

A MEETING OF THE MINDS: ONLINE DISPUTE RESOLUTION REGULATIONS SHOULD BE OPPORTUNITY FOCUSED

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ABSTRACT

Online Dispute Resolution holds true promise as a tool to resolve dispute in the online world. Unfortunately in even the simplest of cross border disputes; however, ODR remains outside the realm of possibility, mainly because of historical legal doctrines based in the physical world. In response to this ongoing impasse I offer this humble solution, we must engage in a true cross discipline discussion concerning the ways that technology could assist in reducing or eliminating the impact of certain behaviors that lead to the creation of some very historic protectionist legal doctrines. It is time for a meeting of the minds or a great divide will emerge between consumers and online commerce.

This paper will briefly explore the main philosophical and legislative divisions that exist in the world of consumer protection. It then suggests that a new design paradigm be created to regulate the online cross border world of consumer protections. The paper suggests a specific set of guidelines for the essential attributes that must be present in any consumer online dispute resolution platform. Finally, the paper concludes by demonstrating how technology can ensure those protections are embodied within the platform.

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I. INTRODUCTION

Cross-Border Online Dispute Resolution is yet again stalling within the United Nations Commission on International Trade Law¹ because of the convergence of two worlds. The online environment in which “a consumer interacting with a website must have the item or the information she is seeking, she is in a rush to obtain it, and she trusts the website or regulators to protect her if agreement terms are outside the bounds of the law”² and the legal issues associated with the enforceability and policy restrictions behind consumer pre-dispute arbitration clauses. Although this great divide has arisen before³ in this very group,⁴ progress sometimes seems impossible. Despite repeated attempts by knowledgeable legal scholars and debates among noted international relations experts, few solutions have moved forward.⁵

In response to this ongoing impasse I offer this humble solution, we must engage in a true cross discipline discussion concerning the ways that technology could assist in reducing or eliminating the impact of certain behaviors that lead to the creation of some very historic protectionist legal doctrines.⁶ It is time for a

¹ “After five years of meetings, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) remains at an impasse arising out of fundamental differences in approach among States regarding protection of consumers in cross-border electronic commerce transactions. United Nations Commission on International Trade Law, Working Group III, *Possible future work in the area of online dispute resolution - Proposal by Colombia, Honduras and the United States of America* A/CN.9/858 (June 2015) See also United Nations Commission on International Trade Law, Working Group III, Report of Working Group III (Online Dispute Resolution) on the Work of its Thirty-First Session, A/CN.9/833, 34, U.N. Doc. A/CN.9/833 (Mar. 24, 2015).

² See Anjanette H Raymond, *Yeah, But Did You See the Gorilla? Creating and Protecting an ‘Informed’ Consumer In Cross Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV., 129, 143 (2014).

³ See *infra* Section II.

⁴ See e.g., Jason Flennoy, *Welcome to Vienna - UNCITRAL Working Group III 28th Session*, Blog, THE CENTER FOR INNOVATIVE JUSTICE AND TECH: BLOG POSTS, (Nov. 19, 2013), <http://forum.thecenter.org/profiles/blogs/welcome-to-vienna-uncitral-working-group-iii-28th-session-1>.

⁵ See Karim Benyekhlef & Nicolas Vermeys, *UNCITRAL’s Working Group III on Online Dispute Resolution Is All but Done*, SLAW: DISPUTE RESOLUTION (April 10, 2015), <http://www.slw.ca/2015/04/10/uncitrals-working-group-iii-on-online-dispute-resolution-is-all-but-done>.

⁶ See *infra* Section IIA.

meeting of the minds or a great divide will emerge between consumers and online commerce.

This paper will briefly explore the main philosophical and legislative divisions that exist in the world of consumer protection. It then suggests that a new design paradigm be created to regulate the online cross border world of consumer protections. The paper suggests a specific set of guidelines for the essential attributes that must be present in any consumer online dispute resolution platform. Finally, the paper concludes by demonstrating how technology can ensure those protections are embodied within the platform.

II. CONSUMERS IN A CROSS BORDER ENVIRONMENT

Spanning decades⁷ and state-lines,⁸ consumers within an online sales environment have stalled or caused the failure or reworking of legislative documents.⁹ Simply put, the world disagrees on the policy behind,¹⁰ the means to protect,¹¹ and the protections that should be afforded consumers.¹² And of course, because the policies developed arise from a fundamentally different view of the role of the State in providing such protections, debates often stall at the most basic of levels. In many instances, while policymakers respect and understand

⁷ See generally, JULES STUYCK, *Public and Private Enforcement in Consumer Protection: General Comparison EU-USA*, NEW FRONTIERS OF CONSUMER PROTECTION – THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT, ED. F. CAFAGGI AND H. -W. MICKLITZ 63, 79 (Fabrizio Cafaggi & Hans-W. Micklitz, eds., Intersentia 2009).

⁸ See Michael J. Trebilcock, *Rethinking Consumer Protection Policy*, INTERNATIONAL PERSPECTIVES ON CONSUMERS' ACCESS TO JUSTICE, ED. 68, 80 (Charles E. F. Rickett & Thomas G. W. Telfer, eds. Cambridge University Press, 2003). See also E. Hondius, *Self-Regulation in Consumer Matters on a European Level*, REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW, ed. F. Cafaggi 239, 243 (The Hague: Kluwer Law International, 2006); Christopher Hodges, *Collectivism: Evaluating The Effectiveness Of Public And Private Models For Regulating Consumer Protection*, COLLECTIVE ENFORCEMENT OF CONSUMER LAW 207, 223 (William Van Boom and Marco Loos, eds. Europa Law Publishing 2007).

⁹ For example, after much debate consumers were excluded from the United Nations Conference On Contracts For The International Sale Of Goods. See, e.g., UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS: VIENNA, 10 MARCH – 11 APRIL 1980: OFFICIAL RECORDS: DOCUMENTS OF THE CONFERENCE AND SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE MAIN COMMITTEES (United Nations ed., 1981) (arguing that “[a] rationale for excluding consumer sales from the scope of this Convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded”); see also Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J. OF L. AND COMMERCE, 1, nn. 463-89, (1995) (explaining the consumer exclusion from the Conference on the International Sale of Goods).

¹⁰ See *infra* Section IIA.

¹¹ See *infra* Section IIB.

¹² See *infra* Section IIA.

each other's point of view, in their hearts they know that the policy is so integrated and fundamental to domestic law that no real compromise can be made without upending existing domestic law.

A. *The Philosophical Divergence in Consumer Protections*

At the heart of consumer protection is contract law based on the principle of party autonomy.¹³ The principle of party autonomy dictates that private parties are free to decide whether and with whom to contract, but also that these parties are responsible for the choices that they make. Central to an understanding of contract doctrine is the recognition of private parties as autonomous actors. In general, the designation of an individual as a consumer does not call for deviation from the autonomous actor recognition. For example, general doctrines in private law related to mistake or misrepresentation or the interpretation of contracts will not normally be applied in a more protective or consumer-friendly way than they would for other parties. This principle is illustrated in the English case of *Smith v. Hughes* in which the court determined that a seller is not obliged to disclose information about the goods, even if he or she is aware that the buyer is operating under a mistaken presumption.¹⁴ Under English law, an action for misrepresentation is supported only in the instance that the mistaken term becomes part of the contract.¹⁵ It seems consumers, like other parties, have their own responsibility to take reasonable care in private law relationships.

In some instances, however, exceptions may be introduced by other means. For example, exceptions may be introduced through a particular application of private law doctrine to take account for the generally weaker position of consumers, or through the introduction of specific consumer protection laws. It is in these exceptions to the general law of contract that much debate exists, as many have commented and much ink has been spilled attempting to craft regulations that are best suited to protect consumers.

In seeking to balance the rights of consumers against those of businesses, the law makes a choice that applies to all consumers, regardless of their actual characteristics, their ability to express or enforce their preferences, or their need for guidance or protection.¹⁶ Consumer protection regulation is usually 'one size

¹³ P.S. Atiyah, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (Oxford University Press 1979); G. Gilmore, *THE DEATH OF CONTRACT* (Ohio State University Press 1974); S.A. Smith, *CONTRACT THEORY* (Oxford University Press 2004).

¹⁴ See *Smith v Hughes* LR 6 QB 597 (1871) (In this case, the buyer mistakenly believed that he was buying old oats instead of new oats. The latter were not suitable as horse feed.)

