during that time period? Or is it related to the nature of cases that went forward on the merits during those years? Likely we will never know for sure, as it is virtually impossible to draw any conclusions about distributive justice from barebones, unexplained FINRA arbitration awards.<sup>127</sup>

## VI. CONCLUSION: TO ZOOM OR NOT TO ZOOM?

Early in the pandemic, when FINRA started reporting customer arbitration outcomes, it seemed that customers who proceeded with merits hearings on Zoom were prevailing at sharply lower rates than pre-pandemic. As the pandemic wore on, the gap significantly narrowed, and now appears to have been mainly eliminated (i.e., customers win after a merits hearing at the same rate regardless if the hearing is in-person or on Zoom).

Does this mean that video-conferenced arbitration delivers less distributive justice than in-person arbitration? As detailed above, several possible theories explain, at least in part, this discrepancy. But the actual data is inconclusive. And the data does not take into account whether parties perceived that the FINRA arbitration process during the pandemic delivered procedural justice.<sup>128</sup> Did parties believe they had been heard even on Zoom? Without a more thorough examination of whether Zoom arbitration delivers procedural justice, we cannot know whether the process is desirable. Certainly, the work of the ZTF and the planned future adoption of more, rather than less, use of videoconferencing to interact with FINRA arbitrators, as described

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127. W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1095 (2012) (stating that securities arbitration “awards yield no trace of a reasoning process”).

128. See Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RES. 1, 4, 13–15 (2011) (exploring role of procedural justice in arbitration); Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 48 (2010) (positing that “mandatory arbitration diminishes procedural justice because it creates a control imbalance between the parties and because parties who are subjected to it perceive it as unfair”); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004) (theorizing the importance of procedural justice for legitimacy of dispute resolution processes).

by Professor Iannarone during this symposium, suggests that dispute design professionals are forging ahead with or without such studies.<sup>129</sup>

Indeed, the more worrisome discrepancy is the overall decline in win rates for customers regardless of how arbitrators resolved the case: during the heart of the pandemic in 2020 and 2021 it was more than ten percentage points lower than the year pre-pandemic (thirty-two percent versus forty-five percent). In 2022, the gap is a little smaller but still almost ten percentage points lower than the average of the three years pre-pandemic (thirty-five percent versus forty-two percent). So why are customers prevailing less often? Is there something about the pandemic other than Zoom arbitration that resulted in that steep decline? Though beyond the scope of this Article, this to me is the more important question, not whether using Zoom impacted justice. Only time will tell if the FINRA customer win rate recovers from some or all of its significant decline during the COVID-19 pandemic.

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129. See Iannarone, *supra* note 30 (describing FINRA's plans to adopt more virtual features for the arbitration process post-pandemic).