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**THERE'S AN "APP" FOR THAT: DEVELOPING
ONLINE DISPUTE RESOLUTION TO EMPOWER
ECONOMIC DEVELOPMENT**

AMY J. SCHMITZ*

ABSTRACT

Traditionally, litigation has been the norm for resolving disputes. It takes place in a public forum and face-to-face. In a global economy, however, such public and face-to-face dispute resolution is not feasible. This is especially true with cross-border purchases through e-commerce. E-commerce requires more efficient and less litigious remedy systems that allow consumers to obtain remedies on their purchases without the cost and travel associated with traditional face-to-face procedures. This has led to development of online dispute resolution ("ODR") processes, especially with respect to business-to-consumer contracts. Accordingly, scholarship and policy papers have advanced ODR for the benefit of consumers. What deserves emphasis, however, is promotion of ODR to empower businesses that seek to attract customers globally. Establishment of trusted ODR systems incentivizes consumers to make cross-border purchases because it provides them with the comfort of knowing there is a cheap and easy means for obtaining a remedy if the purchase goes awry. This is especially important to assist businesses in developing nations, where Internet access is expanding through use of smartphones and similar mobile devices. Such mobile access is narrowing the so-called "digital divide" and fostering enthusiasm for building e-commerce, which is imperative for economic development and global integration. ODR can further these efforts by catalyzing consumer trust, and consequently cross-border sales. This article, therefore, encourages growth of global ODR that is accessible through mobile devices as means for increasing access to remedies and trustworthy e-commerce for companies and consumers in developing nations.

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INTRODUCTION

Dispute resolution once relied on face-to-face interactions, such as litigation or traditional arbitration, mediation, or negotiations. Alternative Dispute Resolution (“ADR”) theorists and practitioners assumed that empathy gained from in-person contact is necessary for resolving conflicts. Furthermore, the norm was litigation, as individuals sought to avail their rights in courts of law. Public justice demanded that dispute resolution be done with full transparency. This has especially been true in the United States (“US”), where one’s “day in court” is sacred.

Nonetheless, times have changed, and public courts are no longer the ultimate venue for resolution of disputes. Litigation is simply too expensive. Individuals want real remedies in real time. Time is money. This is especially true for small dollar claims in business-to-consumer contracts. Consumers are not willing to spend the time and money it takes to file a claim in court or arbitration, and travel to a venue for an in-person process. For small-dollar claims, it is even cost prohibitive to seek redress through face-to-face ADR processes such as mediation if one must pay for the mediator’s time and bear costs of travel and time off of work.

Meanwhile, we transact online, we socialize online, and we even see a therapist online.¹ The Pew Research Center (“Pew”) recently did a study of online shopping and e-commerce and found tremendous growth in the way our commercial behaviors have changed.² Surveys of US consumers in 2015 indicated that Americans were spending nearly \$350 billion annually online, and seventy-nine percent of Americans indicated that they make purchases online.³ Additionally, roughly half of Americans reported making online purchases using their cell phones, including purchases on social media sites such as Facebook or Twitter.⁴ Moreover, there is no doubt that these percentages have grown since 2015.

That said, we continue to express fear regarding trustworthiness of online sellers. It is very important to consumers that they can trust the merchants that sell on these e-commerce websites.⁵ Concern for trustworthiness has fueled the growth of e-commerce sites such as Amazon and eBay. This is due in large part to their development of online means for quickly and securely resolving purchase disputes, otherwise known as Online Dispute Resolution or “ODR.”⁶ ODR includes automated decision-making and online negotiation, mediation, arbitration, or community courts. It also includes variations on these

1. See, e.g., TALK SPACE, Talkspace.com (last visited Aug. 29, 2017).

2. AARON SMITH & MONICA ANDERSON, PEW RES. CTR., ONLINE SHOPPING AND E-COMMERCE 1–14 (2016), available at <http://www.pewinternet.org/2016/12/19/online-shopping-and-e-commerce/>.

3. *Id.* at 5.

4. RICHARD SUSSKIND, TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (2013).

5. See María Mercedes Alborno & Nuria González Martín, *Feasibility Analysis of Online Dispute Resolution in Developing Countries*, 44 U. MIAMI INTER-AM. L. REV. 39 (2012).

6. *Id.* at 51–53.

processes and new possibilities through expanding technologies. ODR provides an exciting frontier for access to justice that moves at the pace of technology, thus surpassing current imagination and allowing for innovation.⁷

Furthermore, ODR has special potential in global markets. This is due to its efficiency, convenience, and ability to defy jurisdictional limits. ODR allows individuals to resolve disputes during times that work with their own time zones without need for international travel or legal complexities. An individual in the United States may upload and post facts and arguments during her waking hours, while an individual in Africa may respond and post her facts during times that suit her time zone. Similarly, a mother with three kids and a job is able to post while wearing her pajamas after the children have gone to sleep, while a merchant on the other end of the complaint is able to respond to the arguments during the regular workday. This is the power of asynchronous communication.

Navigating choice of law and enforcement in foreign venues is also problematic for traditional dispute resolution. Imagine again the disputants in the scenario above: the individual in the US may hope for her laws to apply while the African individual argues that her law should govern the dispute. None of this really matters on the Internet, however, if the real dispute is simply about money and can easily and equitably be determined on the facts. Moreover, consumers do not think about their common complaints as legal issues.⁸ They do not think about hiring attorneys or going to courts. That would be too expensive. Businesses also seek to avoid courts—especially if the business is a small merchant struggling to earn customers.

Consider a jewelry maker in Africa. This jewelry maker creates necklaces that would sell very well across the globe if consumers were able to find and purchase the jewelry without concerns. The jewelry maker sets up a website and posts photos of her jewelry for anyone to purchase from across the globe. Meanwhile, the consumer in the US may see the jewelry online, but refrain from purchasing out of fear that if the item is faulty or never sent, then the consumer has no recourse. The US consumer thinks: "How do I know I can trust this merchant and get a remedy if this purchase goes bad?" This merchant could be fraudulent. The merchant, meanwhile, would never even consider seeking to sue a purchaser in another country who fails to pay for ordered goods.

Now let us change the picture by embedding a reliable and vetted ODR system into the merchant's website. If this ODR system gains a reputation for trustworthiness, then a purchaser in the US may feel encouraged to buy jewelry from the African merchant, thinking: "I know I can trust that this merchant will deliver the goods, and if the goods are not delivered, then I can get a remedy through this ODR

7. *Id.*

8. William H. Redmond, *Consumer Rationality and Consumer Sovereignty*, 58 REV. SOC. ECON. 177 (2000).

process.” The ODR system could likewise create means for the merchant to pursue redress if the purchaser fails to pay for goods properly delivered.

Of course, ODR is still in its infancy—but momentum is growing. ODR is seen as increasingly important for economic development, and progression in emerging economies. In fact, non-governmental organizations and international groups engaged in ODR have reached out to leaders in developing nations for over ten years due to ODR’s importance for economic growth.⁹ Although developing nations generally lack the type of broad access to the Internet and robust infrastructure of more developed nations, improvements continue with the expansion of mobile Internet.¹⁰ Furthermore, these nations have great interest in ODR because it has cross-pollinating impact: ODR boosts public trust in cross border purchases, which fuels e-purchases, which fuels improvements in infrastructure—and on it goes. That makes mobile-accessible ODR (meaning that it is accessible via a smartphone or tablet) vital for expanding ODR programs on a global basis.

This Article will therefore explore the expansion of mobile-accessible ODR as means for empowering consumers and businesses in developing nations. Part II will discuss the importance of the Internet and e-commerce for economic growth, considering the ubiquity of Internet access verses the developing world. Part III will then explain how ODR has grown alongside e-commerce, as “gripe sites” have expanded into remedy systems. Part IV adds to the picture by describing how developing nations are exploring ODR as the most cost-effective and efficient means for resolving e-commerce claims. Importantly, Part V then dives into the policy proposal for creating mobile-friendly ODR to assist advancement of e-commerce throughout the world. Part VI concludes by recognizing that companies, consumers, and policymakers must work together to bring an endeavor of this magnitude to fruition. This is therefore merely a first step encouraging further discussion and development for the benefit of all.

II. EXPANSION OF INTERNET ACCESS AS AN ECONOMIC BOOSTER

A hurdle to equal access to e-commerce has been the so-called “digital divide.” The concern was that only rich people could afford technology and fast Internet connections, so that technology-powered systems would disproportionately benefit the affluent. Many public investments in technology and e-commerce were put off due to this concern. Over the last twenty years, however, the dynamics have changed significantly. The introduction of inexpensive mobile phones has democratized access to the Internet and e-commerce. Buying and

9. Doug Leigh & Frank Fowle, *Online Dispute Resolution (ODR) Within Developing Nations: A Qualitative Evaluation of Transfer and Impact*, OPEN ACCESS LAWS ISSN 2075-471X (Jan. 22, 2014), at 106–16, <https://www.mdpi.com/journals/laws> (last visited August 5, 2017).

10. *Id.* at 111–12.

selling online is not simply for the rich, and people from every walk of life are connecting socially via the web.

A. *Growth of Internet Access Via Mobile Technologies*

Despite this optimism for digital equality, access to the Internet is not equally available and safe throughout the world. Hindrances to e-commerce and Internet access remain in developing nations where more pressing needs such as roads, housing, and clean water take precedence. Nonetheless, building technological infrastructure remains a priority in these nations and expanding access to the Internet via mobile technologies is rapidly narrowing the digital divide.¹¹ Mobile Internet offers low-cost accessibility that leads to greater growth of e-commerce, and hence economic development—especially for entrepreneurs looking to sell on a global level.¹² Internet ubiquity in developed nations is spreading quickly, as some developing nations have skipped basic infrastructure improvements to leap into the Internet age.

1. Ubiquitous Technology in the US

The US is among the leaders in e-commerce and technological expansion. US consumers have become accustomed to purchasing with just a few swipes of our fingers on a tablet or phone. As a result, we are all cross-jurisdictional. Technology is flattening the world, creating connections that span the globe in milliseconds, bouncing along fiber optic cables at the bottom of the ocean or beaming data between satellites. We are now more globally connected than at any other time in human history, and the pace of that connection is continuing to accelerate.

For example, Pew found, in its 2013 study in the US of broadband use, that approximately seventy percent of adults had a high-speed broadband connection to the Internet, while three percent had a home dial-up connection.¹³ Despite this growth in Internet access, a divide remained based on race, age, and income.¹⁴ Still, access to the Internet has grown tremendously for all adults in the US since that time. Pew found in 2016, that eighty-eight percent of all adults in the US had Internet access.¹⁵ That means that Internet access in the US went from essentially seven in ten to nine in ten individuals from 2013 to 2016. That is a significant increase in only three years.

11. Philip M. Napoli & Jonathan A. Obar, *Mobile Leapfrogging and Digital Divide Policy: Assessing the Limitations of Mobile Internet Access*, SSRN 1 (May 12, 2013), available at <https://ssrn.com/abstract=2263800>.

12. *Id.* at 2.

13. KATHRYN ZICKUHR & AARON SMITH, PEW RES. CTR., HOME BROADBAND 2013 4–5 (2013), available at http://www.pewInternetorg/files/old-media//Files/Reports/2013/PIP_Broadband%202013_082613.pdf.

14. *Id.* at 2–5 (indicating seventy-four percent white versus sixty-four percent black and fifty-three percent Hispanic adults had broadband Internet access in 2013).

15. PEW RES. CTR., INTERNET/BROADBAND FACT SHEET (2018), available at <http://www.pewInternet.org/fact-sheet/Internet-broadband/>.

That said, Pew in 2016 also indicated that twelve percent of Internet users relied on their smart phones as their only means for gaining access to the web.¹⁶ Indeed, Pew has found that smartphone usage has created new means for accessing the Internet, especially for minority groups and those with lower economic means.¹⁷ Pew found in 2013 that smartphones virtually eliminated the digital divide among races and ethnicities, with eighty percent of “White, Non-Hispanic,” seventy-nine percent of “Black, Non-Hispanic,” and seventy-five percent of “Hispanic” having some Internet access once you add smartphone access to home broadband.¹⁸ That said, age remains a factor in the digital divide. That same 2013 study indicated that smartphones widen the divide between eighteen and twenty-nine-year-olds and those who are over age sixty-five. The gap was thirty-seven percentage points when only considering home broadband access, and the gap increased to forty-nine percentage points when taking smartphones into account.¹⁹

Furthermore, although smartphones have increased their utility with the advent of new technologies, they may not be as usable as a computer with a home Internet connection—i.e., uploading and editing documents—and costs of data usage under smartphone plans may hinder use of mobile devices for ODR.²⁰ Accordingly, even in the US where Internet access is fairly widespread, policymakers and businesses must consider ways to expand free or low-cost Internet access.²¹ They would also be wise to adopt educational access programs to assist those over age sixty-five and those with lower education. Most consumers will need to invest some time and resources in gathering information about new ODR processes. Policymakers also must realize that using ODR will be more difficult for those who are uncomfortable with online processes, which is especially true for those who grew up in a society that relied on discussions and handshakes to ensure the quality of their deals.²²

2. Accelerating Access in Developing Countries

Access to the Internet is not equal throughout the world. Many businesses and individuals in developing countries lack robust Internet access, as they understandably focus on paramount concerns such as

16. *Id.*

17. Zickuhr & Smith, *supra* note 13, at 4–5.

18. *Id.* at 4–7.

19. *Id.*

20. *See id.* at 4 (noting questions regarding the utility of smartphones for activities such as updating a resume, filing taxes, or viewing educational content because these activities are more challenging on a smartphone operating over a cell phone network than on a broadband-connected home computer).

21. *See, e.g.,* Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES, May 28, 2015, at A1 (discussing plan to expand access to the Internet for the poor).

22. *See* Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court’s Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 192–98 (2008) (explaining how relational sanctions provided sufficient leverage to get ranchers in the first half of the twentieth century to comply with their agreements without need for formalities or litigation).

clean water, electricity, and other basic necessities.²³ This is especially true when one considers only fixed broadband Internet. In contrast to Internet penetration rates in the United States noted above, the 2015 World Bank statistics indicated broadband subscriptions per one hundred people at 10.57 for Latin America, 0.38 for Sub-Saharan Africa, and 16.59 for East Asia and the Pacific.²⁴

Such divergent statistics have led to the United Nations' creation of the International Telecommunications Union ("ITU") to advance information and communication technology ("ICT").²⁵ The ITU studied Internet access in 2016 and found that roughly ninety-five percent live in an area that is covered by a mobile-cellular network, while access to regular broadband Internet remains highly limited.²⁶ In developing countries, only 41.1% of households have Internet access and only eighty-three of the ninety-six developing countries had "affordable" entry-level broadband services, defined as less than five percent of the average monthly income.²⁷ The report showed that stark differences were most apparent in terms of broadband access to the Internet.²⁸ The ITU therefore set an agenda for Connect 2020, identifying four key goals: growth, inclusiveness, sustainability, and innovation and partnership.²⁹ This emphasis on innovation and partnership indicated the importance of public-private collaboration³⁰—which seems to be happening as mobile access to the Internet grows in tandem with cellular telephone providers' presence in the developing world.

