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## Online Dispute Resolution: Beginnings of an Online Rule of Law

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### **Abstract**

The rule of law is a well-established concept among multiple jurisdictions. However, in the online arena, the concept has become fiction. On one end, large corporations such as eBay and Amazon utilise standard-form contracts which govern user actions. On the other hand, small communities of hobbyists have their own unique conventions for governing trade-in online forum-marketplaces. Nonetheless, such divergence of cultures across platforms creates inconsistent and arbitrary governance, resulting in weak dispute-resolution mechanisms which serve to protect consumers.

This essay focuses on dispute resolution in retail e-commerce. Particularly, it identifies two main platforms - traditional e-commerce marketplaces such as Amazon, as well as online 'forum marketplaces' such as Reddit. It explores governing practices in these areas, particularly focusing on the dispute-resolution mechanisms aimed at consumer protection. Ultimately, it finds that de-facto arbitration is often conducted by these platform administrators. However, the effectiveness of such decisions is lacklustre, owing to distinct challenges across both platforms and the unique commercial cultures which have arisen. As such, this essay considers the recommendations of the international community and the integration of e-commerce within international trade law. As these may be long-term solutions, the nature of e-commerce and online retail requires inter-state cooperation. Nonetheless, such a mechanism must strive to be accessible and efficient. Therefore, it proposes a more generalised framework to form the beginnings of an online rule-of-law in consumer disputes. To these ends, stakeholders must work together to develop a strong baseline framework and to harmonise online governance in the rapidly growing online arena.



## Introduction

Global lockdowns amidst the COVID-19 Pandemic saw the acceleration of growth in the e-commerce industry. According to the United Nations Conference for Trade and Development ('UNCTAD') [2021], 2020 saw the global e-commerce economy jumping 20% from 2019, with significant contributions from the retail sector. However, while institutions accelerate operations to match the hastening pace of online business, the law surrounding this field merely trudges along. However, outside of domestic systems, various e-commerce platforms have developed their solutions in online dispute-resolution ('ODR'). This can be seen as the first step towards the creation of an online rule-of-law.

This essay seeks to explore the innovations which online platforms have adopted, alongside the responses by the international community. It will first identify the two distinct types of marketplaces in this field - established marketplaces run by corporations, and informal forum marketplaces that are largely user-run. It then correlates the characteristics of these markets to mechanisms which they adopt in resolving online disputes. Finally, it considers the solutions proposed by international bodies to strengthen the ODR framework. However, it finds that these recommendations should be more nuanced in order to tackle e-commerce. To this end, it finally proposes the development of a framework of guiding principles which could be adopted to strengthen the development of an online rule-of-law.

## Distinguishing Factors of Marketplaces

Before exploring the governing principles in the e-commerce sectors, it is important to distinguish the types of e-marketplaces. This essay identifies two distinct groups - established marketplaces, and 'forum' marketplaces. Both avenues have different characteristics in user-culture and governance cultures. It is worth identifying these differences to understand the development of online governance in this field.

Established e-marketplaces are dedicated platforms designed specifically for facilitating e-commerce. These platforms, established by corporations, provide low bars of market access to users through their global platforms for sale [Karakaya, 2009]. Market players in this field include eBay and Amazon. As such, the administration and governance of these platforms are left to these corporations. In addition, users are subject to an end-user licensing agreement ('EULA') prior to operating on these platforms. For instance, eBay's EULA postulates that users, in trading goods on their site, are subject to particular rules set by the corporation in dispute-resolution, data and privacy, user fees, and the transferring of funds between the parties. Amazon's EULA operates in a similar manner.

