

Online-Dispute Resolution - Paving the way towards harmonising the Birksian archipelago¹ of obligations?

by Gregory Chan and Tan Yan Shen *

1 The term “Birksian” is a reference to the works of Professor Peter Birks and his theories which are regarded as the baseline for modern private law theory, originating from: PBH Birks *Unjust Enrichment* (Oxford: Clarendon Press, 2nd edn, 2005). Helpfully summarised by Professor Duncan Sheehan and Professor TT Arvind, Birksian thinking favours “timeless principles” to generate lower-order rules used by legal decision-making, and “a suspicion of policy as a means of avoiding proper analysis of the principles and rationale of the law”: Duncan Sheehan, TT Arvind. “Private Law Theory and Taxonomy: reframing the debate”. (2015) 35 *Legal Studies* 3, 480-501.

Abstract: It is only natural that the rise of e-commerce is coupled with an increasing number of disputes; eBay alone has seen a record 60 million cases opened under its online dispute-resolution (‘ODR’) scheme. While this can be regarded as the first step towards the creation of an online rule-of-law, such ODR mechanisms are often shrouded in uncertainty.

In that regard, this paper explores ODR mechanisms in both established, and in, what we describe as ‘informal’ marketplaces, such as commerce on Reddit and Discord. This paper first asks whether these ODR mechanisms give rise to its own jurisprudence possibly inconsistent with “offline” rules of law, and whether such a bifurcation of “online” and “offline”

rules of law is normatively desired. Next, it then queries the limitations of various policies and regulations which attempt to strengthen ODR mechanisms. It contends that various policies are disconnected from their practical implementation and constraints which ODR platforms face.

Ultimately, it concludes that a more nuanced approach is required if such frameworks were to be harmonised across Courts through the proposed taxonomy. Current international recommendations, while a good starting point, should be condensed to certain principles which may be adopted across platforms, while preserving site-autonomy across different types of platforms.

Keywords: ODR, Online Dispute Resolution, Legal Technology, Dispute Resolution, Access to Justice, Forum Marketplace, E-Commerce, Access to Justice

© 2023 Gregory Chan and Tan Yan Shen

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Gregory Chan and Tan Yan Shen, Online-Dispute Resolution - Paving the way towards harmonising the Birksian archipelago of obligations?, 14 (2023) *JIPITEC* 420 para 1

A. Introduction

1 With the shifting tide of commerce towards the online realm, there has been an increased conversation about the role that e-commerce places in our lives. Online shopping seems to have overtaken traditional brick and mortar stores, revolutionising the ways that companies have conducted their businesses.¹

According to the United Nations Commission on International Trade Law, 2020 saw a 20% increase in the trade volume of e-commerce compared to the

organisations. The content in this paper is not to be taken as formal legal advice, and is written for academic purposes. Any errors present are solely the fault of the authors.

* All information contained in this paper represents the views and opinions of the authors, and does not necessarily represent the views of the publishers or affiliated

1 Anjali Gupta, ‘E-Commerce: Role of E-Commerce in Today’s Business’, (2014) 4 *International Journal of Computing* 1. <<http://www.ijccr.com/January2014/10.pdf>> accessed 31 July 2022.

previous year.² Unfortunately, as popularity in online trade rises, it seems inevitable that there will be a growing number of conflicts. Hence, e-commerce platforms have worked to develop their own unique forms of dispute-resolution through their platforms. Colloquially, these mechanisms are 'Online Dispute-Resolution' ('ODR'). However, due to the diversity of e-commerce sites, ODR has become site specific, operating very differently across the multitude of e-commerce platforms. Such creates inconsistencies across decisions taken, which would invariably lead to frustrated users and a lack of certainty across ODR platforms.

- 2 As such, this essay seeks to explore the growing trend of ODR mechanisms across various e-commerce platforms and identify core trends across various e-commerce sites. Ultimately it highlights that there seems to be a disconnect between users, regulators, and platform administrators in the administration of ODR. This, in turn, leads to inconsistency across various platforms, which frustrates the implementation and development of an online code-of-conduct and an established Rule of Law. To that end, it posits that a more generalised approach is perhaps preferable in ODR sites - allowing platforms to maintain their autonomy while ensuring a degree of legal certainty and procedural safeguards.
- 3 Following, this paper first provides an overview of ODR mechanisms across various e-commerce sites, and attempts a brief taxonomy of e-commerce platforms for the purposes of this paper in Section B. Section C considers both procedural and substantive issues in the implementation of ODR platforms across formal and informal e-commerce sites. Section D goes on to identify potential solutions which could be implemented, highlighting the constraints of current regulatory proposals while making its own. Section E concludes.

B. An overview of Online-Dispute Resolution

- 4 At the outset, it must be recognised that the ODR can take place across a multitude of platforms, and is not strictly limited to e-commerce. For the purposes of this paper, it is thus important to clarify certain definitions and distinctions that will be used in later sections.

I. Online Dispute Resolution

- 2 UNCTAD, *Global E-commerce Jumps to \$26.7 trillion, COVID-19 boosts Online Sales*, (UNCTAD.org, 3 May 2021). <<https://unctad.org/news/global-e-commerce-jumps-267-trillion-covid-19-boosts-online-sales>> accessed 28 July 2022.

- 5 Generally speaking, ODR mechanisms are not limited to the e-commerce industry. It is a broad term used to reflect a novel form of dispute-resolution available on the internet, not requiring parties' physical presence for adjudication. Proponents of ODR have cited the process as a means of achieving access to justice for civil suits - avoiding the costly legal fees, and achieving efficient dispute-resolution.³ To that end, various jurisdictions such as Singapore have been taking advantage of this, launching a successful ODR platform for employment related claims under the Tripartite Alliance for Dispute Resolution program.⁴ This trend of the growing use of ODR indeed suggests a promising future for this form of alternative dispute-resolution. Undoubtedly, Singapore's application of ODR is one for public purposes, established under a statutory framework for employment laws in Singapore. A different situation would inevitably arise if private companies were to utilise such platforms on a different scale, and without statutory safeguards.
- 6 This is where the story begins. Across e-commerce platforms, ODR mechanisms are commonplace to resolve disputes between users, as well as between third parties. For instance, eBay's ODR mechanism operates under their Resolution Centre, and was designed with high-volume claims in mind.⁵ Indeed, eBay currently averages at approximately 60 million disputes a year.⁶ In a similar vein, e-commerce rival Amazon has a similar ODR mechanism operating on the Amazon Pay platform, for sales made on its website.⁷ Other e-commerce giants such as

- 3 Robert J Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab?', (2017) Faculty Scholarship 1576, 717-758, <https://digitalcommons.law.umaryland.edu/fac_pubs/1576> accessed 1 August 2022.

- 4 Ministry of Manpower, *Employment Standards Improve in 2021 Through Proactive Tripartite Efforts*, (2022, Employment Practices), <<https://www.mom.gov.sg/newsroom/press-releases/2022/0718-employment-standards-report-2021>> accessed 30 July 2022.

- 5 Louis F. Del Duca Colin Rule Kathryn Rimpfel, 'eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers' (2014) 6 Y.B Arb & Mediation, 204-219. <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1060&context=arbitrationlawreview>> accessed 28 July 2022.

- 6 MizzouLaw. *Library Guides: Online Dispute Resolution: Companies Implementing ODR*. (2018, Missouri School of Law) <<https://libraryguides.missouri.edu/c.php?g=557240&p=3832247>> accessed 28 July 2022.

- 7 See Amazon's ODR platform under Amazon Pay, available at: <<https://pay.amazon.com/help/201751580>>.

