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## Empowering Consumers Through Online Dispute Resolution

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or international arbitration. An expert who provides testimony on which a trier of fact can ultimately rely will likely be given more opportunities to do just that.

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## Empowering Consumers Through Online Dispute Resolution

*By Amy J. Schmitz*

*We transact online every day, hoping that no problems will occur. However, our purchases are not always perfect: goods may not arrive; products may be faulty; expectations may go unmet. When this occurs, we are often left frustrated, with no means for seeking redress. Phone calls to customer service are generally unappealing and ineffective, and traditional face-to-face or judicial processes for asserting claims are impractical after weighing costs against likely recovery. This is especially true when seeking redress requires travel, or for cross-border claims involving jurisdictional complexities. This situation has created a need for online dispute resolution (“ODR”), which brings traditional dispute resolution methods into the digital age. ODR systems that utilize negotiation, mediation and arbitration are paving the way for consumers to access the remedies they crave in the borderless Internet marketplace.*

Our lives are moving online. The ubiquity of technology, accelerated by increasing power and decreasing costs, means that this trend will only accelerate. In the dawn of the digital age, we did not fully trust online transactions and made limited use of the Internet for making purchases. We also were easily frustrated with limited access to the Internet and slow modem connections. It

seemed odd to input credit card information on some website in the hope that transactions would go through and goods or services would be delivered.

That has changed quickly and dramatically. Now, powerful wireless computers in our pockets keep us connected to the Internet 24/7. It is not uncommon for a consumer to wear a “Fitbit” device that tracks their steps and sleep as well as a “smart watch” that allows them to make phone calls, check e-mail and search the Internet. Meanwhile, that same consumer may use a computer at work, carry a cellular phone, and access a tablet – all of which provide lightning fast Internet connections and are deemed “essential” to daily life, work and play.

As a result, we are building a new society for ourselves in cyberspace, as evidenced by the movement of common consumer contracts from the in-person to the online world. This migration is important for the resolution of eCommerce conflicts. Online interactions do not work in the same way as face-to-face interactions. Time, place, and identity are all more fluid online, yet people are just as complicated online as they are in the real world. It may be seemingly easy to automate contract formation, but many of those same contracts will inevitably give rise to disputes. For this new society, we must develop innovative social institutions to resolve online conflicts, just like we have developed in the offline world.

That is the focus of *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, a forthcoming book to be published by the ABA Dispute Resolution Section. Consumers traditionally relied on processes backed by social trust to fairly resolve problems. We would agree to use these processes should something go wrong, and we once backed that agreement up with a handshake. We could rely on that symbol of trust to ensure the fairness of a deal. You could shake the hand of the farmer at the corn stand and rest assured that you could get replacement corn or your money back if the corn was full of worms.

Now we must create parallel processes to support our online interactions and our e-contracts. These processes cannot be tied to the same offline concepts of jurisdiction, location, and enforcement. Consumers making purchases online do not have opportunity to look the merchant in the eye while concluding the deal. We therefore need to

reach a new agreement to underscore social trust in the online world. The design presented in the book, *The New Handshake*, is a first attempt to envision how a system like that could work.

If online commerce is to continue to grow, consumers must be assured that they can work out any problems they encounter quickly and effectively. This is important not only for consumers and consumer advocates but for businesses as well. Businesses have bet billions of dollars on the expansion of eCommerce; as a result, business leaders increasingly recognize their responsibility to provide consumers fast and fair redress when problems inevitably arise. However, businesses are not simply providing this functionality to consumers out of the goodness of their hearts. Data analytics demonstrate clearly that the old zero-sum framings for the buyer-seller relationships are no longer appropriate. Businesses now realize that they must provide effective redress out of self-interest because their future success is contingent upon the development of this social trust.

That is not to say that all ODR is good or fair. It is our responsibility to design ODR systems correctly and fairly. ODR design must be careful to protect due process, with a focus on justice and ethical judgement. This means that ODR must be user-friendly and intuitive. Transparency, safety and external audits are vital. The ODR system envisioned in *The New Handshake* is not simply another merchant-sponsored internal claims system or government website for voicing complaints. Those systems have their place and limitations in scope. Instead, the book proposes an idea for an integrated system that provides consumers with a hub, and one-stop-shop. Consumers would be able to access one site to file and resolve their eCommerce claims quickly and independently, with assurance of security and legitimacy.

The time is right to tackle this challenge. Global eCommerce requires a fast and fair resolution system, and most international organizations around the world now agree that ODR is the best way to provide it. The European Union has already established a hub for ODR. Indeed, ODR is merely the latest iteration of *Lex Mercatoria*, or Merchant Law, the foundation of cross-border redress

for more than a thousand years. *The New Handshake* is the extension of *Lex Mercatoria* into the online consumer sphere. Technology has empowered consumers to transact internationally, opening opportunities for both businesses and consumers. It is obvious that technology must now create redress options for these transactions, much like international arbitration has created redress for cross-border commercial transactions for many years.

The justice system is inevitably in the process of being transformed by technology, but that change is not happening in a vacuum. It is happening because consumers, businesses and regulators demand it. There is no question that this change will occur. The only question that remains is whether it will take 2, 5, or 10 years to fully play out. Once the justice system is transformed, online resolution of issues will become the new normal. It will not be controversial, nor will it be seen as particularly innovative. We probably will not even remember how we used to resolve issues back in the Dark Age before technology was an option. We are quickly moving from the Dark Age to the Digital Age.

*The New Handshake* was designed to begin the conversation, not end it. Now is the time for ODR systems designers, online merchants, payment providers, marketplace administrators, consumer advocates, lawyers, judges, students, and policy makers to work together to build the next generation of consumer protection. The design presented in *The New Handshake* is intended to be a launching point, not an ending point, for that effort.<sup>1</sup>

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<sup>1</sup> The ideas in this note are from the forthcoming book, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, by Amy J. Schmitz and Colin Rule. The book will be published by the ABA Dispute Resolution Section.

# 2017 CALENDAR OF EVENTS

## **October 24 – 27, 2017**

2017 Fall Conference — Section of International Law  
JW Marriott Marquis — Miami, FL

## **April 17 – 21, 2018**

2018 Spring Conference — Section of International Law  
New York, NY

## **May 4 – 11, 2018**

ILEX & Asia Forum  
Jakarta & Singapore

## **June 10 – 12, 2018**

Europe Forum  
Copenhagen, Denmark

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