While EULAs traditionally operate as contracts, they seem to act as pseudo-constitutions on these platforms. EULAs generally permit users to obtain a licence to utilise their intellectual property

subject to conditions. However, in relation to online platforms, these conditions operate as the cornerstone for the governance of user rights. Traditional constitutions of countries often posit a judicial system for dispute-resolution, principles, defined principles for their subjects, along with the relevant powers for governance structure. Similarly, EULAs establish a mechanism for dispute-settlement between user-user and user-platform, delineate the relationship between the licensee and licensor, and lay out the powers of the licensor in the operation of the platforms and the overarching governing laws to interpret these gaps [Brosseau et al, 2009]. It is thus easy to draw comparisons between EULAs and traditional constitutions, and it can be identified that in the absence of further agreements, these EULAs operate as pseudo constitutions.

In contrast, forum marketplaces are not established for the sole purpose of acting as e-commerce platforms. Rather, these platforms have evolved to become marketplaces. Most prominent in this field is Reddit. Reddit operates as a forum for users to discuss matters, with significant user input in various topics [Anderson, 2015]. Notably, while Reddit operates as a general platform, users can create 'subreddits' for specific topics. For instance, the 'r/Nintendo' subreddit focuses discussion on matters regarding the video game company Nintendo - news, press releases, product releases, and speculations on future direction. However, it is worth noting that these subreddits are created by users themselves, and governance of these communities similarly falls to users, known as 'moderators', rather than the Reddit administrators.

Within Reddit, hobbyist communities are widespread [Wattson Todd & Rangsarittikun, 2021]. R/Boardgames, a community dedicated to playing, exploring, and developing board games, has over 3.5 million subscribers and has been operating since 2008. However, it was only in 2014 that r/BoardgameExchange was established - a subreddit operating under r/Boardgames which facilitated the buying and selling of these games. At that point, r/Boardgames had approximately 50,000 subscribers. In a similar vein, r/BuildaPC, for custom personal computers, had approximately 20,000 subscribers when the marketplace r/HardwareExchange was set up for the trading of these parts.

While this development of forum marketplaces is a natural result of individual communities' growth [Kim et al, 2010], addressing wider concerns relating to the protection of buyers and sellers becomes necessary. While Reddit has its own EULA for users operating on the site, further provisions have been made for these 'moderators' in order to give them autonomy for governance of their subreddit. Moderators have created unique systems within each community aimed at targeting common e-commerce issues, such as scamming. However, Reddit's EULA is notably silent on provisions governing trade between users, such as user-user dispute resolution, disbursement of funds, among other trade-specific provisions found on established forums. Other than Reddit, this system of governance is found in forums such as imore.com for resale Apple goods, and on Geekhack.com for mechanical keyboards. While these systems remain unique to each community, they share the common purpose of user-governance, while operating on their platforms.

Ultimately, it can be concluded that these platforms operate on different means to similar ends. Established forums for the sole purpose of facilitating e-commerce posit a top-down approach through EULAs; user conduct and user rights are administered by the platform. However, forum marketplaces are established from the bottom up; user-conduct and user-rights are governed by other users with little input from the platform.

## Dispute-Settlement

Having considered the distinct characteristics of these platforms, this section will explore their distinct methods for ODR and their implications on the standard of the rule of law on these platforms. To illustrate this, this essay will refer to A as the vendor, B as the purchaser of goods, and P as a generalised platform for sale.

### *Established Marketplaces*

Established marketplaces have specific EULA provisions that govern user-user dispute resolution. Oftentimes, complaints which arise in e-commerce disputes follow a similar pattern: B would purchase a particular good from A on platform P. B would then notice a defect in their product that does not meet the description and file a complaint on P's ODR mechanism. P's appointed tribunal then moves to arbitrate the dispute and award the appropriate remedy [McInnes et al, 2014]. P further has the power to enforce these decisions and issue a refund for the product to B on A's behalf under the established EULAs.