¹⁵ See *id.*

¹⁶ Vanessa Mak, *The Consumer in European Regulatory Private Law*, *THE IMAGE OF THE CONSUMER IN EU LAW: LEGISLATION, FREE MOVEMENT AND COMPETITION LAW* (Hart Publishing, 2015), available at <http://ssrn.com/abstract=2600474/>

fits all' and it is generally the neediest consumers that garner the most attention. For this reason, the image of the consumer for whom these rules are written seems to be based upon an image of a weaker party who is in need of protection to overcome the lack of bargaining power or cognitive limitations to rational choice.¹⁷ Consequently, much of the active harmonisation efforts¹⁸ take a markedly more pro-consumer stance.¹⁹

This approach puts legislative draftsmen in a difficult position, no longer focusing on balancing interests but instead focusing on protecting weaker parties. Fortunately, draftsmen recognize this dilemma and temper their legislative initiatives to those areas of the greatest need. For example, in many areas of European law the consumer is treated as a rational actor who makes autonomous decisions and for whom the law normally only offers a facilitative back-up,²⁰ instead recognizing the principle of party autonomy that underlies most private laws.²¹

Despite the rational actor assumptions that underlie the European approach to consumer protections, European legislative draftsmen have carved out consumers in an online sales environment as 'weaker' and thus, needing heightened protection. An extension of this leads to the over-regulation of dispute resolution clauses presented to the consumer in an online environment. For example, in the European Union, online merchants generally cannot require

¹⁷ See A. Tversky & D. Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (discussing the behavioral sciences concept known as 'bounded rationality').

¹⁸ As opposed to negative harmonisation, which seeks to harmonize laws but does so through the introduction of legislation that seeks to take away barriers posed by national laws.

¹⁹ Hannes Unberath & Angus Johnston, *The Double-Headed Approach of the ECJ Concerning Consumer Protection*, 44 COMMON MARKET LAW REVIEW 1237 (2007).

²⁰ See e.g., *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market* [2005] OJ L149/22 (2005). See also, Cartwright, *The Image of the Consumer in EU Law*, EDWARD ELGAR RESEARCH HANDBOOK ON EU CONSUMER AND CONTRACT LAW, (C. Twigg-Flesner ed.). And in case law, for example the European Court of Justice enumerated the high standard of a 'reasonably well-informed and reasonably observant and circumspect' consumer when considering deceptive advertising within the internal market. See Mak, Vanessa, *The Consumer in European Regulatory Private Law*, *supra* note 16, at 8 (citing Case C-210/96 *Gut Springenheide and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657). This definition was followed in *Case C-220/98 Estée Lauder Cosmetics GmbH & Co OHG v. Lancaster Group GmbH* [2000] ECR I-117; *Case C-44/01 Pippig Augenoptik GmbH & Co GK v. Hartlauer Handelsgesellschaft mbH* [2003] ECR I-3095; *Case C-99/02 Criminal proceedings against Linhart and Biffel* [2002] ECR I-9375.

²¹ See, e.g., H-W Micklitz and N Reich, *The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)*, 51 COMMON MARKET LAW REVIEW 771 (2014); Richard Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINNESOTA LAW REVIEW 803 (2008) (discussing the neo-classical view based upon the premise that intervention in consumer markets can be justified if it addresses market failures, such as information asymmetries between businesses and consumers).

consumers to resolve disputes through pre-dispute arbitration clauses.²² Similarly, the European Council Directive on Unfair Terms in Consumer Contracts limits any alternative dispute resolution requirements that would hinder consumers' rights to take legal action.²³ Online consumers are not rational actors in the eyes of European draftsmen.

The European non-rational actor that needs protection is not the only approach to regulating and protecting online consumers. It is this split that has caused online regulation in general, and cross-border online dispute resolution specifically, to stall in many international regulatory institutions and instruments.

In the United States, focus is placed on regulation that seeks to create equality between consumer and business by taking away the information asymmetry that exists between the consumer and the business.²⁴ Only when this information asymmetry cannot be overcome is heightened protection necessary. In the case of alternative dispute resolution, the United States refuses to treat it as an area of regulation in which consumers need heightened protection, primarily because the United States, especially the Supreme Court, has long supported the use of alternative dispute resolution.²⁵ In the eyes of the draftsmen within the United States, consumers are fully capable of gathering information as it relates to dispute resolution, considering the information as it is presented and weighing options as they relate to the pursuit of their claims.²⁶ Therefore, consumers are able to make rational judgments in relation to alternative dispute resolution

²² Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (O.J. 1993, L 95/29). An annex to the Directive lists a series of supposed unfair terms that include, as 1(q), terms "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract." *See also, Case C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, 2006 ECR I-10421.

²³ *See* Haitham A. Haloush & Bashar H. Malkawi, *The Liberty of Participation in Online Alternative Dispute Resolution Schemes*, 11 SMU SCI. & TECH. L. REV. 119, 129–31 (2007) (discussing the European Council directives essentially preserving consumers' choice with respect to dispute resolution mechanisms as a means for addressing the disparity of bargaining power they share with merchants who offer form contracts "on a take-it-or-leave-it basis" and often enjoy repeat player advantages in arbitration).

²⁴ *See, e.g.,* Alexander Shen, *The Move Towards E-Commerce*, DARTMOUTH BUSINESS JOURNAL, (March 2012) (discussing how e-commerce relationships have yet to overcome the information gap).

²⁵ *See, e.g.* Anjanette H. Raymond, *It Is Time The Law Begins To Protect Consumers From Significantly One-Sided Arbitration Clauses Within Contracts Of Adhesion*, 91 NEB. L. REV. 666, 690-91 (2013) [hereinafter Raymond *It is Time*]

²⁶ A consumer's unwillingness to gather, read or consider opportunities is not sufficient to shift the need for intervention.

clauses.²⁷ As a result, intervention will be of the minimum degree deemed necessary to correct market failures outside the traditional, standard alternative dispute resolution clause. For example, the United States has sought to protect consumers in key areas where the power balance, or information asymmetry, cannot be overcome in a practical and convenient manner.²⁸

In contrast, European regulatory private law

is based on the idea that consumers are weaker parties who need to be protected. The image of the consumer, therefore, although it may start from the presumption of consumers as 'rational' actors, tends to pay greater heed to the weaknesses and biases that prevent consumers from making rational choices.²⁹

As a result of this fundamentally different approach, the proscribed regulation seeks to fulfill two functions. First, similar to the law of the United States, the rules seek to empower consumers. For example, the rules intend to correct information asymmetries through the imposition of information duties on traders.³⁰ Second, unlike the United States, the rules often create substantive rights aimed at consumer protection.³¹ It is this second prong that causes the greatest difficulty in resolving the lack of philosophical approach as the second prong seeks to reduce power imbalances by creating substantive rights for the weaker party. In at least some instances, the creation of rights should be viewed as overcorrections in market imbalances, sometimes shifting the balance entirely.³² For example, the *European Directive on Unfair Contract Terms* permits a consumer to withdraw from distance contracts without paying

²⁷ Of course, that is not to write that the United States, especially Congress and some State legislatures, have not sought to carve out heightened protections for consumers facing mandatory dispute resolution clauses, these wide-sweeping measures have resoundingly failed in each attempt to date. See generally, Anjanette H Raymond, *Yeah, But Did You See the Gorilla? Creating and Protecting an 'Informed' Consumer In Cross Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV., 143 (2014); Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075, 1085–86 (2009).

²⁸ Y-H Alex Lee and K Jeremy Ko, *To Empower, Prohibit or Delegate? Regulatory Strategies for Modernizing the Consumer Credit Market*, UNIVERSITY OF PENNSYLVANIA BUSINESS LAW JOURNAL (forthcoming) available at <http://ssrn.com/abstract=1903595>.

²⁹ See Mak, Vanessa, *The Consumer in European Regulatory Private Law*, *supra* note 16, at 15.