The picture is more promising once researchers take mobile access to the Internet into account. The World Bank studied Internet use

23. Robin V. Cupido, *The Growth of E-Commerce and Online Dispute Resolution in Developing Nations: An Analysis*, 10 Int'l J. of Soc., Behav., Educ., Econ., bus. and Indus. Engineering, 3254, 3254–57 (2016).

24. WORLD BANK, FIXED BROADBAND SUBSCRIPTIONS (PER 100 PEOPLE) (2018), available at <http://data.worldbank.org/indicator/IT.net.BBND.P2> (last visited Aug. 6, 2017) [hereinafter INTERNET USERS (PER 100 PEOPLE)].

25. INT'L TELECOMM. UNION ("ITU"), PP-14 NEWSROOM (2017), available at <https://www.itu.int/en Plenipotentiary/2014/newsroom/Pages/default.aspx>, (last visited Jan. 31, 2017).

26. INT'L TELECOMM. UNION, ICT FACTS AND FIGURES 2016 (2016), <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf>.

27. *Id.* At the same time, the United Nations Conference on Trade and Development ("UNCTAD") conducted a study in 2016 analyzing the development of e-commerce across the globe. They relied on four factors to rank 137 countries on e-commerce, including (1) Internet use penetration, (2) secure servers per 1 million inhabitants, (3) credit card penetration, and (4) a postal reliability score. The top ten developing countries with the most developed e-commerce included the Republic of Korea, Hong Kong, Singapore, United Arab Emirates, Qatar, Bahrain, Uruguay, Kuwait, Chile, and Malaysia. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, UNCTAD B2C E-COMMERCE INDEX 2016, 9 (2016), http://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d07_en.pdf. Africa, however, ranked the lowest on all indicators. *Id.* at 1. Mobile money is helping facilitate online transactions, but great need remains for enhanced Internet access. *Id.* at 13. Economic development also requires more secure servers, reliable postal delivery, and better means for providing remedies when purchases fail. *Id.*

28. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 27, at 13.

29. INT'L TELECOMM. UNION ("ITU"), CONNECT 2020 AGENDA (2017), available at <https://www.itu.int/en/connect2020/Pages/default.aspx> (last visited Jan. 31, 2017).

30. *Id.*

including both mobile and broadband access, and found that in 2015, East Asia and the Pacific had an Internet penetration rate of 49.8%.³¹ This was a significant increase from 34.2% in 2010 and 5.6% in 2000.³² In China alone, the Internet penetration rate rose from 34.3% to 50.3% between 2010 and 2015, while it rested at only 1.8% in 2000.³³ By contrast, Japan had a much higher Internet penetration rate of 93.3% in 2015, with rates of 78.2% and 30% in 2010 and 2000 respectively.³⁴ This again was due in large part to significant growth in mobile technology in the Asia-Pacific region. Mobile broadband now makes up the majority of Asia-Pacific's connections to the Internet, having passed that threshold in 2016.³⁵ This is especially true in China, where mobile Internet access rates are higher than they are in Europe.³⁶

With respect to Latin America, the World Bank similarly found higher Internet penetration rates, reaching 54.5% in 2015, when considering mobile as well as broadband Internet access.³⁷ There was a significant increase from 34.7% in 2010 and just 3.9% in 2000.³⁸ In Brazil alone, the Internet penetration rate reached 59.1% in 2015, thereby increasing greatly from 40.7% in 2010 and 2.9% in 2000.³⁹ Mexico's Internet penetration rate for 2015 was only marginally lower at 57.4%, and represented an increase from 31.1% in 2010 and 5.1% in 2000.⁴⁰ These increases in Internet access in Latin America coincide with the significant growth in Latin America's mobile market, which boasts the second-highest number of mobile subscribers of any region outside of the Asia-Pacific.⁴¹

Although Africa has trailed behind China and Latin America in Internet usage, the Brookings Institute indicated increased Internet access in Africa.⁴² This again was due in large part to mobile technologies, which are helping to provide access to the Internet and e-commerce in the developing world.⁴³ Even looking at 2011 statistics, the United Nations International Children's Fund (UNICEF) found that

31. INTERNET USERS (PER 100 PEOPLE), *supra* note 24.

32. *Id.*

33. *Id.*

34. *Id.*

35. GSMA INTELLIGENCE, THE MOBILE ECONOMY: ASIA PACIFIC 2017 1–17 (2017), <https://www.gsmainelligence.com/research/?file=336a9db2ab3ed95bc70e62bf7e867855&download> (last visited Aug. 6, 2017).

36. DAVID GEORGE & TIM HATT, GSMA INTELLIGENCE, GLOBAL MOBILE TRENDS 39 (2016), <https://www.gsmainelligence.com/research/?file=357f1541c77358e61787fac35259dc92&download> (last visited Aug. 7, 2017).

37. INTERNET USERS (PER 100 PEOPLE), *supra* note 24.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Why Latin America is the Next Big Mobile Battleground*, U. PENN. (Nov. 23, 2015), <http://knowledge.wharton.upenn.edu/article/why-latin-america-is-the-next-big-mobile-battleground/> (last visited Aug. 6, 2017).

42. Fred Dews, *How the Internet and Data Help the Developing World*, BROOKINGS NOW (Feb. 6, 2014), <http://www.Brookings.edu/blog/Brookings-now/2014/02/06>.

43. *Id.* Mobile access is what brings the percentage up to forty-one percent in the ITU's report, compared to fixed Internet connections ranging from five to ten percent.

the African continent had 620 million mobile connections.⁴⁴ South Africa was the third largest home to mobile users on the continent, trailing only Nigeria and Egypt.⁴⁵ Mobile telephone usage for South Africans age fifteen and twenty-four in 2011 was already seventy-two percent, which is presumably much higher over five years later. This is in stark contrast to 2009 statistics showing fixed Internet connections reaching only 12.3% of the South African population.⁴⁶ Importance of mobile Internet is no surprise, as it remains steadfastly cheaper than fixed Internet and continues to get even cheaper with new innovations.⁴⁷

That is not to say that Internet access is ubiquitous in the developing world, where many lack basic necessities. Looking more narrowly, one study indicated that in parts of the Least Developed Countries (LDCs as defined by the United Nations), the number of households with mobile Internet was still lagging at 19.4% in 2014 and rested at less than one percent when it comes to fixed broadband Internet.⁴⁸ Nonetheless, PRC studies indicated somewhat more positive statistics. Pew showed that by 2013, forty-five percent of developing nations reported using the Internet occasionally, compared to fifty-four percent by 2015.⁴⁹ The results of their research also confirmed that smartphone ownership is driving an increase in Internet access: Smartphone ownership in the twenty-one surveyed countries climbed from twenty-one percent in 2013 to thirty-seven percent in 2015.⁵⁰ The highest increases of smartphone ownership were found in Turkey (+ forty-two), Malaysia (+ thirty-four), Chile, and Brazil (+ twenty-six each), all of which have accelerating economies.⁵¹ Nonetheless, smartphone ownership remained lowest in the poorest economies: notably in Tanzania (eleven percent), Uganda, and Ethiopia (four percent each).⁵²

Smartphone ownership nonetheless correlates with wealth for the most part. PRC's 2015 study of smartphone ownership among twenty-one countries found that the correlation between a country's GDP per capita and smartphone ownership rate was 0.84, only marginally lower than the correlation between per capita income and Internet use (0.87).⁵³ Contrary to expectations, however, this correlation dissipates

44. GERRIT BERGER & AKSHAY SINHA, UNICEF, SOUTH AFRICAN MOBILE GENERATION 5 (2012).

45. *Id.*

46. *Id.* at 11.

47. *Id.*

48. Press Release, OHRLLS, Accelerating the Implementation of the Istanbul Programme of Action for African Least Developed Countries: A Focus on Broadband, UN-OHRLLS Press Release (March 2017), http://unohrlls.org/custom-content/uploads/2017/02/media-advisory_ldcs-regional-meeting-senegal_final.pdf.

49. JACOB Poushter, PEW RES. CTR., SMARTPHONE OWNERSHIP AND INTERNET USAGE CONTINUES TO CLIMB IN EMERGING ECONOMIES (2016), available at <http://www.pewglobal.org/2016/02/22/smartphone-ownership-and-Internet-usage-continues-to-climb-in-emerging-economies/>.

50. *Id.*

51. *Id.*

52. *Id.*

53. Poushter, *supra* note 49.

in Asian countries where smartphone ownership tends to outpace GDP expectations. For example, China had a GDP per capita of \$15,534.70 in 2016 (below the global mean),⁵⁴ but was nearly on par with the United States in terms of smartphone ownership for those under the age of thirty-five (eighty-five percent).⁵⁵ By contrast, Japan had a 2016 GDP per capita of \$41,461.90,⁵⁶ well above the global mean, but had a smartphone ownership rate of thirty-nine percent in 2015 despite its high rate of Internet penetration.⁵⁷ Curiously, South Korea had the highest smartphone ownership rate of any country studied (eighty-eight percent).⁵⁸

Meanwhile, both ITU and PRC reported that gender and age gaps remain when it comes to Internet usage. Pew goes further to show that the gap reaches into smartphone ownership as well. Pew showed that the largest gap between genders in smartphone ownership is in Mexico and in African states such as Nigeria, Kenya, and Ghana.⁵⁹ ITU reported that in Africa, the rate of Internet use was 21.9% female compared to 28.4% male.⁶⁰ Age also is a determining factor in Internet usage, as older individuals remain less comfortable and adept at using smartphones and computers. At the same time, younger, better educated individuals are significantly more likely to report smartphone ownership than others.⁶¹ The only countries with insignificant socioeconomic gaps in smartphone ownership were countries that had exceptionally low rates of smartphone ownership altogether, such as Pakistan and Uganda.⁶²

This creates a new digital divide.⁶³ Many individuals with no prior access to personal computers have not developed the skills necessary to utilize mobile phones.⁶⁴ Some have also noted that the comparatively weaker memory, speed, and content availability of mobile devices create a comparative advantage for those with broadband Internet.⁶⁵ Although mobile Internet has made it possible for those who cannot afford broadband access to use the web, socioeconomic, age, and gender gaps remain.

That said, most agree that access to the Internet will expand and grow—reaching all people in every corner of the world. This is due in large part to the growth of mobile technologies. It is also apparent that the Internet is a major platform for international trade, and e-com-

54. WORLD BANK, GDP PER CAPITA, PPP (CURRENT INTERNATIONAL \$) (2017), *available at* <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD> (last visited Aug. 6, 2017) [hereinafter “GDP PER CAPITA, PPP (CURRENT INTERNATIONAL \$)”].

55. Poushter, *supra* note 49.

56. GDP PER CAPITA, PPP (CURRENT INTERNATIONAL \$), *supra* note 54.

57. Poushter, *supra* note 49; INTERNET USERS (PER 100 PEOPLE), *supra* note 24.

58. Poushter, *supra* note 49.

59. *Id.*

60. INT’L TELECOMM. UNION, *supra* note 26.

61. Poushter, *supra* note 49.

62. *Id.*

63. Napoli & Obar, *supra* note 11, at 1.

64. *Id.* at 3.

65. *Id.* at 7.

merce is a springboard for economic development.⁶⁶ This is especially true for developing countries. Indeed, the Internet provides means for businesses in developing nations to sell to millions of consumers worldwide.⁶⁷

B. Centrality of E-commerce in Economic Development

With the growth of mobile access to the Internet throughout the world, and especially in developing nations, it is no surprise that e-commerce has become a central element in boosting economic development. Mobile "apps" and easy access to the Internet have made it easy for individuals in every nation to buy and sell goods online. Consumers crave the vast options and choice on the Internet, while merchants seek customers across borders to boost their bottom lines.⁶⁸ Even those that saw the Internet as a game-changer did not expect the bombshell that the Internet had on commerce.⁶⁹ Brick-n-mortar stores have suffered in the wake of online merchants' success—à la Amazon and eBay. In response, big box stores such as Walmart have had to step up their online sales and e-commerce portals to compete.⁷⁰

Worldwide, e-commerce transactions as a percentage of total retail transactions grew from 2.4% in 2005 to six percent in 2014.⁷¹ Since that time, there has been a consistent positive trend towards the adaptation and exploitation of the Internet for selling goods and services. In the United States and abroad, consumers appreciate that they can go to websites such as Amazon.com and browse their inventory, hunt for deals, and make purchases via the Internet. At the same time, businesses are using the Internet for their business-to-business ("B2B") transactions. For example, "General Electric began buying and selling industrial and commercial products to other businesses in 2000 . . . [and] B2B transactions occurring over the Internet from 1998 to 2003 grew from \$43 billion to \$1.3 trillion."⁷² Even hospitals joined in to purchase supplies online.⁷³

66. Dews, *supra* note 42.

67. *Id.*

68. Joshua Beldner, *How Technologically Savvy Do You Have to Be to Apply Zipflo: An Approach to Internet Personal Jurisdiction After Fancaster and Edvorsis*, 17 B.U. J. SCI. & TECH. L. 318, 318–23 (2011).

69. See Daniel F. Greenwood & Ray A. Campbell, *Electronic Commerce Legislation: From Written on Paper and Signed in Ink to Electronic Records and Online Authentication*, 53 BUS. L. 307, 307–08 (1997) (noting importance of the Internet and e-commerce but not to the degree we now see); see Andrew Urbaczewski et al., *A Manager's Primer in Electronic Commerce*, BUS. HORIZONS 5 (Sept. 1, 1998) (stating that e-commerce has affected the way individuals and organizations purchase goods and services).

70. Leslie Picker & Rachel Abrams, *Walmart Rewrites Its E-Commerce Strategy With \$3.3 Billion Deal for Jet.com*, N. Y. TIMES (Aug. 8, 2016), <https://www.nytimes.com/2016/08/09/business/dealbook/walmart-jet-com.html?action=click&contentCollection=Technology&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

71. Keith Eisenberg & Gaurav Gupta, *Analysis of the Expansion of E-Commerce into India and Growth Opportunities for Flipkart*, 14 J. INT'L BUS. & L. 151, 152–60 (2015).

