

The Institutional Design of B2B Online Market Intermediaries' Dispute Resolution: Its Promises and Pitfalls

Dissertation

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Abstract

This thesis focuses on online private justice systems that resolve business-to-business (B2B) disputes. In the absence of traditional state justice systems, online private justice systems that uphold procedural justice can generate more online trade, which can help the economy. Such private justice systems are provided or referred to by online market intermediaries (OMIs) that facilitate trade between buyers and suppliers on the Internet. The study looks at under what circumstances OMIs provide such justice systems, and whether the justice system they provide, upholds procedural justice.

The thesis identifies the criteria of procedural justice in B2B justice systems. To do so, it studies the normative and positive approaches to procedural justice. As a result, it concludes that in order to achieve procedural justice in B2B justice systems, accessibility, neutrality, efficiency and effectiveness should be upheld. To study what can hamper the criteria of procedural justice in OMIs, it applies the institutional design and dispute system design theories to the OMIs and their justice systems. It studies how various design aspects of OMIs' justice system—for example, who controls the process, who pays for the decision-makers and how the outcomes are enforced—hamper or help to achieve procedural justice. To evaluate the OMIs' justice systems, nine case studies are carried out. The case studies provide some empirical insights into the existing designs of OMIs' private justice systems.

Through a law and economics framework, the incentives and deterrents of OMIs to adopt a justice system and to uphold procedural justice are also studied. The incentives and deterrents are studied from the perspectives of markets, regulation, and contracts. The thesis concludes that while the OMIs' justice systems are not without shortcomings, through various changes in their design, they can uphold procedural justice.

1 Introduction

International trade, which is the exchange of goods and services across the national borders, needs justice systems that adjudicate disputes and observe procedural justice. In international trade, which is the focus of this thesis, traders consider the existence of a justice system that observes procedural justice when choosing trading partners. If such justice systems are not contractually achievable, or the state justice systems are not available or are weak, market players may forgo contracting,¹ leading to an economic loss and consequently have a negative impact on economic growth.²

Traditionally it has been the task of the state to bring about a justice system that adjudicates disputes among people. John Locke substantiates on government's role in bringing about a justice system. According to Locke, the state should provide laws, adjudicate disputes and enforce the outcome.³ However, the rise of international trade and the advent of the Internet have challenged the state monopoly over the effective administration of justice for economic affairs. The justice systems of modern nation states have the power (at least in theory) to make rules, resolve disputes and enforce

¹ In a survey carried out by the European Union, the businesses were asked about the main barriers to enter into a contract with foreign businesses. They interviewed more than 6,475 managers in 27 EU member states and asked them whether an EU contract law would be beneficial for facilitating the B2B transactions. They were also specifically asked if the cost of cross border conflicts would hamper their decision on entering into cross-border contract. According to the survey analysis, the companies that were not involved in B2B cross border transactions anticipated that the cost of resolving cross-border conflicts was of great impact on their decision to enter into a contract with others abroad. Eurobarometer, conducted by The Gallup Organization, 'European Contract Law Business-to-Business Transactions' (2011), 21. For the relation between international trade and economic growth please refer to Eli Filip Heckscher and Bertil Gotthard Ohlin, Heckscher-Ohlin Trade Theory (The MIT Press 1991); the impact of procedural justice on economic growth derives from the similarity of procedural justice and procedural implications of the rule of law, which will be explained in this section. For the impact of the rule of law and economic growth refer to Robert J. Barro, Determinants of Economic Growth: A Cross-Country Empirical Study (1996) National Bureau of Economic Research ; Arthur Irving Bloomfield, 'Adam Smith and the Theory of International Trade' (Department of Economics, University of Pennsylvania 1973).

² William W Park, 'Neutrality, Predictability and Economic Co-Operation' (1995) 12 Journal of International Arbitration 99; the negative effect of lack of dispute resolution mechanisms that is well functioning has also been mentioned in the European Parliament and the Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (2013) OJ L 165/63, Recital 6 (ADR Dispute Resolution Directive), Recital (6) reads as : "the development within the European Union of well-functioning alternative dispute resolution is necessary to strengthen consumers' confidence in the internal market, including in the area of e-commerce. Such development should build on existing ADR procedures in the Member States and respect their legal traditions."

³ John Locke, The Second Treatise of Civil Government (Prometheus Books 1690) 68. He states that: " Supreme power of any common-wealth is bound to govern by established standing laws promulgated and known to the people and not extemporary decrees; by indifferent and upright judges who are to decide controversies by those laws and to employ the force of the community at home, only in the execution of such laws or abroad to prevent or redress foreign injuries, and secure community from inroads and invasions."

the outcome.⁴ Their authority, however, is limited to their sovereign territories.⁵ Additionally, in developing countries with weak or corrupt judicial systems, state justice systems are less effective⁶ hence procedural justice might be hampered, which may affect trade.

To overcome some of the limitations that states face in resolving cross-border disputes, most of the states collaborate with other states and the private sector to provide justice systems.⁷ Despite such efforts, state-supported private justice systems, such as arbitration, have shortcomings. They are dependent on state justice systems for some of the core functions that directly impact their ability to provide justice for the parties. This dependence has caused ambivalence toward the functionality and effectiveness of such alternatives in a globalized world,⁸ especially in developing countries with high levels of corruption, fragile judicial systems and weak enforcement mechanisms.⁹ For example, these private justice systems have not been able to provide effective mechanisms needed for an effective justice system which can “compel a party to a dispute to defend against a plaintiff’s complaint”¹⁰ and enforce a judgment. The enforcement of “default arbitration awards” which is an award issued in the absence of one of the parties is not a straight forward process, and the process has to uphold all the

4 Kal Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’ (2002) 43 *Virginia Journal of International Law*.

5 Wioletta Konradi, ‘The Role of Lex Mercatoria in Supporting Globalised Transactions: An Empirical Insight into the Governance Structure of the Timber Industry’ (2009) *Contractual Certainty in International Trade* 49, 50. ;Volkmar Gessner, *Foreign Courts: Civil Litigation in Foreign Legal Cultures* (Dartmouth Pub Co 1996) 207.

6 William E. Scheuerman, ‘Economic Globalization and the Rule of Law’ (1999) 6 *Constellations* 3.

7 One of these efforts include the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958, by which the acceded states agreed to recognize and enforce foreign arbitration awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards June. 21, 1958, 330 U.N.T.S.

8 Katherine L Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, vol 7 (Kluwer Law International 2003).

9 For example, the enforcement of arbitration awards in developing countries is doubtful. In a study carried out by Peerenboom, 51% of arbitral cases out of the 87 CIETAC cases were enforced. This is not a very negative record but it does not signal effectiveness either. Randall Peerenboom, ‘Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC’ (2001) 49 *The American Journal of Comparative Law* 249. Moreover, in some cases in developing countries due to lack of legislation for the international convention, the arbitration award was not enforced. Albert Jan van den Berg, ‘New York Convention of 1958: Refusals of Enforcement’ (2007) 18 *ICC International Court of Arbitration Bulletin*, 25.

10 Laurence R. Helfer and Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 *The Yale Law Journal*, 283.

requirements stipulated in United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958.¹¹

Moreover, most of the time, these alternatives to the state justice systems are some “offshore litigation” and might not uphold procedural justice. The implications of offshore litigation are that they can possess the shortcomings of the state justice system (e.g. they might be lengthy and bureaucratic) without possessing the advantages of it (e.g. they do not have the effective contractual enforcement mechanisms readily available).¹²

The challenges that state justice system face in providing effective mechanisms for resolving disputes in Business-to-Business (B2B) markets, especially in developing countries damage B2B transactions. If justice mechanisms are in place and uphold procedural justice, B2B transactions may increase because such access brings about contractual certainty for traders and facilitates the conclusion of business agreements. Adam Smith provided this assertion in 1776,¹³ and institutional economists dwell upon this argument, and some empirical research demonstrated the effect of institutions such as justice systems on economic growth.¹⁴ The argument that justice systems have an impact on economic growth can also be drawn upon from studies that have demonstrated that commerce is adversely impacted in countries with corrupt public sector.¹⁵ Corruption can make the dispute resolution mechanism impotent and take away contractual certainty. Foreign Direct Investment (FDI) rarely takes place in countries with high level of corruption.¹⁶

¹¹ Luca Beffa, ‘Enforcement of Default Awards’ (2013) 31 ASA Bulletin 756, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards June. 21, 1958, 330 U.N.T.S. 38.

¹² Yves Dezalay and Bryant Garth, ‘Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes’ (1995) 29 Law & Society Rev 27; Fernando Mantilla-Serrano, ‘Towards a Transnational Procedural Public Policy’ (2004) 20 Arbitration International 33; Jeffrey Waincymer, ‘Promoting Fairness and Efficiency of Procedures in International Commercial Arbitration - Identifying Uniform Model Norms’ (2010) 3 Contemporary Asia Arbitration Journal 25.

¹³ Smith says: “Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government” Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Nelson and Sons 1887, Originally published in 1776) 387.

¹⁴ Dani Rodrik, Arvind Subramanian and Francesco Trebbi, ‘Institutions Rule: the Primacy of Institutions over Geography and Integration in Economic Development’ (2004) 9 Journal of economic growth 131.

¹⁵ Edgardo Buscaglia, *Law and Economics in Developing Countries* (Hoover Press 2000) 87.

¹⁶ Buscaglia, *Law and Economics in Developing Countries* 87.

In light of the shortcomings of the traditional state justice systems in resolving international trade disputes, this study analyzes the role of the new private justice mechanisms that have arisen on the Internet and are available for resolving international trade disputes. It studies how these mechanisms address the problems of provision of justice systems in international trade and the issue of upholding procedural justice elements when the state justice system is absent or weak.

This study specifically focuses on international online B2B disputes, which arise from international B2B transactions that take place online. Online B2B transactions take place when a buyer purchases bulk merchandise from a supplier via the supplier's website or a third party platform. The underlying reason for selecting such focus is that international B2B transactions and markets, especially on the Internet, can contribute significantly to the global economy. Newly opened international borders, markets, and the Internet level the playing field for companies. The online markets act as a network for Small Medium Sized (SMEs) and larger corporations. Such networks (offline or online) are known to overcome States' institutional failure.¹⁷ The Internet, regardless of the companies' size and nationality, provides equal access to the market.¹⁸ In addition to leveling the playing field regarding access to the market, the Internet helps provide certain procedural justice measures. For example, it provides transparency, familiarizes both parties with their rights and provides them with the necessary information about how the justice system works.¹⁹ Therefore, focusing on their contractual enforcement and justice mechanisms is of great importance. Moreover, as it will be explained in the following chapters, B2B transactions and disputes have rarely been the focus of scholars, compared to Business-to-Consumers (B2C) disputes.

In this introductory chapter, section 1.1 lays out the definitions and research perspective; section 1.2 provides a background on the research significance and Section 1.3 provides a brief overview of the literature. Section 1.4 and 1.5 discuss the research questions, research methods, and research structure.

¹⁷ Woodruff McMillan, 'Private Order under Dysfunctional Public Order' (2000) 98 Michigan Law Review.

¹⁸ David Gefen and Erran Carmel, 'Is the World Really Flat? A Look at Offshoring at an Online Programming Marketplace' (2008) 32 MIS Quarterly 367.

¹⁹ Henry H Perritt, 'The Internet Is Changing the Public International Legal System' (2000) 88 Kentucky Law Journal 88.

1.1 Definitions and Research Perspective

This study focuses on international B2B disputes that are resolved through online market intermediaries (OMIs). Online B2B disputes arise from online B2B trade. This thesis solely focuses on B2B trade that consists of the international import and export transactions that take place among businesses. The focus on online B2B disputes is due to the potentially significant contribution of international B2B transactions to the economy.²⁰ While data is scarce on the volume and amount of international online B2B transactions, studies have measured the value of national online B2B transactions. Globally, Frost & Sullivan, a research and consultancy firm estimates B2B online sales will hit nearly \$6.7 trillion by 2020.

This research focuses on online international B2B transactions that take place on online market intermediaries. Analysts in Frost & Sullivan's Visionary Research Group, state that much of the growth in B2B transactions will come from "many-to-many" e-marketplaces, with large numbers of both buyers and suppliers.²¹ The "many-to-many" e-marketplaces or online market intermediaries are economic actors that facilitate the transaction among buyers and sellers.²² They flourish in environments with weak state legal systems and play a prominent role in creating commitment, cooperation and contractual certainty.²³ Despite being in ineffective legal environment, such systems are not in total vacuum of the lawlessness. They are a type of private ordering that are based in a certain jurisdiction and have to comply with the laws and regulations of that jurisdiction.

The research looks at OMI's dispute resolution from a procedural justice angle. OMI's justice systems generate or adopt rules, adjudicate disputes and enforce the

²⁰ B2B regardless of being offline or online contributes to economic growth. B2B can take place in developing countries in the form of export. In 2008 from B2B of USD \$1,195 billion, in United States was much higher than B2C (\$732 billion) according to the study carried out by AT Kearney, 'Internet Value Chain Economics' (2010) The Economics of the Internet, Vodafone Policy Paper Series.

²¹ B2B EC News, A Guide to B2B e-Marketplaces, 5 <http://images.internetretailer.com/IR/Collections/052215_B2BecNews_Quarterly_IR.pdf> Accessed 21 February 2016.

²² Bethany L. Leickly, 'Intermediaries in Information Economies' (Georgetown University 2004); John McMillan and Christopher Woodruff Simon Johnson, 'Courts and Relational Contracts' (2002) 18 Journal of Economic Literature 221.

²³ Avner Greif, 'Commitment, Coercion and Markets: the Nature and Dynamics of Institutions Supporting Exchange' in Handbook of New Institutional Economics (Springer 2008); Paul R. Milgrom, Douglass North and Barry Weingast, 'The Role of Institutions in the Revival of Trade- The Law Merchant, Private Judges, and the Champagne Fairs' (1990) 2 Economics and Politics 1.

outcome.²⁴ During the process of dispute resolution, these intermediaries should observe the criteria of procedural justice. The procedural justice criteria in this research are derived from, firstly, the normative criteria of procedural justice according to legal philosophy and secondly, the positive approach to procedural justice which are elements that traders consider in a justice system when choosing trading partners. The positive criteria of procedural justice are based on the past surveys that have been carried out on traders and their preferences for a dispute resolution process. The purpose of the combination of normative elements of procedural justice with the positive approach is to achieve a dispute resolution design that is in accordance with the fundamental values of the group. Users can find a procedure just, when the dispute resolution process is designed in accordance with the fundamental values of the group.²⁵

Traditionally, states are responsible for providing a justice system that upholds the procedural justice domestically. But each justice system is limited to their boundaries. To provide a cross-border justice system, the private sector and states bring about justice systems for international trade.²⁶ These systems can be divided into state supported private justice systems and private justice systems that are not reliant on the state, but might function in the shadow of state law.

More precisely, because of the attempts to administer justice globally, state and private sectors have created various kinds of private justice systems that can be divided into four broad categories based on their function and their reliance on the states:

1. Private actor generates rules, which are enforced by the government
2. Private actor has the power to generate and enforce rules pursuant to the governmental delegation (e.g. Internet Corporation for Assigned Names and Numbers)

²⁴ Thomas Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2007) 10 Yale Journal of Law & Technology.

²⁵ Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (Springer Science & Business Media 1988) 252.

²⁶ "Private justice systems are flourishing. The states are gradually sharing the power of lawmaking and adjudication with private actors even at the national level." Fabrizio Cafaggi, 'Private Law-Making and European Integration: Where Do They Meet, When Do They Conflict?' in Oliver Dawn, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (2010) 202.

3. Private actor adjudicates disputes, but the state court enforces the award (e.g. Arbitration)
4. Private actor adopts or makes rules, adjudicates disputes and enforces the award without state intervention, mostly known as private ordering (online market intermediaries fall under this category, e.g. eBay).²⁷

Private ordering rises when the transaction costs of interaction or in this context collaboration between the supplier and buyer, are too high. As Williamson states, private orderings arise mainly to economize on the transaction costs.²⁸ Dixit proclaims that private ordering also takes place when the courts are corrupt and weak.²⁹ The non-involvement of the state courts and laws might not be due to their unavailability, but due to their lack of efficacy.³⁰ As Williamson argues, there is generally an assumption that available courts resolve disputes in an informed and cost effective manner.³¹ However, in most cases the efficacy of courts is problematic, hence to compensate such inefficacy, private orderings, which provide adjudication and enforcement rise up.

Williamson defines private ordering as “efforts to craft governance structure supports for contractual relations during the contract implementation intervals.”³² Private ordering can be classified as an informal justice system.³³ Examples of private ordering providers are relationships, communal norms, trade associations, and market intermediaries.³⁴

There are generally two types of private ordering. Firstly, close-knit societies where access to information is relatively easy, private ordering takes place spontaneously and by self-enforcement mechanisms. Enforcing the contract and the dispute resolution outcome is in the long-term interest of the parties.³⁵ Secondly, in large communities private ordering might appear where the state court is weak, corrupt or non-existent or

27 This classification is partially from Schwarcz, Steven L Schwarcz, ‘Private Ordering’ (2002) 97 Northwestern University Law Review 319.
 28 Oliver E Williamson, ‘The Theory of the Firm as Governance Structure: From Choice to Contract’ (2002) Journal of economic perspectives 178.
 29 Dixit, Lawlessness and Economics: Alternative Modes of Governance 4.
 30 Geoffrey C Hazard Jr and Paul D Scott, ‘The Public Nature of Private Adjudication’ (1988) 6 Yale Law & Policy Rev 42, 60.
 31 Oliver E Williamson, ‘Credible Commitments: Using Hostages to Support Exchange’ (1983) The American Economic Review 519.
 32 Oliver E Williamson, ‘The Theory of the Firm as Governance Structure: From Choice to Contract’ (2002) Journal of economic perspectives 171, 174.
 33 A.K. Dixit, Lawlessness and Economics: Alternative Modes of Governance (Princeton University Press 2011).
 34 Woodruff McMillan, ‘Private Order under Dysfunctional Public Order’ (2000) 98 Michigan Law Review 2421, 2421.
 35 Woodruff McMillan, ‘Private Order under Dysfunctional Public Order’ 2422.

it is inefficient and costly. In these situations, a more organized private ordering has been created. These organized private orderings are the so-called intermediaries, which help to overcome the hurdles of anonymity and transactions with strangers.³⁶

The autonomy of private ordering is, however, contested. Voigt argues that private justice systems are always in the shadow of the state and always operates in the shadow of a certain law or jurisdiction.³⁷ As he empirically demonstrates, private justice systems merely complement public court systems and do not substitute them.³⁸ Moreover, private justice systems, in commercial or other settings, are mostly contractual. Parties agree on the design of such systems, however they do so in the shadow of the public justice, courts or administrative agency. Therefore, both the private justice system and the public governmental rules apply.³⁹

Private ordering is created when the efficacy of the courts differs and such efficacy changes based on the attribution of transactions.⁴⁰ In this research, the transactions that are considered are B2B transactions that take place on the Internet through online market intermediaries. At the beginning of the advent of the Internet, some scholars pointed out that the Internet provided a state-less environment. States did not have much control over Internet activities, hence many forms of private ordering flourished.⁴¹ Many OMIs flourished to address the problem of lack of laws and access to public courts. If the efficacy of courts and laws are not optimal in online B2B transaction, then it should be investigated whether OMIs that facilitate such transactions have enough incentives to uphold procedural justice when resolving disputes.

Among the different types of private justice systems, those that do not heavily rely on the state to provide the function of adjudication and enforcement (the fourth category) might face less limitation in bringing about a justice system and cooperation

³⁶ Dietz, 'The Emergence of Transnational Cooperation in the Software Industry' 94; McMillan, 'Private Order under Dysfunctional Public Order', 2422.

³⁷ Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *The Yale Law Journal* 950, 521.
;Williamson, 'Credible Commitments: Using Hostages to Support Exchange'.

³⁸ Stefan Voigt And Sang-Min Park, 'Arbitration Is No Substitute For State Courts'(2013) *The Journal Of Development Studies* 49(11) 1514–1531.

³⁹ Lisa Blomgren Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict' (2008) 24 *Ohio St J on Disp Resol* 1, 22.

⁴⁰ Williamson, 'Credible Commitments: Using Hostages to Support Exchange'.

⁴¹ Bruce Benson, 'The Spontaneous Evolution of Cyber Law- Norms, Property Rights, Contracting, Dispute Resolution and Enforcement without the State ' (2005) 1 *Journal of Law, Economics, and Policy*.

among the parties in international trade where the state justice system is not available, too costly or traders are located in states with weak or corrupt judicial mechanisms. However, as it was stated, we cannot draw a clear line between privately provided justice and the state legal system, as they are interdependent and embedded.⁴²

The interdependence of private justice systems and state legal system might be applied to the traditional offline trading. The situation might be different on the Internet since the presence and support of the states are even more unclear especially in private justice systems. Katsh, one of the pioneers of online dispute resolution scholarship, rejected the assertion that mechanisms that are used on the Internet to resolve disputes are in the shadow of law, and he proclaimed that they are not alternatives, but substitutes. He argued that arbitration and other alternative dispute resolution mechanisms are alternatives to litigation, while on the Internet online dispute resolution (online justice system) is not an alternative to law as litigation is not an option for disputes that arise from online activities.⁴³

To what extent the private justice systems are truly private or just an extended arm of the state is still debatable.⁴⁴ It is, however, clear that in private ordering, the state has a minimal intervention in carrying out the dispute resolution process. Internet firms such as Facebook and Google have provided such online dispute resolution processes for their users, which do not rely on the state justice system. According to Section 230 of the Communications Decency Act 1998, American Internet Intermediaries are immune from liability for providers and users content. These platforms resolve disputes and take down content from their platform without the intervention of states. Enforceability of court order for taking down content from these platforms is also contested especially if the judgments are issued in a different jurisdiction.⁴⁵ Therefore,

⁴² Wolf Heydebrand, 'Contractual Certainty Versus Efficiency: the Historical and Institutional Context of Global Trade' (2008) Volkmar Gessner (ed) in *Contractual Certainty in International Trade*, Oxford: Hart Publishing, 328.

⁴³ Ethan Katsh, 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace 1' (2007) 21 *International Review of Law Computers & Technology* 97, 101.

⁴⁴ Heydebrand, 'Contractual Certainty Versus Efficiency: the Historical and Institutional Context of Global Trade', 328.

⁴⁵ In 1992, an initiative was started by the US to recognize and enforce foreign judgments that are issued outside a certain country. It was titled as Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. However, the initiative did not manage to result to any convention especially because of the jurisdictional problems that the Internet raised.

due to the state's weaker presence on the Internet, such private ordering mechanisms have become more prominent.

Private ordering on the Internet possesses some unique features that traditional justice systems did not possess and that were not available to the justice users or were not as effective before the advent of the Internet. The Internet contributes to making justice systems more effective⁴⁶ and lowers transaction costs by enabling access to less costly and diverse justice systems.⁴⁷

The effectiveness of private ordering can be further enhanced through the combination of the Internet and market intermediaries. This might assist in providing procedural justice. Considering the advantages and special features of market intermediaries and the Internet, they are introduced in this thesis as one of the new justice systems that belong to the category of private ordering (category 4) that potentially can provide a venue to uphold procedural justice and contractual certainty.

1.2 Research Problem and Motivation

Online private justice systems flourish on the Internet in the absence of state justice systems. The existence of such systems is vital for the continuation various activities on the Internet. Nevertheless, it is not clear whether such online private justice systems uphold procedural justice. Upholding procedural justice by a justice system is important from two perspectives: firstly procedural justice is an important normative criterion that should be upheld to achieve just outcomes, secondly upholding procedural justice can lead to other outcomes such as economic growth. This research focuses on the existence of procedural justice in online private justices systems by studying business-to-business

⁴⁶ European Commission has considered the use of ICT as one of the indicators of effective justice system in its report on 'The EU Justice Scoreboard, a Tool to Provide Effective Justice and Growth' (2013) European Union, COM 160. <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf> Accessed 1 January 2013, moreover technology helps with overcoming legal uncertainties that are caused by distance and time. For example, transactions can occur instantly by the use of technology, therefore a certain predictable law that avoids fast changes becomes immaterial to the trader. This is because the trader can adopt the changes quickly by the use of technology. Scheuerman, 'Economic Globalization and the Rule of Law'.

⁴⁷ Yannis Bakos, 'The Emerging Role of Electronic Marketplaces on the Internet' (1998) 41 Commun ACM 35, Giovanni Mauricio and others, 'Reverse Electronic Auction Web Tool for B2B' (2014) 65 Computers in Industry; Florian Zettelmeyer, Fiona Scott Morton and Jorge Silva-Risso, 'How the Internet Lowers Prices: Evidence from Matched Survey and Automobile Transaction Data' (2006) 43 Journal of Marketing Research 168; Bruce Benson, 'The Spontaneous Evolution of Cyber Law- Norms, Property Rights, Contracting, Dispute Resolution and Enforcement without the State ' (2005) 1 Journal of Law, Economics, and Policy.

(B2B) OMIs' dispute resolution system. The study is limited to the micro level analysis and does not intend to provide evidence as to OMIs contribution to economic growth in general. However, it highlights the importance of procedural justice as a means for contribution to economic growth.

To elaborate further on the importance of procedural justice for economic growth, as will be argued later in this chapter procedural justice and the rule of law (which will be defined in detail in section 1.2.1) have similarities and common objectives. It could be argued that procedural justice also has a role in contributing to economic growth. This research addresses the question of procedural justice in order to find out under which circumstances and under which design, online market intermediaries as a form of private ordering can bring about contractual certainty and as a result might enhance international trade. This section continues as follows: in subsection 1.2.1 the problem of OMIs not being in the shadow of law will be elaborated, subsection 1.2.2 explains the advantages and disadvantages of lack of state oversight in OMIs dispute resolution. It will then discuss the Rule of Law and its effect on economic growth. Subsection 1.2.4 discusses the procedural justice commonalities with the Rule of Law and then in 1.2.5 the importance of procedural justice will be established.

1.2.1 OMIs Dispute Resolution and the Shadow of the Law

Evidently, OMIs have to comply with the laws and regulations of the jurisdiction they reside in. However, whether OMIs' dispute resolution process is regulated or subject to laws is disputed. Recently states have become more engaged with regulating online intermediaries. The regulation can take place directly by addressing them with specific laws or by requiring them to apply for a license.⁴⁸ They are also based in a jurisdiction and must comply with certain public laws. There are attempts to administer the B2B relation, especially in Europe, which might also affect the B2B online market intermediaries. For example, the Unfair Commercial Practices Directive (2005/29/EC), which mainly pertains to Business to Consumer relations, has been applied in B2B

⁴⁸ Urs Gasser and Wolfgang Schulz, 'Governance of Online Intermediaries: Observations from a Series of National Case Studies' (2015) Berkman Center Research Publication, 6.

context by several European member states.⁴⁹ The Directive, however, does not regulate the dispute resolution mechanism in B2B relations.

In the US, many cases have been filed against online intermediaries, which are more of a class action in nature and are B2C cases. In *Comb vs. PayPal*,⁵⁰ the plaintiff argued that PayPal had been engaged in deceptive trade practices and false advertising and were liable for fraudulent inducement, breach of contract and negligence. In *Farinella vs. PayPal and eBay*,⁵¹ the plaintiff sought injunctive relief and related remedies on behalf of a purported nationwide class for alleged violations of state and federal law by PayPal. PayPal insisted on enforcing the individual arbitration clause indicated in its service agreement. The court ruled that the arbitration clause was unconscionable and null and void. Market intermediaries have also been subject to the antitrust concerns. In *Malone vs. eBay, Inc*,⁵² the plaintiff sued eBay for integrating its payment service to its transaction service.⁵³ Yet again, there has been no judgment over the conduct of B2B OMIs in dispute resolution or payments.

There are rules and regulations that may apply to the conduct of the OMIs with regards to dispute resolution mechanisms, but their application to B2B OMIs is debated. One of the prominent examples of this is the Regulation on online dispute resolution for consumer disputes.⁵⁴ This regulation that provides an online dispute resolution (ODR) mechanism for the residents of the EU obliges the intermediaries to use the ODR platform. Recital 30 of the Regulation provides that:

“(30) A significant proportion of online sales and service contracts are concluded using online marketplaces, which bring together or facilitate online

49 Communication From The Commission To The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Protecting businesses against misleading marketing practices and ensuring effective enforcement, Review of Directive 2006/114/EC concerning misleading and comparative advertising COM (2012) 702 final, 3. The communication states that “Some Member States decided to go beyond the minimum legal standard enshrined in the Misleading and Comparative Advertising Directive and extended the level of protection granted by the Unfair Commercial Practices Directive to business-to-business relations, either partly or in its entirety. In particular, in Austria, Denmark, Germany, France, Italy and Sweden the national legislation protecting consumers against unfair commercial practices also applies either partly or entirely to marketing practices affecting businesses.”

50 *Comb vs. PayPal*, 218 F. Supp. 2d 1165 (N.D. Cal. 2003)

51 *Farinella vs. PayPal and eBay*, 611 F. Supp.2d 250 (E.D.N.Y. 2009)

52 *Malone vs. eBay, Inc*, 07-01882-JF (N.D. Cal. filed Apr. 4, 2007)

53 David S Evans, ‘Antitrust Issues Raised by the Emerging Global Internet Economy’ (2008) 102 Nw UL Rev 1987.

54 Council Regulation (EU) 524/2013 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) OJ L 165.

transactions between consumers and traders. Online marketplaces are online platforms, which allow traders to make their products and services available to consumers. Such online marketplaces should therefore have the same obligation to provide an electronic link to the ODR platform.”

The Regulation however only applies to the European business-to-consumer e-commerce disputes and does not cover business-to-business disputes.⁵⁵ It does not regulate the internal dispute resolution rules of the online market intermediaries. States’ laws could regulate OMI’s dispute resolution process, under the condition that OMI’s process constitutes as arbitration or an alternative dispute resolution method that is regulated. In this case, the OMI’s dispute resolution process operates in the shadow of the law.

Schiavetta suggests that any ODR providers should be subjected to the Article 6 of the European Convention on Human Rights (ECHR). She proclaims that Article 6 should apply to those ODR providers that bring about binding and final outcomes for the parties, specifically if the state substitutes a public court with a private Alternative Dispute Resolution provider. She then goes on to say that state members of ECHR have to ensure that ODR procedures that fall under their jurisdiction comply with the rights found in Article 6.⁵⁶ Considering her argument, this means that any kind of non-state binding dispute resolution should be regulated by the states in order to meet the procedural justice criteria and in this case all OMI’s dispute resolution mechanisms regardless of being B2B or B2C and all other standalone ODRs should comply with the set of fairness criteria that are set in article 6.

The application of article 6 of the European Convention on Human Rights (ECHR) to all OMI’s, especially those that are not incorporated in Council of Europe Member States is very unlikely. There has not yet been a case that challenges OMI’s dispute outcomes under this Convention in Europe. Moreover, little regulation is put in place for OMI’s dispute resolution or for ODR providers, but the opportunity exists for the parties to the dispute to seek remedy from the court.

⁵⁵ Council Regulation (EU) 524/2013 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) OJ L 165, Recital 15: This Regulation should not apply to disputes between consumers and traders that arise from sales or service contracts concluded offline and to disputes between traders.

⁵⁶ Susan Schiavetta, ‘The Relationship between E-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights’ (2004) 37 Law Technology 1.

The design of OMI's might also prevent the parties from going to court. While there are many cases seeking remedy from a public court, in the case of breaching the law in online market intermediaries, there is a lack of evidence on disputes and cases that have challenged the OMI's outcome in B2B disputes. This may be due to multiple private dispute resolution processes that OMI's consider in their transaction agreement. For example they might refer the parties to arbitration if the parties are not satisfied with the outcome. The disputes might be resolved more accurately due to reliance on technology.⁵⁷ The intermediaries also have clauses that remove the liability from them in the case of disputes between the parties. This was even supported by the UNCITRAL working group on ODR, which stated that: "60. Draft article 17 (Exclusion of liability)

*"[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR administrator and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]"*⁵⁸

Moreover, the closest analogy of the OMI's dispute resolution mechanism can be to those of credit card charge backs. The relation is to the extent that the government of Colombia and the USA suggested to the UNCITRAL working group to consider payment chargebacks as part of its work in developing instruments relating to online dispute resolution⁵⁹ The charge-back dispute resolution mechanisms and rules that govern these disputes are contractual.⁶⁰ States might occasionally regulate the relationship between the card issuer and the customer. In this instance as well, when global transactions take place it is not clear which law will apply and if the public court is available to the customer.

The usage of online dispute resolution for resolving disputes and its design to prevent the parties from going to court are other reasons that the OMI's' dispute resolution does not to fall in the shadow of law. While online dispute resolution has

⁵⁷ Jane Winn, 'The Impact of XML on Contract Law and Contract Litigation.' XML Conference & Exposition, Atlanta. 2005, 7.

⁵⁸ UNGA, 'Online Dispute Resolution For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules(track I), United Nations Commission on International Trade Law Working Group III (Online dispute resolution) ' (20-24 October 2014) A/CN.9/WG.III/WP.131, para 60.

⁵⁹ United Nations Commission on International Trade Law Working Group III (Online Dispute Resolution) Thirty-second session Vienna, Online dispute resolution for cross-border electronic commerce transactions (30 November 2015) Submission by Colombia and the United States of America A/CN.9/WG.III/XXXII/CRP.3, 2.

⁶⁰ In the US, Truth in Lending Act (Regulation Z) regulates the relationship between the card issuer and the customer.

similarities with alternative dispute resolution, is not the same. ODR, especially when implemented in online market intermediaries, can include methods that traditional dispute resolution systems might be lacking such as certain effective enforcement mechanisms i.e. credit card charge back, judgment funds and transaction insurance mechanisms.⁶¹ Having an effective enforcement mechanism especially in cross-border transactions might prevent the parties to go to court to challenge the award or to enforce the award.

The other reason for non-regulation of OMI's dispute resolution system is that until now, no legislation directly addresses their dispute resolution process. In Europe, the Directive on payment services in the internal market, which regulates the electronic escrows, remains silent about the internal dispute resolution mechanism of the escrow systems.⁶² Other Escrow laws in the US do not regulate the Escrow's dispute resolution mechanism.⁶³

European Directive on ADR has laid out some criteria for ADR entities but it is not clear whether the dispute resolution that OMIs provide can be qualified as an Alternative Dispute Resolution entity. The ADR Directive also does not apply to procedures before consumer-complaint handling systems operated by the trader, nor to direct negotiations between the parties.⁶⁴ Additionally, according to the Directive, an ADR entity is defined as “any entity, however named or referred to which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with article 20(2)”.⁶⁵ Under Article 20(2) member states shall compile a list of ADR providers in their country that fulfills the criteria set out in

⁶¹ Soo Hye Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet* (ProQuest 2009) 9; Mohamed Wahab, 'Globalisation and Odr: Dynamics of Change in E-Commerce Dispute Settlement' (2004) 12 *International Journal of Law and Information Technology* 123; Lan Q Hang, 'Online Dispute Resolution Systems: The Future of Cyberspace Law' (2000) 41 *Santa Clara L Rev* 837, 957. ;M Ethan Katsh, 'Dispute Resolution in Cyberspace' (1995) 28 *Conn L Rev* 953.

⁶² Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (Text with EEA relevance) (2007) OJ L 319/ 1.

⁶³ In California, the Escrow Law is stipulated in Division 6 (commencing with Section 17000) of the California Financial Code. Which does not apply any specific regulation to the Escrow dispute resolution mechanism.

⁶⁴ Directive on consumer ADR, Recital 13.

⁶⁵ Directive on consumer ADR ,Article 4(1)(H) and Article 20 (2).

the Directive.⁶⁶ OMIs are not standalone ADR providers and cannot be listed as ADR providers, hence they are not regulated by the Directive.

Most of the times OMIs shield themselves from being held liable for their dispute resolution method by referring the parties to arbitration. Most OMIs, in their service agreements or terms and condition specify that any dispute between them and the users should be resolved by arbitration. This can also apply to disputes that may arise when one of the parties is not satisfied with the process of OMIs justice system. Arbitration is itself another kind of private justice system with confidential and binding outcomes. It is possible that disputes regarding the lack of due process or procedural justice are resolved by arbitration and the award has not been challenged in court.⁶⁷

Under abovementioned circumstances OMIs dispute resolution processes might not be regulated by the states. Additionally, due to the global nature of OMIs, states might lose control over the application, implementation and adaptation of its laws to new circumstances, or intermediaries might operate some of their functions without the involvement of public justice systems. Public justice system role in remedying the users of such intermediaries is more faded especially in online cross border transactions

⁶⁶ Article 20(2) reads as: "Each competent authority shall, on the basis of the assessment referred to in paragraph 1, list all the ADR entities that have been notified to it and fulfil the conditions set out in paragraph 1.

That list shall include the following:

- (a) the name, the contact details and the website addresses of the ADR entities referred to in the first subparagraph;
- (b) their fees, if applicable;
- (c) the language or languages in which complaints can be submitted and the ADR procedure conducted;
- (d) the types of disputes covered by the ADR procedure;
- (e) the sectors and categories of disputes covered by each ADR entity;
- (f) the need for the physical presence of the parties or of their representatives, if applicable, including a statement by the ADR entity on whether the ADR procedure is or can be conducted as an oral or a written procedure;
- (g) the binding or non-binding nature of the outcome of the procedure; and
- (h) the grounds on which the ADR entity may refuse to deal with a given dispute in accordance with Article 5(4).

Each competent authority shall notify the list referred to in the first subparagraph of this paragraph to the Commission. If any changes are notified to the competent authority in accordance with the second subparagraph of Article 19(1), that list shall be updated without undue delay and the relevant information notified to the Commission."

If a dispute resolution entity listed as ADR entity under this Directive no longer complies with the requirements referred to in paragraph 1, the competent authority concerned shall contact that dispute resolution entity, stating the requirements the dispute resolution entity fails to comply with and requesting it to ensure compliance immediately. If the dispute resolution entity after a period of three months still does not fulfill the requirements referred to in paragraph 1, the competent authority shall remove the dispute resolution entity from the list referred to in the first subparagraph of this paragraph. That list shall be updated without undue delay and the relevant information notified to the Commission."

⁶⁷ Many payment intermediaries and online market intermediaries refer their users to arbitration in case of dispute between the intermediary and the user. For example in Square, Business users are referred to arbitration provided by AAA and JAMS. Clause 51. 'Binding Individual Arbitration' <<https://squareup.com/legal/ua>> Accessed 8 June 2015.

where the efficacy of available courts is undermined, jurisdiction might be unknown, or the parties in the dispute might not have access to the foreign court.

Online market intermediaries dispute resolution processes might be regulated by laws that apply to alternative dispute resolution such as mediation or arbitration. This might put their operation in the shadow of law and their dispute resolution might be regulated. Being in the shadow of the law can bring more order and protect the parties in the dispute, however, if the regulations increase the cost of adoption of dispute resolution, such costs might deter the OMIs to provide dispute resolution for the parties altogether and leave the parties with no recourse to justice at all. Hence this thesis will also briefly look into under which circumstances OMIs dispute resolution is regulated and whether the regulations act as a deterrent or an incentive for OMI to provide dispute resolution and uphold procedural justice.

1.2.2 Advantages and Disadvantages of State Oversight Over OMIs Dispute Resolution

There are both advantages and pitfalls to weak or lacking oversight of states in private ordering. The lack of oversight or support might lead to the development of more “plural” and less “hierarchical” institutional structures. The state may lose its influence and its support may not be needed.⁶⁸ Lack of state support is especially advantageous for developing countries. The imposition of entry requirement for private organizations offering private dispute resolution mechanisms and regulation of such mechanism can have a negative effect on the advantages of private justice systems.⁶⁹ In commercial settings, those traders who reside in developing countries with weak public justice systems need mechanisms that can signal contractual certainty to their trading partners. In order to do so, they might rely on private ordering to carry out international trade. This is a prominent feature for private ordering on the Internet.

Private ordering can add transparency and clarity to rules that are unclear or not substantiated. They have information advantages over the public justice systems

⁶⁸ Dietz, ‘The Emergence of Transnational Cooperation in the Software Industry’.

⁶⁹ Buscaglia, *Law and Economics in Developing Countries* 81.

especially when they are empowered by the Internet and information technology.⁷⁰ Moreover, they can result in the evolution of rules that are not up-to-date and do not consider the recent changes in specific parties relationship.⁷¹ This is especially the case in industrial private dispute resolution, where the interpretation of the rules by the neutral third party has an effect on the behavior of contracting parties that are members of an industry association.⁷²

The lack of state support also causes certain OMIs to provide effective and efficient enforcement mechanisms, as most of the time they inflict immediate punishment on the cheating trader. The cost of enforcement is even cheaper when the punishment is deterrent enough that the party self-enforces the award.⁷³ For example, having an escrow system in place can provide a strong and effective enforcement mechanism. This has been evidenced especially in online market places such as Alibaba.com. To effectively enforce the outcome of the dispute resolution system, Alibaba a secure payment service, which keeps the money and wires it to the winning party in accordance with the dispute resolution outcome.⁷⁴

There are disadvantages to the lack of oversight of the states over private justice systems. The state is not involved with such systems and some of the main features of the state justice system may be compromised in private ordering. Some scholars have called for a greater role of public law in private legal systems, as they argue that these systems do not have the required ability and incentives to provide some of the most important functions of a judicial system.⁷⁵ For example, private ordering may not provide procedural justice or their enforcement mechanism may not be as effective as the state justice system. Hence it is important to consider the incentives and deterrents for private ordering to provide procedural justice.

70 Avinash Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton University Press 2011) 11 and 66.

71 Paul D. Carrington, 'Adjudication as a Private Good: A Comment' (1979) 8 *The Journal of Legal Studies*, 255.

72 Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions' (2001) U Chicago Law & Economics, Olin Working Paper, 13.

73 Dixit, *Lawlessness and Economics: Alternative Modes of Governance* 11 and 66.

74 A detailed description of Alibaba's escrow service is provided in chapter 6.5.1.

75 Thomas Carbonneau, 'Arbitral Justice, the Demise of Due Process in American Law', *Tulane Law Review* (1945) 70; David Snyder, 'Private Lawmaking' (2003) 64 *Ohio State Law Journal*.

1.2.3 Rule of Law and Economic Growth

The importance of looking at procedural justice existing in these private orderings also arise from the relation of economic growth and procedural justice. To illustrate the relation of economic growth and procedural justice, this section and the following subsections will use the rule of law theory, the theories of procedural justice and economic growth to highlight this connection and clarify the significance of procedural justice in dispute resolution mechanism and their influence in increasing trade.

Procedural justice is a concept that has been mainly associated with maintaining fairness. However, procedural justice can also contribute to economic growth by providing contractual certainty. The contribution of procedural justice to economic growth will be supported in this thesis by relying on two approaches: first to establish the effect of the rule of law on economic growth, and second to clarify the commonalities between procedural justice and the rule of law. This section will reveal the connection between procedural justice and economic growth and the next section will move forward to clarify the commonalities between procedural justice and the rule of law.

To clearly show the connection between procedural justice and economic growth, it is important to look at one of the cornerstones of economic growth, which is the rule of law. The rule of law and procedural justice have many similar objectives.⁷⁶ For example, both concepts focus on the neutrality of the decision maker and granting legitimacy to the decision-making body. Therefore, procedural justice is likely to be as effective for economic growth as the rule of law. In order to illustrate this connection, first the impact of the rule of law on economic growth should be clarified. This section proceeds to show the similar objectives of the rule of law and procedural justice.

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Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) *Journal of Dispute Resolution* 1.

Scholars in both Law and Economics and Institutional Economics⁷⁷ have long argued that rule of law is a necessary factor for economic growth. Rule of law can facilitate the fulfillment of commitment and cooperation in trade innovation and other economically beneficial activities.⁷⁸ In economic literature, rule of law has an effect on economic growth through providing various functions such as “provision of security of person; security of property, enforcement of contract; checks on government; and checks on corruption and private capture.”⁷⁹ While there is no clear causation between having institutions such as public court that uphold the rule of law and economic growth, the empirical research has at least proved a strong correlation.⁸⁰

The emphasis on the importance of providing rule of law for trade and bringing about economic growth is based on the argument that provision of rule of law can facilitate contract enforcement and reduce transaction costs associated with opportunistic behavior.⁸¹ This will in turn diminish the mistrust between the parties in the transaction and grants the parties more incentive to engage in trade.

To provide the functions of rule of law, Douglass North suggests that institutions should be in place. He states that “efficient economic organization, the establishment of institutional arrangements (political and economic rules) to protect property rights, enforce contract compliance and punish violations of these is the key to growth.”⁸²

77 Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace Washington, DC 2006); Franklin Allen, Jun Qian and Meijun Qian, ‘Law, Finance, and Economic Growth in China’ (2005) 77 *Journal of financial economics* 5; Stephan Haggard and Lydia Tiede, ‘The Rule of Law and Economic Growth: Where Are We?’ (2011) 39 *World Development*; Douglass C. North, ‘Institutions and Economic Growth: An Historical Introduction’ (1989) 17, 131; Robert Cooter and Hans Bernd Schäfer, ‘The Secret of Growth Is Financing Secrets: Corporate Law and Growth Economics’ (2011) 54 *Journal of Law and Economics* S105, Trubek, D. and Santos, A. (eds.) (2006), *The New Law and Economic Development: A Critical Appraisal*; Kenneth Dam, *The Rule of Law and Economic Development* (Brookings Institution Press 2006).

78 Cooter and Ulen argue that one of the contributing factors to economic growth is innovation (there are others such as labor and capital). They argue law is also necessary for innovation because it can overcome the mistrust that prevents people from cooperating in business. (law and poverty of nations) Efficient contract and property law promotes economic growth by uniting innovative ideas and capital. Robert D. Cooter and Thomas Ulen, *Law and Economics* (7 edn, Boston Pearson Addison Wesley 2007) 50.

79 Haggard and Tiede, ‘The Rule of Law and Economic Growth: Where Are We?’.

80 Daniel Klerman, ‘Legal Infrastructure, Judicial Independence, and Economic Development’ (2006) *Pac McGeorge Global Bus & Dev LJ*, 434.

81 “The essence of Coase Theorem is the instrumental role of legal rules in reducing transaction costs which includes both monetary and other kinds of costs for a mutually beneficial agreement based on consent” Anastassios D Karayiannis and Aristides N Hatzis, ‘Morality, Social Norms and the Rule of Law as Transaction Cost-Saving Devices: the Case of Ancient Athens’ (2012) 33 *European Journal of Law and Economics* 621, 623.

82 Douglass C North, Paul R Thomas, *The Rise of the Western World: A New Economic History* (Cambridge University Press 1973) 1.

North illustrates the importance of institutions that uphold the rule of law and facilitate trade for economic growth by a historical example. He states that the decline of the Roman Empire and trade within their territory might have been due to the high transaction costs of trade which was generated by the lack of institutions for providing enforcement mechanisms and law.⁸³ Therefore, in order to achieve economic growth, one of the important factors is having institutions available for the disputants to resort to in case of a breach of contracts.⁸⁴

In international trade, the institutions that provide the rule of law especially through justice systems that adjudicate disputes and enforce the outcome are weak or lacking. Consequently, providing the rule of law by contract enforcement and provision of dispute resolution has been troublesome. The weak legal structure in international trade and weak contract enforcement through the provision of rule of law in some jurisdictions has a negative impact on economic growth. As Adam Smith pointed out “the imperfection of the law and uncertainty in its application greatly retarded commerce”.⁸⁵ Gessner argues that the role of law, business coordination and contract enforcement in international trade has not been widely discussed. International trade has a weak legal structure and the literature should focus on these aspects of international trade.⁸⁶

While it is important to focus on institutions and legal structures, the mere existence of such institutions might not be the only factor that provides contractual certainty and contributes to economic growth. The institutions do not have to be of a formal nature, they can be both formal and informal. Such institutions need to have certain characteristics and meet certain criteria. Here is where the rule of law scholars, procedural justice theorists and economists meet. The economists proclaim that institutions that uphold the functions of rule of law are important for contract

83 North, ‘Institutions and Economic Growth: An Historical Introduction’ 1320.

84 De Soto asserts that “development is possible only if efficient legal institutions are available to all citizens Hernando De Soto, *The Other Path: The Invisible Revolution in the Third World* (Basic Books 1989) 185. These institutions should secure private property rights protected by the rule of law, provide impartial enforcement of contracts through independent judiciary and others Dani Rodrik, *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton University Press 2003) 302.

85 Adam Smith, *Lectures on Jurisprudence* (Oxford University Press 1978) 528.

86 Volkmar Gessner, ‘Towards a Theoretical Framework for Contractual Certainty in Global Trade’ (2008) *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* 1, 11.

enforcement, the rule of law scholars and procedural justice theorists set out the criteria that these institutions should meet. Having established the common criteria that the economists and rule of law and procedural justice scholars' focus on, the next section will move forward to clarify the commonalities between procedural justice and rule of law.

1.2.4 Procedural Justice and the Rule of Law (The Similarities)

Procedural justice has many common objectives with the rule of law. As was indicated, procedural justice concerns the certain criteria that a process should uphold in order to achieve an outcome that is perceived as fair by the parties to the dispute. These criteria are very much similar to the procedural implications of rule of law. The source of procedural justice and rule of law might differ. The source of procedural justice rests in the user's perception or in other words through positive studies the procedural justice criteria are established, while the rule of law criteria is more nested legal philosophical scholarship and are arrived at normative analysis. The comparison that takes place in this section considers the normative criteria of rule of law and the positive criteria of procedural justice.

The rule of law criteria addresses two dimensions: the quality of adjudication and the level of order.⁸⁷ Many elements of procedural justice are important for the quality of adjudication. The HiiL index for justice suggests that the indicators of justice and rule of law can be aggregated together.⁸⁸ The World Justice Project rule of law Index, considers 4 indicators for rule of law. Two of these indicators focus on aspects that are procedural and are common in both procedural justice and rule of law. The first is that the process by which the laws are [enacted and enforced is accessible, fair, and efficient. This is the lawmaking feature which is not the focus of this thesis. The second is that, justice is delivered in a timely manner by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.⁸⁹ This second feature of how

⁸⁷ Svend-Erik Skaaning, 'Measuring the Rule of Law' (2010) 63 Political Research Quarterly 449, 1.

⁸⁸ Martin Gramatikov and Ronald Janse, 'Justice Monitoring and Evaluation in the Eu: Status Quo and the Way Ahead?' (2012) HiiL Innovative Justice Project.

⁸⁹ Mark David Agrast, Juan Carlos Botero and Alejandro Ponce, 'The Rule of Law Index' (2012-2013) The World Justice Project, Washington DC.

adjudication and enforcement should take place is very much similar to procedural justice objectives. This similarity in objectives might not be very apparent at first sight, if different functions of the rule of law are not apprehended. Hence, it would be useful to provide a brief background on different functions of rule of law and then proceed to identify the similarities between procedural justice and rule of law.

The approach to the rule of law is generally divided into the thick approach and the thin approach. The thick approach to the rule of law considers the more substantive aspects of law and how it affects human rights and other rights. The thin approach to the rule of law has two classifications: the formalist approach and the proceduralist approach. The formalist approach mainly focuses on the process of lawmaking. The proceduralist approach focuses on the procedure by which the law is applied.

As to the process of lawmaking, Hayek (one of the pioneers of rule of law) sets out three characteristics for the state of rule of law: generality, certainty and equality. He describes generality as: the law considers all subjects collectively and all actions in the abstract, it does not consider any individual man or any specific action.⁹⁰ Certainty according to Hayek requires that those who are subject to the law are able to predict reliably that the legal rules will be found to govern their conduct and that those rules will be interpreted and applied correctly. Equality indicates that the laws apply to everyone without making arbitrary distinctions among people.⁹¹ Fuller has also added to these criteria, considering the lawmaking aspect. Fuller indicates that laws should be: general, public, non-retroactive, comprehensible, non-contradictory, possible to perform, relatively stable, administered in ways congruent with rules as announced.⁹²

The criteria that Fuller and Hayek consider for the rule of law mainly apply to the process of lawmaking. While they are related to the procedural implications, they do not elaborate on the elements necessary for adjudication process and the institutional elements necessary for upholding the rule of law.⁹³ In order to achieve the state of rule

⁹⁰ Friedrich A Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 222.

⁹¹ Hayek, *The Constitution of Liberty*, 212.

⁹² Lon Fuller, *The Morality of Law* (Yale University Press 1969); Martin Krygier, 'Four Puzzles About the Rule of Law, Why, What, Where and Who Cares' in James E Fleming (ed), *Getting to the Rule of Law* (2011) 65.

⁹³ Ralf Michaels, 'A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution— a Reply to Thomas Schultz' (2011) 2 *Journal of International Dispute Settlement*, 417; Radin, 'Reconsidering the Rule of Law', 786.

of law, the process and the institution by which the law is enforced, should also possess certain pre-requisites.

The procedural implications of rule of law do not however go unnoticed in the work of these scholars. In his other scholarly papers, Fuller considers the justice provider and the procedural implications of the rule of law as necessary for achieving the state of the rule of law. He points out that "when we move from a condition of anarchy to despotism toward something deserving the name of 'the rule of law,' one of the most important aspects of that transition lies in the fact that formal institutions are established, guaranteeing the members of the community some participation in the decisions by which their interests are affected."⁹⁴ Moreover, in his article *Adjudication and the Rule of Law*, he states that adjudication is "a process of decision making that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments."⁹⁵ He then asserts that whatever factor impedes this participation will lead to the breach of the rule of law.⁹⁶ Hence the parties should be given the opportunity to present evidence and defend themselves. For example, adjudication should enable the parties to have access to a hearing and to provide proofs and arguments, or as Fuller calls it, the right of the parties to have their "day at court."⁹⁷

Other legal scholars have elaborated on the procedural factors that are required to uphold the rule of law. Waldron raises the importance of procedural implications of rule of law and asserts that having appropriate laws in place but not having the appropriate procedural means may not effectuate the rule of law.⁹⁸ Additionally he asserts that when users consider the rule of law, they consider mostly the procedural implication of the rule of law other than the lawmaking procedure.⁹⁹ For the enforcement of the law, Raz considers a more general procedural criterion for rule of law. He indicates the following principles: independence of the judges, the principles of natural justice (he asserts that in the application of law the principles of natural

⁹⁴ Lon Fuller, 'Adjudication and the Rule of Law' (1960) 54 *Proceedings of the American Society of International Law at Its Annual Meeting* 1, 5.

⁹⁵ Lon Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review*, 369.

⁹⁶ Fuller, 'Adjudication and the Rule of Law' 5.

⁹⁷ Fuller, 'Adjudication and the Rule of Law' 6.

⁹⁸ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' *Public Law & Legal Theory Research Paper Series Working Paper No 10-73* (2010), 5.