Etsy,⁸ Alibaba,⁹ and RedBubble¹⁰ have similar high-volume mechanisms in place. These high-volume, high-efficiency models are often regarded as a fundamental characteristic of these ODR mechanisms. Online disputants are known to be highly focused on efficiency; empirical studies have indicated users would prefer to lose a case over a few days, than win a case over a few weeks.¹¹ However, the trade-off from efficiency is the quality of ODR on these platforms, both procedurally as well as substantively of each individual case. This will be further discussed later in the paper.

II. E-commerce platforms

7 While it is impossible to provide an overview of the profiles of every site due to space limitations, this paper highlights 2 core distinctions that the authors have identified - formal marketplaces, as well as informal marketplaces.¹² At its core, we propose this distinction between these e-commerce platforms lies in the purpose for which the platform was set up for. Formal marketplaces were set up for the purposes of e-commerce, whereas informal marketplaces were established for other purposes, but evolved to include e-commerce on their platforms as an extension of its purpose.

8 Looking through the former, core examples of forum marketplaces include eBay, and Etsy. These marketplaces can be characterised through their use of End-User Licensing Agreement ('EULAs') to delineate the rights of users when operating on their sites, particularly in the areas of commercial arrangements. For instance, eBay's EULA incorporates terms for fees and taxes of users posting listings, conditions for international trade, as well as

policies for the trading of goods.¹³ Similarly, Etsy's EULA warrants terms for the use of Etsy as a platform for sale, including provisions for their 'House Rules for Sellers' and 'House Rules for Buyers'.¹⁴ These EULAs form the primary characterisation for what has been identified as formal marketplaces, perhaps best described as 'top-down governance'.

9 On the other hand, informal marketplaces operate through a 'bottom-up governance'; albeit cliché, they can be described as "by users, for users". These marketplaces often operate as forums, before transitioning towards operating as a marketplace through what can be identified as the 'natural expansion'.¹⁵ As a result, e-commerce on these platforms is largely user-driven; platform owners and administrators themselves often do not have a stake in commercial activity here; there are no associated listing fees for users, or any governing EULAs which accommodate for trade. One such informal marketplace operates on the site Reddit. While the site describes itself as a 'online discussion site',¹⁶ sub-communities around various hobbies have themselves created marketplaces as a consequence of growing popularity, and an alternative for users to subvert the strict requirements of formal marketplaces. These include r/mechmarket, a marketplace for mechanical keyboards, r/BoardGamesExchange for the sale of board games, as well as the various trading card marketplace subreddits for popular card games including Yu-Gi-Oh!¹⁷ and Magic the Gathering¹⁸. However, Reddit's EULA does not make any provision for the sale of goods on their sites.¹⁹ Instead, governance of these

8 See here, Etsy's ODR platform: <https://help.etsy.com/hc/en-us/articles/360016126873?segment=selling>.

9 See here, Alibaba's ODR platform: <https://service.alibaba.com/page/knowledge?pageId=128&category=9207656&knowledge=20154304&language=en>

10 See here, RedBubble's ODR platform: <https://help.redbubble.com/hc/en-us/articles/202982715-Resolving-Conflict-with-another-Member>

11 Arno R. Lodder, John Zeleznikow, 'Enhanced Dispute Resolution Through the use of Information Technology' (2010, Cambridge University Press).

12 For a further elaboration on this distinction, see Gregory Chan, 'Online Dispute Resolution: Beginnings of an Online Rule of Law' (2022) *Rule of Law* 3, 2-9. <https://ruleoflaw.lse.ac.uk/articles/abstract/35/> accessed 20th July 2022.

13 See here, eBay's EULA that can be found at: <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>. At 5, provisions on listing fees and taxes. At 6, clauses on listing conditions for sellers, at 8, on policies of buying and selling goods.

14 Here, see Etsy's EULA at: <https://www.etsy.com/legal/terms-of-use/#services>. At 2, see provisions for buyers and sellers according to their EULAs.

15 (n 14), at 7.

16 Katie Elson Anderson, 'Ask me anything: what is Reddit?' (2015) 32 *Library Hi Tech News* 5. https://www.emerald.com/insight/content/doi/10.1108/LHTN-03-2015-0018/full/html?casa_token=zo_SCVCYIIYAAAAA:-cBulgD1x1XvWlzfFnVy9a7URLnGtC0QPEu2fjzAlcevU6a9wJOf-9JsESK-bLBmQpuj8qYTAnUr8Ck89DLPfw8NTXdfsaBLTjtGDAElcxuQSmsAXSVKq accessed 31 July 2022.

17 See here at <http://old.reddit.com/r/YGOMarketplace>.

18 See here at <http://old.reddit.com/r/MTGSales>.

19 See here at <https://www.redditinc.com/policies/user->

marketplaces turn to user-created conventions, rather than binding policies.

III. Categories of disputes on these platforms

10 It must lastly be noted that trade disputes are not the only claims which operate and are resolved by ODR claims. While such user-user disputes are the crux of what occurs on e-commerce sites, 2 further types of disputes are similarly relevant in the field of e-commerce, namely user-user reputation-based disputes and user-third party intellectual property disputes.²⁰

11 Reputation-based disputes can be summarised as disputes over the reviews that traders leave for each other on these platforms. On both formal and informal marketplaces, administrators and moderators have developed a unique 'reputation-based' system, where users are able, and often required to, leave feedback for each other based on their sales experience with other parties.²¹ However, disputes arise when one party leaves misleading, or false feedback on these platforms that were intended vexatiously. Consequently, these innocent users are portrayed as distrustful, harming their standing and potentially resulting in false sales. These ODR platforms thus have been used by platforms to require users to modify their feedback (if claimants are successful), or moderators use their platform privileges to outrightly remove these misleading statements.

12 The next type of ODR claim is of a different nature, [agreement-september-12-2021](#).

20 Collin Rule, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay.' (2017) 13 University of St. Thomas Law Journal, 354-370. <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/usthomlj13&div=21&id=&page=>> accessed 23rd July 2022.

21 For an analysis of eBay's reputation system, see: Kat Busch and others, 'Psychology of Trust on the Internet', (2010-2011, Stanford University). <<https://cs.stanford.edu/people/eroberts/cs201/projects/2010-11/PsychologyOfTrust/rep2.html>> accessed 31 July 2022. See also here, for Etsy's reputation system, available at: <<https://cs.stanford.edu/people/eroberts/cs201/projects/2010-11/PsychologyOfTrust/rep2.html>> But see also for example here, for informal marketplaces on r/MechMarket on Reddit, on <https://old.reddit.com/r/mechmarket/comments/wd06su/august_confirmed_trade_thread/>. Other instances of similar mechanisms include <<https://old.reddit.com/r/YGOMarketplace/>> using a flair-based system (accessed 1 August 2022).

and primarily involves a third party, as opposed to direct buyers and sellers - intellectual property disputes. Predominantly, these claims involve third parties alleging that the seller is selling counterfeit products, or those of stolen designs, and, in light of the anonymity which the internet gives them, has no recourse under traditional means of dispute-resolution. For such claims, third parties are required to file complaints through the platform's ODR mechanism to enforce their intellectual property rights against these sellers.²² However, it must be noted that such claims offer limited recourse, on both established, and informal marketplaces; the most that moderators or administrators are able to do remain to be the taking down of such posts made by users. Of course, there are rare situations where companies have chosen to enforce their intellectual property rights against the platform as a whole, seeking specific reliefs against the sellers. One such instance was in *Tiffany v eBay*²³ on the sale of counterfeit products on eBay's platform. However, this challenge was denied by the New York Court of Appeal, citing the difficulties of the platform in policing future sales of such products. Hence, it would follow that, while recourse is available on such platforms between users and third parties, they remain rather limited in nature.