It is a rather straightforward system, akin to traditional claims in domestic judicial systems. Yet in practice, these online tribunals that are appointed by platforms often create unsatisfactory results. Anecdotal evidence indicates that these platforms favour buyers over sellers, often neglecting sellers' testimony when disputes arise [Brignall, 2020]. EBay buyers have notoriously taken advantage of these loose policies through the 'Chargeback' scam. In essence, B would purchase a particular good from A, but later claim that the good was defective in a certain way or that it never arrived. EBay then, as the platform of sale, often sides with the buyer, and sends a refund of the goods, allowing B to keep both their money and the item purchased from A. While it must be acknowledged that established platforms have a significant volume of cases, the potential for the abuse of ODR is problematic. While mechanisms for consumer protection must be considered where e-commerce scams are a real threat, these online platforms seem to be cutting corners in reviewing the merits of disputes, creating a large obstacle in the development of an online rule of law.

In a similar vein, reputation disputes are rather commonplace on e-commerce sites [Rule, 2013]. To promote buyer confidence, most online platforms have implemented reputation-based systems, allowing buyers and sellers to give each other a rating following the conclusion of a

transaction. Such a system aims to promote trustworthiness of both sellers and buyers to combat the impersonal nature of e-commerce [Rahimi & Bakkali, 2014]. Therefore, users often place a large emphasis on these ratings where it has the potential to materially affect their sales. Inevitably, disputes might arise due to an alleged 'fake' review left behind for a particular reason. Thus, these platforms provide users with an option to dispute the legitimacy of the reviews left by various users [Xu et al, 2012]. In this regard, these platforms are significantly less transparent. Most sites run a policy of automatic review for most cases of removal of negative comments on a vendor's page, with limited opportunities for both buyers and sellers. In most circumstances, platforms are hesitant to intervene in the sale between a buyer and a seller, in order to allow the parties to amicably resolve the dispute. Even when platforms intervene, their scope of intervention is merely limited to removing feedback which contravenes company policies such as the use of vulgar or derogatory language. They ask buyers to publicly respond to such claims, leaving little recourse to dispute allegedly fraudulent feedback. Such 'false' feedback might not have any practical effects on the seller's future sales, but they would undoubtedly have effects on sellers who believe to be wronged and left with no remedy. This lack of intervention and the lack of available appropriate remedies would undoubtedly weaken the 'judicial system' on these platforms.

Other than these traditional claims of consumer protection, more specialised disputes have arisen, particularly those geared towards breaching intellectual property rights [Rule, 2013]. These generally include the sale of counterfeit goods [OECD/EUIPO, 2021] and illicitly reproduced material (i.e software, music) [Eggertson, 2010]. These matters can be filed by both users (or third parties with no affiliation to the platform) who have no existing business relationships and those who have previously concluded sales. These matters often require particular knowledge about the subject matters rather than a mere 'he said/she said' that often occurs in disputes of sales. Commentators in this field have raised issues regarding the conflict of applicable laws in any dispute, which may cause difficulties in identifying a particular right that a dispute may bring [Gervais, 2001]. Particularly, for third parties who do not operate on these platforms but wish to bring a claim for a product they noticed being sold, there is a question of relevance of the governing law of the EULAs. Thus, while some of these established platforms have their own versions of dispute-settlement in intellectual property, some claimants might not wish to subscribe to platform-specific dispute-settlement.

However, looking beyond that, claimants might not have a choice but to utilise these settlement mechanisms to obtain a proper remedy. In the online marketplace, there is an issue of anonymity. Users often do not pose their real names, contact details, or other material information which are required to bring a claim in a domestic court [Soska & Christin, 2015]. It is only at the time of purchase that these details are released, often due to logistical reasons, such as shipping and payment details. Therefore, potential claimants for a breach of intellectual property may be forced to utilise these platform specific dispute-settlement mechanisms. However, unlike domestic courts, it is often impossible to determine the abilities and competence of these platforms in

handling such disputes where there exists a dearth in literature and official reports. While confidentiality is commonplace in arbitration, potential claimants should enjoy a certain degree of clarity in this regard, particularly concerns over prominent and complex legal issues.