⁹⁹ Waldron, 'The Rule of Law and the Importance of Procedure'.

justice; open and fair hearing, impartial decision maker and the like, should be followed)¹⁰⁰, the review power of the adjudication system and the accessibility of the court.¹⁰¹ Waldron expands on these criteria and provides a more detailed list without considering the context of the dispute. He considers the following: right to hearing, right to a professional counsel, right to an independent trained judicial officer, right to be present at all the stages of a court proceeding, right to confront witnesses against the detainees, right to an assurance that the evidence presented (by the government) has been gathered in a properly supervised way, right to make arguments, right to hear reasons of the award and some right of appeal to a higher tribunal of a similar character.¹⁰² Sternlight also adds efficiency to the criteria. He indicates that an efficient, fair, independent, and accessible judicial system is required for upholding the rule of law.¹⁰³

The abovementioned criteria of rule of law conform to the parties' perception of procedural justice.¹⁰⁴ Procedural justice scholars, who have carried out empirical research on how people perceive procedural justice assert, that the indicators are very much in conformity with the elements that define the rule of law.¹⁰⁵ More specifically, both rule of law indicators and procedural justice share the conception that dispute resolution process should be held by a neutral decision maker in a participatory process where parties can provide proofs and arguments.¹⁰⁶

One of the reasons for the commonality between the rule of law indicators and the perception of the procedural justice is that people are not only economic actors that evaluate the legal process based on its outcome. They assess the legal process based on

¹⁰⁰ Joseph Raz, 'Legal Positivism and the Sources of Law' in John Oberdiek Aileen Kavanagh (ed), *Arguing About Law* (2008)

¹⁰¹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP Oxford 1979) 217, Similar criteria has been considered by Rawls: There must be structures for achieving truth and correct enforcement: trials, hearings, rules of evidence, due process. Judges must be impartial and independent. Trials must be fair, open, and not "prejudiced by public clamor." Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 BUL Rev 781, 788.

¹⁰² Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Ga L Rev 1. Waldron was not the first scholar to raise this issue. Others had pointed this out as well. Look at Randy E. Barnett, 'Toward a Theory of Legal Naturalism' (1978) 2 Journal of Libertarian Studies 97.

¹⁰³ Jean R Sternlight, 'Is Alternative Dispute Resolution Consistent with the Rule of Law-Lessons from Abroad' (2006) 56 DePaul L Rev 569, 580.

¹⁰⁴ Gus Van Harten, 'Arbitration Procedural Fairness and the Rule of Law' in Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 17, Hollander-Bulmoff and Tyler indicate that " people's everyday understanding of what procedural justice means conforms to many of the key elements that define the rule of law" Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution'.

¹⁰⁵ Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution'

¹⁰⁶ Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) Crime and justice 283.

other factors, such as neutrality of the decision maker and respect for rights, which are integral to the rule of law.¹⁰⁷

Even businesses and corporations, which might be presumed as purely economic actors, have preferences that are aligned with rule of law indicators and procedural justice. Businesses require neutral decision makers and participation in the process. The level of such participation and the modality might differ to those of non-economic actors, however they do not prefer non-participatory and biased decisions to participatory and neutral processes.¹⁰⁸ Conversely, as research suggests, the fairness of the process might be one of the greatest concerns for profitable relationships that are temporary and not stable such as those transactions that take place on the Internet with no prior interaction of the parties.¹⁰⁹

1.2.5 The Importance of Procedural Justice

Procedural justice significantly contributes to contractual certainty. If procedural justice is in place, certainty can be upheld even when the outcome of adjudication is not accessible and there is a lack of information about the consistency of outcome. Moreover, upholding procedural justice assures the parties that the outcome would be fair in the case of uncertainty.¹¹⁰ For example, if the decision maker is neutral, it is highly probable that the decision based on evidence and not personal opinion, hence it will result in a higher probability that the rational parties will receive an outcome that they expect, or the outcome is similar to what others have issued when treating similar cases. This is especially important as most of the outcome of the proceedings in private justice systems (and some public courts) are not transparent, especially in commercial matters.¹¹¹

¹⁰⁷ Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 2.

¹⁰⁸ Business preferences will be substantiated in chapter 3.

¹⁰⁹ H Lamm, E Kayser and T Schwinger, 'Justice Norms and Other Determinants of Allocation and Negotiation Behavior' (1982) *Studies in decision making* 359, Edith Barrett-Howard and Tom R Tyler, 'Procedural Justice as a Criterion in Allocation Decisions' (1986) 50 *Journal of Personality and Social Psychology* 296.

¹¹⁰ Robert J MacCoun, 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness' (2005) 1 *Annu Rev Law Soc Sci* 171

¹¹¹ Kees Van den Bos and others, 'How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect' (1997) 72 *Journal of Personality and Social Psychology* 1034.

The users' perception is important as it enhances the legitimacy of the decision maker.¹¹² When the legitimacy of the decision maker is perceived positively, there is more chance of voluntary compliance with the outcome of the process. This will increase both the efficiency and the effectiveness of the process, which are crucial for upholding rule of law and procedural justice. Users also value process control more than decision control hence procedural justice is more important for them than aspects that relate to the outcome. According to research carried out by various scholars, either the procedural justice is more important¹¹³ than control over the actual decision or only control over the process is important and decision control does not matter.¹¹⁴

Procedural justice can be used as a tool to evaluate the fairness of justice systems in general, especially private justice systems. This is mainly due to the fact that a justice system outcome might not be available to measure its predictability, fairness or accuracy. A justice system can be evaluated more effectively by considering procedural justice when the outcome of the process is not available. When it is not possible to assess the consistency of the outcome by considering the outcome, then procedural criteria that influence the consistency can be measured in order to evaluate the justice system.

Considering the effects of procedural justice on legitimacy, certainty and other aspects that are of utmost importance for international trade, this research focuses on online market intermediaries dispute resolution processes that resolve B2B disputes and to assess their role in providing procedural justice for the parties and ultimately better environment for B2B trade.

1.2.6 B2B E-commerce and Global Trade Flow

B2B e-commerce is broadly defined as “sharing business information, maintaining business relationships and conducting business transactions by means of

¹¹² Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 2.

¹¹³ Tom R Tyler, Kenneth A Rasinski and Nancy Spodick, 'Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control' (1985) 48 *Journal of Personality and Social Psychology* 72; Tom R Tyler, 'Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models' (1987) 52 *Journal of Personality and Social Psychology* 333.

¹¹⁴ E Allan Lind, Robin I Lissak and Donald E Conlon, 'Decision Control and Process Control Effects on Procedural Fairness Judgments' (1983) 13 *Journal of Applied Social Psychology* 338.

telecommunication networks.”¹¹⁵ B2B transactions may involve a host of online commercial transactions, from the simple submission of electronic purchase orders to a vendor, participation in market exchange programs with suppliers, responding to requests for quotes and proposals for the distribution of software, and other products and services to business customers via the Internet.¹¹⁶

B2B transactions take place among large corporations, supply chain managers, and small and medium sized enterprises (SMEs).¹¹⁷ The value of the transactions can vary widely in both value and volume, and both typically scale with the size of the company.¹¹⁸ These transactions include both goods and services. They can vary from a range of manufactured goods, commodities to market information and software purchases. In B2B e-commerce, advanced payment systems and escrow mechanisms are generally in place, as well as invoicing.

The use of the Internet for B2B transactions reduces the inherent transaction costs in traditional B2B. The Internet makes the exchange of information faster and cheaper. This happens on two fronts: tangible goods and intangible goods. As enterprises find out the utility of the use of the Internet in advancing their interactions and transactions with other businesses, the transaction costs will be even further lowered.¹¹⁹ This will increase the number of B2B transactions and consequently the number of online B2B disputes.

It is important to note that B2B online transactions are different from B2C transactions and it is necessary to distinguish between the two. In B2B e-commerce, there is less information asymmetry than in B2C e-commerce. B2B e-commerce has more focus on customer retention and pre-negotiation of the contract terms. The pre-negotiation of contracts will reduce the information asymmetry in B2B transactions.¹²⁰ However, in B2C transactions, consumers that are rational actors do not pay attention

115 Vladimir Zwass, ‘Electronic Commerce: Structures and Issues’ (1996) 1 *International Journal of Software Quality* 3.

116 Lucille Ponte Thomas Cavenagh, *Cyber Justice, Online Dispute Resolution For E-Commerce* (Prentice Hall Publishing New Jersey 2004) 2.

117 Ronan McIvor and Paul Humphreys, ‘The Implications of Electronic B2B Intermediaries for the Buyer-Supplier Interface’ (2004) 24 *International Journal of Operations & Production Management* 241.

118 Jari Luomakoski, *Why Did Electronic B2B Marketplaces Fail?* (HAAGA-HELIA University of Applied Sciences 2010).

119 Joel P Trachtman, ‘Cyberspace, Sovereignty, Jurisdiction, and Modernism’ (1998) *Indiana Journal of Global Legal Studies* 561, 573.

120 Kerry Martin and Tim Toews, ‘B2B Commerce Effectiveness: 5 Key Components of Successful B2B Commerce’ (2014) *FitForCommerce White Paper Series*, 5.

to developing and altering clauses that are already in the contract. As Cooter explains, the decision to not read the contract is rationale due to the fact that the cost of obtaining the information exceeds its expected value for the consumer.¹²¹ This is different in B2B transactions. There are benefits for both parties in B2B transactions to read and agree on dispute resolution policy. Both sides of the transaction carry out negotiations and agree on clauses that further their interest. The rational SMEs have to pay attention to clauses that they negotiate with larger corporations, as the cost of obtaining the information does not exceed its expected value. Moreover, B2B companies are more aware of the legal business environment and deal with complex issues. B2B companies, even when they are SMEs, are more sophisticated and can also operate in multiple currencies, languages and typically deal with regional or industry regulatory rules.¹²²

Unlike B2C e-commerce, which is usually a one-off transaction, B2B transactions involve approval processes and authorizations and re-ordering when possible. Such transactions can lead to a long-term business relationship or a relational contract, which is “informal agreement sustained by the value of future relationships.”¹²³ Relational contracts make the information asymmetry and the incentives to breach the contract different from B2C transactions, hence dispute resolution mechanisms and processes might be different for such dispute.

B2B e-commerce is becoming more focused, more complicated and more technologically savvy.¹²⁴ A more specialized field of e-commerce necessitates a specialized dispute resolution process, dedicated to resolving disputes that arise from such transaction. Lawmakers and dispute resolution policy makers should focus on the dispute resolution processes that resolve disputes that arise between suppliers and buyers.

The distinction between B2B and B2C will become clearer by the increase in the activities of businesses on the Internet. Until recently, B2B e-commerce had not truly

121 Robert D Cooter and Edward L Rubin, ‘Theory of Loss Allocation for Consumer Payments’ (1987) 66 Tex L Rev 63, 68.

122 Kerry Martin and Tim Toews, ‘B2B Commerce Effectiveness: 5 Key Components of Successful B2B Commerce’ (2014) FitForCommerce White Paper Series, 5.Commerce’5.

123 George Baker, Robert Gibbons and Kevin J. Murphy, ‘Relational Contracts and the Theory of the Firm’ (2002) 117 The Quarterly Journal of Economics 39.

124 Kerry Martin and Tim Toews, ‘B2B Commerce Effectiveness: 5 Key Components of Successful B2B Commerce’.

developed. Although B2B e-commerce market in the US alone is twice the size of B2C e-commerce, the companies had not yet invested fully in the necessary technology for providing such service.¹²⁵ This has however changed, especially among the market intermediaries.

It is difficult to measure e-commerce contribution in general and specially at the international level.¹²⁶ The statistics on the value of e-commerce are not comprehensive.¹²⁷ Moreover, most data sources do not distinguish domestic and cross-border transactions. This makes it difficult to prove the contribution of online international B2B transactions to the global trade flow. Setting aside the scant nature of the data, the country specific B2B online transactions show promising results. In the manufacturing industry, in the United States, the share of e-commerce in total revenue increased from 19 per cent to 51 per cent from 2002 to 2012. Manufacturing and wholesale trade (B2B) accounted for 89 per cent of total e-commerce revenue, whereas B2C amounted to just 4 per cent. B2B gained predominance in other countries as well.¹²⁸ In Canada two thirds (64 per cent) of the value of online sales by enterprises were attributable to B2B in 2013. In the Republic of Korea, this number was even higher and 91 percent of e-commerce was B2B. In Europe, B2B (and Business to Government) accounted for about 87 per cent of the total value of e-commerce. In 2012-2013 global B2B sales amounted to a total of 12.5 USD trillion, with the United States accounting for 36 per cent of the B2B, 18% by the United Kingdom, Japan 14% and China 10%.¹²⁹

The dominant leadership position of online B2B in a market expected to grow to \$6.7 trillion in gross merchandise value by 2020. This trend will make the B2B e-commerce market two times bigger than the B2C market (\$3.2 trillion) within that timeframe. With China expected to emerge as the largest online B2B market with an

¹²⁵ The Forrester Wave™: B2B Commerce Suites, Q4 2013 The "Big Three" Lead The Pack, But Several Emerging Players Trail Closely Behind, October 7, 2013, <<http://www.forrester.com/The+Forrester+Wave+B2B+Commerce+Suites+Q4+2013/fulltext/-/E-RES90821>> Accessed 7 March 2016.

¹²⁶ United Nations Conference On Trade and Development, 'In Search of Cross-Border E-Commerce Trade Data', TN/UNCTAD/ICT4D/2016.

¹²⁷ United Nations Conference On Trade and Development, 'Information Economy Report: Unlocking the Potential of E-commerce for Developing Countries' (2015) United Nations Publication, UNCTAD/IER/2015,13.

¹²⁸ United Nations Conference On Trade and Development, 'Information Economy Report: Unlocking the Potential of E-commerce for Developing Countries' ,13.

¹²⁹ United Nations Conference On Trade and Development, 'Information Economy Report: Unlocking the Potential of E-commerce for Developing Countries' 13.

estimated potential of \$2.1 trillion by 2020.¹³⁰ Venture capitals also have recently funded B2B startups and funds invested in such startups rose to \$11.9 billion. Funds invested in B2B startups rose by 40 percent to \$11.9 billion in 2016, in Europe and the United States.¹³¹

Online B2B Market intermediaries, which are the focus of this research, have also become more active and introduced specific platforms such as Amazon B2B platform¹³² and eBay B2B market¹³³ for B2B transactions. According to Forbes, B2B models are moving towards ubiquitous and affordable online platforms where buyers and sellers can meet from anywhere in the world on the Web to transact goods and services. This transition marks a move from the “one-to-many” model, where one company had to work with many suppliers, to “many-to-many,” or public intermediaries, where organizations are integrating their processes with e-procurement companies and online B2B retailers to facilitate the purchase of their goods online.¹³⁴ Online Market Intermediaries have also paved the way for Small Medium-Sized Enterprises (SMEs). For example, at eBay, more than 90% of commercial sellers export to other countries. While the traditional SMEs export less than 25%.¹³⁵

As McKinsey research group shows in its report, OMIs can help the SMEs to reach the global market. The numbers of eBay SME users that export are far more than traditional SMEs. The Exhibit below from McKinsey report shows the enabling effect of using an online market intermediary (eBay) for SMEs to participate in the global market.¹³⁶

130 Sarwant Singh, ‘B2B eCommerce Market Worth \$6.7 Trillion by 2020: Alibaba & China the Front-Runners,’ Forbes (2014) <<http://www.forbes.com/sites/sarwantsingh/2014/11/06/b2b-e-commerce-market-worth-6-7-trillion-by-2020/#6d53fddd2e7c>> Accessed 16 April 2016.

131 ‘B2B Heats Up’, <<https://www.pehub.com/2016/04/b2b-heats-up-as-vcs-grow-skittish-about-consumer-focused-startups/>> Accessed 16 April 2016.

132 ‘Amazonsupply’ <www.amazon.com/business> Accessed 13 March 2016.

133 Business and Industrial Platform, <<http://www.ebay.com/rpp/business-industrial>> Accessed 7 March 2016

134 Sarwant Singh, ‘B2B eCommerce Market Worth \$6.7 Trillion by 2020: Alibaba & China the Front-Runners’.

135 McKinsey Global Institute, ‘Global Flows In A Digital Age: How Trade, Finance, People, and Data Connect the World Economy’ (2014) <https://www.mckinsey.de/files/140425_globalflows_full.pdf> Accessed 24 October 2016, 11.

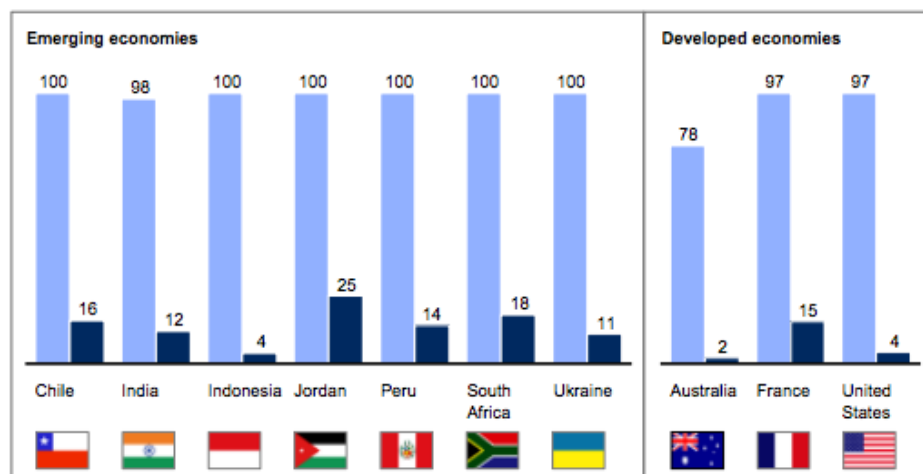
136 McKinsey Global Institute, ‘Global Flows In A Digital Age: How Trade, Finance, People, and Data Connect the World Economy’ 41.

Exhibit 15

Online platforms enable businesses to attain global reach that comparable offline businesses have not achieved

Share of eBay commercial sellers and offline SMEs¹ that export, 2012
%

■ eBay sellers²
■ Traditional SMEs



¹ Small and medium-sized enterprises.

² eBay sellers are defined as a commercial seller with sales of over \$10,000.

SOURCE: Enterprise Surveys, World Bank, 2012; Australia Bureau of Statistics, 2012, 2007; eBay; McKinsey Global Institute analysis

Source: McKinsey Global Institute, ‘Global Flows In A Digital Age: How Trade, Finance, People, and Data Connect the World Economy’ page 41

Moreover, UNCTAD’s report on online market intermediaries (which included retail companies as well) showed that the international e-commerce sales (including B2B and B2C) in 2014, covered 33% of the global merchandize value of the platforms which was approximately \$54,038 Million U.S. Dollars.¹³⁷ The report looked at the top 10 companies by retail e-commerce. However, it could not identify which sort of transaction (B2B or B2C) contributed to the global merchandise value.

The growth of the online market intermediaries and international trade increases the specialization and complexity of B2B commerce and the intensifying focus on reducing cost by improving the efficiency of key processes.¹³⁸ This is significant since the efficiencies born from the involvement of such intermediaries will lead to higher

¹³⁷ United Nations Conference on Trade and Development, ‘In Search of Cross-Border E-Commerce Trade Data’, TN/UNCTAD/ICT4D/2016,p. 12.

¹³⁸ Maureen Fleming, ‘Process Management and Middleware’ (2008) <<http://www.marketresearch.com/IDC-v2477/Worldwide-Business-Middleware-Vendor-Shares-2552177/#toc>> Accessed 28 Feb 2014.

growth rates.¹³⁹ Moreover such online market intermediaries can help Small Medium Sized companies based in developing countries to participate in international supply chain markets and access the export market more easily.¹⁴⁰

The higher growth rate of B2B transactions, the participation of developing countries in such transactions and their international nature, require an efficient, cost effective, borderless means of dispute resolution which can adapt to the particular features of such disputes. This will also help with remedying power imbalance that sometimes may exist in B2B disputes. Evidently, dispute settlement, contractual clarity and means of payment have been paramount for suppliers and buyers and online market intermediaries can bring about more trust and growth by providing these elements.¹⁴¹ Having a dispute resolution mechanism that enforces the outcome effectively might in the long run have macro economic effects, for example it increases the international trade. This is evidenced in empirical research that has been carried out about arbitration. In an empirical study, Wang found that accession to New York Convention could amount to increase in international trade.¹⁴² The rationale behind such increase is that the greater the enforceability of certain dispute resolution mechanism is, the greater chance is for the parties to enter international trade contracts. Hence the existence of a dispute resolution mechanism in online market intermediaries in the long run might contribute to increase in international trade.

139 Merrill Warkentin, *Business to Business Electronic Commerce: Challenges and Solutions* (Idea Group Publishing London 2002) 3, as it was shown by IDC (*International Data Corporation*) study which looked at the worldwide business-to-business (B2B) middleware vendor share from 2006 to 2008, the multibillion-dollar B2B middleware market grew at a healthy rate in 2008. M Fleming, *Business Process Management and Middleware 2008 vendor share (2009)* <<http://www.Idc.Com/Getdoc.Jsp?Sessionid=&Containerid=221395&Sessionid=Osgad5t5bw24ycqjaficffakbeaumiw>> Accessed 7 March 2016.

140 United Nations Conference On Trade and Development, 'Information Economy Report: Unlocking the Potential of E-commerce for Developing Countries' (2015) United Nations Publication, UNCTAD/IER/2015,47.

141 Maria Perogianni, *B2B Internet Trading Platforms: Opportunities and Barriers for Smes* (Office for Official Publications of the European Communities 2003) 21. According to the report, "The open consultation of the Enterprise Directorate-General on B2B related trust issues, conducted between March and May 2002, confirms that the most important trust barriers for the use of e-marketplaces for on-line purchasing, as perceived by companies, are the uncertainties related to confidentiality of sensitive data (60,7 %), the lack of clear information on the terms and conditions of the contract (57,1 %), the uncertainties related to security issues (55,4 %), to on-line payments (51,8 %) and to the settlement of disputes (51,8 %). The most important trust barriers to the use of emarketplaces for on-line selling are the uncertainties related to the confidentiality of sensitive data (58,9 %), to security issues (51,8 %) and to the settlement of disputes (51,8 %)".

142 Yu Wang, 'The Effect of State-Endorsed Arbitration Institutions on International Trade', (2008)13 *New Pol. Econ.* 419, 421

1.3 Literature Review

The current literature review looks at the approach of scholars and initiatives to justice systems on the Internet and the theories that have been applied to such justice systems. As was previously stated, the Internet provides a space where the central power of the state does not strongly dominate or take control of economic activity. New justice systems on the Internet flourished as state's authority to coordinate behavior in cyberspace was absent.¹⁴³ These new justice systems have been largely studied under the title of Online Dispute Resolution.

Online Dispute Resolution is a dispute resolution method that resolves the dispute between two or more parties using various dispute resolution mechanisms such as arbitration, third party evaluation, mediation and conciliation. It mainly occurs online by the use of information technology and Internet communication applications.¹⁴⁴ ODR providers may use other means of telecommunication combined with the Internet in order to provide their services. Scholars have made distinctions between various kinds of ODRs. These distinctions can be broadly categorized based on the level of technology used in resolving the dispute and the dispute resolution method. Wahab has divided the ODR schemes into three distinctive groups: technology-assisted ODR mechanisms by which technology is used as a medium of communication, technology-based ODR mechanism sophisticated; comprehensive online application is used to resolve disputes, and technology facilitated online dispute prevention which reduces the occurrence of disputes and enhances trust.¹⁴⁵

ODR processes use the Internet as a tool to facilitate dispute resolution, however, the Internet also facilitates the creation of various virtual communities, networks and intermediaries that might face disputes.¹⁴⁶ Internet has led to specialization of more fields and in the field of dispute resolution, there has been much improvement and progress by using the Internet as a means of facilitating the resolution of disputes. However, the Internet is not only a means of communication, but also a means to allow

¹⁴³ Orna Rabinovich-Einy and Ethan Katsh, 'Technology and the Future of Dispute Systems Design' (2012) 17 Harv Negotiation L Rev 151, 164.

¹⁴⁴ Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press United Kingdom 2009).

¹⁴⁵ Abdel Wahab, *ODR and E- Arbitration: Trends and Challenges in Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (2012) Eleven International Publishing.

¹⁴⁶ Bruno Deffains and Yannick Gabuthy, 'Efficiency of Online Dispute Resolution: A Case Study' (2005) 60 Communications and Strategies 201.

the proliferation of communities and networks which are constantly evolving. For example, online expats communities, online merchants and civil society communities have used the Internet as a space for discussion and shaping activities, ideas and policies. These communities sometimes have dispute resolution in place, which is mostly carried out online. The justice system that is provided by such virtual communities and by online market intermediaries is especially more effective than the standalone online dispute resolution mechanisms.¹⁴⁷

The literature on online dispute resolution has focused mostly on the process of ODR and how it can be more procedurally just. Scholars, international organizations and the private sector have studied the modalities of ODR in order to achieve justice in e-commerce disputes through the online mechanisms. The literature on ODRs mostly focuses on how to make ODRs more successful by bringing about procedural justice. The seminal work that started this debate was by Thornburg. She considered the Internet where the traditional court had become irrelevant and the private sector held a dominant role in providing the public good of dispute resolution.¹⁴⁸ She argued that most of the due process aspects (which are related to procedural justice) such as neutrality, discovery, hearing and other aspects might disappear when the justice system is privatized.

Other scholarly research has also focused on how ODR systems uphold procedural justice. By applying theories of due process and procedural justice, their research mostly suggests how to regulate ODR mechanisms. Cho sets the theoretical procedural values for procedural justice and argues that Internet disputes, even if private, can have social welfare effects and raise public interest issues and emphasizes the role of public national, subnational and international authority to oversee these systems¹⁴⁹ and suggests a new regulatory design for the ODR mechanisms.¹⁵⁰ Hörnle also focuses on

147 The effectiveness of OMI's dispute resolution is discussed in section 2.5. Such effectiveness stems from the general ex ante (pre-dispute) consideration of certain enforcement mechanisms that allows the OMI to enforce the outcome easier than other ODR providers.

148 Elizabeth G Thornburg, 'Fast, Cheap & out of Control: Lessons from the Iccann Dispute Resolution Process' (2001) 7 *Journal of Small & Emerging Business Law*, 153.

149 Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet* 2.

150 Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet*.

the procedural justice elements in ODR for resolving Internet disputes and suggests how to bind ODR providers to a certain due process standard.¹⁵¹

Arbitration institutions and tribunal, law associations and international organizations¹⁵² have also provided guidelines for ODR providers. The International Chamber of Commerce has provided best practice guidelines for ODR providers to use in Business-to-Consumers and Consumer-to-Consumer disputes. The criteria that they have considered for the ODR providers are, inter alia, accessibility, neutrality, mode of communication, security of communication, transparency and informational justice (providing information as to the time, cost, and other matters related to the dispute).¹⁵³ American Bar Association has also made a recommendation as to how to provide procedural justice for the disputants.¹⁵⁴ It recommends the steps that ODR providers should take in order to maintain procedural justice. For example, it recommends how to maintain neutrality by holding the neutrals accountable. Under section VI of the best practice, the ODR provider must disclose all matters that might raise a reasonable question about the impartiality of the provider, information about referral compensation should also be disclosed, the ODR provider is also responsible for establishing whether the neutral might have any conflicts of interest. It recommends the ODR providers to transparently inform the parties as to the cost of the procedure and its duration.

151 Hörnle, *Cross-Border Internet Dispute Resolution*.

152 Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce, American Bar Association Task Force on Ecommerce and ADR, Recommended best practices for online dispute resolution service providers

CEN (European Committee of Standardization) Workshop Agreement on Standardisation of Online Dispute Resolution Tools (2007), European Code of Conduct for Mediators 2004, European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, Recommendation 98/257/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation, Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce, International Chamber of Commerce, Resolving disputes online, Best practices for Online Dispute Resolution (ODR) in B2C and C2C transactions 2003, OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999), OECD Recommendation on Consumer Dispute Resolution and Redress (2007), Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure; Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Uniform Domain Name Dispute Resolution Policy and Rules for Uniform Domain Name Dispute Resolution Policy, 2007 report of the Association of Southeast Asian Nations (ASEAN) on Consumer Protection.

153 International Chamber of Commerce, 'Ice Best Practices for Online Dispute Resolution (Odr) for B2C and C2c Transactions' (2003) Commission on E-Business, IT and Telecoms Task Force on Consumer Policy for E-Business.

154 'Recommended Best Practices for Online Dispute Resolution Service Providers' American Bar Association Task Force on e-commerce And ADR.

UNCITRAL Working Group on Online Dispute Resolution¹⁵⁵ has been working on the procedural issues that may rise in ODR platforms and mechanisms and is in the process of developing the rules for such procedures. Others have also addressed the issue such as how these systems should be regulated and what characteristics they should hold and how they should follow the principles of fairness.¹⁵⁶ The harmonization of the process for ODR providers has not yet been successful. Like many other harmonization efforts, implementing these guidelines run into obstacles due to differences in commercial practice as well as differences in legal approaches.¹⁵⁷

There are also differences among scholars on the principles that the ODR systems should follow, some arguing for less lengthy procedures and some expressing the need for strict due process compliance.¹⁵⁸ This might be due to the general inclination that the scholars have in generalizing the needs of parties to a dispute to a different context and not considering the parties' preferences in a particular context, for a certain set of criteria. While it is important to consider the society's interest in the interaction of citizens and the role of regulatory authorities in coordinating the relationship, such focus should not preclude what the disputants' needs are.¹⁵⁹

Different ODR models have been studied¹⁶⁰ and different rules and regulations about such systems have been enacted.¹⁶¹ ODR systems have been studied either as standalone systems that provide dispute resolution only or as intermediaries that provide such services to their client as a part of the transaction.

¹⁵⁵ According to the UNCITRAL Working Group on ODR para 38.1, "ODR" means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology. " Online Dispute Resolution For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, United Nations Commission on International Trade Law Working Group III (Online dispute resolution) A/CN.9/WG.III/WP.127, 8, this definition includes both private justice system and state-supported justice systems.

¹⁵⁶ Julia Hörnle, Cross-Border Internet Dispute Resolution.

¹⁵⁷ Henry Deeb Gabriel, 'Advantages of Soft Law in International Commercial Law: The Role of Unidroit, Uncitral, and the Hague Conference' (2008 - 2009) 34 *BrookJINT'L L* 655, 660.

¹⁵⁸ Schultz, 'Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle'.

¹⁵⁹ Tom R Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform' (1997) *The American Journal of Comparative Law* 871, 975.

¹⁶⁰ Colin Rule, *Online Dispute Resolution for Business: B2b, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass 2003) Orna Rabinovich-Einy and Ethan Katsh, 'Lessons from Online Dispute Resolution for Dispute Systems Design' in *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012).

¹⁶¹ The European Parliament and the Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (2013) OJ L 165/63).

State regulation is however slow and not effective. The approach that scholars have adopted to apply strict due process and procedural justice on ODR does not yield efficient results. The studies on ODR have not considered other theories of procedural justice that focus on providing a balance and tradeoff between accuracy and participation. Moreover, these studies have merely focused on the theoretical perspective of procedural justice and have not looked into the parties preferences for certain criteria, and the setting of disputes have been either B2C or merely B2B disputes go unnoticed or is treated similar to B2C disputes.¹⁶²

The regulatory framework that some have insisted upon might not be as effective. In the absence of formal institutions (government support) for effective regulation of ODR, the design of these mechanisms can have a direct effect on their provision of procedural justice. In fact the most likely causes of such failure might be that ODR systems have not emphasized their dispute resolution designs.¹⁶³ They have mostly engaged with the tools they could use and applied them on ad hoc basis without considering the nature of disputes, the parties to the disputes and other factors that are important for designing dispute resolution systems.

The ODR literature also mainly provides laundry lists of criteria that ODR processes should uphold.¹⁶⁴ The lists are mainly based on ODR initiatives, consumer rights initiatives and European Directives.¹⁶⁵ However taking the approach of Rabinovich and Katsh¹⁶⁶ this thesis argues that the studies on ODR should focus more on ODR designs and settings and analyze how the design of a certain ODR process affects procedural justice. This also applies to the best practices and guidelines that

162 For example, Hörnle's book on cross border Internet disputes considers disputes between a corporate entity and an individual because of the presumed power imbalance but does not treat such disputes differently. She wrote "This does not limit the focus on B2C only and can be about B2B when business takes place between a sole trader and a large corporation but it does not cover other kinds of B2B disputes i.e. when the parties are large corporation and SMEs or large corporations in general." Hörnle, *Cross-Border Internet Dispute Resolution* 36.

163 Rabinovich-Einy and Katsh, 'Technology and the Future of Dispute Systems Design', 167.

164 Lee Bygrave, 'Online Dispute Resolution—What It Means for Consumers' (2002) 7 Conference on Domain Name Systems and Internet Governance.

165 Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet*; Bygrave, 'Online Dispute Resolution—What It Means for Consumers'; Hörnle, *Cross-Border Internet Dispute Resolution*.

166 Rabinovich-Einy and Katsh, 'Lessons from Online Dispute Resolution for Dispute Systems Design'.

have been issued for ODR providers. Best practices and guidelines that are shaped in a manner of one size fits all are not applicable and do not yield the desired outcome.¹⁶⁷

Additionally, when the design of the ODR providers has been discussed, the implementation of such design has been problematic.¹⁶⁸ Studies have investigated how ODR systems can be implemented by looking at the existing ODR mechanisms such as the ICANN domain name dispute resolution system.¹⁶⁹ More diverse research, however, is needed to explore the various successful ODR platforms and their design.

The lack of focus on the design of ODR and their setting has caused lack of focus on B2B disputes as well. There is a myriad of research on business to consumer disputes online, however B2B disputes go mostly unnoticed or are not studied as a specific branch of disputes. This thesis aims to bring attention to the B2B disputes, especially from the angle of how OMIs resolve or can potentially resolve B2B disputes.

Analyzing the design of ODR can provide an outlook on how ODR mechanisms can provide procedural justice, i.e. provide incentives for participating in the process, use the power of technology for providing more efficiency and accessibility and ensuring the enforceability of the outcome.¹⁷⁰

OMIs have been more successful in using ODR various forms than standalone or entrepreneurial ODR providers. The success of OMIs justice system rests on their power to resolve the dispute and enforce the award.¹⁷¹ This has been lacking in standalone ODRs. The design of such intermediaries, regardless of being online or offline, has been discussed in detail by economists such as Williamson and Dixit.¹⁷² Due to the relative success of these intermediaries online, it is important to carry out an

¹⁶⁷ Tom Ginsburg, 'Pitfalls of Measuring the Rule of Law' (2011) 3 Hague Journal on the Rule of Law 269, 272. Pablo Cortés and Fernando Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes' (2013) 62 International and Comparative Law Quarterly 407, 411.

¹⁶⁸ Michael G. Bowers, 'Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework' (2011) 64 Vanderbilt Law Review 1265, 1267.

¹⁶⁹ Michael G. Bowers, 'Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework' 1267.

¹⁷⁰ Cortés and de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes', 411.

¹⁷¹ Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists'.

¹⁷² See Dixit, *Lawlessness and Economics: Alternative Modes of Governance*.

in-depth analysis on how these intermediaries dispute resolution functions online and if they uphold the procedural justice criteria where the state is weak or absent.

1.4 The Gap in the Literature

While extensive research has been carried out about procedural justice in online dispute resolution and various normative values have been set and discussed, positive studies on what procedural justice is from the users perspective have not been fully explored.¹⁷³ Moreover, while the major focus has been on the design of the regulatory framework to achieve procedural justice and due process,¹⁷⁴ there has not been much focus on the design of such private justice systems, especially on the Internet. Lisa Bingham emphasizes the importance of focusing on the design of the institutions, she states that “the most significant issues for the future are: we must become more mindful of how designing institutions and systems to manage conflict affects justice, we should move more knowingly and intentionally to assess justice in dispute system design.”¹⁷⁵

Moreover, in broader scholarly works, scholars have not sought to influence the development of private regimes by making them accountable to a set of normative criteria. This has been done in the public realm when jurists subjected the nation states to the rule of law.¹⁷⁶ This research also attempts to consider influencing the development of private regimes, specifically online dispute resolution and online market intermediaries dispute resolution by studying their dispute resolution design and providing an evaluation model by which their adherence to procedural justice can be measured. .

There is generally a lack of focus on private international market player’s role in resolving commercial disputes other than the states. Specifically, in international

¹⁷³ For a study of normative values of procedural justice in an online dispute resolution study refer to Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet*.

¹⁷⁴ See Cho *International Commercial Online Dispute Resolution: Just Procedure through the Internet* and Hörnle, *Cross-Border Internet Dispute Resolution*

¹⁷⁵ Bingham, ‘Designing Justice: Legal Institutions and Other Systems for Managing Conflict’, 3.

¹⁷⁶ Graf-Peter Calliess, ‘Transnational Civil Regimes: Economic Globalisation and the Evolution of Commercial Law’ in *Contractual Certainty in International Trade Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (2008) 217; Calliess, ‘Transnational Civil Regimes: Economic Globalisation and the Evolution of Commercial Law’.

relations, the design of intergovernmental regimes has been studied while the private institutional arrangements that can remedy market failures have been overlooked.¹⁷⁷

Until present, international trade has been successful without predictive legal institutions. The institutional gap has been filled by various actors such as law firms and trade association, networks and interfirm relations. Networks and inter-firm relationships have been strengthened by developments in communication technology and the use of the Internet. It has also enabled the parties to control the transactions in real time.¹⁷⁸

While some of the traditional actors such as law firms and trade association roles have been considered in providing dispute resolution mechanisms and contractual certainty,¹⁷⁹ there is even less attention paid to the similar actors and their dispute resolution mechanisms that are available on the Internet, such as online intermediaries. Alternatively, it has been assumed that the dispute resolution that is used by these intermediaries does not uphold procedural justice.¹⁸⁰

This thesis endeavors to understand the design of Internet intermediaries' dispute resolution mechanisms and how such mechanisms can be evaluated in terms of procedural justice. Understanding the design of justice systems and how they affect procedural justice not only move us forward to achieve fairness in private dispute resolution, but can also provide insights as to which private dispute resolution design and policies can succeed in upholding procedural justice.¹⁸¹

177 Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55 *International Organization* 919, 923.

178 Volkmar Gessner, 'Towards a Theoretical Framework for Contractual Certainty in Global Trade' (2008) *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* 1, 21.

179 Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *The Journal of Legal Studies* 115.

180 Hörnle, *Cross-Border Internet Dispute Resolution* 44. Hörnle states that "Finally, in the context of an argument on the fair resolution of Internet disputes, it also has to be pointed out that they do not provide for due process and a fair hearing. Saying that chargebacks provide a remedy to buyers in E-commerce transactions in many instances is not the same as saying that they provide a fair means of dispute resolution." She does not however extensively analyze the online payment intermediaries dispute resolution agreements or consider their design and the perspective of the users to evaluate whether they uphold procedural justice or due process.

181 For the importance of discussing the optimal policies that can enhance justice see Maurits Barendrecht, 'Growing Justice: Justice Policies and Transaction Costs' Tilburg University Legal Studies Working Paper No 013/2009, 6.

1.5 Research Questions and Research Methods

The overarching question that this thesis poses is: Do Business-to-Business OMIs uphold the procedural criteria of justice in B2B disputes? The sub-questions entail: What online private actors are involved in B2B disputes? (Chapter 2) What is procedural justice in a B2B environment? (Chapter 3) How are OMI's dispute resolution mechanisms designed? (Chapter 4) How should the OMIs' dispute management design be evaluated (Chapter 5) Does the current design of OMI's dispute system influence procedural justice? (Empirical research) (Chapter 6), What are the incentives and deterrents for OMIs to uphold procedural justice? (Chapter 7) and what is the optimal design for OMIs' dispute resolution (Chapter 8).

In order to address the overarching question, the first step is to clarify the connection between online private actors and B2B disputes. The concepts should be clarified as to how B2B disputes arise and why they are important; what online intermediaries are in general and how they get involved with dispute resolution; and which online private actors play a role in resolving disputes in B2B transactions in general and how online market intermediaries get involved.

This thesis will then carry out normative and positive analyses that identify the procedural implications of justice. As well as considering the criteria of procedural fairness, it investigates the empirical analysis that identifies the user perception justice, especially within the firms' preferences.

The thesis will then provide a descriptive analysis of OMIs, assessing their institutional design based on how they provide the procedural criteria of justice. In order to do so, it identifies those OMIs that provide a justice system for the B2B traders. Ostrom attempts to identify an underlying set of universal building blocks and to lay out a method for researching institutions and how they function. Using the identification method, the research introduces the design of the OMIs using Ostrom's criteria for identifying institutions. This method was suggested by Bingham,¹⁸² for analyzing private justice systems and is appropriate for this part of the thesis. Ostrom introduces 7 criteria for identifying institutions: “ 1) the set of participants [single

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Lisa Blomgren Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict' (2008) 24 Ohio St J on Disp Resol 1, 12.

individuals or corporate actors], (2) the positions to be filled by participants, (3) the potential outcomes, (4) the set of allowable actions and the function that maps actions into realized outcomes [action-outcome linkages], (5) the control that an individual has in regards to this function, (6) the information available to participants about actions and outcomes and their linkages, and (7) the costs and benefits-which serve as incentives and deterrents-assigned to actions and outcomes.”¹⁸³ Using these building blocks the dispute system design of OMIs will be clarified.

By then looking into the OMIs terms and conditions, service agreements and other possible sources, the thesis will assess which elements influence the criteria of procedural justice in OMIs dispute system design. The use of terms and conditions and service agreements as preliminary sources is due to lack of access to the outcome of dispute resolution that OMIs offer.¹⁸⁴

The thesis also considers the incentives and deterrents for OMIs to uphold procedural justice. To do so, transaction costs economics will be applied. Transaction costs “are the costs of specifying and enforcing the contracts that underlie exchange. They include all the costs involved in capturing the gains from trade”.¹⁸⁵ Transaction costs add to the price of a good or service, and involve search costs, information costs, bargaining costs, decision costs, policing costs and enforcement costs.¹⁸⁶ OMIs are usually created when transaction costs are too high due to uncertainty, inaccessibility of enforcement mechanisms, and other reasons that might be related to procedural justice. In this sense, OMIs are economic agents that can reduce the transaction costs of monitoring, payment and enforcement. OMIs that provide a justice system that is effective can reduce the transaction costs for B2B traders. This might encourage the intermediaries to provide this service. Conversely, there are transaction costs involved with providing a private justice system that might deter OMIs from providing such service or upholding procedural justice. For example, the intermediary might incur high costs to provide such criteria. They are only viable if they reduce the transaction cost,

183 Elinor Ostrom, *Understanding Institutional Diversity* (Princeton university press 2009).

184 For a full review of problems facing researchers to access the outcome of dispute resolution see Bingham, ‘Designing Justice: Legal Institutions and Other Systems for Managing Conflict’, 25.

185 Douglass C. North, ‘Government and the Cost of Exchange in History’ (1984) 44 *The Journal of Economic History* 256.

186 Larry Downes and Chunka Mui, ‘Unleashing the Killer App’ (1998) Harvard Business School Press, Boston, MA.

so intermediation and provision of justice can only be advantageous if the increase of value added through intermediation overcompensates the transaction costs additionally incurred.¹⁸⁷

To sum up, the thesis structure is as follows: the first phase of research focuses on describing how B2B disputes arise on the Internet and why they are an important focus. It will then move forward to describe different online private actors that get involved with resolving disputes on the Internet.

The second phase (chapter 3) focuses on procedural justice and its indicators. It provides a background on theories of procedural justice then proceeds to provide the overarching criteria for upholding procedural justice. In order to introduce the procedural criteria of justice, it uses the scholarly sources on the necessary components of procedural justice, the general user perception of procedural justice and the firms' preferences that are aligned with the procedural elements of the rule procedural justice.

In Chapter 4, Ostrom's institutional design identification will be used to identify the design of online market intermediaries. The questions such as who designs the dispute resolution system, who has control over the process, what is the enforcement mechanism, and other factors that Ostrom considers for identifying the institutional design of entities will be considered.

Chapter 5 lays out the dispute system design elements that affect the procedural justice criteria established in Chapter 3. This will provide a tool for evaluation of OMIs justice system which takes place in Chapter 6. Chapter 7 discusses the OMIs incentives and deterrents in providing a justice system and upholding procedural justice and based on the findings in Chapter 6 and 7, the optimal design for OMIs' justice system will be investigated in Chapter 8.

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Frank Rose, *The Economics, Concept, and Design of Information Intermediaries: A Theoretic Approach* (Physica-Verlag Heidelberg 1999).

2 Private Actors in Online B2B Disputes

A nexus of various private actors creates Private Justice Systems on the Internet. The justice systems are designed mostly through contracts between the users and the platforms. Each function of the justice system might be carried out by one or more set of private actors. Justice systems carry out rule making, adjudication and enforcement.¹⁸⁸ Private actors might be involved in carrying out only one or more of these functions. As this thesis focuses on dispute resolution, it only considers the private actors that provide adjudication and enforcement of the outcome, using online dispute resolution. A full descriptive analysis and definition of online market intermediaries and their various kinds will also allow the evaluation and analysis of their dispute resolution institutions in the following chapters.

This chapter first defines B2B transactions and disputes that might arise from such transactions. It describes how these disputes might arise and why it is important to focus on such disputes. It will then proceed to explain how different private actors participate in resolving B2B disputes. In order to do so, section 2.2 describes the role of Internet intermediaries in dispute resolution in general and section 2.3 further elaborates on online market intermediaries various kinds. Section 2.4 focuses on the OMIs role in contractual enforcement that is its primary function in providing a justice system for B2B disputes. Section 2.5 focuses on online payment intermediaries, which are also involved in resolving B2B disputes, either in an OMI platform or independently. The chapter does not go into the details of the dispute resolution structure of OMIs. This will be addressed when their institutional design is considered Chapter 4. The analysis here takes place descriptively by explaining the concepts and giving some concrete examples.

2.1 Online B2B Disputes

B2B disputes arise between suppliers and buyers that transact with each other, using an Online Market Intermediary. A scenario can clarify the nature of these disputes: A

¹⁸⁸ Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists'.

German buyer purchases some merchandise in bulk from a Chinese supplier through a platform called www.alibaba.com. A dispute might arise if the buyer does not receive the merchandise on time, or the merchandise is defective or if the supplier does not receive the money.

There has generally been a lack of focus on B2B transactions and disputes among scholars. This is generally due to the fact that B2B disputes, especially between SMEs and large corporations, or those disputes that arise from low value transactions are subject to the same procedural safeguards as B2C disputes. The parties in the dispute need similar protection, especially if they are at an unequal bargaining power position.¹⁸⁹ This has led to UNCITRAL working group on online dispute resolution not to make a distinction on purpose between these low value disputes in B2B and B2C transactions.¹⁹⁰

The necessity of more protection for SMEs has also been acknowledged in the process of drafting the European Contract Law and they have been treated similar to B2C.¹⁹¹ The European Contract Law is of special relevance to B2B disputes as it has also discussed the differences of their contracts and their disputes. In the course of consultations for drafting the European Contract Law, the Council of the European Union has acknowledged the importance of drawing a distinction between B2B and B2C contracts.¹⁹² The European parliament resolution adds that the European Contract Law should take into account the differences of B2C and B2B, existing practices and principles of contractual freedom have to be preserved regarding B2B contracts.¹⁹³ It

¹⁸⁹ Martijn W Hesselink, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (2010) 18 *European Review of Private Law* 57.

¹⁹⁰ UNGA, 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-second session, United Nations Commission on International Trade Law 48th Session' (11 January 2011) UN. Doc A/CN.9/716, para. 14.

¹⁹¹ European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (2011/2013(INI)).

¹⁹² In a meeting on competitiveness, the Council emphasized that there is a need to acknowledge the distinction between business-to-business and business-to-consumers', see Council of the European Union, 29694th Council Meeting, Brussels, 28-29 November 2005, 1455/05(Press 287), P.29, Para 13. The paragraph reads as "EMPHASISES: The need for work to focus on practical issues in order to deliver real benefits to consumers and business; in this regard, the need to acknowledge the distinction between business-to-consumer and business-to-business contracts.";

¹⁹³ European Parliament resolution 2005/2022 of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses, clause 18 2011/2013(INI). Hereafter, European Contract Law Resolution. Paragraph 18 of the resolution reads as: 18. [the council] Further believes, taking into account the special nature of the different contracts, especially B2C and B2B contracts, leading national and international principles of contract law, and the fundamental principle of a high degree of consumer protection, that existing branch practices and the principle of contractual freedom have to be preserved regarding B2B contracts..

also calls the commission to distinguish between the B2B and B2C sectors and separate the two systematically.¹⁹⁴ However, the resolution states that the term “business” covers more than just large corporations and includes sole traders and small businesses. Therefore the vulnerability of these types of businesses should be acknowledged and they require contracts that are especially tailored to their needs.¹⁹⁵ Clause 11 of the resolution also states that attention is required for ensuring that the model contract law offers protection to consumers and small businesses given their position as the weaker commercial partner.¹⁹⁶ Hence despite the emphasis on distinguishing B2B from B2C, the resolution treats SMEs in B2B transactions as consumers and the B2B trade involving an SME can be classified as B2C transaction, which contradicts the purpose of the resolution to provide a major distinction between B2B and B2C trade.

B2B disputes can also go unnoticed in Alternative Dispute Resolution regulations. ADR Directive, issued by the European Union, is for the protection of consumers in terms of access to alternative dispute resolution in both online and offline transactions. It has been specifically stated that the principles of the directives do not apply to transactions between traders, and the B2B disputes are not subject to the ADR Directive hence they are unattended.¹⁹⁷ Although during the consultations, it was recommended to look into provisions for B2B ADR, the attempts did not result in enacting separate directives for these disputes and the Commission did not act on issuing a separate Directive on B2B ADR, arguing that:

“The Commission has examined the coverage and quality of B2B ADR in the Member States, in particular from a cross-border point of view, and the problems businesses may face when trying to resolve problems with other businesses. However, on the basis of the information collected by the Commission there is no evidence that an EU action in the field of B2B ADR is needed. The existing EU acquis in the area of ADR – which includes the mediation Directive and the

194 European Contract Law resolution, Clause 16 of the same resolution notes that the contract law provisions governing B2B and B2C contracts respectively should be framed differently, out of respect for the shared traditions of national legal systems and in order to place special emphasis on the protection of the weaker contractual party, namely consumers.

195 European Contract Law Resolution, Clause 4 and 5.

196 European Contract Law Resolution.

197 European Directive on ADR, 2013 165/65, Recital 16 , and Chapter 1 Article 2(2)(d).

ADR and ODR Regulation already cover a large number of situations where ADR schemes can be used.”¹⁹⁸

In summary, online B2B disputes and dispute resolution mechanisms have either not been investigated with regards to procedural justice issues or have been treated similar to B2C disputes when SMEs were involved. It is however doubtful that SMEs in B2B disputes are always in a weaker position and should be treated similar to consumers. SMEs and consumers activities and characteristics are not of a similar nature. As the International Chamber of Commerce in a position paper emphasized that

“While it is true that parties to a B2B contract will not necessarily be in an equally strong position, it does not follow from this that the weaker party to the contract should be treated like a private consumer. Furthermore, an SME is not automatically the weaker party when dealing with a larger company – the bargaining power of a company is due not only to its size, but also to other factors, primarily its position in the marketplace, for example as a technology leader.”¹⁹⁹

Applying B2C procedural and contractual safeguards to B2B disputes might not protect the weaker party to B2B dispute at all or impose unwanted protection on the B2B parties by applying B2C protection to B2B disputes. There are differences between SMEs and Consumers, especially in B2B e-commerce. These differences can directly affect the power balance between the parties, either increasing or decreasing the balance.

Moreover, the preferences of B2B actors for dispute resolution mechanism are different from those in B2C. The parties in B2B disputes prefer, as much as possible, to resolve their disputes privately rather than seeking recourse from court. The complaints that are filed against intermediaries such as eBay and the lawsuits that are brought against such intermediaries and their dispute resolution process have been

¹⁹⁸ Author Correspondence with European Commission, 7 April 2014.

¹⁹⁹ ICC Commission on Commercial Law and Practice, ‘ICC Position on the European Commission proposal for a regulation on a Common European Sales Law’ (No. 460/662 – 12 July 2012) International Chamber of Commerce, 1. Some disagree and believe that treating SMEs as an equal in B2B disputes and contradicts with justice. See Klijnsma, J. G. (2010). SMEs in European Contract Law: A Rawlsian Perspective. Centre for the Study of European Contract Law Working Paper, (2010/05).

mainly by consumers.²⁰⁰ There is no evidence of lawsuits in the United States that have been brought against an online market intermediary that challenges the outcome of the dispute resolution mechanism in B2B.

Therefore, treating B2B and B2C disputes similarly with recent developments on the B2B front might not continue to be correct. A simple example illustrates the consequences of applying B2C principles for procedural justice to B2B disputes. According to European directive on ADR, the dispute resolution services cannot issue a binding resolution for the consumers. Binding resolutions can only be applied to businesses.²⁰¹

Application of this rule to B2B disputes might result in the stronger party forgoing the contract, resulting in economic loss for both SME and large corporations. In the case of non-enforceability of an outcome for one of the parties, the effectiveness of the dispute resolution process is hampered. Effectiveness is one of the major procedural justice criteria that all businesses value. The buyer must have sufficient confidence in order to be willing to do business with small businesses or less known brands.²⁰² If the dispute resolution process outcome is not effective, especially when the large corporation does not have access to public court (due to corruption or weakness of the public court), then the non-binding nature of the arbitration awards makes the dispute resolution mechanism ineffective for the large corporation. Binding dispute resolution is important for all businesses, especially if they trade long distance or depend on decisions that are speedy and provide a quick remedy.²⁰³ This is especially the case for

200 In *Roberts v. Ebay Inc et al.*, No. 6-2014cv04904 (D.S.C. Dec.30. 2014) the plaintiff alleged that in resolving the dispute between him and the buyer, eBay did not take into account his side of the story and the evidence he provided. In *Campbell vs. eBay Inc and Paypal Inc.*, No5:13-cv-02632 (ND. Cal. 7. June.2013), Paragraph 8, which lead to a class action suit, the plaintiff alleged that eBay sides with the buyers and their dispute resolution mechanism is unfair. The seller argued that eBay restricts the usage of the seller account based on arbitrary measures.

201 Directive on Consumer ADR, clause 49. "This Directive should not require the participation of traders in ADR procedures to be mandatory or the outcome of such procedures to be binding on traders, when a consumer has lodged a complaint against them. However, in order to ensure that consumers have access to redress and that they are not obliged to forego their claims, traders should be encouraged as far as possible to participate in ADR procedures. Therefore, this Directive should be without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system as provided for in Article 47 of the Charter of Fundamental Rights of the European Union"

202 Commission and Staff Report, 'Entering The 21 Century, Competition Policy in The World Of B2B Electronic Market Place' (2000) Federal Trade Commission 12.