13 While these sectors are worth mentioning for completeness, this paper will primarily focus on the traditional user-user dispute for the sale of goods. This follows the traditional fact-pattern of e-commerce scams, through misrepresentation of the conditions of goods, failure to ship the goods, defective products, and other sale-related disputes.²⁴ However, even on this perhaps clearer front, there exists complex nuances which will be explored in the subsequent section on both formal and informal marketplaces.

22 See, for example, the eBay IP mechanism known as VeRo available at: <<https://www.ebay.com/sellercenter/ebay-for-business/verified-rights-owner-program>>. On Etsy, the IP disputes mechanism is available at: <<https://www.etsy.com/legal/ip/>>. For informal platforms, on r/mechmarket, it is written on the guidelines of use of the platform, that "It is up to the discretion of r/MechMarket mods on whether the claims are relevant and valid regarding any action taken for infringing posts." Taken from: <<https://www.reddit.com/r/mechmarket/wiki/rules/rules?v=307a046c-234f-11e9-8765-0e7e4515df94>>. Accessed 1 August 2022.

23 600 F.3d 93 (2nd Cir 2010).

24 M Niranjana Murthy and others, 'Analysis of E-Commerce and M-Commerce: Advantages, Limitations and Security issues', (2013) 2 *International Journal of Advanced Research in Computer and Communication Engineering* 13.

C. ODR applied: Challenges and Difficulties on Various Platforms

- 14 Having laid out the foundation, challenges within these marketplaces in the field of trade disputes on e-commerce sites can be explored. Particularly, this paper sheds light on the ways that the two different categories of platforms identified tackle various procedural and substantive issues in the application of ODR.

I. Procedural Matters

- 15 The crux of procedural matters in ODR lies in the mechanisms by which parties are heard, and bring their disputes to the relevant adjudicators available on various platforms. While the procedural aspects of such claims differ from platform to platform, one key trend can be noted across the board - that sellers are systematically disadvantaged. This occurs either through a lack of equality of arms or being subject to disproportionate penalties.

1. (In)equality of arms

- 16 Beginning first with issues around equality or arms. The crux of such concerns lie in the lack of procedural due process. While alluded to earlier when comparing private ODR platforms with those established under statutory provisions, the lack of procedural safeguards across these platforms give cause for concern.
- 17 To delve further in, one should first note the procedure of an ODR claim on these platforms. Traditionally, claims against sellers are started by buyers for defective goods or products that do not match the listed description, often after a mandatory period of mediation between the two parties.²⁵ However, as opposed to traditional service of court documents, these claims are submitted to the platform that would inform the seller of the existence of such a claim. While this seems necessary in light of the anonymity which these platforms offer through the internet, this first step already presents issues. Firstly, ODR platforms often do not have a

25 See here, Facebook's ODR mechanism requiring mandatory mediation period: <<https://www.facebook.com/business/help/1167434420087941?id=353836851981351>>. See also, on AirBNB's platform for <<https://www.airbnb.com.sg/help/article/767/how-the-resolution-centre-helps-you>>, requiring a period of mandatory negotiation between consumers and service providers before stepping in to arbitrate a dispute between the parties.

mechanism for buyers to challenge the appropriate forum for disputes. Their reasoning for this is sound - the emphasis on efficiency, coupled with provisions stipulated in EULAs that are buyer-focused.²⁶ However, if buyers stray away from the stipulated ODR mechanism, and engage a third party service provider involved in the transaction, this would inevitably create issues. For instance, buyers may call their credit card companies alleging their card's misuse, thus, having their credit card company give chargebacks and effectively refunding the purchase. This leaves the buyer with the goods purchased, and his money back, while leaving the sellers with no recourse.²⁷ While safeguards can be put in place, the fundamental problem turns to the anonymity of these e-commerce sites; it becomes impossible for sellers to be represented in such ODR claims. This issue is similarly more prevalent on informal marketplaces, where these sites often do not store a site-specific payment mechanism, and opt for third party financial services, such as PayPal.²⁸ By bringing a claim under PayPal (or other third party financial service provider) as opposed to the platform-specific e-commerce site, buyers are able to circumvent both the sellers and administrators who are often able to accrue evidence on both sides, and create conditions favourable to their case with no alternative recourse for sellers.

- 18 However, even if an appropriate forum is chosen in accordance with stipulated EULAs or through parties consent on informal platforms, ODR platforms themselves do not afford equality of arms to both parties. For instance, on Facebook Marketplace (a formal marketplace by characterisation of the implementation of their EULA and top-down governance²⁹), only buyers are able to file ODR claims through the 'Commerce Manager' system. In that vein, after the mandatory mediation period has elapsed, the buyer may start a claim against the

26 Mohammed A. Aslam, "B-2-C Pre-dispute Arbitration Clauses, E-commerce Trust Construction and Jenga: Keeping Every Cog and Wheel" (2013) 7 *Masaryk University Journal of Law and Technology* 1, 1-18.

27 Yue Guo and others, 'To sell or not to sell: Exploring sellers' trust and risk of chargeback fraud in cross-border electronic commerce', (2017) 28 *Information Systems Journal* 2, 359-383.

28 See, for instance, r/mechmarket, that encourages users to use third party financial services such as PayPal for their transactions. Available at: <<https://www.reddit.com/r/mechmarket/wiki/payment>>. See also here on <<http://www.reddit.com/r/YGOMarketplace>> on the sidebar which lists the Subreddit's rule. At 5

29 See here, Facebook's EULA and more specific rules governing ODR mechanisms: <https://www.facebook.com/policies/purchase_protection>.

seller. The buyer is given the opportunity to state their case and provide the details of the claim in the claim form. After the buyer has submitted his/her claim, the seller is not given an opportunity to submit a defence or adduce evidence to support his/her defence.³⁰ Rather, the platform will review the claim and the messages passed between the parties on the platform, and make a decision after only hearing from one party, and considering the messages sent in attempts of settlement. While Facebook provides a mechanism for sellers to appeal any decision,³¹ and thus, perhaps akin to adducing a defence, this is undoubtedly too little too late for sellers; appropriate procedural safeguards should be guaranteed at the start of the process, rather than at the tail end of it. The importance of procedural law remains to ensure due process and fairness; that each individual receives the same treatment across the adjudication process. However, giving parties different rights at different stages of the proceedings would only serve to create tension between e-commerce business owners, and various customers on the market.

- 19 Further constraints arise in situations where procedural aspects are governed under EULAs. For example, on the Amazon Pay platform, when a claim is submitted by the buyer, the seller has to cooperate with that claim “in good faith”.³² It is unclear what such “good faith” refers to in this context and whether the duty of such an obligation would vary with the seriousness of the claim filed against the seller. This obligation of good faith is independent of the substantive content of the claim itself – while a poor defence submitted in good faith would only result in the seller losing the dispute, a defence submitted in bad faith would not only mean that the seller would lose the dispute, but also face severe penalties such as a restriction or termination of their

account.³³ However, there are no such obligations on the buyer. Indeed, there is often nothing prohibiting the buyer from submitting multiple frivolous (or even fraudulent) claims against a seller in the hope that the platform might view one or more of these claims to be strong enough to overcome the seller’s defence. At the same time, given the obligation of good faith on the seller, it is unsure whether the seller can respond to these claims against buyers in a dismissive manner since that may flout the vaguely worded obligation of “good faith”.