72. *Id.* at 152.

73. *Id.*; see also Beldner, *supra* note 68, at 320–23 (2011).

Adoption of e-commerce has been fast and furious as means for gaining an advantage. The main benefits of having an e-commerce platform include increased sales, decreased costs, increasing customer awareness, improved access to new markets, better customer service, and efficient communications.⁷⁴ Furthermore, merchants with established online communications can easily incorporate ODR methods for preventing and resolving conflicts—and warding off the type of built-up consumer frustration that leads to class actions and costly lawsuits. This was the important lesson that eBay learned in adopting its ODR process.⁷⁵

Similarly, economic growth has come to developing nations via the Internet and e-commerce. For example, researchers expect that by 2019, 151.1 million people in Latin America will buy goods and services online, a dramatic increase from 121.1 million in 2016.⁷⁶ Furthermore, e-commerce sales in Latin America are projected to grow from over fifty-seven billion US dollars in 2016 to over eighty-four billion by 2019.⁷⁷ The most popular online retailer in Latin America in terms of visitors is MercadoLibre.com, which facilitates consumer-to-consumer (“C2C”) transactions similar to eBay.com.⁷⁸ It is currently present in Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Mexico, Ecuador, Peru, Panama, Portugal, Uruguay, and Venezuela and boasted over 50.5 million unique visitors in June 2016 alone.⁷⁹

Nonetheless, the average number of annual online transactions per capita in Latin America in 2016 paled in comparison with other parts of the world, including Asia.⁸⁰ China, India, and Russia have all enjoyed economic expansion due to e-commerce.⁸¹ E-commerce has especially thrived in Asia due to a large population base, high population growth, increasing middle class, growth in small businesses seeking customers online, and government strategies seeking foreign direct investment.⁸² This expansion of interest in e-commerce also has thrived beyond India to capture Indonesia, and Myanmar.⁸³ Again,

74. See Eisenberg & Gupta, *supra* note 71, at 152–60 (emphasizing how the benefits outweigh costs of e-commerce for any merchant).

75. See AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION*, 33–57 (2017) (providing data and explaining how eBay profited by providing ODR for resolving consumer disputes); see also EBAY, RESOLUTION CENTER, <https://resolutioncenter.ebay.com> (last accessed Aug. 30, 2017) [hereinafter EBAY, RESOLUTION CENTER].

76. STATISTA INC., *E-COMMERCE IN LATIN AMERICA – STATISTICS & FACTS* (2018), available at <https://www.statista.com/topics/2453/e-commerce-in-latin-america/> (last visited January 18, 2018) [hereinafter “STATISTA INC.”].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Gary D. Sprague & Rachel Hersey, *Permanent Establishments and Internet-Enabled Enterprises: The Physical Presence and Contract Concluding Dependent Agent Tests*, 38 GA. L. REV. 299, 300 (2003).

82. See Eisenberg & Gupta, *supra* note 71, at 153.

83. *Id.*

access to the Internet leads to e-commerce expansion and ultimately economic growth.

Moreover, mobile Internet's expansion is a further catalyst for economic growth, especially in areas where reliable and affordable broadband Internet is lacking. For example, mobile Internet in Sub-Saharan Africa, reaching twenty-six percent of its population in 2016,⁸⁴ has been a boon for many in the region. Mobile phones in Sub-Saharan Africa have allowed many in rural areas to access bank accounts for the first time.⁸⁵ In fact, mobile money accounts now outnumber traditional bank accounts in Sub-Saharan Africa, leading to more efficient money transactions and growth for commercial enterprises.⁸⁶ This allows individuals to make purchases by mobile device from anywhere in the community. The ability to make purchases by mobile device similarly has created an economic boost in Latin America.⁸⁷ A survey in August of 2016 showed that forty-three percent of mobile buyers in Latin America had purchased products via a mobile device on a monthly basis.⁸⁸

These examples show that Internet access and e-commerce are vital to economic growth throughout the world, and especially in developing nations. Meanwhile, mobile Internet in particular is a central actor in both Internet access and e-commerce in these developing parts of the world. At the same time, complaints are inevitable and growth in e-commerce translates into more and more e-disputes that parties cannot practically handle in person. That means it is vital to create "apps" and mobile-friendly means for resolving these e-commerce complaints.⁸⁹ Establishing online mechanisms for resolving disputes boosts transactions among consumers and merchants in all parts of the world. Consumers buy goods from those they trust, and there is no question that merchants in emerging economies are eager to attract those customers. Policymakers, businesses, and consumers should therefore work together to explore ODR to spur innovation and access to e-commerce as an essential component in overall market expansion.

III. MOVING REMEDY SYSTEMS ONLINE

With the growth of e-commerce comes need for simple means of resolving e-purchase disputes. Naturally, online purchasers and sellers are not eager to face travel, lost time, and other costs of litigation or in-person processes to settle these disputes. Traditional means for resolv-

84. See HYUNMI YANG ET AL., GSMA INTELLIGENCE, GLOBAL MOBILE TRENDS 36 (2016), available at <https://www.gsmainelligence.com/research/?file=357f1541c77358e61787fac35259dc92&download> (last visited Aug. 7, 2017).

85. Moses K Gahigi, *Mobile Money is Only Just Starting to Transform Some of Africa's Markets*, QUARTZ AFRICA (July 27, 2017), <https://qz.com/1039896/m-pesa-mtn-orange-others-lead-africas-mobile-money-revolution/> (last visited Aug. 5, 2017).

86. *Id.*

87. STATISTA INC., *supra* note 76.

88. *Id.*

89. See Matthew Dixon et al., *Stop Trying to Delight Your Customers*, HARV. BUS. REV. 1-5 (2010) (emphasizing that customers do not seek perks, but instead want their problems handled quickly without having to call customer service departments numerous times or deal with long hold times).

ing disputes are nonsensical and cost prohibitive for e-commerce, especially small claims.⁹⁰ This has led to growth of consumer complaint websites and use of chargeback mechanisms. However, these mechanisms generally do not allow for complete remedies or cross-border resolutions. Accordingly, there has been a call for greater development of ODR processes that add value by moving complaint and resolution processes online through use of automated and computer mediated negotiation, as well as online mediation and arbitration, aimed to end disputes and resolve complaints.⁹¹

A. Consumer Complaint Sites

Consumer review and complaint sites are ubiquitous, with sixty-one percent of consumers reporting that they look to reviews before deciding whether to purchase an item.⁹² One study found that reading three reviews could change the minds of sixty-three percent of consumers.⁹³ Nonetheless, the veracity and validity of these sites is unclear. Approximately sixteen percent of restaurant reviews on Yelp and fifteen percent of all online reviews are fake.⁹⁴ This is made worse by companies that hire individuals to post positive reviews of their products,⁹⁵ and/or to post bad reviews of competing companies.⁹⁶ Samsung, for instance, was subjected to heavy fines after it paid individuals to write poor reviews for its rival company, HTC.⁹⁷ Incentive systems may inspire false reviews as well. For example, Uber terminates drivers that have rating averages of less than 4.6 stars, which arguably has diminished the meaning of reviews with “five-star” considered almost obligatory.⁹⁸ The Federal Trade Commission (“FTC”) determined that paying individuals to provide reviews without disclosing the individual’s identity amounts to deceptive advertising.⁹⁹

Nonetheless, there are government run sites that have clear legitimacy. In the US, the primary public consumer complaint site is developed and run by the Consumer Financial Protection Bureau (“CFPB”). The CFPB is the federal watchdog for consumer financial protection

90. See ETHAN KATSCH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 1–25 (2017).

91. ABA TASK FORCE ON ELEC. COMMERCE AND ALT. DISPUTE RESOLUTION TASK FORCE, *WHAT IS ONLINE DISPUTE RESOLUTION? A GUIDE FOR CONSUMERS* (2002), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/consumerodr.authcheckdam.pdf.

92. Tamar Weinberg, *Are Fake Online Reviews Killing Consumer Confidence?*, *MARKETING LAND* (Oct. 21, 2016), <http://marketingland.com/fake-online-reviews-killing-consumer-confidence-194239>.

93. Mike Deri Smith, *Fake Reviews Plague Consumer Websites*, *GUARDIAN* (Jan. 26, 2013), <https://www.theguardian.com/money/2013/jan/26/fake-reviews-plague-consumer-websites>.

94. Weinberg, *supra* note 92.

95. Smith, *supra* note 93.

96. Weinberg, *supra* note 92.

97. *Id.*

98. Ethan Wolff-Mann, *Here's Everything Wrong with Online Reviews—and How to Fix Them*, *TIME* (July 22, 2016), <http://time.com/money/page/online-reviews-trust-fix/>.

99. Smith, *supra* note 93.

created pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). This law seeks to increase transparency in the market for consumer financial services by requiring additional disclosures in financial dealings and giving the CFPB power to bring enforcement actions against companies that violate consumer laws.¹⁰⁰ In the same spirit, the CFPB has developed an online Consumer Complaint Database.

Since 2011, the CFPB has handled more than a million complaints from consumers nationwide.¹⁰¹ Consumers may access an interactive webpage on the CFPB website that allows them to submit complaints based on particular product groups.¹⁰² After confirming a complaint's validity, the CFPB forwards the complaint to the subject company through a web portal.¹⁰³ If the subject company does not respond within fifteen days, CFPB then prioritizes a complaint for investigation.¹⁰⁴ In June 2015, CFPB also began publishing consumers' narratives of problems they are facing as part of this online portal.¹⁰⁵

Accordingly, the CFPB's website has evidenced consumers' thirst for online means for asserting their complaints. Furthermore, many businesses have responded to CFPB complaints although it is not required. Unfortunately, the CFPB's complaints portal does not go further to provide ODR, leaving many consumers with no real remedy for their complaints. The CFPB simply lacks the resources to help consumers on an individual basis.¹⁰⁶ This may cause consumers to feel frustrated with the lack of access to remedies, especially in light of costs and complexities of most traditional processes.¹⁰⁷

At the same time, complaint websites do not always cater to those most in need. One researcher focusing on the CFPB's complaints website found that consumers who asserted their complaints on the portal generally enjoyed higher income and education levels than the census overall.¹⁰⁸ She concluded that "the CFPB does not appear to prioritize complaints from low-income consumers."¹⁰⁹ Nonetheless, she found consumers preferred to submit complaints online, with submission percentages of eighty-five percent online versus fifteen percent by tele-

100. Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General after Dodd-Frank*, 99 IOWA L. REV. 115, 126, 140–41 (2013).

101. Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS. 177, 178 (2017). CFPB's primary functions include collecting, monitoring, and responding to consumer complaints about consumer financial products and services. *Id.* at 177.

102. *Id.* at 177–78.

103. *Id.* at 181.

104. *Id.* at 182.

105. *Id.* at 178.

106. *Id.*

107. Many complaining consumers express sadness and fear and ask the CFPB for assistance that it will not be able to give because CFPB does not provide assistance with individual problems. *Id.* at 188–207.

108. Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 910 (2015).

109. *Id.* at 906.

phone.¹¹⁰ Moreover, it does not appear that the CFPB has an “app” or easily accessible mobile means for posting complaints.¹¹¹

The CFPB has therefore created a database that shows promise for allowing consumers to vent their concerns, and evidences consumer interest in online means for asserting their claims. Nonetheless, there is no guarantee that disputes will be resolved or that the CFPB will answer the complaints filed. The system also lacks a mobile-friendly platform that is easy to use for those without broadband Internet access. Of course, there are other complaints portals that are accessible via mobile phone, but these again are questionable in terms of veracity, and they do not necessarily lead to remedies. Sites that allow individuals to simply complain or post reviews are not ODR. They do not offer or necessarily lead to resolutions.

B. *Going Beyond Credit Card Chargebacks*

Some consumer advocates have argued that the best model currently available for protecting consumers is the credit card chargeback process.¹¹² A chargeback is the total or partial reversal of a purchase made on a credit card by the card issuer, thereby saving the consumer from paying for the purchase at issue. In the US, the Truth in Lending Act (“TILA”) and Regulation Z implementing the Act require credit card companies to refund customers for unauthorized charges or for the cost of non-delivered or non-conforming goods.¹¹³ Regulation Z does not address remedies regarding pre-authorized payment transactions, such as those for rental cars. It also neglects to discuss ADR or customer remedies in the event of a merchant’s bankruptcy.

In contrast, the European Union’s (“EU”) chargeback regulations address merchant bankruptcy and direct member states to create alternative dispute resolution mechanisms to efficiently deal with chargeback disputes.¹¹⁴ The EU provides for chargebacks with respect to unauthorized transactions, a merchant’s failure to respect a consumer’s rights, and in the event of merchant bankruptcy.¹¹⁵ A merchant’s failure to respect consumer rights could involve pre-authorized payment transactions, and a customer may be entitled to a chargeback against a creditor when the original authorization differs from the charged amount and exceeds what the cardholder could have reasonably expected.¹¹⁶ The regulations also provide that a consumer

110. *Id.* at 911.

111. CONSUMER FIN. PROT. BUREAU, CFPB Consumer Complaints Database (2017), available at <https://www.consumerfinance.gov/data-research/consumer-complaints> (last visited Feb. 27, 2017).

112. Matt Brownell, *Credit Card Chargebacks: Your Secret Weapon in Merchant Disputes*, DAILY FIN. (July 31, 2012), www.dailyfinance.com/2012/07/31/credit-card-chargeback-merchant-disputes.

113. 12 C.F.R. § 226.13 (West 2010).

114. ECC-NET, CHARGEBACK IN THE EU/EEA 6 (2017), available at http://ec.europa.eu/consumers/ecc/docs/chargeback_report_en.pdf (last visited Sept. 5, 2017).

115. *Id.* at 6.

116. *Id.* at 8.

must attempt to resolve disputes directly with a merchant regarding undelivered or non-conforming goods before seeking remedies directly against the credit card issuer.¹¹⁷ Again, this only applies to credit card purchases and not payments by debit card, direct ACH, check, or cash.¹¹⁸

While the EU leaves details of the chargeback process to member states, the US regulations specify that a customer must send written notice with detailed information regarding a claim to the credit card issuer no later than sixty days after receiving a contested billing statement.¹¹⁹ If a customer misses that sixty-day window or the bank rejects the claim, her rights become limited. Additionally, the process is not entirely online, and it contemplates other face-to-face processes. At the same time, customers must make a good faith effort to obtain a refund directly from the merchant before seeking a chargeback from the credit card company.¹²⁰

Chargebacks are helpful for many consumers, but they are not a panacea for global consumer protection. Constraints and lack of awareness among consumers hinder their use.¹²¹ Many consumers do not even know that chargeback rights exist, or understand how to use these rights.¹²² Furthermore, consumers (perhaps wrongly) may worry that assertion of chargeback claims could harm their credit rating or their relationships with their creditors.¹²³ This is especially concerning for consumers who already have poor credit and fear that creditors would raise their interest rates or drop a consumer's credit line or limits in the wake of a chargeback request.