A relevant decision in this regard is *Tiffany v eBay*, filed in the US. Tiffany, a provider of luxury goods, noticed counterfeit products on eBay and filed a complaint to the established marketplace. However, eBay requested Tiffany to begin proceedings on their intellectual property dispute platform, but Tiffany had refused and began litigation for breach of trademark. The Court found in favour of eBay, denying Tiffany's application for alleged contributory trademark infringement. This decision affirmed a District Court decision in *Hendrickson v eBay* on the sale of counterfeit copies of documentaries. Both courts found that the marketplace should not be held vicariously liable as an intermediary for the sale of goods which infringe on copyrights where it would place too big a burden on their policing of sales. English law adopts a similar position. Lord Denning in *Chelmsford Auctions Ltd v Poole* emphasised that these sites do not act as agents for users. However, this has not been explored since 1973, and with the rise of e-commerce in the recent decade, it is possible that the position will change.

Going back to the case of *Tiffany v eBay*, it should be considered that Tiffany had refused to go through eBay's internal intellectual property dispute system due to the nature of the remedies they sought. Tiffany's request for the outright ban of the sale of Tiffany Silver jewellery across the platform rather than taking down individual sellers seems to contradict eBay's business model, where they take a small percentage of each sale as 'platform fees' [Krishnamurthy, 2021]. While it is likely that eBay would be willing to temporarily comply with smaller claims against individual sellers, as is the purpose of the internal mechanism), more drastic measures such as a blanket prohibition of sale of a particular good would fall outside the available remedies. Further, such actions would likely remain rather limited due to these financial incentives [Levin, 2009]. Therefore, it is understandable that Tiffany decided to bring this to court and acted against eBay, considering the impossibility of bringing a claim against the hundreds of sellers selling counterfeit goods. Nonetheless, it signifies the limited recourse that larger companies have under these platforms and the arbitrariness of decisions which has a potential of conflicting with a platform's primary interest. These factors indicate a rather weak rule-of-law that is largely influenced by corporations' fundamental interests.

In these regards, a common theme of established marketplaces lies in concerns over the competence of platform administrators in resolving disputes. In both user-user disputes and user-third party disputes, two potential issues can be identified within the governance of these platforms - lack of accountability in decision-making, and the potential for a conflict of interest on these platforms. Furthermore, it is especially important to consider accountability of users on these platforms amidst the anonymity of the online world. Unfortunately, current jurisprudence in the US and England seem to emphasise this notion, despite there being little avenues of recourse for users and third parties.

### *Informal Forum Marketplaces*

Informal forum marketplaces, in direct contrast to established marketplaces, were developed as a form of 'evolution' for hobbyist forums. While a natural evolution, there are concerns that administrators in charge of these forums do not have the adequate skillset to handle more complex matters of commerce. For comparative purposes, this section will consider how these forums tackle issues which arise from identical factual matrixes as those in established marketplaces. It must similarly be noted here that there is a dearth of research in this field of informal marketplaces; more formal inquiry from other authors would thus assist to formalise current anecdotal evidence.

Similar to established marketplaces, the most common dispute in this field occurs in product complaints. Purchaser B, having bought an item from Seller A but is unsatisfied, would lodge a complaint to platform P. While established marketplaces have appointed staff dedicated to handling these disputes [Dei Duca et al, 2014], these forums do not. Hence, most situations often call for general moderators, who oversee the day-to-day running of the site, to step in and arbitrate a dispute between parties. In most circumstances, the specialised nature of the subject matter of trade allows this smaller team to be more aware of its nuances. Further, the human element is also rather prominent. Directly contrasting the position of corporations, moderators on these platforms are often known and prominent members of the community who have taken up their duties voluntarily, rather than being paid by the corporation behind the forum. Hence, there is an intrinsic degree of trust between users and moderators of these platforms [Fiesler et al, 2018]. Especially so when there is little incentive for these users to step up and take these duties. As such, disputants feel more comfortable when discussing their matters with these admins, and in turn, admins become more open to considering the evidence, while having a degree of accountability [Seering et al, 2019].