203 Gabrielle Kaufmann-Kohler, 'Online Dispute Resolution and Its Significance for International Commercial Arbitration' (2005) *Global Reflections on International Law, Commerce and Dispute Resolution Liber Amicorum* in honour of Robert Briner International Chambers of Commerce 439, 456.

companies that are located in developing countries but intend to carry out trade with companies in the developed world. The companies in the developed world might not enter into a contract with those in developing countries if they cannot seek an effective remedy, regardless of their size.

2.2 Online Intermediaries

To study and evaluate the OMI's dispute resolution, it is first necessary to look at the online intermediaries in general and their definition. The online intermediary is a term that applies to almost any intermediary that facilitates any kind of transaction on the Internet. A universally agreed upon definition for online intermediaries is lacking.²⁰⁴ Online intermediaries can be defined broadly as third party platforms that mediate between digital content and humans who contribute to and access this content. These intermediaries are usually private for-profit corporations that do not provide actual content but rather facilitate information or financial transactions among those who provide and access content.²⁰⁵

DeNardis categorizes different intermediaries into the following: search engines, social media platforms, blogging platforms, content aggregation sites, reputation engines, financial intermediaries, trust intermediaries, application intermediaries, locational intermediaries and advertising intermediaries.²⁰⁶

Depending on the jurisdiction of which the online intermediaries are based, they can get involved with resolving some very important and complicated policy questions and can autonomously respond to complaints on various issues such as determining sexual harassment, child pornography and copyright infringement and can make the decision to remove materials from their platform.²⁰⁷

204 Gasser and Schulz, 'Governance of Online Intermediaries: Observations from a Series of National Case Studies', 1.

205 Gasser and Schulz, 'Governance of Online Intermediaries: Observations from a Series of National Case Studies'; Laura DeNardis, *The Global War for Internet Governance* (Yale University Press 2014); DeNardis, *The Global War for Internet Governance* 154.

206 DeNardis, *The Global War for Internet Governance* 155.

207 Gasser and Schulz, 'Governance of Online Intermediaries: Observations from a Series of National Case Studies', 22.

There are no regulations at the moment to hold intermediaries accountable for the way they resolve disputes between the parties.²⁰⁸ The problem has become even more acute by the judgment of Court of Justice of the European Union (CJEU) issued in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*.²⁰⁹ The judgment obliges Google to resolve the conflict between a person that requests the removal of information that is directly related to that person and the source of the information that happens to appear on Google search engine. The CJEU in this instance has mandated Google to resolve these kinds of disputes. Although parties will have access to court if not satisfied with the outcome, Google is the primary dispute resolution provider in cases of this nature. Moreover, the CJEU does not direct the way Google should resolve the disputes between the parties procedurally.²¹⁰ The involvement of Internet intermediaries with the privatization of justice has brought up controversies, largely related to privacy and censorship.

The problems are not only limited to content intermediaries. Financial intermediaries also have a role in blocking websites and not allowing transactions, without giving any reason. Online reputation systems that allow users to rate the sellers have raised issues as to the fairness of such ratings. Until recently eBay has delegated the resolution of disputes about reputation to NetNeutrals²¹¹ an ODR provider which has a procedure for resolving disputes with regards to reputation feedbacks on eBay. In other cases, the criteria are not clear on how the disputes between two users are resolved. This study will delve into the way that B2B disputes are resolved in order to contribute more insights into how commercial intermediaries provide justice systems.

Before proceeding to define B2B online market intermediaries, it is necessary to understand their differences with other intermediaries. Although B2B online market intermediaries' activities can fall into the category of general content intermediaries, they have some distinctive features. One of the major differences between market intermediaries and content intermediaries is that content intermediaries are created to

208 Technology And Industry Directorate For Science and Computer And Communications Policy Committee For Information, 'The Role of Internet Intermediaries in Advancing Public Policy Objectives Forging Partnerships for Advancing Policy Objectives for the Internet Economy, Part II' (2011) Organisation for Economic Co-operation and Development, 12.

209 Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* [2014] ECR 317.

210 Gasser and Schulz, 'Governance of Online Intermediaries: Observations from a Series of National Case Studies', 8.

211 About us, <https://www.netneutral.com/About-Us.aspx>, Accessed 7 March 2016.

facilitate access to content on the Internet. They are relatively new. B2B market intermediaries however, are not a new phenomenon. There are many traditional market intermediaries that use the Internet to facilitate their transactions. They might have an already established special dispute resolution mechanisms, tailor made to the preferences of their users, hence facing fewer challenges with regards to the satisfaction of the users with the dispute resolution outcome. These differences can assist with clarifying the institutional design of the online market intermediaries' justice systems.

2.3 Online Market Intermediaries

This section focuses on defining and describing various kinds of online market intermediaries. The types of the OMIs are important in distinguishing their role in providing a justice system that upholds procedural justice for their users. The variation of OMIs in their function may attribute to their role in providing justice for their users. Drawing from various traditional definitions of market intermediaries, OMI can be defined as an economic agent that helps buyers and sellers transact on the Internet using various technologies.²¹² Market intermediaries reduce the transaction cost for and coordinate between two or more groups of customers that need each other but cannot capture the value of their mutual attraction on their own.²¹³ They seek out suppliers and find buyers. When parties transact, there are costs associated with the coordination and transaction of resolving disputes, as well as enforcing the agreement and dispute resolution outcome.²¹⁴ The intermediaries help reduce such transaction costs by defining the terms of transactions, managing the payments and holding the inventories.

OMIs are a “many to many” platform type that facilitate transactions among many buyers and many suppliers, as opposed to “one to many” online platforms that facilitate the transaction between one buyer and multiple suppliers. OMIs facilitate the participation of a group of merchants whose involvement with other groups would have

212 Evans, 'Antitrust Issues Raised by the Emerging Global Internet Economy', 294.

213 Evans, 'Antitrust Issues Raised by the Emerging Global Internet Economy', 294.

214 Bryan W Husted and Robert Folger, 'Fairness and Transaction Costs: The Contribution of Organizational Justice Theory to an Integrative Model of Economic Organization' (2004) 15 Organization Science 719.

otherwise been more costly.²¹⁵ As a result of the advent of the Internet, the participation of such groups has increased and the global multisided platforms have flourished. In creating market places in a virtual space, market intermediaries use technology to facilitate interorganizational information and allow buyers and suppliers exchange information, prices and product offering.²¹⁶ This increases the chance of buyers and sellers find their appropriate match.²¹⁷ Moreover, they connect financial intermediaries or institutions to buyers and suppliers and provide a central hub for all the stages of the transaction.

Online market intermediaries can be broadly divided into neutral intermediaries and biased intermediaries. The neutral or independent market intermediaries are not producers themselves.²¹⁸ They provide a platform for trading that anyone can access. Platforms such as Alibaba and eBay belong in this category. The biased intermediaries, as well as providing a B2B platform which creates content and provides access to products information, have a line of production and inventory.²¹⁹

The first B2B exchanges were neutral intermediaries that facilitated spot trading. In spot-purchases buyer's search costs become important, and the relationship between buyers and suppliers is limited.²²⁰ These exchanges are either horizontal cross industry or vertical intra industry. Horizontal intermediaries provide suppliers across various industries and are not industry specific. Vertical intermediaries provide their services to a specific industry.²²¹ They also provide industry-specific news and information, as

215 David S Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2013) National Bureau of Economic Research, 2.

216 Yannis Bakos, 'The Emerging Role of Electronic Marketplaces on the Internet' (1998) 41 Commun ACM 35 ; Roman Brandtweiner and Arno Scharl, 'An Institutional Approach to Modeling the Structure and Functionality of Brokered Electronic Markets' (1999) International Journal of Electronic Commerce 71.

217 Market intermediaries are established due to a friction in the market. Intermediaries provide utility by increasing the chances of a successful match between buyers and sellers, thus the need for an intermediary will come about because of frictions in the market. Thomas F. Cosimano, 'Intermediation' (1996) 63 *Economica* New Series 131.

218 Yoo, Choudhary and Mukhopadhyay, 'Neutral Versus Biased Marketplaces: A Comparison of Electronic B2B Marketplaces with Different Ownership Structures'.

219 Yoo, Choudhary and Mukhopadhyay, *Neutral Versus Biased Marketplaces: A Comparison of Electronic B2B Marketplaces with Different Ownership Structures*.

220 Evans and Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses', 2.

221 Commission and Staff Report, 'Entering The 21 Century, Competition Policy in The World Of B2B Electronic Market Place' (2000) Federal Trade Commission 6. Colin Rule, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass 2003) 124.

well as other value-added services, such as employment opportunities, discussion forums, and event calendars. These benefits can substantially reduce operating costs.

Later on, due to the struggles of spot exchange platforms, other market intermediaries flourished that were producers themselves and either public or private platforms.²²² Private B2B OMIs are owned and operated by a single firm to trade with suppliers and customers. They mainly engage with e-procurement and e-sale.²²³ For example, General Motors provided a supply chain platform online which it took part in with its own line of manufactured products. It is a private intermediary that solely deals with pre-approved members.²²⁴

Public B2B OMIs are different in a way that they provide their platform to the public and every supplier and buyer can join the platform. Public intermediaries might also have a line of products or they might only provide the platform. For example Amazon provides a public B2B platform, but also has its own inventory and products.

Some of the OMIs are multisided platforms and some are of a single function. The multisided platforms provide various functions in one single platform. Their platform can be used for advertising, content generation, B2B and B2C transactions and other functions. This will require the OMI to interact with various groups of merchants and other users from various sectors.²²⁵ The single sided markets focus only on one function, such as facilitating content generation for merchants. They focus on only one group, mainly merchants and can be either buyers or suppliers.

OMIs can also be categorized based on their involvement with contract enforcement. As contractual enforcement is mainly carried out by the justice system they provide, it is important to observe the extent of their involvement with contractual enforcement. The following section is dedicated to considering their role in this realm.

222 For example 6 major automobile producers created Covinsit which was a B2B platform for trading automobile parts.

223 In Lee, *Electronic Commerce Management for Business Activities and Global Enterprises: Competitive Advantages: Competitive Advantages* (IGI Global 2012) 255.

224 Jay Kandampully, 'B2B Relationships and Networks in the Internet Age' (2003) 41 *Management Decision* 443.

225 David Evans and Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, vol 2 (Roger D Blair and D Daniel Sokol eds, Oxford University Press 2014).

2.4 OMIs and Contract Enforcement: Infintermediaries and Infintermediaries

Market intermediaries have three distinctive features: they provide a place to trade, rules to govern trading and an infrastructure to support trading. Dixit discusses the market intermediaries as providers of profit motivated contract enforcement.²²⁶ When there is a market friction, if the government does not provide contract enforcement using general revenues or if such contract enforcement is costly, then a private actor might be able to do so.

Some intermediaries provide information about the members or non-members actions. In some cases the small group of commodity traders trade with their own members and provide information about the members past actions. Some intermediaries provide information about the non-members past actions. For example, credit card approval services by Visa and Master Card provides information about the non-members to the members. These actors provide information about cheating non-members to the members of the network. Alternatively, market intermediaries provide information and sanctioning mechanisms for a large number of traders that can be a combination of members and non-members actors.²²⁷ Moreover, some OMIs within the supply chain management negotiate dispute resolution clauses with the suppliers.²²⁸

Not all the online market intermediaries get involved with direct sanctioning and enforcement of the contracts. Considering the forms of sanctioning and how online market intermediaries provide contractual certainty, they can be divided into two

226 Dixit, *Lawlessness and Economics: Alternative Modes of Governance* 99.

227 The function of intermediaries as contract enforcers can be compared to Law Merchants in medieval times. Dixit makes the historical example of Law Merchant. The intermediaries got involved with contract enforcement – historical example of Weingast, North and Milgrom in 1990 for medieval France:

Each player is matched with a partner who he is unlikely to have met before and unlikely to meet again

Each player in such a pair can by paying a fee query the LM about his current partners past history

Each pair then plays a one time prisoners dilemma game

If either of the players in this game cheat the other can by paying a fee complain to LM but only if the victim had queried LM about the partners history

If such a complaint is lodged the LM investigates at a cost and if appropriate, awards the plaintiff a judgment (monetary restitution)

A losing defendant decides whether to pay judgment, an unpaid judgment is another act of cheating and recorded as a such by the LM ,

Dixit, *Lawlessness and Economics: Alternative Modes of Governance* 99.

228 Robert Monczka and others, *Purchasing and Supply Chain Management* (Cengage Learning 2008) 466.

categories: Inforintermediaries and Enfointermediaries.²²⁹ Inforintermediaries provide a neutral platform for the B2B parties. They are simple catalogue based hubs that do not get involved with the transaction terms and condition and payment services. The Inforintermediaries customers (buyers and sellers) receive select information partially from the platform, however the bargaining over terms and condition of sales take place between the buyers and sellers and the Inforintermediary has no role in that. The businesses offer their goods and services via the intermediary website and another business accepts the offer and enters into a contract for the sale and delivery of goods or services on a separate independent agreement.²³⁰

Enfointermediary consists of an independent online market intermediary, which is established to facilitate multiple buyers purchasing products and/or services from multiple suppliers.²³¹ Enfointermediaries get involved with the transaction and provide dispute resolution mechanism. These mechanisms have been institutionalized in these intermediaries and have not been closely inspected by the legal scholars in terms of upholding procedural justice. A good example of an Enfointermediary is stated in one of the OMI's that is a case study in this thesis. Retracemobile explains its role in contractual enforcement and dispute resolution in a real case study as:

“A buyer was interested in purchasing 3,000 lbs of batteries off the Retrace Mobile Marketplace, and deposited funds into the secure Retrace Payment Vault after closing the transaction. After receiving the shipment, the buyer had 72 hours to verify the shipment before his funds were to be released to the seller. He noticed that the seller had only shipped 2,500 lbs. Retrace Mobile conflict resolution mediated the conflict and the buyer was refunded for the undelivered product. At the end of the settlement, both parties were satisfied.”²³²

Clearly, Enfointermediary can bring about contractual certainty and their mechanisms for dispute resolution should be studied. To do so, it is first important to set out the

229 Based on Dixit Division of Intermediaries. Dixit, *Lawlessness and Economics: Alternative Modes of Governance*.

230 W Slate, Online Dispute Resolution: Click Here To Settle Your Dispute (2001) *Dispute Resolution Journal* 11, Daniel F Spulber, 'Market Microstructure and Intermediation' (1996) *The Journal of Economic Perspectives* 135.

231 Final Report And Recommendations Of The American Bar Association's Task Force On Electronic Commerce And Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce, (2002) <<http://www.abanet.org/dispute/documents/finalreport102802.pdf>> at 7, accessed 7 March 2016

232 'RetraceMobile Securing Every Transaction' <<http://retracecorp.com/retrace-blog/2015/5/20/retrace-mobile-securing-every-transaction>> 18 April 2016.

extent of their availability. With the help of online search engines and using the electronic market services portal²³³ 118 B2B intermediaries were identified in this thesis. These intermediaries are from various industries and some facilitate other kinds of transactions such as Business to Consumer and Consumer to Consumer.

In order to investigate the intermediaries' involvement with contractual enforcement, their Transactions Services Agreements were studied. Four kinds of potential referral for resolving disputes were tested.

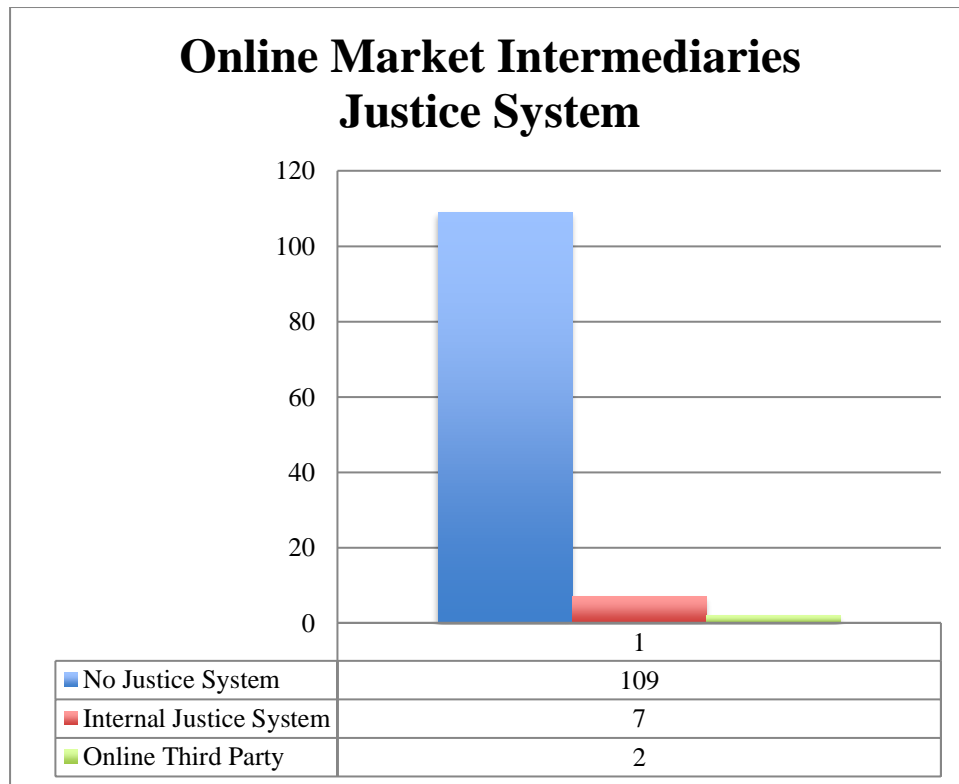
- The Transactions Services Agreement refers the parties to public courts
- The Transaction Services Agreement refers the parties to internal justice system
- The Transaction Services Agreement does not provide any internal justice system
- The Transaction Services Agreement refers the parties to a third party dispute resolution provider.

Among the 118 intermediaries that have been studied in this thesis, 9 online market intermediaries were involved with contractual enforcement and dispute resolution (including the financial intermediaries). One intermediary referred the parties to court or arbitration for resolution of disputes.²³⁴ Some (2 intermediaries) referred the parties to an external online dispute resolution provider. Seven OMIs provided an internal justice mechanism that resolves the dispute and enforces the outcome through the escrow mechanism.²³⁵

²³³ 'e-market Directory', <http://www.emarketservices.com/start/eMarket_Directory/index.html> accessed 7 March 2016.

²³⁴ <https://www.globalwinespirits.com>, Globalwinespirits is a B2B market intermediary, which provides wine wholesale services for buyers and sellers. It is a vertical intermediary and works with buyers and suppliers of wine globally. It is the only intermediary that refers parties to the court of Quebec, where it is incorporated. The clause states that: "Global Wine & Spirits may, but shall not be obligated to, turn the Funds over to a court of competent jurisdiction in the Province of Québec to be held pending an appropriate determination of such court as to the rights of the parties involved. In such a case, the Vendor and the Buyer both consent to the exclusive jurisdiction of the courts sitting in the Province of Québec for purposes thereof. All expenses incurred in placing the Funds under the control of a court shall be borne by the Vendor and the Buyer, and shall be taken out of the Funds, without further notice to the Vendor and Buyer."

²³⁵ List of all the studied OMIs can be accessed in Index 3.



Source: The author.

This chart illustrates the distribution of justice systems and their types among online market intermediaries. The graph is provided by the author by going through 127 B2B online market intermediaries, reading their service agreement and establishing whether they provide the justice system themselves, delegate to a third party or do not provide a justice system at all. Index 3 provides a list of all the studied B2B online market intermediaries.

The jurisdiction of the OMIs that provided a justice system is of importance, and it may reveal some important factors in understanding the incentives of OMIs to provide a justice system. Most of the OMIs that provided a justice system are from China and the United States.²³⁶ China is one of the biggest supplier based countries. It has been facing challenges with upholding the rule of law. As one of the biggest manufacturing places in the world, the network of China-based intermediaries can have a high number of suppliers that need to provide contractual certainty for their buyers.

²³⁶

Amazon, RetraceMobile, Toadlane are based in the United States. Teleroute is based in Belgium and Alibaba, HQEW, DHgate, Made-in-China, Globalmarket are based in China.

When public court cannot be an optimal solution, the dispute resolution mechanism that the Enfointermediary offers can provide some level of contractual certainty.

However, the number of Enforintermediaries in general is very low. The low number of Enfointermediaries maybe surprising, especially when it has been argued that Enfointermediaries can be more successful than Infointermediaries. Dixit explains that customers are more inclined to use Enfointermediaries other than Info due to its role in maintaining contractual certainty. Companies tend to choose those electronic markets that provide both operating and production supplies. Such electronic markets are destined to be large and important players of the Internet in the future.²³⁷ However, the upfront investment in Enfointermediaries is higher than Info and the rate of return on initial investment might not be. Moreover, even if the initial investment is not high, the struggle to maintain monopoly against newcomers can result in Enfointermediaries's extinction.²³⁸

Enfointermediaries provide a formal or "rule-based" dispute resolution mechanism that is reliant on a reputation system rather than relationships. The cost of setting up this dispute resolution mechanism is high, but Dixit argues that once these costs have been born by intermediaries, the marginal costs of dealing with the stranger by different buyers and suppliers will be lower. Therefore, online market intermediaries might adopt dispute resolution and enforcement mechanisms when the size of their network is substantial.²³⁹

Furthermore, some of the OMIs rely on financial intermediaries to provide such contractual certainty and dispute resolution. This might be because the OMIs do not want to bind parties to a certain payment mechanism in their contracts and intend to allow the parties to draft their contract autonomously without the involvement of the intermediary. Hence the role of payment intermediaries in providing a dispute resolution comes into force in two instances: when the OMIs implement a payment system and a dispute resolution mechanism and when the parties use the payment intermediary in the transactions. Considering the important role of the payment

²³⁷ Qizhi Dai and Robert J Kauffman, 'Business Models for Internet-Based B2B Electronic Markets' (2002) 6 International Journal of Electronic Commerce 41, 68.

²³⁸ Dixit, *Lawlessness and Economics: Alternative Modes of Governance* 109.

²³⁹ Dixit, *Lawlessness and Economics: Alternative Modes of Governance* 66.

intermediaries in providing a justice system, the next section will elaborate further on their definition, their different types and their justice systems.

2.5 Online Payment Intermediaries and Escrow Services

Payment intermediaries provide various services to their customers. In B2B context, these services can range from escrow, to supplyings information and managing transactions and dispute resolution.²⁴⁰ The services that will be highlighted in this thesis are the payment services and the dispute resolution mechanism that intermediaries provide for their customers.

During the past couple of years, online payment intermediaries that assist with transferring funds to overseas have been created.²⁴¹ Some B2B online payment intermediaries as well as facilitating the money transfer, provide escrow services and dispute resolution.²⁴² Online payment intermediaries get involved with B2B transactions in two ways. One way is for the supplier or the buyer to accept payment through a specific online payment intermediary (for example some sellers on eBay accept PayPal). The other way is that the supplier and the buyer, using an online market intermediary, carryout a transaction. The online market intermediary refers the buyers and suppliers to a specific online payment intermediary. For example retracemobile.com which is a B2B OMI refers the parties to Armorpayment.com for payment and dispute resolution.²⁴³ Alibaba refers the parties to AliPay or its Secure

²⁴⁰ Spulber, 'Market Microstructure and Intermediation' 134.

²⁴¹ Shari Krikorian, 'B2B Payments Face Major Transformation ' (2008) 21 Bank Technology News 38.

²⁴² PayPal, ArmorPayment, Traxpay are some of the online payment intermediaries that provide dispute resolution.

²⁴³ 'FAQ' <<https://www.retracemobile.com/faq>> Accessed 18 April 2016.

Payment Service for carrying out the monetary transaction.²⁴⁴ Until recently, eBay was the owner of PayPal. Merchants use PayPal to send money, and PayPal also got involved with the resolution of disputes.²⁴⁵

Online payment intermediaries mostly intermediate as a third party between the financial institution and the parties to the transaction. For example, merchants can register with PayPal by providing information, such as an email address and credit card number or bank account information. When the buyer transfers money to the seller, PayPal informs the seller of the receipt.²⁴⁶ If a dispute arises as to the quality, timeliness and matters related to delivery, PayPal resolves the dispute and enforces the outcome.

Payment intermediaries have the power to enforce monetary outcomes of the dispute resolution in two ways. The payment intermediaries either provide an escrow mechanism or partner with various banks for carrying out the transaction. Some payment intermediaries are not escrow accounts i.e. they do not hold the money.²⁴⁷ For example, PayPal and Squareup do not provide escrow mechanisms themselves, but work as intermediaries that are partners with various other financial intermediaries.²⁴⁸

Payment intermediaries may provide escrow services for the parties. Escrow service works similar to letter of credit.²⁴⁹ Escrow service provider holds the buyer's

244 Alibaba Annual Report, United States Securities And Exchange Commission , Washington, D.C. 20549 Form 20-F, 2015, ii. The referral of the parties to AliPay and other Alibaba services is stipulated in Alibaba Transaction Service Agreement, <<https://rule.alibaba.com/rule/detail/2054.htm>> Accessed 4 May 2016, Section 3.5 of TSA stipulates that: 3.5 Payment of Contract Price. For any Online Transaction, Buyer agrees to pay the full transaction price listed for Online Transaction to the Seller through the Alipay website or services of Alibaba.com unless another option is made available directly by Alibaba.com on the Alibaba.com Sites. When using Alipay or Alibaba.com to submit payment for an Alibaba.com Online Transaction, payments are (in the case of Online Transaction through Alipay) processed through accounts owned by Alipay or one of its affiliates and/or a registered third party service provider acting on Alipay's behalf, and (in the case of Online Transaction through Alibaba.com) processed through accounts owned by Alibaba.com or one of its affiliates and/or a registered third party service provider acting on Alibaba.com's behalf. The funds are received for the Seller in accordance with the Alibaba.com Transaction Services Agreement. Seller agrees that the Buyer's full payment of the transaction price listed for the Online Transaction to Alipay or Alibaba.com (as the case may be) constitutes final payment to Seller and Buyer's payment obligation for the Online Transaction is fully satisfied upon receipt of funds by Alipay's or Alibaba.com's account.

245 'Customer Update' <<https://www.paypal.com/webapps/mpp/paypal-ebay-update>> 18 April 2016.

246 Tillett, L Scott, Good As Cash: The Check Is In The E-Mail -- Version of payment service used by eBay now offered to facilitate B2B transactions, , InternetWeek 825 (Aug 21, 2000)19.

247 Sorkin, 'Payment Methods for Consumer-to-Consumer Online Transactions', 13.

248 'Square up Legal', <<https://squareup.com/legal/ua>> Accessed 7 March 2016; 'Understanding Chargebacks', <<https://www.paypal.com/cgi-bin/webscr?cmd=xpt/seller/ChargebackRisk-outside>> Accessed 7 March 2016.

249 Graff-Peter Calliess, 'Transnational Consumer Law: Co-Regulation of B2C E-Commerce' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Bloomsbury Publishing 2008) 235.

payment until after the goods have been shipped and the buyer had the chance to inspect them. If the buyer does not file a complaint during the inspection time²⁵⁰ then the escrow service provider disburse the money to the seller. If there is a dispute, then the escrow service provider either resolve the dispute itself or refers it to another dispute resolution provider.²⁵¹ Escrow services are generally more costly than other Internet payment mechanisms. They might require shipping with special carriers and tracking information.²⁵² The buyer incurs more fees as thes/he receives more protection.

The payment intermediaries might have contracts with the buyers or sellers or both. The contract is the primary governance mechanism of the relationship between the users and the intermediaries.²⁵³ The dispute resolution processes that online payment intermediaries have are not regulated, and the rights of buyers and sellers are generally contractual, rather than legal.²⁵⁴ This is primarily one of the main differences between Internet payment intermediaries and banks that are highly regulated.²⁵⁵

However, this does not support the claim that intermediaries are unregulated, as there are regulatory Acts that apply to online payment intermediaries, such as the Uniform Money Service Act, the Electronic Funds Transfer Act and regulation E in the US and the EU Payment Services Directive. Escrow mechanisms are also regulated by various licensing laws.²⁵⁶ But in general, Internet intermediaries are regulated as money transmitters and not financial institutions. Not being subject to banking regulation may result in many aspects of their functions falling outside of the regulatory framework. This is specifically the case with regards to their dispute resolution policies.

250 Inspection time is based on contracts and can differ in each Escrow Service. In Escrow.com for example, inspection time is based on the parties' contract.

251 Escrow.com refers the parties to various arbitration institutions while Alibaba.com for example resolves the disputes itself. 'Alibaba Secure Payment' <<http://activities.alibaba.com/alibaba/secure-payment.php>> Accessed 5 May 2016.

252 David E Sorkin, 'Payment Methods for Consumer-to-Consumer Online Transactions' (2001) 35 Akron Law Review 1, 17.

253 Calliess, 'Transnational Consumer Law: Co-Regulation of B2C E-Commerce' 236.

254 Sorkin, 'Payment Methods for Consumer-to-Consumer Online Transactions', 10. Gregory E Maggs, 'New Payment Devices and General Principles of Payment Law' (1996) 72 Notre Dame L Rev 753.

255 Mark MacCarthy, 'What Payment Intermediaries Are Doing About Online Liability and Why It Matters' (2010) 25 Berkeley Tech LJ 1037

256 California Escrow Law Protects Online Consumers, California Department of Business Oversight, <http://www.dbo.ca.gov/Licensees/Escrow_Law/nr0013.asp> Accessed 7 March 2016. The Escrow regulatin is stipulated in California Financial Code, 2007 and regulates independent escrow companies in California and provides important protections to California consumers. State law requires licensing of companies that act as a middleman and hold customer funds in a trust account until the confirmation of delivery of goods, services, or the performance of a promised action has been completed. This law also applies to online payment mechanisms.

2.6 Online Dispute Resolution Providers

Online dispute resolution is the resolution of disputes using various telecommunication means. Online dispute resolution can be a mechanism used by OMIs, or it can be used by an independent platform that solely provides online dispute resolution. Some ODR providers exclusively provide dispute resolution services to various online and offline communities. Some ODRs are nested in organizations that carry out other activities such as commercial market intermediaries like eBay, Alibaba, and community networks such as Wikipedia. Some organizations provide ODR, due to their involvement with providing different functions of the Internet. For example, Internet Corporation for Assigned Names and Numbers has delegated the resolution of disputes for domain names to dispute resolution providers such as World Intellectual Property Organization, which primarily uses ODR to resolve disputes.

The design of ODR varies as much as the participants and activities in the virtual world vary. The focus of this study is on private justice systems hence the governmental schemes for ODR will not be considered.²⁵⁷ This study divides different types of ODR providers into two categories: standalone ODRs and organizational ODRs. These two types will be substantiated in the following sections.

2.6.1 Standalone ODR

Standalone ODRs or entrepreneurial ODRs are the ODR providers that solely offer dispute resolution mechanisms. They are not multisided markets like commercial intermediaries that bring together different agent groups. They are entrepreneurial in nature, established to make profit from providing dispute resolution service online.²⁵⁸

ODR providers use the traditional dispute resolution methods such as mediation, assisted negotiation, conciliation and arbitration in order to resolve the dispute between the parties. They usually have a pool of arbitrators and mediators and provide software

²⁵⁷ Some governmental schemes of ODR are: Pan-EU ODR and ODR portals in Belgium and Austria.

²⁵⁸ There are other kinds of ODRs as well that are not entrepreneurial such as ODR services that are offered by court or are publicly funded, for example the European ODR platform.

for their client to resolve the disputes. These providers may also provide their software for companies to provide complaint handling for their customers.

The customers of ODR platforms can range from consumers to businesses. The disputes can be of low value or of high value, depending on the ODR platform and their business model.²⁵⁹ ODR customers can also be ADR providers themselves, using the ODR provider platform for their customers. Recently the American Arbitration Association has partnered with Modria (a standalone ODR provider) to provide an ODR platform to appellants, insurance carriers, and new case management tools to AAA staff and neutrals.²⁶⁰

2.6.2 Modria

Modria is a standalone dispute resolution system that provides online dispute resolution software to various intermediaries such as eBay. It is a cloud-based platform that companies use to resolve disputes of any type and volume.²⁶¹ Modria has changed its business model multiple times. Previously, the process of Modria started with a diagnosis module that organized information and suggested possible solutions. At the negotiation stage, the parties could discuss matters directly and because of a special algorithm, the parties might be able to reach an agreement more rapidly. In case of inability to resolve the matter, mediation provided a third party to clarify the issues. If no mutual agreement could be reached, the arbitration module provided an arbitrator that examines the facts and renders a decision.²⁶²

Recently, Modria has changed its business model to solely providing technology and cloud-based software that can act as a resolution center, which can be used by B2B OMI and essentially customer service. Modria sets some policies for dispute resolution that are modifiable. The dispute resolution can take place in three stages. The customer files the dispute based on a policy adopted by the platform or the company. The dispute will be resolved automatically by technology and no third person gets involved. If the

²⁵⁹ For example, Modria one of the prominent ODR providers provides both high and low value mechanisms.

²⁶⁰ Colin Rule, 'ODR News' (2014) *International Journal of Online Dispute Resolution*. <http://www.elevenjournals.com/tijdschrift/ijodr/2014/1/IJODR_2014_001_001_007> Accessed 24 March 2016.

²⁶¹ 'The Modria Platform' <<http://modria.com/product/>> Accessed 9 March 2016.

²⁶² 'Modria Technology' <<http://modria.com/technology/>> Accessed 9 March 2016.

customer is not satisfied with the resolution, the software facilitates negotiation between the seller and the buyer. Modria does not mention if binding resolution can be reached, however it is likely that based on the platform policy, Modria's platform policy can be customized to provide outcomes of different natures.

2.6.3 NetNeutrals

NetNeutrals is an entrepreneurial ODR provider that gets involved with resolving disputes rather than providing a software platform. It mainly resolves disputes that arise from the eBay reputation platform. They also get involved with B2B disputes. Moreover, some financial intermediaries refer their disputes to NetNeutrals, and enforce the outcome based on the NetNeutrals decision.²⁶³

NetNeutrals provide both informal and formal (arbitration) dispute resolution program. It mainly provides a resolution for disputes that arise over feedback reviews on eBay platform. The decisions that it makes with regards to feedback reviews are final and binding, enforced by eBay.²⁶⁴

Organizational ODR

By the advent of the Internet, online networks and communities blossomed. These communities that sometimes exist solely online needed a dispute resolution mechanism to resolve disputes that arose from interaction between community members. As disputes arose online, the mechanisms they used were a combination of online mechanisms and traditional dispute resolution methods such as arbitration, mediation and conciliation.

2.6.4 Wikipedia

One of the prime examples of such dispute resolution mechanism can be found in Wikipedia. Wikipedia is an online encyclopedia and its members create the content. When there is a dispute about certain content between two parties, Wikipedia resolves

²⁶³ Escrow.com refers the parties to NetNeutrals.

²⁶⁴ NetNeutrals, 'Rules and Guidelines', <[https:// NetNeutrals.com/Rules.aspx](https://NetNeutrals.com/Rules.aspx)> Accessed 24 March 2016.

the dispute online and enforces the outcome. Wikipedia has used sophisticated dispute resolution mechanisms, which also reduce the cost of coordination.²⁶⁵ The success of its dispute resolution mechanisms has been attributed to effective policy and precedent.²⁶⁶

2.6.5 RIPE NCC

Another example of organizational ODR is Internet protocol providers that resolve disputes between their customers. For example, RIPE NCC is an independent, not for profit organization that supports the infrastructure of the Internet through technical coordination. Its activities range from distribution and management of Internet number resources to maintaining databases on Internet Protocol address space and AS numbers.²⁶⁷ In case a dispute arises between its members, RIPE resolves the dispute by arbitration through an online form. The parties are required to enforce the outcome²⁶⁸ within two weeks or challenge the award or seek recourse from the Dutch or a national competent court. If they do not challenge the outcome, RIPE will enforce the outcome.

2.7 The Decision Makers in Online B2B Disputes

As it was stated in section 2.5, the OMIs either provide the dispute resolution system themselves (internal, using their own dispute resolution platform or using platforms such as Modria mentioned in section 2.6.2) or refer the parties to a third party dispute resolution provider (external, for example through platform such NetNeutrals which was mentioned in 2.6.3). The nature of the dispute resolution system (whether it is arbitration, mediation or other dispute resolution methods) and the qualifications of the decision makers largely depend on whether they provide external dispute resolution or internal dispute resolution. If they provide internal dispute resolution mechanisms, the decision makers are normally employees of the OMIs. If they are external dispute resolution providers, they are usually arbitration and mediation. It is necessary to note

²⁶⁵ Aniket Kittur and others, *He Says, She Says: Conflict and Coordination in Wikipedia* (ACM 2007).

²⁶⁶ Kittur and others, *He Says, She Says: Conflict and Coordination in Wikipedia*.

²⁶⁷ 'Ripe NCC Services' <<http://www.ripe.net/lir-services/ncc/list-of-ripe-ncc-services>> 24 March 2016.

²⁶⁸ RIPE NCC Conflict Arbitration Procedure available at www.ripe.net/publications/docs/ripe-502.

that unlike some form of arbitration where the parties appoint their own arbitrators, the parties to the dispute in OMI do not appoint the decision maker. The arbitral institution or the OMI randomly assigns the case to someone who might be an arbitrator, mediator or an untrained employee of the OMI. This section will explain the current actors involved with resolving disputes in OMI dispute resolution.

2.7.1 Employees of OMI as the Decision Makers

Some OMI provide dispute resolution internally through their own mechanism without referral to external dispute resolution mechanisms. Some OMI in their terms and conditions identify themselves as the decision-maker in the dispute resolution process and do not state which department or employees within the company is in charge of resolving the disputes. In practice the person who resolves the dispute is the employee of the OMI.²⁶⁹ Moreover, the decision maker in such scenarios is usually not a trained, professional dispute resolution provider.²⁷⁰

Those that adopt internal ODR mechanisms resolve disputes through their employees, usually claim that the process is not arbitration and the employees are not professional, trained arbitrators or mediators.²⁷¹ Thus the nature of the process is unknown in such mechanisms. This is however not always the case and some OMI that provide internal dispute resolution management have contracts with professional mediators and arbitrators.²⁷²

²⁶⁹ For example, HREW refers to itself as the entity deciding on disputes: [http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html) Accessed 27 October 2016.

²⁷⁰ See Alibaba TSA “2.9...You also acknowledge that Alibaba.com is not a judicial or arbitration institution and will make the determinations only as an ordinary non-professional person. Further, we do not warrant that the supporting documents that the parties to the Dispute submit will be true, complete or accurate. You agree not to hold Alibaba.com and our affiliates liable for any material which is untrue or misleading.”

²⁷¹ ‘Alibaba.com Transaction Services Agreement, clause 2.9 [...] You also acknowledge that Alibaba.com is not a judicial or arbitration institution and will make the determinations only as an ordinary non-professional person. Further, we do not warrant that the supporting documents that the parties to the Dispute submit will be true, complete or accurate. You agree not to hold Alibaba.com and our affiliates liable for any material which is untrue or misleading.’ <<https://rule.alibaba.com/rule/detail/2054.htm>> Accessed 19 November 2016.

²⁷² For example Teleroute in its terms and conditions, section 6, states that: Teleroute only assumes the role of mediator. <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 19 November 2016.

2.7.2 External ODR and the Decision Maker

Some OMIs refer the parties to online arbitration and online dispute resolution providers such as NetNeutrals. The nature of the process (being arbitration or other forms of dispute resolution) in such cases is clearer than internal dispute resolution provided by OMIs and the decision makers are trained, professional arbitrators or mediators. They use arbitration and mediation techniques.²⁷³ The external ODR providers usually operate in a jurisdiction and can be classified as institutional arbitration as opposed to ad hoc arbitration. National procedural regulations related to arbitration and mediation laws might apply to such tribunals. Such ODR providers also have procedural rules, which govern the institution, and the arbitrators conduct.

2.8 Conclusion

The private actors that get involved with resolving or assisting with resolution of B2B disputes have in recent years flourished. The rise of B2B market intermediaries after an initial failure and specialized payment services for B2B transactions have all lead to the more involvement of private actors with B2B disputes. How the B2B disputes are resolved in OMIs and independent B2B disputes depends on the institutional design of the OMIs and the contractual design of buyers and suppliers. This chapter focused on delineating the role of private actors that get involved in B2B e-commerce and B2B disputes. Identification of the actors was the primary step for analyzing OMIs institutional design and its dispute resolution. The next chapter will discuss procedural justice from normative and positive perspective in B2B disputes.

²⁷³

NetNeutrals explains that the decision-maker in disputes referred to NetNeutral are professional and trained. "Our Neutrals are selected from a pool of trained dispute resolution professionals located throughout the United States with experience in various fields including electronics, collectibles and antiques, automotive, and dispute resolution. Our Neutrals use proven mediation techniques to help you reach an agreement and standard criteria to provide the basis for Independent Feedback Review decisions. <<https://netneutrals.com/Learn-More.aspx>> Accessed 19 November 2016.

3 Procedural Justice: Legal Philosophy and Social Sciences Perspective

In defining procedural justice and its application to B2B OMIs, this thesis takes both a normative and a positive approach. This approach is in line with Galligan's theory that normative legal theories should be complemented by socio-legal studies.²⁷⁴ To follow this approach, this chapter will lay out the ground of what is procedural justice from two perspectives: normative and positive. According to van Aaken the normative perspective of law questions how a system of law ought to be and what should the goal of a system be. The positive perspective of law is descriptive and explanatory.²⁷⁵ In other words, the normative approach is within the scope of legal philosophy while the positive approach remains in the realm of social sciences.

Taking on the both normative and positive approaches, this chapter will continue as follows: First, the normative criteria of procedural justice will be treated, i.e. the goals of a procedurally just legal system from the legal philosophy perspective will be laid out. Then the principles that are recommended by international organizations will be considered. It will then consider the general positive approach to procedural justice and then carry out positive analysis of how businesses perceive a dispute resolution system as procedurally just and draw the conclusion as to how to pursue the procedural justice criteria for B2B disputes.

3.1 Legal Philosophy and Procedural Justice

The concept of procedural justice comes from two ancient principles: *audi alterem partem*, 'hear the other side', which requires participation in the process and the second is the principle of *nemo iudex sua causa*, 'no one shall judge his own cause', which refers to the requirement of an unbiased decision maker.²⁷⁶ The procedural justice

²⁷⁴ Neil Walker and DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Modern Law Review, Wiley 1999).

²⁷⁵ Anne van Aaken, 'Opportunities for and Limits to an Economic Analysis of International Economic Law' (2011) 3 *Transnational Corporations Review* 27, 29.

²⁷⁶ Gus Van Harten, 'Arbitration Procedural Fairness and the Rule of Law' in Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 639.

theories have evolved and added to these principles. One of the most prominent theories of procedural justice is set by Rawls. In Rawls's view, procedural justice is of three kinds: Pure procedural justice in which random procedures are utilized to achieve a just outcome,²⁷⁷ the perfect procedural justice entails those procedures that are designed to achieve perfect justice in the outcome,²⁷⁸ and imperfect procedural justice applies to procedures which are designed to achieve justice but the outcome might not be perfectly accurate, for example in case of human errors.²⁷⁹

The theories of perfect and imperfect procedural justice endeavor to set certain pre-requisites for a justice system in order to produce a just outcome. These criteria are varied but they are certainly more detailed than the ancient concepts of procedural fairness and go beyond neutrality and participation. These pre-requisites can guide the justice system to achieve fair, accurate and predictable outcomes. They come from various sources and differ based on perspectives. Some scholars consider procedural justice from the angle of what grants the decision maker legitimacy. They conclude that participation in the process and accuracy of the outcome is of importance.²⁸⁰ Gaffney considers impartiality of the decision maker and the equality of the parties that require the procedure to be inclusive and allow the parties to participate in the process and issue a reasoned judgment.²⁸¹

Overall, the pre-requisites set by these theories can be conceptualized within three categories of procedural justice put forward by Solum and later on used and applied by Cho to online dispute resolution: the accuracy model, the participation model and the balancing approach.²⁸² The rest of this chapter will focus on these three different models, the various procedural pre-requisites that fall under each model and discusses which model can be applied to the B2B dispute resolution system.

277 John Rawls, *A Theory of Justice* (Harvard university press 2009) 86.

278 Rawls, *A Theory of Justice* 85.

279 Rawls, *A Theory of Justice* 85.

280 Lawrence B Solum, 'Procedural Justice' (2004) U San Diego Law & Econ Research Paper 04.

281 John P Gaffney, 'Due Process in the World Trade Organization: the Need for Procedural Justice in the Dispute Settlement System' (1998) 14 Am U Int'l L Rev 1173.

282 Solum, 'Procedural Justice', 243., Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet*, 38.

3.1.1 The Accuracy Model

The accuracy model deems a procedure just if the result is accurate.²⁸³ It is closer to the theory of perfect procedural justice set by Rawls. Rawls's perfect procedural justice maintains that the process should allow for all the measures that lead to an accurate outcome.²⁸⁴ Moreover, the process should be designed to ascertain the "truth".²⁸⁵

The measures that should be taken to ascertain the truth can be found in the works of various justice scholars.²⁸⁶ These measures are: independent, neutral and trained judicial decision makers, open, accessible, and fair hearing with the right to a professional counsel and the right to be present at all the stages of a court proceeding, the right to confront witnesses against the detainee, right to an assurance that the evidence presented (by the government) has been gathered in a properly supervised way, right to make arguments, the review power of the adjudication system and the accessibility of the court.²⁸⁷

The accuracy model clearly leads to setting more idealistic notions of procedural justice, as it does not consider elements such as timeliness and costs. It is close to the notion that the justice system for determining an outcome completely exhausts all considerations of the justice of the situation and provides all the procedural justice criteria in order to achieve an accurate outcome.²⁸⁸

In reality, all the elements that are considered by the legal scholars cannot be upheld fully or they may even hamper procedural justice as they increase the cost of participation or might prolong the process.²⁸⁹ To set an example, presence at all the hearings might not add to the procedural justice and accuracy of the outcome in certain

283 Solum, 'Procedural Justice', 244.

284 Rawls, *A Theory of Justice* 74. Rawls in defining perfect procedural justice asserts that: "The essential thing is that there is an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it."

285 Rawls, *A Theory of Justice* 210.

286 Solum provides a compilation of such measures. Solum, 'Procedural Justice', 244.

287 Joseph Raz, 'Legal Positivism and the Sources of Law' in John Oberdiek Aileen Kavanagh (ed), *Arguing About Law* (2008); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP Oxford 1979) 217, Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 *BUL Rev* 781, 788. Rawls, *A Theory of Justice* 210; Waldron, 'The Concept and the Rule of Law'. Randy E. Barnett, 'Toward a Theory of Legal Naturalism' (1978) 2 *Journal of Libertarian Studies* 97.

288 Kenneth M. Ehrenberg, 'Procedural Justice and Information in Conflict-Resolving Institutions' (2003) 67 *Albany Law Review* 167, 183.

289 The notion of conflicts between upholding different elements of procedural justice set by legal philosophers and known as due process in jurisprudence with values such as effectiveness and costs are discussed in detail in Hörnle, *Cross-Border Internet Dispute Resolution* 17.

circumstances and might prolong the process to the point that some scholars have even questioned why hearing should mean in person hearing and hearing cannot be had in writing materials only.²⁹⁰ The less idealistic and more realistic principles for procedural justice are submitted in participation and balancing approach which will be substantiated in the following sections.

3.1.2 The Participation Model

The participation model establishes that the parties in the dispute should be given the right to participate in the decision making process and be given an opportunity to present evidence.²⁹¹ The participation model does not evaluate the procedural justice of the proceeding based on the accuracy of the outcome but based on merely the level of participation in the process. In accuracy model procedural justice is breached if the outcome is not accurate. In participation model, procedural justice is not upheld if anything hampers the parties' participation.

The participation model is close to the notion of imperfect justice set by Rawls. According to this notion, the process has to allow for complete participation of the parties who are affected by the decision of the dispute resolution system and participate.²⁹² Rawls asserts that imperfect procedural is exemplified in criminal trials, where various participation aspects should be considered in order to reach a correct outcome.²⁹³ This can be also interpreted from Fuller's definition of adjudication in which he ascertains that "When we move from a condition of anarchy to despotism toward something deserving the name of "the rule of law," one of the most important aspects of that transition lies in the fact that formal institutions are established guaranteeing to the members of the community some participation in the decisions by which their interests are affected."²⁹⁴ Fuller in his definition of adjudication sets some criteria for the procedure. He writes "a process of decision making that grants to the affected party a form of participation that consists in the opportunity to present proofs

²⁹⁰ Henry J Friendly, 'Some Kind of Hearing' (1975) 123 *University of Pennsylvania Law Review* 1267, 1271.

²⁹¹ Solum, 'Procedural Justice', 259.

²⁹² Rawls, *A Theory of Justice* 74.

²⁹³ Rawls, *A Theory of Justice* 74.

²⁹⁴ Lon Fuller, 'Adjudication and the Rule of Law' (1960) 54 *Proceedings of the American Society of International Law at Its Annual Meeting* 1.

and reasoned arguments.”²⁹⁵ He then asserts that whatever factor hampers this participation will lead to the breach of the rule of law.²⁹⁶ Hence the parties should be given the opportunity to present evidence and defend themselves. Adjudication should enable the parties to have access to a hearing and to provide proofs and arguments or as Fuller calls it the right of the parties to have their “day at court”.²⁹⁷

Some of Waldron’s pre-requisites for rule of law and court system also fall under participation theory, he asserts that: “there should be a first party, second party and an impartial decision maker with authority to make decisions. The parties should be able to provide evidence. The mode of submission of the evidence may vary but the existence of such opportunity must not. The evidence should be examined in open court (this means the process should be transparent). They should also be provided with the opportunity to respond to the reasons that are given in the outcome of the process and be treated respectfully by the authorities.”²⁹⁸ The pre-requisites for a just procedure are also set in Article 6 of European Convention on Human Right (ECHR) which accord to the participation theory. Article 6 (ECHR) indicates that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a *fair and public hearing within a reasonable time by an independent and impartial tribunal* established by law. Judgment shall be pronounced *publicly*”.

Overall the criteria that participation theory considers for upholding procedural justice should ensure greater participation, without regarding matters such as cost or accuracy. These criteria are namely: Right to participate in the process and to provide evidence, the right to an impartial decision maker, an open process which is transparent, right to a reasoned outcome and the right to review of the outcome. As the participation theory aims for the greatest participation, an exhaustive list of all the elements that can affect participation cannot be provided.

295 Lon L. Fuller and Kenneth I. Winston, ‘The Forms and Limits of Adjudication’ (1978) 92 Harvard Law Review, 369.

296 Fuller, ‘Adjudication and the Rule of Law’, 5.

297 Fuller, ‘Adjudication and the Rule of Law’.

298 Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’, Public Law & Legal Theory Research Paper Series Working Paper No 10-73 (2010), 14.

3.1.3 The Balancing Approach

The balancing approach considers both participation and accuracy, but they should be achieved at the minimum cost.²⁹⁹ The balancing approach is similar to the Law and Economics approach to dispute resolution process. Posner views the procedural objective of the legal system to minimize the cost of erroneous judicial decision (accuracy) and to reduce the administrative costs of the process.³⁰⁰

The balancing approach is also very similar to the theories set by scholars on access to justice. Cappelletti and Garth define some of the successful reforms of a justice system as reforms in speed of the process, relative informality, active decision maker and the possibility of litigation without an attorney.³⁰¹ Scholars of access to justice, go beyond providing the parties with procedural formalism. They consider cost and time as two important elements for access to justice and assert that legal scholars have long been discussing procedural criteria that focus on the participation in the process, provision of evidence and an opportunity to defend, without considering those factors that hamper participation such as cost and delay.³⁰²

As the balancing approach emphasizes on achieving an outcome at its minimum cost (which also includes delay), it can also include the effectiveness of the justice system which sometimes goes unnoticed in other theories as they emphasize on providing all the criteria of participation and accuracy without considering costs. Moreover, finality and enforceability of the award in due time are important factors for effective participation in the process³⁰³ which in accuracy and participation models cannot be emphasized upon as much as in the balancing approach. This is due to the fact the accuracy and participation models do not consider the cost of the procedure as a matter of procedural justice and provide many elements that can increase the cost of the procedure.

299 Solum, 'Procedural Justice', 253.

300 Richard A. Posner 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *The Journal of Legal Studies* , 399.

301 Mauro Cappelletti and Bryant Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective' (1977) 27 *Buff L Rev* 181, 244.

302 Mauro Cappelletti and Bryant Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective' 183-184.

303 Michael Bayles, *Procedural Justice: Allocating to Individuals*, vol 10 (Springer Science & Business Media 2012) 133.

While the balancing approach considers low cost of administration of justice as a procedural justice criterion, it does not deny other elements, such as the right to a hearing, neutrality, or control over the process that exist in other models. It indeed includes these principles, but only as long as their costs do not exceed their benefits. The balancing approach has been used in the US jurisdiction. Its use is quite evident in the case *Mathews v. Eldridge*, in which the court used this balancing approach to decide on whether a hearing was necessary or not.³⁰⁴ The issue in this case was whether the Due Process Clause of the Fifth Amendment to the United States constitutional law requires that, prior to the termination of Social Security disability benefit payments, the recipient be afforded an opportunity for an evidentiary hearing. The court said: “At some point, the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just may be outweighed by the cost.”³⁰⁵

The approach is also evident in *Morrissey v. Brewer* where the US Supreme Court held that: “Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible, and calls for such procedural protections as the particular situation demands.”³⁰⁶

It can be concluded that under the balancing approach, the elements that are considered by accuracy theory and participation theory are considered such as right to an open public hearing, right to an independent and neutral decision maker, right to a reasoned judgment, right to appeal, right to an effective enforcement mechanism and right to a less costly procedure. However, under this theory, the design of a procedurally just dispute resolution process does not have to hold as many elements as it can, rather the procedure can be designed in order to optimize multiple ends.³⁰⁷

304 *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)

305 *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) 349

306 *Morrissey v. Brewer*, 408 U.S. 471 (1972) 481

307 John R Allison, ‘Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis’ (1993) Utah L Rev 1135, 1136.

3.2 Procedural Justice in International Law (or Legal Domain)

Theories of procedural justice can be also applied to the international organizations that provide procedural standards in dispute resolution processes. In this section some of these procedural standards set by international bodies such as the United Nations and private organizations that have international activities such as International Chamber of Commerce will be considered. It will be also concluded that most of these procedural standards conform to the theory of balancing approach, i.e. they do not only consider participation or accuracy but they also consider costs.

3.2.1 UNCITRAL Guidelines On Online Dispute Resolution

In 2010, United Nations Commission on International Trade Law (UNCITRAL) convened a working group on online dispute resolution (ODR).³⁰⁸ The working group is mandated to provide procedural rules for ODR for cross-border electronic commerce transactions. Its mandate includes both business-to-business and business to consumers transactions.³⁰⁹ But such mandate is limited to low value high volume transactions, therefore it does not include B2B high value transactions.³¹⁰

The procedural rules set by the working group require the ODR provider to provide a timely, accessible, neutral and effective mechanism for the disputants.³¹¹ The objectives of the rules were pronounced as: to provide an easy, fast, cost-effective procedure, create a safe, predictable legal environment to ensure traders confidence in the online market and to facilitate Micro and SMEs' access to international market.³¹²

308 UNGA, 'Possible Future Work On Online Dispute Resolution In Cross-Border Electronic Commerce, Transactions, United Nations Commission on International Trade Law 43 Session' (23 April 2010) UN. Doc A/CN.9/706, para 51,52.