The chargeback system also fails to provide means for venting concerns and does not generally encourage amicable settlement. Although consumers are directed to first seek a remedy directly with the merchant, they may put forth little to no effort in seeking such a solution when they know that a complete chargeback is available.¹²⁴ By its

117. *Id.* at 9–10 (also noting that consumers are entitled to a chargeback against a bankrupt creditor by EU law, but this and all other rights are subject to national law of EU member states).

118. *Id.* at 1, 4.

119. 12 C.F.R. § 226.13(b)(1)-(3) (West 2010).

120. *Credit Cards—Disputing a Charge*, CAL. OFF. OF THE ATT'Y GEN., https://oag.ca.gov/consumers/general/credit_card_chargeback_rights (last visited Sept. 5, 2017).

121. Neil M. Peretz, *The Single Euro Payment Area: A New Opportunity for Consumer Alternative Dispute Resolution in the European Union*, 16 MICH. ST. J. INT'L L. 573, 580–85 (2008) (noting that chargebacks are seldom used).

122. Mark Furletti & Stephen Smith, *The Laws, Regulations, and Industry Practices that Protect Consumers Who Use Electronic Payment Systems: Credit and Debit Cards*, PHILA. FED 1 (Jan. 2005), https://philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2005/ConsumerProtectionPaper_CreditandDebitCard.pdf (noting that there are misperceptions of credit card chargeback rights, leading consumers to perhaps make poor payment choices).

123. *Id.*

124. *Most Common Chargebacks*, CHARGEBACKS911 (Sept. 29, 2015), <https://chargebacks911.com/common-types-chargebacks/> (“According to a recent Chargeback 911 study, 81% of cardholders admitted to filing a chargeback out of convenience. It was easier to contact the bank for a chargeback than call the merchant for a refund.”).

very nature, the chargeback process is less a resolution process and more of a liability-shifting mechanism. In fact, merchants have begun to speak out against the process for incentivizing fraud and impeding business success without due process.¹²⁵ Merchants feel that the system gives too much power to the buyers and places an unfair burden on merchants to defend buyer claims. They complain that the system is set up for one-way remedies and proves costly to the merchants who not only lose revenues for lost purchases, but also suffer high fees that the credit card companies assess for chargebacks as well as the regular processing fees for using the credit card networks.¹²⁶

Moreover, there is no international chargeback system. In North America, the chargeback process is very generous, with consumers able to file chargebacks for disputes ranging from non-receipt to item quality concerns.¹²⁷ That is not true in regions where chargeback rights are more limited.¹²⁸ In South Africa, for example, the Consumer Protection Act 68 of 2008 established some chargeback rights.¹²⁹ The law is not very effective, however, because the banks are not strictly required to implement the legislation.¹³⁰ At the same time, many merchants are trying to shift their payments onto debit or ACH networks that provide no or limited chargeback rights. In some regions, consumers also rely heavily on mobile payments and alternative means for banking that do not rely on credit accounts that are built with means for shifting liabil-

125. See, e.g., Ben Dwyer, *Chargebacks: A Survival Guide*, CARD FELLOW, <https://www.cardfellow.com/chargebacks/> (last visited Oct. 11, 2017) (“From a business’s perspective, however, chargebacks can often be a costly hassle. The burden of proof to show that a customer has been rightfully charged falls on you, and when consumers successfully dispute charges, you lose both the product sold and the revenue from that sale. Even when a dispute is unsuccessful, the acquiring bank will withhold payment for any chargebacks until the matter is resolved. Add in the fees charged by banks and processors, and even disputes which turn out in your favor can be expensive.”).

126. “On top of all of these fees, both Visa and MasterCard have a strict limit on the total number of transactions that can be charged back before additional fines and penalties are levied. A business whose chargebacks exceed 1% of its total sales volume (the dollar amount, not the number of transactions) becomes subject to a chargeback monitoring program administered by the card brand, which is accompanied by a \$5,000 fine. At this point, there is a very good chance that the account will simply be terminated by the bank or credit card processor.” *Id.*; see also, Peretz, *supra* note 121, at 588 (“Some merchants decry the multiple costs of presenting evidence against chargeback, which they might only be losing because they cannot gather sufficient proof of the sale and the delivery of the good or service quickly enough.”). Some merchants find that they pay high interchange fees while losing out on payment for goods and bearing arbitration costs if they continue to dispute a chargeback. *Id.* at 588–89.

127. Peretz, *supra* note 121, at 584–88 (noting impediments in the chargeback system).

128. *Id.*

129. Dan Hernan Guana, *The Code of Banking Practice: A Good Time and Place to Formally Start Recognizing Consumer Chargeback Rights in South Africa*, U. PRETORIA 1, 3 (Dec. 2016), https://repository.up.ac.za/bitstream/handle/2263/60046/Gauna_Code_2017.pdf?sequence=1&isAllowed=y.

130. *Id.* at 3.

ity.¹³¹ While we can learn quite a bit from the chargeback system, it is not a viable solution for expanding consumer redress around the world.

Instead, building a platform that allows merchants as well as payment system providers to participate seems to have greater feasibility in e-commerce on a global level. Merchants upset with the fees and structure of credit card chargebacks have even suggested use of robust online customer service as means for warding off dreaded chargebacks.¹³² As exemplified in the next section, ODR platforms driven by merchants, consumers, and policymakers are already taking shape. They allow for greater public-private collaboration and flexibility to adapt for various payment systems. Indeed, not all consumers are making e-purchases with credit cards, and not all payment systems will agree to work together across the globe to bless one process. An independent ODR platform, however, allows for merchant and payment system providers to "buy in" and use the platform, while maintaining separate specific systems, in order to gain consumer trust and loyalty.

C. *Global Growth of ODR*

Complaints databases and chargeback processes do open doors to some consumer remedies, but do not provide the robust claims resolution needed for a global resolution system. True ODR that is user-friendly allows consumers to quickly fill out standard forms and upload related documents to obtain timely resolutions. They also may use real-time and asynchronous communications for maximum convenience and efficiency.¹³³ Furthermore, ODR has gained international acceptance because it transcends borders and escapes the legal constraints of other processes for the resolution of international disputes.¹³⁴ Online case management also benefits businesses by enabling them to address issues before they escalate into costly consumer class claims and government enforcement actions. ODR also allows businesses to efficiently gather information to improve their products and services—thus enhancing customer loyalty and attracting new customers along the way. We are at the crossroads for ODR to level the playing field and change the game for economic development throughout the world.

1. ODR Advancements from the Field

The Internet has continued to change the market "game" in business-to-consumer transactions, as consumers are getting more skilled at using the Internet to organize their lives and navigate purchases. Con-

131. Arnold S. Rosenberg, *Better than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 44 COLUM. J. TRANSNAT'L L. 520, 530–38 (2006) (noting how many in Africa rely on mobile payment systems).

132. See Dwyer, *supra* note 125.

133. See generally AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* 5–50 (2017).

134. See, e.g., *More More More: CPR Meeting Highlights*, 27 ALT. TO HIGH COST LITIG. 125, 127–28 (2009) (highlighting technology and ODR as key elements in the future of dispute resolution).

sumers continue to become savvier in researching and comparing merchants on the Internet and seeking the best value in terms of price and quality. Furthermore, consumers see trustworthiness as an essential component of value. They want to be sure that they have a remedy if a purchase does not go as promised.

Meanwhile, forward-thinking online merchants have learned that gaining consumer trust is critical to their success. They realized early on that they needed to create next generation systems for handling consumer problems. Large Internet intermediaries, like online marketplaces (eBay), large merchants (Amazon), and payment processors (Paypal), realized that the consumer trust problem was preventing many consumers from moving their purchases from physical to virtual marketplaces. They learned that addressing this trust issue by creating ODR systems could provide a valuable market advantage.¹³⁵ “[G]rouserers are likely to remain loyal” if they are happy with resolution of their complaints but will harm a company with public “gripping” if a business fails to provide efficient means for settling claims.¹³⁶

As noted above, eBay has been a forerunner in providing private ODR. In the US, the eBay Resolution Center processes consumer claims related to website purchases free of charge.¹³⁷ The eBay Money Back Guarantee that applies when a buyer does not receive an item or the item is not as promised gives the buyer the right to file an online complaint within thirty days after the latest estimated delivery date. The seller then has three business days to respond in the Resolution Center.¹³⁸ If the seller does not respond or provide an adequate remedy, the buyer may ask eBay to assign an online neutral to arbitrate.¹³⁹ If necessary, eBay may enforce these determinations via PayPal, eBay’s payment system provider, by setting aside a seller’s funds.¹⁴⁰

Under its Unpaid Item Policy, eBay allows sellers to submit claims online against buyers who do not pay for purchased items within two days.¹⁴¹ If a buyer fails to provide proof of payment or a valid reason for not paying, eBay may grant the seller a final credit and refund the

135. Rob Enderle, *eBay vs. Amazon: An Interesting Lesson in Customer Care*, IT BUS. EDGE (Jan. 19, 2012), <http://www.itbusinessedge.com/cm/blogs/enderle/ebay-vs-amazon-an-interesting-lesson-in-customer-care/?cs=49557&page=2>. See also EBAY, RESOLUTION CENTER, *supra* note 75; AMAZON, DISPUTING TRANSACTIONS, *available at* <https://pay.amazon.com/us/help/201754740> (last visited Aug. 30, 2017); AMAZON, BUYER DISPUTE PROGRAM, *available at* <https://pay.amazon.com/us/help/201751580> (last visited Aug. 30, 2017); PAYPAL, RESOLVING DISPUTES, CLAIMS, AND CHARGEBACKS, *available at* <https://www.paypal.com/us/webapps/mpp/security/resolve-disputes> (last visited Aug. 30, 2017).

136. Tibbett L. Speer, *They Complain Because They Care*, 18 AM. DEMOGRAPHICS 13 (1996).

137. Colin Rule, *Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace*, ACRESOLUTION: THE QUARTERLY MAG. OF THE ASS’N FOR CONFLICT RESOL. 1–10 (Fall 2008).

138. EBAY, EBAY MONEY BACK GUARANTEE, <http://pages.ebay.com/help/policies/money-back-guarantee.html> (last visited 16 July 2017).

139. *Id.*

140. *Id.* (also giving both parties 30 days to appeal any determinations).

141. EBAY, Unpaid Item Policy, *available at* <http://pages.ebay.com/help/policies/unpaid-item.html> (last visited June 19, 2017).

fee for relisting the item.¹⁴² eBay's Verified Rights Owner Program ("VeRO") similarly allows intellectual property rights holders to submit a Notice of Claimed Infringement online with respect to items sold on eBay. Such Notice prompts eBay to remove a listing that arguably infringes intellectual property rights. The seller then has ten days to seek item reinstatement unless the holder of the intellectual property rights informs eBay that it is seeking a court order to restrain the relisting under the Digital Millennium Copyright Act.¹⁴³

Under eBay's Independent Feedback Review policy, a seller may challenge a review posting within thirty days. eBay will then enlist an online neutral from a professional dispute resolution service to examine the challenged posting and determine whether to affirm, withdraw, or take no action regarding the review.¹⁴⁴ Similarly, under eBay's Vehicle Purchase Protection program, eBay offers up to \$50,000 with respect to vehicles purchased on eBay to cover payment for a vehicle never received or not as promised if the parties are unable to resolve their disputes through direct discussions.¹⁴⁵ The online payment system, PayPal, also offers ODR for items that are not received or not as described by the seller.¹⁴⁶ PayPal's policy largely mimics eBay's, and allows for a third party's determination that PayPal enforces by issuing refunds or imposing other consequences.¹⁴⁷

Merchants outside of the US also have embraced ODR for its ability to transcend borders and lower dispute resolution costs. For example, the online retailer Alibaba uses an ODR mechanism for resolution of buyer and seller disputes.¹⁴⁸ It allows parties to submit a dispute to Alibaba's online Dispute Resolution Team if they cannot resolve a complaint after ten days. The Team will make a determination based on evidence provided. If a party does not comply with a determination, Alibaba may terminate the party from the site on claims over \$300. For claims of less than \$300, Alibaba publishes a complaint case record on the recalcitrant party's webpage on Alibaba.com for ninety days.¹⁴⁹ This exemplifies the type of self-enforcement that incentivizes "good behavior" and trustworthy content in e-commerce where consumers are prone to research and compare merchants as previously noted.

142. *Id.*

143. EBAY, HOW EBAY PROTECTS INTELLECTUAL PROPERTY (VeRO) (2017), *available at* <http://pages.ebay.com/help/policies/programs-vero-ov.html> (last visited June 19, 2017) (noting how the right for an Ebay member to file a counter notice to reinstate a listing after a notice of claims infringement is rooted in the DMCA).

144. EBAY, INDEPENDENT FEEDBACK REVIEW, *available at* <http://pages.ebay.com/help/feedback/feedback-review.html> (last visited 19 June 2017).

145. If the buyer cannot resolve the issue with the seller, he or she must request reimbursement no later than forty-five days after the listing end date. EBAY, Vehicle Purchase Protection, *available at* <http://pages.motors.ebay.com/buy/purchase-protection/> (last visited June 19, 2017).

146. PAYPAL, PAYPAL USER AGREEMENT Section 14, *available at* www.paypal.com/us/webapps/mpp/ua/useragreement-full#14 (last visited June 19, 2017).

147. *Id.*

148. ALIBABA, DEFINITION OF DISPUTE AND RESOLUTION BY ALIBABA.COM, *available at* <http://rule.alibaba.com/rule/detail/2060.htm> (last visited June 19, 2017).