- 20 On informal marketplaces, such procedural safeguards are, to an extent, alleviated through the implicit trust that users have in moderators. As opposed to administrators, moderators are merely users on the platform, and rarely have a financial incentive to decide the disputes in one way.³⁴ Hence, it seems that, on most informal marketplaces, moderators do consider the evidence in a holistic manner before making a final decision on the matter.³⁵ However, the question fundamentally remains as to whether this element of trust is sufficient in these circumstances, particularly as these forums are largely amorphous, and have flexible procedures. In addition, such ‘trust’ may entail users’ belief in their moderator’s competence to grant them the public acceptance of their authority to handle such disputes, rather than a mechanism that ensures that due process will be guaranteed in all disputes. Hence, safeguards should be in place to ensure due process, rather than trusting that due process will be granted, in such informal marketplaces.

2. Disproportionate Penalties

- 21 The last point which brings about inequality in the procedural rights lies in the harshness of remedies available for a parties’ potential breach of due process requirements. Namely, that the failure by the seller to respond to a claim in a manner deemed proper by the platform would lead to a penalty that is disproportionate compared to that faced by the buyer reticent in providing information to sustain his/her claim.

30 Ibid. Notably however, on Facebook’s marketplace, the policy reads: “When using onsite checkout, if a seller or individual seller has not responded or resolved your issue after 2 business days, you can submit a claim for our review on the third business day. When you file a claim, answer the questions presented, and include details regarding your issue within the form. We’ll review your claim, including any messages that you and the seller sent to each other along with supporting documentation from the buyer and the seller. We’ll typically respond within 48 hours.”

31 See here, more details regarding Facebook’s policy regarding disputes at: <<https://www.facebook.com/business/help/1167434420087941?id=353836851981351>>. Accessed 31 July 2022.

32 See here, Amazon Pay’s dispute policies available at: <<https://pay.amazon.co.uk/help/201751580>> Accessed 1 August 2022.

33 Ibid.

34 See here, an analysis on eBay’s fees for sales, as well as use of ODR mechanism at (n 13), 6.

35 See, for example here, a publication by the moderators of r/MechMarket on the parent SubReddit r/MechanicalKeyboards about an investigation around the Group Buy about the Lyra <https://www.reddit.com/r/MechanicalKeyboards/comments/nfnbau/warning_about_santigo_customs_lyra_monoflex_gb/>. Accessed 31 July 2022.

- 22 This is particularly problematic on established e-commerce sites, particularly when users depend on them for their livelihoods. On the Etsy platform for example, it is mandatory for sellers to “participate in a case against [their shops]”. Similarly, on the Amazon Pay platform, if the seller does not “respond timely to a dispute or does not honour a commitment made to resolve a dispute within a reasonable amount of time”, Amazon Payments may “place a hold on funds in a seller’s account”.³⁶ As such, it is rather evident that the penalties levied on the sellers far outpace those which are levied on the buyers for similar breaches of obligations. Indeed, these penalties are often levied on areas beyond the dispute itself (e.g. by striking out the seller’s defence or finding the case in favour of the buyer in default) and involve matters relating to the seller’s ability to continue their operations on the platform (e.g. existence on the platform or access to their funds or account on the platform). Even if the penalties levied on the seller and buyer in such cases are the same, the *effect* of the penalties on the sellers would still be, in the usual case, far heavier since many sellers on the platform are often there “for the long run” and have built up not only a system of operations, but also commercial reputation for themselves. A suspension of their accounts, even if temporary, might mean disruption in their business and would bear a detrimental impact on their reputation. A detrimental impact on their ability to continue operations on such platforms would thus have a more severe impact on them as compared to a buyer on such platforms, who may only occasionally visit such platforms to purchase goods or services and can create a new account with relative ease.
- 23 Of course, it is not necessarily the case that due process is infringed just because the penalties on the sellers and buyers are unequal in the case of breach. Such a disparity between the treatment of the parties may be justified if it is proportionate to any legitimate aim sought. In the instant case, heavy penalties on the sellers may have a role to play in deterring potential fraudulent sellers from entering into an agreement to sell the goods without ultimately delivering said goods to the buyer. Ostensibly, fraudulent sellers do not challenge the buyer’s claims since where the goods were not delivered, did not match the description, or were defective due to fraud, there is unlikely to be any serious defence or evidence to support such defences. Thus, placing harsh penalties on sellers who do not cooperate in the dispute resolution process may weed out fraudulent sellers by removing their ability to conduct their business on the platform or collect the money the buyer has paid.
- 24 However, while it might be reasonable to weed out potential fraudsters, such measures are disproportionate. First, by suspending the accounts of those who are slow to reply, the platform risks pre-judging sellers who may legitimately be slow to reply. This is especially the case since usually, sellers are only given a few days to reply to a potential dispute and may not be able to craft a defence, gather evidence, or even take notice of the fact that a claim has been formally entered against them.
- 25 Second, there is no need to take such drastic measures to deter potential fraudsters. If it is indeed the case that fraudsters are less likely to challenge claims brought forth by the buyers, it would be enough, in the interests of justice pertaining to the case, that the buyers are able to win their claims by default if the seller does not respond to the claim within a set amount of time. If the measures bearing impact beyond the specific dispute such as the suspension of an account due to suspicions of fraud are to be taken, they can, and should be taken where there is evidence of such fraud arising from the adjudication of the case, or where there is an established pattern of suspicious activity such as where there are multiple successful claims against the seller or where the seller has had a history of not responding to the claims against him/her. This way, the platform can balance between upholding the rule of law through upholding the equality of arms and still maintaining a robust anti-fraud regime. Such a model of anti-fraud monitoring is in fact put in place for the buyers on the Amazon Pay platform. Where the buyer submits three or more complaints that are subsequently ruled invalid by Amazon Payments, their account may be terminated³⁷. It is evident that these platforms are capable of using such a system to deter fraud instead of relying on draconian sanctions on its users to deter fraud.
- 26 The situation varies for forum-based marketplaces. For one, many of these forums are built around enthusiasts of different things, ranging from board games (r/boardgamesexchange) to keyboards (r/mechmarket). The specialised and community-based nature of such forums breed an “intrinsic degree of trust”³⁸ between users and moderators of these forums, and parties are more comfortable discussing the case with the moderators, and moderators feel an increased degree of accountability³⁹. Thus,

37 *ibid.*

38 Casey Fiesler and others, ‘Reddit Rules! Characterising an Ecosystem of Governance’ (2018) 12 Conference on Web and Social Media 1. <<https://ojs.aaai.org/index.php/ICWSM/article/view/15033>> accessed 1 August 2022.

39 Joseph Seering and others, ‘Moderator engagement and community development in the age of algorithms’, (2019)

36 See here, Amazon’s policies available at <<https://pay.amazon.co.uk/help/201751580>>.

there is less of a need to impose highly restrictive penalties on sellers should they not respond within an extremely short time frame for fear of fraud given the increased degree of accountability by the moderators and the trust that has been built up amongst the users in the forum. Therefore, while sellers may still be banned for failing to cooperate with a dispute, there are no strict rules on the timeline according to which they should respond to such a dispute. Further, buyers now also have the responsibility of providing evidence to support their claims and similar punishments are levied on them should they fail to provide evidence to substantiate their claims⁴⁰. It hence appears that the rules on forum-based marketplaces appear fairer to both parties, taking into circumstances of their unique predicament.