309 UNGA, 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-second session, United Nations Commission on International Trade Law 48th Session' (11 January 2011) UN. Doc A/CN.9/716, para. 14.

310 UNGA, 'Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session, Transactions', United Nations Commission on International Trade Law 49th Session', (16 December 2015) UN. Doc A/CN.9/862. para3., Para 6. The present note contains draft fast-track procedural rules that could be used as a model by ODR providers, and does not address the question of enforcement of decisions made in the context of ODR. The Working Group may wish to note that the draft procedural rules have been drafted in a generic manner, so as to apply to B2B and B2C transactions, provided that those transactions have the common feature of being low-value. A/CN.9/WG.III/WP.107 Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules.

311 UNGA, 'Online dispute resolution for cross-border electronic commerce transactions, Draft outcome document reflecting elements and principles of an ODR process' (22 December 2015) A/CN.9/WG.III/WP.140, para 24.

312 UNGA, 'Report of Working Group III (Online Dispute Resolution) On The Work Of Its Thirtieth Session, United Nations Commission

Overall, the principles that the guidelines for ODR embodied were: impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.³¹³ It was also agreed that: ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that “it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.”³¹⁴ These principles are in line with the balancing approach and consider efficiency as well as participation and neutrality of the process.³¹⁵

While it is obvious from the principles that ODR should be accessible, neutral and efficient, the effectiveness of ODR is still under discussion. The Working Group has not yet come to a conclusion for the enforcement mechanism of ODR process’s outcome. Although the Commission requested the Working Group to continue to explore a range of means of enforcement for ODR outcome,³¹⁶ the question of the final stage of the ODR process did not reach a consensus with regards to the binding or nonbinding nature of the outcome of ODR.³¹⁷ Notwithstanding, various principles that were counted by the Working Group accord with the theory of balancing approach.

3.2.2 ALI/UNIDROIT Principles on Transnational Civil Procedure

The ALI/UNIDROIT Principles on Transnational Civil Procedure (hereinafter principles) set some standards for the rules and procedure for adjudication of

on International Trade Law Forty-eighth session’(4 November 2014)A/CN.9/827, para 19. Also see UNGA, ‘Online dispute resolution for cross-border electronic commerce transactions, Draft outcome document reflecting elements and principles of an ODR process’, (22 December 2015) UN. Doc A/CN.9/WG.III/WP.140, para 20.

313 UNGA, ‘Online dispute resolution for cross-border electronic commerce transactions, Draft outcome document reflecting elements and principles of an ODR process’, (22 December 2015) A/CN.9/WG.III/WP.140, para3.

314 UNGA, ‘Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session, Transactions, United Nations Commission on International Trade Law 49th Session’, (16 December 2015) UN. Doc A/CN.9/862, para 27: §11.

315 The effectiveness of the ODR outcome has not been explored by the commission yet. The Working Group states that “The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration” UNGA, ‘Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session’, (16 December 2015) UN. Doc A/CN.9/862, para3.

316 UNGA, ‘Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session, United Nations Commission on International Trade Law 49th Session’, (16 December 2015) UN. Doc A/CN.9/862, para3.

317 UNGA, ‘Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session, Transactions, United Nations Commission on International Trade Law 49th Session’, (16 December 2015) UN. Doc A/CN.9/862, para.5.

transnational civil and commercial affairs.³¹⁸ It has been endorsed by the member states of UNIDROIT and also provides “a mean or a transnational standard by which particular systems could be measured.”³¹⁹ The Principles suggests that it is applicable to arbitration as well, however it recognizes that some of the principles might be incompatible with arbitration, hence the arbitration proceedings are not obliged to follow the principles related to jurisdiction, publicity of proceedings and appeal.³²⁰

The principles that are put forward are impartiality, independence, qualification of courts and judges, procedural equality of the parties, the proceedings should be conducted in the language of court or as agreed by the parties, the dispute should be resolved promptly, provisional and protective measures should be taken to grant effective relief by final judgment, the parties share with the court the responsibility of a fair, efficient and reasonably speedy resolution of the proceeding, the pleadings can be conducted in both written and oral format, the court should provide a reasoned explanation of the outcome, the judgments should be final and immediately enforceable and procedures should be in place for effective enforcement of judgments. The principles also include many paragraphs that are related to providing the procedural justice by enhancing efficiency. For example, time is one of the most important factors that ALI/UNIDROIT principles have considered for the judicial management. P-7 has indicated that the court should resolve disputes within a reasonable time. Moreover, the court should find progressive rules on submission of evidence, which overcomes the delays that are caused by highly bureaucratic procedures.³²¹ Index 2 illustrates the measures that Ali/UNIDROIT provides for upholding the procedural criteria.

3.2.3 Guidelines and Best Practices on Procedural Justice

International guidelines and best practices on ODR focus merely on B2C disputes. Some of these guidelines were analyzed by Soo Hye Cho with respect to the international consensus on procedural justice criteria and ODR. She analyzed the

318 Patrick Glenn, ‘The ,Ali / UNIDROIT Principles of Transnational Civil Procedure as Global Standards for Adjudication ?’ (2004) 9 Uniform Law Review, 829.

319 Glenn, ‘The Ali / Unidroit Principles of Transnational Civil Procedure as Global Standards for Adjudication ?’, 832.

320 The American Law Institute/UNIDROIT Study Group, Principles of Transnational Civil Procedure, at P-E. The principles are Adopted in 2004 by Ali/UNIDROIT and are re-produced at Uniform Law Review (2004) issue 9, volume 4.

321 For a full chart please refer to index 1.

organization for Economic Co-operation and Development (OECD) guidelines for Consumer Protection in the Context of Electronic Commerce (1998), as well as the recommendation by European communities for the Principles applicable to the Bodies Responsible for Out-of-court Settlement of Consumer Disputes. Cho concluded that both guidelines require the online dispute resolution process to be effective, efficient, transparent and fair.³²²

American Bar Association recommended Best Practice Guidelines for how to conduct online dispute resolution. They apply to both B2B and B2C. Instead of offering some abstract criteria, ABA makes suggestions as to how to uphold procedural justice criteria. Concerning accessibility, it suggests periodic reports, publishing the case outcomes and information about the procedure. As to effectiveness, ABA proposes that the providers should specify whether they assist in enforcing the case outcome. Neutrality is also another principle and ABA indicates that there should be information about the neutrals, their qualifications and that the selection procedure of neutrals should be set forth in detail, the fee structure should be presented and other sources of funding and the providers should set forth procedures to monitor the neutrals and to ensure accountability.³²³

ICC also published a set of principles for B2C and C2C that emphasized accessibility, including convenience, privacy and confidentiality of the process and the data provided, transparency, which means the procedure should be described in a clear manner and the selection of the third neutrals should be indicated as well as publishing anonymized caseload history and neutrals should be free of conflicts of interest.³²⁴

The Advisory Committee of Internet Corporation for Assigned Names and Numbers (ICANN) for Online Dispute Resolution Standards of Practice³²⁵ also put forward some recommendation as to the principles that ODR should adhere to. These

³²² Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet* 55.

³²³ American Bar Association Task Force On Ecommerce and ADR, 'Recommended Best Practices For Online Dispute Resolution Service Providers' <<http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/BestPracticesFinal102802.authcheckdam.pdf>> Accessed 16 April 2016.

³²⁴ ICC, 'Icc Best Practices for Online Dispute Resolution (Odr) for B2C and C2c Transactions'; Karsten Ronit, *Transnational Corporations and the Regulation of Business at the Global Level* (Ashgate Publishing 2011).

³²⁵ ICANN, Online Dispute Resolution Standards of Practice <<https://www.icann.org/resources/pages/odr-standards-of-practice-2012-02-25-en>> Accessed 5 March 2016.

principles are as follows: principles of accessibility, affordability, transparency, fairness (which is interpreted as an impartial process), innovation and relevance third parties professionals who are independent of the parties.³²⁶

3.3 The Positive Approach to Procedural Justice

According to socio-legal studies, procedural justice is defined as the parties' perception of fairness of a dispute resolution mechanism,³²⁷ the dispute mechanism procedures that are applied, and the rules and regulations by which the dispute resolution system is regulated.³²⁸ In the legal field, it is known as due process. The distinction between procedural justice and due process comes from the source that sets the criteria. Due process is a set of criteria that legal scholars and legal systems set to achieve fairness. Procedural justice includes the preferences of the users of a justice system as to how a justice system process should be administered.

Procedural justice has been studied in various fields such as law, psychology and organizational settings.³²⁹ Parties' perception of a dispute resolution mechanism and their preferences is of significance when it comes to procedural justice. Legal scholars assert that users' preferences are the most critical factors for upholding procedural justice.³³⁰ Moreover justice is generated from the needs and values of the people

³²⁶ ICANN, Online Dispute Resolution Standards of Practice <<https://www.icann.org/resources/pages/odr-standards-of-practice-2012-02-25-en>> Accessed 5 March 2016.

³²⁷ John W Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (L. Erlbaum Associates Hillsdale, NJ; New York, NY 1975)

³²⁸ Lisa Blomgren Bingham and others, 'Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace' (2009) 14 Harv Negot L Rev 1, 35.

³²⁹ Jason A. Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 Journal of Applied Psychology 386;Lind and Tyler, *The Social Psychology of Procedural Justice* ;Thomas R Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures* (Kellogg Graduate School of Management Dispute Resolution Reserach Center 1987).

³³⁰ Bruce L Hay, 'Procedural Justice-Ex Ante V. Ex Post' (1996) 44 UCLA L Rev 1803, 1808. Lisa B Bingham, 'Self-Determination in Dispute System Design and Employment Arbitration' (2001) 56 U Miami L Rev 873;Robert G. Bone, 'Party Rulemaking: Making Procedural Rules through Party Choice' (2012) 90 Texas Law Review 1329 ;Donna Shestowsky and Jeanne M Brett, 'Disputants' Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study' (2008) UC Davis Legal Studies Research Paper, 71.

involved in the procedure.³³¹ If those needs and values are ignored, procedural justice most probably is not upheld.

The evaluation of justice systems by people and their perception of such institutions has been commonly attributed to the outcome of the process that people were involved in.³³² However, Thibaut and Walker found that people care about the process of decision making as much as the outcome.³³³ The process of decision-making has a great impact on the perception of justice. Tyler and Huo carried out a study on why people comply with court outcome and police order. They found that compliance with court outcome increases more from the level of procedural justice. This exhibits that the effectiveness of the process and outcome of adjudication partially depends on the level of procedural justice that exists in the process.³³⁴ Therefore, it is important to consider the user's preferences of procedural justice and how they choose to achieve the criteria of procedural justice.

Considering the importance of the perception of justice, the procedural justice criteria in B2B disputes should be established based on the B2B parties' perception and its congruence with theories of procedural justice. In B2B context users might value one criterion of procedural justice over another, or they might not require some of the sub-components set by legal scholars to achieve the overarching criteria of procedural justice such as participation or neutrality.

The perception of B2B parties as to the procedural justice criteria has been largely ignored. Recently the procedural justice in B2B disputes has caught the attention of regional legislators and the United Nations such as the UNCITRAL Working Group on ODR and European Union. The ODR working group in its recent meeting emphasized that B2B transactions should be treated differently than business-to-consumers (B2C)

³³¹ Tom R Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform' (1997) 45 *The American Journal of Comparative Law* 871; see also Wayne D Brazil, 'Court ADR 25 Years after Pound: Have We Found a Better Way' (2002) 18 *Ohio St J Disp Resol* 93 in Shestowsky and Brett, 'Disputants' Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study', 71.

³³² Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential' (2008) 33 *Law & Social Inquiry* 473.

³³³ John W Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (L. Erlbaum Associates Hillsdale, NJ; New York, NY 1975).

³³⁴ Tom R Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts Through* (Russell Sage Foundation 2002).

transactions with regard to a certain procedural aspect.³³⁵ At the European Commission, the Commission Work Program 2011 and the Digital Agenda 2012 revealed that the majority of respondents consented that different schemes and rules of procedure should be applied to private dispute resolution mechanisms in the context of B2B and it should be treated differently from B2C.³³⁶ Hence the commission intended to carry out recommendations on the principles applicable to dispute resolution mechanisms that solely dealt with B2B disputes.³³⁷ However, as mentioned in section 2.1, the Commission did not come up with principles solely applicable to B2B disputes or a specific B2B directive, arguing that studies showed that current ADR/ODR Directive and Regulation cover most of the ADR schemes. In effect, the European Commission in the end decided not to apply principles customised to B2B disputes in ADR processes.

This might not be the correct approach to B2B disputes. As it was stated in the previous chapter, B2B disputes are different from B2C and other e-commerce disputes.³³⁸ Therefore, the principles that are applied to the dispute resolution mechanisms that resolve these disputes should be of different nature. The research on preferences within SMEs and large corporations for a choice of ADR forum also indicates that there is not a large gap between the preferences of SMEs and large corporations in a dispute resolution mechanism.³³⁹

335 General Assembly, *Report of Working Group Iii (Online Dispute Resolution) on the Work of Its Twenty-Third Session (New York, 23-27 May 2011)* 6.

336 European Commission Roadmap, 'Alternative Dispute Resolution Instrument for Business to Business (B2B) Disputes' (December 2012) European Commission, <http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2012_just_028_adr_b2b_en.pdf> Accessed 17 March 2016.

337 It was indicated in the EC Roadmap that "The Commission Work Programme 2011 and the Digital Agenda 2012 foresee proposals on ADR (the latter for online dispute resolution ODR)). A general consultation on ADR was carried out where the majority of respondents said that different schemes ought to be applied to B2C and B2B complaints as separate treatment is required for these types of disputes. This shows also that the demand for a B2B scheme exists." Roadmap, 'Alternative Dispute Resolution Instrument for Business to Business (B2B) Disputes', <http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2012_just_028_adr_b2b_en.pdf> Accessed 17 March 2016.

338 This has been also attested by the agreement between the Consumer International to global Business Dialogue on Electronic Commerce. The agreement states that : where ADR is still relatively little known and practiced. Settlements of disputes resulting from business-to-business (B2B) transactions, both offline and online, will follow their own rules with a very high degree of party autonomy, mostly in the form of binding arbitration. The issues of consumer protection and consumer confidence are of no relevance in this context. Hence, there is neither a need to develop new recommendations for B2B ADR, nor would it be appropriate to address any issues related to B2B under the same parameters as B2C dispute settlements." Global Business Dialogue on Electronic Commerce, 'Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce' November 2003 <http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution_Nov03.pdf> Accessed 24 March 2016.

339 Allan Lind and others, 'Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic' (1993) *Administrative Science Quarterly* 224.

To remedy this problem and to understand how and if a certain justice system upholds the procedural justice, the justice system should be evaluated based on the criteria that are derived from positive analysis of parties' preferences. The perception of justice can be affected by various factors, depending on the parties in the dispute and the nature of the dispute.³⁴⁰ Therefore, it is important to understand the criteria of procedural justice in its related setting. As Hoffman asserts, "a more detailed account of what preferences individuals had for different legal procedures in different contexts [is needed]."³⁴¹ Therefore, understanding the perception of users of a justice system is crucial for achieving justice. The next section will first expand on procedural justice in socio-legal studies and then considers the preferences of B2B parties for procedural justice in dispute resolution systems by using empirical research that has been carried out in arbitration, civil justice systems and alternative dispute resolution.

3.3.1 General Socio-Legal Studies on Procedural Justice

Socio-legal studies have focused on the preferences of the individuals for a procedurally just system in various settings such as dispute resolution, law enforcement and organizations.³⁴² The results of these studies have reached the conclusion that in general four criteria are important for the parties involved with dispute resolution, namely: accessibility, neutrality of the decision maker, trustworthiness of the decision maker and treatment with courtesy and respect.³⁴³ These aspects will be substantiated in this section.

3.3.1.1 Accessibility

Thibaut and Walker carried out the first study on the positive aspects of procedural justice i.e. how people perceive a procedure as just. They suggested that control over

³⁴⁰ Greenberg, Jerald, and Robert Folger, 'Procedural Justice, Participation, and The Fair Process Effect In Groups And Organizations' (1983) Springer New York.

³⁴¹ David A Hoffman and Michael P O'shea, 'Can Law and Economics Be Both Practical and Principled?' (2002) 53 Alabama Law Review 335, 383.

³⁴² Robert J MacCoun, E Allan Lind and Tom R Tyler, 'Alternative Dispute Resolution in Trial and Appellate Courts' in Dorothy K. Kagehiro and William S. Laufer (eds), *Handbook of Psychology and Law* (Springer 1992); Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure'; Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution'.

³⁴³ Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 5.

the process is significant.³⁴⁴ Their research led to similar scholarly work on disputants' preferences for procedural justice. These empirical studies confirmed that representation that can control the process is significant both in binding and nonbinding dispute resolution systems.³⁴⁵ Control over process can be achieved by participation in the process. As Hollander-Blumoff and Tyler argue, individuals care whether or not they had an opportunity to present their own story,³⁴⁶ and present evidence to the decision maker.³⁴⁷ The importance of the accessibility of a justice system is also evidenced by the organizational changes that happen within firms. Firms indicate that accessibility of the dispute resolution is one of their main preferences.³⁴⁸ Accessibility has a direct effect on the firm's reaction to the organizational structure. If state courts are neither available nor accessible, the firm structure changes in order to make the dispute resolution system more accessible.³⁴⁹ This is also in line with the normative approach to procedural justice that recommends taking measures to be taken to accommodate the parties' full participation.

3.3.1.2 Neutrality

The second procedural justice principle that people consider is the neutrality of the decision maker.³⁵⁰ Neutrality is a principle that can serve many objectives such as impartiality (lack of bias); the ability to gather and assess the information needed to make appropriate decisions; openness about the procedure (transparency); and consistency in the application of rules over people and across time.³⁵¹

344 John Thibaut and others, 'Procedural Justice as Fairness' (1973) 26 *Stan L Rev* 1271.

345 Lind, Lissak and Conlon, 'Decision Control and Process Control Effects on Procedural Fairness Judgments'; Thibaut and Walker, *Procedural Justice: A Psychological Analysis*.

346 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution'.

347 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 5.

348 Edgardo Buscaglia and Thomas Ulen, 'A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America' (1997) 17 *International Review of Law and Economics* 275, 277.

349 Oliver E Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 *Journal of Economic Literature* 595, Graft-Peter Callies and Stephan Freiherr von Harder, Intra-Firm Trade Law-Contract-Enforcement & Dispute Resolution in Transnational Corporations, Zentra Working Papers in Transnational Studies No. 01 / 2012 (Center for Transnational Studies of the Universities of Bremen and Oldenburg 2012).

350 Tom R Tyler, *Why People Obey the Law* (Princeton University Press 2006) 137 and 146.

351 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 5.

3.3.1.3 Trustworthiness

The other factor that contributes to the parties' perception of procedural justice, is trustworthiness of the decision maker. Trust is formed by the way the decision maker acts. As Hollander-Blumoff and Tyler explain "when the authorities provide evidence that they have listened to and considered the views of the parties, and tried to take them into account in thinking about how to respond to the issues, they are viewed as more trustworthy."³⁵² This notion of trustworthiness is sometimes used jointly with the neutrality of the decision maker and we can interpret this as suggesting that neutrality and trustworthiness are connected; the more neutral the decision maker is perceived to be, the more trustworthy they are. This assertion is supported by Hollander-Blumoff and Tyler supported this argument and argued that we should change the structure of arbitration or other dispute resolution mechanisms to uphold trustworthiness and neutrality.³⁵³ The key for Hollander-Blumoff and Tyler is the decision maker's neutrality. In their example for enhancing both neutrality and trustworthiness they focus on eliminating factors that cause bias. Hence it can be argued that when neutrality is perceived to be high, trustworthiness consequently increases.

3.3.1.4 Treatment with Courtesy and Respect

Individuals consider whether or not they were treated with courtesy and respect.³⁵⁴ This involves both common respect and courtesy and respect for people's rights.³⁵⁵ Parties that use a dispute resolution mechanism would like to be treated with respect. In the normative approach to procedural justice, dignity is also treated as a value that should be upheld. Dignity is also a value in participation theory in a way that the value of dignity requires the parties have their day in court³⁵⁶ and a dignified hearing meaning that it includes notice served for hearing, opportunity to be heard and if necessary cross

352 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 5.

353 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 5.

354 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 9; Tyler, *Why People Obey the Law* 150; Robert E Lane, 'Procedural Goods in a Democracy: How One Is Treated Versus What One Gets' (1988) 2 *Social Justice Research* 177.

355 Shari Seidman Diamond, 'Psychological Aspects of Dispute Resolution: Issues for International Arbitration' in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International 2003) 335.

356 Solum, 'Procedural Justice', 262.

examination.³⁵⁷ Hence there is conformity between dignity that is a criterion set by positive studies for procedural justice and the normative perspective of procedural justice. Considering this, it can be concluded that treatment with dignity should be a part of participation process as a value, however, similar to trustworthiness, achieving dignity depends on the neutrality and accessibility of the decision-making process and the decision maker. Giving a chance to the parties to be heard and provide evidence as well as the assurance that the decision maker will take the evidence into account can enhance the sense of a dignified process.

3.3.2 Procedural Justice in B2B Disputes

Despite the general convergence of studies, establishing a set of criteria for procedural justice in all situations has been cumbersome. Different perspectives yield different criteria for achieving procedural justice. The result of empirical research indicates that the implications that legal scholars establish for procedural justice are very similar to what users identify as justice,³⁵⁸ however there are some divergences in different situation i.e. the divergence on what constitutes procedural justice is related to different users' preferences and expectations based on the dispute. Not all the procedural justice pre-requisite apply to every situation. In other words, parties' perception of justice might vary considering the context.

The literature on the users' perception of procedural justice takes a very general path. For example, when offering measures for evaluation of the quality of justice, the Hague Institute for Internationalization of Law (Hiil)³⁵⁹ do not consider the users perception of justice within a certain context for example criminal or commercial; it does, however, suggest that in using its index for evaluation of a justice system the

357 Jerry L Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 BUL Rev 885;E Allan Lind and others, 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System' (1990) Law and Society Review 953, 958. .

358 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution'.

359 Hiil criteria are overarching and include procedural justice as well as other elements such as: informational justice, pragmatic justice, opportunity costs, monetary costs, intangible cost, distributive justice and restorative justice. Gramatikov and Janse, 'Justice Monitoring and Evaluation in the EU: Status Quo and the Way Ahead?' 14.

subject matter should be considered.³⁶⁰ Blader and Tyler also suggest that the literature on procedural justice often ignores the role of different sources of experience.³⁶¹

Considering that a more narrow focus on the preferences of B2B parties is needed, it is necessary to look into the firms' preferences that are aligned with the general criteria of procedural justice set by legal scholars, ODR initiatives and general legal principles and Socio-Legal studies. It is difficult to measure the firms' preferences for choosing a dispute resolution or litigation. Their preferences mostly vary and are not observable.³⁶² Moreover, the procedural justice literature has been criticized by law and economics scholars for not having assigned a market value to the user's preferences.³⁶³ However, there has been some empirical research on the firms' preferences, which may directly relate to the procedural justice. Some have provided survey analysis of firm's preferences for an alternative dispute resolution that can assist with understanding firms' preferences for procedural justice.³⁶⁴ Other studies are on courts and its reformation to accommodate business needs which lead to discovering what the B2B transactors need.³⁶⁵ This section considers such preferences by using different sources and the result of empirical research on the firms' preferences in choosing a dispute resolution system.

360 Gramatikov and Janse, 'Justice Monitoring and Evaluation in the EU: Status Quo and the Way Ahead?'; Other scholarly work has also laid out principles for procedural justice: Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', Suzanne S Masterson and others, 'Integrating Justice and Social Exchange: The Differing Effects of Fair Procedures and Treatment on Work Relationships' (2000) 43 *Academy of Management Journal* 738, Thibaut and Walker, *Procedural Justice: A Psychological Analysis*. These studies offer the measures for evaluations of justice in organizational context, which is very similar to those indicators that Hiil provides for measuring justice. For example Colquitt proposes that fairness in organizational justice can be measured by distributive justice, procedural justice, interpersonal justice and informational justice. Jason A. Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 *Journal of Applied Psychology* 386.

361 Steven L Blader and Tom R Tyler, 'A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process' (2003) 29 *Personality and Social Psychology Bulletin* 747, 749.

362 Jeffrey A Frieden, 'Actors and Preferences in International Relations' in David A. Lake and Robert Powel (eds), *Strategic Choice and International Relations* (Princeton University Press 1999).

363 Blair H Sheppard, Roy J Lewicki and John W Minton, *Organizational Justice: The Search for Fairness in the Workplace* (Lexington Books/Macmillan 1992)

364 Loukas Mistelis and Crina Baltag, 'Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2008) 19 *American Review of International Arbitration*.

365 Theodore Eisenberg and Geoffrey P Miller, 'Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts' (2008) 30 *Cardozo L Rev* 1475.

3.3.2.1 The Mistelis Surveys on Corporations and Their Preferences in Arbitration

The Mistelis and Baltag survey carried out in 2008 and Mistelis and Friedland surveys carried out in 2010, discussed the corporation preferences in arbitration. The 2010 survey asked corporations as to what drives their decision on choosing arbitration institutions. The corporations ranked the most important factor as neutrality of the institutions by 66%.³⁶⁶ As to other procedural matters, previous experience of the institution was deemed as important 42%, as well as the overall cost (41%) which was also highly valued.³⁶⁷ In the 2008 survey, corporations indicated a high preference for neutrality 80% and 80% of corporations indicated a highly significant preference for the enforceability of the arbitral agreement.³⁶⁸ They were also asked about what factors they considered important in an arbitration mechanism. They stated enforceability (effectiveness)³⁶⁹, privacy and flexibility, and neutrality. Confidentiality was also regarded by 62% of the responded as very important and 24% responded quite important.³⁷⁰

The enforceability of the arbitration agreement was also highly regarded in the study carried out by Mistelis and Baltag in 2008.³⁷¹ The preference of the firms for an effective dispute resolution mechanism is more evident when they are located in different regions and come from different cultural and linguistic backgrounds. In such disputes, they opt for a more effective procedure and enforceable outcome than in disputes where the parties have more homogeneity. This can be also concluded from the statistics of the parties' regional diversity in International Court of Arbitration.

³⁶⁶ Loukas Mistelis and Paul Friedland, '2010 International Arbitration Survey: Choices in International Arbitration' (2010) White and Case and Queen Mary University, 11.

³⁶⁷ Mistelis and Friedland '2010 International Arbitration Survey: Choices in International Arbitration' (2010) White and Case and Queen Mary University, 21.

³⁶⁸ Mistelis and Baltag, 'Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2008) 19 American Review of International Arbitration 319.

³⁶⁹ Mistelis and Baltag, 'Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2008) 19 American Review of International Arbitration 319.

³⁷⁰ Mistelis and Friedland '2010 International Arbitration Survey: Choices in International Arbitration', 21.

³⁷¹ Mistelis and Baltag, 'Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2008) 19 American Review of International Arbitration 319.

According to Mattli, institutionalized arbitration procedure and outcome are more effective and enforceable than ad hoc arbitration.³⁷² There is also a strong preference for choosing institutional arbitration as opposed to ad hoc.³⁷³ They are more centralized and have more effective procedural safeguards. Hence these institutions receive more disputes from parties with diverse backgrounds specifically because their process and outcome are more enforceable.³⁷⁴ Such preference confirms the parties' preference for more enforceable outcome in international disputes.

3.3.2.2 Eisenberg and Miller Empirical Study of Choice of Law and Choice of Forum Clauses

Eisenberg and Miller studied the choice of law and the choice of forum in a data set of 2,882 contracts in filings that were reported by corporations to US Securities and Exchange Commission (SEC). They observed that 46% of the contracts had New York Law as their chosen Law as opposed to only 15% of the contracts that chose Delaware Law. As to the choice of the forum, New York was also the preferred forum, accounting for 41 percent of the choices, while Delaware only accounted for 11 percent of the forum choices.³⁷⁵

They hypothesized that this flight from Delaware, which was the preferred choice of forum for many years to New York, was related to the businesses preferences for the quality of court and the efforts of states such as New York and Delaware to attract contractual business.³⁷⁶ They associated the success of New York in attracting more businesses to its quality of courts, which entailed providing more predictability, offering experts and prompt and reliable judicial system. The New York Court

³⁷² Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration', 939.

³⁷³ According to a survey carried out by Mistelis and Baltag in 2008, 86 percent of arbitration awards were carried out by institutional arbitration. Loukas Mistelis and Crina Baltag, 'Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2008) 19 *American Review of International Arbitration* 319.

³⁷⁴ Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration', 939.

³⁷⁵ Eisenberg and Miller, 'Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts', 1475.

³⁷⁶ Eisenberg and Miller, 'Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts', 1475,1478.

established a commercial division that enlisted judges and court personnel, implemented new case management techniques to speed up the process.

The New York success in attracting cases was related to both accuracy and efficiency of the procedure. Eisenberg and Miller assert that the lack of neutrality of the judges in New York Supreme Court (before the establishment of the Commercial Division of the Supreme Court in 1995) as the reason that the businesses increasingly used other fora.³⁷⁷ In the American court system, as indicated by Eisenberg and Miller, the inaccessibility of the court (long delays) discouraged businesses from filing their disputes in New York Court.³⁷⁸ However, the conditions changed when New York changed its approach to both accuracy and efficiency of the court system by providing more neutral and expert judges as well as the cost-efficient and speedy process.

3.3.2.3 European Commission Study on B2B Disputes

In a study carried out by European Commission on B2B alternative dispute resolution in Europe³⁷⁹, a survey was carried out to explore the experiences of EU companies in B2B dispute resolution and their attitudes toward the different methods available for dispute resolution. The interesting aspect of this report is that it divides the corporations to SMEs and Large enterprises.

Some of the results for the primary reasons the corporations indicated for not using ADR was

“ ... the fear that nothing would come of it (19%) and that it is too expensive compared to the amount of money involved (18%). Another 17% cited the desire not to ruin the business relationship with the other company. One in ten companies (11%) said the procedure would take too long, while 7% said that the other party did not want to participate.”³⁸⁰

Companies were also asked to consider the three most important factors in selecting an ADR scheme. The speed of the process was the most often preferred factor, with (50%)

³⁷⁷ Eisenberg and Miller, 'The Market for Contracts', 2093.

³⁷⁸ Eisenberg and Miller, 'The Market for Contracts', 2093.

³⁷⁹ European Commission Directorate-General for Communication, 'Business-to-Business Alternative Dispute Resolution in the EU' (2012) Flash Eurobarometer 347 - TNS Political & Social, 37.

³⁸⁰ European Commission Directorate-General for Communication, 'Business-to-Business Alternative Dispute Resolution in the Eu', 37.

of all companies mentioning this. The expertise of the arbitrator or the mediator came second at (35%), and the cost of the process came third at 34%. The binding nature of the decision was also deemed as important by 25%, the simple and easily understandable process was also mentioned (30%).³⁸¹ In the study, 45% of the firms indicated that their choice to seek recourse from a dispute resolution was affected by its expenses³⁸² and that the expected value of the claim was less than the cost of the procedure.

3.3.2.4 Lipsky and Seeber

In 1998, Lipsky and Seeber observed businesses inclination to use alternative dispute resolution in place of courts. While they indicate costs and government policy program for encouraging the use of ADR, they conducted a survey on firms to understand their preferences for choosing ADR. They asked Fortune 1000 corporations about their preferences for ADR. In addition to cost and time, they indicated control over the process.³⁸³

The survey specifically asked the corporations the reasons that they use arbitration or mediation. Nearly 68.5% indicated that arbitration saved time and money, 49.9% indicated that arbitration uses the expertise of neutral, 43.2% indicated that it preserves confidentiality, 59.3% indicated that it has limited discovery.³⁸⁴

Lipsky and Seeber also conclude that the main barriers to using ADR are the other party's resistance to agree to use ADR and the lack of confidence in the neutral.³⁸⁵ The reason for not choosing ADR was the enforceability of the agreement. Some respondents stated that if there was no existing ex ante agreement between the parties,

381 European Commission Directorate-General for Communication, 'Business-to-Business Alternative Dispute Resolution in the EU', 63.

382 European Commission Directorate-General for Communication, 'Business-to-Business Alternative Dispute Resolution in the Eu' The study states "Companies that experienced a disagreement or dispute with another business but did not go to court to resolve it were asked the reasons why they made this choice. The most common is that the procedure would be too expensive for the sum of money involved in the dispute (45%). Around one quarter of companies said that the court procedure would take too long (27%), that they thought nothing would come of it (27%), and that they did not want to ruin the relationship with the other business (25%). Very few said they did not know how to begin the procedure, or that it would have involved going to court in another country (both 2%)."

383 David B Lipsky and Ronald L Seeber, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations' (1998), 9.

384 Lipsky Seeber, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations' 9.

385 Lipsky Seeber, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations' 9.

it was very difficult to agree to mediation or arbitration, a downside that did not exist in courts.³⁸⁶ The respondents also indicated that the lack of rules for governing the procedure was a primary reason not to use ADR, especially mediation. This was in contrast to the preference of the majority of the respondents that preferred more concise discovery.

As Lipsky and Seeber show in their results, many corporations chose arbitration due to its enforceability of agreement and award. Later on in the paper, they asked the corporations specifically in which disputes they would use arbitration, it was illustrated that in commercial disputes and employment disputes, use of arbitration and mediation is on the rise.³⁸⁷ However, in cases where important issues of legality exist, the corporations might not be inclined to use arbitration, as it prevents them from seeking recourse from court.³⁸⁸

Hence it can be concluded that in commercial disputes (the focus of this thesis), there is generally more inclination towards a cost effective, a speedy mechanism that maintains the neutrality of the decision makers. While parties in other disputes might retain their rights to discovery and witness examination, in commercial disputes the parties delegate the task of dispute resolution to a third party which might apply limited discovery and acceptance of evidence.

3.3.2.5 Oxford Civil Justice Survey

The Oxford Institute of European and Comparative Law and the Oxford Center for Socio –Legal Studies jointly conducted Oxford Civil Justice Survey in 2008. The aim of the project was to establish the perceptions of businesses regarding the civil justice systems in Europe empirically.³⁸⁹ It did so by posing questions regarding the choice of dispute resolution forum in cross border transactions. The researchers asked 100 businesses around Europe that carried out cross-border business about their preferences for their choice of dispute resolution forum. The specific question that they asked

³⁸⁶ Lipsky Seeber, ‘The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations’ 25.

³⁸⁷ Lipsky Seeber, ‘The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations’,30.

³⁸⁸ Lipsky Seeber, ‘The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations’,25.

³⁸⁹ ‘The Oxford Civil Justice Survey’ (2008) Institute of European and Comparative Law, University of Oxford, Faculty of Law.

revealed some information about the procedural justice factors that the parties considered. The question was framed as: to what extent do you consider the following factors as important in a dispute resolution system: quality of judgment and court when choosing a forum, fairness of the outcome, corruption, predictability of the outcomes, speed of the dispute resolution, contract law, arbitration, language, costs, quality of lawyers, bureaucracy, tax law, company law, availability or absence of disclosure/discovery, advice by law firm, mediation availability or absence of cross-examination, employment law, availability or absence of class/collective procedure, other procedural aspects, small claims procedure, ombudsman.³⁹⁰ The parties were asked to rate these factors from the scale of 1 to 5. Number one accounted for the least important criterion and number five accounted for the most important criterion.

In the Oxford Study, the factors that are of importance and relate to procedural justice are: quality of judges and courts (4.39), the fairness of the outcomes (4.38), corruption (4.38), predictability of the outcomes (4.32), speed of dispute resolution (4.15), language (3.97), costs (3.83), availability or absence of disclosure/discovery (3.37).³⁹¹

The factors that were set are either elements to uphold procedural justice, such as costs, language, speed and lack of corruption or the ends for procedural justice, such as predictability and fairness of the outcome. These factors can either be achieved by maintaining procedural justice.

The problem that this survey poses for the purpose of the thesis is that the survey did not provide a clear-cut definition for each factor. For example, it is not clear what is meant by fairness. It is however of importance that the businesses consider speed and cost as to very highly valued factors for choosing a dispute resolution forum, coupled with the predictability of the outcome and language.

The survey also asked the businesses whether they prefer arbitration to court and why, the results indicate that arbitration in general is not deemed as cheap, however it

³⁹⁰ Stefan Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Hart Publishing 2013) 247.

³⁹¹ Stefan Vogenauer, 'Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law a Business Survey' (Institute of European and Comparative Law, 2008) <<http://bit.ly/1wYaWR2>> 28 accessed 3 November 2015.

is advantageous to court. 63% said they prefer arbitration to courts and their preferences were: confidentiality (63%), speed (21%), cost (3%), informality (6%), enforceability (5%), and particularity of a certain type of transaction (2%).³⁹²

The confidentiality of the process was very important to businesses. When the respondents were asked why they prefer other modes of alternative dispute resolution to court, the respondents indicated their top preferred factors are speed (39%), confidentiality (31%), cost (10%), informality (10%), particularity of a certain type of transaction (3%).³⁹³

As the survey clearly shows, the businesses prefer a speedy, inexpensive and confidential process. The preferences of speed and cost effectiveness are indeed in line with the procedural justice criteria that scholars and other initiatives are set. Efficiency (cost and duration of the process) is also a criterion that firms consider in choosing a dispute resolution mechanism. The number and the duration of bureaucratic steps that the parties to the dispute need to take in order to reach a verdict and enforce the award can measure the efficiency of a justice system. These steps affect the duration and cost of a dispute resolution mechanism. Reduction of such steps is also related to the flexibility (informality) of the process, which can lead to the efficiency of the justice system. In the study carried out by Oxford Research Group on Comparative Studies, the flexibility and informality as well as the cost and speed of the process affected the firms' preference in choosing a justice system.³⁹⁴

3.3.2.6 WIPO Survey on Preferences of Parties on Dispute Resolution in Technology Transaction

WIPO arbitration and mediation center carried out a survey on the preferences of firms and other organizations, government bodies and self-employed individuals on their preferred features of dispute resolution in technology related transactions. Although the survey has parties other than firms, the transactions are of B2B nature. Therefore the

³⁹² 'The Oxford Civil Justice Survey ' (2008) Institute of European and Comparative Law, University of Oxford Faculty of Law, 28.

³⁹³ 'The Oxford Civil Justice Survey ', 46.

³⁹⁴ Stefan Vogenauer, 'Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law a Business Survey' (Institute of European and Comparative Law, 2008) <<http://bit.ly/1wYaWR2>> accessed 3 November 2015.

result of the survey is of special importance in this thesis as it confirms the preferences of the parties on dispute resolution.

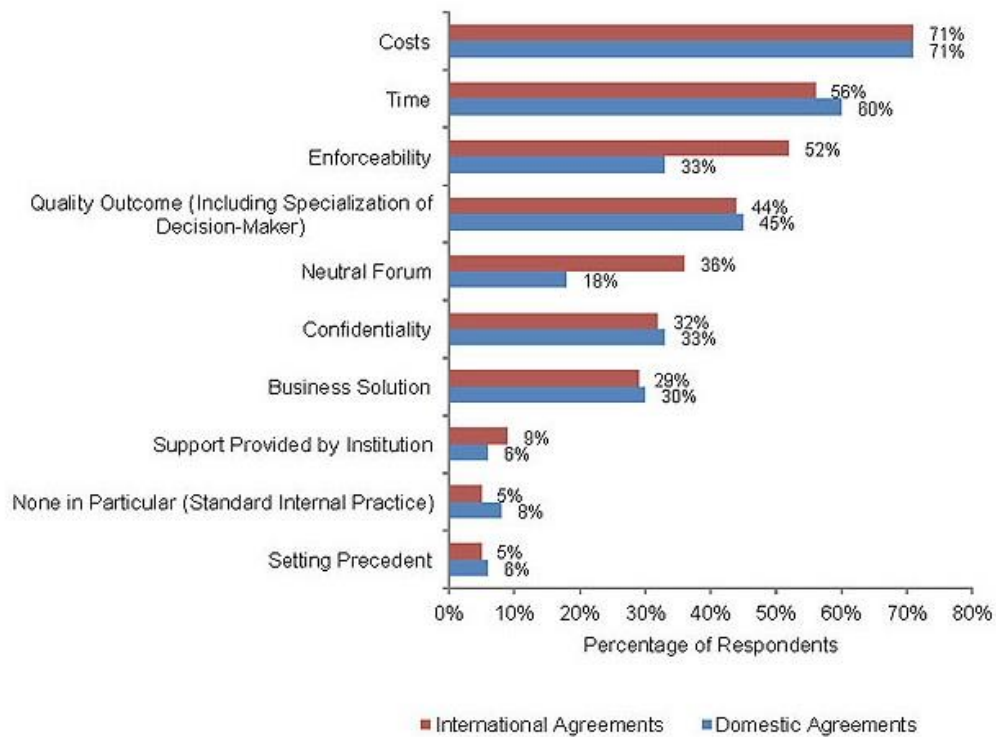
There were 393 respondents to the survey from 62 countries. They were located in various regions: Europe, North America, Asia, South America, Oceania, the Caribbean, Central American and Africa. The respondents varied from small-medium sized enterprises to large corporations. They are active in various business sectors such as pharmaceuticals, biotechnology, IT, electronics, telecom, life sciences, chemicals, consumer goods and mechanical. The nature of the contracts ranged from non-disclosure agreements, assignments, licenses, agreement on the settlement of litigation, research and development, and agreements and merge acquisition agreements.³⁹⁵

The majority of the respondents (94%) indicated that negotiating dispute resolution clauses were a part of their contract negotiations. With respondents major preference for choosing a dispute resolution clause was cost and time. According to the survey, 71% of the respondents both international and domestic contracts considered the cost of dispute resolution process when negotiating the dispute resolution clause. Time was also the major consideration, 56% indicated time as their preference for dispute resolution method in international contracts. The respondents expected more enforceability and neutrality in international agreements for the dispute resolution. 52% considered enforceability as an important factor and neutrality scored 44%. The quality of the outcome (which included the specialization of the decision maker) was also as important for the respondents. 32% of the respondents considered confidentiality as important.³⁹⁶

³⁹⁵ World Intellectual Property, 'Results of the International Survey on Dispute Resolution in Technology Transactions' WIPO Arbitration and Mediation Center 3.

³⁹⁶ World Intellectual Property, 'Results of the International Survey on Dispute Resolution in Technology Transactions' (2013) WIPO Arbitration and Mediation Center.

Main Considerations When Negotiating Dispute Resolution Clauses



Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions

Source: WIPO report World Intellectual Property, 'Results of the International Survey on Dispute Resolution in Technology Transactions' WIPO Arbitration and Mediation Center page 5 (March 2013)

3.4 Congruency and Divergence in Positive and Normative Approaches to Procedural Justice

The theories of procedural justice and the normative criteria that they set are not always congruent with the positive criteria and the preferences of the parties to the dispute. This section considers normative principles of procedural justice based on the theories of Accuracy, Participation and Balancing approaches that were explained in section 3.1. It will then considers the closest theory to the B2B preferences for a dispute resolution mechanism and provide the principles that should be considered to evaluate B2B online dispute resolution mechanisms.

3.4.1 The Accuracy and Participation Theories and B2B Parties Preferences

The accuracy theory asserts that procedural justice is upheld when the outcome of a proceeding is accurate. Whatever element hampers the accuracy of the outcome should be eliminated and each element that can help with the accuracy of the outcome should be included. Hence, this principle considers all kinds of pre-requisites for procedural justice. It might consider in person hearing as compulsory, it might not set time limits for the participation in the dispute resolution process and does not consider the cost of the process as an element that hampers procedural justice. As it was stated, it is more of an idealistic notion and can lead to grave divergence with the preferences of the B2B parties and hamper aspects that they value such as efficiency and effectiveness.

Participation theory considers a process as just if no element has hampered parties' participation, regardless of what the outcome is. As it was stated both lists for participation and accuracy model pre-requisites are not exhaustive but they are mainly: right to hearing, right to an impartial third party decision maker, right to a legal counsel, right to present evidence, right to a reasoned decision and right to appeal the decision.

Both of these theories are limited from the practical point of view and what the commercial parties perceive as procedurally just.³⁹⁷ These theories do not consider the costs of the procedure that can hamper the parties' participation in the process, nor do they consider the pace of the process as an element of procedural justice.

Not considering cost and duration of the process grants a latitude to the dispute resolution process to allow for elements that are not in line with parties' preferences for a dispute resolution mechanism and that the B2B parties do not value highly. Surveys that were studied reveal the preferences of the firms for efficiency and finality of the award as well as a limited discovery process. The cost of the process is one of the most important procedural aspects for the commercial parties in most of the surveys about the firm's preferences for dispute resolution. These are in contrast to the participation and accuracy model which can allow for unlimited discovery and does not consider the cost of the procedure as a procedural justice aspect.

³⁹⁷ Diamond, 'Psychological Aspects of Dispute Resolution: Issues for International Arbitration' 327.

3.4.2 The Balancing Approach and B2B Parties' Preferences

Both the general positive studies of parties' preferences for procedural justice and the normative theories of accuracy and participation do not consider affordability and timeliness of dispute resolution process as procedural justice criteria. In the general preferences of parties' for procedural justice, Lind argues that cost and delay do not have any effect on the parties' perception of procedural justice.³⁹⁸ While he does not assert that delay and expense are not significant, he argues that disputants view costs and delays as unfortunate but unavoidable features of litigation and might consider other features more in their perception of justice.³⁹⁹ The normative criteria of accuracy and participation also allow for many elements to be considered to achieve accuracy or/and participation without considering cost and time. This is however different in commercial disputes and users and as it was demonstrated cost and time are important to commercial settings and can in fact be treated as a procedural value.

Among the procedural justice theories, the balancing approach considers time and cost as procedural justice criteria. While there are criticisms regarding the application of the balancing approach to the legal system, as it cannot explain the right to jury trial, discovery and traditional pleading,⁴⁰⁰ applying the balancing approach to private dispute resolution processes in the B2B context might be justified. This is specifically the case when the preferences of the firms that are involved in the dispute are considered regarding procedural justice. As Cooter and Rubinfeld suggests, "there is reason to wonder whether disputants value cumbersome procedural rules designed to produce accuracy as highly as courts do."⁴⁰¹ As it was argued in section 3.2 effectiveness and efficiency of the process are of great importance for commercial parties.

The balancing approach theory considers two values of accuracy and participation at minimum costs and the effectiveness of the justice system can be also justified under this theory. In other words, the balancing approach aim is to provide a fair balance between the costs and benefits of various procedural rights. The balancing approach

³⁹⁸ Lind and others, 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System', 972.

³⁹⁹ Lind and others, 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System', 972.

⁴⁰⁰ Solum, 'Procedural Justice'.

⁴⁰¹ Robert D Cooter and Daniel L Rubinfeld, 'Economic Analysis of Legal Disputes and Their Resolution' (1989) *Journal of Economic Literature* 1067, 1088.

can accommodate the principles of accessibility, neutrality, effectiveness and efficiency that are of importance in B2B parties' preferences in dispute resolution mechanisms. The effectiveness that requires the enforceability of the award can be guaranteed by participation, efficiency and neutrality. A neutral decision maker will allow the parties to participate in the process and resolve their dispute in a timely manner at the minimum possible cost and enforces the award.

3.5 The Criteria for Evaluating Procedural Justice

In the previous section it was established that in B2B disputes, parties require that a justice system provide a process in which they can participate in and can provide evidence, which in this thesis is titled as accessibility. It was further established that neutrality is an important measure for a justice system and can enhance trustworthiness. The enforceability of the outcome and the effectiveness of the process i.e. compelling the parties to participate in the process was an important criterion of procedural justice. The cost and time of the process was highly rated as well which is titled as efficiency in this thesis. The procedural fairness can be affected by the presence and strength of these criteria. To measure the overall strength of procedural justice the extent to which these criteria are upheld should be considered. This section lays down the four criteria of procedural justice. It should be noted that the elements that will affect these criteria should be considered by examining the design of dispute resolution mechanism, hence this part discusses how these criteria should be upheld in general terms and Chapter 5 discuss in detail the elements that affect these for criteria.

3.5.1 Accessibility

Accessibility relies on two overarching elements, first participation in the dispute resolution process, and second in order to achieve accessibility the cost of adjudication or dispute resolution should not exceed the cost of expected value of the claim.⁴⁰²

⁴⁰² This perspective is based on "the standard rational-choice model of the decision to sue, according to which a plaintiff will only file a claim if the expected value of the claim (the probability that the plaintiff will win, p , times the amount of recovery if it wins, w , less the costs of suit, c) is greater than zero. The so-called "filing condition" is thus $(pbw) - c > 0$ ". Christopher A Whytock, 'The Evolving Forum Shopping System ' (2010) 96 Cornell L Rev 481.

Therefore, accessibility can be reduced by eliminating factors that obstruct parties' participation in the process and factors that increase the costs of submitting a dispute and taking part in the dispute resolution process these factors include how the decision making process requires data from the participants and how it staffs the process.⁴⁰³

These factors vary depending on the design of the dispute resolution mechanism. In general, in order to understand how a justice system provides accessibility and reduces the cost of the adjudication process, the means by which the design of the process facilitates participation should be assessed. In assessing the accessibility of a justice system, it should be considered how the system reduces the transaction cost of access so that the cost does not exceed the expected value of the outcome. The study on the design of the OMI's accessibility and the design elements that can hamper its accessibility will be substantiated in Chapter 5 and Chapter 6.

3.5.2 Neutrality

Neutrality requires the decision maker to make an unbiased decision. An unbiased decision is a decision that is solely made based on the evidence and arguments that have been provided by the parties and not based on any other external factor.⁴⁰⁴ The external or, as Allison indicates, the alien factors can include "both states of mind and particular decision making structures encouraging or inadequately checking these states of mind."⁴⁰⁵

Neutrality is a criterion of procedural justice that contributes to the equal treatment of the parties and certainty of the process.⁴⁰⁶ It provides incentives for the parties to participate in the process by reducing the cost of being awarded a biased decision.⁴⁰⁷ It also ensures the independence and impartiality of the decision making process. As Pasquino indicates, "independence has to be conceived of as neutrality, and absence of

403 Solum, 'Procedural Justice', 191.

404 Waldron, 'The Rule of Law and the Importance of Procedure'.

405 Allison, 'Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis' 1222.

406 Tom Tyler, Peter Degoey and Heather Smith, 'Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model' (1996) 70 *Journal of Personality and Social Psychology* 913.

407 Warren F Schwartz and Gordon Tullock, 'The Costs of a Legal System' (1975) 4 *The Journal of Legal Studies* 75, 77.

the subordination of the judge a) from the parties to the conflict, b) from any other power interested in a given resolution of the conflict, and as far as possible c) from the bias of passions and partiality of the judge himself or herself.”⁴⁰⁸ Users of justice systems highly value neutrality and it contributes to the legitimacy of the process both from rule of law and procedural justice perspective.⁴⁰⁹

Neutrality of the decision maker can be used as a proxy for procedural justice and also may be used as an indicator as to the fairness of outcome, when the substantive fairness of the outcome cannot be measured.⁴¹⁰ Neutrality can also enhance efficiency, legitimacy of the decision and the decision making institution.⁴¹¹

In order to ascertain the neutrality of the decision making, the structure of the justice system should be studied to understand whether it creates incentives for maintaining impartiality or discourages partiality. To do so, it should be established who pays for the neutrals and the nature of their financial or professional incentive structure.⁴¹²

To unbundle the financial or professional incentive structure, the system of bias control of the justice system should be investigated. The system of control can be divided into: internal control and external control. Internal control is when the justice system internally monitors the neutrality of the process or the decision maker. External control is when an external authority has oversight on the functioning of justice system and controls for neutrality.⁴¹³

The internal control of in a justice system is shaped when the justice system internally monitors bias. Justice systems can have variety of incentives in order not to make biased decisions. For example, reputation can be one incentive for a justice

408 Pasquale Pasquino, ‘Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History’ (2003) 2 *Law and Practice of International Courts and Tribunals* 11.

409 Hollander-Blumoff and Tyler, ‘Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution’, 9.

410 Allison, ‘Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis’ 1153 and 1154.

411 Cogan, ‘Competition and Control in International Adjudication’, 413. Maurits Barendrecht, ‘Growing Justice: Justice Policies and Transaction Costs’ (2009), 30.

412 Lisa Blomgren Bingham, ‘Designing Justice: Legal Institutions and Other Systems for Managing Conflict’ (2008) 24 *Ohio St J on DispResol*, 13.

413 Cogan, ‘Competition and Control in International Adjudication’ 418.

system to remain neutral. The design of the justice system and where it is nested also has an effect on the neutrality of the decision maker. The incentives created by the internal control mechanism or the structure of the justice provider should prohibit those decision makers that have a financial stake in the outcome, personal bias toward a party or predisposition toward one party.⁴¹⁴

The external control is in place when an external body or institution has oversight. For example, the arbitrators' neutrality is normally controlled by the state and the states have laws pertaining to the arbitration to keep them independent and to prevent them from making a biased decision. For example, recent European Commission Directive on ADR, certain yardsticks for maintaining the independence of the decision maker have been considered such as, checks and balances on conflict of interest, duration of appointment, lack of instructions from any of the parties, and disclosing direct or indirect financial interest.⁴¹⁵ By applying laws, directives and other external norms, the decision maker has incentives to remain neutral.

Posner touches upon the decision making process of judges and how they make decisions. He indicates that judges are utility maximizers and a wide variety of incentives can affect their decision. What is important to consider here is the structure of adjudication or dispute resolution system in which the incentives that may exist for the decision maker to make a biased or non-biased decision. Posner considers the judges incentives in public courts. He maintains that through different devices judges are precluded from having economic incentives, such as through life tenure or conflict of interest rules.⁴¹⁶ Hence, judges are placed in a vacuum away from economic incentives.⁴¹⁷ He also analyses the arbitrators' incentives. He argues that due to receiving financial compensation directly from the parties, the arbitrator might want to satisfy both parties in order to secure future business with them. However, he adds that

John R Allison, 'Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis' 1138

414 Posner, *What Do Arbitrators Maximize*, Law and Economics of Arbitration (St Gallen 2014).

415 Council Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (2013) OJ L 165/63.

416 Richard A Posner, 'What Do Judges and Justices Maximize?(the Same Thing Everybody Else Does)' (1993) *Supreme Court Economic Review* 1.