149. *Id.*

Indeed, forward-thinking merchants have seen ODR as a powerful competitive differentiator, one with a demonstrably positive impact on the bottom line.¹⁵⁰ For eBay, the research showed that they earned more money by making things easier for consumers to get remedies via ODR.¹⁵¹ Consumers are not looking for perks and giveaways, as much as they simply want to be treated fairly and not “work” to receive remedies they deserve.¹⁵²

At the same time, consumer protection organizations have recognized the importance of developing efficient and fair ODR systems. Organizations have seen that these new ODR platforms were creating next-generation redress systems that were delivering fast and fair resolutions to consumers, all within the private sector. Over fifteen years ago, Consumers International was already cognizant of the potential for ODR to serve as a consumer protection vehicle for consumers in business-to-consumer disputes. It issued a report gathering information on the various ODR systems around the globe and concluded:

To be useful to consumers, ODR schemes need also to: • cover all types of [business-to-consumer] disputes; • be offered at no or low cost to the consumer; • be available for initiation by consumers; • be visible, accessible, and easy to use; • operate in a timely fashion; and • produce results that satisfy the consumer’s need for redress. And finally, to be optimally effective, ODR services will: • accommodate linguistic diversity; • be scalable and coordinated with each other so as to optimize the “fit” between the dispute and the ODR service; and • offer appropriate levels of security for online communications.¹⁵³

Policymakers and regulators also have become interested in how ODR could help avoid jurisdictional questions around consumer disputes. The American Bar Association (“ABA”), for example, is currently considering ways to include ODR in the ABA Pro Bono and Public Service Committee’s ABA Free Legal Answers website.¹⁵⁴ The website is the backbone for a nationwide program that launched in 2016 and has provided over 2,000 clients with legal service. This program is expected to be available in over 40 states by the end of 2017.¹⁵⁵

On an international level, a proposition to legally locate all consumer disputes in the home jurisdiction of the consumer was presented by the Canadian and Brazilian delegations to the Organization of American States (OAS) in 2009, but the concept was met with quite a bit of

150. See SCHMITZ & RULE, *supra* note 133, at 70–125.

151. *Id.*

152. *Id.*

153. *Alternative Dispute Resolution Guidelines: Agreement between Consumers International and the Global Business Dialogue on Electronic Commerce*, GLOB. BUS. DIALOGUE ON ELEC. COM. (Nov. 2003), available at http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution_Nov03.pdf.

154. *In the Spotlight: ABA Free Legal Answers*, AM. BAR ASS’N CTR. FOR INNOVATION (Jan. 12, 2017), <http://abacenterforinnovation.org/in-the-spotlight-aba-free-legal-answers>.

155. *Id.*

resistance.¹⁵⁶ Policymakers saw that Internet merchants would not be able to defend themselves in every jurisdiction around the world with commerce quickly moving online.¹⁵⁷ Accordingly, the US State Department offered a blueprint for the use of ODR to build a global, cross-border system for resolving consumer disputes that would not be reliant on "home state" jurisdiction. The proposal was met with such enthusiasm that UNCITRAL (the United Nations agency responsible for harmonizing global laws) decided to devote a Working Group to the concept, Working Group III, which met bi-annually in Vienna and New York from 2010 to 2016 in pursuit of creating global ODR.¹⁵⁸

2. UNCITRAL Working Group III

As noted, the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III began meeting in 2010, with a focus on establishing global online dispute resolution procedures for small value consumer, as well as B2B, disputes arising from Internet transactions. The group's focus was on low value claims, although the limit was never defined. Controversy surrounded the inclusion of binding arbitration procedures through this process. This became known as the debate between Track One and Track Two. The United States favored Track One because it allowed for enforcement of pre-dispute arbitration agreements, whereas the EU member states and other countries championed Track Two because it did not allow for such binding procedures and focused on mediation as the best means for online dispute resolution systems.¹⁵⁹

After continual debate regarding the differences in Tracks, a decision was made to focus on Track Two before addressing Track One. This occurred at a meeting in 2014, at the same time that some of the nations were suggesting a global chargeback system.¹⁶⁰ Variations in payment systems and complexities of creating a universal chargeback system laid that proposal to rest. Nonetheless, it was understood that a global system for ODR would assist small businesses and entrepreneurs, especially in developing nations where those companies might not be able to attract cross-border consumers due to fear that the consumer would not be able to get a remedy in purchase disputes. The hope was that this global ODR system would encourage consumers from around

156. Louis F. Del Duca et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments*, 42 UCC L.J. 221, 222–50 (2010).

157. *Id.*

158. U.N. Comm'n on Int'l Trade Law, Working Grp. III, *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Guidelines*, U.N. Doc. A/CN.9/WG.III/WP.128 (Nov. 30, 2015).

159. Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for Online Dispute Resolution*, 2016 NEGOT. J. 297, 297–310 (2016).

160. The author was an appointed expert to the Working Group for a meeting during this time.

the world to freely purchase from merchants wherever they may be located.¹⁶¹

Despite this hope, the working group never reached consensus on development of a global ODR system. Instead, political wrangling and fundamental disputes about rules for ODR brought an end to discussions. Furthermore, the emphasis on arbitration distracted the conversation from consideration of automated processes, negotiation, and e-mediation that better fit the business-to-consumer context.¹⁶² The conversations at the time focused on complexities of arbitration that would not be necessary for consumer disputes. Again, consumers seek quick redress and do not have the time or the money for a lengthy process which also requires the consumer to seek enforcement for any reward obtained.¹⁶³ Therefore, when the Working Group ended in 2016, it did not denounce ODR, but instead encouraged the nations of the world to consider more forward-thinking ODR systems. The hope remains that leaders from around the world will continue to discuss ideas and finally bring a global ODR system to fruition.¹⁶⁴

3. The European Union's ODR System

A key example of ODR's establishment as a premier means for advancing e-commerce is the new EU Regulation on Online Dispute Resolution for Consumer Disputes, which took effect in January 2016.¹⁶⁵ This legislative instrument sets up a framework for online dispute resolution to handle national and cross-border issues within the EU. All merchants established in member states are required to inform European consumers about the availability of ODR on their website and in email communications. The EU has constructed a government-hosted ODR filing page to make case filing simple for consumers. Cases filed on the EU page are immediately routed to national ADR service providers located in the appropriate geographies.¹⁶⁶

Accordingly, this system was created under the EU ADR Directive and calls for the establishment of an ODR platform to serve as "a single point of entry for the out-of-court resolution of online disputes."¹⁶⁷

161. U.N. Comm'n on Int'l Trade Law, Working Grp. III, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Outcome, U.N. Doc. A/CN.9/WG.III/WP.140 (Dec. 22, 2015). [hereinafter "Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Outcome"].

162. See Mirèze Philippe, *ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR*, 1 INT'L J. ONLINE DISP. RESOL. 57 (2014).

163. *Id.* at 66–67.

164. Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Outcome, *supra* note 161.

165. Martini Manna Avvocati, *Regulation (EU) no. 524/2013: The ODR Platform for Online Dispute Resolution Between Consumers and Traders Will Now Go Live*, LEXOLOGY, (Jan. 29, 2016), <http://www.lexology.com/library/detail.aspx?g=6e598826-7648-48a4-8bc0-37b9c8f38838>.

166. *Id.*

167. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/64) para. 12 [hereinafter Directive 2013/11/EU].

Furthermore, it supports transparency by requiring "that ADR entities make publicly available on their websites . . . and by any other means they consider appropriate, annual activity reports."¹⁶⁸ This EU ODR platform also assists consumers by remaining free of charge in all the official languages of the EU.¹⁶⁹

At the same time, the EU ADR Directive also requires that procedures (and not solely access to the ODR platform) should be free of charge or limited to only a nominal fee for the consumers.¹⁷⁰ "This Directive should be without prejudice to the question of whether ADR entities are publicly or privately funded or funded through a combination of private and public funding."¹⁷¹ The Directive also establishes quality requirements which apply to all ADR procedures carried out by an ADR entity which has been notified to the Commission.¹⁷² Member states also must designate a competent authority to monitor the ADR entities to advance quality standards.¹⁷³ The goal is "to ensure that consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union."¹⁷⁴

The EU ODR Regulation seems to be a step forward for consumers in the EU but it is only available for consumers and merchants within the EU. Consumers outside of the EU do not have an equivalent system and the process is by no means global. All consumers around the world should be eligible for similar redress processes. That is why these advances, and the emerging consensus behind them, are opening a window of opportunity. Now is the time to build the next generation of consumer protection, powered by ODR.

IV. INVITING EMERGING NATIONS TO THE TABLE OF ODR

A global ODR process must include emerging nations. While ODR systems such as those in the EU assist commerce within a region, they do not help with economic development throughout the world. Of course, developing countries face challenges beyond dealing with disputes (i.e., lack of delivery infrastructure) in establishing e-commerce presence. Nonetheless, businesses and consumers in these regions have expressed great interest in ODR as means for increasing access to justice and economic development.¹⁷⁵ Consumer trust is a necessary precursor to business success.¹⁷⁶ As one scholar from South Africa explained in promoting ODR: "It is clear that participation in this

168. *Id.* at 2013 O.J. (L 165/73) art. 7, para. 2.

169. Regulation No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/6) ch. II, art. 5, para. 2.

170. Directive 2013/11/EU, *supra* note 167, at 2013 O.J. (L 165/67) para. 41.

171. *Id.* at 2013 O.J. (L 165/68) para. 46.

172. *Id.* at 2013 O.J. (L 165/67) para. 37.

173. *Id.* at 2013 O.J. (L 165/55) para. 55.

174. *Id.* at 2013 O.J. (L 165/70) ch. 1, art. 2, para. 3.

175. Leigh & Fowle, *supra* note 9, at 106–15.

176. Cupido, *supra* note 23, at 3256.

global online marketplace will boost a country's economy, as it will bring in money from foreign consumers through trade. It could also stimulate foreign investment in developing nations and promote the growth of an international marketplace."¹⁷⁷

A. ODR Advances in Asia

ODR is gaining traction in Asia, especially in China, where e-commerce is growing amidst invigorated consumer sales. In fact, some policymakers have called for creation of online arbitration agreements to deal specifically with cross-border consumer small claims between parties in China and the United States.¹⁷⁸ This discussion then grew, however, and led to creation of a proposed "Draft Model Law for Electronic Resolution of Cross-Border E-commerce Consumer Disputes" to foster global online arbitration. The proposal was to allow parties to submit claims to a neutral third-party to issue final and binding decisions that could be enforceable under local and international arbitration law.¹⁷⁹

Although the full-scale online arbitration proposal has not come to fruition, ODR mechanisms have been developed in Asia. For starters, two main governmental entities have implemented ODR for domain name disputes: the Asian Domain Name Dispute Resolution Center ("ADNDRC") and the Online Dispute Resolution Center at the China International Economic and Trade Arbitration Commission ("CIETAC").¹⁸⁰ These entities are largely responsible for settling disputes over domain names.¹⁸¹ CIETAC, headquartered in Beijing, is considered the leading arbitration institution in China, as well as one of the best-known arbitration institutions globally.¹⁸² Working in conjunction with the Hong Kong International Arbitration Center ("HKIAC"), CIETAC began the Domain Name Dispute Resolution Center ("DNDRC") in 2002. ADNDRC operates as a charitable institution, providing domain name dispute resolution based upon the Internet Corporation for Assigned Names and Numbers ("ICANN") and the Uniform Domain Name Dispute Resolution Body ("UDRP").¹⁸³ ADNDRC was preceded by Hong Kong International Arbitration Center ("HKIAC"), which was established as an independent non-profit

177. *Id.* at 3254.

178. Philip Johnson, *Enforcing Online Arbitration Agreements for Cross-Border Consumer Small Claims in China and the United States*, 36 *Hastings Int'l & Comp. L. Rev.* 577, 577-601 (2013).

179. *Id.* at 590-601.

180. Zhao Yun et al., *Online Dispute Resolution in Asia*, in 22 *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE* 499, 499-500 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).

181. ADNDRC operates four offices across four regions: Beijing, Hong Kong, Seoul, and Kuala Lumpur. *Id.*

182. ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE, About ADNDRC (2017), available at <https://www.adndrc.org/mten/AboutUs.php?st=2> (last visited Sept. 10, 2017).

183. *Id.*

organization in 1985 to moderate Chinese domain name and keywords disputes.¹⁸⁴

With respect to e-commerce disputes, the China Commercial Arbitration, run by Guangdong Arbitration Commission, offers online arbitration for e-commerce disputes.¹⁸⁵ Similarly, *Taobao*, a shopping website similar to Amazon, created its own consumer ODR system.¹⁸⁶ Its platform is committed to concluding consumer disputes over sales and deliveries within seven days.¹⁸⁷ *Taobao* initiated the system on January 15, 2010, and has remained committed to strict timelines.¹⁸⁸ After a consumer files a claim in the system, the vendor must contact the consumer and attempt to settle the complaint within forty-eight hours.¹⁸⁹ If no settlement is reached by the end of this period, a consumer rights officer will intervene in the dispute.¹⁹⁰ This system's growth evidences an aptitude and interest in ODR in China that is expected to play a large role in Asian dispute resolution.¹⁹¹

Nonetheless, Japanese ODR is still in the experimental stages, and most ODR participants use it for consultation rather than resolution.¹⁹² In 2011, the consumer agency in Japan created the International Consumers Advisory Network ("ICA-Net") to provide cross-border dispute resolution in southern and eastern Asia.¹⁹³ To that end, ICA-Net allows parties to share documents and participate in discussions through a secure, electronic environment.¹⁹⁴ The parties can communicate with each other through chat rooms, and send private messages to advisors.¹⁹⁵ At the same time, the Alternative Dispute Resolution Online Modeling System ("ADR-OMS") tracks the lifecycle of online disputes and allows parties to predict resolutions, or even attempt to avoid the risk of disputes altogether, by capitalizing on captured data.¹⁹⁶

India's Internet use has grown, and e-commerce in India has embraced ODR to resolve disputes between buyers and sellers.¹⁹⁷ eBay India was the first consumer site to introduce ODR in India, and it

184. HKIAC was later tapped by DotAsia Organization ("DotAsia") to preside over ODR for DotAsia's .asia domain name issues. Yun et al., *supra* note 180, at 499–504.

185. *Id.* at 500–02.

186. *Id.*

187. *Id.*; see generally XU Junke, Professor of Law, China Foreign Affairs University, Development of ODR in China, Presentation at the Pace Law Institute of International Commercial Law Colloquium (March 29, 2010), https://law.pace.edu/lawschool/files/iicl/odr/Xu_Junke.pdf.

188. Jiping Song & Qisheng He, A Global Online Dispute Resolution System: Is China Ready to Join?, Presentation at the First UNCITRAL Regional Workshop in Asia (November 23–24, 2010), http://www.uncitral.org/pdf/english/whats_new/11_2010/1124_8_HE_paper.pdf.

189. *Id.*

190. *Id.*

191. Yun et al., *supra* note 180, at 504.

192. *Id.* at 505.

193. *Id.* at 519.

194. *Id.* at 508.

195. *Id.*

196. *Id.* at 509.

