

Fall 2017

The New Handshake: Online Dispute Resolution and the Future of Consumer Protection

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Recommended Citation

Phillips, F. Peter '87, "The New Handshake: Online Dispute Resolution and the Future of Consumer Protection" (2017). *Articles & Chapters*. 1576.

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BOOK REVIEW

The New Handshake: Online Dispute Resolution and the Future of Consumer Protection by Amy Schmitz and Colin Rule (ABA Publishing, 2017)

Reviewed by F. Peter Phillips



For many years, a tempest has surrounded public-policy approaches to consumer protection, largely implicating three utterly inapt legal constructs: FRCP 23, the Federal Arbitration Act, and traditional principles of contract formation. Accustomed to managing customer

complaints but unwilling to expose themselves to the coercion of class actions, companies have sought to require consumers to waive rights to collective remedies. Courts have recognized the validity of contracts containing such waivers if they are embedded in agreements

to arbitrate. And consumer agreements to arbitrate have been enforced regardless of whether consumers knew that they were agreeing to anything, what they are agreeing to, or what rights they were waiving.

So intractable has been the legal discourse that Congress, through Dodd-Frank, created an agency to promulgate rules protecting consumers of financial products from “forced arbitration and class action waivers.” So vulnerable is our public policy to political change that, upon the ascendance of the Republican administration, that promulgating agency (the Consumer Financial Protection Bureau) and its proposed rules are likely to be stalled or overturned.

This climate has been a testament to the futility of the law to address a social need in a way that conforms to consumers’ legitimate expectations.

Now come Prof. Amy J. Schmitz of the University of Missouri and Colin Rule of Tyler Technologies with an extralegal, market-driven, empirically based approach whose values, they convincingly argue, reflect “old-time America” and yet whose execution relies upon cutting-edge technology. Illustrating old-time America, Professor Schmitz remembers when she would buy ears of corn from a local farm stand, hand the farmer a buck, and shake his hand. The dollar signified the market value of the corn, while the handshake signified the farmer’s willingness, in the event that an ear was wormy, to replace it with a good one.

President Harry Truman expressed his frustration with economic advisors who equivocated “On the one hand . . . but on the other hand . . .” by declaring that what

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this country needs is a one-armed economist. Schmitz and Rule suggest that what this country needs is a “New Handshake.” Their book of that name, published in April 2017 by the ABA Section of Dispute Resolution, makes a compelling argument.

For new technology, the authors explain the legitimate expectations of online retailers and their online customers. Both seek, and almost always realize, accuracy, satisfaction, efficiency, and responsiveness. Retailers devise easy methods of product identification, ordering, payment, and order fulfillment. Moreover, they compete with others in the marketplace to provide those experiences better than their customers’ alternative suppliers. Consumers want ease of use, quick delivery, conforming goods, and both privacy and safety with respect to the details of their financial transactions.

The question is, if most of those online transactions go as contemplated, what do consumers expect with respect to the few that do not? And what are the market justifications for retailers’ trying to meet those customer expectations?

Rule and Schmitz argue that the nature of online transactions presents the opportunity for the management and resolution of consumer disputes online, presenting opportunities for both customer satisfaction and enhanced business. Setting aside the concerns of third-party advocates, regulators, and lawyers, the authors propose that what customers really want is a dispute process that is as easy to access as the sale was; is online, like the sale was; and is fair, quick, private, confidential, effective, and direct. They do not want coupons, negotiations,

arguments, excuses, or offers of discounts for future purchases, and they certainly do not want to have to pick up a telephone and have a recording tell them how important their call is.

Here comes the most compelling part of the authors’ argument: based on a study of the buying behavior of millions of consumers on the retail site eBay, the authors conclude that consumers who are offered, and who initiate, online dispute management processes concerning their purchases actually engage in more purchases—irrespective of the outcome of the dispute process they initiated. That is to say, the mere availability of direct, simple online access to remedy boosts customer loyalty with respect to that online merchant. The authors even call this phenomenon “Return on Resolution,” or “RoR.” Return on resolution can backfire if done badly, of course. If the online consumer redress protocol is perceived as unfair, complaints get lost, or other adverse experiences lead customers to feel hoodwinked, things will change rapidly for the worse. But the empirically based proposition is that the presence on a retail website of an online consumer dispute mechanism results in enhanced customer loyalty. It acts like a farmer’s handshake.

If the validity of this consumer behavior, not self-described consumer “satisfaction,” is accepted, then a whole new world of online dispute resolution presents itself, driven and enforced by the market rather than by legal theories or regulatory initiatives. The authors envision a global, uniform, multilingual, cross-cultural system of online consumer redress that possesses certain design criteria:

- The process is easy to access and to understand;
- The system is highly automated;
- Users of the process are treated fairly and their privacy is respected;
- The system identifies “bad guys”—fraudulent sellers and repeated claimants—and uses a “tripwire” system to exclude them from participation or notify appropriate authorities;
- The process is sufficiently sophisticated to detect other efforts at “gaming;”
- The process must yield benefit to the merchants who take part; and
- The system must self-improve through iterative lessons learned.

They go on to spell out in some detail how such a global network might be built on a single platform. And they offer hypothetical case studies of how it would work in instances of buyer nonpayment, seller failure of delivery, dissatisfaction with quality of service, or other common business-to-consumer disputes.

These are timely, innovative, creative ideas. And it is a refreshing reminder that the law follows, and seldom incites, human endeavors. New developments in trade relationships come from the felt needs of the market, and when the market undergoes fundamental reshaping www.newhandshake.org such as the multijurisdictional, multilegal, cross-cultural, clickable world of contemporary online retailing—we lawyers are fortunate to have people like Amy Schmitz and Colin Rule to point us to the leaders and encourage us to follow.

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