³⁰ See *id.*

³¹ See *id.*

³² See, e.g., Jan M. Smits, *The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law*, 29 PENN STATE INTERNATIONAL LAW REVIEW, 671, 671-84, (2011) (discussing the negative impact of legislator imposes statutory withdrawal rights).

compensation for use to the seller.³³ In considering the impact of such a rule, the Court of Justice of the European Communities in *Pia Messner* determined “To hold otherwise could impair the effectiveness and efficiency of the right to withdraw by imposing a financial burden on consumers – which could deter them from making use of the right to withdraw – and by curtailing their possibility to test (as opposed to use) the goods free of charge.”³⁴

The correction of market imbalances through the creation of substantive rights is also problematic, as those rights are left to judicial interpretation that at times may result in additional, and/or unintended, rights that are given to the weaker party. For example, while the *Directive on Unfair Terms* proscribes that unfair terms will be regarded as non-binding, several courts have reasoned that “a national court should be able to determine of its own motion whether a contract term is unfair.”³⁵ In this instance, substantive rights have been used to create a procedural mechanism to give effect to those rights.³⁶ The weaker consumer image has been heightened to such an extreme that the court seeks to counter “the real risk that he is unaware of his rights or encounters difficulty in enforcing them.”³⁷

B. *Consumers Do Not Need Protecting from Alternative Justice Opportunities*

Within the area of online dispute resolution, consumer protections has been the “elephant in the room” for the entire consultation process, always recognized, but frequently put off as an issue to be discussed later.³⁸ The avoidance is fundamentally because a large segment of the world prefers to refuse enforcement of pre-dispute arbitration clauses against consumers. While the

³³ Directive 97/7 On Distance Contracts, Art 6(1). The Consumer Rights Directive now contains not only a codification of this case law but also a specification of the requirements regarding compensation for use.

³⁴ *Case C-489/07 Pia Messner v Firma Stefan Krüger* [2009] ECR I-7315. the Consumer Rights Directive now contains not only a codification of this case law but also a specification of the requirements regarding compensation for use.

³⁵ *See Océano Grupo Editorial SA v. Roció Murciano Quintero*, ECR I-4941 [2000] (Joined cases C-240/98 to 244/98). *See also Cofidis SA v. Jean-Louis Fredout* [2002] ECR I-10875 [2002] (Case C-473/00).

³⁶ *See Mak, The Consumer in European Regulatory Private Law, supra* note 16, at 19.

³⁷ *See Mak, The Consumer in European Regulatory Private Law, supra* note 16, at 18 (citing *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* ECR I-10421 [2006] (referencing *Océano Grupo Editorial SA v. Roció Murciano Quintero* ECR I-4941 [2000] and *Cofidis SA v. Jean-Louis Fredout* [2002] ECR I-10875, [2002]).

³⁸ *See e.g., UNCITRAL, Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session, A/CN.9/716 (Vienna, 13-17 December 2010) (citing UNCITRAL Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), (the very first session with consumer protections already being discussed)*

almost identical segment of scholars and courts refuse to enforce arbitration awards as the consumer must be allowed access to the courts, irrespective of an effective arbitration agreement.³⁹ American readers will immediately recognize this is not the general approach in the United States.⁴⁰

Before the discussion can proceed, it is important to note the debate about pre-dispute arbitration clauses is not a simple one as multiple problems arise. For example, there has been ongoing and robust discussion about the use of arbitration within the consumer portion of the Online Dispute Resolution facility.⁴¹ In response to this debate, let me offer two comments. First, as a last stop in the dispute resolution progression, current experience tells us that arbitration would rarely be used.⁴² That is not to say that it is not important to consider within the context of the ODR platform, but it needs to be considered in light of the highly progressed and advanced discussions that would have already occurred and failed to accomplish a resolution of the dispute.

Second, no one disagrees with the need to protect everyone, businesses and consumers, from poorly designed, fundamentally unfair, due process deficient or otherwise one-sided, bias-based arbitration. It has long been the case that the most egregious of claims against the use of arbitration have been specifically provided as means to challenge the final outcome via the New York Convention.⁴³ As I have previously argued,⁴⁴ simply eliminating arbitration as a means of resolving disputes misses the many advantages that arbitration provides to resolving low value consumer disputes.⁴⁵ Instead, what should be occurring are attempts to draft regulation covering the most essential attributes to be included within the online dispute resolution environment.⁴⁶

³⁹ See *infra* Section IIB

⁴⁰ See *infra* Section IIB

⁴¹ See e.g., UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session, A/CN.9/833*, (New York, 9-13 February 2015)(discussing the creation of two tracks, so consumers could be handled separately); UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session A/CN.9/827*, (Vienna, 20-24 October 2014)(discussing the creation of two tracks, so consumers could be handled separately)

⁴² In fact, “more than ninety percent of the disputes filed are resolved without requiring the intervention of a third party to render a decision.” Collin Rule, *eBay Resolution Center Up for Dutch Innovating Justice Awards - Needs Your Vote!* Mediate.com (June 2011), <http://www.mediate.com/articles/vote.cfm>.

⁴³ For example, Article V provides for basic due process protections such as the right to receive notice, the right to present the case. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3.

⁴⁴ See e.g. Anjanette H. Raymond, *It Is Time The Law Begins To Protect Consumers From Significantly One-Sided Arbitration Clauses Within Contracts Of Adhesion*, 91 NEB. L. REV. 66, 690-1, (2013)[hereinafter Raymond *It is Time*]

⁴⁵ See *id.*

⁴⁶ See *infra* Section IV and V

Even without legislation, many consumers have demonstrated their willingness to engage in dispute resolution within an online platform, so long as the process is reasonably easy and fair and results in a binding outcome.⁴⁷ The success of eBay is a hard example to ignore.⁴⁸ Even those that fail to use the eBay system will likely understand the chargeback facility available as a private enforcement mechanism for purchasers using credit cards.⁴⁹ It seems the community is well past the discussion stages and has moved into the use stage. But of course, these are private mechanisms that are basically unregulated and unmonitored for fundamental fairness and due process protections. Thus, arguments can be made that some regulation must occur to bolster the options available and to ensure fundamental justice and privacy attributes are incorporated into *any* online dispute resolution platform.

Of course, one of the key discussions relating to consumers involves their propensity to engage in “must, rush, trust” online shopping behavior. As I have previously asserted, “a consumer interacting with a website must have the item or the information she is seeking, she is in a rush to obtain it, and she trusts the website or regulators to protect her if any information gathered or agreement terms are outside the bounds of the law.”⁵⁰ Important to this discussion are two salient portions of the assertion. First, consumers are in a rush to purchase and read few terms other than those that specifically relate to their purchase. In fact, they rarely even glance at the dispute resolution clause.⁵¹ Second, consumers know they have no bargaining power⁵² and trust the system to protect them in the vast majority of the situations.⁵³ Simply put, consumers trust the law will protect them from unscrupulous parties – this is a trust we should stop ignoring. Thus, we must craft a basic set of protections for parties that have placed their trust in the system.

Within the ODR legislative community this has sparked various discussions, as the main beneficiary of the rules is a matter of debate. The debate became so robust at one point that the group agreed to create two tracks of

⁴⁷ Many don't even believe they need to pursue a legal claim.

⁴⁸ For example, on a global level, eBay and PayPal Resolution Centers “resolve more than 60 million disputes per year in more than a dozen different languages around the world.” Collin Rule, *eBay Resolution Center Up for Dutch Innovating Justice Awards - Needs Your Vote!*, Mediate.com (June 2011), <http://www.mediate.com/articles/vote.cfm>.

⁴⁹ See Vikki Rogers, *Knitting the Security Blanket For New Market Opportunities*, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 251, 293 (Mohamed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

⁵⁰ See Anjanette H Raymond, *Yeah, But Did You See the Gorilla? Creating and Protecting an 'Informed' Consumer In Cross Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV., 143 (2014)

⁵¹ See *id.* at 139-40

⁵² See *id.* at 144.

⁵³ See *id.* at 146.

available ODR, one for Business to Consumer [B2C] and one for Business to Business [B2B] environment.⁵⁴ Yet, many of the basic rules are consistent regardless of the determination of B2B or B2C.⁵⁵ The debate continues to cloud the rules as B2B and B2C contracts are often fundamentally different creatures. Without resolution, drafting will continue to be problematic because it is difficult to create a set of default rules for such divergent parties.

There is one important point that is being overlooked in this debate. Repeat players (*i.e.* big business, B2B contracts)⁵⁶ are not the primary beneficiaries of these rules as they have the ability, the incentive, and the power to negotiate around default rules. It is instead the one-shot consumers engaging in low value transactions that will need to find their protections within these rules. As such, the language should “confine itself to common sense default rules that unsophisticated parties would expect.”⁵⁷ When the courts are called upon to consider such situations, it is important to keep in mind: “Since actual intent is (by hypothesis) missing, a court respects the autonomy of the parties so far as possible by construing an allocation of burdens and benefits that reasonable persons would have made in this kind of arrangements.”⁵⁸

Common sense rules recognize the expectations of the less sophisticated party, while attempting to balance the burdens of each of the parties within the transaction. Certainly, in this particular set of circumstances, the less sophisticated party would not anticipate a low value online dispute requiring attorneys, cross border travel, and extraordinary time and cost commitments, especially in light of the online nature of the purchase and the widely available online dispute resolution mechanisms that are used by the majority of consumers when they shop on websites such as eBay, Amazon, and Alibaba.⁵⁹ Pretending that consumers expect their “day in court”⁶⁰ in situations such as these is to ignore the research on consumer behavior.⁶¹ Of course, one could argue that it is

⁵⁴ See UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, REPORT OF WORKING GROUP III (ONLINE DISPUTE RESOLUTION) ON THE WORK OF ITS THIRTIETH SESSION (Vienna, 20-24, October 2014).