- 27 However, this situation is not ubiquitous across all forum-based marketplaces. On r/hardwareswap for example, moderators take the approach of “ban first, and ask questions later” when dealing with suspected scammers.⁴¹ This goes further than many of the informal marketplaces in that the penalty is applied immediately where there is a dispute, and the burden of proof is on the seller to show that he/she is not engaging in fraud. Further, this is to be done at the moderator’s discretion, and there are very few rules on what would cause a moderator to ban a user. The lack of uniformity and certainty between different forums and within a forum itself thus leaves much to be desired.

II. Substantive Matters

- 28 The substantive rules applied to a dispute also arguably run contrary to the rule of law due to a lack of clarity over what the exact rules are and how they are to be interpreted. In that regard, three points are thus noted. First, EULAs and various subsidiary rules are not comprehensive enough to cover all situations where a dispute within the parameters of the EULA may arise, and there is little information on how the existing rules are to be applied. Second, given that each platform essentially has its own *sui generis* set of

rules that depart from broader principles of contract law, it is difficult to reconcile broader principles of traditional contract law to pinpoint what rules may apply in the event that the EULAs or the subsidiary rules are silent on an issue.

- 29 EULAs, while commonly regarded as infamous lengthy documents that are often ignored by users,⁴² are said to govern user-behaviour, providing the ‘dos and don’ts’ across online platforms. However, they can be said to have a special place on online marketplaces, acting as the equivalent of a “constitution” to serve as the basic contract law principles for parties looking to contract on these platforms.⁴³ However, as with constitutions of sovereign nations, the EULAs and subsidiary rules on both established platform-based marketplaces and forum-based marketplaces are insufficiently comprehensive enough to cover all the situations where a dispute may arise.
- 30 Indeed, EULAs are, by nature, limited documents, and one cannot expect drafters to cover all possible circumstances which may arise. That would undoubtedly be unfeasible, and impractical. It is thus best left to the dispute-resolution platform equipped to handle cases on its merits, as perhaps best reflected in Courts of law in sovereign nations. However, the same cannot be said for ODR platforms on e-commerce sites, particularly given the significant uncertainty and opaqueness of ODR mechanisms. Perhaps in that vein, EULAs can be said to have greater importance on ODR platforms. However, its incompleteness, as well as vagueness of the basis of its decisions present issues for both consumers and vendors. On the Amazon platform for example, buyers may obtain a refund or exchange of an item if it is “materially different” from what the buyer has described. While there are provisions that state situations where a goods may be “materially different” from what the buyer has described, Amazon Pay has recognised that this checklist is non-exhaustive and may not cover all scenarios.⁴⁴ While traditional jurisprudence in major jurisdictions would provide some guidance in normal courts,⁴⁵ such criteria remain fundamentally

21 New Media and Society 7, 1417-1443. <<https://journals.sagepub.com/doi/abs/10.1177/1461444818821316>> accessed 29 July 2022.

40 Failure to Provide this Evidence by EITHER PARTY can result in Permanent Ban from the trading platform: <https://www.reddit.com/r/mechmarket/wiki/rules/rules#wiki_disputes>

41 See here, for example, on the informal marketplace Hardware Swap on Reddit: <<https://www.reddit.com/r/hardwareswap/wiki/rules/rules>>

42 Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts”, (2014) 43 *Journal of Legal Studies* 1, <<https://doi.org/10.1086/674424>> Accessed 26 July 2022.

43 (n 14).

44 (n 7).

45 For an analysis of comparative contract law, and interpretation of the term ‘material difference’, see: Arthur Taylor von Mehren, ‘The “Battle of the Forms”:

unclear across Amazon's ODR platform. One then inevitably wonders if it is the case that all defects would be considered material no matter how minute they may be or even if they do not pertain to the utility, value, or even aesthetic of the product for a return or an exchange to be triggered. The lack of clarity over the issue of "materiality" in the defect is common across other platforms such as eBay and Etsy. Similarly, this is also the case for forum-based, informal marketplaces. On r/mechmarket for example, the right of rejection is available for "defects" and "damage".⁴⁶ However, there is no clear indication of whether this needs to be a "material defect" or "material damage" for the right of rejection to be triggered, or whether any defect or damage would trigger the right to rejection. Such uncertainty in the substantive matters of ODR claims on various platforms would inevitably create a degree of confusion among users. In that regard, legal certainty seems to be undermined in these areas.

- 31 Further, it is unclear what the rules of interpretation are on these platforms. In major legal jurisdictions around the world, the parol evidence rule exists in different forms to bar the use of pre-contractual negotiations in the interpretation of the contract.⁴⁷ However, on platforms such as Facebook Marketplaces and r/BoardGameExchange, the conversation between the buyer and seller may be admitted as evidence in a dispute.⁴⁸ Similarly, it is unclear whether other e-commerce platforms have access to the messages between users in a similar light, and whether weight is afforded to these communications. Given that the rules on these platforms appear to potentially deviate significantly from the rules found in major jurisdictions worldwide and are silent on how exactly these rules are to apply, there is potential legal uncertainty in the rules, which militates against the rule of law.
- 32 The situation is far more pronounced in forum-based marketplaces. On such marketplaces, there is a distinction between different types of obligations that may arise. Popular obligations may include

an ordinary sale of goods, "giveaways" (which creates an obligation on the giver to give away the product despite there being no consideration passing between the parties),⁴⁹ deals (an obligation to provide a discount on the goods offered) or sharing deals, which similarly include Group Buys (an obligation to purchase goods with another person to take advantage of a discount),⁵⁰ and fundraisers (an obligation to sell goods and donate the monies received to a charity).⁵¹ These obligations are entered into under very formulaic conditions and have their own sui generis rules applying to them that parties cannot contract out of. As such, it appears that there is no singular rule of obligations in forum-based marketplaces, but rather a Birksian "archipelago" of different obligations with their own rules applying in such marketplaces. Such an archipelagic array of obligations do not mirror the various contractual obligations found in different jurisdictions around the world since they are formed in the unique circumstances of forum-based marketplaces, and are only applicable in those circumstances. At the same time, information on the application of these rules are scant and it is unsure what each of these different obligations entail when a user moves from one forum to another. This thus poses another set of challenges for legal certainty and the rule of law.

- 33 Of course, it is not the case that for the rule of law to be upheld all rules and laws must be laid down in stone before a contract is entered into. In some jurisdictions, the law is developed through a "gradual expansion" upon the adjudication of individual cases and such systems are nonetheless still regarded as certain enough to uphold the rule of law. These platforms, however, are not of the same ilk. Decisions made in individual cases are not published on these platforms such that it is not possible to infer from these cases what the rules applied are. The incompleteness of the rules on these platform is recognised by Amazon, which has stated that the platform will "ultimately determine material difference at [its] discretion"⁵². Similarly, on r/BoardGamesExchange, it is emphasised that "Should any ambiguous scenario arise, the Mods

A Comparative View', (1990) 38 *The American Journal of Comparative Law* 2, 265-298.

46 See here, at: <https://www.reddit.com/r/mechmarket/wiki/buying>.

47 Tony Cole, 'The Parol Evidence Rule: A Comparative Analysis and Proposal', (2003) 26 *UNSW Law Journal* 2, 680-703.

48 For Facebook Marketplace, see <https://www.facebook.com/business/help/1167434420087941?id=353836851981351>. Similarly, on r/BoardGameExchange, see the rules available at: https://www.reddit.com/r/BoardGameExchange/wiki/scam_awareness.

49 See, for example, 'Giveaway' posts on r/MechMarket at: https://old.reddit.com/r/mechmarket/comments/vcjz4s/giveaway_tofu60_gold_case_hotswap_pcb_switches/.