This allows disputes to be resolved rather efficiently. Some communities are also rather transparent with the results of their investigation and make public announcements. However, the remedies available for these platform moderators are starkly different from those of established marketplaces in these situations of buyer disputes. Particularly, where these forums were not designed for the original purpose of acting as marketplaces, no provision or mechanism has been made on the transfer of funds. Parties utilise established online accounts, such as PayPal, to conclude these international transactions. However, where a third-party company is being employed, there are little recourse platform administrators can do for reimbursement of funds (apart from requesting the seller to refund the buyer); those decisions would be left to these fund transferring services. Moderators who complete these investigations are merely left to preventive remedies, rather than compensatory; banning users who they deem are acting fraudulently, prohibiting them from utilising the platforms in the future, and making other users aware of potential 'alternate accounts' through various means. However, when bringing disputes to third

party payment services, they seem to follow a similar pattern of dispute-resolution as established marketplaces [Condlin, 2017]. These fund service platforms similarly do not allow the input from third party intervention, and decisions by these platforms who are able to provide appropriate remedies are traditionally opaque. This creates a paradox. Where transparency and efficiency are available, no compensatory remedies are available; yet, where a platform has the necessary ability to award compensatory and direct remedies, the decision-making bodies operate under a relatively opaque framework. Such a fine line seems to frustrate the operation of any potential rule-of-law framework which was developing.

Compared to established marketplaces, reputation disputes are rather infrequent on these platforms. In general, these marketplaces have adopted their own unique methods for the categorisation of completed trades through posts on sub-forums to these informal markets. In practice, moderators utilise their general powers of content vetting to ensure that there are no discrepancies or feedback fraud which might occur. Some forums utilise bots or adopt customisable 'flairs' for each user which reflects their verified trade history on the platform. However, in hypothetical situations where disputes arise, it is likely that the strong degree of trust between a user and a moderator would play a significant role; users already often share correspondence of the transaction, and such willingness of disclosure should remain open. Even if potential feedback fraud occurs, the relatively tight-knit nature of these communities, coupled with their origins as forums, often create a degree of gossip culture, which in turn remains effective as a soft-law mechanism for regulating trade [Bachrach et al, 2009].

Similarly, there is a dearth in material for intellectual property disputes arising from these informal platforms. Even considering the largest of these platforms, Reddit, which features a multitude of subcommittees and subcultures with their own distinct marketplace system, has been free of any potential claims for trademark infringement for the sale of counterfeit goods despite being notorious for the resell of these goods [Kwon & Shao, 2021]. Perhaps this could be attributed to an overall lack of awareness of the platform's capabilities for acting as a marketplace, or a lack of formal dispute mechanism on the platform for the sale of such goods which third parties may apply for. Nonetheless, this is often regarded as a rather grey area, which moderators of various community markets do not attempt to police, despite Reddit's overarching policy to prevent the promotion of sale of counterfeits [Lai, 2020]. However, if the jurisprudence for established markets is consistent, it is unlikely that Courts may find Reddit vicariously liable in this area; although whether the platform's lack of efforts in policing such sale is relevant (contrasting eBay's Verified Rights Owner system, which Professor Eric Goldman [2018] argues contributed to the Court's decision) remains up in the air. Other forums operating which have developed similar marketplaces might also be affected.

In addition, similar to the situation in established marketplaces, the technical knowledge regarding intellectual property disputes in this field are of similar concern. It remains unlikely that volunteer platform admins would have the technical knowledge in applying and operating legal frameworks



pertaining to intellectual property. Even if the platform itself steps in to intervene, using reserve decision-making authority under EULAs, moderators may be viewed as overstepping their authority by users despite being legally allowed to do so. Especially so when the key feature of informal marketplaces seems to be the lack of formal requirements, and the large emphasis on party autonomy in contracting. However, where moderators begin to 'police' goods being sold, it creates a sense of formalism, while having the dual effect of pseudo-formal recognition that these informal forums operate as an established platform for sale. While not necessarily a drawback, most users utilise these platforms as an alternative to established marketplaces which may be too 'out of touch' or have too formalistic requirements which may draw people away [Litondo & Ntale, 2013]. Such seems to put these informal marketplaces in a bind – risk losing their comparative advantage, or to afford greater policies for the protection of their intellectual property. Where these platforms have seemingly not decided, this weakens the overall rule of law, where there exists little means of appropriate recourse in this field. Perhaps the ideal solution would be for these subcommunities to develop their own solution to allow third parties to have a right of recourse. However, it is presently rather weak, and remains an issue for further development in this field.