⁵⁵ See *id.* at 8.

⁵⁶ See Anjanette H Raymond, *Confidentiality in a Forum on Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM REV INT’L ARB 479 (2005).

⁵⁷ Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647-665 (2012).

⁵⁸ *Id.* (citing CHARLES FRIED, *CONTRACT AS PROMISE*, 73 (1981)).

⁵⁹ See Alibaba website information available at http://tradeassurance.alibaba.com/bao/buyer_advertise.htm?tracelog=from_home_menu#htc.

⁶⁰ Rebecca Sandefur and the American Bar Foundation, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study* (CNSS) (Aug. 8, 2014).

⁶¹ See Anjanette H Raymond, *supra* note 50, at 140-44; Amy Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPPERDINE LAW REVIEW 279, Vol. 39, pp. 279-366 (2012).

the unregulated online arbitration environment that we should protect consumers from and their expectations are of a system that protects them from such unscrupulous behavior. This is a point I unequivocally agree with⁶² and one that demands the default rules contain due process protections, not merely that consumer have their day standing in a brick and mortar courtroom.

C. Concerns About the Lack of Compliance with Outcomes

While many commentators are criticizing the lack of final and binding outcome of some ODR processes,⁶³ and some are suggesting the presence of arbitration within the process has doomed the project to failure,⁶⁴ noted arbitration authority Thomas Stipanowich stresses: “Binding arbitration is often a favorable alternative to the litigation process, but it is ill-suited to be the primary process option for serving the day-to-day needs of businesses. Rather, the logical, normal first step is negotiation, followed in many commercial dispute resolution procedures by mediation.”⁶⁵

One can certainly support the premise that options and a progression of dispute resolution opportunities may best suit the overall needs of consumers and business. In fact, research supports the use of compliance incentives as a first step in resolving a large portion of consumer to business disputes. This section examines the process from incentives to state authority.

1. Incentives to Comply Early in the Process

Despite contract law’s economic elements, behavioral and psychological theories, as well as empirical evidence, suggest that individuals believe there is a

⁶² See e.g. Anjanette H. Raymond, *It Is Time The Law Begins To Protect Consumers From Significantly One-Sided Arbitration Clauses Within Contracts Of Adhesion*, 91 NEB. L. REV. 66, 690-1, (2013)(discussing the creation of such protections)

⁶³ See e.g. Scott J. Shackelford and Anjanette H Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 3 WISCONSIN LAW REVIEW 615(2014)(considering the importance of arbitration in the process); Anjanette H Raymond, *It’s Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses within Contracts of Adhesion*, 91 NEBRASKA LAW REVIEW 666 (2013) (discussing the need to use arbitration as a means to resolve disputes); Thomas Schultz, *Online Dispute Resolution: An Overview and Selected Issues. Economic Commission for Europe*, June 7, 2002, available at: <http://ssrn.com/abstract=898821> (noting the issue and suggesting possible mechanisms around the barrier); Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 LOY. U. CHI. INT’L L. REV. 11 (2012) (noting the limitations created by the use of arbitration).

⁶⁴ See Karim Benykhlef, Nicolas Vermeys, *UNCITRAL’s Working Group III on Online Dispute Resolution Is All but Done*, SLAW (April 10, 2015).

⁶⁵ Thomas Stipanowich, *Arbitration: The ‘New Litigation’* 2010 U. ILL. L. REV, 1, 4 (2010).

moral element to contract performance.⁶⁶ Individuals are pre-disposed to desiring to comply with their promises, especially when they appreciate the promise that they have made and the impact of non-performance.

In many ways, some individuals need to be reminded of such beliefs and simple incentives may just provide the encouragement a consumer, or a business, needs to comply. As Professor Pablo Cortes points out: “[A] successful ODR platform should include built-in incentives that encourage parties to: (i) participate in approved ADR processes; (ii) settle complaints with little or no intervention from neutral third parties; and (iii) ensure voluntary compliance with final outcomes.”⁶⁷

Moral beliefs, incentives, and a well-designed platform may provide enough of a setting to ensure a compliance with outcomes.

At the same time, non-legal forces fostered by registration requirements and other control mechanisms may also serve as *de facto* enforcement mechanisms for dispute resolution agreements and awards.⁶⁸ Rather than depending on state power, these non-state online communities generate legal regimes consisting of primary and secondary rules that form “nearly self-contained spheres of normativity, adopting their own rules, applying them in their own dispute resolution fora, and ensuring [. . .] enforcement.”⁶⁹ Others, too, recognize private governance mechanisms in cyberspace as sources for the creation of alternatives to state law.⁷⁰ As a prime example of the emergence of non-state law in cyberspace, the eBay trading platform is often cited. Specifically, eBay’s user policies, its outsourced online dispute resolution (ODR) mechanism, and its reputation management system are said to represent all the ingredients necessary to form an independent legal system.⁷¹ The reputation management

⁶⁶ See Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 638–49 (2010) (discussing the moral impetus to follow through with contract terms).

⁶⁷ See Pablo Cortes, *A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We are and How to Move Forward*, (University of Leicester School of Law Research Paper No. 13-02 2014) available at <http://ssrn.com/abstract=2324945>

⁶⁸ See Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 324 (2008)(noting non-legal enforcement).

⁶⁹ Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 799, 829 (2008).

⁷⁰ See Joachim Zekoll, *Online Dispute Resolution: Justice without the State?*, Max Planck Institute for European Legal History, Research Paper Series, 2014-02 available at <http://ssrn.com/abstract=2398976>.

⁷¹ Regrettably, many of the early movers within these communities have needed to deal with fraud and significant power imbalances, sometimes arising in ways that are unexpected. For example, TripAdvisor had a bunch of fraudulent reviews (both positive and negative) while several businesses has suffered at the hands of social media campaigns that target the business. Travel Mail Reporter, *Tripadvisor Responds To ‘Fake Reviews’ Controversy With Phone Lines For Aggrieved Hotel Owners*, Daily Mail, (Nov. 8, 2011); BBC Reporter, *Trip Advisor ‘Fake Reviews’*

system consisting of reputation points and the award/removal of a trustmark⁷² can operate as a powerful incentive both to participate in the eBay dispute resolution procedure and abide by its outcome.⁷³

Outside the closed networks of online communities, similar positive results have occurred when institutions seek to enforce standards. For example, two of the largest arbitral institutions, the American Arbitration Association (“AAA”) and Judicial Arbitration and Mediation Service, Inc. (“JAMS”) have both promulgated due process protocols governing consumer arbitrations.⁷⁴ These Consumer Due Process Protocols⁷⁵ create the expectation of a fundamentally fair process in arbitration by requiring adequate notice, an opportunity to be heard, and an independent decision maker. To ensure compliance, both the AAA and JAMS state that they will refuse to administer a case when the arbitration clause “materially fails to comply with the relevant protocol.”⁷⁶ Institutions providing alternative dispute resolution services therefore, can serve as gatekeepers to the

Investigated In Italy, BBC NEWS (May 2014). *See also* Juliet Barbara, *Is Social Media Bad For Business?*, FORBES, (Nov. 11 2012)(discussing several negative social media campaigns and the impact upon the business)

⁷² Colin Rule & Harpreet Singh, *ODR and Online Reputational Systems – Maintaining Trust and Accuracy Through Effective Redress*, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION, 163, 180-81.

⁷³ *See* Julia Hörnle, *CROSS-BORDER INTERNET DISPUTE RESOLUTION*, (Cambridge, Cambridge University Press, 2009); Fred Galves, *Virtual Justice: Making the Resolution of E-Commerce Disputes more Convenient, Legitimate, Efficient, and Secure*, JOURNAL OF LAW, TECHNOLOGY & POLICY, 1 (2009).