50 See here, an example of a Group Buy: https://old.reddit.com/r/mechmarket/comments/wfinv0/gb_good_or_evil_rubberhose_by_deskpads_gallery/.

51 See here, for instance, at https://old.reddit.com/r/mechmarket/comments/t746t3/fundraiser_mechmarket_ukraine_crisis_relief/.

52 (n. 8).

will deliberate and will have final say over the resolution.” However, this seems to present itself as an excessive use of discretion as a ‘gap-filling mechanism’. While the retroactive characteristics of the law would allow these decisions to build on one another and create firm rules for the future, such emphasis on discretion inadvertently only creates inconsistencies through adjudication. Hence, resulting in further frustrations among users and hampering the development of a possible online rule of law.

D. Problems

34 Having identified such issues across various ODR platforms is the first step towards resolving such matters. However, in proposing any solutions, it must be recognised that there are similarly certain limitations on the implementation of any feasible solution. To that end, this section first considers such limitations and concurrently addresses the current proposed regulatory framework across the world. Finally, we propose a set of solutions in light of these constraints.

I. ODR Constraints and current regulatory initiatives.

35 One core prominent feature of ODR lies in the ease of implementation. Yet, there are fears that any reform or regulatory initiative would overcomplicate ODR platforms. From the perspective of the layperson, the more complex an ODR system becomes, the less accessible and more time consuming ODR becomes. Online disputants are highly focused on efficiency; empirical studies have indicated users would prefer to lose a case over a few days, than win a case over a few weeks.⁵³ An overly complex system would thus require system administrators or ‘tribunals’ to be overburdened with formalities or in reviewing extensive evidence adduced by parties. This further impedes any appropriate dispensing of an effective remedy. Similarly, most mechanisms are platform specific and purport to operate as the only available recourse; an overcomplication may even result in potential disputants dropping cases in light of these complications. Such overcomplications create favourable conditions for respondents, which creates contradictions within the fundamental purpose of site-specific ODR.

36 This similarly follows the work of UNCITRAL Working

53 Arno Lodder, John Zeleznikow, *Enhanced Dispute-Resolution Through the Use of Information Technology*, (2010, Cambridge University Press), 1-32.

Group 2’s policy recommendations for ODR systems. While their work and initiatives of drafting a uniform code for ODR platforms is to be commended,⁵⁴ the implementation of international instruments across site-specific ODR platforms presents too high a hurdle. Indeed, to layperson users, these instruments present themselves as ‘confusing legalese’, which is rarely fully read and understood. However, a further issue can be identified where these instruments operate and run contrary to customs and traditions found on platforms. For instance, the UNCITRAL Working Group has written extensively about the incorporation of various international commercial codes such as the CISG or PICC, and methods to obtain user consent.⁵⁵ However, as has previously been pointed out, the specialist knowledge required to implement these doctrines remains too high a barrier for administrators to effectively dispense justice under such instruments.⁵⁶ It should further be noted that Article 2(1) of the CISG expressly indicates that the Convention would not apply to goods for personal use, reflecting the buyers’ intention at the time of conclusion of the contract. From the *travaux préparatoire*, the International Commercial Court notes this provision was required for the CISG to be acceptable to many States.⁵⁷ Thus, it would be difficult for States to accept any potential amendment derogating from this provision, merely to extend the CISG to e-commerce.

37 However, apart from international instruments, there has been growing relevance of regional instruments which seek to regulate ODR mechanisms. Of note, Article 17 of the European Union’s ‘E-Commerce Directive’ presents a unique take towards ODR - requiring member-states to adopt adequate procedural guarantees in ODR claims.⁵⁸ This ground-up approach however, has seen little success. Particularly, critics note the vagueness of what ‘procedural guarantees’ are defined as

54 United Nations Commission on International Trade Law Fifty-fourth session. “Legal issues related to the digital economy – dispute resolution in the digital economy” 2021. A/CN.9/1064/Add.4

55 *Ibid*, at 23.

56 (n 13).

57 United Nations Conference on Contracts for the International Sale of Goods. “Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees.” A.CONF.97/19. (Vienna, 10 March - 11 April 1980)

58 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’)

within ODR claims, and what these notions relate to.⁵⁹ In a similar vein, the E-commerce Directive Assessment Report does not query the applicability of these mechanisms. While it does cite the *Cornelius de Visser*⁶⁰ judgement noting that internal market clauses do not apply where the service provider is unknown,⁶¹ such a position is rather unsatisfactory. Merely looking at the territorial applicability of such directives creates significant potential for abuse of non-compliance. Further, there is significant uncertainty over the classifications of 'e-commerce' to which the ODR directive seeks to govern. While these regulations would alleviate concerns for what perhaps is perceived as traditional B2C e-commerce by established business on their dedicated platform, what the Directive neglects to consider lies in both established marketplaces, and informal marketplaces. A further distinction should also be made between businesses which utilise these platforms as an extension of their services, and individuals who perhaps have one-off sales; requiring such individuals to comply with such formalities would indeed result in significant backlash.

- 38 In that light, the bloc's modernisation attempts through the recently proposed Digital Service Act 2020 showcases a more troubling interventionist approach taken towards online platforms. Particularly relevant within ODR, lies in Article 17, 22, and 23.⁶² Article 17 and 23 requires online platforms to produce reports for ODR users about decisions taken. Article 22 limits Union-based users access to the platform only when personal details are provided, including their name, address, telephone numbers (Article 22(a)), and bank account details of the trader Article 22(c)). While these extensions do not alleviate the issues raised above, it seemingly makes things worse. In particular, the extensiveness

of these new provisions would create a degree of concern among intermediary store fronts, and matters for compliance. Of note, the references to 'online platforms' create a degree of uncertainty. As discussed, the distinction between various forms of online and offline marketplaces would create fundamental issues in itself. While established marketplaces may be able to comply with such provisions, informal forum-based marketplaces likely lack the infrastructure to do so; the storing of such personal data, especially bank account numbers, would require significantly greater infrastructure development on those sites for systems more than merely storing log-in details of accounts. In a similar vein, informal marketplaces would in itself require a formalised system of ODR to comply with transparency and reporting mechanisms to govern the 'marketplaces' which have developed on those sites. The terminology of 'trader' also remains ambiguous within the directive. On both established and informal forums, there are 'business accounts' which run as an extension of established business - businesses which use these platforms as a secondary means to marketing their products.⁶³ While the provisions of the directive would make sense to govern the practices of such businesses, they present a significant hurdle for individual users. Yet, some individuals who operate on these platforms, but maintain high volumes of trade and use these platforms as a 'full-time job' must similarly be distinguished from the 'one-off' trader. This is largely a threshold issue, but requires further clarity within legislation. It would similarly make sense for such formalised rules to apply to such established traders, but not for the layperson. Similarly, one wonders if the broader term of 'traders' would similarly apply to buyers

- 39 Lastly, the implementation of such a directive across online platforms would create inconsistencies across the rules governing sale agreements. The underlying nature of e-commerce lies in global trade. Hence, the imposition of such requirements would create a fundamentally different atmosphere for Union-based traders, and global traders operating under a different set of legislation. While such likely makes matters complex for online platforms, the more prevailing issue lies in applicable law when a Union-based trader and a non-union-based trader contracts for goods. The current solution avoids this through the implementation of EULA's to avoid such discrepancies on some marketplaces, to others largely ignoring these claims. Yet, EULAs themselves often do not extend to the sales contract

59 Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union*, (2010, Taylor & Francis Group London).