As such, it remains clear that the fundamental issue undermining the current dispute-resolution system in online forums seems to be a lack of an appropriate remedy. Unfortunately, this remains as a fundamental characteristic of such informal arrangements, rather than the fault of the platforms. Particularly, the role of these moderators largely lies in governance - ensuring the smooth operation of the platform and maintaining the integrity of these subcommunities. However, as these communities develop to form mini-economies, their power becomes rather lacking. Innovative solutions in this field have thus been established from a policy level. Yet, where disputes arise, recourse remains rather limited.

### **Recommendations for reforms**

Having considered the unique challenges of both established marketplaces, and forum marketplaces in e-commerce, this essay will now turn to consider various recommendations which have been proposed in these areas, and how they impact online dispute-resolution. It goes further to consider how such recommendations may be strengthened to facilitate the development of an online rule-of-law.

#### *WG3 UNCITRAL - An attempt at harmonisation*

The United Nations Commissions on International Trade Law ('UNCITRAL') has considered the significance of online e-commerce within the global economy, and have similarly sought to harmonise, and strengthen the law in this field. To this end, Working Group 3 ('WG3') has been tasked with considering further developments for the strengthening and capacity-building of online

dispute-resolution mechanisms. To these ends, WG3 has suggested 5 points to strengthen such mechanisms, namely:

“(i) how to incorporate the procedural rules in the terms of use, including how to obtain valid consent of the users; (ii) whether the mechanism should resolve disputes between the operator and the users or also between users; (iii) the law applicable to the dispute, including the possible application of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG); (iv) the anticipated role of the platform to protect consumers and the applicable law for such protection; (v) how to ensure an impartial and fair procedure; and (vi) the possibility of appealing the outcome of the process.” at [23].

In principle, these mechanisms for capacity building are rather sound. It cannot be denied that the adoption of an international legal instrument as a framework for trade has its benefits. Particularly it provides greater certainty as a set of governing principles for disputes, along with clear and applicable rules backed up by courts and commentators. Particularly, the applicability of the United Nations Convention on Contracts for the International Sale of Goods ('CISG') seems like an appealing prospect. In general, the CISG is an international treaty which attempts to harmonise the laws governing international trade [Schlechtriem & Schwenger, 2016]. While WG3 had left open the possibility of its application, one should also consider the applicability of its counterpart - the United Nations Institute for the Unification of Private Law Principles of Commercial Contracts ('PICC'). While there are merits on the applicability of either legal regime, this essay will not delve deep into this legal analysis. Instead, the question of whether one should apply an international legal instrument in the context of online dispute-resolution should be considered, both in a procedural aspect as in suggestion (i), and on the merits of the dispute, as in suggestion (ii).

In the application of international legal instruments, one needs to bear in mind the characteristics of online-dispute resolution on these platforms. Particularly, these disputes for e-commerce operate in a high-volume setting. For instance, eBay averages at around 60 million disputes a year, with a majority being user-user [Mizzou Law, 2018]. Such a high volume of cases had largely led to implementation of the current system with a focus on efficiency of the disputes [Del Duca et al, 2014]. Yet, with the implementation of an international legal instrument containing specific provisions on international trade, the formalistic requirements under these instruments would undoubtedly slow down the pace of dispute-resolution in the analysis of these disputes through specialised legal instruments. Further, one similarly wonders about the proper implementation of what is generally regarded as 'confusing legalese' by platform administrators [Hannah, 2010], particularly in the context of informal forum marketplaces where moderators are often volunteers rather than trained specially for the position of dispute-settlement. A further concern arises in user-knowledge of these rules. The applicability of various EULAs seems controversial enough where it is widely known that ordinary laypersons rarely read and understand these lengthy documents [Waddell et al, 2016]. It thus seems to follow that requiring an ordinary person to