Some commentators are quick to point out that reputation improves efficiency only in settings where the high cost of litigation, insufficient damage levels or low court accuracy induce sub-optimal effort or cause market failure. Thus, adding reputation to existing litigation mechanisms increases seller effort. *See e.g.*, Yannis Bakos, and Chrysanthos Dellarocas, *Cooperation Without Enforcement? A Comparative Analysis of Litigation and Online Reputation as Quality Assurance Mechanisms* MIT (Sloan Working Paper No. 4295-03. March 1, 2003) *available at* <http://ssrn.com/abstract=393041>.

⁷⁴ In fact, both have promulgated protocols in relation to employment as well and the AAA has promulgated protocols governing health care and debt collection arbitrations. *See* Am. Arbitration Ass’n, Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses

⁷⁵ *See* American Arbitration Association, CONSUMER DUE PROCESS PROTOCOL, STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE, at princ. 2, 3, 12; *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014[hereinafter Consumer Due Process Protocol]. JUDICIAL ARBITRATION AND MEDIATION SERVICES, INC., JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2009), *available at* www.jamsadr.com/consumer-arbitration/ [hereinafter JAMS CONSUMER MINIMUM STANDARDS].

⁷⁶ *See* CONSUMER DUE PROCESS PROTOCOL, *supra* note 75, at princ. 1; JUDICIAL ARBITRATION AND MEDIATION SERVICES, INC., JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS *supra* note 75.

process and in this way can assist in ensuring both appropriate arbitration clauses and the provision of due process.⁷⁷

2. Enforcement of Awards

In today's global online world, enforcement of awards – that is, the ability to compel due compensation for harm caused – is one that perplexes numerous international institutions.⁷⁸ Yet, the mechanism of enforcement is an essential determination that must occur, especially in light of the cross-border nature of the online world. Assuming this is a fair assertion, there is only one solution that can realistically solve the issue of enforcement of awards in cross-border sales, the use of arbitration that draws its power from the New York Convention, embodied within the Federal Arbitration Act.⁷⁹ This is because the United States Supreme Court has consistently reinforced arbitration's efficiency and finality,⁸⁰ going so far as to preclude contractual expansion of judicial review of arbitration awards beyond the limited grounds provided in the Federal Arbitration Act.⁸¹ As one court emphasized, "a nonfinal arbitration is, in the last analysis, an oxymoron."⁸² The finality and efficiency of the outcome is essential in the consumer context as these attributes diminish access to justice issues in low value disputes and ease the costs and burdens of appeals for consumers.⁸³

Moreover, enforcement is crucial in forming the incentives and deterrents that serve to change people's behavior in a way to induce compliance with the

⁷⁷ For a further discussion, see Anjanette H Raymond, *Yeah, But Did You See the Gorilla? Creating and Protecting an 'Informed' Consumer In Cross Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV. 170, (2014)

⁷⁸ In fact, the Hague enforcement of award just suffered with the same set of issues.

⁷⁹ For an interesting exploration of the history, specifically in terms of the New York Convention and the FAA, see Richard W. Hulbert, *The Case For A Coherent Application Of Chapter 2 Of The Federal Arbitration Act*, 22 AM. REV. INT'L ARB. 45 (2011). See also Anjanette H. Raymond, *It Is Time The Law Begins To Protect Consumers From Significantly One-Sided Arbitration Clauses Within Contracts Of Adhesion*, 91 NEB. L. REV. 666, 690-1, (2013)

⁸⁰ See, e.g., *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (emphasizing the FAA's limited and exclusive grounds for judicial review of arbitration awards in order to promote arbitration's finality and efficiency).

⁸¹ Federal Arbitration Act, 9 U.S.C.A. §§ 9-11 (West 2015). See *Hall St. Assocs.*, 128 S. Ct. at 1404 (emphasizing the FAA's limited and exclusive grounds for judicial review of arbitration awards in order to promote arbitration's finality and efficiency).

⁸² *Gonzalez v. Hughes Aircraft Employees Federal Credit Union*, 83 Cal. Rptr. 2d 763 (1999) citing *Saika v. Gold* 49 Cal.App.4th 1074, 1076, (1996).

⁸³ See Amy Schmitz, *Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR*, 62 BAYLOR L. REV., 178 (2010) (citing *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) (explaining that lack of finality practically means beginning at square one in court, leading to substantially increased expense and delay)).

law.⁸⁴ While enforcement has several prongs of consideration, such as detection and penalizing⁸⁵ versus the enforcement of outcomes, enforcement as a mechanism of change and empowerment is essential within the context of consumers.⁸⁶

III. THE CREATION OF A DESIGN PARADIGM

Within the field of international relations and legislative drafting, few issues have drawn outrage and controversy more than consumers. From the protections they should be afforded to their inability to have their day in court, consumers are a focal point of many a heated debate. Despite scholars' hesitation, consumers continue to shop online, even crossing borders to make purchases. It is the consumers' willingness to throw caution to the wind in the cross border online shopping world that demands legislative bodies forge ahead to find solutions to these age-old debates.⁸⁷ To accomplish such a lofty goal, we must begin to use a new design paradigm.

This section briefly explores the age-old concept of the meeting of the minds.⁸⁸ Rejecting its historic definition, the author embraces the modern multifaceted definition, which demands individuals be given an opportunity to understand information. The section then explores the current research into the widely regarded concept of a behavioral nudge. Finally, the section concludes by arguing that many of the issues causing the greatest disagreement can be solved

⁸⁴ See Franziska Weber, *Assessing Existing Enforcement Mechanisms in Consumer Law: The Unavailability of an Allrounder* 542-543 (November 21, 2011) (Rotterdam Inst. of L. and Econ. (RILE) Working Paper Series, No. 2011/7, 2011), available at <http://ssrn.com/abstract=1962665>

⁸⁵ Although generally researched within criminal law, deterrence theory has often been carefully generalized into wider areas. See, e.g., S. Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, COLUM. L. REV. 1232, 1246 (1985); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

⁸⁶ It is often one reason advanced to support the existence of class actions. See, e.g., Roger Van den Bergh and Louis Visscher, *The Preventive Function of Collective Actions for Damages in Consumer Law*, 1 ERASMUS LAW REVIEW 5,14 (2008); W. M. Landes and R. A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Hans-Bernd Schäfer, *The Bundling of Similar Interests in Litigation, The Incentives for Class Action and Legal Actions Taken by Associations*, 9.3 EUR. J. L. & ECON., 183, 195 (2000)

⁸⁷ Several public platforms already exist. For example, the Belgian ODR platform known as 'Belmed', deserves a special note as innovative and promoted through a legislative body- even when others seemed hesitant. Stefaan Voet, *Belmed: The Belgian Digital Portal for Consumer A(O)DR* (April 4, 2013) available at <http://ssrn.com/abstract=2245017> And one of the early public platforms Concilianet, an ODR platform launched in Mexico. For information see <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>

⁸⁸ As the readers are undoubtedly aware, in general the concept meeting of the minds embodies a belief that the parties to an agreement either, (1) meant the same thing, or that (2) the parties objectively expressed agreement. Of course, neither fully captures the concept and technically both are wrong.

with basic technology and a shift in the paradigm used in designing the overall system.

A. The Meeting of the Minds

As proclaimed by Oliver Wendell Holmes in 1897 the meeting of minds is really a fiction:

We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties' having meant the same thing but on their having said the same thing.⁸⁹

Despite proclamations to the contrary, the meeting of the minds within the world of contract lore remains an often argued tenet of contract law.⁹⁰ One

⁸⁹ Oliver Wendell Holmes Jr., *The Path of the Law*, 10 *Harvard Law Review* 457 (1897).

⁹⁰ See, e.g., Omri Ben-Shahar, *Against the 'Meeting of the Minds': Exploring a New Basis for Contractual Liability* (October 2002). Michigan Law and Economics Research Paper No. 02-015. (explores a new principle of 'no-retraction', under which each party is obligated to terms it proposed, even if different from the terms proposed by the other, and can retract only with some liability) available <http://ssrn.com/abstract=341700> ; Dr. Hisham Tahat, *The Postal Acceptance Rule in the Digital Age*, 2 *JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY*, 1 (2007) (discussing the meeting of the minds as a justification for postal acceptance rule); Choi, Stephen J. and Gulati, G. Mitu, *Contract as Statute* (December 2005) Georgetown Law and Economics Research Paper No. 872861. (2005) (discussing meeting of the minds relating to boilerplate terms) available at SSRN: <http://ssrn.com/abstract=872861>.

would think the tenet would be frequently advanced as it relates to consumers as they rarely read and often fail to understand the most important and complex contract terms. Certainly, there can be no meeting of the minds. Yet, as Supreme Court Justice Scalia has proclaimed, “the times in which consumer contracts were anything other than adhesive are long past.”⁹¹ It seems the meeting of the minds should be a dead concept in the modern, scroll through, click on a button contract world.⁹²

Because of the tenet’s continued use, some commentators argue the definition of the phrase within today’s digital jurisprudence should set the standard of an opportunity to understand.⁹³ That is, one should be afforded information that assists in understanding the intent and agreement, but should one choose to not avail himself of such opportunity, he shall still be bound by the agreement.⁹⁴ It is the opportunity that matters. Within this context opportunity arises in one of three ways: (1) opportunity for consumers to understand, (2) opportunity to improve consumers’ access to justice, and (3) opportunity for learning for multiple stakeholders of the importance of incorporating technology across the justice environment. Each of these is a conceptual understanding that can be embodied within the ODR platform easily, as will be demonstrated in Section III.