60 C-292/10, ECLI:EU:C:2012:142.

61 Alexandre de Streel, Martin Husovec, 'The e-commerce Directive as the cornerstone of the Internal Market Assessment and options for reform' (May 2020, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, PE 648.797). <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648797/IPOL_STU\(2020\)648797_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648797/IPOL_STU(2020)648797_EN.pdf)>, 19. Accessed 29 July 2022.

62 European Commission, *Proposal for a Regulation of the European Parliament and the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*. (2020/0361 (COD), Brussels). <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020P0361&from=EN>> Accessed 31 July 2022.

63 Mersut Savul, Ahmet Incekara and Sefer Sener, 'The Potential of E-commerce for SMEs in a Globalizing Business Environment'. (2014) 150 *Procedia - Social and Behavioral Sciences*, 35-45. <<https://doi.org/10.1016/j.sbspro.2014.09.005>> Accessed 27 July 2022.

between parties to an ODR, and merely remain as a regulatory framework for compliance purposes. Nonetheless, requiring compliance of these strict Union-based rules would surely open the door for other nations to legislate. Of note, the recent United States Supreme Court decision in *AT&T Mobility LLC v Concepcion*⁶⁴, where small claims ‘arbitration’ were discussed. These small-claims mechanisms are often likened to ODR across academic literature,⁶⁵ and the contrasting position between the US and the EU’s ODR rules have been lengthily discussed.⁶⁶ In light of such concerns, the constraints with procedural mechanisms and safeguard thus arises once more. Conflicting standards and applicable laws remain at the forefront of any regional solution which can be proposed.

- 40 The scope of such ODR reforms must also be defined. While various e-commerce sites and forums utilise third party payment-services, such as PayPal to enforce chargebacks,⁶⁷ use of third-party sites presents a different challenge altogether. Particularly, chargeback mechanisms which credit-card companies can adopt. While buyers in traditional e-commerce disputes can utilise such mechanisms to obtain a refund, the chargeback policies remain at the discretion of such companies.⁶⁸ Indeed, there are often significant limitations in obtaining a credit card chargeback in e-commerce, attributed to the ambiguities surrounding a dispute. In that regard, 3 practical hurdles in e-commerce chargeback claims - quality discrepancies of descriptions versus item received, responsibility of return shipping cost, and timely delivery.⁶⁹ Indeed, the latter 2 remain uniquely related to e-commerce. As such, focus of

ODR reform has to remain fundamentally within the realms of site-specific remedies. While such could similarly extend to situations when third party payment-service platforms are used (distinguishing them from banks with chargeback policies), further consideration must be had between the interaction between the different sites involved in claims.

- 41 A further consideration ties into the enforceability of ODR mechanisms in domestic courts. Most experts agree that another reason which may hamper the development of ODR is the legal uncertainty regarding ODR enforcement. While significant conversation has been had on whether enforcement is required,⁷⁰ The consensus seems to follow that ODR mechanisms expect compliance, but do not ensure compliance.⁷¹ Notably, the OECD Code of Conduct for ODR Tribunals is silent on this issue as a whole.⁷² It is in this vein that Elizabeth Thornberg has argued that governments should enforce these decisions as these online tribunals perform public functions;⁷³ thus, national court intervention assists the enforcement of a contractual settlement to maintain the utility of ODR services. Certainly, institutions such as the ICANN and the UDRP have worked collaboratively to incorporate an enforcement mechanism in domain-name related disputes.⁷⁴ In that vein, arguments have been made to develop such mechanisms to further ODR in consumer-related disputes.⁷⁵
- 42 Thus, bringing a decision by an ODR tribunal to domestic Courts for enforcement may be ideal; the strong institutional support provided by Courts would indeed be of aid, particularly where certain remedies awarded are discretionary on the parties. This is particularly problematic on forum marketplaces which operate with user-trust, where lack of enforcement means fraudulent users merely face a platform ban as opposed to any compensatory damages. Hence, an enforcement mechanism would allow these traders recourse. However, user-
- 70 Jie Zheng, ‘Enforcement of ODR Outcomes’, in: Jie Zheng (2020) *Online Resolution of E-Commerce Directives*, 291-344.
- 71 Elizabeth G Thornburg, ‘Fast, Cheap & Out of Control: Lessons from the Icanndispute-Resolution Process’, (2001) 7 *Journal of Small & Emerging Business Law*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=321500> Accessed 28th July 2022.
- 72 Ester van den Heuvel, ‘Online Dispute Resolution as a Solution to Cross-border E-Disputes’ (2000) <<https://www.oecd.org/digital/consumer/1878940.pdf>> pg 22
- 73 (n. 70), 54.
- 74 Uniform Domain-Name Dispute Resolution Policy, Para 4(k).
- 75 (n 59), 82-83.

64 563 U.S. 333 (2011)

65 Amy J Schmitz, ‘Evolution and Emerging Issues in Consumer Online Dispute Resolution (ODR)’ (June 27, 2022). Ohio State Legal Studies Research Paper No. 714, <<https://ssrn.com/abstract=4147917> or <http://dx.doi.org/10.2139/ssrn.4147917>> Accessed 30 July 2022.

66 Amy Schmitz, ‘ODR to Address Exceptionalism in Arbitration’ (2013, University of Colorado Law). <http://conferences.law.stanford.edu/codr2013/wp-content/uploads/sites/9/2016/09/Schmitz-Stanford_SchmitzHO.pdf> Accessed 29th July 2022.

67 (n 29).

68 *ibid*.

69 Lucille M Ponte, ‘Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions’, (2002) 12 *Albany Law Journal of Science and Technology* 2, 441-492. <<https://www.mediate.com/integrating/docs/Abernethy.pdf>> accessed 30th July 2022.

anonymity presents a significant bar here, especially when users are identified by their online personas as opposed to those in person. Hence, there are practical limitations in serving a claim to individuals where it becomes almost impossible to identify them. Further, one must nonetheless consider the practical effects of bringing an e-commerce claim on an e-commerce transaction. The high cost of litigation and legal fees, alongside the lengthy duration of trial should not be understated. Similarly, where these disputes are often cross-border, issues surrounding the interaction between the various laws, and the platform's EULA would inevitably arise. However, in the off-chance that claimants wish to pursue domestic litigation, it seems evident that domestic courts are prepared to handle such claims. In England, the *JK v MK*⁷⁶ the decision on the enforceability of ODR has shown a rather pragmatic and prudent approach. Mostyn J notes that where ODR platforms can show a set of due process rules (in *JK*, a lack of a conflict of interest by the ODR 'tribunal'), the Courts are willing to enforce the decision. While the case concerned an ODR divorce platform and Mostyn J was careful to limit this to similar platforms, it remains likely that the Courts enforce similar mechanisms.⁷⁷ Nonetheless, this exemplifies that enforceability of ODR decisions remains a largely moot point. Any competing claims of 'setting aside' an ODR tribunal's decision should remain at the discretion of domestic Courts, where claims are pursued.

II. Proposed solutions

43 In light of such constraints, this essay thus makes a few suggestions to reform potential ODR mechanisms, while respecting the unique systems and cultures that are prevalent on the different marketplaces. Ultimately, any reform to ODR systems should take a user-centric approach, prioritising user-friendliness and user-experience, when maintaining a sense of procedural and substantive fairness.