understand their rights under an international instrument separate from domestic law seems especially unrealistic, even when most users currently are not themselves aware of their rights in domestic legal systems. Further, there is a general procedural matter on the applicability of these doctrines, where they do not exist as customary international law, nor have the relevant instruments been universally ratified. Yet, even if the issues fall to domestic legislation, similar issues on choice-of-law clauses might apply where domestic legislation is varied across jurisdictions. While there have been some attempts to harmonise the law in this field, European Union's E-Commerce Directive, these seem limited to regional rather than global use. Such barriers thus impede efficient access to justice across all these platforms, whether due to governing law of platforms established in EULAs, or geographical location of users operating on these platforms.

However, in informal forum marketplaces, the imposition of a formalistic doctrine or regime somewhat contradicts the whole idea of an established informal marketplace. If WG3's recommendations are implemented as is, it would likely turn many volunteers who moderate these platforms away, imposing a significant barrier to entry for these volunteers who mostly work on these platforms out of passion, rather than as a source of income [Matias, 2016]. Further, while these international instruments may address matters related to the harmonisation of laws and could be interpreted consistently with the unique cultures of these communities, they do not address the underlying issue - the lack of suitable remedies through these platforms. These international instruments may make clear what the remedy is in given circumstances, but they do not possess mechanisms for the implementation of these remedies. However, there may be some argument that, in the event that there is a harmonisation of laws governing disputes, third party companies who are able to provide these remedies may be more willing to listen to moderator input in this field.

Bearing in mind these core issues with the implementation of WG3's recommendations, they should nonetheless be completely cast aside. Perhaps the adoption of a core international legal regime to govern online disputes may be relevant in the future. Particularly, complimenting WG3's work, the UNCITRAL 2016 Technical Notes on Online Dispute Resolution similarly cannot be neglected. However, the practical implementation of these treaties in the online realm, and their lacklustre impact on existing problems cannot be ignored.

Yet, these principles could nonetheless form a set of core standards for the facilitation of online dispute-settlement. Rather than acting as a set of strict guidelines, it could form the basis for a harmonised set of principles which might operate in this field. While certain matters in these international instruments, such as those pertaining to contractual formation between users are relatively well-known by laypersons, other more technical aspects such as the binding nature of past practices or the operation of force majeure might not be. The implementation of such a framework into these online platforms might be beneficial to significantly expand the scope of disputes, providing a degree of certainty and clarity within these communities. Take, for example,

Art 9(2) of the CISG, stipulating the binding nature of trade practices where they are frequently adopted in international trade. While users and administrators might not be familiar with legal analysis pertaining to Art 9(2), nor the application of the subjective and objective requirements under Art 9(2) in the determination of a trade usage which may be binding, this provision itself might operate to provide a consistent harmonisation of trade practices where they overlap between established marketplaces, and informal forum marketplaces. In applying such a principle without in-depth legal knowledge, a platform administrator of either defined marketplaces might be required to defer to consider the unique characteristics of each marketplace, leading to more clarity and certainty in dispute resolution. The adoption of these principles as a guiding framework would similarly nullify potential geographical issues regarding the complete applicability of legal regimes.

Yet, if one were to take this further, perhaps a greater solution, albeit more far-reaching, would be the adoption of a unique set of frameworks for these e-commerce sites. The CISG, PICC, and other international legal instruments primarily function as treaties; negotiated by countries, for countries. In that regard, requiring the applicability of a treatise into the cybersphere which has its own set of regulations might be absurd. Instead, if the drafters of the CISG or PICC would come together with members of online platforms to draft their own set of framework governing international e-commerce, perhaps these platforms would be more willing to adopt a harmonised framework for online dispute-settlement. Yet, such an issue requires an unlikely corporation between established e-commerce platforms and their direct competitors in informal forums (who are even more unlikely to consider such a framework due to fear of recognition), alongside public international bodies which may refuse to enter negotiations for fear of recognition of the influence of these organisations [Paust, 2011].