417 Posner, 'What Do Judges and Justices Maximize? (the Same Thing Everybody Else Does)' 1.

this might not automatically affect the impartiality of the arbitrator.⁴¹⁸ Nevertheless, if the structure of justice system allows the decision maker for systematic under-compensation of one group over another, then it will lead to bias and inefficiency. For example, it has been illustrated that the dispute resolution providers for domain name disputes are more biased towards the complainant, as the more complaints they get, the more money they receive.⁴¹⁹ In summary, when there is a lack of regulation for ensuring a certain dispute resolution system neutrality, the design of the system should be considered in order to find out if there are internal mechanisms for checks and balances, and also if economic incentives exist to remain neutral.

Various elements can contribute to the neutrality of a justice system. The more the rules for resolving the disputes are elaborated, the more it is likely that the justice system remains neutral.⁴²⁰ Other matters such as economic incentives in remaining neutral or biased can also affect the neutrality of the justice system, competition between different providers that might also induce the justice providers to remain neutral and if the outcomes of the dispute resolution are evidence based, it is more likely that the justice system remains neutral.⁴²¹

The elements that can affect the neutrality of Online Market Intermediaries will be substantiated in Chapter 5.2, considering the design of the OMIs. In order to evaluate the neutrality of their dispute resolution, their institutional design and those elements that have an effect on the neutrality will be considered.

418 Posner, What Do Arbitrators Maximize, *Law and Economics of Arbitration* 125.

419 Allison, 'Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis', 1168.

420 Andres A. Gallo Jay P. Kesan, 'The Market for Private Dispute Resolution Services- an Empirical Re-Assessment of Icann-Udrp Performance' (2005) 11 *Mich Telecomm Tech L Rev*.

421 Thomas Nathan Hale, 'The Rule of Law in the Global Economy: Explaining Institutional Diversity in Commercial Dispute Resolution' (Citeseer 2012) 95.

3.5.3 Effectiveness

The effectiveness of a dispute resolution system lies in its authority to compel the parties to engage in the process and issue an enforceable outcome.⁴²² Similarly, the effectiveness of a justice system from the user's perception of justice, according to HiiL, is called pragmatic justice,⁴²³ which requires the outcome of the adjudication to be enforceable and be enforced in congruence to the outcome.

A fair but unenforceable outcome does not yield any justice to the parties of the dispute.⁴²⁴ In the rule of law scholarship effectiveness might be interpreted as the practicality of the outcome and it enhances the predictability of the dispute resolution process, which is very important for upholding the rule of law.⁴²⁵ Scholars also consider that justice will be maintained when the remedies that are provided by law and the decision maker are implemented and enforced through institutions.⁴²⁶ Consistent enforcement of awards enhances certainty.⁴²⁷ Effective enforcement mechanisms also contribute to the goal of compliance, which is fundamental to achieving the state of rule of law.⁴²⁸

The effectiveness of a justice system can be maintained through the enforcement mechanisms. Enforcement mechanisms can generally be provided by two sources: a legal enforcement mechanism that the state provides (formal enforcement mechanisms) and social enforcement mechanisms (informal enforcement mechanisms). Non-state actors provide social enforcement in the form of markets, reputation and norms.⁴²⁹

422 Laurence R. Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication'.

423 Measuring Costs and Quality of Access to Justice (2010) < <http://www.hiil.org/project/measuring-costs-quality-of-access-to-justice> > Accessed 25 April 2016.

424 Gramatikov and Janse, 'Justice Monitoring and Evaluation in the Eu: Status Quo and the Way Ahead? '.

425 Waldron, 'The Rule of Law and the Importance of Procedure '.

426 Rachel Kleinfeld Belton, 'Competing Definitions of the Rule of Law: Implications for Practitioners' (2005) Carnegie Endowment for International Peace

427 Buscaglia and Ulen, 'A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America', 276.

428 Raz, *The Authority of Law: Essays on Law and Morality* (1979), Peerenboom, 'Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC', *Enforcement of Transnational Regulations*, Fabrizio Cafaggi, *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar Publishing 2012).

429 Curtis J Milhaupt, 'A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law' (1996) 37 *Harv Int'l LJ* 3, DL Mazumdar, 'The Modern Corporation and the Rule of Law' (1965) 114 *University of Pennsylvania Law Review* 187.

The effectiveness of a justice system is however not reliant on the provider of the justice system. In other words, it does not matter if the justice system is privately provided or state provided. Effectiveness of a justice system is more reliant on the expected value of enforcement. If the enforcer finds that following through with the outcome is worthwhile then s/he will follow through and a zero-sum or a positive-sum outcome can be achieved. In sum, when the enforcer finds that resistance would not be worthwhile then s/he will not deviate from complying with the outcome.⁴³⁰

Expected value of enforcement can be calculated by multiplying two factors: the magnitude of the prescribed sanction and the probability of its being imposed. The magnitude and the probability of the enforcement of award vary with the attributes of transactions.⁴³¹

Broadly speaking enforcement mechanisms can be divided into reputation mechanisms, ostracism and monetary punishment. The effectiveness of different types of enforcement mechanisms depends on various attributions of disputes, such as the context of the dispute and the sector in which it takes place.⁴³² Hence costs can be calculated by considering the attributes of the transactions. As Barzel argues, “The costs of applying different means of enforcement will differ according to circumstances, and the scale economies in applying them can vary widely. Each such means, then, may have a comparative advantage under different circumstances, and no single means is likely to be preferable to all the others all the time. For instance, excommunication cannot be effective if the transactors do not belong to the same community in the first place, and physical force will not be useful if the transactors are located far from the enforcer. The nature of the interaction can determine which form of enforcement will be used.”⁴³³

In support of Barzel’s argument, scholarly work has been carried out on how enforcement mechanisms can be effective. Bernstein in a seminal work about the diamond industry illustrates how ostracism and reputation mechanisms are effective in

430 Yoram Barzel, *A Theory of the State: Economic Rights, Legal Rights, and the Scope of the State* (Cambridge University Press 2002) 26.

431 Oliver E Williamson, ‘Outsourcing: Transaction Cost Economics and Supply Chain Management’ (2008) 44 *Journal of supply chain management* 5.

432 Cafaggi, *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* 5.

433 Barzel, *A Theory of the State: Economic Rights, Legal Rights, and the Scope of the State* 25.

enforcing arbitral judgments within the diamond industry network. As shown in her work, this mechanism only works due to the high cost of reputation and ostracism from the network as the New York Diamond Network holds a monopolized network that being ostracized from can cost the diamond dealers their jobs.⁴³⁴ In a related academic research in Timber Industry, Konradi found that the arbitral award is normally respected due to two reasons: the high value of reputation within Timber Industry and the good reputation of the arbiters.⁴³⁵

Drawing on Barzel's explanation, it can be concluded that effectiveness of a justice system can be maintained through different mechanisms and they do not necessarily have to be provided by the state. The effectiveness of enforcement mechanism depends on the magnitude of the prescribed sanction and the probability of its being imposed. The magnitude and the probability change with the attribution of transactions and the design of the institutions and justice systems. This study will delve into the effect of the design elements of B2B OMI on effectiveness in Chapter 5(2).

3.5.4 Efficiency

Before getting into the general discussion about efficiency, it is important to clarify what notion of efficiency is being used in this part. A frequent use of economic analysis of law is to promote efficiency.⁴³⁶ In such analysis, efficiency might have different notions. One of the notions of efficiency is the theory of welfare economics that "explores how the decisions of many individuals and firms interact to affect the well-being of individuals as a group."⁴³⁷

The other notion of efficiency, which is the focus of this thesis, is cost-effectiveness. It is an instrumental criterion rather than a normative criterion.⁴³⁸ Cost effectiveness analysis is used as an instrument of cost minimization in the

434 Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry'..

435 Konradi, 'The Role of Lex Mercatoria in Supporting Globalised Transactions: An Empirical Insight into the Governance Structure of the Timber Industry', 62.

436 Francesco Parisi, *The Language of Law and Economics* (Cambridge University Press 2013).

437 Cooter and Ulen, *Law and Economics* 38.

438 Parisi, *The Language of Law and Economics*.

implementation of the policy or the institution objectives.⁴³⁹ In order to achieve the objectives of accessibility, neutrality and effectiveness, efficiency should be observed.

Provision of the three criteria of accessibility, neutrality and effectiveness can be hampered by a lack of efficiency. Allison defines efficiency in justice systems as “a process value [which] refers to the achievement of an accurate, efficacious, and fair decision, as well as one that promotes non-instrumental values, with the least possible expenditure of time, money, and other resources.”⁴⁴⁰ Batra et. Al observed that countries that declared higher discontent with the affordability and speed of the justice systems perceived less impartiality.⁴⁴¹ Caffagi also proclaims that the higher level of efficiency can result in higher level of accountability, which is related to procedural justice.⁴⁴² Therefore, it is important to consider efficiency as an element of upholding the procedural justice.

Efficiency can be measured by the overall cost and duration of the process. The cost and duration of the dispute resolution proceeding increases if all the procedural criteria, such as oral hearing, right to appeal, access to legal counsel, and other factors are rigidly applied to every case without considering the context. This has an adverse effect on providing the procedural justice criteria that are essential for the parties. Therefore the extent to which adherence to the procedural justice criteria is maintained differs depending on the context of the dispute.⁴⁴³

In international trade, some of the elements of procedural justice might be denied due to tradeoffs with efficiency. For example, the timeliness of the dispute resolution

439 Parisi, *The Language of Law and Economics*.

440 Allison, ‘Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis’, 1154.

441 Geeta Batra, Daniel Kaufmann and Andrew HW Stone, ‘Voices of the Firms 2000: Investment Climate and Governance Findings of the World Business Environment Survey (Wbes)’ (2002) Rev May.

442 Fabrizio Cafaggi, ‘New Foundations of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 20..

443 This does not only happen in arbitration or private justice systems. Even in state justice system the adherence to the criteria of the rule of law depends on the context , as Bingham illustrated this in the US justice systems “depending upon the context, procedural due process may include some or all of the protections the U.S. Supreme Court articulated in *Goldberg v. Kelly*: timely and adequate notice, presenting evidence orally, confronting adverse witnesses, cross-examining adverse witnesses, having government disclose opposing evidence, access to legal counsel, presenting oral arguments, an impartial decision-maker who decides the case on the hearing record, and a decision that states the reasons and the evidence.” Lisa Bingham, ‘Reflections on Designing Governance to Produce the Rule of Law’ (2011) 67 *J DispResol*, 69.

process might affect the right of the parties to be heard and have their day in court.⁴⁴⁴ It is true that the fast pace of these economic activities requires speedy dispute resolution system, which may be in contrast to the traditional adjudication.⁴⁴⁵

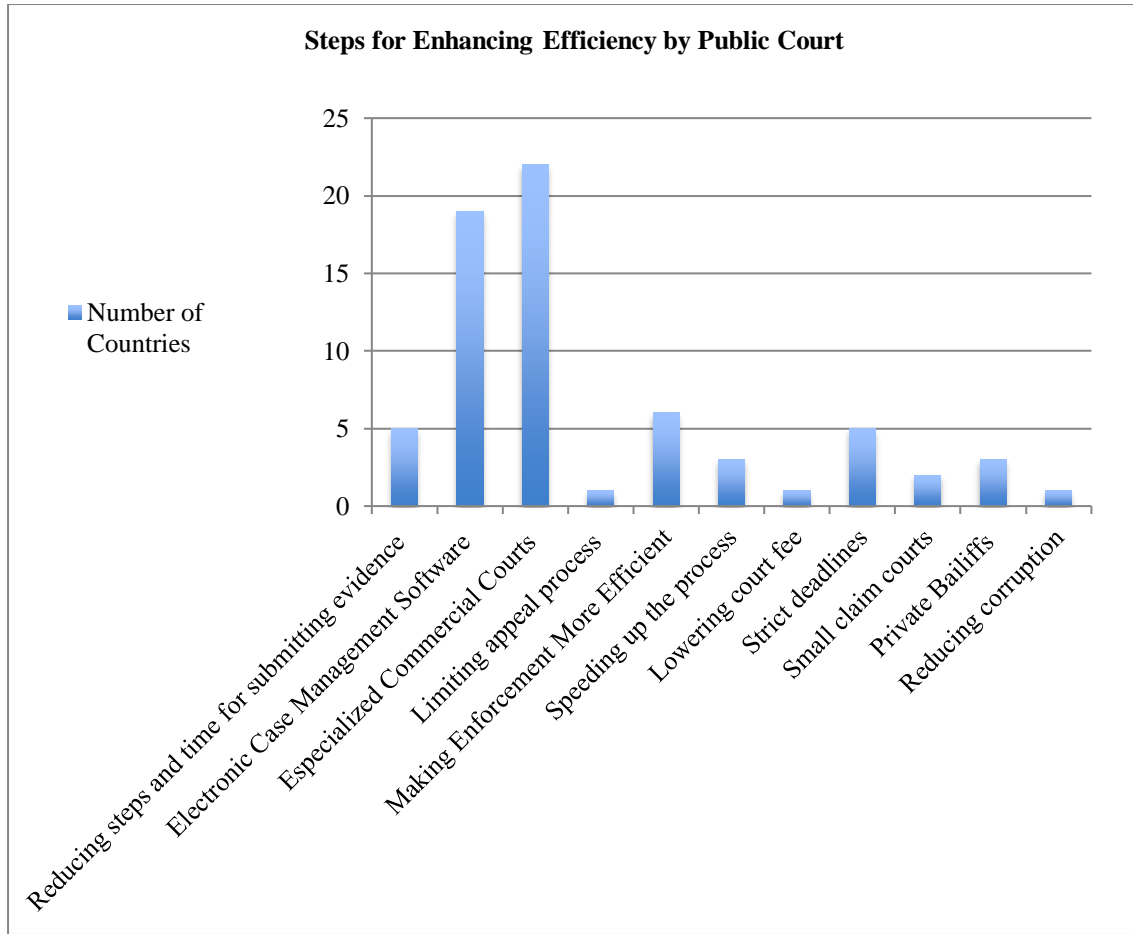
Nevertheless, the tradeoff between the degree of adherence to procedural justice criteria and efficiency does not necessarily lead to the diminishment of justice, especially in trade. Efficiency is even a factor that public courts consider for bringing about due process in their domestic affairs.⁴⁴⁶ The table below indicates the changes and the number of countries that have attempted to reform their judicial system for bringing about efficiency. Courts in general have provided electronic management software to reduce the time and cost of the process, which can provide better accessibility. They have also provided specialized commercial courts with expedited processes, which also improves accessibility and efficiency of enforcement by reducing costs and delay in the enforcement of the award.⁴⁴⁷

444 Michael J. Trebilcock, & Edward M. Iacobucci, 'Designing Competition Law Institutions: Values, Structure, and Mandate', 41 *Loy. U. Chi. L. J.* 455 (2010) 458.

445 Scheuerman, 'Economic Globalization and the Rule of Law', 111.

446 Maria Dakolias, 'Court Performance around the World: A Comparative Perspective' (1999) 2 *Yale Human Rights and Development Journal* 2.
For example, in The Delaware Court System Summary Proceeding has introduced time limits for the submission of the evidence and duration of the discovery. All depositions must be completed within a certain time frame.

447 Alon Klement and Zvika Neeman, 'Civil Justice Reform: A Mechanism Design Framework' (2008) 164 *Journal of Institutional and Theoretical Economics* JITE 5.



Source: Doing Business⁴⁴⁸ – Chart Created by the Author

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The World Bank Group on Doing Business, 'Enforcing Contracts', <<http://www.doingbusiness.org/data/exploretopics/enforcing-contracts/reforms>> Accessed 16 March 2016.

In order to measure the efficiency of a justice system, the overall cost and duration of the process should be considered. A system that is able to reduce the cost of providing the process for achieving the procedural justice can be called efficient. However, the level of upholding various criteria of procedural justice might differ based on the nature of the dispute and the parties involved. For example, while participation might be the core element of procedural justice, the preferred level of participation and the means of participation might be different. When the dispute is complicated and the economic stakes are very high, parties might want to attend the hearing in person. A case that is very complex may sometimes justify long proceedings. For example, in the case of *Boddaert v. Belgium*, six years and three months were not considered unreasonable by the Court since it concerned a difficult murder enquiry and the parallel progression of two cases.⁴⁴⁹ This prolongation does add to the cost of the process, however it does not make the process inefficient.

To investigate whether the OMIs' dispute resolution mechanism is efficient, the design of their dispute resolution mechanism will be studied. Studying their design can explain the nature of the disputes they deal with and other elements that can hamper the costs and duration of their dispute resolution mechanism.

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Boddaert v. Belgium (1992) Series A235-D.

4 Online Market Intermediaries' Institutional Design

In B2B context, principles of accessibility, neutrality, efficiency and effectiveness should be upheld in order to achieve procedural justice. Each of these principles can be hampered or achieved based on various design elements of the justice system. Hence, to evaluate OMIs justice system, it is necessary to look at how their institutional design affects these criteria. As substantive outcomes of the disputes are typically not available due to confidentiality, it is not possible to assess their dispute resolution mechanism based on the outcome of the process. To overcome this shortcoming this study will evaluate OMIs justice systems based on how their Dispute System Design (DSD) of OMIs can affect procedural justice criteria.

In order to do so, the design of the OMIs dispute resolution should be first laid out. This chapter aims also to clarify the different institutional design of OMIs; specifically those design features that have an effect on the procedural justice criteria. To do this more systematically, it draws upon the theoretical framework of institutional identification proposed by Ostrom.⁴⁵⁰ Bingham has applied Ostrom's theory to DSD which can be considered a form of institutional design⁴⁵¹ and has analyzed several dispute system designs such as labor disputes.⁴⁵²

In the theory of dispute system design, there are certain design structures that have a direct effect on the criteria of procedural justice that were introduced in the previous chapter as accessibility, neutrality, effectiveness and efficiency. These design factors should be identified and explained in order to understand their effect on the procedural justice criteria. Using Ostrom's institutional identification and Bingham practical application of these design elements, this section will analyze the different institutional design of online market intermediaries that affect the procedural justice elements.

The chapter is organized as follows: first Ostrom's institutional identification theory and Bingham's application of dispute design to different dispute resolution

450 Elinor Ostrom, *Understanding Institutional Diversity* (Princeton university press 2009).

451 Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', 9.

452 Bingham and others, 'Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace'.

mechanisms will be explained. Then it proceeds to elaborate on various dispute system designs that shape OMI's justice systems.

4.1 Ostrom's Theory of Institutional Identification and Dispute System Design

Institutional design is an approach that Ostrom used to understand and examine various institutions and how their design influences their goals.⁴⁵³ To understand the institutional design approach a definition of institutions is required. Institutions are rules that govern the interaction of a certain group or members, which are enforced by a sanctioning mechanism.⁴⁵⁴ They can be found in formal settings such as legislatures and elections or informal settings such as -families and sports.⁴⁵⁵

To understand the institutions, Ostrom sets out the common structural components of institutional design in different situations. Ostrom considers the action situation as a focal point of analysis for institutions. As a typical action she identifies buyers and sellers exchanging goods in a market⁴⁵⁶ and identifies seven components for analyzing the actions:

- (1) the set of participants [single individuals or corporate actors],
- (2) the positions to be filled by participants,
- (3) the potential outcomes,
- (4) the set of allowable actions and the function that maps actions into realized outcomes [action-outcome linkages],
- (5) the control that an individual has in regards to this function,

453 Elinor Ostrom, *Understanding Institutional Diversity*.

454 Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge university press 1990) 3., Stefan Voigt, 'How (Not) to Measure Institutions' (2013) 9 *Journal of Institutional Economics* 1.

455 Ehrenberg, 'Procedural Justice and Information in Conflict-Resolving Institutions', 175.

456 Ostrom, *Understanding Institutional Diversity* 32.

(6) the information available to participants about actions and outcomes and their linkages, and

(7) the costs and benefits—which serve as incentives and deterrents—assigned to actions and outcomes.⁴⁵⁷

Bingham applies the categorization of Ostrom to Dispute System Design (DSD).⁴⁵⁸ DSD is a term used by William Ury, Jeanne Brett and Stephen Goldberg to describe internal, private dispute resolution mechanism that organizations use to resolve internal conflicts such as labor disputes.⁴⁵⁹ Considering the institutional elements that Ostrom sets out, Bingham pinpoints the DSD elements in various contexts, including private dispute resolution mechanisms.⁴⁶⁰ She does not only consider internal conflict management by organizations but also considers dispute resolution mechanisms that are external.⁴⁶¹ She provides the general criteria for identifying their design and their effect on a specific feature for example, the fairness of the process.⁴⁶²

Taking on Bingham's approach, to understand the dispute system design of a dispute resolution provider we need to identify the setting of the DSD, how the DSD is provided (conflict management system, ombudsman etc), the subject matter of the conflict and the participants that use the system, the type of dispute resolution mechanism used (alternative dispute resolution, or arbitration or non-binding arbitration), its possible outcome and the sequence of interventions, the neutral's characteristic (training, qualifications, demographics), the financial and professional structure of the neutrals, the nature of any due process protection (availability of written opinion, availability of seeking redress from court) and structural support with respect

⁴⁵⁷ Ostrom, *Understanding Institutional Diversity* 33.

⁴⁵⁸ Lisa Blomgren Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict' (2008) 24 Ohio St J on Disp Resol 1.

⁴⁵⁹ William L Ury, Jeanne M Brett and Stephen B Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Jossey-Bass 1988).

⁴⁶⁰ Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', 21.

⁴⁶¹ She considers institutional design of arbitration, court-connected mediation and other third party dispute resolution mechanisms. Lisa Bingham, 'Control over Dispute-System Design and Mandatory Commercial Arbitration' (2004) 67 Law and Contemporary Problems 221; Bingham, 'Self-Determination in Dispute System Design and Employment Arbitration'; Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict'.

⁴⁶² Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', 46.

to dispute resolution level of control of the parties in the process (bilateral, unilateral or third party decision-making).⁴⁶³

The list of the components that Bingham provides is not exhaustive.⁴⁶⁴ Each dispute resolution design might have specific components that affect the criteria of procedural justice. Drawing upon both Bingham and Ostrom's list of components, to identify the design of OMIs the following elements will be considered:

- (1) The control over the process
- (2) The nature of the DSD (whether it is conflict management, internal, or external)
- (3) The type of dispute resolution (Arbitration, non-binding arbitration etc)
- (4) The financial and professional structure of the neutrals
- (5) The nature of any external oversight

The following sections will analyze the institutional design of OMIs based on the abovementioned elements.

4.2 The Control Over the Process

Control over the process of a justice system requires possessing power to decide on various important functions of the design of a justice systems, for example what kind of disputes can be filed, which dispute resolution mechanism can be used (for example arbitration or mediation), what will be the cost of the process and who bears the costs.⁴⁶⁵ Therefore, the institution that exerts such control has the primary role in affecting the procedural justice by choosing the location of dispute resolution, the financial and professional structure of the neutrals and etc.

Depending on who controls the procedural or sanctioning mechanisms of dispute system design, the institution can be of internal or external nature. Voigt provides a

⁴⁶³ Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', 13.

⁴⁶⁴ Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', 12.

⁴⁶⁵ Bingham and others, 'Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace', 4.

useful distinction, which divides institutions to internal and external, based on who sanctions the breaching party.⁴⁶⁶ If the breaching party is sanctioned by a state justice system, for example by public court, then the institution is external. If the breaching party is sanctioned by the organization or in this study by the intermediary, then the institution is internal.

The question of who exerts control over the process has many important impacts on the justice that the justice system produces. There might be certain clauses in the contract between the parties that takes the mutual control over the process away, and puts it in the hands of one of the parties. These instances occur when one of the parties is more powerful than the other. Power can be defined as the ability to coerce someone to do something s/he would otherwise not do, by imposing costs or threatening to impose costs.⁴⁶⁷ The examples of such practices are: referring consumers to arbitration in a contract designed by the business or referring the employee to an arbitration forum selected by the employer.

In B2B contracts the design of the contract and the dispute resolution clause is mutually crafted if both parties are of equal bargaining power. If one of the parties is less powerful than the other, there is the risk of the more powerful party to exert control over the dispute resolution process. It does so by various means such as unilaterally by appointing the dispute resolution provider.⁴⁶⁸

The exertion of power and control over the dispute system design can lead to the creation of various dispute systems that affect the procedural justice elements. The neutrality of the decision maker might be affected or the cost of the process might be too high. In any dispute system design it is necessary to find out what various types of control the parties or the dispute resolution provider have over the design of the disputes system.

466 Voigt, 'How (Not) to Measure Institutions'.

467 Ury, Brett and Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*.

468 The literature on adhesive contracts points out to the deficiency of control of the more powerful in designing the dispute resolution system. See Lisa B Bingham, 'On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards' (1997) 29 *Megeorge L rev* 223; Zev J Eigen, 'The Devil in the Details: The Interrelationship among Citizenship, Rule of Law and Form-Adhesive Contracts' (2008) 41 *Conn L Rev* 381. Jean R Sternlight, 'Creeping Mandatory Arbitration: Is It Just?' (2005) *Stanford Law Review* 1631.

The questions that Bingham suggests to ask to understand the nature of the control, are: 1) who is designing the system (for example sets the rules of procedure or has a specific policy and 2) what are their goals 3) how have they exercised their power?⁴⁶⁹ In order to address the first question “who is designing the system”, it is necessary to find out who the participants in the dispute resolution design are and what role they play. To establish the goals of the dispute resolution provider or designer, the overall organizational structure of the entity should be considered. Lastly, how the OMIs have exercised their power can be answered by looking into the clauses of their terms and conditions as well as looking into their overall structure.

4.2.1 Who Designs The Justice System And For Whom?

Identifying the participants to the dispute and the dispute resolution provider can reveal what might affect the criteria of procedural justice. For example, if the participants are of unequal bargaining position, the accessibility of the process might be negatively affected. Hence to answer the question of who designs the system and for whom this research will identify the participants to OMIs.

Three scenarios can be considered to identify who designs the system: one of the parties might design the dispute resolution and the other party agrees to it. One party imposes a specific dispute resolution clause on the other party. The third party designs the dispute resolution system. The following section identifies the parties to the dispute in OMIs and the role of OMIs in designing dispute resolution.

4.2.1.1 The Participants and Their Relation in the Design of Dispute Resolution

In B2B disputes that rise from transacting on OMIs, OMIs either decide which dispute resolution provider the parties should go to in case of a dispute or they provide a justice system themselves. They might have a specific policy on resolving disputes between the parties.⁴⁷⁰

⁴⁶⁹ Bingham, ‘Designing Justice: Legal Institutions and Other Systems for Managing Conflict’, 21.

⁴⁷⁰ For example, eBay, Alibaba and Amazon have adopted such policies.

Online Market Intermediaries are not always the sole designers of the dispute resolution mechanism. As it was indicated in Chapter two, different intermediaries might carry out a different function. When financial intermediaries are involved with the transactions, their policies for dispute resolution prevail if OMIs do not provide a dispute resolution mechanism. When ODR providers are referred to, they are a part of the DSD as well and might take part in designing the dispute resolution process. Hence it is also important to recognize the financial intermediaries and ODR providers as participants to resolving B2B disputes. This is specifically necessary now that some B2B payment services provide dispute resolution for the parties. The involvement of parties other than OMIs and businesses in the dispute resolution design is of importance as they might have an effect on upholding procedural justice.

The users in a B2B online market intermediary are generally suppliers and buyers. They can vary from sole traders to large suppliers, distributors wholesalers and retailers. There is generally less homogeneity between the transacting parties in online B2B transactions facilitated by online market intermediaries, especially if they are open. Disputing parties are located in different geographical regions, and may have different linguistic and cultural background.⁴⁷¹

In OMIs, the nature of the relationship between the parties can be detected based on the characteristics of the OMI. In biased (private) OMIs, B2B traders are more prone to build a long term relationship as they are in a system similar to supply chain, the number of members that can use the platform are limited as the members have to be certified by the intermediaries before joining the platform and it is not open to everyone.⁴⁷² This kind of intermediary provides a better opportunity for relational contracts.⁴⁷³ In relational contracts, parties are more likely to trade with each other more than once. In independent online market intermediaries, the B2B traders might have an arm's length relationship. As obtaining membership in these platforms is relatively easy

⁴⁷¹ Stephen Standifird and Chris Sandvig, 'Control of B2B E-Commerce and the Impact on Industry Structure' (2002) 7 First Monday.

⁴⁷² Byungjoon Yoo, Viyanand Choudhary and Tridas Mukhopadhyay, 'Neutral Versus Biased Marketplaces: A Comparison of Electronic B2B Marketplaces with Different Ownership Structures' (2001) ICIS 2001 Proceedings 15.

⁴⁷³ Robert M Morgan and Shelby D Hunt, 'The Commitment-Trust Theory of Relationship Marketing' (1994) The journal of marketing 20.

or not even necessary, any party can join or use the platform. This will lead to the facilitation of spot trading which might not occur more than once.

The relationship between the parties is of importance as it affects the effectiveness of the justice systems. In relational contracts, the parties' reputation and the risk for their reputation to be damaged might be an effective mechanism for compelling the parties to participate in the dispute resolution process and for enforcing the award.⁴⁷⁴ Therefore in OMI's designs a simple reputational mechanism such as the "black list" might be as effective as a monetary sanction. When the OMI's platform is independent, it is mostly facilitating spot trading transactions, hence reputational mechanisms might not be as effective as other enforcement mechanisms. Therefore the business model or the structure of OMI itself has an effect on one of the core elements of procedural justice. This point will be substantiated more in chapter 5.3 on OMI's effectiveness.

4.2.1.2 One Party Designs the Dispute Resolution, the Other Party Agrees

In this scenario the B2B parties are in an equal bargaining position and one of the parties suggest using a certain design, for example select the private dispute resolution provider and sometimes even the rules. The other party agrees to the design.

This scenario mostly happens when one party goes to a wholesaler or a supplier's website and directly orders merchandise(s). In this case most of the time, the buyer has to comply with the terms and conditions of the supplier. The supplier or wholesalers usually use a standardized contract, as it is too costly to draw a contract for every single contract.⁴⁷⁵ In the terms and conditions, the supplier might design a dispute resolution mechanism or participate in designing one (for example, suggests arbitration) and the buyer agrees to it.

The scenario also takes place when the buyers and suppliers match on an online market intermediary that does not have a justice system or the parties opt out of the dispute resolution mechanism the intermediary provides. In this case, the parties will

⁴⁷⁴ This was attested by Konradi's research on Timber Industry arbitration. She found that reputation in relational and network contracts can incentivize people to abide by the outcome. Konradi, 'The Role of Lex Mercatoria in Supporting Globalised Transactions: An Empirical Insight into the Governance Structure of the Timber Industry', 62.

⁴⁷⁵ Andrew Goodchild, Charles Herring and Zoran Milosevic, 'Business Contracts for B2B' (2000) Distributed System Technology Center (DSTC), 64.

agree on terms and conditions. The terms and conditions might implement a dispute resolution clause, which could be designed by the supplier. The supplier might refer the buyer to a payment intermediary, and the payment intermediary might have a dispute resolution process in place.

The problem with one-party control over dispute system is that costs can be shifted to the party that does not control the design.⁴⁷⁶ The non-controlling party does not participate in designing the dispute resolution; hence it does not have any say in how the costs are allocated. Shifting the costs to the non-controlling party can result in the party abandon the claim and justice will be jeopardized.⁴⁷⁷ Moreover, control on the design can also have effects on the neutrality, effectiveness and efficiency of the dispute resolution process.

4.2.1.3 One Party Designs the Dispute Resolution Process and Imposes it on the Other Party

One party design of the dispute resolution and its imposition on the weaker party is evident in employment contracts. The employee has to agree to the terms and conditions or forgo contracting and as the corporation is at a more advantageous bargaining position, it can impose the terms and conditions on the employee.⁴⁷⁸

This scenario can also take place when large corporations get involved with contracting with SMEs and sole traders. “There is a common view that arbitration involves weaker parties selling their legal rights to a stronger party (repeat player firm), sometimes in a coercive setting.”⁴⁷⁹ In this case, when the SME is in a weaker bargaining position, the larger corporation might impose their corporation dispute

⁴⁷⁶ Bingham demonstrates the problem of one party design and its effect on fairness in employment arbitration. She argues that the parties, if they control the design of the process together, can shift the costs and can have a positive effect on neutrality of the decision maker. While in one party dispute resolution design costs can be shifted to the other party unfairly. Bingham and others, ‘Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace’, 9.

⁴⁷⁷ Ury, Brett and Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*.

⁴⁷⁸ Bingham, ‘On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards’; Martin H Malin and Robert F Ladenson, ‘Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer’ (1992) 44 Hastings LJ 1187; Lewis L Maltby, ‘Private Justice: Employment Arbitration and Civil Rights’ (1998) 30 Colum Hum Rts L Rev 29; Katherine Van Wezel Stone, ‘Mandatory Arbitration of Individual Employment Rights: the Yellow Dog Contract of the 1990s’ (1995) 73 Denv UL Rev 1017; Stephen J Ware, ‘Employment Arbitration and Voluntary Consent’ (1996) 25 Hofstra L Rev 83.

⁴⁷⁹ Christopher R Drahozal and Keith N Hylton, ‘The Economics of Litigation and Arbitration: An Application to Franchise Contracts’ (2003) 32 The Journal of Legal Studies 549, 28.

resolution policy on the weaker party, design the arbitration process (choosing the number of panel members) and select the arbitration institution.⁴⁸⁰ This scenario also arises when B2B trade takes place without an intermediary or through infintermediaries that do not provide a dispute resolution for the parties. As it will be argued in chapter 5.1.7 OMI that provide dispute resolution and enforcement mechanisms might be able to level the playfield for SMEs.

4.2.1.4 Third Party Designs the Dispute Resolution System

In the two scenarios above, one of the transacting parties designs the dispute resolution mechanism. In the third party scenario, B2B OMI design a justice system and act as third parties. In their contract they either refer the parties to their own dispute resolution mechanism,⁴⁸¹ or they refer them to use a payment intermediary that has its dispute resolution mechanism.⁴⁸² The payment intermediary itself might have a separate dispute resolution mechanism. They might also refer the parties to an ODR provider, for example, an online market intermediary that refers the parties to use a payment intermediary. The payment intermediary might get involved with dispute resolution by referring the parties to an ODR provider.⁴⁸³ In such dispute system designs parties do not directly get involved with designing dispute resolution, and the intermediaries have the main role.

480 There is not much scholarly work on adhesive contracts of arbitration and SMEs. They are majorly focused on consumers. Nevertheless, as the SMEs might be at a weaker bargaining position in general when negotiating contracts with larger corporations, the argument that the larger corporation might be able to impose a certain dispute system design on the SME could be valid. Moreover, the weaker bargaining power of the SMEs has been attested in the literature about their contractual relationship. The level of bargaining power varies based on multiple factors such as information asymmetry, competition and other, even in drafting the Common European Sales Law, the consumer origins of European Contract Law has led to the status based approach based on the identity of the contracting party, and has given the SMEs a specific status and treats them differently from others. Hirofumi Uchida, 'Empirical Determinants of Bargaining Power' RIETI Discussion Paper Series 06-E -030. Cafaggi F, 'From a Status to a Transaction-Based Approach? Institutional Design in European Contract Law' (2012) Common Market Law Review.

481 Amazon refers the party to its own dispute resolution program. See <<https://payments.amazon.com/help/6025>> Accessed 6 May 2016.

482 Tradescraper refers its clients to Armorpayment, armorpayment in turn provides payment services and dispute resolution. See <http://www.tradescraper.com/>.

483 For example, escrow.com refers the parties involved with a dispute to Net-Arb, an online dispute resolution provider. See <<https://www.escrow.com/support/faqs/faq-questions/what-if-there-is-a-disagreement-during-the-transaction-what-is-dispute-resolution>> Accessed 25 April 2016.

4.2.2 What is the Goal of Dispute Resolution Provider?

Dispute resolution providers have various goals. The public court is designed by a third party with funding from the legislative branch to act for the benefit of both disputants.⁴⁸⁴ Private justice systems were designed contractually by two parties or more to act for the benefit of all the parties, they are privately funded and their goal is predominantly to maximize profit in addition to providing justice.

The goal of the dispute resolution provider becomes paramount when it might have an effect on procedural justice. This is especially the case when the more powerful party with a superior economic power designs the justice system.⁴⁸⁵ In this case, the goal of the dispute resolution design might be in conflict with the interest of the weaker party and might hamper procedural justice of the dispute resolution mechanism.

The question that needs to be addressed here is what the goal of the OMI is in providing dispute resolution? One goal in providing a dispute resolution for their users is to reduce uncertainty to the transactions for both parties. Contractual certainty especially in non-homogenous environments and cross border transactions is key to successful trading.⁴⁸⁶ OMIs act as third parties that design a dispute resolution mechanism for B2B disputes and reduces uncertainty.

The other goal of OMIs is to gain economic benefits from the parties' transactions. This goal in some situations might be in conflict with the goal of OMI to bring about dispute resolution for the benefit of both parties. For example depending on the OMIs member structure, the OMI might gain more economic benefit from one side of the market than the other. Hence, this might affect procedural justice of the dispute resolution. These matters will be more substantiated in Chapter 7 in evaluating OMIs incentives and deterrents to uphold procedural justice.

484 Bingham and others, 'Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace', 5.

485 Bingham and others, 'Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace', 5.

486 Dixit extensively has written about the role of Enforcement intermediaries and information intermediaries in providing contractual certainty. Dixit, *Lawlessness and Economics: Alternative Modes of Governance*.

4.3 The Nature of the DSD

The nature of the DSD verifies whether the dispute system design is internal or external. There are various types of dispute system designs in B2B OMIs. Some B2B OMIs have an internal dispute resolution mechanism. At the outset in their transaction service agreement they oblige the parties to agree that they will use the OMIs dispute resolution service.⁴⁸⁷ Some outsource the dispute resolution mechanism through payment intermediaries.⁴⁸⁸

OMIs' B2B disputes have a mixture of internal and external dispute system design. For example, some OMIs provide their dispute resolution mechanism themselves or they might oblige the parties to use a certain payment intermediary. The payment intermediary will try to resolve their disputes internally and if that is not possible, it will refer the parties to the arbitration tribunals or to courts.⁴⁸⁹

4.4 The Type of Dispute Resolution and Nature of its Potential Outcome (Arbitration, Non-binding Arbitration etc.)

In some DSDs the parties have the power to decide which type of dispute resolution will be used and what will be the outcome of the dispute (binding or non-binding). This also applies to OMIs. OMIs by contract, design the dispute resolution mechanism for the parties. The potential outcome of the disputes can be binding, conditionally binding or non-binding on the parties. Moreover the parties can be referred to arbitration or court, which makes binding decisions.

⁴⁸⁷ Amazon and Alibaba refer the parties to dispute resolution system.

⁴⁸⁸ Retracemobile for example refers the parties to Armorpayment. See <https://www.retracemobile.com/faq>, Accessed 9 November 2016.

⁴⁸⁹ Armorpayment tries to resolve the dispute, if not possible it refers to parties to NetNeutral, an online dispute resolution provider. More information can be found at <http://www.armorpayments.com/escrow/dispute-management-faq>.

Some OMI's have a multi-step process by which the parties are first obliged to amicably negotiate the dispute before they can resort to their dispute resolution.⁴⁹⁰ If that fails, they will then be referred to the OMI's dispute resolution. Some OMI's expressly state that their process is not arbitration.⁴⁹¹ The outcome of this dispute resolution process can be conditionally binding, i.e. after a certain period of time and under the condition that no objection is received; it becomes final and binding on the parties.⁴⁹² However, if the parties object to the outcome they can be referred to an arbitration institution for a final and binding decision.⁴⁹³ This process evidently ends in a final and binding decision. If they are not referred to arbitration, they can file a claim in court.

Some OMI's use mediation or expert evaluation. For example they try to facilitate the communication between the buyer and the seller. They have some enforcement

⁴⁹⁰ For example, Alibaba requires the parties to first negotiate. "10.2 Amicable Negotiations. If any dispute or claim arises from or in connection with this Agreement, an Online Transaction or your use of the Transaction Services ("Dispute"), the relevant parties shall resolve the Dispute through amicable negotiations." <<http://news.alibaba.com/article/detail/alibaba.com-transaction-services-agreement-for-prc-customers/100132707-1-alibaba.com-transaction-services-agreement-prc.html>> Accessed 21 March 2016.

Amazon also has a multistep dispute resolution process. <<https://www.amazon.com/gp/help/customer/display.html?nodeId=541260>> Accessed 21 March 2016.

⁴⁹¹ Alibaba TSA: 2.9 Disputes between Buyers and Sellers. "You agree that any Dispute arising between you and the other party to an Online Transaction will be handled in accordance with clause 10, and that Alibaba.com shall have the full right and power to make a determination for such Dispute. Upon receipt of a Dispute, Alibaba.com shall have the right to request either or both of Buyer and Seller to provide supporting documents. You agree that Alibaba.com shall have the absolute discretion to reject or receive any supporting document. You also acknowledge that Alibaba.com is not a judicial or arbitration institution and will make the determinations only as an ordinary non-professional person. Further, we do not warrant that the supporting documents that the parties to the Dispute submit will be true, complete or accurate. You agree not to hold Alibaba.com and our affiliates liable for any material which is untrue or misleading." "Transaction Services Agreement", <<http://news.alibaba.com/article/detail/alibaba.com-transaction-services-agreement-for-prc-customers/100132707-1-alibaba.com-transaction-services-agreement-prc.html>> Accessed 7 March 2016

⁴⁹² Alibaba.com TSA, 10.3 Dispute between Buyer and Seller. In case a Dispute arises between Buyer and Seller from or in connection with an Online Transaction, if the Dispute is not resolved through amicable negotiation within the prescribed time period according to the relevant Transactional Terms, you agree to submit the Dispute to Alibaba.com for determination. If you are dissatisfied with Alibaba.com's determination, you must apply to the Hong Kong Arbitration Centre ("HKIAC") for arbitration and notify Alibaba.com of such application within 20 calendar days after Alibaba.com's determination. If each of Buyer and Seller in the Dispute does not apply for arbitration within the above 20 calendar days, each of the Buyer and the Seller shall be deemed to have agreed that Alibaba.com's determination shall be final and binding on you. With a final determination, in the case the Online Transaction adopts the Escrow Services, Alibaba.com may instruct Alipay to dispose the funds in escrow by Alipay according to such determination. Further, each of Buyer and Seller shall be deemed to have waived any claim against Alibaba.com, Alipay and our affiliates and agents.

⁴⁹³ Alibaba uses such approach, in its TSA it states that: 10.3 Dispute between Buyer and Seller. In case a Dispute arises between Buyer and Seller from or in connection with an Online Transaction, if the Dispute is not resolved through amicable negotiation within the prescribed time period according to the relevant Transactional Terms, you agree to submit the Dispute to Alibaba.com for determination. If you are dissatisfied with Alibaba.com's determination, you must apply to the Hong Kong Arbitration Centre ("HKIAC") for arbitration.

mechanism for the outcome, however it is more related to sanctioning the member from accessing their website or becoming a member on the website.⁴⁹⁴

If the dispute resolution is handled by the payment service, the payment intermediary usually has two stages of negotiation and arbitration, in which the decision is final and binding on the parties.⁴⁹⁵ The payment intermediary might refer the parties to an independent online dispute resolution provider that makes a binding decision.⁴⁹⁶

4.5 The Applicable Law

The applicable law in this thesis is important since it might have an effect on the procedural justice criteria substantiated in chapter 3. As it will be explained in section 7.2, the applicable law can act as a deterrent or an incentive for the OMI to provide online dispute resolution and uphold procedural justice. The applicable law can be looked at from three angles: the law applicable to the dispute resolution process, the law applicable to the validity of dispute resolution clause and determination of its scope, and the law applicable to substantive issues.

Since the law applicable to the procedure of arbitration is almost always similar to the validity of the dispute resolution clause, they will be discussed in the section on applicable law to the procedure. Then the applicable law to substantive issues will be only briefly analyzed, since the thesis focuses on procedural issues other than substantive ones.

⁴⁹⁴ Made-in-china, Terms and Conditions, Clause 8 to 8.4 <<http://www.made-in-china.com/help/terms/>> Accessed 17 March 2016.

⁴⁹⁵ 10.3 Dispute between Buyer and Seller. In case a Dispute arises between Buyer and Seller from or in connection with an Online Transaction, if the Dispute is not resolved through amicable negotiation within the prescribed time period according to the relevant Transactional Terms, you agree to submit the Dispute to Alibaba.com for determination. If you are dissatisfied with Alibaba.com's determination, you must apply to the Hong Kong Arbitration Centre ("HKIAC") for arbitration and notify Alibaba.com of such application within 20 calendar days after Alibaba.com's determination. If each of Buyer and Seller in the Dispute does not apply for arbitration within the above 20 calendar days, each of the Buyer and the Seller shall be deemed to have agreed that Alibaba.com's determination shall be final and binding on you. With a final determination, in the case the Online Transaction adopts the Escrow Services, Alibaba.com may instruct Alipay to dispose the funds in escrow by Alipay according to such determination. Further, each of Buyer and Seller shall be deemed to have waived any claim against Alibaba.com, Alipay and our affiliates and agents. <<http://news.alibaba.com/article/detail/alibaba.com-transaction-services-agreement-for-prc-customers/100132707-1-alibaba.com-transaction-services-agreement-prc.html> > Accessed 7 March 2016.

⁴⁹⁶ Armormpayment frequently asked questions< <http://www.armormpayments.com/escrow/dispute-management-faq> > Accessed 7 March 2016.

4.5.1 Applicable Law: The Procedural Framework

In this section, the applicable law to the processes of arbitration and mediation will be considered. The applicable law is important since it provides oversight for the dispute resolution process and makes it more likely for OMIs to adhere to the principles of procedural justice. The nonbinding nature of mediation has supported the argument that procedural fairness might be irrelevant as the parties can go to litigation or arbitration if they are not satisfied with the mediation process. This argument is not valid for cross-border online disputes. When an online dispute resolution process has a de facto private enforcement mechanism such as an escrow mechanism, the outcome is at least de facto binding. Moreover, access to court and other remedies in online disputes is hampered due to the transnational nature of Internet disputes. For these reasons, it is important to look at the applicable law to arbitration as well as other dispute resolution processes which are legally nonbinding.

4.5.1.1 Lex Arbitri

Lex arbitri is the procedural rules that guide the arbitration process. Lex arbitri is usually the law of the location of arbitration.⁴⁹⁷ The parties might also choose a certain law (other than the local law) to govern the procedural conduct of the process. In this thesis, the discussion on lex arbitri illustrates whether any external public oversight is available for the OMIs' dispute resolution and whether it is subject to any laws by clarifying whether the process qualifies as arbitration. This section discusses lex arbitri in two countries: US and China, where most of the studied OMIs in this thesis are located.

4.5.1.2 Lex Arbitri in China

In China, the procedural framework of arbitration is enacted in Arbitration Law of the People's Republic of China. It sets out prerequisites for a dispute resolution process to be constituted as arbitration. Article 16 of the Arbitration Law of People's Republic of China stipulates that, "An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitrations that are concluded in other written forms before or after disputes arise.

⁴⁹⁷ New York Convention provides that lex arbitri is "the law where the arbitration took place", New York Convention Article V(1)(d)

An arbitration agreement shall contain the following particulars:

- (1) an expression of intention to apply for arbitration;
- (2) matters for arbitration; and
- (3) a designated arbitration commission.”⁴⁹⁸

One of the most controversial prerequisites of the arbitration process in China is to have a designated arbitration commission. This, as some have argued, eliminates the possibility of enforcing the ad hoc arbitration agreement.⁴⁹⁹ Since there is no designated arbitration commission involved in most China based OMI dispute resolution mechanisms, the only other approach to recognizing their dispute resolution as arbitration is through recognizing ad hoc arbitration as arbitration under a different applicable law.

Ad hoc arbitration does not fulfill the criteria of Article 16, since a designated arbitration commission does not carry out arbitration. However, Arbitration agreements that refer to ad hoc arbitration or can be qualified as such are not necessarily automatically invalid in China. The validity of such agreements mainly relies on the applicable law. If the choice of law for the validity of the arbitration agreement is a law other than the Chinese arbitration law, then the Chinese court is likely to enforce the award of an ad hoc arbitration.⁵⁰⁰ In order to increase the probability of enforcement, the choice of law should be explicitly stated in the agreement. If the agreement does not have an explicit choice of law and does not contain a provision concerning the arbitration commission, according to Article 18 of PRC Arbitration Law the parties may reach a supplementary agreement. If the supplementary agreement cannot be reached the arbitration agreement shall be void.⁵⁰¹

⁴⁹⁸ See Chinese Arbitration Law, translation in English is available at <http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm>, Accessed on 23 November 2016.

⁴⁹⁹ Tietie Zhang, ‘Enforceability of Ad Hoc Arbitration Agreements in China: China’s Incomplete Ad Hoc Arbitration System’, (2013) 46 *Cornell Int’l LJ* 46, 365.

⁵⁰⁰ See generally Tietie Zhang, ‘Enforceability of Ad Hoc Arbitration Agreements in China: China’s Incomplete Ad Hoc Arbitration System’,

⁵⁰¹ Article 16 of PRC Arbitration Law available at <http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm> Accessed 18 November 2016.

In some OMIs that are based in China, such as Alibaba, the law of Hong Kong is the law of the transaction service agreement.⁵⁰² This gives the analysis another dimension. China has entered into special bilateral arbitration arrangements with Hong Kong. According to the arrangement, the Supreme People's Court of Mainland agreed to enforce the arbitral awards made in Hong Kong in accordance with Hong Kong Arbitration Ordinance.⁵⁰³ Since it was unclear whether the Mainland courts will also enforce ad hoc arbitration awards issued in Hong Kong, the Supreme Court of Mainland issued a notice. The notice clarified that the courts in Mainland would recognize and enforce both ad hoc arbitral awards and institutional awards issued in Hong Kong.⁵⁰⁴

The Arbitration Ordinance in Hong Kong in fact recognizes ad hoc arbitration. Moreover, the Chinese courts enforce Hong Kong ad hoc arbitral awards. It might be easier for the OMIs dispute resolution to be recognized as arbitration if the governing law is the law of Hong Kong. Hence if dispute resolution of Alibaba is recognized as ad hoc arbitration, it can be regulated by Chinese law. This puts ad hoc arbitration processes in the shadow of the law. However, there are other criteria that a process should meet in order to be recognized as arbitration under the PRC Arbitration Law. Under the PRC Arbitration Law there should be an explicit arbitration agreement that discloses (1) an expression of intention to apply for arbitration; (2) matters for arbitration.⁵⁰⁵

Taking Alibaba's Transaction Service Agreement as an example, the dispute resolution clause in TSA does not meet the criteria expressed intention to apply for arbitration and there is no arbitration agreement for Alibaba's dispute resolution.⁵⁰⁶ Hence it cannot be qualified as arbitration under the PRC Arbitration law. But since the Hong Kong Law is chosen as the governing law, the Hong Kong arbitration ordinance should be referred to in order to find out if it constitutes arbitration. The Hong Kong Arbitration Ordinance came into effect in 2011, replacing an old arbitration ordinance

⁵⁰² Alibaba Transaction Service Agreement, clause 10.1 GOVERNING LAW. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION ("HONG KONG") WITHOUT REGARD TO CONFLICT OF LAW PRINCIPLES. <<https://rule.alibaba.com/rule/detail/2054.htm>> Accessed 19 November 2016.

⁵⁰³ Hong Kong Arbitration Ordinance, available at <<http://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf>> Accessed 9 November 2016.

⁵⁰⁴ Notice of the Supreme People's Court on Issues Related to the Enforcement of Hong Kong Arbitral Awards in Mainland China (Fa [2009] No. 415). The notice is available at <http://www.doj.gov.hk/eng/topical/pdf/notice_enforcement_HK_arbitral_awards_e.pdf> Accessed 9 November 2016.

⁵⁰⁵ See Chinese Arbitration Law, translation in English is available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm.

⁵⁰⁶ Alibaba does however refer the parties to arbitration in Hong Kong if one of the parties wants to appeal the decision of Alibaba's dispute resolution.

that distinguished between national and international arbitration. The new ordinance has mainly adopted the UNCITRAL Model Law. The Ordinance and the Model Law do not provide any kind of arbitration definition in order to understand what process constitutes arbitration. Similar to UNCITRAL Model Law, a process to be recognized as arbitration requires an arbitration agreement. The Arbitration Ordinance section 19 (1) defines arbitration agreement as: “(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement.”⁵⁰⁷ Accordingly, it can be assumed that if there is no arbitration agreement in accordance with Hong Kong Arbitration Ordinance then the process does not constitute arbitration. If that is the case, then the OMI dispute resolution is not in the shadow of the law and there is no public oversight.

4.5.1.3 Lex Arbitri in the US

In the US, Federal Arbitration Act (FAA) and states arbitration laws regulate arbitration. In 1984, in *SouthlandCorp. v. Keating*⁵⁰⁸, the Court held that the FAA is a substantive federal law that preempts state laws regulating arbitration agreements. Since this ruling has been applied until now, the FAA will be the focus of this section as the lex arbitri.⁵⁰⁹

The FAA governs the enforceability of parties’ written agreements to arbitrate disputes.⁵¹⁰ Whether the FAA applies to OMIs’ dispute resolution is dependent on establishing two factors: what agreement constitutes arbitration under FAA and US judicial precedent and what should be the nature of the dispute resolution process and the outcome (binding or nonbinding) in order for the process to be regulated by FAA.

507 Hong Kong Arbitration Ordinance (2014), Gazette Number E.R. 2 of 2014
<[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\\$FILE/CAP_609_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf)> Accessed 21 November 2016.

508 *Southland Corp. v. Keating*, 465 U. S. 1 (1984)

509 Many have criticized the pre-emptory effect of FAA over state laws. See Tracie Jones, ‘State Law of Contract Formation in the Shadow of the Federal Arbitration Act’ (1996) 46 Duke Law Journal 3,651.

510 9 U.S.C 2 (2012)

Similar to the New York Convention, and Chinese and Hong Kong arbitration laws, the US Federal Arbitration Act (FAA) does not define arbitration.⁵¹¹ The US courts have generated judicial precedents with regards to the question of what constitutes arbitration.⁵¹² The precedents also consider if dispute resolution process can be recognized as arbitration even if there are no arbitration agreements between the parties. They do not require a dispute resolution agreement explicitly be an arbitration agreement in order to be classified as arbitration. As Supreme Court of Missouri in *Dworkin V. Caledonian INS. CO* stated: “An agreement to arbitrate is really an agreement between parties who are in controversy, or look forward to the possibility of being in one, to substitute a tribunal other than the courts of the land to determine their rights.”⁵¹³ The US District Court for the Eastern District of New York in *AMF INC. v. Brunswick CORP* argued that “If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.”⁵¹⁴ Hence, the precedents make it clear that the parties’ denomination of a dispute resolution process does not have any role in determining whether the process is arbitration or not.