1. Systems of Classification

44 Prior to enacting legislation governing online platforms, it remains key to distinguish what 'online platforms' would we be referring to. As discussed, the various online marketplaces operate distinctly from one another. Established marketplaces and informal marketplaces have different forms of ODR mechanisms, levels of enforceability of decisions,

and sale mechanisms. Particularly important however, lies in the vastly diverse cultures of users within these platforms, creating different user-experience within these platforms. While this is trite on established marketplaces, such as the distinction between eBay and Etsy,⁷⁸ it becomes even more prevalent within informal marketplaces. For instance, Facebook Marketplace users operate on a peer-peer basis, but utilise the social-media aspect of the platform (common friends, location, ability to view sellers' personal profile, etc) to create a sense of 'trust' among users.⁷⁹ Conversely, user-expectation on Reddit's marketplace forums are based primarily on party autonomy, coupled with significant moderator intervention across the board.⁸⁰ Yet, even within Reddit's numerous hobbyist marketplaces, cultural differences among users are present on different 'Subreddits'.⁸¹ As such, operating a blanket definition of 'online platform' with similar obligations would create a significant degree of backlash among users.

45 Apart from user-expectations, the different roles and responsibilities of administrators on such sites would benefit from a degree of classification. As identified previously, while administrators on established marketplaces are often employees of a particular team, the situation is vastly different for platform moderators on informal platforms. It would be simpler for established corporations to 'train' employees to comply with legislative mechanisms. However, on informal platforms, moderators are often trusted members of a community, appointed by other more 'senior' moderators. While they may seem akin to employees, in reality, they are often volunteers, with no relation to the platform which these informal marketplaces operate on. Particularly, Reddit's EULA expressly notes that

78 See here, a comparative study on these digital business platforms: Arvind Rangaswamy and others, 'The Role of Marketing in Digital Business Platforms' (2020) 51 *Journal of Interactive Marketing*, 72-90. <<https://doi.org/10.1016/j.intmar.2020.04.006>> Accessed 27th July 2022.

79 Ahmad Anshorimuslim Syuhada, 'Online Marketplace for Indonesian Micro Small and Medium Enterprises based on Social Media, (2013) 11 *Procedia Technology*, 446-454. <<https://doi.org/10.1016/j.protcy.2013.12.214>> Accessed 29th July 2022.

80 Hanlin Li, Brent Hecht, Stevie Chancellor, 'All that's happening behind the scenes: Putting the Spotlight on Volunteer Moderator Labor in Reddit' (2022) 16 *Proceedings of the Sixteenth International AAAI Conference on Web and Social Media*. <<https://ojs.aaai.org/index.php/ICWSM/article/view/19317>> Accessed 31 July 2022.

81 See, for example, between the communities at (n 18), (n 19), (n 20).

76 [2020] EWFC 2.

77 (n 14), 12-13.

“Moderating a subreddit is an unofficial, voluntary position that may be available to users of the Services. We are not responsible for actions taken by the moderators.”⁸²

- 46 Hence, imposing legislative reforms which require these moderators to perform certain obligations, or be potentially privy to sensitive information (as required by Article 17 of the Digital Service Act) would likely be too onerous. Similarly, regular users would also be sceptical if they are required to entrust such legal obligations to mere volunteers, or to the platform to share with these volunteers. Such would undoubtedly both users and prospective moderators away from the platform. It must however, be noted that the situation is very different across the vast majority of informal marketplaces which each having their own system, this disparity would only give rise to greater considerations.
- 47 To that end, there first needs to be a distinction between established e-commerce sites, established marketplaces, and informal marketplaces. The nuances that arise between both users and administrators of these sites should be recognised to more effectively

2. A base set of ‘governing principles’

- 48 The development of a model ODR code-of-conduct to be implemented has been discussed at length, and proposed at various stages.⁸³ However, what remains core here lies in the lack of appropriate stakeholder consultation; particularly - that of the nature of these ODR administrators. Indeed, the development of a set of governing principles should incorporate the considerations of users on both formal and informal marketplaces,⁸⁴ and bear in mind that such provisions should be developed from the perspective of laypersons rather than legal practitioners. It seems to follow then that any set of guiding principles should be highly intuitive, with a focus on access to justice, and simplicity of implementation.
- 49 In that vein, procedural safeguards seem to be the core consideration of policy-makers and users - to ensure that their case has been heard appropriately. Perhaps this could be attributed to the age-old maxim that “*justice must not only be done, but seem to*

be done.”⁸⁵ Nonetheless, truer words cannot be said about the ODR process. It is in this vein that Colin Rule, head developer of the ODR system at eBay argues that efficiency, consistency and certainty to create public confidence should be the priority of any ODR system.⁸⁶ Yet, one must nonetheless further consider that ODR remains as the only available recourse for users in e-commerce. This moves ODR into a necessity as opposed to a feature. Hence, if allegations of bias are thrown around by users, this compromises on the public confidence which ODR platforms have been created for.

- 50 Therefore, the substance of the dispute must similarly be considered. Basic contract law principles such as offer and acceptance, simple breaches of duties, and fraud should be adopted to form the backbone for such conducts. Similarly, wider evidential matrixes not limiting the evidence should be incorporated into these platforms. Lastly, reasons for decisions by tribunals should be given out to parties, whether extensive reasons or merely a few lines of text. Such allows users to better trust the ODR process, and feel as though their cases have been adequately heard amidst a backdrop of substantial principles.

E. Conclusion

- 51 The role of e-commerce technologies and the impact on the global economy which it has brought about cannot be understated. Indeed, both businesses and consumers have taken to the internet, moving away from traditional brick and mortar stores. However, as with any growing economic landscape, disputes between businesses and users would inevitably arise.
- 52 Perhaps rather novelly, this paper drew attention to the different forms of e-commerce platforms that are used by consumers. Namely, traditional and established forums, but also, informal, and forum-based marketplaces. Undoubtedly, significantly more literature has been written on the former rather than the latter. However, it is hoped that this paper would mark the beginnings of greater studies on that front. Nonetheless, in completing a comparative analysis of these marketplaces and how ODR is handled across these platforms, it can be said that both models of e-commerce sites have largely inadequate safeguards for how ODR is handled, both procedurally, as well as substantively.

⁸² (n 21), Para 8.

⁸³ For a list of the various ODR standards proposed, see: <<https://odr.info/standards/>>.

⁸⁴ (n 14), 13.

⁸⁵ *Rex v Sussex Justices* [1924] 1 KB 256 per Lord Hewart.

⁸⁶ Amy Schmitz and Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (2017, American Bar Association Section on Dispute Resolution), 44. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3106913> Accessed 29th July 2022.

This is made worse with the current trajectory of such ODR platforms that seems to present itself as a consumer-bias system, neglecting the position of sellers and disadvantaging them both procedurally and substantially. In that regard, policymakers and regulators have attempted to take the stage and rescue sellers, but also maintain the rights of buyers through various instruments. Yet, it seems that these mechanisms, while sound in principle, are largely disconnected from the wider user-base on these platforms, which leads to potentially greater issues arising on these e-commerce platforms and creating a wider divide in user-bases.

- 53 Ultimately, to these ends, this paper sought to address this through 2 core mechanisms - the classification of marketplaces and e-commerce sites, and the implementation of guiding principles and a generalised approach. These solutions presented strive to preserve the autonomy and characteristics of the various e-commerce sites which attract their user-base, while maintaining public confidence as well as a degree of legal certainty through fundamental principles of commerce. These solutions, while not concrete in nature, were designed as the first steps towards what could potentially be regarded as a harmonised framework for ODR, while maintaining the nuances across these platforms and preserving the intuitive, accessible, but similarly effective and efficient nature of ODR. In that vein, further research in this field is similarly welcome, particularly from sociological and economics perspectives and especially in the field of informal forum-based marketplace, to explore greater community sentiments towards how ODR is conducted.