B. Awareness through the Behavioral Nudge

Behavioral insight intervention, described in the seminal work *Nudge* by University of Chicago economist Richard H. Thaler and Harvard Law School Professor Cass R. Sunstein,⁹⁵ has taken the world by storm as it builds upon the work of Nobel Laureate Daniel Kahneman,⁹⁶ who is widely regarded as the researcher that explained what influences the human decision making process.⁹⁷

⁹¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

⁹² “[A] literal “meeting of the minds,” requiring both parties to have a comparable, subjective understanding of their agreement is clearly not what the courts intend by the use of this phrase. Our modern economy simply could not function if a “meeting of the minds” required individualized understanding of all aspects of the typical standardized contract that is now signed without any expectation that the terms will actually be negotiated. . .”*Spring Lake NC, LLC v. Holloway*, 110 So. 3d 916, 918 (Fla. Dist. Ct. App. 2013).

⁹³ See e.g., Ralph H. Schofield Jr., *The Demise of the “Meeting of the Minds” in Contract Law*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, Articles, (June 4, 2014) (discussing meeting of the minds, under Florida law, in relation to nursing home residential agreements)

⁹⁴ See *id.*.

⁹⁵ See generally, Richard Thaler and Cass Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS*, (Penguin Books February 24, 2009).

⁹⁶ See generally, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW*, FARRAR, STRAUS AND GIROUX (2011) (<Paren>).

⁹⁷ See Roger Lowenstein, Book Review: *Thinking, Fast and Slow* by Daniel Kahneman, Bloomberg, (October 27, 2011).

“Nudging” involves structuring the choices that people make in order to lead them towards particular outcomes.”⁹⁸ By way of brief explanation, there are three levels of nudges: (1) Alerting, (2) Design Architecture, and (3) Behavioral Influence.⁹⁹ The first two types of nudges have been widely used, in various environments, for a number of years.

“First degree nudges,” such as simple warnings or reminders, are designed to respect the decision-making autonomy of the individual and serve no other purpose than to enhance the individual’s reflective decision-making process.¹⁰⁰ For example, the devices described as “feedback devices,” such as a FitBit,¹⁰¹ would fall within the category of First Degree nudges – alerting individuals to information, but leaving the reaction to the information fully within the decision making of the individual.

A “second degree nudge” is designed to use “choice architecture”¹⁰² to build on behavioral limitations in an effort to bias a decision in the desired direction.¹⁰³ It is the second degree nudge, *i.e.* the design architecture nudge that is often hidden from the general public but is nonetheless widely used in regulation and policy-making. Again, most of us are familiar with the use of this concept. For example, the use of a default rule with an opt-out option is a choice architecture decision that has been proven to have a powerful influence on individual’s behavior.¹⁰⁴

⁹⁸ Robert Baldwin, *Nudge: Three Degrees of Concern*, LSE LAW-POLICY BRIEFING PAPER No. 7 (February 1, 2015) available at <http://ssrn.com/abstract=2573334>.

⁹⁹ Third degree nudges, sometimes called behavioral influence, are of controversial use of behavioral intervention. Increasing in order of potential intrusion on the decision making process, a ‘third degree nudge’ involves behavioral manipulation which often uses “a message with an emotional power that blocks the consideration of all options.” It is argued by commentators that this type of behavior manipulation directly impacts that individual’s ability to act in accordance with her or his own preferences. *See id.* at 2.

¹⁰⁰ *See id.*

¹⁰¹ *See* Fitbit Inc., <http://www.fitbit.com/> Of course, wearable feedback devices can be much more intrusive and can serve a more important function. For example, thermo-sensitive fire fighter gloves provide temperature and retreat warning to firefighters through the use of a vibration response and a heart patients wear a haptic tactile device that alert the individual if their heart rate is dangerously high. *See generally*, Christof Breckenfelder, Damian Mrugala, Chunlei An, Andreas Timm-Giel, Carmelita Görg, Otthein Herzog, Walter Lang, *A Cognitive Glove Sensor Network for Fire Fighters*, AMBIENT INTELLIGENCE AND SMART ENVIRONMENTS, VOLUME 8: WORKSHOP PROCEEDINGS OF THE 6TH INTERNATIONAL CONFERENCE ON INTELLIGENT ENVIRONMENTS, IOS Press, (2010) <http://ebooks.iospress.nl/publication/27982>; Erin B Ramsay, Robert W Heubel, Neil Thomas Olien, *Haptic Health Feedback Monitoring System*, *Immersion Corporation*, Assignee, Patent EP 2155050 A1 (24 Feb. 2010). <http://www.google.com/patents/WO2009002577A1?cl=en>

¹⁰² *See* Baldwin, *Nudge*, *supra* note 98, at 2.

¹⁰³ *See* Baldwin, *Nudge*, *supra* note 98, at 2.

¹⁰⁴ For example, automatically enrolling individuals on to pension schemes has increased saving rates for those employed by large firms in the United Kingdom from 61 to 83%. The Behavioural

In fact, the nudge based choice architecture within policy creation has garnered much attention in recent years. For example, in 2010, United Kingdom Prime Minister David Cameron commissioned the Behavioural Insights Team through a “process of rapid, iterative experimentation,”¹⁰⁵ which successfully identified and tested interventions to “further advance priorities of the British government.”¹⁰⁶ Since its inception, the Behavioural Insights Team has designed simple, highly cost-effective interventions that often yield surprising results. For example:

- Automatically enrolling individuals on to pension schemes has increased saving rates for those employed by large firms in the UK from 61 to 83%;
- Informing people who failed to pay their tax that most other people had already paid increased payment rates by over 5 percentage points;
- Encouraging jobseekers to actively commit to undertaking job search activities increased their chance of finding a new job;
- Prompting people to join the Organ Donor Register using reciprocity messages (“if you needed an organ, would you take one?”) adds 100,000 people to the register in one year.¹⁰⁷

The combination of alert and opt-in/opt-out nudges clearly has an impact on the decision making of individuals. If done with an eye toward efficiency, cost savings, and socially acceptable goals, the use of basic nudges may avoid some of the loudest ethical based criticisms.¹⁰⁸ As Professor Sunstein argues, we live in a world of nudges, but their presence doesn’t mean that we are forced into a particular direction,¹⁰⁹ as nudges should be “easy and cheap to avoid.”¹¹⁰ Within

Insights Team, in partnership Cabinet Office, Government of the United Kingdom, *See Behavior Insights Team*, <http://www.behaviouralinsights.co.uk/about-us>

¹⁰⁵ The Behavioural Insights Team, in partnership Cabinet Office, Government of the United Kingdom, *See Behavior Insights Team*, <http://www.behaviouralinsights.co.uk/about-us> Possibly in response to the widespread success of the Behavioural Insights Team, the United States announced in 2013 that it too would be pursuing the use of nudges as a means to influence individual’s behavior. Maxim Lott, *Gov’t Knows Best? White House Creates ‘Nudge Squad’ To Shape Behavior*, Fox News, (July 30, 2013) <http://www.foxnews.com/politics/2013/07/30/govt-knows-best-white-house-creates-nudge-squad-to-shape-behavior/>

¹⁰⁶ The Behavioural Insights Team, website information, *supra* note 104.

¹⁰⁷ The Behavioural Insights Team, website information, information available at <http://www.behaviouralinsights.co.uk/>.

¹⁰⁸ *See* Courtney Subramanian, *‘Nudge’ Back in Fashion at White House*, TIME, (Aug. 2013). <http://swampland.time.com/2013/08/09/nudge-back-in-fashion-at-white-house/>.