197. *Id.* at 522.

helped to create the Community Court which provides an online forum for resolving e-commerce disputes regarding eBay purchases.¹⁹⁸ This process enables sellers that receive negative reviews they believe to be undeserved to log into Community Court, explain their rationale for why they dispute the review, and ask that the review be removed.¹⁹⁹ The buyer initially posting the negative review also gets an opportunity to explain her viewpoint, and a jury of other eBay users make a final determination.²⁰⁰

At the same time, the Consumer Coordination Council, supported by India's Department of Consumer Affairs, runs the Consumer Online Resource Empowerment ("CORE") system to provide online resolutions.²⁰¹ This system allows users to file claims online, and get a resolution generally within sixty days. The system also allows users to track the resolution of their issues in real time.²⁰² Additionally, the Tamil Nadu Electricity Board provides ODR services for electricity-related claims. It keeps consumers updated on claim status through text messaging.²⁰³ Such mobile solutions are essential in India, as only one-third of the population uses a broadband Internet connection.²⁰⁴ In contrast, mobile access to the Internet is robust and growing in India, making app-friendly court-connected ODR a great option for helping to clear up the courts' backlogs.²⁰⁵

B. ODR in Latin America

Latin America has faced challenges as it seeks to expand e-commerce.²⁰⁶ Lack of broadband Internet access and illiteracy are common in some regions. This is particularly true in rural areas. Accordingly, cyber-illiteracy also hinders e-commerce development.²⁰⁷ Additionally, the inadequacy of basic infrastructure, like roads for deliveries, in some areas suppresses the growth of e-commerce. Policymakers have therefore focused on finding ways to boost e-commerce, as means for furthering economic development overall.²⁰⁸

This has led to the growth in e-commerce and Internet access noted above.²⁰⁹ At the same time, ADR and ODR have grown in popu-

198. *Id.*; see also Colin Rule & Chittu Nagarajan, *Crowdsourcing Dispute Resolution over Mobile Devices*, in ch. 8 MOBILE TECHNOLOGIES FOR CONFLICT MANAGEMENT 93, 99 (Marta Poblet ed., 2011).

199. Rule & Nagarajan, *supra* note 198.

200. *Id.*

201. Avinash Saxena, *How to File a Consumer Complaint Online in India (In 3 Easy Steps)*, ABRITION (April 3, 2017), <http://abrition.com/how-to-file-a-consumer-complaint-online-in-india/>.

202. *Id.*

203. Yun et al., *supra* note 180, at 511.

204. *Id.*

205. *Id.* at 513.

206. Alborno & Martín, *supra* note 5, at 41. Although connectivity has increased as noted above, studies had indicated Internet penetration in Latin America was only 48.2%, in contrast to North America's penetration at 78.6%.

207. *Id.* at 54–55.

208. *Id.* at 52.

209. See *supra* note 27 and accompanying text.

larity in Latin America as means for avoiding the notoriously cluttered courts.²¹⁰ Latin America has demonstrated great interest in developing best practices for ODR,²¹¹ and its openness to innovation led to the first fully online dispute platform in Latin America—Mexico's Concilianet.²¹² Concilianet provides online mediation for consumers who have complaints against companies that have registered on the site.²¹³ By 2010, a total of eighteen companies committed to using Concilianet for ODR.²¹⁴ More recent numbers show that over ninety companies have now registered.²¹⁵ Furthermore, from June 2008 to August 2012, the system has resolved ninety-six percent of the 7,000 filed complaints, and it was accomplished in an average of twenty-five days (as compared with ninety-two days if in court). Moreover, ninety-three percent of the consumers who have used the system report that they trust the system.²¹⁶

ODR systems also have appeared elsewhere in Latin America. In Brazil, an online negotiation platform called Consumidor.gov.br launched in June 2014.²¹⁷ By the end of 2016, the platform, built and managed by the government, already handled more than 560,000 complaints involving suppliers of goods and services that participate in the site. These complaints were mainly launched against merchants in the telecommunications sector (47.5%), followed by banks (23.9%) and companies in the e-commerce segment (9.7%).²¹⁸ The system has cut down on resolution time versus the courts, and boasts an 80.3% average solution index and average response time of 6.3 days.²¹⁹ Nonetheless, the so-called digital mediation center in Brazil has been rarely used, with only fifty-five cases filed since its launch in 2016.²²⁰

210. Gabriela R. Szlak, *Online Dispute Resolution in Latin America*, in ch. 23 ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 517, 522–25 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).

211. See Albornoz & Martín, *supra* note 5, at 39–42.

212. *Qué es Concilianet?*, GOB.MX, <http://concilianet.profeco.gob.mx/Concilianet/comoconciliar.jsp> (last visited Aug. 21, 2017); see generally Szlak, *supra* note 210, at 525–43.

213. Szlak, *supra* note 210, at 525–43.

214. *Id.* at 542.

215. *Proveedores Participantes*, GOB.MX, http://concilianet.profeco.gob.mx/Concilianet/proveedores_que_concilian.jsp (last visited Aug. 21, 2017).

216. PROCURADURÍA FEDERAL DEL CONSUMIDOR, MEMORIA DOCUMENTAL: CONCILIACIÓN A TRAVÉS DE MEDIOS ELECTRÓNICOS: CONCILIANET (2008 A 2012), 23–24 (2012), available at https://www.profeco.gob.mx/transparencia/resol_comite/anexos_informe/MD-%20Concilianet.pdf.

217. *Boletim Consumidor.gov.br: 2016*, MINISTÉRIO DA JUSTIÇA, <https://www.consumidor.gov.br/pages/publicacao/externo/> (last visited Aug. 21, 2017).

218. *Id.*

219. MINISTÉRIO DA JUSTIÇA E CIDADANIA, BALANÇO CONSOLIDADO CONSUMIDOR (2016), available at <https://www.consumidor.gov.br/pages/publicacao/externo/> (click the download icon that follows "Balanço" in order to view the publication) (last visited Aug. 21, 2017).

220. Regina Bandeira, *Relatório Justiça em Números Traz Índice de Conciliação*, CONSELHO NACIONAL DE JUSTIÇA (Oct. 17, 2016, 4:39 PM UTC-3), <http://www.cnj.jus.br/noticias/cnj/83676-relatorio-justica-em-numeros-traz-indice-de-conciliacao-pela-1-vez>.

Latin America's potential ODR strengths are adaptability and keen interest in economic growth through e-commerce.²²¹ Furthermore, e-commerce in Latin America thrives by taking advantage of extensive mobile connectivity and alternative payment systems.²²² Mexican e-commerce site Decompras.com successfully partnered with Telemax, a phone company, to allow consumers to charge their purchases to their phone bill.²²³ This has allowed ODR providers to use mobile payment systems to facilitate resolutions such as chargebacks in a manner similar to PayPal's role in ODR for eBay. For example, the Latin American Institute of Electronic Commerce ("ILCE") is a regional ODR provider that intervenes in disputes arising from online or mobile e-contracts, linked with mobile payment systems.²²⁴ This provider offers businesses a chance to provide and promote ODR by placing ILCE's eTrust seal on their website.²²⁵ These businesses must then allow their customers to seek remedies using this ODR system free of charge.²²⁶ Businesses benefit from attracting customers through the eTrust seal, while consumers benefit by obtaining remedies using ODR without paying a filing fee like they would do in the courts. ODR also saves all parties from time and hassle of travel and facilitates easier communications among various regional language differences (namely, Spanish and Portuguese variations).²²⁷

C. Growing ODR Interest in South Africa

With the exceptions of South Africa, Egypt, and Tunisia, the African countries are struggling to build and expand their ICT infrastructure.²²⁸ That said, growth is evident, and further expansion is eminent. Even considering the data from ten years ago, "most countries in Africa saw an average of ten percent increase in the number of people who own a personal computer" from 2006 to 2007, and sub-Saharan Africa had thirty-five million Internet users in 2008.²²⁹ Secure servers, which are required for e-commerce and ODR, are also gaining ground in Africa.²³⁰ South Africa is leading the way with Nigeria and Tunisia right behind. Security is not as robust in Egypt, despite the fact that it has a very high Internet penetration rate.²³¹ Nonetheless, Egypt's Internet proliferation has led to the e-commerce disputes, including those among businesses.²³² Egypt also has passed the Digital Signatures

221. Albornoz & Martín, *supra* note 5, at 49–50.

222. *Id.*

223. *Id.* at 50.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Mohamed S. Abdel Wahab, *Online Dispute Resolution for Africa*, in ch. 24 ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 549 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).

229. *Id.* at 551–52.

230. *Id.* at 553.

231. *Id.*

232. *Id.* at 557.

Law and created the Information Technology Industry Development Agency.²³³ Indeed, e-commerce is growing in Egypt and ripe for greater development cross-border with the assistance of ODR to garner trust from purchasers abroad.

Overall, South Africa has shown aptitude for ODR due to greater access to the Internet and e-commerce. South Africa currently has two ODR programs: (1) the ZA Domain Name Dispute Resolution Regulations ("ZADRR") and (2) the Online Ombudsman. The ZADRR is an online resolution system for domain name disputes. Similar to other programs under the UDRP, it allows complainants to file a dispute with a service provider, who then appoints an adjudicator to deliberate over the matter and issue an opinion.²³⁴ Additionally, ZADRR is similar to other UDRP programs in that it does not provide monetary relief to claimants. ZADRR deals exclusively with cyber-squatters, and solely provides binding instructions to domain registries for transfer of the disputed name.²³⁵ The program is accredited by the South African Institute of Intellectual Property ("SAIIP") and was the first non-judicial means for claimants to bring domain name complaints.²³⁶

With respect to consumer claims, Online Ombudsman is the chief ODR program in South Africa. It is an online means for implementing and enforcing The South African Consumer Protection Act, and allows consumers to get in touch with mediators through an online platform.²³⁷ It addresses complaints from consumers against service providers where negotiations between the consumer and the provider have failed.²³⁸ Online Ombudsman's services are limited in that they do not handle complaints exceeding one million SAR (approximately seventy-five thousand USD). The program also excludes claims older than three years, anything pending before another decision-making body, or matters that are outside the scope of the National Credit Act.²³⁹

Commentators have noted, however, that ODR in Africa is mainly provided by platform operators located outside of the African states.²⁴⁰ These ODR providers do not consider African languages or cultures in their procedures.²⁴¹ Nonetheless, commentators have hoped that African governments could be incentivized to promote ODR.²⁴² One scholar surmised that "virtual courtrooms" could eventually be established for many areas, including family dispute resolution. This could be significant in promoting public policy by allowing individuals of all economic means to assert their rights more easily. Currently, it is too costly to litigate, and courts are backlogged for many years.²⁴³

233. *Id.*

234. Cupido, *supra* note 23.

235. Wahab, *supra* note 228, at 579.

236. *Id.* at 574–82.

237. *Id.*

238. *Id.*

239. *Id.* at 580.

240. *Id.* at 581.

241. *Id.*

242. *Id.*

243. Cupido, *supra* note 23, at 3254–56.

Still, concerns remain with development of ODR in South Africa as well as the rest of the continent. The key concern is adequacy of infrastructure to maintain a virtual court. This would rely on a stable data provider and steady electricity, as well as adequate privacy protections. Furthermore, while it is true that mobile Internet usage has increased access to the Internet, it is questionable whether such mobile access is equivalent to broadband Internet access when it comes to ODR. Consider: An individual who accesses the Internet on a laptop at home will have greater ability to upload documents and argue her case than one who is simply swiping and inputting basic information via a cell phone.

That said, ODR systems can be built for mobile technology to assist all users in answering required information and using easy mobile uploads for supporting documentation. Possibilities are endless as technologies progress. Moreover, ODR can itself be a catalyst for e-commerce expansion, which leads to economic development and infrastructure improvement. Indeed, with ODR comes greater e-commerce. With the growth of e-commerce, comes greater investment in the economy and economic growth for all involved. “[T]here is a direct relationship between bridging the digital divide, [and] achieving a higher degree of ICT penetration in the progressive development of e-commerce and ODR.”²⁴⁴ Despite the slow process of introducing ICT and ODR in developing countries, it has been recognized as a necessary growth.²⁴⁵

V. CREATING MOBILE-FRIENDLY ODR TO PROMOTE E-COMMERCE WORLDWIDE

Mobile phones have opened new avenues to the Internet and ODR in developing nations.²⁴⁶ Mobile access to the Internet and technologically assisted communications have become central in connecting the world. Accordingly, mobile-friendly ODR methods that can be completed on mobile devices would expand access to consumer remedies for e-commerce claims in developing countries and throughout the world. Mobile ODR would help narrow the digital divide in ODR, while promoting a social aspect of dispute resolution that has emerged in a new generation that increasingly looks to their cell phones for interaction. Moreover, phone users can rely on voice and video recording, rather than text-based interaction. This would be more effective in reaching illiterate users than requiring traditional email systems.²⁴⁷ Mobiles would also allow dispute professionals working with larger groups to enjoy easier means for coordinating meetings. This also would enable non-present parties to be kept in the loop while away

244. *Id.* at 3319.

245. *Id.* at 3257.

246. Flávia de Almeida Montingelli Zanferdini & Rafael Tomaz de Oliveira, *Online Dispute Resolution in Brazil: Are We Ready for This Cultural Turn?*, 24 REVISTA PARADIGMA, RIBEIRAO PRETO-SP 68 (2015) (emphasizing how mobile phones have been a game-changer for Brazilian expansion of Internet access and e-commerce).

247. Rule & Nagarajan, *supra* note 198, at 1, 3.

from their computers.²⁴⁸ The key is to develop easy-to-use systems that also assist businesses to attract customers worldwide by providing a trust mechanism for e-commerce.

A. *Ideas for Mobile Accessible Global ODR*

ODR may include anything from automated case predictions based on data regarding similar cases to fully online arbitration hearings that lead to enforceable awards. The spectrum is wide and evolving. This section notes the creative options for ODR but suggests automated case predictions leading to quick online settlements as a starting place for a global ODR system for small e-commerce claims. Although the system may evolve in various ways as technology expands, a scalable and efficient ODR process that results in nearly one hundred percent settlement is best. This would occur through online negotiations coupled with data-driven case predictions. Such a simple system would provide means for businesses in developing countries to gather consumer trust on a global level.