*What kind of backbone should we consider?*

In considering the principles which could be adopted in online dispute settlement, it is important to bear in mind the importance of generality [Hentrei, 2015]. In traditional treaty drafting, member-states are cognisant of the unique cultural identities which exist in each member-state. This can similarly be applied across these marketplaces; it is trite that the distinct marketplaces - established, and forum, would have their own unique cultures and communities. However, going further beyond these distinctions, each category is similarly not limited to one platform; cultural differences further exist between subcommunities, even when they are operating on the same site [Datta & Adar, 2019].

Perhaps as a starting point, judicial directions in the applicability of online dispute-resolution should be considered. In *JK v MK*, the English Courts have recognised the powers and enforceability of decisions made by Amicable, an online-dispute settlement mechanism for divorcing couples. In *JK v MK* ('*JK*') the Court considered whether there was any conflict of interest

of a third party dispute-service, and whether staff operating in Amicable infringed s.4 and s.5 Legal Services Act 2007. However, both questions were answered in the negative; Mostyn J found no conflict of interest and no transgression of the Act. Nonetheless, Mostyn J remained wary that such a service should remain subordinate to the Courts [at [16]]. However, Mostyn J made the following remark:

“The declarations made in this case relate only to amicable. Other online divorce facilitators (and there are many) can only rely on them if their business models are virtually indistinguishable from amicable's.”, per Mostyn J, [46].

Mostyn J seemed hesitant to apply similar principles to other systems and sought to limit the judgement to online divorce services. However, it cannot be neglected that this decision opened the door for the enforceability of other online dispute-resolution mechanisms. Particularly, the former criteria of enforceability - the lack of a conflict of interest, seems to be a core principle for online dispute-settlement.

Taking it a step further, particular key provisions are commonplace across various provisions as a form of general contract law. These include issues of non-delivery of goods, misrepresentation, among other general principles of contractual formation. These can be identified as principles of a generalised contract law which laypersons seem to be familiar with. As such, while already implemented across the various platforms, the codification of such a framework may provide some clarity and be the first step to capacity-building.

Unfortunately, an overarching principle of transparency in dispute-resolution mechanisms might not be ideal. While some communities have implemented such provisions, the nature of online culture might cause transparency to be more of an issue. Especially, where doxxing is a common phenomenon across all platforms [Eckert & Metzger-Riftkin, 2020], universalised transparency in all disputes might cause unwanted consequences of cases of cyber-harassment that might be taken too far. Should a framework be implemented in this regard, safeguards and limitations should be considered; and the extent to which disputes should be public in the online sphere.

## Conclusion

This essay has provided a general overview of the development in the rising industry of e-commerce. Global trade in the retail sector is at an all-time high [UNCTAD, 2021]. Yet, the legal framework of governance in this field seems to be lacking. This essay thus identified two categories of marketplaces which encompass most of the online trade - established marketplaces, and informal forums - both of which possess unique challenges in developing a strong rule-of-law framework. The former consists of a lack of clarity and certainty in decision-making, alongside potential issues of conflict of interest and laws. The latter has further issues in the enforcement of

remedies. Nonetheless, a common theme across both institutions seems to be the lack of a clear and concise framework which delineates user-rights and governing principles across platforms.

To combat the growing international trade, this essay further considered UNCITRAL WG3's recommendations. While in principle sound, issues around implementation of these suggestions call for a more nuanced approach in the field of e-commerce. As such, this essay proposes a more generalised framework which can be adopted by laypersons who often run these platforms, rather than a specialised legal instrument. Nonetheless, it is clear that if any solution were to be adopted, it would require the cooperation and consent of all stakeholders across these platforms - administrators, users, and third-party service providers.

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