The denomination of the dispute resolution process does not determine its legal nature. Hence OMI’s dispute resolution agreement that obliges the parties to use its dispute management system could constitute an arbitration agreement between the Supplier and the Buyer. This is the case, even if the OMI’s in their terms and conditions state that the dispute resolution process is not arbitration. However, the judicial precedent has required that the dispute resolution process be binding, meaning that the parties should not be allowed to start litigation when they have started a dispute

511 Wesley Sturges, ‘Arbitration--What is it’ 35 (1960), NYUL Rev,1033., The US courts also state that arbitration is undefined under FAA. *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1238 (11th Cir. 2008) (“[T]he FAA does not define its key term, ‘arbitration,’ and courts have had a difficult time defining it”).

512 For a more recent study of related court cases refer to Andrew Daeschel, ‘Fake Arbitration: Why Florida’s Nonbinding Arbitration Procedure is Not Arbitration Within the Scope of the Federal Arbitration Act’ (2016): 67 Florida Law Review 10, For a discussion on the arbitration definitional avoidance in the US refer to Niall Roberts ‘Definitional Avoidance: Arbitration’s Common-Law Meaning and the Federal Arbitration Act’ (2016) 49 UC Davis L. Rev., 1547.

513 285 Mo. 342, 356 (Mo. 1920) 285 Mo. 342, 356, 226 S.W. 846, 848 (1920).

514 *AMF INC. v. BRUNSWICK CORP.*, (E.D.N.Y. 1985), 621 F. Supp. 456, 460 (E.D.N.Y. 1985), *Ass’n v. Hellenic Lines, Ltd.*, 549 F.Supp. 435, 437 (S.D.N.Y. 1982) (holding that binding review by a designated third party is arbitration even if not denominated as such in the contract)” and in *McDonnell Douglas Finance V. Pa. Power Light*, 858 F.2d 825, 831 (2d Cir. 1988), even some other forms of dispute resolution such as mediation can be constituted as arbitration later on. *CB Richard Ellis, Inc. v. Am. Envt’l Waste Mgmt.*, No. 98-CV-4183, 1998 WL 903495, *2 (E.D.N.Y. Dec. 4, 1998) (“Because the mediation clause in the case at bar manifests the parties’ intent to provide an alternative method to ‘settle’ controversies arising under the parties . . . agreement, this mediation clause fits within the [FAA’s] definition of arbitration”).

resolution process and it should be concluded. This was put forward in *AMF v. Brunswick* when the judge in deciding whether FAA is applicable to nonbinding arbitration, argued that in light of commercial expectations a dispute resolution process is arbitration if it settles the dispute effectively.⁵¹⁵ In *Harrison v. Nissan Motor Corp.*, the court asserted that the essence of arbitration is to bring the dispute to a conclusion. The court said, “Although it defies easy definition, the essence of arbitration, we think, is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator. Arbitration does not occur until the process is completed and the arbitrator makes a decision. Hence, if one party seeks an order compelling arbitration and it is granted, the parties must then arbitrate their dispute to an arbitrators' decision, and cannot seek recourse to the courts before that time.”⁵¹⁶

To compel the parties to use the arbitration process, the dispute resolution agreement should obligate both parties to use the dispute resolution to completion, and replace formal litigation. However, even if the process is recognized by the dispute resolution agreement as a mandatory process, the policy should be examined to ascertain whether the parties can bring legal actions during the process.⁵¹⁷ Merely stating that the process is mandatory does not make the process legally mandatory. Accordingly for a dispute resolution process to be arbitration it should legally compel the parties to use that process before seeking remedy from court.

The nature of the decision (whether it is binding or nonbinding) is immaterial to the classification of the dispute resolution as arbitration based on judicial precedent.⁵¹⁸ Nonbinding arbitration (which has a binding process but a nonbinding outcome) has

515 *AMF INC. v. BRUNSWICK CORP.*, 461.

516 *Harrison v. Nissan Motor Corporation*, 111 F.3d 343, 350 (3d Cir. 1996)

517 *Parisi v. Netlearning, Inc.*, 139 F.Supp.2d 745, at 751(E.D.Va. 2001): (quoting *Bankers Ins. Co.*, 245 F.3d at 319). “It is true that the language of the resolution policy describes the dispute-resolution process as “mandatory,” but “the process is not ‘mandatory’ in the sense that either disputant’s legal claims accrue only after a panel’s decision.” By way of an example, a lawsuit that halts in a “stay . . . so that arbitration can be had” before litigation may proceed means that a dispute-resolution proceeding constitutes “arbitration.”; Also in the same case, the court argued that: (“[T]here is no reason to ‘stay’ litigation under § 3 [where a proceeding] contemplates parallel litigation.”). *Parisi* at 751. Also, In *Storey v. Cello Holdings, L.L.C* 347 F.3d 370 (2d Cir. 2003) the court argued that a nonbinding process does not have a res judicata effect and hence it does not constitute arbitration.

518 “Arbitration is a creature of contract, a device of the parties rather than the judicial process. If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration. The arbitrator’s decision need not be binding in the same sense that a judicial decision needs to be to satisfy the constitutional requirement of a justiciable case or controversy” *AMF INC. v. BRUNSWICK CORP.*, (E.D.N.Y. 1985), 621 F. Supp. 456, 460 (E.D.N.Y. 1985)

been recognized as arbitration. Other factors such as the extent of adversarial nature of the dispute resolution and whether it holds hearing are also not determining constitutive factors as long as the parties have agreed to such arrangements.⁵¹⁹ The decisive factor is that the process should be binding. Under no circumstances the parties can start litigation while the processes have not come to a definitive and conclusive result.⁵²⁰

The interpretation of the US court about the availability and the opportunity to commence litigation was purely based on the fact that the dispute resolution processes allowed for the parties to go to court at any stage of the dispute resolution. It does not however consider that the parties to the dispute might be subject to the US jurisdiction while they do not reside in the US. They will need to hire a representative and incur an unreasonable cost that might override the benefit of going to court. Hence, in cross border disputes, some dispute resolution processes might indeed be substitute litigation in court because parties cannot access the court easily.

4.5.2 Procedural Framework for Mediation

Since mediation is used in some of the studied OMIs⁵²¹ for resolving disputes between suppliers and buyers in Europe and China, this section will briefly discuss whether commercial mediation will fall in the shadow of law, i.e. its procedure is regulated with regards to procedural justice criteria.

In Europe, the Directive on certain aspects of mediation in civil and commercial mediation was adopted to “to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is

⁵¹⁹ In *AMF INC. v. BRUNSWICK CORP* the court stated that adversarial nature of the process is not a factor for constituting arbitration. “In a confidential-submission scheme, such as the one agreed to here, adversarial hearings cannot take place. But this fact does not militate against application of the Act. Rather it supports arbitration since the special arbitrator may be more capable of deciding the issue than is a court which relies so heavily on the adversary process. Moreover, the particular arbitrator chosen by these parties is more capable than the courts of finding the faint line that separates data supported claims from puffery in the sometimes mendacious atmosphere of advertising copy.” *AMF INC. v. BRUNSWICK CORP.*, F. Supp. 456, 461 (E.D.N.Y. 1985) 621

⁵²⁰ *DLUHOS v. STRASBERG*, 321 F.3d 365, 371-72 (3d Cir. 2003), *Migliore & Associates, LLC v. Kentuckiana Reporters, LLC*, No 3:13-CV-315-H, 2013 WL 5323035, at * 2 (W.D. Ky. Sept. 20, 2013)

(“[T]he UDRP contemplates parallel litigation. Nothing in the UDRP restrains either party from filing suit before, after, or during the administrative proceedings.”). Thus UDRP proceedings and parallel civil litigation are not mutually exclusive. “The remedies available in these fora differ, and the standards of liability, while similar, are not identical.” *Am. Online Latino v. Am. Online, Inc.*, 250 F.Supp.2d 351, 358 (S.D.N.Y. 2003).

⁵²¹ *www.teleroute.com* is based in Belgium and *www.globalmarket.com* is based in China.

necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.”⁵²² The Directive applies only to the cross-border mediation.⁵²³ It instructs the Member States to define quality control mechanisms concerning the provision of mediation services.⁵²⁴ The mechanisms should preserve the flexibility of the mediation process and the autonomy of the parties. But it should ensure that mediation is conducted in an effective, impartial and competent way and Mediators should be made aware of the European Code of Conduct for Mediators.⁵²⁵

Article 4 of the Directive directs the Member States to “encourage” the adherence of the mediators and mediation organizations to voluntary codes of conducts, by whatever means the Member States deem appropriate. The Directive does not elaborate on the accessibility of the mediation or the neutrality of the mediators. The rationale for such approach is to give the Member States the liberty to implement legislations that address these criteria.

The European Code of Conduct for Mediators was adopted by some states as mandatory policy for mediators. The code of conduct addresses the fairness of the procedure. The Directive and European Code of Conduct with regards to mediation and procedural have a laissez fair approach and allow the Member States to decide to what extent the mediation process should be regulation. Hence when deciding whether mediation has external oversight, it is important to look at the jurisdiction in which the OMIs operate. Since looking at all European countries mediation regulation is beyond the scope of this thesis only Belgium will be considered as one of the OMIs (Teleroute) is located in Belgium.

4.5.2.1 Mediation in Belgium

The Belgian Mediation Act was enacted in 2005 and broadened the scope of mediation to all types, including civil and commercial mediation.⁵²⁶ Belgium has not considered

⁵²² Recital 7, Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters (2008) OJL136/3, Hereinafter Mediation Directive.

⁵²³ Recital 8, Mediation Directive.

⁵²⁴ Recital 16, Mediation Directive.

⁵²⁵ Recital 16 and 17, Mediation Directive.

⁵²⁶ Michael Traest, Belgium, in *Civil and Commercial Mediation in Europe*, Carlos Esplugues, José Luis Iglesias, Guillermo Paolo, eds (Intersentia, 2013) 45.

adopting the Mediation Directive since the Belgian Mediation Act largely implements the Directive.⁵²⁷ The Act regulates mediation through accreditation criteria for mediators; there is also a Code of Conduct that the mediators should abide by. The accreditation criteria uphold neutrality and independence of mediation through requiring that the mediators who can function in Europe and Belgium should provide a guarantee of independence and impartiality for the performance of mediation.⁵²⁸

Section 4 of Mediation Codes of Conduct minimally regulates the process of mediation. Section 4 (1) describes how the mediation process starts and section 4(2) explains how it should be conducted.⁵²⁹ Some minimal criteria such as providing the parties with information on how the process starts and the nature of the process as well as modes of payment and other matters are also mentioned and the mediator is obliged to conduct the mediation in accordance with the Code of Conduct and the Mediation law.

4.5.2.2 Mediation in China and Hong Kong

Mediation in China consists of extra judicial mediation, administrative mediation and court mediation.⁵³⁰ The administrative and court mediation are processes that are dependent on a judicial body or an arbitration process. The extra-judicial mediation is not reliant on any judicial or quasi-judicial process. This latter kind of mediation is the focus of this section since the other two types do not apply to OMI's dispute resolution. The type of mediation that is usually carried out in B2B disputes is commercial mediation. Commercial mediation is not regulated in China.

In 2011, People's Mediation Law of the People's Republic of China came into force. The law requires that People's mediation be carried out via a mediation commission. It stipulates in Article 2 "The term "people's mediation" as mentioned in this Law refers to a process that a people's mediation commission persuades the parties

527 Ivan Verougstraete, The Belgian Law on Mediation, *In Family Mediation And Guidance In Cross- Border Disputes Within The EU: How To Improve Practices?* 153 (Institut de Formation Judiciaire ed., 2012).

528 Code Judiciaire [Belgian Judicial Code] art. 1726, §1.

529 Belgian Code De Bonne Conduite Du Mediateur, available at <http://5033.fedimbo.belgium.be/sites/5033.fedimbo.belgium.be/files/explorer/Legislation_Belge/Decisions_commission/Code_de_bonne_conduite.pdf> Accessed 20 November 2016.

530 Jeffrey Lee, 'Mediation in Mainland China and Hong Kong: Can They Learn from Each Other' (2014) 16 APLPJ 101.

concerned to a dispute into reaching a mediation agreement on the basis of equal negotiation and free will and thus solves the dispute between them.”⁵³¹ It further provides that mediation commissions are mass-based organizations that are legally established by law and provide resolution for free. Chapter 8 of The Civil Procedure Law of the People's Republic of China also recognized court-mediation.⁵³² There are certain aspects of the Mediation Law of China that regulate the process of mediation and are related to procedural justice. For example Mediation Law requires the mediator to be impartial and have a sound knowledge of the law and be just.⁵³³ Moreover, it provides some clauses as to how a mediation outcome can be enforced in court. The People's mediators however cannot charge for their services and this might lead to having less experienced, less trained mediators and this may have an effect on reaching conclusive outcome for mediation in China.⁵³⁴

The Mediation Ordinance governs mediation in Hong Kong.⁵³⁵ Mediation in Hong Kong is more institutionalized.⁵³⁶ Hong Kong has three kinds of mediation: Court Annexed Mediation, Administrative Mediation and Private Sector Mediation.⁵³⁷ Private sector mediators are accredited by mediation organizations based on their skills and expertise and the organizational rules. There are also freelance mediators and they receive fees and can be experts in the issues they mediate. Although the Ordinance provides some regulation as to the impartiality of the mediator and the definition of mediation, it does not provide any kind of accreditation criteria for the mediator. The mediation institutions in general accredit mediators. The Ordinance allows mediators to charge a fee and in section (4) defines the mediation process. This definition states that the mediator should be an impartial individual who is not an adjudicator, and mediation meetings can be held electronically. During the process the parties “(a) identify the issues in dispute; (b) explore and generate options; (c) communicate with

531 The People's Mediation Law of the People's Republic of China.<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/85806/96276/F1660942158/CHN85806.pdf>> Accessed on 14 Nov 2016.

532 The text in English can be found at: <http://www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Civil-Procedure-Law-2012.pdf>

533 Article 20, 21 and 29 of The People's Mediation Law of the People's Republic of China.

534 Lee, 'Mediation in Mainland China and Hong Kong: Can They Learn from Each Other' 115. Also see Sarah Hilmer, *Mediation in the People's Republic Of China and Hong Kong* (Eleven Publishing 2009).

535 Hong Kong Mediation Ordinance, L.N. 167 of 2012 (2013).

536 Lee, 'Mediation in Mainland China and Hong Kong: Can They Learn from Each Other' 115.

537 Lee, 'Mediation in Mainland China and Hong Kong: Can They Learn from Each Other' 115.

one another; (d) reach an agreement regarding the resolution of the whole, or part, of the dispute.”⁵³⁸ Overall, it seems that the design of commercial mediation in Hong Kong is moderately regulated. However in China this is not the case and independent commercial mediation processes are still not recognized under the Chinese law.

4.5.3 Substantive Law

Applicable substantive law to OMI's dispute resolution could be the law of the country of a particular jurisdiction (national state, state or federal law) or an international or transnational law such as UNIDROIT principles, The Lando Principles, CISG and Lex Mercatoria.

The applicable substantive law as opposed to the procedural law is not the focus of this thesis. Hence the discussion on this subject will be brief. Most OMI's (regardless of internal or external dispute resolution system) do not apply any body of laws when resolving disputes. They act on the basis of what is fair and reasonable, or *ex aequo et bono* principle. As it will be substantiated in chapter 6, they do have policies that might touch upon based on what principles they resolve disputes.

Some OMI's use transnational laws, for example HQEW states that it will use INCOTERM to decide on certain matters.⁵³⁹ OMI's, in resolving disputes rarely apply the law of the country they are incorporated in. Some OMI's might give the liberty to the parties to choose an applicable law to the substantive issues.

⁵³⁸ Hong Kong Mediation Ordinance, L.N. 167 of 2012 (2013).

⁵³⁹ HQEW, Fraud and Dispute, Article 24. If the products are destroyed or damaged for reasons of force majeure, accidents, problems with the carriers, or other reasons that are not attributable to the seller, then the allocation of the risks shall be decided based on the contract between the buyer and the seller. If the contract did not specify the allocation of risks in the circumstances, then responsibilities and risks shall be allocated based on the provisions of the United Nations Convention on Contracts of International Sales of Goods and the International Commercial Terms (INCOTERMS). If the relevant risks shall be borne by the seller, the seller shall be responsible for the delivery or refund, etc. If the relevant risks shall be borne by the buyer, the seller shall assist the buyer in making claims against the carrier. If the seller refuses to provide such assistance, Hqew.net shall have the right to suspend the seller's account(s). Available at [http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html).

4.6 The Nature of Disputes in B2B Online Market Intermediaries

B2B disputes in OMIs can be based on conflicts over the quality of the product, which include claims regarding counterfeit, damaged and defective goods, the timeliness of delivery, the price charged, and products not as described. Some specify which disputes are eligible to be filed at the OMI's dispute resolution center.⁵⁴⁰

4.7 The Financial and Professional Structure of the Neutrals

In traditional settings, the financial and professional structure of the neutrals is easily detectable. Arbitration tribunals provide information or in ad hoc arbitration the parties to the dispute choose their arbitrators.⁵⁴¹ This will allow a certain level of awareness regarding the financial and professional structure of the neutrals. The situation is however different in OMIs. OMIs do not publish the list of the neutrals and their profession on their websites. Some particularly emphasize that they are not an arbitration tribunal and the decision makers are not professional judges or arbitrators.⁵⁴² In their terms and conditions OMIs name themselves as the entity that resolves the dispute. In practice, the decision makers are the OMIs' customer service, and in case the OMI refers the party to an online third party dispute resolution provider, the decision maker will be the arbitrators or the mediators that work with that third party.

In some respect, the fact that the parties do not choose the decision maker for dispute resolution and that the decision maker might be unknown to the parties, might help enhance the neutrality of the OMI's dispute resolution. As it has been evidenced in arbitration, arbitrators that are selected by the parties and their livelihood depends on

540 Amazon A to Z Claim Conditions, <<https://www.amazon.com/gp/help/customer/display.html?nodeId=541260>> Accessed 7 March 2016.

541 Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55 *International Organization* 919, 927.

542 For example, Alibaba states that : 2.9 Disputes between Buyers and Sellers. [... You also acknowledge that Alibaba.com is not a judicial or arbitration institution and will make the determinations only as an ordinary non-professional person. Further, we do not warrant that the supporting documents that the parties to the Dispute submit will be true, complete or accurate. You agree not to hold Alibaba.com and our affiliates liable for any material which is untrue or misleading.]<<http://news.alibaba.com/article/detail/alibaba.com-transaction-services-agreement-for-prc-customers/100132707-1-alibaba.com-transaction-services-agreement-prc.html>>Accessed 7 March 2016.

their future appointments, might take sides with one side, specifically the repeat player.⁵⁴³

The ambiguity that exists in some OMIs with regards to who resolves the dispute, makes it difficult to understand the professional and financial incentives of individual decision makers. To overcome this problem and to shape a new way to understand the neutrality of OMI's dispute resolution, it is important to look at the overall financial incentives of the OMIs.

As it was stated in Chapter 2.4, OMIs can be divided into neutral intermediaries and biased intermediaries (those who are producers or are wholesalers themselves). The neutral intermediaries source of revenue is solely from the sales that take place on their platform and they do not sell their own merchandise on the platform. The biased intermediaries however are wholesaler or producers themselves.⁵⁴⁴ Another revenue model is based on the users of the OMIs. Some OMIs receive their revenue from multiple sides of the market. Some receive their revenue from solely one side of the market and the transaction costs for other sides of the market is less than zero. Usually the side that is harder to attract on the platform such as the consumers or business buyers receive a price break. The opposite holds as well, when the side that gets the most value bears the high cost of access.⁵⁴⁵ In private intermediaries, OMI is a supplier and receives revenue by selling its merchandise as well as administering the platform. Some public OMIs also receive revenue from both providing merchandise and the platform for buyers and sellers.⁵⁴⁶ The effect of the source of revenue and different design of OMI on neutrality will be provided in more details in section 5.4.

⁵⁴³ Alon Klement and Zvika Neeman, 'Does Information about Arbitrators' Win/Loss Ratios Improve Their Accuracy?' (2013) 42 *Journal of Legal Studies* 369.

⁵⁴⁴ Yoo, Choudhary and Mukhopadhyay, 'Neutral Versus Biased Marketplaces: A Comparison of Electronic B2B Marketplaces with Different Ownership Structures'.

⁵⁴⁵ David S Evans, 'Some Empirical Aspects of Multi-Sided Platform Industries' (2003) 2 *Review of Network Economics*, 196. David S Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2013) National Bureau of Economic Research.

⁵⁴⁶ For example, Amazon is a producer as well as a platform for suppliers and buyers.

4.8 The Nature of any External Oversight

External oversight mechanisms over dispute resolution design ensure that the dispute resolution process has upheld a certain level of procedural justice and it has been “fair”. In a way, it puts the dispute resolution process in the shadow of the law.⁵⁴⁷ State laws regulate various dispute resolution mechanisms. Arbitration is a dispute resolution mechanism that is usually subject to such oversight by state laws as well as international laws. The arbitration process should uphold certain pre-requisite set by the national laws or New York Convention or other conventions, otherwise the outcome could not be enforced in another jurisdiction.⁵⁴⁸ In some jurisdictions, mediation might also be subject to laws and regulations with regards to adhering to certain principles such as confidentiality, neutrality and other matters.⁵⁴⁹

Whether online market intermediaries dispute resolution process is subject to the oversight of a public justice system is very much based on the national laws. Some OMIs claim that they are not an arbitration tribunal and the award they issue is not an arbitration award, but at the same time they argue that their award will become binding on the parties after a certain period of time.⁵⁵⁰ In such cases, in order to establish if

547 See Bingham, ‘Designing Justice: Legal Institutions and Other Systems for Managing Conflict’, 23. She states that when private justice systems arise in the shadow of public justice systems, they are monitored by public justice systems. This will create a duty and an incentive for the dispute resolution provider to follow what the law requires which might lead to a more transparent and consistent dispute resolution mechanism.

548 156 member states have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

The Convention sets some pre-requisites for arbitration regarding its agreement, process and issuance of the outcome. The parties to the dispute can challenge the outcome of the arbitration in a national court based on due process issues. The parties to the dispute can also invoke the UNCITRAL Model Law on International Commercial Arbitration (1985) if their member state is a party to it. For example, they can invoke the convention or the national law to challenge the impartiality of the arbitrator. See *Oberlandesgericht Dresden*; 11 Sch 2/00. (20 February 2001) available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V03/856/49/PDF/V0385649.pdf?OpenElement>> .

549 In the US, mediation has been the subject of some litigation cases. James R Coben and Peter N Thompson, ‘Disputing Irony: A Systematic Look at Litigation About Mediation’ (2006) 11 *Harv Negot L Rev* 43.

550 Alibaba, Transaction Service Agreement, Clause 2.9 “You agree that Alibaba.com shall have the absolute discretion to reject or receive any supporting document. You also acknowledge that Alibaba.com is not a judicial or arbitration institution and will make the determinations only as an ordinary non-professional person. Further, we do not warrant that the supporting documents that the parties to the Dispute submit will be true, complete or accurate. You agree not to hold Alibaba.com and our affiliates liable for any material which is untrue or misleading.”

OMIs is subject to external oversight, the nature of its DSD and the applicable law should be discussed. Hence in evaluating the existence of external oversight for OMIs dispute resolution process, the analysis carried out in section 4.5 will be used.

Alibaba Terms and Conditions Clause 10.3 reads as “if you are dissatisfied with alibaba.com’s determination, you must apply to the hong kong arbitration centre (“hkiac”) for arbitration and notify alibaba.com of such application within 20 calendar days after alibaba.com’s determination. if each of buyer and seller in the dispute does not apply for arbitration within the above 20 calendar days, each of the buyer and the seller shall be deemed to have agreed that alibaba.com’s determination shall be final and binding on you. with a final determination, in the case the online transaction adopts the alipay services, alibaba.com may instruct alipay to dispose the funds held by alipay according to such determination. further, each of buyer and seller shall be deemed to have waived any claim against alibaba.com, alipay and our affiliates and agents. Transaction Service Agreement,” <<http://news.alibaba.com/article/detail/alibaba.com-transaction-services-agreement-for-prc-customers/100132707-1-alibaba.com-transaction-services-agreement-prc.html>> Accessed 9 March 2016.

5 Research Design: Evaluating the OMIs' Justice System Based on the Criteria of Procedural Justice

This chapter illustrates how to evaluate OMIs justice systems based on the four criteria of accessibility, neutrality, efficiency and effectiveness. In order to carry out this evaluation, the elements necessary for achieving the criteria must be examined considering the OMIs' design and its effect on the criteria. For each criterion of procedural justice i.e. accessibility, neutrality, effectiveness and efficiency, based on the Dispute System Design literature, elements will be established that can affect achieving each component. It will also describe the coding criteria that will be used to provide an evaluation model for assessing the procedural justice in OMIs' dispute resolution.

As it was concluded in the previous chapter, the overarching criteria of procedural justice are: accessibility, neutrality, effectiveness and efficiency. The existence or non-existence of the elements that will be laid out in 5.1, 5.2, 5.3 and 5.4 verify whether OMIs adhere to the overarching criteria of procedural justice. The choice of various elements has been informed by extensive research on theoretical literature on dispute system design and institutional design. While the research has endeavored to provide comprehensive elements that affect procedural justice, it does not assert that the list of elements is exhaustive and final. Other elements in other settings might also hamper procedural justice.

In order to evaluate the OMI's justice system, this research attributes values of 0 or 1 to each subcomponent that will be established in this chapter, and the evaluation takes place in chapter 6, in case studies. If the subcomponent contributes positively to upholding a procedural justice criterion, it is given a value of 1. If the subcomponent does not exist or might negatively affect the procedural justice criterion, it is given a value of 0. The index is binary and includes values of 0 and 1. When calculating the overall score of each OMI in chapter 6, each procedural justice criteria score might be between the values of 0 and 1, with the higher value illustrating a better adherence to procedural justice.

The rationale behind using such a coding scheme is twofold. First, in most circumstances the answer to the existence of the elements or their non-existence is either a “yes” or “no”. Secondly, in rare cases where the answer could be different from a simple “yes” or “no”, it is extremely difficult to measure to what extent the elements exist within the system. Assigning the binary values of 0-1 in indexing and measuring has been used in similar studies such as the Doing Business Project, specifically in measuring quality and efficiency of enforcement of contracts.⁵⁵¹

To further clarify the rationale behind using the 0-1 coding scheme, an example that falls within the evaluation setting shall be provided. The answer to the question of the existence of an escrow system that compels the parties to participate in the dispute and enforces the award is a simple yes or no. However, the answer to the question to what degree the neutrality of a dispute resolution mechanism is affected if the intermediary is a supplier or not can be more complicated. Due to the non-availability of the outcome of dispute resolution, we cannot look at the end result and verify to what degree neutrality exists. Therefore, as it will be theoretically explained, it will be assumed that being a supplier can affect the market intermediaries’ neutrality when resolving a dispute.

The following sections will go into details of each of the procedural justice criteria and their subcomponents. It describes how the OMI’s dispute system design elements affect the criteria of procedural justice.

5.1 OMI’s DSD and Accessibility

Accessibility of a justice system is directly related to the design of the process. Depending on who controls the process and how they have designed the process, accessibility might be upheld or hampered. Considering that OMIs design the dispute resolution process for the parties, the policy elements that OMIs have in place which affect the accessibility of the dispute resolution process should be considered.

⁵⁵¹ Doing Good Business, ‘Enforcing Contracts Methodology’, <<http://www.doingbusiness.org/methodology/enforcing-contracts>> Accessed 1 April 2016.

In order to understand how a justice system design provides accessibility and reduces the cost of participation in the dispute resolution, the means by which it facilitates participation in the process should be assessed. Bingham enumerates some of these design factors in an arbitration setting: filing fees to initiate a claim, forum fees to pay for hearing space and case administration, and fees to pay the arbitrator or arbitrators.⁵⁵² In addition to these components, other elements can be added to evaluate the accessibility of the justice system. These include ease of access to information, the location of the justice system, means of communication, language of communication, mandatory requirements that affect costs, how many steps to file a dispute and accessibility for the weaker party. These elements will be considered in the design of OMIs. The following sections provide an explanation of how these elements can affect accessibility and how the OMIs justice systems can be evaluated based on these components.

5.1.1 Accessible Information

To start and participate in the process, the DSD should provide the parties with enough information that provides them with certainty about the boundary rules (which disputes can be handled),⁵⁵³ the modes of participation and the rules that apply to the process. Moreover the information should be provided in the parties' preferred language. The ease of access to such information increases the accessibility of the justice system. It also leads to more transparency of the process.

Depending on the design of OMI's dispute resolution, they provide such information in various ways. As to whether OMIs have elaborate boundary rules, their terms and conditions should be studied to consider which disputes can be filed at the forum. In most OMIs that were studied, the boundary rules are clear. The parties are certain about the OMIs' competence over the dispute and they can file their dispute on the platform.

⁵⁵² Bingham, 'Control over Dispute-System Design and Mandatory Commercial Arbitration', 234.

⁵⁵³ Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', 15.

The accessibility of OMI's justice system is not without shortcoming. Some intermediaries have an arbitrary approach in their policy for dealing with disputes between the parties. Amazon.com states that they might decide not to handle a specific dispute at their discretion.⁵⁵⁴ This will hinder the parties' accessibility of their venue, as it is not clear whether they can even file their claim. Moreover, they are not clear on what basis they will not accept a certain dispute.

The reason for this could be to prevent parties from submitting frivolous claims, however the current policy does not indicate on what basis it will reject a dispute. Being unclear about which disputes can be filed at the venue or based on what grounds they do not accept a certain dispute might hamper accessibility. In the empirical evaluation of the accessibility of OMIs, specific attention will be paid to whether OMIs have rules that hamper accessibility by being vague or by creating uncertainty about the process.

Access to information in the parties preferred language is also an important aspect as it facilitates access to information about the three aspects of jurisdiction, modes of participation and rules that apply. OMIs provide information about how to resolve the dispute in English, which is the language that traders use to interact with each other through the platform. Courts, even in the presence of parties' explicit preference for using English in the process, might not provide information about the dispute resolution process in English.⁵⁵⁵ The importance of the availability of the justice system proceeding in the preferred language of the parties has been recognized by UNIDROIT.⁵⁵⁶ The accessibility of information in parties' language of transaction helps with participation in the dispute resolution process and can contribute achieving more accurate and fair results.

The other factor that is related to accessible information and contributes to the accuracy of the outcome is to clearly state which rules have been applied to the case by

554 Amazon has such practice see 'About Denied Claims', <<http://www.amazon.com/gp/help/customer/display.html?nodeId=200783790>> Accessed 11 January 2016.

555 In Germany, for example, although the court can accept documents in a foreign language as well as hold hearing in a foreign language, it is at its own discretion to do so. Hence such discretion can hamper the certainty of the parties about the acceptability of their evidence and the possibility of their participation in the proceeding. Christoph A Kern, 'English as a Court Language in Continental Courts' (2013) 5 *Erasmus Law Review*, 198.

556 Ali/UNIDROIT Principle of Transnational Civil Procedure, Article 6 states that the proceedings of court can be held in a language other than the official language of court. In comment, paragraph 6A states that the proceedings can be held in a language mutually agreed upon by the parties.

the decision maker. For example, Alibaba states that its decision will be evidence based.⁵⁵⁷ In clause 2.10, it discloses that the parties should agree that Alibaba makes decisions based on the evidence received, as well as commonly accepted principles and practices in the relevant industries.⁵⁵⁸ This is also another factor that will be considered in the evaluation of the OMIs, under the disclosure of the rules.

5.1.2 Accessible Location and Filing Fee

Accessible location and the fee for submitting a dispute are two elements that affect the cost of participation. Therefore, it is important to consider where online market intermediaries hold hearings and the cost for participation. The cost of participation in the venue depends on the attribution of the transaction. If the transaction is cross-border, it is costly for the parties (especially the one which does not have control over the dispute system design) to participate in person, or through a legal representative. This is specifically the problem with arbitration. An arbitration hearing has to be held in person, at least until video teleconferencing and webcasting become more prevalent. Moreover, as Bingham indicates many arbitration clauses identify a city as the site of hearing⁵⁵⁹ and as Professor Drahozal found, franchise agreements choose an arbitration situs near where they are located in their contract.⁵⁶⁰

The OMI holds the dispute in a virtual space. The intermediary requests the parties to use online forms for filing a dispute. The virtual location of the OMIs makes them more accessible than other physical venues such as courts, as it decreases the cost of travelling, hiring legal representatives in case of absence and other costs.

Some intermediaries provide the dispute system as an added value service to reduce transaction costs of the dispute for both parties, hence they might not charge either of the users for using the justice system.⁵⁶¹ This will facilitate accessibility of the disputes

557 What Are Common Trade Disputes, < <http://news.alibaba.com/article/detail/safe-buying-disputes/100575316-1-what-common-trade-disputes%3F.html>> Accessed 9 March 2016.

558 'Alibaba Service Agreement', Clause 2.10, < <http://rule.alibaba.com/rule/detail/2054.htm>> Accessed 9 March 2016.

559 Bingham, 'Control over Dispute-System Design and Mandatory Commercial Arbitration', 237.

560 Christopher R Drahozal, 'Unfair Arbitration Clauses' (2001) U Ill L Rev 695, 733.

561 Almost all the OMIs that were studied provided free of charge dispute resolution mechanism.

resolution mechanism, especially in comparison to hefty costs of traditional arbitration and public courts.

Some OMIs refer the parties to another dispute resolution provider. Sometimes OMIs incur the cost of the external proceedings, but if not the ODR provider sets the price for the filing fee.⁵⁶² Parties should be informed of the fee for participation, as well as the time it takes to file and process a dispute. Therefore, for evaluating the OMIs dispute resolution system, their policies on cost and time of filing will be analyzed.

To evaluate the OMIs accessibility, the location of filing the dispute should be virtual, considering the nature of the dispute, which is online, the fee for filing a dispute should also be transparently disclosed.

5.1.3 Mandatory Obligations that Affect Costs

A justice system that requires the parties to be presented by lawyers increases the cost of the process and hampers accessibility. The European Directive on ADR also asserts that compulsory rules that require the parties to be presented by lawyers and legal advisors affect the justice system. Under effectiveness in the directive the ADR entity is accessible and parties have access to the procedure without being obliged to have a lawyer or a legal adviser, but they are not deprived of this right either.⁵⁶³ Being obliged to have a lawyer increases the cost of the procedure and hence makes it inaccessible.

The parties to an online B2B dispute should be able to file their disputes themselves. Since not requiring a legal representative can decrease the cost of participation, this will be considered as a positive factor for enhancing accessibility.

⁵⁶² NetNeutrals for example provides dispute resolution for ArmorPayment clients. There are no additional fees if an order goes into a dispute and is resolved during the Negotiation Phase. The policy states that “if the dispute is escalated to the Arbitration Phase, Armor Payments will cover your cost for one arbitration case per 365-day period. If you are involved in additional disputes that go to arbitration within a 365-day period, there will be a flat fee of \$175 for the third party arbitration service.” See Armorpayment Dispute Management <<http://www.armorpayments.com/escrow/dispute-management-faq>> Accessed 6 May 2016.

⁵⁶³ Directive 2013/11/EU of The European Parliament and of The Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L 165, Article 8 (b).

5.1.4 The Means of Communication

In e-commerce transactions, most of the activities are carried out online by the use of the Internet. The Internet is the primary means of communication during the transaction, hence it is important for the justice system to accept evidence that has been transmitted and communications that have been carried out through the Internet. Transferring the means of communication to traditional communication mechanisms and the unacceptability of electronic evidence can incur costs to the parties and result in inaccessibility and lack of participation of the parties in the process. To elaborate, if the justice system does not accept electronic evidence or require an in-person hearing, it will incur more cost for the parties.

The means of communication gains importance specifically in two situations: submitting the online evidence and participating in the process. Requiring hard copy evidence instead of electronic evidence can incur costs to the parties and it might be impossible to provide. In B2B disputes that occur due to transactions via the online intermediaries, the parties in the dispute might not even have any hard copies. Moreover, the especially in international B2B transactions, parties to the dispute might be located in a different jurisdiction, obliging them to participate in the process in person would greatly affect the transaction costs of the process. Hence, if the venue only accepts oral hearing or original, hardcopy documents, the parties access to the forum will be hampered and the evidence might not be admissible. Therefore, the more the proceeding is held online and within the boundaries of the original communication means for the transaction, the more accessible the proceeding is for the B2B disputants.

5.1.5 Language of the Proceeding

The design of a dispute resolution system can directly or indirectly impact the language of the proceeding. The design can either facilitate the accessibility of the process by choosing a language that both parties prefer to communicate in or can hamper it by choice of a language that one or non of the parties prefer to communicate in.

There are transaction costs associated with the language of the dispute resolution mechanism. If non of the parties or only one party understands the language of the proceeding, they have to bear the cost of hiring translators, using a local lawyer and

hiring interpreters. This affects the accessibility of the process as it increases the transaction costs of participation in the process.

In international transactions or even regional transactions⁷ businesses prefer to communicate in a common language that both parties can understand, which is normally English.⁵⁶⁴ One of the reasons that the parties choose an English-speaking dispute resolution forum could be the language of the forum. This has even persuaded some European countries to hold court session in English.⁵⁶⁵

In traditional contracting, when no intermediary is involved with designing the justice system, either one party selects the language of the venue by contract, or both parties negotiate the language of the dispute resolution proceeding. The two scenarios have different implications, if one party only decides on the appropriate jurisdiction, the language of the court proceeding is decided by the law of that jurisdiction which is usually the official languages of the country. If one party chooses an arbitration forum and no preferred language is agreed upon the arbitration tribunal or the arbitrators decide. One party choice of forum increases the transaction costs of the proceeding if the other party does not know the language of the proceeding. The choice of language by the third party can reduce transaction costs if the tribunal is neutral.

In the second scenario, the parties agree on the language of the proceeding, and businesses as rationale actors consider how the language of the proceeding can affect its cost and consequently the accessibility and transaction costs of the whole process. The first scenario can increase the cost of accessibility due to a one sided choice of language. The second scenario can provide both parties with a proceeding that is held in an agreed language, provided that they are at equal bargaining position.

When online market intermediaries are involved with designing the dispute resolution mechanism none of the scenarios above apply. The language of the proceeding is decided by the OMI in its terms and conditions and other rules that govern

⁵⁶⁴ Christoph A Kern, 'English as a Court Language in Continental Courts' (2013) 5 *Erasmus Law Review* 188.

⁵⁶⁵ Christoph A Kern, 'English as a Court Language in Continental Courts'.

its dispute resolution mechanism.⁵⁶⁶ This language is also the language with which parties interact and carry out the transaction.

The involvement of the OMIs in dispute resolution and choosing the language of the proceeding for the parties reduce the transaction costs and provides accessibility for the parties in two ways: first the OMI's language of the proceeding is the same language by which parties interact and the language of the contract (if the parties do not opt out of the intermediary contract). This is of utmost importance to accessibility and the UNIDROIT Principles also attest to the importance of serving the notice and complaints by the court in the language the principal documents of the transaction.⁵⁶⁷ Second OMIs can prevent the stronger party to impose a dispute resolution venue which holds proceedings in a language that might be unknown to the weaker party, they can provide more accessibility for the weaker party.

Holding the dispute resolution proceeding in English is also an advantage that might increase the accessibility of the dispute resolution mechanism. English has predominantly become the language of international commercial law and business.⁵⁶⁸ The terms and conditions and the language of interaction between the parties on OMIs platform are also primarily English. Hence when evaluating the OMIs it is important to consider if the language of the dispute resolution is the language of the platform.

5.1.6 How Many Steps to File a Dispute?

To evaluate the OMI's justice system with regards to accessibility, the number of steps to file a dispute will be considered. This is based on a method used by World Bank Doing Good Business Report. The report evaluated the efficiency of contract enforcement in each country by the number of steps users should take to file a dispute at court and resolve the dispute, and the number of days. Doing Business adopted this

⁵⁶⁶ For example, Alibaba Transaction Service Agreement states that: "1.6 Language Version. Unless otherwise Alibaba.com has posted or provided a translation of the English version of any terms of this Agreement including the Transactional Terms and the General Terms, you agree that the translation is provided for convenience only and that the English language version will govern your use of the Transaction Services." 'Alibaba Transaction Service Agreement' <<https://rule.alibaba.com/rule/detail/2054.htm>> Accessed 14 May 2016.

⁵⁶⁷ ALI / UNIDROIT Principles of Transnational Civil Procedure, Article 5.2.

⁵⁶⁸ Tsedal Neeley, 'Global Business Speaks English: Why You Need a Language Strategy Now' (2012) Harvard Business Review.

method which was developed by Djankov and others.⁵⁶⁹ Djankov and others collected data on the duration and cost of legal procedure regarding resolving neighbor disputes in 109 countries. They considered how many calendar days it takes from start to finish (the enforcement of outcome). This method considers the overall efficiency of the system. They used this approach in order to compare the formal procedure of court to that of informal dispute resolution mechanisms that are considered as efficient.

Although this thesis will follow Djankov approach in Doing Business Report in evaluating the accessibility of the OMI, it will only look at how long it takes to file a dispute and how many steps should be taken. The other measures that were applied in World Bank Doing Business report (the overall costs including enforcement costs and duration) will be considered when evaluating the efficiency of OMI's dispute resolution mechanism.

The procedural steps, according to World Bank report, are "defined as any interaction, required by law or commonly carried out in practice, between the parties or between them and the judge or court officer. Other procedural steps, internal to the court or between the parties and their counsel, may be counted as well. Procedural steps include steps to file and serve the case, steps to assign the case to a judge, steps for trial and judgment and steps necessary to enforce the judgment."⁵⁷⁰ The procedural steps that will be considered for OMI in order to consider their accessibility will be similar to that of World Bank criteria. More specifically this research considers procedural steps regarding filing the dispute, assigning the case to the dispute resolution provider, steps for filing the evidence and consideration of the case. As the internal management of dispute such as steps for assigning the case to the dispute resolution provider is not clear, this research does not delve into that area. The necessary steps for enforcement of the outcome will be considered when evaluating the effectiveness of the OMI's dispute resolution.

To find out how many steps the disputants take in order to file a dispute, it is important to look into the information that the website provides on how to file a dispute.

⁵⁶⁹ Simeon Djankov and others, 'Courts' (2003) *The Quarterly Journal of Economics* 453. Christopher R Drahozal, 'Unfair Arbitration Clauses' (2001) *U Ill L Rev* 695, 733.

⁵⁷⁰ World Bank Doing Business, *Enforcing Contracts Methodology*, <<http://www.doingbusiness.org/methodology/enforcing-contracts>> Accessed 7 March 2016.

The steps that need to be taken are usually detailed by the OMI's dispute resolution policy. For example, Amazon details these steps as: first, the party should contact the seller and wait 3 days past the maximum estimated delivery date or 30 days from the order date, whichever is sooner. This applies to both B2B and B2C disputes. Thereafter, the party can file a dispute by taking 4 steps: 1. go to accounts and then orders, 2. select order and click on view claim, 3 select a reason for the claim and enter the required information, 4. report the problem.⁵⁷¹

Following the example set above, the accessibility of OMIs justice systems will be based firstly on how long it takes to file a dispute and the steps it takes to participate in the process. To consider if the duration hampers accessibility or not the average duration of filing the dispute in OMIs should be considered. If according to the policy of OMI it takes substantially longer than average for the claimant to file a dispute, for example a claimant has to wait much longer for the respondent to respond than as is practiced in other online market intermediaries, then the duration can hamper accessibility. This study measures the steps by analyzing the service agreements and information found in OMIs dispute resolution center.

5.1.7 Should OMI's DSD Protect the SMEs in their Dispute System Design?

Accessibility of a justice system has also been assessed based on how the parties in an economically weaker position can have access to dispute resolution. Due to their weaker economic position compared to large corporations, Small-Medium Sized Enterprises (SMEs) have been the focus of legislators and scholars with regards to access to justice.⁵⁷² Various laws have treated the SMEs differently and sometimes have also applied the same consumer protection laws to SMEs.⁵⁷³ This also includes providing the micro enterprise's access to court and out of court solutions. This might

⁵⁷¹ 'Amazon Customer Dispute Resolution Policy' <http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=541260&qid=1432678405&sr=1-1> Accessed 7 March 2016.

⁵⁷² Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (2009) OJ L 266., Article 11(1) and (3) considers out of court settlement for disputes regarding consumers and SMEs.

⁵⁷³ As it was asserted by Cafaggi, SMEs are sometimes presented with the same protection as the consumers. This is evident in The Common European Sales Law. Fabrizio Cafaggi, 'From a Status to a Transaction-Based Approach? Institutional Design in European Contract Law' (2012) Common Market Law Review.

lead to the conclusion that OMIs should also have different policies to treat the SMEs differently. This section first defines SMEs and then moves to discuss if OMIs have different policies for SMEs, or if their justice system can potentially remedy the power balance.

According to the European Commission, SMEs can be of Micro, Small and Medium Sized Enterprises. Micro enterprises have less than 10 staff members and less than two million Euros revenue. Small enterprises have less than 50 staff members and less or equal to 10 million Euros revenue. Finally, medium enterprises have less than 250 staff members and less or equal to 43 million Euros revenue.⁵⁷⁴

In some jurisdictions, SMEs have always been treated as the weaker parties in the transactions. In areas of information technology services and data protection, the protection afforded to consumers is being extended to micro and SMEs and legislation presents the possibility to allow microenterprises to be treated the same as consumers.⁵⁷⁵ European Regulation on Cross border payment, article 11, requires member states to provide an out of court complaint and redress procedure for consumers, and member states can extend this competence of out-court process to micro enterprises as well. In other words, SMEs similar to consumers can have access to out of court complaint and redress procedure,⁵⁷⁶ and such access is a positive factor for enhancing accessibility to justice for SMEs.

However, providing a concrete definition of SMEs in order for them to reap the benefits of the protections provided for them by the law has not been conclusive. The

⁵⁷⁴ European Commission Enterprise and Industry, Final Report Framework Service Contract for the Procurement of Studies and other Supporting Services on Commission Impact Assessments and Evaluations Interim, final and ex-post evaluations of policies, programs and other activities, Evaluation of the SME Definition, Center for Strategy and Evaluation Services, 2011, 23.

⁵⁷⁵ European Commission Enterprise and Industry Division Evaluation of the SME Definition (2012) Center For Strategy and Evaluation Services 21, the European Parliament and of the Council Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (Text with EEA relevance) (2015) OJ L 337, Article 20 –it reads as “As consumers and enterprises are not in the same position, they do not need the same level of protection. While it is important to guarantee consumers' rights by provisions that cannot be derogated from by contract, it is reasonable to let enterprises and organizations agree otherwise. However, Member States should have the possibility to provide that micro-enterprises, as defined by Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (15), should be treated in the same way as consumers. In any case, certain core provisions of this Directive should always be applicable irrespective of the status of the user.”

⁵⁷⁶ Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (2009) OJ L 266.

European Commission argued that the definition of SMEs should be applied on a case-by-case basis. Not all SMEs necessarily qualify to be SMEs.⁵⁷⁷ A non-conclusive definition also deters OMI's from having any special policy for SMEs. As argued in chapter two, both parties in B2B transactions (regardless of size) value an accessible justice system that issues binding and enforceable outcomes. Favorable dispute resolution policies for SMEs might not encourage large corporations to conduct trade with them.

As to the accessibility of OMI's dispute resolution mechanism for SMEs, the use of technology and technology readiness of SMEs might not hamper their access to justice, especially if they frequently carry out activities online and have previously performed online transactions.⁵⁷⁸ The participants to the process are traders that are accustomed to the use of online services. The inaccessibility of these intermediaries does not arise due to technological incapability.

Considering the remedies that have been predicted to provide access to justice for SMEs, for example the availability of out of court settlement, the OMI's dispute resolution system can equally facilitate such access to SMEs. OMI's that provide a justice system also assist SMEs in having access to an alternative process that is more accessible than court. Hence, although OMI's do not differentiate between large corporations and SMEs, they are still more accessible than other means of dispute resolution. Also, not having a specific policy for SMEs in place does not directly result in SMEs lack of access to OMI's justice systems. Considering this, not having a separate policy for SMEs is not considered as an indicator of inaccessibility of justice systems in these disputes.

⁵⁷⁷ Judgment of the Court of First Instance: Case T-137/02 Pollmeier Malchow GmbH & Co. KG v Commission of the European Communities, 14 October 2004, The Commission argued that the definition of SMEs should not be applied in a mechanical or formal way and it is necessary to ensure that the definition of SMEs is not circumvented for purely formal reasons. Not all enterprises which formally satisfy the definition of an SME are in fact SMEs, Commission Decision 2002/821/EC of 15 January 2002 on the State aid implemented by Germany for Pollmeier GmbH, Malchow, OJ 2002 L 296. European Commission Enterprise and Industry Division Evaluation of the SME Definition (2012) Center For Strategy and Evaluation Services 48.

⁵⁷⁸ http://ec.europa.eu/eurostat/statisticsexplained/index.php/Information_society_statistics__enterprises#Further_Eurostat_information> 8 December 2015.

According to the European Commission Survey, 96% of small sized businesses and 99% medium sized businesses had access to the Internet, and 70% of small and 87% of medium sized had their own website.

5.1.8 Evaluating the Accessibility of OMIs Dispute Resolution

To assess the subcomponents the research will take the following approach: for accessibility, 12 elements will be considered namely: the boundary rules (which disputes can be filed), arbitrary rejection of claims, possibility to appeal the rejection of claim, location, mandatory rules that affect cost, how many steps to file the dispute, disclosure of the rules of procedure, acceptability of online evidence, participation fee, modes of communication, how long it takes to file a dispute, language of the proceeding.

The rationale behind the codification has been already explained in this section. Briefly, an accessible dispute resolution should indicate the boundary rules, should not arbitrarily reject a claim and if it does, an appeal mechanism should be in place. Hence a value of 0 will be given to those dispute resolution policies that arbitrarily reject a claim and a value of 1 will be given to the policies that allow the appeal for the rejection. As to the location of dispute resolution, the optimal location for online disputes is cyberspace. Not requiring the parties to attend hearing in person is necessary as such requirement can hamper accessibility. Hence a value of 1 will be given to those dispute resolution policies that do not require the parties to be present physically at hearings and a value of 0 if otherwise. The mandatory rules that affect costs are varied; this research considers whether the dispute resolution policy requires the participants to be represented by a lawyer. If there are no such requirement, value of 1 will be given and value of 0 if otherwise. The optimal level of number of steps to file a dispute will be measured based on the median value of all OMIs' practice. The median for the number of steps among all the studied OMIs is 5 (this will be shown in chapter 6 in case studies). If the number of steps for filing a dispute is more than 5 then a value of 0 will be given. If it is equal to or less than 5 a value of 1 will be assigned.

The other element for an accessible dispute resolution is the disclosure of rules of procedure and how the OMI conducts the dispute resolution and resolves the dispute. If the rules of procedure are stated in OMIs policy they will be given a value of 1. Acceptability of online evidence is another important criterion for accessibility. The transactions take place almost online throughout and if the OMI does not deem online evidence as credible it hampers the accessibility of the dispute resolution system for the parties. Hence a value of 1 will be given to those that accept electronic evidence and

receive evidence through online means. As to participation fee, the medium of the cost of filing a dispute in all the studied OMIs will be considered as a threshold. If the OMI's cost of filing is less than or equal to the threshold of the median, then a positive value of 1 will be assigned to them. If it is more than the threshold, they will receive a value of 0. Modes of communication should be primarily online as well. Submitting evidence and providing explanation and participating in the process as well as receiving the outcome should take place online in order to have an accessible dispute resolution system. If the means of communication is not primarily online through, a value of zero will be given to the criterion, a positive value will be given if otherwise. The duration of filing a dispute at the dispute resolution center of OMIs is also another criterion that will be considered based on the number of days that the parties have to wait to file a dispute. The median value of the days that takes to file a dispute among all the OMIs is 30 days. Those OMIs that have a 30 day or less policy will be given a value of 1 and for those that exceed the duration of 30 days will be given a value of zero. If the OMI does not mention how many days it will take to file a dispute or requires negotiation as the first step but does not indicate a time a value of 0 will be given as the uncertainty can result in inaccessibility. The language of the proceeding is a great contributor to the accessibility of justice system. To find out whether the language of the proceeding facilitates accessibility, the language in which the transaction takes place will be considered. This is in general English but specific attention will be paid to the language which is used in OMI's participation agreement.

Evaluation Chart For Accessibility of OMIs

The OMI's Accessibility		
Accessibility	Reasoning for Coding	Value
The boundary rules (which disputes can be filed)	Is it stated in the policy or service agreement?	If yes then the value of 1 will be assigned, if no value of 0 will be assigned.

Arbitrary rejection of claims	Can OMI reject the claim at its own discretion?	If the intermediary can reject the dispute at its own discretion, then a value of zero will be given to this element. If not, the value of 1 will be given.
Appeal the rejection of claim	Can the party appeal the rejection of claim?	If the party can appeal the value of 1 will be given, if it cannot, value of 0 will be given.
Location	Does the OMI require the party to attend in person hearing?	If the DSD does not require the parties attend in person hearing then a value of 1 will be given, if it requires the parties to attend the hearing in person value of 0.
Mandatory rules that affect cost	Do the parties have to be represented by lawyers?	If the parties have to have lawyers, then value of 0 will be given, if the

		answer is no, value of 1 will be given.
How many steps to file the dispute	Is it more than 5 steps, the median number of steps for filing a dispute among all studied OMIs?	If it takes less than 5 steps, value of 1 will be given, if more than 5, value of zero will be given.
Disclosure of the rules of procedure	Are the rules of procedure disclosed in service agreement and OMI's policy?	If the answer is yes, value of 1 will be given, if it's no value of 0 will be assigned.
Acceptability of online evidence	Does the OMI accept online evidence?	If the answer is yes, value of 1 will be given, if the answer is no value of 0.
Participation Fee	How much is filing fee?	If filing fee is free value of 1 will be given, if it is not value of 0. Because most OMIs provide free dispute resolution and the median of filing fees among all the

		studied OMIs is 0.
Modes of communication	Does the process take place online or offline?	If the process takes place online and does not require the parties to use offline means of communication, then a value of 1 is given, if not a value of 0.
How long it takes to file a dispute	How long should the parties wait to file a dispute?	The median value of the days that takes to file a dispute among all the OMIs is 30 days. Those OMIs that have a 30 day or less policy will be given a value of 1 and for those that exceed the duration of 30 days will be given a value of zero. If the OMI does not mention how many days it will take to file a

		dispute or requires negotiation as the first step but does not indicate a time a value of 0 will be given as the uncertainty can result in inaccessibility.
Language of the proceeding	Is the language of the proceeding, the language of transaction?	If the language of proceeding is the language of transaction a value of 1 will be assigned. If not value of 0 will be assigned.

5.2 OMI's DSD and Neutrality

A neutral decision maker is required to make an unbiased decision based on the evidence and arguments provided during the course of the proceeding.⁵⁷⁹ There should be no external factor that affects the neutrality of the decision maker.⁵⁸⁰ The design elements that affect the OMIs' neutrality, based on the discussion in Chapter 4, are the financial and professional structure of the neutrals, internal or external nature of the dispute resolution provider, and the oversight of a third party over the process. These

⁵⁷⁹ Waldron, 'The Rule of Law and the Importance of Procedure'.