1. Considering the Spectrum

ODR need not take any particular form. It may even include crowdsourced determinations. For example, eBay India's Community Court, noted above, is crowdsourced. This allows the best judgement of the community at large to decide an issue.²⁴⁹ When a seller receives a bad review on eBay that she does not believe she deserves, she may submit a claim to the Community Court. At that point, she and the buyer submit evidence such as photos or explanatory text through an online portal.²⁵⁰ Twenty-one eBay jurors are randomly selected from a pool of applicants, who are eBay users that have met eligibility requirements.²⁵¹ These jurors all submit impartial votes, and whichever side gets more than half of the votes will win the case.²⁵²

Such systems garner legitimacy through the juror selection process in that fellow eBay users are essentially judging each other. Claimants are not at the mercy of an outside entity that may or may not understand how purchases work on eBay. Instead, those determining the case are in the "same boat" with the claimants and respondents. Furthermore, such systems are encrypted and preserve anonymity. They also may be entirely operational via mobile phone.²⁵³ Consider: jurors, claimants, and respondents may all access the ODR portal via their mobile devices and submit evidence, arguments, and votes in real time from anywhere in the world.

Crowdsourced ODR was likewise proposed for a mobile ODR application called M-Jirga for use in Afghanistan. Afghanistan struggles with

248. *Id.* at 5.

249. *Id.* at 3–6.

250. *Id.* at 6.

251. *Id.* at 7.

252. *Id.* at 99.

253. *Id.* at 100–01.

maintaining a credible justice system, and thus it is typical for a community of elders to settle most disputes in an informal and undocumented way, called Jirga.²⁵⁴

In essence, Jirga is a tribal assembly of elders which takes decisions by consensus. It operated over the centuries as an important mechanism of conflict resolution among the Pashtuns, Eastern Iranian ethno-linguistic group with populations primarily in Afghanistan and northwestern Pakistan, and has contributed to the maintenance of social order in the rest of the Afghan society both in direct and indirect ways.²⁵⁵

The idea for M-Jirga evolved in light of the growing access to mobile devices in Afghanistan. The US military had built many cellphone towers and distributed free phones in the region. Policymakers therefore designed an “app” for resolving disputes via mobile phone in the region. This brought the tribal process of Jirga to the digital age. In order to solve their disputes through M-Jirga, the parties should call a certain number and initiate the M-Jirga process. Once both sides recorded their arguments, the system could call out to elders in the relevant regions.²⁵⁶ Elders would then listen to both sides and render their decisions. A vote of the majority would determine the case. However, that determination would remain legally non-binding.²⁵⁷

Some may criticize such non-binding determinations because they leave the door open to subsequent litigation. In reality, however, parties would rarely defy a decision of the elders in a community. Moreover, a process via mobile phone produces wider cost-effective access and greater credibility than courts in the region.²⁵⁸ Furthermore, this online process allowed dispute settlements to be recorded so that users could research outcomes when the same or similar disputes arise again.²⁵⁹ This idea was pitched for special use in land disputes, which are among the most common in Afghanistan due to a lack of a land registry.²⁶⁰ Although the M-Jirga proposal never came to fruition, it sparked policymakers’ interest in such use of ODR for various disputes on a global level.

Interest in the proposal also evidenced how “non-binding” determinations have value. For example, a scholar recently proposed non-binding online arbitration for fraud claims regarding crowdfunded securities.²⁶¹ Entrepreneurs increasingly rely on crowdfunding to

254. *Id.* at 101–03.

255. ASS’N FOR PROGRESSIVE COMMS., CROWDSOURCED ONLINE DISPUTE RESOLUTION (2011), available at <https://www.apc.org/en/blog/crowdsourced-online-dispute-resolution>.

256. *Id.*

257. *Id.*

258. Rule & Nagarajan, *supra* note 198, at 105.

259. *Id.* at 104–05.

260. *Id.* at 104.

261. C. Steven Bradford, *Online Arbitration as a Remedy for Crowdfunding Fraud*, FLA. ST. U. L. REV. (forthcoming), <https://ssrn.com/abstract=3014148>.

launch start-up businesses.²⁶² However, crowdfunding has opened the door to fraud, and thus a surge in fraud claims. These are generally for small-dollar amounts, leaving defrauded investors without cost-effective remedies. Litigation or even in-person arbitration are prohibitively expensive and especially impractical for parties located in various parts of the world.²⁶³ Accordingly, a potential solution would be to establish an online arbitration mechanism for resolution of these fraud claims. Online arbitrators would be experts on crowdfunding and securities law, and would take an active role in the arbitration process by asking questions and obtaining relevant documents.²⁶⁴ At the same time, making arbitrators' opinions public would improve transparency and credibility.²⁶⁵ These features would converge to improve the efficiency and efficacy of the process, and ward off litigation—although litigation would remain a viable option for investors who seek to pursue a class claim in court.²⁶⁶

Similarly, a new ODR "app" has been proposed for resolving refugee disputes and issues involving displaced individuals. "ODR 4 Refugees" is a recent proposal for a mobile application that seeks to help refugees resolve disputes ranging from those emanating from sharing space in refugee camps to those dealing with discrimination, poverty, and lack of communication with camp administration officials.²⁶⁷ The "app" would be free to use for refugees and guides them to select their type of dispute from a list and describe the issue in a couple of lines. Claimants then add their contact details and those of the other side.²⁶⁸ The system processes all the data and appoints a mediator based on criteria such as nationality, language, area, topic, and gender. The whole mediation process could be conducted online through the parties' smartphones by video conference (in joint or separate sessions). It also may be handled via a chat tool, or other means that will evolve with the technology.²⁶⁹ Currently, this is a pilot project proposal "targeted to all points of entrance in countries where there is a flow of refugees,

262. *Id.* (manuscript at 1).

263. *Id.* (manuscript at 20).

264. *Id.* (manuscript at 32–33).

265. *Id.* (manuscript at 33–34).

266. *Id.* (manuscript at 1).

267. ODR EUROPE, ODR FOR REFUGEES (2017), available at <http://www.odreurope.com/odr4refugees> (last visited Sept. 11, 2017).

268. Developers of the application explain their inspiration as follows: "[O]ur work with refugees a couple of years ago in the context of an international mediation competition. We recruited six young Syrian refugees from a camp, trained them in mediation and formed two teams to participate in the competition. To our surprise, they performed exceptionally well. We had long discussions with them about mediation and the conditions they lived in. Also we have been monitoring the refugee crisis in Greece for the past two years and we have noticed that refugees had no access to easy dispute resolution mechanisms but they had third generation smartphones as they were easy to carry with them. So, we have decided to develop a smartphone application that could create the environment for dispute resolution." *Id.*

269. *Id.*

and to all refugee camps and [sic] communities” throughout the world.²⁷⁰

2. Seeking Efficiency

The possibilities for mobile ODR are evolving and exciting. For e-commerce disputes, however, they must remain simple. Efficiency is key for maximizing use and potential for companies and consumers to benefit. To that end, ideas could expand from an ODR design that this author has proposed with Colin Rule, the architect for the ODR system at eBay. This proposal is for a global ODR platform called “newhandshake.org.” This system would be unified so that it could affordably scale alongside the expansion of global e-commerce.²⁷¹ This would call for a single hub that powers the overall system. There would be hundreds of routes into this home base, or core platform. These routes would derive from ODR providers, merchants and consumer protection authorities around the world. Merchants would visit the newhandshake.org site and fill out a form to register in the system. Merchants would have to specifically agree to abide by standards of the program and provide contact information for the individual within their staff who will liaise with any communications from the newhandshake.org administration team.²⁷²

Once the merchant completes the registration form, they would be provided with a link to their free Resolution Center. This Resolution Center would be a cloud-based system through which the merchant can review any problems reported by that merchant’s customers through the newhandshake.org system.²⁷³ The merchant would also be provided with a single line of JavaScript code to place on the home page of their website, which would appear as a “button” for consumers to click when they experience purchase problems. It could look something like this:



This little button would relay information to a merchant’s customer service system or customer relationship management (“CRM”), as well as newhandshake.org. The submission of this information would be instantaneous when the button is clicked, and all of it would be encrypted to ensure its safety. This button would work on both mobile devices and full-resolution web browsers.²⁷⁴ Moreover, it would

270. ODR EUROPE, ODR FOR REFUGEES: PROJECT OUTLINE (2017), available at http://www.odreurope.com/assets/site/content/ODR4refugees%20PROJECT%20OUTLINE_2.pdf (last visited Nov. 14, 2017).

271. SCHMITZ & RULE, *supra* note 133, at 95–106.

272. *Id.* at 95–96.

273. *Id.* at 96.

274. *Id.* at 97.

be mobile accessible, and usable on a small or large screen. This, again, is important to make it fully functional on any wireless device and appear with the correct status even from within third party digital code. In other words, it would work with Android and Apple systems.

The design would be simple, and well-suited to resolve e-commerce claims. When a consumer has an issue that is unresolved, the consumer could click the button to submit a complaint at the same place they engaged in the transaction—the point of sale (“POS”). This filing would follow guided questions:

1. What are the details of your transaction?
2. What kind of problem are you experiencing?
3. What resolution would you prefer? (e.g., I want my money back, I want a partial refund, I want a new product, etc.)
4. What email address can we use to contact you about this case?²⁷⁵

Convenience will be key. The data captured in the intake form will be primarily structured, meaning that the consumer picks information from lists. There would be only one option to submit free-form text to describe the issue in detail. The buyer would have the ability to upload files or images if, for example, they want to show how an item was damaged in transit, or why they suspect the item may be inauthentic.²⁷⁶

Once a case is filed by a consumer, the liaison specified in the merchant’s sign up process would receive notice of the complaint, and directions to log into the Resolution Center.²⁷⁷ Here, the merchant would be able to sort the list as the merchant prefers and respond as appropriate. The merchant also could export the list into her own computer or system for further integration and functionality.²⁷⁸ This would allow a merchant to incorporate the newhandshake.org platform into her own customer service and dispute resolution processes. That means that this process would set a floor and not a ceiling for customer service and claims resolution. Companies would remain free to provide greater protections.

The centrality, or “hub”, design of newhandshake.org would also allow merchants to keep track of their actions in one place. A merchant could use the platform to easily identify new cases and take action. First, the merchant could enter a response to the buyer’s filing, explaining the matter from the merchant’s perspective. Second, the merchant could indicate that she will provide the buyer a full refund to address the concern. Third, the merchant could indicate that she has already resolved the matter directly with the buyer, the buyer is now satisfied, and the case should be closed.²⁷⁹

275. *Id.* at 97–98.

276. *Id.* at 98.

277. *Id.*

278. *Id.* at 99.

279. *Id.* at 99.

At the same time, data regarding similar cases could be used to suggest settlements where the parties have reached an impasse. For example, consumers and merchants would be able to use a tool on the platform to enter information regarding their claims and see how similar cases have been resolved. They would learn what is “reasonable” under the circumstances, which often leads parties to settle. It is common to assume one’s case is “better” than it is in reality, and thus predictions prove powerful in setting reasonable expectations.

All of this functionality could be part of a free or low-cost Resolution Center that the merchant would have access to just for signing up to be part of *newhandshake.org*, or small fees could be charged based on the volume of disputes. For example, small emerging merchants who have very few disputes would not pay a fee due to low volume, while larger companies with many claims would have a reasonable fee. Access to this ODR platform would be a value-add for the large and small merchants: it saves the costs of establishing another mechanism for resolving e-commerce claims, helps merchants gain consumer goodwill by ensuring means for obtaining remedies, and saves companies a great deal in customer service costs. Costs of a global system could remain low due to economies of scale and various non-profit and governmental grants—geared toward consumer protection, access to remedies, and economic development.

Such a central hub for ODR would provide great value to consumers as well. Currently, consumers are at the mercy of merchants’ privatized and generally uneven customer service measures. Customer service ranges from nothing, to painful phone systems, to in-person arbitration that is prohibitively expensive for consumer claims. Companies currently favor the “squeaky wheels” who are sufficiently proactive in pursuing their complaints to get assistance, remedies, and other benefits that companies are not eager to provide.²⁸⁰ Meanwhile, the majority of consumers remain silent because they lack the knowledge, experience, or resources to artfully and actively pursue their interests.²⁸¹ As a result, the individuals who already enjoy disproportionate bargaining power due to social or economic status are usually the squeaky wheels that receive the benefits—thus perpetuating the divide between the consumer “haves” and “have-nots.”²⁸² A central and user-friendly ODR “app” would help narrow this divide to open access to remedies for all consumers.

Of course, there are many details that would need to be worked out. The platform could start with automated and asynchronous nego-

280. Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 280 (2012) [hereinafter Schmitz, *Squeaky Wheel System*].

281. *See id.* at 282–83.

282. *See* Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI-KENT L. REV. 879, 895–96 (2008) (discussing how businesses may discriminate in favor of sophisticated consumers); *see also* Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer “Haves” from “Have-Nots”*, 2014 MICH. ST. L. REV. 1411, 1411–74 (2014) (exploring how Big Data has been used by businesses to determine what contracts and benefits to provide to consumers, thereby perpetuating contractual discrimination).

tiations, but additional features such as online mediation, arbitration, and community courts (as noted above) could be added. The key is to create a unified and encrypted system to handle e-commerce complaints on a global level. Unification keeps data organized and trigger mechanisms could be added to catch dangerous products (i.e., if there are high levels of claims regarding the same product). An outside system also would prevent merchants from "getting away with" ignoring claims. If a merchant continues to provide no response, he or she could be removed from the system after a certain number of violations. Similarly, a buyer may be "flagged" for filing fraudulent claims.

Such an ODR platform also could be integrated with existing ODR systems. For instance, it could add value to the EU's current ODR platform, noted above. Some of the cases will be filed by EU citizens against merchants outside of the EU. The newhandshake.org system would provide standard-compliant data exchange interfaces to share information about cases in real time with these other systems. New case filings would come in from consumers reporting issues through the buttons on merchant websites. Nonetheless, other cases may come in via other external ODR systems like the EU framework. Merchants will be notified about these cases in the same way they are notified about cases filed directly from the buttons on their websites.

Again, the platform does not have to be "newhandshake.org," and new ideas will surface as technology continues to surpass imaginations. These are simply some ideas for a system that could work with mobile devices and create a win-win for consumers and companies. Global ODR systems could help large and small companies seeking customers, as well as consumers who struggle to obtain remedies with respect to e-purchases.

Importantly, this would not be a replacement for courts. However, the ODR "app" would prevent most e-commerce cases from reaching a court. Instead, the process would open new avenues for consumers who would never invest the time and money necessary to pursue an e-merchant, especially across borders. Furthermore, the system would easily present in the users' native language and include adaptations for various disabilities. This can all be done via ODR and will become more sophisticated and cheaper as technologies develop.