¹⁰⁹ *See* Cass R. Sunstein, *Nudging and Choice Architecture: Ethical Considerations* (January 17, 2015), YALE JOURNAL ON REGULATION, (Forthcoming), available at SSRN: <http://ssrn.com/abstract=2551264>.

each of the nudges designed by the Behavioural Insights Team, the autonomy and personal choice of the individual was preserved. The nudge simply made the less policy supportable option more of a hassle to pursue.

One must wonder what areas of the online dispute resolution world could best benefit from an alert nudge. One area springs to mind: basic information. Professors Best and Andreassen's seminal article, *Consumer Response to Unsatisfactory Purchases*¹¹¹ shows that dissatisfied consumers generally do not complain to either the offending business or external agencies.¹¹² In fact, a recent Consumer Financial Protection Bureau study found an incredibly low use of arbitration to resolve small financial claims, causing some commentators to argue: "What this report shows is not that claims go to arbitration but that they simply go away."¹¹³ Of course, much ink has been spilled about possible reasons for the failure to follow through on redress opportunities. One wonders if one frequently advanced theory – the lack of knowledge, about numerous aspects of their right and redress opportunities¹¹⁴ – could not be solved through a simple alert nudge to alert them to a redress opportunity, for example in response to a late delivery.

One other frequently advanced concern, the lack of understanding¹¹⁵ or knowledge about the use of arbitration,¹¹⁶ might also be impacted by the use of

¹¹⁰ See Richard Thaler and Cass Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS*, (Penguin Books February 24, 2009).

¹¹¹ Arthur Best and Alan R. Andreassen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 *LAW & SOC.REV.* 701, 728–29 (1977),

¹¹² See *id.*

¹¹³ Carter Dougherty, *Bank Customers May Get Their Day in Court*, Bloomberg Business, (March 20, 2015) (discussing Consumer Financial Protection Bureau, *ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015)* ("Consumers rarely consider bringing formal claims in any forum, arbitration or litigation,") Section 1.4.2 http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

¹¹⁴ For example "Consumers with such clauses (arbitration) in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so" See *id.*

¹¹⁵ Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, and Yuxiang Liu, "Whimsy Little Contracts" *With Unexpected Consequences: An Empirical Analysis of Respondent Understanding of Arbitration Agreements* 75 *MD L. REV.* 1, 4 (2014).

¹¹⁶ Attention has been drawn to clauses, but when presented in test within an agreement, the terms tend to be overlooked (or ignored). See, e.g., *Murea v. Pulte Group, Inc.*, 2014-Ohio-398 (Ct. App. Ohio Feb. 6, 2014) ("The arbitration provisions in both agreements were clearly marked in capital letters. The arbitration clause in the purchase agreement was conspicuously written in bold print, and the signature line of the agreement expressly warned Murea to 'make sure that all provisions are read and understood before signing.'"); *Forest Hill Nursing Ctr., Inc. v. McFarlan*, 995 So. 2d 775, 785 (Miss. Ct. App. 2008) (noting bold, all capital letters); *Lorene Park, Be Loud, Clear, and Fair in Arbitration Provisions or be Prepared to Litigate*, WOLTERS KLUWER (Aug. 7, 2012) <http://www.employmentlawdaily.com/index.php/2012/08/07/be-loud-clear-and-fair-in-arbitration-provisions-or-be-prepared-to-litigate/> (advising employers to feature arbitration agreements in a separate

specific, well directed, and appropriately designed nudges. Nudge alerts do work as mechanism to provide information and exposure to basic opportunities. For example, Illinois law asks drivers renewing their licenses to choose whether they want to be organ donors.¹¹⁷ Based on elaboration of behavioral economics, the draftsmen were able to implement an alert nudge that allowed choice. It turns out the simple act of having to choose meant that more people signed up to become organ donors.¹¹⁸

C. Transparency

Commentators and scholars have long been making the case for expanding transparency in the international commercial arbitration system.¹¹⁹ It seems to many, transparency is the sanitizer of inappropriate behavior. While the traditional international commercial arbitration community tends to focus on business-to-business disputes, thereby lessening the need (and the desire)¹²⁰ for

document, or at least in its own paragraph set off with spacing, and to “[u]se a 12-point font or larger; and use a bold, underlined, and capitalized heading that includes the words “**Arbitration Agreement.**” (emphasis in original).

And failing to read the fine print is not surprising. *See, e.g.* Anjanette H Raymond, *Yeah, But Did You See the Gorilla? Creating and Protecting an ‘Informed’ Consumer In Cross Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV., 129, 140 (2014); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts.*, 43 J. LEGAL STUD. 1 (Jan. 1, 2014) (studying online browsing habits of 45,091 households relating to online software merchants);

¹¹⁷ *See* Benjamin Wallace-Wells, *Cass Sunstein Wants to Nudge Us*, THE NEW YORK TIMES MAGAZINE, (May 13, 2010) at MM38.

¹¹⁸ *See id.*

¹¹⁹ *See e.g.*, Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 n.1., (2006); Julian D. M. Lew, *THE CASE FOR THE PUBLICATION OF ARBITRATION AWARDS*, in *THE ART OF ARBITRATION* 22 (Jan C. Schultz & Jan van den Berg eds., 1982); Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT’L L. 579, 606 (1985); Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 530 (2005). For example, some scholars have proposed compelling publication of awards over party objection. Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121, 138 (2003) (arguing for a presumption in favor of publication that can only be overcome by objection by both parties); Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT’L L. 923, 960–63 (2003) (proposing establishment of an official international regulatory body to require and oversee award publication except in those cases involving exclusively “issues of a private, consensual nature”).

¹²⁰ Rogers, *supra* note 119, at 1327 (arguing that transparency reforms forcibly imposed on the international arbitration system are impracticable)

transparent outcomes,¹²¹ the presence of consumers as main players in the online dispute resolution environment demands transparency that extends beyond the outcomes.¹²²

Transparency, in a system that stands to replace the existing brick and mortar justice system, must ensure that the essential attributes of the existing system are replicated within the replacement system. As such, transparency must exist in the notice, the process, and the outcomes – and in the online environment this is sometimes a difficult task. For example, online environments benefit from non-human interaction, thereby eliminating the ability of a human to use judgment or to ask questions in the information gathering process. Thus, the system must ensure that information gathering is not limited, impacted, or subjected to bias. As described above, the system will also likely provide information and may nudge individuals to explore key concepts or to opt out (or opt-in) to particular aspects of the system. These nudges and the impact upon various individuals will need to be monitored. None of this monitoring can occur without a high level of openness and transparency.

One can quickly understand why transparency is an essential aspect of the system, for it is the only real means to ensure that an individual can trust the system. Consider the potential impact of transparency on the “squeaky wheel” dilemma. The squeaky wheel dilemma occurs when businesses are attentive to a small minority of squeaky wheel consumers. Professor Amy Schmitz hypothesizes that within the business-to-consumer context, merchants reward “the relatively few “squeaky wheel” consumers who have the requisite information and resources to persistently seek assistance.”¹²³ Professor Schmitz argues this “system fosters contractual discrimination and hinders consumers’ awareness and access with respect to contract remedies.”¹²⁴ A transparent system reduces the impact of the squeaky wheel dilemma by providing information to consumers, allowing aggregation of data to reveal contractual discrimination, and lessening information imbalances that erode trust and hinder an open system of justice.

Transparency of process ensures the online justice system protects due process expectations that every party brings into the dispute resolution system.

¹²¹ See generally, Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 308–11 (2004) (noting that courts are willing to ensure public access when the purpose is to provide oversight of the judicial process, but more reluctant when it is for other, particularly commercial, purposes).

¹²² Sebastian Fehrler, and Niall Hughes, *How Transparency Kills Information Aggregation: Theory and Experiment*. 9027 (IZA Discussion Paper No. 9027 2015) available at <http://ssrn.com/abstract=2604390>

¹²³ See Amy Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPPERDINE LAW REVIEW, 279, 280-81 (2012).

¹²⁴ See *id.* at 290.

Due process protections are more difficult to ensure in an opaque system,¹²⁵ as Professor Citron of the University of Maryland enumerates: “Automated systems jeopardize due process norms. . . . Code, not rules, determines the outcomes of adjudications. Programmers inevitably alter established rules when embedding them into code in ways the public, elected officials, and the courts cannot review. Last century’s procedures cannot repair these accountability deficits.”¹²⁶

The online dispute resolution development community is not unaware of such criticism.¹²⁷ In fact, many argue that a carefully structured model of quality control along with the inclusion of mechanisms designed to enhance transparency, accountability, and accuracy of rules embedded in automated decision-making systems¹²⁸ can lead to a trustworthy, effective, due process focused on an online dispute resolution platform.¹²⁹ It is transparency that will shine a light on those areas that need adjustment within the newest justice system tools.