⁵⁸⁰ Allison, 'Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis' 1222.

factors will be substantiated and considered in evaluating the OMIs' dispute system design.

5.2.1 The Financial Structure of Intermediaries

To unbundle the financial incentives of the decision makers in OMIs, the overall financial structure of OMIs should be considered. OMIs usually hold control over the design of the dispute resolution process by either providing the dispute resolution mechanism themselves or by referring the parties to a third party dispute resolution provider. As they are effectively the designer of the dispute resolution process and the individual decision makers are their employees, hence their incentives are unknown; this study will consider OMIs' financial structure and its effect on the neutrality of OMIs.

To ascertain the financial incentives of the OMIs, its sources of revenue should be considered. OMIs' revenue can come from; inter alia, transaction fees, membership fees and selling products.⁵⁸¹ As will be explained, these three sources of revenue might affect the neutrality of OMIs through: biased membership, repeat player problem and producer bias.

5.2.1.1 Biased Membership

Neutrality of dispute resolution mechanism might be hampered if the intermediary receives profit from one side of the market more than the other or from members rather than non-members. For example, when there are different membership programs and dispute arises between a non-member and a member, or a paid member and a free member it is not clear whether the OMI will have enough incentives to remain neutral to the non-member.

The problem of network membership programs and its clash with the neutrality of dispute resolution system is apparent in payment intermediaries and chargeback cases. They are more likely to side with their members and in business to consumer disputes with the consumers, as their success depends on the satisfaction of the cardholder. In

⁵⁸¹ Pamela Jones Harbour, *B2B Basics and Antitrust Issues* (Comments at Federal Trade Commission Workshop on Emerging Issues for Competition Policy in the E-Commerce Environment 2001) 40.

many cases, online payment intermediaries and online market intermediaries have left the sellers with biased decisions. Sellers have filed class action suits against eBay and PayPal, objecting their unfair treatment in resolving disputes between buyers and sellers and siding with buyers.⁵⁸² This is also the overall impression in the industry of chargebacks and Visa card and Master cards. If the merchants contest, the dispute resolution system is biased against merchants and in favor of consumers. This is due to the fact that consumers (cardholders) are the members of Visa and MasterCard and therefore the membership has a direct effect on the neutrality of OMIs if they carry out the dispute resolution themselves.⁵⁸³

5.2.1.2 The “Repeat Players” and the Financial Structure

“Repeat players” in adjudication and arbitration, are those that routinely face the same dispute and use the dispute resolution system more than once as opposed to one-shotters who may use the dispute resolution sporadically.⁵⁸⁴ The repeat player problem in OMIs might occur due to repeat player carrying out more transactions on the platform, hence bringing more revenue and using the dispute resolution mechanism more.

The effect of repeat players on the neutrality of a dispute resolution provider has been discussed in arbitration.⁵⁸⁵ Repeat player problem is directly related to the financial structure of the dispute resolution provider. If the financial structure allows only one set of users to provide revenue, or receives its substantial revenue from one set of users then it is more likely to be biased.

In arbitration literature, it has long been argued that repeat players affect the neutrality of the arbitration mechanism.⁵⁸⁶ The concept of repeat player can refer to two

⁵⁸² *Campbell vs. eBay Inc and Paypal Inc.*, No5:13-cv-02632 (ND. Cal. 7. June .2013).

⁵⁸³ Ronald J Mann, ‘Making Sense of Payments Policy in the Information Age’ (2005) 93 Georgetown Law Journal 633, 661. “[Because this is a consumer-driven society and Visa and MasterCard are primarily driven by the cardholder’s side—all the issuing banks are the ones who sit on the board with Visa and MasterCard—I would say [it’s] just [the] law of averages[; I] would say that most of those would rule on behalf of the cardholder.”

⁵⁸⁴ Marc Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 Law & Society Review 95, W Mark C Weidemaier, ‘Arbitration and the Individuation Critique’ (2007) 49 Ariz L Rev 69.

⁵⁸⁵ In the arbitration field the issue of financial incentives of the dispute resolution provider that affect its neutrality is usually identified through the concept of “repeat player”, a term coined by Galanter· Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’.

⁵⁸⁶ Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’;Bingham, ‘On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards’;Bryant G Garth, ‘Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution’ (2001) 18 Ga St UL Rev 927.

actors; the arbitrators and the arbitration tribunal and the institutional repeat players that refer to arbitration in their contracts, such as employers, investors and traders. Arbitration tribunals and arbitrators are funded privately by the disputants and their livelihood depends on the number of appointments. Hence there are concerns that these tribunals would not maintain their neutrality when only one of the parties to the dispute funds the process or designs the process.⁵⁸⁷ The problem is generally raised when there is power disparity between the parties to the dispute, and when one party designs the process and refers the other party to a specific tribunal. Additionally if the dispute system is designed to allow only one party (the complainant) to file a dispute and pay a filing fee then it is more likely that the arbitrator or the tribunal would be biased towards the respondent.

To illustrate the issue more tangibly it is useful to discuss the problem within the fields that it was raised in. The “repeat player” problem was found within the fields of employment arbitration, investment arbitration and domain name dispute resolution. In investor disputes, only the investor can file a dispute. In employment disputes, the problem rests in who designs the dispute resolution. As the employer obliges the employee to use a certain arbitration forum for filing disputes through ex ante agreement, the neutrality of the forum is under question. Due to the power imbalance between the parties, the more powerful party might have more power to appoint the tribunal. Moreover, if the employer uses the tribunal for all its employee dispute, the tribunal might be biased towards the employer as the employer provides a source of income.⁵⁸⁸ In domain name disputes, the complainant can initiate the process against the domain name holder, there are no appeals mechanisms and the respondent who holds the domain name is not allowed to appeal the outcome.⁵⁸⁹ The only recourse

587 In employment disputes for example where usually the cost of arbitration is born by the employer, Bingham found out that repeat players won the majority of the cases against employees. Bingham, ‘On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards’.

588 Bingham, ‘Self-Determination in Dispute System Design and Employment Arbitration’; Bingham, ‘On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards’; Samuel Estreicher, ‘Saturns for Rickshaws: the Stakes in the Debate over Predispute Employment Arbitration Agreements’ (2000) 16 Ohio St J Disp Resol 559.

589 ICANN Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”)
(b) If neither the Complainant nor the Respondent has elected a three-member Panel (Paragraphs 3(b)(iv) and 5(b)(iv)), the Provider shall appoint, within five (5) calendar days following receipt of the response by the Provider, or the lapse of the time period for the submission thereof, a single Panelist from its list of panelists. The fees for a single-member Panel shall be paid entirely by the Complainant. ,
<https://www.icann.org/resources/pages/rules-be-2012-02-25-en>

available is the court. The fact that complainants are repeat players in this context and bring about disputes, and the fee of single panel members is entirely upon the complainant may damage the neutrality of the tribunal and they might side with the complainant.⁵⁹⁰

In order to overcome the repeat player problem, the dispute system design and who has control over the system should be considered. In a similar vein, Mueller turns his attention to the design of dispute system and suggests that in domain name disputes, the complainant should not be able to choose the dispute resolution forum, but a third party should.⁵⁹¹ Similarly, in online B2B disputes, it should be considered who has control over the design of the dispute resolution system and how it can create or overcome the repeat player problem.

One of the advantages of dispute resolution system designed by OMIs over dispute resolution designed by one of the parties is that it can partly overcome the repeat player problem. Repeat players that design the justice system, consider their interests and usually design the justice system in a way that operates in their favor in various ways. They set limits on their liability and impose disclaimers. They also choose a dispute resolution design that is more accessible to themselves.⁵⁹² As the OMIs are the third parties that design the dispute resolution, depending on their structure they might have enough incentives to design a dispute resolution mechanism that is procedurally just.

Nevertheless, the neutrality of the internal dispute resolution mechanism that OMIs provide can be affected by the fee structure of the OMI. The phenomenon of repeat player might also be seen in OMI's dispute resolution mechanism under certain circumstances. Repeat players in OMIs are those that bring the most profit by carrying out regular transactions. While in many cases the OMIs do not charge the parties to file a dispute, the OMIs might receive a service fee or commission on each transaction. If the OMI has incentives to be more favorable to the repeat player, then it might not maintain neutrality at all times. This is especially the case if it receives fee per transaction as those that carry out more transactions might receive a more favorable

⁵⁹⁰ Milton Mueller, 'Rough Justice: A Statistical Assessment of Iccann's Uniform Dispute Resolution Policy' (2001) 17 *The Information Society* 151.

⁵⁹¹ See Mueller, 'Rough Justice', 19–20.

⁵⁹² Bingham, 'Control over Dispute-System Design and Mandatory Commercial Arbitration', 232.

treatment. Therefore, to assess the neutrality of OMI's dispute resolution it is necessary to find out where the OMI has a fee per transaction scheme.

5.2.1.3 Biased or Independent Intermediary?

Another issue stemming from the financial structure that can hamper the neutrality of the intermediary is when the intermediary receives revenue from offering its own products and services. Such intermediary is called biased intermediary.⁵⁹³ In non-dispute related functions, such as listing products and services on the platform, the intermediaries that have a line of products and inventory have sought ways to profit from their influence on their platform. This behavior is exemplified within search engines and online market intermediaries. The biased listing takes place when the intermediary vertically integrates to the downstream market and recommends its own product. Google, for example, favors the listing of its own products (such as Google Map and YouTube) to others.⁵⁹⁴ The existing bias against listing the competitors' products might lead to the argument that the OMI's financial incentives can also influence the neutrality of the intermediary when the disputant is a competitor. If the financial incentives require the OMI to favor the non-competitors over competitors then the neutrality of the process is hampered.

As the biased intermediaries have their own product line and an interest in the merchandise of the marketplace, they could potentially devise rules that put them in an unfair and advantageous position.⁵⁹⁵ If they carry out the dispute resolution themselves, there might be the possibility that they have some incentive to be biased against those merchants that sell the same merchandise and offer similar products. Independent intermediaries do not have their own line of products and only provide a platform for buyers and suppliers. The public and independent intermediaries that do not have their own line of products have more incentive to be neutral.

⁵⁹³ Yoo, Choudhary and Mukhopadhyay, 'Neutral Versus Biased Marketplaces: A Comparison of Electronic B2B Marketplaces with Different Ownership Structures', 121.

⁵⁹⁴ Geoffrey A Manne and Joshua D Wright, 'If Search Neutrality Is the Answer, What's the Question' (2012) Colum Bus L Rev 151.

⁵⁹⁵ Yoo, Choudhary and Mukhopadhyay, 'Neutral Versus Biased Marketplaces: A Comparison of Electronic B2B Marketplaces with Different Ownership Structures', 121.

5.2.2 External Justice System and Internal Justice Systems

The referral to external justice system can play a role in maintaining the neutrality. For example, if OMIs provide an internal dispute resolution, they are more likely to be biased, particularly if they are also suppliers, in particular for disputes over those merchandise that are in their line of products. However, if they refer the parties to a third party which is not affiliated with the OMI, then this might decrease the probability of being biased. In general, those intermediaries that have an external justice system might maintain neutrality better than those that provide an internal justice system, especially if they have an interest in the dispute financially or due to the design of their market intermediary.

5.2.3 External Oversight

If the OMIs' dispute resolution function in the shadow of the law, they might bind themselves to the procedural justice criteria better than those that operate independently.⁵⁹⁶ The existence of external oversight by a public body such as court or an administrative agency that holds oversight on the conduct of OMI's dispute resolution, depends mostly on how the OMI designs the dispute resolution mechanism. If OMI's dispute resolution is designed in a way that constitutes arbitration or another form of regulated dispute resolution (such as mediation) then there is public oversight for its conduct. For example, under the applicable arbitration laws, the OMI's dispute resolution process can be challenged in court and the process can be regulated by arbitration laws. This means that the process should observe all the applicable legal requirements regarding due process and other matters in order to be recognized as arbitration under the law. If the dispute resolution process does not constitute arbitration then it is not subject to oversight by arbitration laws.⁵⁹⁷

⁵⁹⁶ There are disadvantages to public oversight and as it will be discussed in chapter 7, over regulation of dispute resolution processes might lead to not providing a justice system by OMIs.

⁵⁹⁷ In *Dluhos v. Strasberg*, 321 F.3d 365 (3rd Cir. 2003) the court stated that "If, however, a dispute-resolution mechanism does not constitute arbitration under the FAA, then a district court has no jurisdiction to review the result absent an independent jurisdictional hook. See *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 291 n. 1 (3d Cir.2001) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (explaining that the FAA does not independently provide federal jurisdiction)); *Harrison*, 111 F.3d at 352 (dismissing a request for lack of appellate jurisdiction, where the dispute resolution proceeding did not constitute arbitration under the FAA)."

It is challenging to establish whether a dispute system design is subject to specific laws. For example, it is difficult to ascertain what process constitutes arbitration as it differs from jurisdiction to jurisdiction. Some jurisdictions might consider only dispute resolution mechanisms that yield a binding outcome as arbitration.⁵⁹⁸ Some jurisdictions might consider only institutional arbitration as arbitration, hence any ad hoc arbitration agreement cannot be enforced.⁵⁹⁹ If under the respective law the arbitration process needs to be adjudicatory, or the award has to be binding or submitting the dispute to arbitration has to be binding, and the design of the OMI dispute resolution does not meet these requirements, then the process is not arbitration and OMI's dispute settlement mechanism will not be subject to the due process requirements. Parties might have the right to go to the competent court to file their dispute, but unlike arbitration OMIs are not obliged to uphold due process in its legal sense. Under these circumstances, there can be potentially less legal incentives for OMIs to uphold procedural justice.

It is easier to establish the nature of the dispute resolution mechanism when the OMI or the third party dispute resolution provider refers the disputant to an arbitration tribunal. For example, Escrow.com refers the parties to arbitration tribunals, this subjects the process to public oversight and the awards can be challenged in court.⁶⁰⁰

In evaluation of the case studies, to establish whether the OMIs' dispute resolution is subject to oversight, the thesis will take the following approach: If the OMIs dispute resolution process can be considered as arbitration or a regulated dispute resolution system such as mediation, in accordance with the applicable law, then they are subject

⁵⁹⁸ The approach in US varies, but in the following cases the process that did not yield a final and binding award was not recognized as arbitration and hence not subject to Federal Arbitration Act. See *Parisi v. Netlearning*, 139 F. Supp. 2d 745 (Va.E.D. 2001); *Sallen v. Corinthians*, 273 F.3d 14 (1st Cir. 2001); *Eric Dluhos v. Anna Strasberg*, 321 F.3d 365, (3rd Cir. 2003).

⁵⁹⁹ Ad hoc arbitration agreements and outcomes are not recognized as arbitration in China and cannot be enforced. This is different from the US approach. A designated commission should be chosen in arbitration agreement according to the Chinese Arbitration Law. Hence dispute resolution is only arbitration if OMI refers the parties to an arbitration tribunal. Chinese Arbitration Law (article 16) provides that arbitration agreement should include an arbitration commission. See Chinese Arbitration Law, translation in English is available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm.

⁶⁰⁰ Escrow.com refers the parties to the dispute to arbitration tribunals such as NetArb and JAMS. See 'what is a dispute resolution', <<https://www.escrow.com/support/faqs/faq-questions/what-if-there-is-a-disagreement-during-the-transaction-what-is-dispute-resolution>> Accessed 12 May 2016.

to the oversight of state law. If no law applies then the dispute resolution mechanism is not subject to oversight.

5.2.4 Evaluating the Neutrality of OMIs Dispute Resolution

Neutrality subcomponents in this research entail: biased fee structure, transaction fee, external or internal justice system, which party pays fee for DSD, Biased or independent intermediary and external oversight. The biased fee structure is evaluated based on the membership of the platform. If the platform receives members, and the members are only one side of the market, for example only the suppliers are members of the platform for a fee, then as the platform receives revenue from one side it can be biased towards the other side. Hence if one side of the market pays a substantial membership fee and the other side does not or pays much less, a value of 0 will be given to such fee structure. If there a transaction fee, in the sense that the platform receives a commission per transaction then it might favor those that carry out more transactions on the platform. Hence a value of 1 will be given to those that charge no transaction fee and a value of 0 to those that do.

External or internal justice systems means that either the OMI refers the parties to a third party to resolve the dispute or it resolves the dispute itself. As it was argued in section 5.2 if the OMI refers the parties to another dispute resolution provider, the likelihood of a neutral dispute resolution is more than when it internally resolves the dispute. Hence, if the justice system in OMI is internal i.e. the OMI provides it itself a value of 0 will be given, if it is provided by a third party, a value of 1 will be assigned. In which party pays the fee for dispute resolution, if one party bears the costs of the dispute resolution system then a value of 0 will be given to that process. If the dispute resolution is free of charge or both parties pay then a value of 1 will be given to that process. As to biased or independent intermediary, those intermediaries that have a line of products and are producers themselves are called biased intermediaries. In this case, the biased intermediaries might not be neutral over disputes that the subject matter is a product they produce themselves. Hence a value of 0 will be given to biased intermediaries and a value of 1 to independent intermediaries.

External oversight exists if the dispute resolution process is regulated or can be challenged procedurally at court. For example, if it qualifies as arbitration, depending

on its jurisdiction, its award can be challenged. If it is regulated then there might be more incentive for the OMI to uphold procedural justice. Hence if it is regulated then a value of 1 will be given and if it is not a value of 0.

Evaluation Chart For Neutrality of OMIs

The OMI's Neutrality		
Indicator	Reasoning for the coding	Value
Biased fee structure	One side of the market provides fee	If one side only provides fee and the other side does not, value of 0 will be given. If both sides contribute equally, value of 1 will be given.
Transaction fee	Commission received based on each payment that can lead to "repeat player" problem	If commission is received per transaction value of 0 will be given. If no commission is received for payment value of 1 will be given.
External or Internal justice system	Does the OMI refer the parties to an external dispute resolution provider or does it provide the dispute management system itself?	If it refers to an external dispute resolution provider, value of 1 will be given, if it provides it itself value of 0 will be given.

Which party pays fee for DSD	Does the buyer pay for the DSD or the seller or the OMI?	If buyer or seller pay value of 0 will be given. If OMI pays value of 1 will be given.
Biased or independent intermediary	Is it a public platform that has a line of products or does it not have a line of product.	If it is a producer itself, value of 0 will be given, if it is not value of 1 will be given.
External oversight	Do any laws regulate the OMI's dispute resolution mechanism?	If any law or regulation applies to the procedure of the dispute system management of OMI value of 1 will be given, if not value of zero will be given.

5.3 OMI's DSD and Effectiveness

The OMIs' dispute system design should be able to compel the parties to engage in the dispute resolution process and to enforce the award.⁶⁰¹ In order to achieve these two goals, the design of dispute systems should be able to impose costs on the parties in case of non-participation and non-compliance. The cost of non-participation and non-compliance depends on the magnitude of the sanction and the probability of imposing the sanction.⁶⁰²

To evaluate the effectiveness of OMIs' dispute system design this section will consider the probability of imposition and magnitude of three major enforcement

⁶⁰¹ Laurence R. Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication'.

⁶⁰² Schwartz and Tullock, 'The Costs of a Legal System', 77.

mechanisms that OMIs' DSD have in place, namely: Escrow services and payment intermediaries, reputation mechanisms and other nonmonetary sanctions.

5.3.1 Escrow Services, Payment Intermediaries and Enforcement

In OMIs' services agreements, B2B parties are sometimes referred to an escrow mechanism or are recommended to use a specific payment intermediary for handling the payment. The payment intermediary issues the outcome and enforces the monetary outcome or they only act as an enforcing mechanism, enforcing the OMIs dispute resolution outcome or court judgment.⁶⁰³

In cross border disputes, without the threat of immediate monetary punishment on the breaching party, the winning party is left with the alternative of court for enforcement of the outcome, which is more expensive.⁶⁰⁴ This will increase the cost of enforcement for the winning party. The high cost of enforcement for the winning party hampers the effectiveness of the award in two ways: it does not encourage voluntary compliance with the award for the losing party and does not compel the party to participate in the process.⁶⁰⁵

With holding the threat of monetary punishment, the payment intermediaries can increase the cost of non-compliance and provide an effective enforcement. However, the effectiveness of escrow mechanisms is limited to the OMI's design needs to identify an escrow mechanism or a payment intermediary ex ante when drafting the contract. As the lack of ex ante agreement for escrow hampers the effectiveness of enforcement mechanism. Hence in the case studies, when evaluating OMIs' effectiveness, ex ante arrangement for escrow mechanisms will be valued positively.

⁶⁰³ See Armorpayment policy "During the Negotiation Phase, the dispute is resolved by one party accepting the other party's offer or counter-offer. Armor Payments will automatically process payment according to the terms of the accepted offer (payment to the seller, refund to the buyer, or some combination). During the Arbitration Phase, the dispute is resolved by the decision of the independent arbitrator from NetNeutrals. Armor Payments will automatically process payment according to the terms of the decision" available at <http://www.armorpayments.com/escrow/dispute-management-faq>.

⁶⁰⁴ Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions', 19.

⁶⁰⁵ Mann, 'Making Sense of Payments Policy in the Information Age', 659.

5.3.2 Reputation

Online Market Intermediaries, especially for business-to-consumers, have provided reputation mechanisms through online feedback.⁶⁰⁶ If the seller does not comply with the dispute resolution outcome, the buyer can give a negative feedback which is visible to all the members (and sometimes nonmembers) on the platform. The reputation mechanism can increase the cost of non-compliance with the outcome.⁶⁰⁷ However, reputation mechanisms are not effective in every case, i.e. they might not increase the cost of non-compliance with the outcome. It should be noted that reputation itself is not an enforcement mechanism, but in some cases it can increase the cost of non-compliance and induce self-enforcement.

The online reputation mechanisms were developed based on what Bernstein termed as “the Theory of Reputational Bond”.⁶⁰⁸ Repeat players that engage with transactions over a long run, usually come from the same geographical location and form a homogeneous group that values reputation highly, hence they have incentives to comply with the outcome or not to breach the contract. This will make reputation an effective punishment for non-enforcement of dispute resolution outcome.

The theory of reputational bond did not stay within the limits of a homogenous group. As Charny stated, the advancement in technology and ease of dissemination of information through information intermediaries at low cost could make the reputation mechanism more effective even for non-homogenous communities.⁶⁰⁹ This prediction turned out to be true, as many online reputation mechanisms and information intermediaries flourished on the Internet. In public intermediaries that have many to many transactions and between parties that mostly carry out one-off transaction, public online reputation mechanism was used to ensure compliance with the contract and

⁶⁰⁶ Chrysanthos Dellarocas, ‘Building Trust Online: The Design of Robust Reputation’ (2004) *Social and economic transformation in the digital era* 95, 96.

⁶⁰⁷ Susan Block-Lieb, ‘E-Reputation: Building Trust in Electronic Commerce’ (2001) 62 *La L Rev* 1199.

⁶⁰⁸ Bernstein, ‘Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’.

⁶⁰⁹ David Charny, ‘Nonlegal Sanctions in Commercial Relationships’ (1990) *Harvard Law Review* 373, 419. He asserts that “Conversely, mass markets based on reputational bonds are feasible only with technology that conveys information cheaply to a large group of transactors, such as computers used to monitor creditworthiness or mass media used in advertising”.

outcome of dispute resolution.⁶¹⁰ The online reputation mechanism especially in low value transactions was effective as the merchants with better reputation were able to have more transactions. Moreover as the Internet made the feedback accessible widely and worldwide, the cost of bad reputation increased for the merchants.⁶¹¹

The effectiveness of the reputation mechanism in online intermediaries cannot be overstated. Reputation does not always increase the cost of non-compliance, especially in B2B public intermediaries, which are open to every participant and sometimes are anonymous. In low value B2C disputes, the reputational mechanism might work, however in high value trade, reputation might not be an effective mechanism, as the cost of losing reputation might be less than non-enforcement of the outcome. The cost of damage to reputation for a small business carrying out transactions with consumers on the platform might be more than the value of the merchandise that has been sold, however when high value is at stake and merchants are unknown, the cost of reputation might not exceed the cost of non-compliance with the award.

To consider the effectiveness of reputation mechanisms that OMIs have in place (e.g., feedback and rating mechanism), first the nature of the OMIs (public or private) should be considered. In OMIs, the attributes of transactions change depending on whether the intermediary is public or private. Private intermediaries have a close-knit community, with approved members. Unlike public OMIs, the members of this community know each other or the intermediary endorses them.⁶¹² Private intermediaries can be compared to the Diamond and Timber networks that have been studied by scholars.⁶¹³ Reputation mechanisms can be used as enforcement mechanisms within these networks, as they are most of the time the most profitable network to be a part of. Reputable sellers can expect more purchases⁶¹⁴ and can expect price premiums.⁶¹⁵ Moreover, the livelihood of the business of the merchants depends on being a part of the network, as it might not be possible to join another network

610 Block-Lieb, 'E-Reputation: Building Trust in Electronic Commerce'.

611 Block-Lieb, 'E-Reputation: Building Trust in Electronic Commerce'.

612 Alexandre de Corniere and Greg Taylor, 'Quality Provision in the Presence of a Biased Intermediary'.

613 Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry'; Konradi, 'The Role of Lex Mercatoria in Supporting Globalised Transactions: An Empirical Insight into the Governance Structure of the Timber Industry'.

614 Mark Lane and John Fitzgerald Kennedy, *Rush to Judgment* (Holt 1966).

615 'Buyer Dispute Program' < <https://payments.amazon.com/help/6025>> Accessed 14 May 2016.

easily.⁶¹⁶ The effectiveness of reputation mechanism also depends on the remaining horizon of the supplier and the buyer to be long enough.⁶¹⁷ A bad reputation can result in not being able to stay within the profitable network and if it is possible to remain in the network, other members will not be willing to trade with those that breach the laws and adjudication or dispute resolution outcome. That means that, if the supplier and buyer have future plans to have relational contracts on the platform, the reputational mechanism will be more effective. As relational contracts are more likely in private intermediaries, reputation is very important to the parties. Therefore, use of reputation, as an enforcement mechanism can be more effective in private intermediaries than in public intermediaries.

The effectiveness of reputation is different in public intermediaries. Public intermediaries, in general, do not endorse or verify their members extensively. In public intermediaries that facilitate spot trading, relational contracting does not occur regularly. As relational contracting rarely takes place, when high values are at stake and the cost of compliance with the award exceeds the cost of enforcement, the compliance with the award might not occur. Therefore, the effectiveness of reputation as a sanctioning mechanism might be higher in private intermediaries.⁶¹⁸ Private intermediaries certify the members and the members are more likely to carry out transactions with other members. Therefore, reputation might increase the cost of non-compliance or non-participation in the dispute resolution process for the party.⁶¹⁹

Reputation might also increase the cost of noncompliance with the award if the intermediary has established a monopoly or has a market dominance, hence gaining a bad reputation in a dominant intermediary can cost the non-complying member its business. The online feedback mechanism is more effective than traditional reputation

⁶¹⁶ Paul Resnick and others, 'Reputation Systems' (2000) 43 Communications of the ACM 45.

⁶¹⁷ Dellarocas suggests to evaluate the effectiveness of the online feed back mechanism the expected payoffs of the outcomes induced by the mechanism for the various classes of stakeholders over the entire time horizon should be considered. Chrysanthos Dellarocas, 'The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms' (2003) 49 Management science 1407, 1412.

⁶¹⁸ Dellarocas, 'The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms', 1412. Nevertheless there is a disadvantage regarding reliance on relationship as an enforcement mechanism, since heavy reliance on relationships leads to uncertainty about the effectiveness of the award.

⁶¹⁹ The higher level of effectiveness was also observed in partner markets(private intermediaries) Dellarocas, 'The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms', 1412.

mechanisms as it has a quicker effect than word of mouth.⁶²⁰ Nevertheless, the feedback mechanism is effective when a sufficient number of customers have provided that feedback and it will also reach a significant portion of future customers. Theoretically a minimum scale is required before reputation mechanisms have any effect on the behavior of the suppliers and buyers.⁶²¹ Hence the online market intermediaries need to have enough suppliers and buyers for its reputation mechanism to be effective. Overall, two factors should be considered in measuring the effectiveness of online rating in B2B OMIs: the dominance of the OMI and whether it is a public or private intermediary.

5.3.3 Other Nonmonetary Sanctions

Other nonmonetary sanctions in OMIs include blacklist policy, non-complaint status, and sanctioning from the platform.⁶²² For example, the noncomplying members or those who have received an excessive number of complaints can be blacklisted and sanctioned from the platform. With the advancement of the Internet, the intermediaries have taken up the nonmonetary sanctions as an enforcement mechanism. As the dissemination of information on the Internet can reach a wider crowd, the effectiveness of such mechanism has also progressed.⁶²³

The effectiveness of OMIs' dispute resolution mechanism is enhanced through nonmonetary sanctions⁶²⁴ under two circumstances: when the OMI is a private network and when the OMI is dominant in the market. In Private intermediaries that merchants know each other and are certified and verified nonmonetary sanctions work better. Similar to reputation, nonmonetary sanctions can lead to the businesses being sanctioned from a profitable network. In public OMIs, nonmonetary sanctions are

⁶²⁰ Dellarocas, 'The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms', 1412.

⁶²¹ Dellarocas, 'The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms', 1412.

⁶²² This is not an exhaustive list and differs from one OMI to another. For more information on various mechanisms, Alibaba.com policy provides a list of possible enforcement mechanisms which are not nonmonetary. See https://rule.alibaba.com/rule/detail/3310.htm?spm=a271m.7932209.0.0.i4cHhgour_marketplace_&_htm Accessed 14 May 2016. For more information on other sanctioning policy in Alibaba refer to 'Rules for Enforcement Action against Non-Compliance of Transactions on Alibaba.com' <<https://rule.alibaba.com/rule/detail/3310.htm?spm=a271m.7932209.0.0.i4cHhg>>.

⁶²³ Gary Bolton, Elena Katok and Axel Ockenfels, 'How Effective Are Online Reputation Mechanisms?' (2002) Max Planck Institute of Economics, Strategic Interaction Group.

⁶²⁴ In B2B OMIs the nonmonetary sanctions might add to the effectiveness of the enforcement mechanism, but they cannot be solely used as an enforcement mechanism. They should be used in conjunction with other enforcement mechanisms such as reputation and ex ante escrow system.

effective when the public OMI is dominant in the market. In this case, being blacklisted or sanctioned from their platform inflicts great loss on the member, which cannot be rectified by joining other intermediaries.

5.3.4 Evaluating the Effectiveness in OMIs

To evaluate the effectiveness of OMIs the characteristics of the third party involved in dispute system design should be identified. This requires specific attention to several aspects: whether the parties transact with each other only once or multiple times, if the online market intermediary is dominant in the market, and whether monetary punishment can be carried out immediately. These aspects are of great importance, as they have an effect on the payoff from compliance or non-compliance with the dispute resolution award, which in turn can hamper or increase the effectiveness of the justice system.⁶²⁵

To consider if the parties are one off players or repeat players, the nature of the intermediary should be considered. The parties transact with each other more regularly and perhaps multiple times in private intermediaries. Hence the private nature of the intermediary can increase the cost of reputation in the private network. Therefore reputation mechanism should be given the value of 1 when private intermediaries are involved.

The more nonmonetary mechanisms the market intermediaries have in place, the more the effectiveness of their enforcement mechanism is enhanced. However, the effectiveness of the enforcement mechanism depends on aspects such as the dominance of the online market intermediary. Measuring the effect of reputation mechanism on market participant's behavior is an extremely complicated task. It is not possible here to get into the granularity of such mechanism, as it is not within the scope of this research. However some of the measurements for the effectiveness of reputation mechanism that have been used in other scholarly work will be used. For example, the effectiveness of black list policy and feedback mechanism enforcement mechanisms depends on whether the intermediary is dominant in the market, if the intermediary is dominant in a way that it will cost the losing party to be sanctioned from the network

⁶²⁵ Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration', 922.

and be listed on the black list more than its compliance with the award, the black list policy is effective.

The dominance of the intermediary can increase the cost of non-compliance with the outcome of the dispute resolution. Black list policy can also be effective in private intermediaries that are not necessarily dominant, because private intermediaries can induce repeat transactions and relational contracts. To measure the dominance of the online market intermediary, its website ranking based on Alexa (an Amazon website traffic ranking tool) will be considered.⁶²⁶ To measure the dominance of the market, as the number of platform members and their revenues are not consistently available, the number of website visitors will be considered.

To measure whether the punishment (or the outcome of the dispute resolution proceeding) can be enforced immediately without parties having to take additional steps, the ex ante arrangement should be considered. Ex ante arrangements such as obliging the parties to contractually agree to use an escrow mechanism also enhance the probability of the enforcement of monetary sanction. The ex ante arrangements also reduce the cost of enforcement, as the punishment is enforceable immediately and does not incur cost of enforcement on one of the parties. Hence if such mechanisms are in place, a positive value will be allocated to the intermediaries' effectiveness.

Overall, the effectiveness consists of three sub-components: Ex Ante arrangement for escrow mechanism, the magnitude of feedback mechanism, and the magnitude of black list policy. The ex ante arrangement will be evaluated positively if the OMI refers the parties to an escrow system or a payment intermediary. If referral to the escrow or payment intermediary is merely a recommendation and not obligatory the effectiveness will be assigned a zero. The magnitude of the feedback mechanism and its level of effectiveness as well as the black list policy will be evaluated based on the website ranking of the OMI according to Alexa Traffic Rank (a website ranking engine) and if available the revenue of the OMI. Alexa Trafik Rank system is an estimate of the site's popularity. The rank is calculated using a combination of average daily visitors to this

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<http://www.alexa.com/>

site and pageviews on this site over the past 3 months. The site with the highest combination of visitors and pageviews is ranked #1.”⁶²⁷

If the OMI is a dominant market intermediary with a high-ranking website, then black list policy and feedback mechanism will be given the value of 1. If the OMI does not have blacklist policy and feedback mechanism or is not dominant in the market, a value of 0 will be assigned. The website rankings of all the intermediaries are listed below. Website rankings equal to one million or less are deemed to be effective far reaching websites, hence being banned from the website might be an effective sanction on these platforms. If the ranking is more than one million the feedback and blacklist policy is not effective. The table below shows the website ranking of the OMIs that will be evaluated in the next chapter.

OMI	Website Ranking (19 April 2016)
Amazon	6
Alibaba	60
Dhgate	1260
Made In China	1738
GlobalMarket	29,528
HQEW	80,956
Teleroute	635,735
Toadlane	1,282,659
Retracemobile	21,631,772

Evaluation Chart For Effectiveness of OMIs

OMIs Effectiveness		
Indicator	Reasoning for the coding	Value
Ex-Ante arrangement for escrow mechanism	ex-ante agreement to have escrow mechanism or lack of it	If there is an ex ante arrangement for escrow mechanism value of 1 will

⁶²⁷ ‘How are Alexa’s traffic rankings determined?’ <<https://support.alexa.com/hc/en-us/articles/200449744-How-are-Alexa-s-traffic-rankings-determined->> Accessed 28/10/2016.

		be given, if not value of 0 will be given.
The magnitude of the effect of feedback mechanism	Dominant or non-dominant platform. The cost of non-enforcement of the award should be higher than the cost of enforcement.	If OMI is a dominant platform in the market value of 1 will be given, if not value of zero. Dominance will be decided based on revenue of the OMI as well as website ranking.
The magnitude of black list policy	Dominant platform or non-dominant platform	If OMI is a dominant platform in the market, value of 1 will be given, if not value of zero. Dominance will be decided based on revenue of the OMI as well as website ranking.

5.4 OMI's DSD and Efficiency

An efficient dispute resolution mechanism resolves disputes in the minimum amount of time with the lowest cost. Efficiency is however not a binary issue, meaning that in some circumstances the high costs and long duration can be justified by the nature of the dispute and the value of the dispute at stake and the preference of the parties. Hence high costs and time consuming processes do not automatically result in inefficiency. However, as the B2B disputes within OMIs are more or less of the same nature, measuring the efficiency of the overall system can be based on calculating the overall cost and duration of the process. In a nutshell, the efficiency of the OMI's justice system relies on the overall costs and time of the dispute resolution process from its beginning to end.

As the duration of dispute resolution process for each case is unknown in intermediaries, some other elements will be considered to evaluate whether the dispute

resolution process is carried out in a timely manner. Factors such as an indication of the duration in the agreement or the procedural rules of the dispute resolution provider as well as having time limits for the process will be considered.

5.4.1 Duration

Parties prior to the dispute should be made aware of how long it will take to resolve a potential dispute. Speed has been recognized as one of the reforming criteria of judicial institutions.⁶²⁸ Indicating the duration of adjudication has an effect on the procedural certainty.⁶²⁹ In arbitration tribunals for example there are some time limits for issuance of award.⁶³⁰ Time limits also have been applied in courts.⁶³¹

In measuring efficiency, the overall number of procedural steps to be taken until the enforcement of the award should also be considered as well. As the procedural steps for filing a dispute are calculated in terms of accessibility,⁶³² those steps that must be taken until the completion of enforcement of the award should be considered. However, in most cases the award that is issued by OMIs or escrow mechanism is automatically enforced by the intermediaries and the parties do not have to take any additional steps.⁶³³ Therefore only if there is a clause in OMIs service agreement that states otherwise and the process is different, the procedural step to enforce the award will be considered.

5.4.2 Cost

Djankov measures the overall costs of the dispute resolution by considering two factors: dispute resolution costs and enforcement costs.⁶³⁴ Measuring the overall cost of OMIs

⁶²⁸ World Bank, World Development Report : Building Institutions for Markets (2002) New York: Oxford University Press.

⁶²⁹ McMillan, 'Private Order under Dysfunctional Public Order', 2436.

⁶³⁰ Article 30 (1) (2), ICC Arbitration Rules available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>

⁶³¹ Lane and Kennedy, *Rush to Judgment*.

⁶³² Section 5.1.6.

⁶³³ Alibaba TSA, Clause 10.3 stipulates the enforcement of the outcome through the escrow mechanism. It states that: " With a final determination, in the case the online transaction adopts the alipay services, alibaba.com may instruct alipay to dispose the funds held by alipay according to such determination, and in the case the online transaction adopts alibaba.com supplemental services, alibaba.com may dispose of the funds held by alibaba.com according to such determination." 'Alibaba TSA', <<https://rule.alibaba.com/rule/detail/2054.htm>> Accessed 11 January 2016.

⁶³⁴ 'Enforcing Contracts Methodology' <<http://www.doingbusiness.org/methodology/enforcing-contracts>> Accessed 11 January 2016.

dispute resolution is challenging. OMIs normally do not charge the parties to the dispute for carrying out dispute resolution. The dispute resolution is funded by the OMI through membership fees, transaction fees and other fees which it receives from its services. As it is not possible to find out the real cost of the dispute resolution for the parties and data is not available on the cost of dispute resolution in OMIs in most cases, the overall direct costs cannot be measured. Normally there is no direct cost for dispute resolution in OMIs. Therefore, the cost of the process if not indicated otherwise will be considered as free.

5.4.3 Evaluating the Efficiency of OMIs' Dispute Resolution

The efficiency of the OMIs' dispute resolution will be evaluated based on the overall cost and duration of the dispute resolution mechanism. To evaluate, the median of the duration (15 days) and cost (Free) of all the OMIs' dispute resolution will be considered. If the OMIs dispute resolution duration is more than the median, the value of zero will be assigned. If it is equal or less than the median then value of 1 will be given.

Evaluating OMIs Efficiency		
Indicator	Reasoning for the coding	Value
Overall duration	The median of the duration that it takes for OMIs to enforce the outcome is 15 days. If the dispute resolution policy does not indicate the time that it will take to enforce the award, the parties' access to information will be hampered.	If the duration of enforcement of the award is more than 15 days value of 0 will be given. If it is less than 15 days value of 1 will be assigned. Value of 0 will also be given to the OMIs that do not disclose how long it takes to enforce the outcome.
Overall cost	As most OMIs provide dispute resolution for free, the median of the cost of dispute	Value of 1 will be given to the OMIs that do not charge the parties. Value

	resolution for all OMI is zero. Hence if the OMIs' dispute system design charges the participants then it is less efficient.	of zero will be given to the ones that charge the parties for providing dispute resolution.
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6 Case Studies

Based on the evaluation scheme laid out in Chapter 5, this chapter will consider nine B2B online Market Intermediaries' dispute resolution systems and evaluates their dispute resolution mechanism to establish to what extent they uphold procedural justice. The choice of specific online market intermediaries as case studies was related to whether they provided dispute resolution or referred the parties to another dispute resolution provider. Case studies of 9 exemplar firms are used to build a coherent and testable model of the elements necessary to evaluate OMIs dispute resolution mechanisms with regards to procedural justice.

This is a qualitative research and the cases that have been chosen are not the representative samples of all B2B OMIs. The results are not generalizable to all B2B OMIs behavior and no statistical significance can be attributed to the findings of the case studies. What can be gathered and concluded from these case studies (similar to other kinds of qualitative research that carry out case studies) is, understanding the design of OMIs dispute management system and its possible consequences for procedural justice. The study as a whole (including the B2B OMIs that do not provide a justice system) might be representative of the variations in adoption of dispute resolution systems and dispute system design in B2B OMIs.

6.1 Introduction to the Selected B2B OMIs

This section will introduce the 9 OMIs that have been chosen, and describe their business model. Amazon is an online intermediary that provides its services for business-to-business (B2B), business to consumers (B2C) and consumers to consumers' (C2C) transactions.⁶³⁵ It is located in the US. It is a horizontal market intermediary, which means it provides its platform for any types of merchandise and services such as industrial manufacturing, education, business services and healthcare services.⁶³⁶ Both distributors and manufacturers can use the platform. Its B2B platform

⁶³⁵ Amazon United States Securities and Exchange Commission Form 10-K (2015) D.C. 20549, 3.

⁶³⁶ 'Amazon Business Account' <<http://www.amazon.com/b?node=11436294011>> Accessed 11 January 2016.

called “Business Seller Program” provides the ability for businesses to offer products to business customers only.⁶³⁷ The program has been established to accommodate the needs of the business customers and tries to cater to the requirements of business customers.

Alibaba is a B2B platform based in China, with other branches around the world. While Alibaba Group has other platforms that concentrate on B2C and C2C transactions and payment transactions, Alibaba.com is solely for B2B transactions.⁶³⁸ It is one of the most successful B2B platforms in the world. Its revenue from sales in the June quarter of 2015 was 201 million USD.⁶³⁹ Alibaba.com offers its services to suppliers and buyers. Suppliers are mainly from China, however the buyers that can register to use the platform should be based in foreign countries and cannot be based in China or Taiwan. The restriction on Chinese buyers to use the platform reflects the extent of the international transactions that take place on Alibaba.com platform. It has also recently started vetting suppliers internationally.⁶⁴⁰ Alibaba is a public, horizontal intermediary, facilitating the transactions between various industries. Any supplier or buyer can join Alibaba. It is solely a platform that focuses on facilitating a transaction between buyers and suppliers and it is not a supplier itself.

HQEW is a vertical online market intermediary that only offers electrical supplies and is incorporated in China. It owns the largest platform for electronics suppliers in Asia and all its services are focused on the electronics industry.⁶⁴¹ It has 6000 verified suppliers and 15 million USD in daily sales. It has mainly Chinese suppliers and international buyers.⁶⁴² Its service is offered for re-sellers, manufacturers, import and export experts, stock brokers, electronic manufacturing services and parts

637 Amazon Business Seller Program <<http://www.amazon.com/b?ie=UTF8&node=11436300011?>> Accessed on 25 April 2016.

638 Alibaba is the leading platform for the global wholesale trade, serving millions of buyers and suppliers. <http://www.alibabagroup.com/en/about/businesses>

639 ‘Alibaba Group Announces June Quarter 2015 Results’, <<http://alibaba.newshq.businesswire.com/press-release/alibaba-group-announces-june-quarter-2015-results>> Accessed 21 February 2016.

640 Don Davis, ‘Alibaba.com extends a supplier-vetting service to companies outside of China’, <<https://www.b2becommerceworld.com/2015/08/21/alibabacom-extends-supplier-vetting-service-beyond-china>> Accessed 21 February 2016.

641 ‘About Us’ <http://www.hqew.net/about_us/about-us.html> Accessed 3 May 2016.

642 They also cooperate with trade associations such as KEA (from Korea) and Taiwan Electrical and Electronic Manufacturers association. ‘History’, <http://www.hqew.net/about_us/history.html> Accessed 7 March 2016.

manufacturers. HQEW is owned by Huaqiang groups.⁶⁴³ Huaqiang has various sources of income such as cloud industry, financial industry, commercial real estate and B2B platform. The special feature of HQEW is that it publishes some of its decisions on its websites about the complaints that have been received and handled.⁶⁴⁴ Although this is not a factor that has been considered in the evaluation of OMIs, due to the limitations that are faced regarding access to the outcome of disputes, this is a step towards transparency. It has both public and private features of the intermediary. When it is delegated the task of sourcing suppliers, it chooses from the verified members. It is a public intermediary which means everyone can join the platform but it requires minimum verification of the members.⁶⁴⁵

DHgate is a Chinese company based in Beijing. Based on its assertion, it is the world's leading B2B online trading marketplace for goods manufactured in China. It is a horizontal market intermediary, providing a platform for the wholesale of various products. Its services are mostly targeted at small and medium sized enterprises. It also claims its listings exceed 30 million online products and connects 1.2 million sellers with 5.5 million buyers from 227 countries and regions.⁶⁴⁶ It has only Chinese suppliers and international buyers.⁶⁴⁷

Made-in-China is operated by Focus, an e-business company in China.⁶⁴⁸ Its business model is very similar to that of DHgate. It has helped small-medium sized enterprises to carry out transnational transactions effectively. It is not a supplier and

643 <http://www.szhq.com/>

644 'Complaint Records', <<http://www.hqew.net/safety-security/complains-records-2.html>> Accessed 7 March 2016.

645 'Terms and Conditions', <<http://www.hqew.net/article/Terms-Conditions.html>> Accessed 7 March 2016.

646 'DHgate' <<http://www.dhgate.com/>> , Accessed 3 May 2016. China Wholesale Marketplace DHgate.com is the world's leading online wholesale marketplace for goods made in China, connecting international buyers with Chinese wholesale sellers who offer the same quality products found elsewhere at a fraction of the price. DHgate hosts over 30 million products in a wide range of categories including Apparel & Accessories, Computers & Networking, Consumer Electronics, Toys & Hobbies, Health & Beauty, Bags & Jewelry, Home, Auto, and more. Get low prices on top selling products such as but not limited to wedding dresses, tablet pc, and cell phones. DHgate provides a buyer protection plan, a secure refund policy, express delivery, and shipment tracking, and is committed to providing a fast, easy, and safe buying experience to businesses and consumers worldwide...

647 'China's DHgate Adds MasterPass For Cross-Border B2B Payments', <http://www.pymnts.com/company-spotlight/mastercard/2014/chinas-dhgate-adds-masterpass-for-cross-border-b2b-payments/#.Va6lr_IVjCs> Accessed 7 March 2016.

648 'Focus', < http://www.focuschina.com/html_en/> Accessed 7 March 2016.

provides a platform for Chinese suppliers and manufacturers to connect with global buyers. Made-in-China is a horizontal intermediary focusing on all the industries.

Toadlane is a B2B intermediary located in the US. Presently, it is a vertical intermediary that provides a platform for wholesale of electronic devices.⁶⁴⁹ Toadlane is still at its development stage and does not maintain many buyers or sellers. Toadlane customers come from a variety of sources: OEM manufacturers, distributors, secondary market re-sellers, agents, globally recognized depots and liquidators.⁶⁵⁰ Toadlane verifies and vets the suppliers, before they are able to provide their merchandise on the platform. However, it is still a public intermediary and anyone can apply to be a supplier.

RetraceMobile is a two-sided market and it is vertical, focusing on mobile phone sales. It is incorporated in the United States. As it is a private company its revenue is not publicly available, and it is newly established. Any businesses, collectors, refurbishers, resellers or distributors can register and join Retrace Mobile to sell or buy new, used or refurbished mobile devices.⁶⁵¹

Teleroute is an online market intermediary involved with facilitating logistics for freight and vehicle exchange. Teleroute's trading volume is by far the largest among the European transportation market.⁶⁵² It is a part of Wolters Kluwer, a leading global information services and publishing company. Teleroute employs more than 200 people and runs operations in 27 countries. It is headquartered in Brussels. Its customers are truck owners, drivers, haulers, freight forwarders and large multinational companies.⁶⁵³ Approximately 1.2. Million tons of freight are transported daily via Teleroute solutions. The services it provides are freight exchange, unique value added services such as debt management, reliability and customer identity as well as route planner.⁶⁵⁴ Teleroute is

649 <https://www.toadlane.com/>

650 'FAQ', < <https://www.toadlane.com/faq>>Accessed 7 March 2016.

651 <https://www.retracemobile.com>

652 David Lucking-Reiley and others, 'Pennies from Ebay: The Determinants of Price in Online Auctions' (2007) 55 *The Journal of Industrial Economics* 223.

653 Lee, *Electronic Commerce Management for Business Activities and Global Enterprises: Competitive Advantages: Competitive Advantages* 250.

654 Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry'; Barak D Richman, 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' (2006) 31 *Law & Social Inquiry* 383; Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions'.

a two sided market, one side consisting of freight owners or transportation companies and the other side consisting of transportation providers. The role of freight owners and transporters can be switched on the platform.⁶⁵⁵ Teleroute as a value added service provides a debt mediation service which helps to collect overdue invoices issued by transport companies to freight forwarders. They claim that they hold the members responsible for their actions in case of breach by suspension or termination of their contract.⁶⁵⁶

GlobalMarket Group is a B2B e-commerce service provider.⁶⁵⁷ It focuses on certifying Chinese suppliers and connecting them to international buyers.⁶⁵⁸ It is a private intermediary for the suppliers that reside in China, which means that the suppliers need to be certified to be able to join the network; however, it is public to the buyers around the world. Its aim is to simplify international sourcing.⁶⁵⁹ They are a horizontal intermediary and focus on electric industry such as lighting, machinery and equipment, furniture, building and decoration, hardware and tools, automotive parts and vehicles, apparel and textiles, consumer electronics, home appliances, household goods and gifts. GlobalMarket has 1,100,000 buyer members such as GE, WalMart, Carrefour, Home Depot and Auchan.⁶⁶⁰

6.2 Descriptive Analysis of OMIs' Governing Rules for Dispute Resolution

In this section, the rules that govern the dispute resolution mechanism of each of the OMIs will be substantiated.

Amazon B2B platform does not have a specific B2B dispute resolution policy. It uses the same A_Z claims policy (its dispute resolution process) that is used for B2C

⁶⁵⁵ 'Safe Market Place', <http://teleroute.com/en_en/teleroute-freight-exchange/safe-market-place-programme/debt-mediation> Accessed 7 March 2016

⁶⁵⁶ 'Debt Mediation', <http://teleroute.com/en_en/teleroute-freight-exchange/safe-market-place-programme/debt-mediation> Accessed 7 March 2016, "We hold all members to our high standards and we enforce those standards consistently through negotiation".

⁶⁵⁷ 'Global Market Group Limited', <<http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/new-and-recent-issues/new-recent-issue-details-description.html?issueId=8774>> Accessed 1 May 2016.

⁶⁵⁸ 'Frequently Asked Questions', <<http://www.globalmarket.com/gmc.html>> Accessed 1 May 2016.

⁶⁵⁹ 'Global Market Group', <<http://www.globalmarket.com/sourcing-service/sourcing-salon.html>> Accessed 1 May 2016.

⁶⁶⁰ 'what is GMC', <<http://www.globalmarket.com/gmc/introduction.html>> Accessed 1 May 2016.

and C2C disputes.⁶⁶¹ For transactions that are not covered by the A_Z guarantee policy the Amazon Payments Buyer Dispute Program⁶⁶² allow buyers to resolve their disputes.⁶⁶³ To evaluate the accessibility of Amazon dispute resolution process both rules will be considered. These rules are implemented in the contractual agreement called as participation agreement.⁶⁶⁴ The guarantee policy plan is a special program that Amazon offers to resolve disputes and it also applies to Business accounts. The Amazon Payments Buyer Dispute Program is a service offered by Amazon, which the sellers and buyers will agree to abide by its terms and conditions.⁶⁶⁵ In order to use the website, the buyers and sellers have to accept the special terms and conditions of Amazon Payment Service and the participation in dispute resolution is compulsory for the buyer.⁶⁶⁶ The difference between the A-Z guarantee program and Amazon Buyer Dispute is that, under the Amazon Guarantee Protection program, certain disputes regarding physical goods can be filed and it does not include digital goods. While in Amazon payment, dispute related to other goods can be filed as well.

661 Author Inquiry From Amazon Customer Service, it was stated that:
You were looking for some additional information on how dispute resolutions are handled with an Amazon.com Procurement Account. The policies for the returns, replacements, and refunds are the same as the regular consumer accounts. Anything sold and fulfilled by Amazon will be protected under Amazon.com return policies, and anything sold/fulfilled by sellers is protected under the A-to-Z Guarantee Claim program. You can learn more about Amazon.com and Seller return policies by following the link below...', <https://www.amazon.com/gp/help/customer/display.html/ref=hp_gt_ret?nodeId=150157...> Accessed 25 April 2016.

662 Section 3.5, 'Amazon Payments, Inc. Customer Agreement' <<https://payments.amazon.com/help/6019>> Accessed 3 May 2016.

663 The application of other policies of Amazon to Business Accounts was confirmed in a phone conversation with Amazon Customer Service. In Conditions of Use applicable to Business Account Amazon also predicts that: "SITE POLICIES, MODIFICATION, AND SEVERABILITY :Please review our other policies, such as our pricing policy, posted on this site. These policies also govern your use of Amazon Services. We reserve the right to make changes to our site, policies, Service Terms, and these Conditions of Use at any time. If any of these conditions shall be deemed invalid, void, or for any reason unenforceable, that condition shall be deemed severable and shall not affect the validity and enforceability of any remaining condition." <https://www.amazon.com/gp/help/customer/display.html/ref=ap_footer_condition_of_use?ie=UTF8&nodeId=508088> Accessed 21 February 2016.

664 'Amazon Participation Agreement', <<https://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 21 February 2016.

665 5. The Transaction Processing Service. By registering for or using the Services, you authorize Amazon Payments, Inc. ("Amazon Payments") to act as your agent for purposes of processing payments, refunds and adjustments for Your Transactions (as defined below), receiving and holding Sales Proceeds (as defined below) on your behalf, remitting Sales Proceeds to your bank account, charging your credit card, and paying Amazon and its affiliates amounts you owe in accordance with this Participation Agreement or other agreements you may have with Amazon or its affiliates (collectively, the "Transaction Processing Service") 'Amazon Participation Agreement', <<https://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 21 February 2016.