B. *Note on Legal Hurdles to Global ODR*

That said, there are legal hurdles to building ODR systems on a global level. As noted above, dissention at the United Nations brought UNCITRAL Working Group III to a halt in its development of global ODR. For starters, various national laws treat e-arbitration agreements and awards differently, with some refusing to enforce any pre-dispute arbitration agreements.²⁸³ These clauses are usually buried in click-

283. Reinmar Wolff, *E-Arbitration Agreements and E-Awards—Arbitration Agreements Concluded in an Electronic Environment and Digital Arbitral Awards*, in ch. 7 *ARBITRATION IN THE DIGITAL AGE: THE BRAVE NEW WORLD OF ARBITRATION* (C. Aschauer and M. Piers eds.) (forthcoming 2018) (manuscript at 3), <https://ssrn.com/abstract=2922550>.

wrap and browsewrap website agreements.²⁸⁴ These are agreements consumers generally never read, as they “click” to accept a purchase or are deemed to accept when simply browsing a website.²⁸⁵ One 2013 study analyzed terms of service for the hundred most-visited websites and found that thirty percent contained arbitration clauses.²⁸⁶ Sixty-three percent of arbitration clauses were mandatory; the clauses explained only a limited number of the users’ rights, and the average clause appeared near the end of these multi-page click-wrap agreements.²⁸⁷ Additionally, forty percent of the clauses did not mention that the user was waiving other remedies, sixty-seven percent contained class action waivers, and seventy percent did not address how to initiate an arbitration proceeding.²⁸⁸

Due in part to this lack of real consent, these arbitration agreements may not be enforceable in all countries.²⁸⁹ If the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) does not apply, then national law must determine the criteria for enforcement.²⁹⁰ Most European countries, for example, do not enforce these arbitration clauses in consumer contracts.²⁹¹ Moreover, even the US, which had been a staunch supporter for arbitration under the Federal Arbitration Act (“FAA”), has a new CFPB rule that prohibits banks and other consumer financial companies from including mandatory arbitration clauses that block group lawsuits in any new contracts after the compliance date.²⁹² The rule does not bar arbitration clauses outright, but instead requires them to say explicitly that they cannot be used to stop consumers from banding together to pursue relief as a group.²⁹³ The rule also requires companies to submit their claims, awards, and other information about the arbitration of individual disputes to the Bureau.²⁹⁴

Arbitration agreements also raise the question of “written form” validity, and some national laws treat electronic communication, including e-mail and e-signatures, as not sufficiently “in writing” for enforce-

284. *Id.* at 2–3.

285. James R. Bucilla, II, *The Online Crossroads of Website Terms of Service Agreements and Consumer Protection: An Empirical Study of Arbitration Clauses in the Terms of Service Agreements for the Top 100 Websites Viewed in the United States*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 101, 106 (2014) (citing October 2013 figures from Alexa).

286. *Id.* at 111.

287. *Id.* at 112–20.

288. *Id.* at 120–25. Forty percent did not address responsibility for cost, while another forty percent provided that AAA rules govern cost. *Id.* at 125. However, scholars support consumer arbitration clauses. See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–64, 292 (2006) (proposing that pre-dispute arbitration clauses benefit companies and consumers).

289. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1230–43 (1983) (discussing enforcement of adhesion contracts).

290. Wolff, *supra* note 283, (manuscript at 2–4).

291. *Id.* (manuscript at 4–6).

292. 12 C.F.R. Pt. 1040 (2017).

293. 12 C.F.R. § 1040.4 (2017).

294. *Id.*

ment.²⁹⁵ Laws and treaties similar to the UNCITRAL Model Law on Electronic Commerce and the Convention on the Use of Electronic Communications in International Contracts state that electronic forms meet "written form" requirements if the data is available for later reference.²⁹⁶ The Model Law also provides that e-signatures are valid if they provide a reasonably reliable method that can identify the person and indicate the person's consent.²⁹⁷ However, not all countries follow this and arbitration agreements in particular have been controversial.

Foreign agreements for binding arbitration generally fall under the New York Convention.²⁹⁸ Under the New York Convention, "in writing" includes an agreement signed by the parties.²⁹⁹ What constitutes as a "signature" depends largely on interpretation and may be complicated depending on how nations implement the law in their courts.³⁰⁰ Other conventions also may come into play. Therefore, if the Electronic Communications Convention is utilized (e.g., by those states who are a party to it) an electronic signature is valid.³⁰¹ Again, however, each nation may apply law in its own way.

Accordingly, online arbitration may pose challenges when subsequent enforcement will be necessary. Although e-arbitration agreements and awards are desirable in the international context due to speed and convenience,³⁰² this must be balanced with the risk that electronic agreements or awards will not be legally valid.³⁰³ This makes self-enforcing ODR systems and online mediation particularly attractive for global e-commerce. Ideally, a global ODR system should operate without need for reliance on choice of law or legal enforcement through the courts. That leads to need for "Trustmarks" and other measures that encourage self-enforcement.

C. *Ensuring Confidential, Trustworthy and Ethical ODR*

Any dispute resolution system is ineffective if it is unfair. Efficiency should not overshadow fairness. It is therefore essential to build ODR systems for particular contexts in consideration of due process standards.³⁰⁴ The importance of ODR due process standards coincides with the need for specialized ethics rules to address the new and evolving dilemmas ODR creates for systems designers, providers, and third-party neutrals. Some commentators worry that private ODR providers will favor the businesses that hire them and pay the bill for their ser-

295. Wolff, *supra* note 283, (manuscript at 2–4).

296. *Id.* (manuscript at 4–6).

297. *Id.*

298. *Id.* (manuscript at 8).

299. *Id.* (manuscript at 9).

300. *Id.* (manuscript at 10).

301. *Id.*

302. *Id.* (manuscript at 16).

303. *Id.*

304. See Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485, 492 (2014).

vices.³⁰⁵ Furthermore, even if providers are not in fact biased, consumers may nonetheless remain skeptical that the businesses are repeat players who have mastered use of the ODR systems for their benefit.³⁰⁶

These are valid concerns. Accordingly, some have argued for establishment of an ODR “Trustmark” that indicates that an ODR system meets due process and ethics standards. It would need to be regulated by a government or independent non-governmental authority that has earned the public’s trust.³⁰⁷ In the US, the Better Business Bureau (“BBB”) is one of the most formidable consumer organizations because it offers an accreditation, or “Trustmark,” to businesses that pay a fee and abide by the BBB Code of Business Practices.³⁰⁸ Although the BBB is private, it has gained a strong reputation for its Trustmark system based on consumers’ feedback regarding their experiences with listed businesses.³⁰⁹

An ODR Trustmark would therefore take time to gain respect. It would be imperative that merchants agree to abide by due process, privacy, and other agreed standards in order to gain the right to post the Trustmark. Additionally, regulators would have power to “police” the Trustmark by canceling a merchant’s right to post it if the merchant’s system is biased or otherwise fails to conform to fairness standards. Of course, one may argue that this “policing” would drive merchants away from the ODR platform. Why would a merchant subject itself to this oversight? In actuality, however, the Trustmark also would benefit merchants by attracting customers. An ODR Trustmark would signal that the merchant has an effective and fair ODR system, thus helping the merchant gain trust and loyalty of customers. Consumers would know that the merchant will follow fair procedures to provide a fast remedy if the purchase goes awry.

Such ODR fairness standards are not new. For example, the EU ADR Directive does not establish a Trustmark system per se, but it does safeguard some level of due process by allowing for exclusion of providers who do not abide by prescribed standards. A Trustmark could thus

305. *See id.* at 518.

306. *See id.* at 519–20.

307. SCHMITZ & RULE, *supra* note 133 (proposing an online remedy system to expand consumers’ access to remedies and to revive corporate responsibility in consumer contracting). This author has set forth a blueprint with Colin Rule for how a global ODR process would work. Please see the book for further information, as such full discussion is beyond the scope of this article.

308. BETTER BUSINESS BUREAU, *Dispute Resolution Processes and Guides* (2015), available at <https://www.bbb.org/bbb-dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/dispute-resolution-processes-and-guides/> (last visited Aug. 30, 2015).

309. The BBB disclaims responsibility for making a determination as to the business’ product quality or competency. BETTER BUSINESS BUREAU, *GET ACCREDITED* (2015), available at www.bbb.org/council/for-businesses/about-bbb-accreditation (last visited Aug 30, 2015); Steven J. Cole & Charles I. Underhill, *Fifteen Years of ODR Experience: The BBB Online Reliability Trust Mark Program*, 43 UCC L.J. 443, 446–50 (2010).

bolster evaluation of compliance with due process standards.³¹⁰ Standards generally safeguard confidentiality, impartiality, competence, and quality of process.³¹¹ This means that practitioners must understand confidentiality risks and communicate those risks to clients, and ODR neutrals must remain impartial and competent for the case at issue. They also must ensure that all parties have an adequate opportunity to participate in the process and that parties can make voluntary and informed choices surrounding the procedures and outcome.³¹²

Of course, there is no one set of wholly acceptable standards for all ODR. We learned that in UNCITRAL Working Group III. Representatives from various nations disagreed on what precise procedures are fair or proper. Nonetheless, there has been movement toward creating generally acceptable ethics and fairness standards for e-commerce ODR built on ODR Ethical Principles that could apply on a global level.³¹³ These standards would cover basics noted above such as confidentiality, impartiality, and quality. However, they can be stated in more particularity as follows:³¹⁴

- Accessible: ODR must be easy for parties to find and available through both mobile and desktop channels, minimize costs to filers, and be easily accessed by people with different physical ability levels.
- Accountable: ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.
- Competent: ODR providers must have the relevant expertise in dispute resolution, law, technical execution, language, and culture required to deliver competent, effective services in their target areas.
- Confidential: ODR must maintain the confidentiality of party communications in line with publicly provided policies around a) who will see what data, and b) how that data can be used.
- Equal: ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard and ensure that offline privileges and disadvantages are not replicated in the ODR process.
- Fair/Impartial/Neutral: ODR must treat all parties equally and in line with due process, without bias or benefits for or against

310. Joasia A. Luzak, *The New ADR Directive: Designed to Fail? A Short but Hole-Ridden Stairway to Consumer Justice* (Centre for the Study of European Contract Law, Working Paper No. 2015-12, 2015).

311. Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 INT'L J. OF DISP. RESOL. 37, 42–52 (2014).

312. *Id.* at 46.

313. Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT'L J. ON ONLINE DISP. RESOL. 12 (2016).

314. INT'L COUNCIL FOR ONLINE DISPUTE RESOLUTION, *ICODR Standards*, <http://icodr.org/index.php/standards/> (last visited Apr. 2, 2018); Wing, *supra* note 313, at 11–15). See also NAT'L CTR. FOR TECH. & DISPUTE RESOL., *ETHICS AND ODR* (2017), available at <http://odr.info/ethics-and-odr/> (last visited Aug. 28, 2017).

- individuals or groups. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance.
- Legal: ODR must abide by and uphold the laws in all relevant jurisdictions.
 - Secure: ODR must ensure that communications between participants are not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.
 - Transparent: ODR must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context.

Security and confidentiality are essential. However, it is a difficult issue in that most if not all websites and “apps” gather some sort of information in order to function. This must be done safely and with special protection for any personally identifiable information. For example, the Modria ODR program (operated under Tyler Technology) noted above provides stepped procedures for resolving disputes.³¹⁵ While accessing Modria, users first receive a quick diagnosis of their situation that helps them determine whether to proceed with their case.³¹⁶ If a user then decides to proceed forward with the case, Modria collects information from the user and opens an online dialogue between the feuding parties to facilitate negotiation discussions.³¹⁷

Although Modria, through tylertech.com, collects some general information such as a Modria user’s name, email address, IP address, and access times, Modria and Tyler Technologies never sell, rent, or release customer lists to third parties.³¹⁸ Moreover, tylertech.com protects personal information (e.g., a credit card number) entered into the ODR program using encryption features such as Secure Socket Layer (“SSL”) protocol.³¹⁹ Furthermore, users who choose to customize a resolution flow for their case are also protected, as the Modria resolution flows are backed by a security certified, API-enabled case management system.³²⁰

Any Trustmark or other certification measures should insist on such security. Furthermore, policymakers should seek ways to ensure that ODR systems and processes are designed and implemented in ways that enable growth and positive change. The goal should be to increase access to justice and enhancement of choices, as well as effective deci-

315. TYLER TECH., ALL THE TOOLS YOU NEED FOR ONLINE DISPUTE RESOLUTION (2017), available at <https://www.tylertech.com/solutions-products/modria/odr> (last visited Sept. 6, 2017).

316. *Id.*

317. *Id.*

318. TYLER TECH., PRIVACY STATEMENT (2017), available at <https://www.tylertech.com/Privacy> (last visited Sept. 6, 2017).

319. *Id.*

320. ALL THE TOOLS YOU NEED FOR ONLINE DISPUTE RESOLUTION, *supra* note 315.

sion-making opportunities. ODR continues to innovate to improve the delivery of dispute resolution services in ways that increase peace, trust, and access to justice. Furthermore, ODR processes may integrate both internally within a system and externally with other systems, networks, and entities. As new technologies develop, ODR will become increasingly cost effective, and it will work with other existing systems and networks. Finally, ODR design and implementation should seek to prevent and minimize harm and risk for those involved in dispute resolution processes, with particular attention to those most marginalized and with least access to justice.

CONCLUSION

ODR is particularly efficient and effective in global e-commerce disputes. It offers means to a remedy where none exist in the face-to-face world. It therefore offers protection for cross-border deals and helps garner trust from buyers who may fear purchasing overseas. Bypassing the traditional legal system through ODR also allows parties to reduce or eradicate jurisdictional problems and helps to expedite participation of emerging economies in the global e-market. Moreover, when e-commerce becomes trustworthy, it strengthens expansion of the digital economy. ODR therefore creates a win-win for companies and consumers in a world moving to online transactions.

This article therefore seeks to promote ODR to empower businesses in developing nations that seek to attract customers on a global level. Establishment of trusted ODR systems incentivizes consumers to make cross-border purchases because it provides consumers with the comfort of knowing there is a cheap and easy means for obtaining a remedy if the purchase goes awry. Although less developed nations are not as digitally connected as more affluent parts of the world, rates of Internet access are growing in these nations through use of mobile devices, and smart phones. Indeed, use of smart phones and tablets is narrowing the digital divide. This article, therefore, encourages growth of global ODR that is accessible through mobile devices as means for increasing access to remedies and trustworthy e-commerce for companies and consumers in developing nations. Furthermore, this global ODR should be simple and efficient. Such a unified process could create a revolution in e-commerce and consumer protection that would be a catalyst for economic development.