IV. ENSURING A POWERFUL ONLINE CONSUMER

Any design mechanism within the area of online dispute resolution should also address the very real issue of the consumer feeling disenfranchised from the justice system, especially in the area of low value disputes. To address this issue, many draftsmen must embrace, or at least demonstrate a willingness to consider, the opportunities that may exist for consumers that use online dispute resolution.

¹²⁵ See Thomas B. Sheridan, SPECULATIONS ON FUTURE RELATIONS BETWEEN HUMANS AND AUTOMATION, in AUTOMATION AND HUMAN PERFORMANCE: THEORY AND APPLICATIONS 449, 458 (Raja Parasuraman & Mustapha Mouloua eds., 1996) (“It is so tempting to trust to the magic of computers and automation. . . if a computer program compiles, we often believe, the software is valid and the intention will be achieved.”).

¹²⁶ Danielle Keats Citron, *Technological Due Process*, 85 WASHINGTON UNIVERSITY LAW REVIEW, 1249, 1249-1313, (2007).

¹²⁷ See e.g., Anjanette Raymond, and Scott Shackelford, *Technology, Ethics and Access to Justice: Should an Algorithm Be Deciding Your Case?*, MICHIGAN JOURNAL OF INTERNATIONAL LAW, Vol. 35, No. (2014).

¹²⁸ I have previously argued for the creation of a platform auditor, that not only tracks and analyzes outcomes, but as checks coding, and presentation for influences intentionally and unintentionally contained within the system. See Anjanette Raymond, and Scott Shackelford, *Jury Glasses: Wearable Technology and its Role in Crowdsourcing Justice*, CARDOZO JOURNAL OF CONFLICT RESOLUTION (forthcoming 2015) available at <http://ssrn.com/abstract=2573797>

¹²⁹ Anjanette Raymond, and Scott Shackelford, *Jury Glasses: Wearable Technology and its Role in Crowdsourcing Justice*, CARDOZO JOURNAL OF CONFLICT RESOLUTION (forthcoming 2015); Scott Shackelford, and Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WISCONSIN LAW REVIEW, 616 2014; Anjanette, Raymond, *The Dilemma of Private Justice Systems: Big Data Sources, the Cloud and Predictive Analytics*, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, (forthcoming 2015), available at <http://ssrn.com/abstract=2469291>.

For any legislative document to be successful, some shifts must occur in the thinking, approach, and understanding of the various draftsmen. At the heart of this debate lies the following essential shift in approach:

- Recognition that discussions must include all stakeholders, ensuring that all are fully considered and protected;
- Recognition that the location of the dispensing of justice can be irrelevant if done correctly;
- Recognition of the need to ensure consumers are afforded the opportunity to understand terminology and the dispute resolution agreement;
- Recognition that this opportunity is given by the consumer- but the absence of taking up the opportunity does not negate the effectiveness of the agreement;
- Recognition that consumers, given the opportunity to be informed, are more than capable of understanding that arbitration eliminates recourse to the court;
- Recognition that arbitration – if designed appropriately with an eye toward due process – is capable of being an efficient and equivalent dispute resolution process;¹³⁰
- Recognition that a private justice market is developing that will soon be unregulated without guidance and limited intervention;
- Recognition that ODR does not need to be limited to conversations involving online platforms and that all forms of communication should be explored, used and integrated into the system, including mobile and kiosk based services;
- Recognition that while some arguments against widespread use are legitimate (like issues associated with internet connectivity problems and accessibility related issues), other options and solutions should be considered and implemented before the concerns overtakes existing progress;
- Recognition that there is no longer any justifiable or supportable argumentation for stifling attempts to improve

¹³⁰ FAA and the various EU Mediation and Arbitration laws widely recognize the importance of mediation and arbitration and have long supported the value of mediation/arbitration as an alternative to the justice system. *See generally*, Directive 2013/11/EU Of The European Parliament And Of The Council of 21 May 2013 on Alternative Dispute Resolution For Consumer Disputes. EUROPA publication, *A Step Forward For EU Consumers: Questions & Answers On Alternative Dispute Resolution And Online Dispute Resolution*, Press Release, Mar. 2013 [hereinafter EUROPA, Press Release] (discussing the current work occurring in the EU). The original website for the platform is available at http://ec.europa.eu/consumers/redress_cons/adr_en.htm

access to justice through the use of technology and the online community;

Each of these principles must be embraced in the drafting process as each stands to recognize opportunity, while empowering consumers to engage in an online dispute resolution environment. While none of these alone is enough – and the wording of each should be a matter of debate – the principle that lies behind each must remain. Consumers are being denied access to justice and are increasingly disenfranchised with the justice system in these matters. Online dispute resolution is one opportunity that should be explored to reduce this issue within the online world.

V. TECHNOLOGY AS A FACILITATOR OF DUE PROCESS

With the above attributes and compromises in mind, technology can be used to further reduce or eliminate concerns that arise within the context of those discussions. For example, I have long argued that one of the essential attributes of the institution of justice is to ensure that the public knows of its rights and of the options available to exercise those rights.¹³¹ Imagine the information that could be shared to facilitate such knowledge when an individual engages in the use of an ODR platform for the first time.

The use of ODR may just be the future of justice in a variety of settings. In fact, it may be that ODR provides better access to justice and reduces age-old biases and barriers within the existing brick and mortar justice system. To accomplish the creation of a successful ODR system, several attributes of design, interaction and function should be considered essential:

- First and foremost, as proscribed by the New York Convention any dispute resolution process should ensure that basic due process protections are strictly ensured, including notice, an opportunity to be heard and a neutral decision maker;
- Ensure that the platform is designed, supported and monitored with an eye toward eliminating all types of bias and/or undue or improper influence;
- Ensure that the platform is subjected and compliant with the most rigorous privacy protections;
- Ensure that the system fosters communication among the parties as opposed to an adversarial winner takes all process;

¹³¹ See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 435–36 (2004) (discussing e-rulemaking as a way to reform the administrative process by encouraging widespread public participation).

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- Ensure that the system is built upon a system of reputational measures to safeguard against parties gaming or otherwise influencing the system;
- Ensure the system has a limited set of identified claims that can be submitted with clear directions and alternatives for claims that cannot proceed through the online process; and
- Ensure that fees and time commitments are kept to reasonable levels, and always proportionate to the claim.

And of course, the use of technology within the justice system will lead to opportunities for exploration and research into the dispute resolution process and the mind of the consumer. As such, provided privacy and identity can be protected, it is essential that the system be designed with an eye toward information gathering and robust use. To accomplish this goal, the entire system must:

- Insist upon information gathering, storage and analysis to facilitate relevant and accurate data driven decision making support for the user;
- Insist upon the use of data metrics and analytics to develop critical decision making support, guidance, and outcome prediction;
- Insist upon the creation of a feedback loop to improve individual's ability to predict outcome and understand corporate and commercial realities related to claims;
- Insist upon research into the analysis and prediction of consumer decision-making patterns, including process tracing; and
- Insist upon information gathering such that implicit and inductive bias can be monitored, discovered and reduced.

All with the overall goal of improving access to justice by ensuring the cost, expedience, reduced complexity and understandability of rights are available to individuals facing a dispute.

Finally, the use of technology may – for the first time in modern history – allow for individuals to engage in the rulemaking process.¹³² Technology may assist in the elimination of one-size fits all consumer regulation, focused on the protection of an assumed weaker party. The consumers themselves could voice

¹³² See Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) (explaining that code can regulate through rules embedded in system's architecture).

the projections that they need – and the data gathering could assist in the deployment of immediate needs – while the technology could nudge people into being better informed and making more accurately informed decisions.

VI. CONCLUSION

The legal community is failing yet again to engage in discussions surrounding the use of technology as a means to improve access to justice for cross-border online consumers. States, in an effort to not displace long standing domestic law (among other reasons), have solidified their positions and have resolved to stop communicating. As a result, consumers will not be protected from unscrupulous online businesses. Even more concerning may be the very real possibility of private business stepping in to fill the void in the justice environment. While many of these businesses will be above board and focused on the provision of ethical, due process focused ODR, some may be less than attentive to these expectations. Basic protections must be agreed upon and platform minimum requirements must be established. The issues that continue to plague discussions, in some instances, should be solved within the platform itself – a point that should be discussed with a wider engagement of the technology sector. It is past time for the international community to begin to resolve this issue – it is time for a meeting of the minds.