666 "3.5 Buyer Dispute Program. When you sell goods or services using our Service, you will cooperate with us to resolve complaints submitted through our Buyer Dispute Program. You will respond to our inquiries and deliver to us any information requested by us regarding any disputed sales transactions within 5 business days of our request." Section 3.5, 'Amazon Payments, Inc. Customer Agreement' <<https://payments.amazon.com/help/6019>> Accessed 3 May 2016.

Alibaba:

The rules governing Alibaba dispute resolution procedure are set out in the Trade Dispute Rules, Alibaba Transactions Services Agreement, Alibaba.com Online Transaction Dispute Rules.⁶⁶⁷ There are some other clauses for resolving disputes that relate to Sourcing Transactions. Sourcing Transactions refer to the Online Transactions for cross-border trading of products and in which, Seller delivers the products to Buyer by ocean shipment.⁶⁶⁸

The rules for dispute resolution are implemented in contractual agreements and apply in different situations. The Alibaba.com Transaction Services Agreement (TSA) applies to seller and buyers that are registered on Alibaba.com and have accepted the Transaction Services Agreement.⁶⁶⁹ The Online Transaction Dispute Rules applies to buyers that complete sales with suppliers residing in Mainland China. Trade Dispute Rule applies to members on Alibaba as well as those buyers that are not members of Alibaba.⁶⁷⁰ There are differences between the rules that apply, which also have an effect on the accessibility of the forum as well as the other criteria. As the focus of this thesis is on the transnational trade of Alibaba.com and mainly those agreements that oblige the parties to use Alibaba's dispute resolution process, the dispute resolution rules that are stipulated in Alibaba Transaction Service Agreement will be evaluated.⁶⁷¹ It should be noted that the Online Transaction Dispute rules lay out substantive rules of resolving⁶⁷² disputes, which in some cases apply to those transactions that have been concluded under TSA. These rules, combined with TSA rules, will be analyzed for the evaluation of Alibaba.com's dispute resolution mechanism.

⁶⁶⁷ 'Alibaba.com Online Transactions Dispute Rules', <<http://rule.alibaba.com/rule/detail/2058.htm>> Accessed 21 February 2016.

⁶⁶⁸ 'Alibaba.com Sourcing Transactions Dispute Rules', <<http://rule.alibaba.com/rule/detail/2056.htm>> Accessed 21 February 2016.

⁶⁶⁹ 2. Registration, 2.1 The Services are provided by Alipay and its affiliates for you to facilitate payments in connection with online transactions for products or services concluded on and through www.alibaba.com and www.aliexpress.com (collectively, "Alibaba.com Sites"). By using the Services, you acknowledge and agree that Alipay is not a bank and the Services should in no way be construed as the provision of banking services. Alipay is not acting as a trustee, fiduciary or escrow with respect to your funds and it does not have control of, nor liability for, the products or services that are paid for with the Services. In accordance with the Alibaba.com Transaction Services Agreement, transactions concluded on the Alibaba Sites are subject to your acceptance of the terms of that Agreement. 'Alipay Service Agreement' <<https://intl.alipay.com/help/agreements/detail.htm?agreement=AlipayServiceAgreement>> Accessed 21 February 2016.

⁶⁷⁰ 'Trade Dispute Rules', <<https://rule.alibaba.com/rule/detail/2055.htm>> Accessed 21 February 2016.

⁶⁷¹ 'Alibaba Transaction Services Agreement', <<http://rule.alibaba.com/rule/detail/2054.htm>> 25 March 2016.

⁶⁷² 'Alibaba.com Online Transactions Dispute Rules', <<http://rule.alibaba.com/rule/detail/2058.htm>> Accessed 21 February 2016.

HQEW:

HQEW dispute resolution policy is laid out in “Fraud and Dispute” policy.⁶⁷³ Article 2 of Fraud and Dispute Policy stipulates that the rules apply to registered members of HQEW, members who use any products or services on its website and buyers who have conducted trading or business transactions for products and/or services with members.⁶⁷⁴

DHgate:

The governing rules for dispute resolution are stipulated in DHgate dispute resolution policy and return and refund policy.⁶⁷⁵

Made-in-China:

The governing rules for dispute resolution under Made-in-China.com can be found under the general Terms and Conditions, section 8, Dispute Resolution,⁶⁷⁶ as well as the Secure Trading Transaction Services Agreement. The dispute resolution process is provided by the company Focus which owns MIC. The dispute resolution clause and its subsections compared to other intermediaries are very brief. It consists of four distinct rules without elaborating on the procedure. Clause 8.1 sets out the general rules of the authority of MIC as the dispute resolution provider. It states that MIC has the right but not the obligation to process disputes. The complainant needs to provide evidence. Clause 8.2 establishes that the role of MIC in providing dispute resolution is limited, without providing detail on the limitations of the dispute resolution process. It further maintains that the dispute resolution outcome might not meet the requirement and anticipation of the claimant and that MIC should not be held liable for the judgment or the result.

⁶⁷³ ‘Terms and Conditions’, <<http://www.hqew.net/article/Terms-Conditions.html>> Accessed 7 March 2016.

⁶⁷⁴ ‘Fraud & Dispute’, <<http://www.hqew.net/events/news-article/14762.html>>, Accessed 12 February 2016

⁶⁷⁵ ‘Return and Refund Policy’ <http://helphelpseller.dhgate.com/help/buyerhelpen.php?catid=3302&artid=D364B2DE1CADD9F5E04010AC0C644F06#hel_php-listmiddel-2> Accessed 7 March 2016. ‘Dispute Resolution Policy’, <http://www.dhgate.com/news/media/i18823.html/helpfile_en/help-52.htm> Accessed 3 May 2016.

⁶⁷⁶ ‘Terms and Conditions’, <<http://www.made-in-china.com/help/terms/>> Accessed 7 March 2016.

The other agreements that govern the dispute resolution process can be found in the “Secured trading Transaction Services Agreement”. Under this agreement, the buyers and sellers should first attempt to resolve the dispute amicably; if it is not possible, they will need to submit the dispute to MIC for a decision.⁶⁷⁷

Toadlane:

Toadlane does not directly get involved with disputes. It refers the parties to Armorpayment for payment. Armorpayment refers the parties to NetNeutrals for dispute resolution. NetNeutrals and Armorpayment both set the governing rules for dispute resolution in Toadlane.⁶⁷⁸ The process takes place as follows: Toadlane refers the party to the dispute to its escrow provider Armorpayment. Armorpayment’s governing rules are set in its terms and conditions.⁶⁷⁹ It provides that dispute resolution takes place in two phases: Negotiation and Arbitration. In negotiation, parties use the Armorpayment platform to negotiate. If the negotiations do not yield a resolution, Armor payment refers the parties to NetNeutrals, an online dispute resolution provider that provides online arbitration and mediation. According to Armorpayment, NetNeutrals will arbitrate among the parties and issues an outcome. The general rules for dispute resolution in NetNeutrals are indicated on its website.⁶⁸⁰

RetraceMobile:

RetraceMobile has a specific dispute resolution policy which sets out the requirements for filing a dispute through PayPal and Armorpayment,⁶⁸¹ the two payment intermediaries it has selected to provide payment services, as well as dispute resolution

⁶⁷⁷ MIC clause 10, ‘Secured Trading Services’, <<http://www.made-in-china.com/secured-trading-services.html>> Accessed 7 March 2016.

⁶⁷⁸ ‘Terms and Conditions’, <https://www.toadlane.com/terms_of_service> 3 May 2016.

⁶⁷⁹ Dispute Resolution FAQ, <<http://www.armorpayments.com/escrow/dispute-management-faq>> Accessed 1 May 2016.

⁶⁸⁰ ‘NetNeutrals Rules’, <<https://www.NetNeutrals.com/Rules.aspx>> Accessed 7 March 2016.

⁶⁸¹ Secure transactions: We guarantee protection of your trade and payment through our escrow service partner, Armor Payments, and through world’s most trusted online payment service, PayPal. Armor Payments protects both the buyers and sellers, securely holding the money in buyer’s escrow account until the buyer accepts the product (up to 72 hours after delivery). Should there ever be any need for conflict resolution between trading parties on the Marketplace, we offer a dispute resolution through our payment partners. ‘FAQ’, <<https://www.retracemobile.com/faq>> Accessed 1 May 2016.

mechanisms. PayPal and Armormyament dispute resolution policies also apply to the transactions.⁶⁸² The dispute resolution mechanism is similar to Toadlane.

Teleroute:

The governing rules for dispute resolution are laid out in “Process Special Terms And Conditions Debt Mediation”.⁶⁸³ The members of Teleroute can file complaints.

Globalmarket:

Globalmarket’s governing rules for dispute resolution is based on its buyer protection plan. It does not provide details on how it supports the suppliers if there is any dispute. Globalmarket provides three means of redress based on the buyer protection plans: Swift dispatch, on-time delivery, double-check protection.⁶⁸⁴

6.3 Descriptive Analysis of OMIs Accessibility

Considering the terms and conditions for using the dispute resolution services, and the overall design of OMIs, the accessibility of their dispute resolution mechanism will be evaluated. This section analyses the accessibility of OMIs dispute resolution. It focuses on which disputes can be filed, what are the fees for filing a dispute, how many steps the parties should take to file a dispute, if there is a need for legal representative and the means of communication.

6.3.1 The Boundary Rules

The boundary rules of OMIs can be categorized as: failure to deliver the merchandise, quality of the merchandise, merchandise are significantly different from the website description, shipping disputes, breach of the contractual agreement and other trade disputes. As to sellers’ disputes, the boundary rules include nonpayment and return

682 ‘Help’ <<https://www.retracemobile.com/help>> Accessed 7 March 2016.

683 ‘Special Terms and Conditions Debt Mediation’, <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

684 ‘Buyer Protection’, <<http://www.globalmarket.com/gmportal/order/buyerProtection/detail.gm#DoubleCheck>> Accessed 7 March 2016, ‘Ontime Delivery’, <<http://www.globalmarket.com/gmportal/order/buyerProtection/detail.gm#OnTimeDelivery>> Accessed 7 March 2016.

issues.⁶⁸⁵ OMI's policies vary with regards to their boundary rules and the disputes they accept. Under the A-to-Z claim condition, Amazon declares competency in resolving disputes regarding:

- (1) The third party failed to deliver the item
- (2) The item was damaged, defective or materially different from the item presented on the product detail page
- (3) The third-party seller agreed to refund but has not initiated the refund
- (4) No address provided for returns
- (5) The eligible services provided by the third party.

Under the Alibaba.com Transaction Services Agreement (TSA), Alibaba.com resolves disputes related to delivery, quality of the merchandise and release of payment.⁶⁸⁶ Some go into the details of what disputes can be filed and provide examples. DHgate provides some examples of the nature of the disputes. It states that the dispute can be over Brand problem or imitation, used items, color problem, materials not as described, missing items and other detailed disputes.⁶⁸⁷ When explaining how DHgate resolves disputes between buyers and sellers, it indicates two main criteria of procedural justice: it is accessible, as it allows the parties to the dispute to communicate easily, it is also participatory and parties to the dispute can provide their evidence and in resolving the disputes, DHgate is impartial.⁶⁸⁸ It clearly signals to its users that it attempts to uphold

⁶⁸⁵ 'A-to-z Guarantee Restrictions', <http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201436500> Accessed 11 January 2016. Amazon clearly states which disputes cannot be filed for:

Payments for services (excluding eligible services), Digital Merchandise Cash or stored value instruments, prohibited items, credit card payments where the issuing bank has initiated a chargeback, Damage or loss that occurs to good after they are delivered to a freight forwarder here are also specific policies about returning certain goods such as watches, jewelries, collectibles and fine arts as well as restrictions for wine purchases

⁶⁸⁶ Alibaba.com Online Transactions Dispute Rules, section 1, 3,4,6, < <http://rule.alibaba.com/rule/detail/2058.htm>> Accessed 21 February 2016.

⁶⁸⁷ 'Return and Refund Policy', <http://help.dhgate.com/help/buyerhelpen.php?catid=3303&artid=BD4E28A5B7AEEB64E04010AC0B647863#help_php-listmiddel-2> Accessed 7 March 2016.

⁶⁸⁸ 'Disputes', < http://www.dhgate.com/html/helpfile_en/help-51.htm > Accessed 3 May 2016. When suspicious activity is reported, DHgate investigates the situation. DHgate will warn, suspend, or otherwise sanction accounts that violate our policies.

DHgate provides buyers with an easy way to communicate directly with the sellers.

DHgate facilitates dispute resolution by providing buyers with a means to report and track their disputes.

DHgate acts as an impartial judge for all the cases submitted.

procedural justice and uses upholding procedural justice to incentivize users to use its platform. Armormayment is the escrow mechanism for RetraceMobile and Toadlane which carries out the dispute resolution. Disputes in Armormayment are divided into two types: dispute over goods and dispute over services. For goods, the disputes can be filed if: goods significantly not as described; goods damaged; goods never delivered; and other (the claimant should provide description). For Services orders, available dispute reasons are: deliverable does not meet requirements; deliverable past due; deliverable not fully completed, and other (the claimant should provide description).⁶⁸⁹ Hence it gives the liberty to the claimant to describe the potential problem with the delivery.

HQEW and Made-in-China boundary rules include the general rules that were mentioned above. They also accept trade disputes that are not mentioned in the list of their boundary rules, at their own discretion.⁶⁹⁰ Teleroute is an online freight exchange OMI, which resolves disputes which are limited to unpaid invoice.⁶⁹¹ The disputes that can be filed at the mediation center of Globalmarket are based on the buyer protection plan: dispatch related dispute, delay in delivery, quality of the product.⁶⁹²

In general, OMIs provide a list of disputes that can be filed in their dispute resolution process, hence providing certainty for the parties to the dispute and a competent forum for resolving the disputes. This contributes to an accessible dispute resolution mechanism.

⁶⁸⁹ 'Dispute Management FAQ', <http://www.armorpayments.com/escrow/dispute-management-faq> Accessed 7 March.

⁶⁹⁰ According to the Chapter 2 of HQEW Trade Dispute Rules, the following types of disputes can be filed at the HQEW dispute resolution forum: 1. the buyer complains that Buyer has not received the products ordered; 2. the buyer complains that the products received by Buyer are different from those as agreed; 3. the seller complains that the seller has not received the payments from the buyer for the products delivered; 4. Other trade disputes that Hqew.net may agree to handle at Hqew.net's, sole discretion, Based on the MIC complaint resolution platform, the disputes below can be filed at the dispute center: 1.Products not received after payment , 2. Quality not as agreed, 3. Quantity not matching with contract, 4. Packaging not as agreed (shipment problem),5. Other trade dispute 'Complaint', <<http://sourcing.made-in-china.com/complaint/>> Accessed 7 March 2016.Article 7, Fraud and Dispute, < [http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html)> Accessed 7 March 2016

⁶⁹¹ 'Special Terms and Conditions Debt Mediation', <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

⁶⁹² 'Swift Dispatch' <http://www.globalmarket.com/gportal/order/buyerProtection/detail_gm#SwiftDispatch> Accessed 7 March 2016.

6.3.2 Arbitrary Rejection of Claims

Despite the fact that all studied OMIs provided the boundary rules of their dispute resolution, i.e. they stated which disputes can be filed, some have policies that can lead to arbitrary rejection of claims and hamper accessibility. If the OMI denies claims arbitrarily, with no certain grounds then it hampers its accessibility of dispute resolution. Some OMIs provide the grounds based on which they deny the claim. Amazon maintains the right to deny a claim based on the following criteria:

- (1) The item received was the same as described by the seller.
- (2) The item was received and the seller provided verification of delivery.
- (3) You failed to respond to a request for further information.
- (4) You filed a chargeback with your payment processor or bank.
- (5) You were unwilling to return the item to the seller.
- (6) Amazon regarded the claim as inappropriate.⁶⁹³

While laying the grounds for denial of claims can contribute to certainty of the buyers and sellers that which disputes qualify for Amazon dispute resolution, the fact that Amazon maintains the right to deny a claim if it sees it as “inappropriate” does not contribute to certainty, as it does not strictly define the word “inappropriate”.⁶⁹⁴ This can lead to arbitrary rejection of claims that will considerably affect the accessibility of the venue. However, Amazon remedies this by allowing the claimant to appeal the denial of the claim. Hence in evaluating Amazon’s accessibility, a negative value will be given due to arbitrary rejection and a positive value, as there is an appeal process⁶⁹⁵ that allows the customer to appeal the decision if the customer feels the claim has been denied unfairly. Alibaba does not have a policy that may lead to arbitrary rejection of claims. Its transaction service agreement does not lay out grounds based on which disputes cannot be filed. Moreover, it states that Alibaba.com shall have the right to make determinations whenever it sees appropriate, even if it does not explicitly mention

⁶⁹³ ‘About Denied Claims’, <<http://www.amazon.com/gp/help/customer/display.html?nodeId=200783790>> Accessed 11 January 2016.

⁶⁹⁴ ‘About Denied Claims’, <<http://www.amazon.com/gp/help/customer/display.html?nodeId=200783790>> Accessed 11 January 2016.

⁶⁹⁵ ‘Appeal a Denied Claim’, <<http://www.amazon.com/gp/help/customer/display.html?nodeId=201125650>> Accessed 11 January 2016.

that it processes such disputes.⁶⁹⁶ HQEW on the other hand has a very discretionary rejection policy. Article 13 of HQEW terms and conditions stipulates that HQEW can accept or reject a claim and there is no appeals mechanism to file a complaint against the decision.⁶⁹⁷ The boundary rules in DHgate are quite flexible and it does not limit the claims that can be filed to certain disputes. Although Teleroute gives reasons as to when disputes can be filed, it also allows itself to reject or accept a claim. But it has a set of concrete criteria on which disputes are accepted or rejected.⁶⁹⁸ According to clause 2.2. of terms and conditions,⁶⁹⁹ Teleroute accepts complainant's dispute if : the complainant is an existing customer of Teleroute, the invoice is unpaid for at least 30 days but no later than one year after the original invoice due date and the original offer was found on the Teleroute Freight Exchange. The defaulter must not be bankrupt or known to be going bankrupt and must be an existing customer of Teleroute. Moreover, legal actions should not have been initiated against the defaulter already and there must be no dispute over the work. If any one of these conditions is not met, the dispute cannot be accepted.

In Made-in-China, while the disputes are not limited to certain categories and other disputes can be filed as well, the MIC reserves the right to reject any claim, as it sees fit. The arbitrary rejection of the claim goes to the extent that MIC states that it is not obligated to resolve the disputes between buyers and sellers.⁷⁰⁰ Under its Terms and Conditions agreement, under clause 8.2, it explicitly states that: "It is FOCUS' s right to decide whether or not to participate in the handling of the complaint dissension, or dispute."⁷⁰¹ There are also no appeals mechanisms for complaining about the rejection of the claim. Toadlane and RetraceMobile which apply the policy of Armorpayment

696 TSA, section 2.10, <<http://rule.alibaba.com/rule/detail/2054.htm>> Accessed 21 February 2016.

697 If Hqew.net agrees to accept the complaint, Hqew.net will notify the respondent about the complaint via e-mail or telephone

698 Clause 3, step 3, "Validate case": Teleroute will make sure that all of the documents are available and correct, and all criteria have been met. If the case is accepted, Teleroute will start to manage the case, and if the case is rejected, the consuler is informed that the case cannot continue. Clause 3, 'Special Terms and Conditions Debt Mediation', <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

699 'Special Terms and Conditions Debt Mediation', <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

700 'Trade Safety and IPR Protection', <<http://www.made-in-china.com/faq/detail1u606206264/Trade-Safely-and-IPR-Protection.html>> Accessed 7 March 2016.

701 'Terms and Conditions', <<http://www.made-in-china.com/help/terms/>> Accessed 7 March.

Armorpayment does not have any clauses based on which disputes can be rejected. GlobalMarket does not state that it will not accept disputes at its own discretion.

6.3.3 Disclosure of the Rules

Disclosure of the procedural rules related to how the process of submitting a dispute works and how it increases the chances of a dispute being filed at the dispute resolution center is important. Such rules are disclosed transparently and publicly on the Amazon website.⁷⁰² Alibaba.com Online Transactions Dispute Rules provides substantive rules on the rules that apply to the delivery of products, Inspection and Acceptance, quality, delay or failure in deliver, supporting evidence, return of products, release of payments and time limits. Moreover, in Services Transaction Agreement rules, section 2.10 stipulates that Alibaba.com shall have the right to make determinations whenever Alibaba.com considers appropriate with regard to the evidence received by Alibaba.com and commonly accepted principles and practices in the relevant industries and interests of both Buyer and Seller, regardless of whether the issue in question has been expressly addressed in the Transactional Terms or in Transaction Services Agreement.⁷⁰³ HQEW uses various rules and customs to resolve disputes. As to the substantive ruling, in Article 24 it states that the contract between the parties is considered as the source of the decision. If the contract does not stipulate certain risks and damages, allocation of responsibilities and risks shall be based on the provisions of United Nations Convention on Contracts of International Sales of Goods and the International Commercial Terms (INCOTERMS).⁷⁰⁴ DHgate has a detailed rule of procedure for resolving dispute, stipulated in return and refund policy.⁷⁰⁵ In Made-in-China, the rules of dispute resolution process are disclosed in Terms and Conditions and Secure Trading Agreement.⁷⁰⁶ Toadlane and RetaceMobile procedural rules for

⁷⁰² These policies can be found at 'Amazon Participation Agreement', <<https://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 21 February 2016., 'Amazon Payments, Inc. Customer Agreement' <<https://payments.amazon.com/help/6019>> Accessed 3 May 2016.

⁷⁰³ 'Alibaba.com Transactions Services Agreement', <<http://rule.alibaba.com/rule/detail/2054.htm>> Accessed 21 February 2016.

⁷⁰⁴ 'Fraud and Dispute', < [http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html)> Accessed 7 March 2016.

⁷⁰⁵ 'Return and Refund Policy' <http://help.dhgate.com/help/buyerhelpen.php?catid=3302&artid=D364B2DE1CADD9F5E04010AC0C644F06#help_php-listmiddel-2> Accessed 7 March 2016

⁷⁰⁶ made-in-china.com transaction service agreement can be accessed on its website. No direct link can be provided.

dispute resolution can be found at ArmorPayment Dispute Management Process FAQ.⁷⁰⁷ Teleroute also discloses the procedure for bringing a claim against a party in its terms and conditions.⁷⁰⁸ GlobalMarket's dispute resolution provides details of governing disputes and the procedure on buyers' disputes. However, sellers' disputes are not acknowledged in the policies written in English.⁷⁰⁹ The non-disclosure of the rules for buyers in English causes problems, as they do not have the informational justice regarding how the supplier can bring a claim against them.

6.3.4 Accessible Location and Filing Fee

The accessibility of location of the dispute resolution in online B2B dispute depends on not requiring the parties to attend in person hearing especially if the location of the dispute forum is out of reach of one of the parties. Amazon.com's dispute resolution forum is not bound to a specific jurisdiction. As the means of communication is online and the parties are not required to lodge their complaint at a physical site, the location of Amazon dispute resolution venue is virtual.⁷¹⁰ In other words, parties anywhere in the world do not have to travel to the US to resolve the dispute and can do so from the country of their residence. As argued this increases the accessibility of dispute resolution forum, as it reduces the cost of participation. Amazon does not charge a filing fee for its dispute resolution program. Alibaba provides for online submission of evidence and it does not require in-person hearing. Hence, the location is virtual, which reduces the cost of participation and enhances accessibility. Although Alibaba does not explicitly state in any of its TSA that filing a dispute is free, in practice it does not charge any fee. The dispute resolution mechanism comes as a value-added service,

707 'Dispute Management' <<http://www.armorpayments.com/escrow/dispute-management-faq>> Accessed 7 March 2016.

708 'Special Terms and Conditions Debt Mediation', <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

709 'Buyer Protection', <http://www.globalmarket.com/gmportal/order/buyerProtection/detail.gm#DoubleCheck>, Accessed 7 March 2016, 'Ontime Delivery' <http://www.globalmarket.com/gmportal/order/buyerProtection/detail.gm#OnTimeDelivery>> Accessed 7 March 2016.

710 'Amazon Customer Agreement', <<https://payments.amazon.com/help/6019>> Accessed 3 May 2016. 11.1 Electronic Notices and Your Consent. We primarily communicate with you via the Site, Seller Central, and the e-mail address we have on file for you. By registering for the Service and accepting the terms of this Agreement, you affirmatively consent to receive notices electronically from us (your "Consent"). You agree that we may provide all communications and transactions related to the Service and your Payment Account, including without limitation agreements related to the Service, amendments or changes to such agreements, or any Policies, disclosures, notices, transaction information, statements, policies (including without limitation notices about our Privacy Notice), responses to claims, and other customer communications that we may be required to provide to you by law (collectively, "Communications") in electronic format.

which Alibaba provides without any extra charge. However, considering the dispute resolution mechanism as a free of charge service might be a simplification. Alibaba has service fees for the various services that it provides to the parties. The service fees can contribute to cover the cost of dispute resolution. In evaluating the filing fee, this indirect expense cannot be considered in the dispute resolution mechanism, as the parties do not pay for the mechanism as a standalone service. Moreover, the buyers do not pay for the service fees and only the suppliers pay for service fees, which also include dispute resolution mechanism fee. At HQEW dispute resolution process takes place in cyber space; there is no physical location for hearing or any other segment of the dispute resolution process.⁷¹¹ Similar to the structure of other online market intermediaries, HQEW earns its revenue by charging membership fees and provides the dispute resolution system as a value added service; hence, free of charge. DHgate The dispute resolution forum is located in the virtual space and all the filing can take place online. The fee for dispute resolution, similar to other platforms, is included in the membership fee or the transaction fees that the platform receives. Hence, it can be considered to be free of charge. The MIC dispute resolution forum does not have a physical location and parties do not have to go to a certain jurisdiction to file disputes. There is also no filing fee and the service expense is included in the membership fee.⁷¹²

In Toadlane, the location of dispute resolution is virtual. The parties do not have to attend hearings in another jurisdiction. There are no additional fees if an order goes into a dispute and is resolved during the Negotiation Phase. If the dispute is escalated to the Arbitration, Armor Payments will cover the cost for one arbitration case per 365-day period. If they are involved in additional disputes that go to arbitration within a 365-day period, there will be a flat fee of \$175 for the third party arbitration service.⁷¹³ The same applies to RetraceMobile. In Teleroute, the mediation takes place online. The filing fee is 10 Euros. 10 Euros shall be due for each case, once the customer has completed the web form. Validation of the case means that Teleroute has received all

711 The online trade dispute can be filed via this form , <http://www.hqew.net/safety-security/complains.html>.

712 Made-in-China, 'Trade Safety' <<http://sourcing.made-in-china.com/complaint/>> Accessed 7 March.

713 'Dispute Management FAQ', <<http://www.armorpayments.com/escrow/dispute-management-faq>> Accessed 7 March.

of the required documents and that all of the acceptance criteria have been met.⁷¹⁴ Globalmarket dispute resolution takes place online and there is no in-person hearing.

6.3.5 How Long it Takes to File a Dispute

In Amazon, it the claimant has to wait 15 days after order date to file a dispute.⁷¹⁵ In Alibaba, The disputant can file a dispute 5 five days after the goods have been sent. Under the general guidelines, the disputant has 30 days to negotiate with the seller. If they do not reach a solution after 30 days, the dispute will be submitted to Alibaba for resolution.⁷¹⁶ It is not clear how long HQEW considers for amicable negotiations, as it does not mention it in its policy. In clause 12 of Fraud and Dispute policy, HQEW states that: “Hqew.net encourages both parties to settle disputes through amicable negotiations. If parties fail to reach an agreement within the time limit designated by Hqew.net, Hqew.net shall have the right to handle disputes in accordance with the provisions of these Rules.”⁷¹⁷ As it can be gathered from clause 12, while HQEW mentions a time limit for negotiations, it does not indicate anywhere on the website how long should the parties wait before submitting a dispute, after negotiations has failed.⁷¹⁸ Due to the unavailability of this information, a value of zero will be given to the HQEW’s duration of filing a dispute, in the evaluation chart. In DHgate, Buyers on average, can file a dispute from the 7th day after the seller has sent the goods out. They have to first negotiate with the seller and if they do not reach an agreement within 5 days, they can submit their dispute to DHgate for mediation.⁷¹⁹ In MIC, as the length of negotiations depends on the parties’ agreement, it is not known how long the negotiations take and the length depends case by case. However, not having a time limit set by a third party might create uncertainty as to how long negotiations should take place. This will lead to attributing a value of zero to the time it takes to file the dispute

714 ‘Special Terms and Conditions Debt Mediation’,
â<http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

715 Buyer Dispute Program, <<https://payments.amazon.com/help/201751580>> Accessed 7 March 2016.

716 ‘Alibaba Online Transaction Dispute Rules, General Guideline’, <<http://rule.alibaba.com/rule/detail/2058.htm>> Accessed 7 March 2016

717 Article 12, ‘Fraud and Dispute’, <[http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html)> Accessed 7 March 2016

718 ‘Fraud and Dispute’, <[http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html)> Accessed 7 March 2016

719 ‘FAQ’, <http://help.dhgate.com/help/buyerhelpen.php?catid=3302&artid=C257113A60821800E04010AC0B641256#help_php-listmidde1-3>
Accessed 7 March 2016.

at MIC in the evaluation chart. In Toadlane and RetraceMobile, negotiations take around 2 days and then the parties can escalate the dispute to arbitration.⁷²⁰ In Teleroute, the unpaid invoice must be at least 30 days overdue.⁷²¹ In GlobalMarket negotiation phase is eight days and then the dispute will be referred to a mediator.⁷²²

6.3.6 How Many Steps to File a Dispute

Amazon details the procedural steps as follows: first, the party should contact the seller and wait 3 days past the maximum estimated delivery date or 30 days from the order date, whichever is sooner. This applies to both B2B and B2C disputes. The complainant can file a dispute maximum 90 days after the expected delivery. Thereafter, the party can file a dispute by taking 4 steps: 1. go to accounts and then orders, 2. select order and click on view claim, 3. select a reason for the claim and enter the required information, 4. report the problem.⁷²³ The seller is required to respond to the complaint within 5 days of receipt.⁷²⁴ Initially, there are 5 steps to file a dispute at the forum. It has to be first negotiated with the seller and then take steps to file the dispute by filling in the online form and file the dispute.

In Alibaba, after the dispute is submitted to Alibaba, Alibaba notifies the Buyer and Supplier about the dispute within 2 business days from the receipt of notice of the dispute. Then, the Buyer and Supplier must submit supporting documents or defend the claim within 7 Calendar days of Alibaba.com's notice. Unless there are special circumstances, Alibaba will make its decision within 45 calendar days of the notice of disputes.⁷²⁵ The general steps that should be taken to file a dispute: 1. Negotiation

720 'Dispute Management FAQ', <<http://www.armorpayments.com/escrow/dispute-management-faq>> Accessed 7 March.

721 Clause 2, 'Special Terms and Conditions Debt Mediation', <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

722 'OnTime Delivery', <http://www.globalmarket.com/gmportal/order/buyerProtection/detail.gm#OnTimeDelivery>, Accessed 7 March 2016.

723 'Amazon Customer Dispute Resolution Policy', <http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=541260&qid=1432678405&sr=1-1> Accessed 11 January 2016.

724 'Buyer Dispute Program', <<https://payments.amazon.com/help/6019>> Accessed 11 January 2016.

725 'Online Transactions Dispute Rules', <<http://rule.alibaba.com/rule/detail/2058.htm>> Accessed 21 February 2016.

between buyers and sellers, 2. Enter the members account, 3. Choose the nature of the dispute, 4. Provide evidence, 5. Submit the dispute.⁷²⁶

In HQEW, to file a dispute, the claimant needs to go through a consultation process first. If the consultation process (negotiations) fails then the dispute can be filed; HQEW processes the dispute and issues an award.

To file a complaint against the buyer or supplier in HQEW, the complainant needs to: 1. Choose a complaint, 2. Provide the contact information of the seller or buyer, 3. Provide comments and evidence, 4. Submit the dispute.⁷²⁷ The steps are similar to Alibaba and Amazon and consist of four steps with the step for negotiation, so that 5 steps in total needs to be taken to file a dispute. The diagram below illustrates the steps for filing a dispute at HQEW.

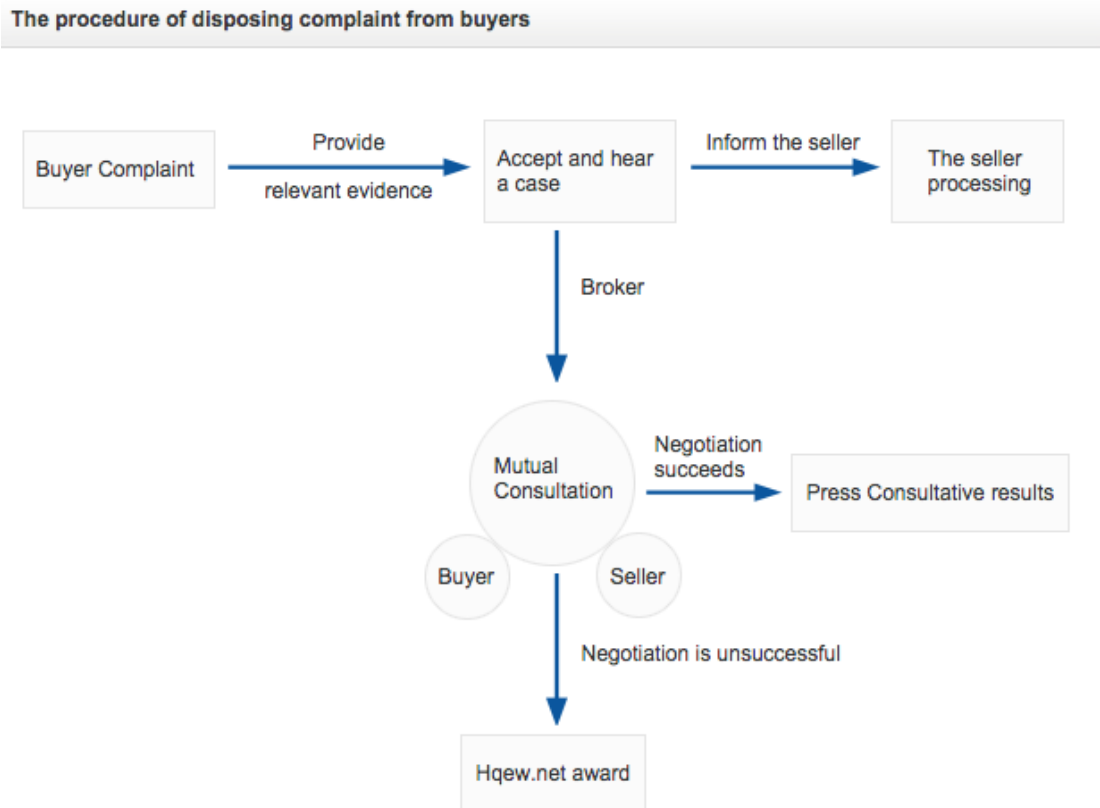


Diagram on how www.hqew.net resolves disputes, source: <http://www.hqew.net/safety-security/index.html>

⁷²⁶ 'Complaint Center, Report your complaint protect your right' <http://resources.alibaba.com/topic/800010860/Complaint_Center_Report_your_complaint_protect_your_right.htm> Accessed 21 February 2016.

⁷²⁷ 'Complaints', <<http://www.hqew.net/safety-security/complains.html>> Accessed 3 May 2016.

DHgate encourages the parties first to negotiate, it then asks them to use the mediation service to come to an agreement and if this does not yield any resolution, DHgate will arbitrate the dispute and enforce the outcome.⁷²⁸

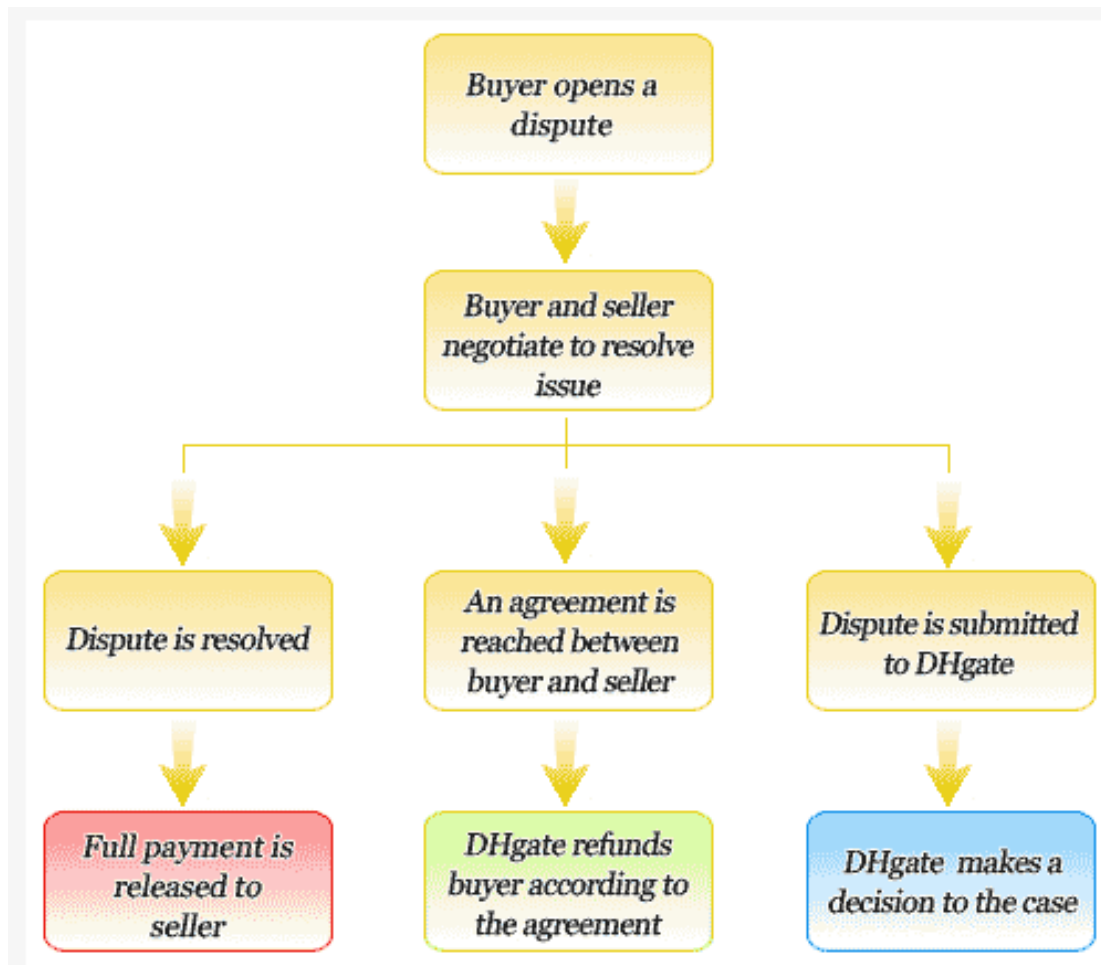
The steps for submitting the dispute are as follows:

- (1) Submit evidence and explanation⁷²⁹
- (2) After opening the dispute, the complainant needs to start negotiating with the other party in order to reach a satisfactory solution (which has a time limit which is in favor of the disputant, as it does not stall the process if they do not reach a solution).
- (3) If a solution has not been reached within 5 days, then the complainant can file a dispute at DHgate mediation.
- (4) Submit evidence at the mediation center
- (5) If the mediation does not yield any results after 15 days, the party can submit the dispute to DHgate arbitration center.

⁷²⁸ 'Dispute Policy', <http://seller.dhgate.com/html/helpfile_en/help-52.htm> Accessed 7 March 2016

⁷²⁹ 'How Does Arbitration Proceed When Full Refund Is Requested', <http://help.dhgate.com/help/buyerhelpen.php?catid=3303&artid=BC8468E2FF17DB3EE04010AC0B6474AD#help_php-listmiddel-5> Accessed 7 March 2016

'Dispute DHgate', <http://help.dhgate.com/help/buyerhelpen.php?artid=BC845237597DA035E04010AC0B6436E4&catid=3303#help_php-searchmiddel-2> Accessed 7 March 2016.



In order to submit a dispute to MIC dispute resolution center, the parties to the dispute are required to negotiate first. The length of negotiation is in accordance with the agreement between the parties. They can then file a dispute by providing the seller or buyers' information, submitting evidence and providing their contact information. After one to two days, a dispute resolution expert will process their dispute.

In Toadlane and Retracemobile the buyer may first initiate a dispute during the Buyer Review Period by clicking on the Initiate Dispute button on the specific Order page within the ArmorPayments application. The second step is then for the parties to provide evidence and description of the claim. The third step is to submit the dispute. If no resolution is achieved within two days, the fourth step for the parties is to go to arbitration. The fifth step in the arbitration phase is to provide additional documents;

the parties are contacted to provide any additional suggestions or comments to the arbitrator. There are, in general, 3 steps to file a dispute at Teleroute's mediation: First, the complainant will fill in the online form for mediation. Then the complainant submits evidence and the third step entails validation of the case, in which, Teleroute decides to accept or reject the case.⁷³⁰ Similar to other OMIs, Globalmarket also has 4 general steps: 1. Submit the dispute and negotiate with the seller, 2. Submit the dispute to the Globalmarket if not resolved, 3. Submit evidence.

6.3.7 Mandatory Requirements that Affect Costs

None of the OMIs require the parties to have a legal representative to engage with the dispute resolution process and the parties can file the disputes and represent themselves.

6.3.8 Modes of Communication and Submitting Evidence

Amazon Payment Inc. is in charge of resolving the disputes between buyers and sellers. In the Participation agreement, the means of communication is predicted to be online. Notices will be sent by email or posted on the website and the means of contacting the Amazon payment is also online.⁷³¹ The complaint can be filed online and the dispute is processed online, as well. In Alibaba, means of communication or the methods by which the parties participate in the process and submit their evidence and argumentation is via an online form which has the ability to receive documents and arguments can be written in a text format. No oral hearing is conducted and Alibaba does not hold an

730 Clause 3, 'Special Terms and Conditions Debt Mediation', <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

731 'Participation Agreement', <<http://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 11 January 2016.

5. The Transaction Processing Service. By registering for or using the Services, you authorize Amazon Payments, Inc. ("Amazon Payments") to act as your agent for purposes of processing payments, refunds and adjustments for Your Transactions (as defined below), receiving and holding Sales Proceeds (as defined below) on your behalf, remitting Sales Proceeds to your bank account, charging your credit card, and paying Amazon and its affiliates amounts you owe in accordance with this Participation Agreement or other agreements you may have with Amazon or its affiliates (collectively, the "Transaction Processing Service"). "Sales Proceeds" means the gross proceeds from any of Your Transactions, including all shipping and handling, gift wrap and other charges, but excluding any taxes separately stated and charged. "Your Transaction" means any sale of your items through the Site. As used in this Section 5, "we," "us" and "our" mean Amazon Payments. Notwithstanding anything to the contrary in this Participation Agreement, Amazon may in its discretion perform the Transaction Processing Services described in this Section 5. 'Amazon Participation Agreement' <<http://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 11 January 2016.

online hearing either. The system is based on e-document submission.⁷³² In HQEW, the parties to the dispute can upload their evidence via the online system. The participation in the dispute resolution process does not entail in-person hearing and it is held solely online.⁷³³ DHgate resolution center allows the parties to the dispute to upload videos and documents as evidence.⁷³⁴ The same applies to MIC, Teleroute, RetraceMobile, Toadlane and GlobalMarket.

6.3.9 Language of the Proceeding

The language of the dispute resolution proceeding in all the OMIs is the same as the language of the transaction agreement, which is English.

732 'Complaint Center, Report your Complaint'
<http://resources.alibaba.com/topic/800010860/Complaint_Center__Report_your_complaint_protect_your_right.htm> Accessed 21 February 2016

733 'Fraud and Dispute', <[http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html)> Accessed 7 March 2016, Article 8.

734 'How to Upload and Send Video Evidence to DHgate?',
<http://help.dhgate.com/help/buyerhelpen.php?catid=3303&artid=EA7D58DB5E3E7DCAE04010AC0C642F61#help_php-listmiddle-1> Accessed 7 March 2016.

6.3.10 The OMI's Accessibility Evaluation

The OMI's Accessibility										
Accessibility	Reasoning for Coding	Amazon	Alibaba	HQEW	Dhgate	Made-in-China	Toadlane	RetraceMobile	Teleroute	GlobalMarket
The boundary rules (which disputes can be filed)	Is it stated in the policy or service agreement?	1	1	1	1	1	1	1	1	1
Arbitrary rejection of claims	Can OMI reject the claim at its own discretion?	0	1	0	1	0	1	1	1	1
Appeal the rejection of claim	Can the party appeal the rejection of claim?	1	Not Applicable	0	Not Applicable	0	Not Applicable	Not Applicable	0	Not Applicable
Location	Does the OMI require the party to attend in person hearing?	1	1	1	1	1	1	1	1	1

Mandatory rules that affect cost	Do the parties have to be represented by lawyers?	1	1	1	1	1	1	1	1	1
How many steps to file the dispute	Is it more than 5 steps, the median number of steps for filing a dispute among all studied OMIs?	1	1	1	1	1	1	1	1	1
Disclosure of the rules of procedure	Are the rules of procedure disclosed in service agreement and OMI's policy?	1	1	1	1	1	1	1	1	0
Acceptability of online evidence	Does the OMI accept online evidence?	1	1	1	1	1	1	1	1	1
Participation Fee	How much is filing fee?	1	1	1	1	1	0	0	0	1

Modes of communication	Does the process take place online or offline?	1	1	1	1	1	1	1	1	1
How long it takes to file a dispute	How long should the parties wait to file a dispute?	1	0	0	1	0	1	1	1	1
Language of the proceeding	Is the language of the proceeding, the language of the transaction?	1	1	1	1	1	1	1	1	1

6.4 Descriptive Analysis of OMIs and Neutrality

Based on the evaluation criteria presented in chapter 5, the neutrality of OMIs will be evaluated. If the financial structure of an intermediary is designed in a way that the intermediary relies mainly on one side of the market to receive revenue, then the probability of remaining neutral during dispute resolution process for the intermediary is not high. Moreover, if the financial structure creates “repeat players” by directly receiving revenue from those that do more transactions on the platform, then their neutrality is hampered. Additionally, if the platform provider is a producer itself, neutrality of dispute system design might be hampered. Hence the factors of membership, commission per transaction and producer biased, will be considered to understand whether repeat player problem exists.

6.4.1 OMIs Overall Financial Structure

Amazon is a multisided platform. It receives its revenue from providing multiple services such as advertising, sales platform, payment services and customer service.⁷³⁵ It also has its own inventory line and it has its own payment system. Alibaba is a multisided market as well. It offers various services. Alibaba also receives revenue from Online Market Services, Online Market Service Commissions on Transactions Storefront Fees, International Commerce Wholesale Cloud Computing, other acquired businesses, mainly the mobile Internet services provided by UCWeb and AutoNavi as well as annual fees of 2.5% of the daily average book balance of the SME loans generated by the SME loan business.⁷³⁶ The wholesale market’s revenue is driven by paying members, membership renewal rates and other value added marketing services they provide. The buyers can join the platform for free. In the fiscal year 2015, 85% of Alibaba’s global wholesale marketplace revenue was generated from fees from

⁷³⁵ ‘Amazon Services’, <<http://services.amazon.com/content/amazon-seller-services-products.htm?ld=NSGoogleAS>> Accessed 11 January 2016.

⁷³⁶ Alibaba Group Holding Limited, United States Securities and Exchange Commission, Washington, D.C. 20549 FORM 20-F <http://www.alibabagroup.com/en/ir/pdf/agm150625_ar.pdf> Accessed 21 February 2016, 16.

memberships and value-added services.⁷³⁷ Revenue is normally derived from members with Gold membership. Such financial structure might raise concerns as to the neutrality of Alibaba to the non-members and non-repeat players. However, Alibaba states that the number of buyers using their wholesale marketplaces will affect sellers' willingness to purchase and renew membership packages with them and to use their marketing services.⁷³⁸ Hence there is a certain incentive for Alibaba to be also fair to the buyers.⁷³⁹ Nevertheless, when only one side of the market provides revenue Aliababa's dispute resolution still faces neutrality issues. Unlike Alibaba and Amazon, HQEW is a vertical market and provides a platform only for electric appliances. It includes buyers and sellers (sellers are mainly from China). It earns revenue by requiring membership fee as well as providing services such as delegated purchasing, escrow mechanism, verified suppliers and sample solution.⁷⁴⁰ DHgate provides a platform for wholesalers, buyers and sellers. It also provides various services such as seller guarantee service and escrow.⁷⁴¹ Made-in-China also provides a platform for buyers and sellers and provides services such as audit, escrow and easy sourcing request.⁷⁴² It receives its revenue from membership fees as well as trading services.⁷⁴³ It charges the suppliers a fee for each transaction, the buyer can use the services for free unless they decide to be the VIP buyers, which will entitle them to additional services and charges them a fee.⁷⁴⁴

Toadlane and RetraceMobile provide a simple online market place without additional services and earn their revenue by charging a fee for the transaction. Teleroute provides a platform for facilitating transportation, and it is a vertical market.

737 United States Securities and Exchange Commission, Form 20 F, Alibaba Group Holding Limited, 97<http://www.alibabagroup.com/en/ir/pdf/agm150625_ar.pdf> Accessed 7 March 2016, 95.

738 United States Securities and Exchange Commission, Form 20 F, Alibaba Group Holding Limited, 97<http://www.alibabagroup.com/en/ir/pdf/agm150625_ar.pdf> Accessed 7 March 2016.

739 United States Securities and Exchange Commission, Form 20 F, Alibaba Group Holding Limited, 97<http://www.alibabagroup.com/en/ir/pdf/agm150625_ar.pdf> Accessed 7 March 2016.

740 'Solutions' <<http://www.hqew.net/solutions/>> Accessed 11 January 2016.

741 'DHgate Help-page', <<http://help.dhgate.com/help/buyerhelpen.php?language=en&kw=service&smt=Search+Help>> 10 Nov 2016.

742 'Made-in-China Trade Services', <<http://www.made-in-china.com/tradeservice/main/>> 10 November 2016

743 'Secured Trading Services', <<http://www.made-in-china.com/secured-trading-services.html>> Accessed 7 March 2016. and 'Membership Fee', <<http://service.made-in-china.com/help/guide/virtualoffice/4419.htm>> Accessed 7 March 2016.

744 'Secured Trading Services', <<http://www.made-in-china.com/secured-trading-services.html>> Accessed 7 March 2016.

It receives membership fee from both sides of the market.⁷⁴⁵ GlobalMarket is a horizontal platform and provides a platform for buyers and sellers to transact as well as providing services such as audit, verification of suppliers, sourcing consultancy and sourcing service.⁷⁴⁶

6.4.2 Membership Fee

Amazon Business requires the suppliers and buyers to sign up for a business account. The business account for buyers is free of charge. Sellers have to pay a fixed fee of \$39.99 per month.⁷⁴⁷ Alibaba has Gold Supplier Membership as well as free membership for both suppliers and buyers. The Gold Suppliers Members are divided into three tiers based on the membership fee: Basic Package, Standard Package and Premium Package. There are no membership fees for the buyers. Different tiers of membership pay a different premium.⁷⁴⁸ HQEW has different memberships for suppliers such as value added service and gold suppliers.⁷⁴⁹ The gold suppliers pay a membership fee that is more than others, in order to have access to additional features of the platform. Moreover, in its free buyer membership program, it receives revenue only by charging the suppliers and not buyers. While the network effect could remedy

⁷⁴⁵ Tobias Ihde 'Dynamic Alliance Auctions' (2004) Physica-Verlag HD, 61.

⁷⁴⁶ 'Services' <<http://www.globalmarket.com/sourcing-service.html>> Accessed 11 January 2016

⁷⁴⁷ 'Amazon Fees and Pricing', <<https://services.amazon.com/selling/pricing.htm>> Accessed 11 January 2016.

⁷⁴⁸ 2.2 The Service will have the following core features (which may be added to or modified, or suspended for scheduled or unscheduled maintenance purposes, from time to time at the sole discretion of Alibaba.com and notified to you) ("Free Member Benefits"):

- a) Company Profile - allows each Member to display and edit basic information about its business, such as year and place of establishment, estimated annual sales, number of employees, and products and services offered, etc.
- b) Products - allows each Member to display and edit descriptions, specifications and images of at least 5 products.
- c) Unlimited Buyer Trade Lead Posting - allows each Member to post on the Site for public display offers to buy products and services from other users of the Site.
- d) Limited Seller Trade Lead Posting - allows each Member to post on the Site for public display at least 20 offers to sell products of the Member.

http://www.alibaba.com/trade/servlet/page/static/legal_notice_basic

The fee also is as follows: US\$1,899 = 1 year Gold Supplier Basic Membership(US \$1,399) + US \$500 Extra Inquiries Package

US\$2,999 = 1 year Gold Supplier Basic Membership(US \$1,399) + US \$1600 Extra Inquiries Package

US\$5,999 = 1 year Gold Supplier Standard Membership(US \$2,999) + US \$3000 Extra Inquiries Package

US\$1,399 Gold Supplier Basic Package US\$1,899 = 1 year Gold Supplier Basic Membership(US \$1,399) + US \$500 Extra Inquiries Package

US\$2,999 = 1 year Gold Supplier Basic Membership(US \$1,399) + US \$1600 Extra Inquiries Package

US\$5,999 = 1 year Gold Supplier Standard Membership(US \$2,999) + US \$3000 Extra Inquiries Package

US\$1,399 Gold Supplier Basic Package

⁷⁴⁹ 'Fraud and Dispute', <[http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html)> Accessed 7 March 2016

the problem by incentivizing the intermediary to act impartially; there is still the problem where one side pays for all.⁷⁵⁰ DHgate does not have a membership plan.⁷⁵¹ For the buyers, if they purchase goods every month for the amount of 3000 USD or more, they can be VIP buyers. Sellers do not have multiple membership models. Made-in-China has membership programs for both buyers and suppliers. It has three categories of membership for buyers: Free membership, Global buyers and Pro-buyers.⁷⁵² The suppliers also pay a membership fee of 31100RMB/year. While this might mean that both buyers and suppliers (both sides of the market) directly bring profit, the amount of contribution of buyers to the revenue is substantially lower than the suppliers. Hence, the supplier is the main side of the market that brings in revenue.⁷⁵³ The suppliers have to be registered in China in order to be able to become members. RetraceMobile and Toadlane do not charge a membership fee. At Teleroute, both transporters and requesters are members of Teleroute and Teleroute receives a membership fee. Both sides of the market pay equally for the services. Hence, Teleroute does not receive its revenue from one side of the market. Globalmarket.com has paid subscribers.⁷⁵⁴ These subscribers are mostly the suppliers.

6.4.3 Commission Per Transaction

Amazon business provides its services as commission per transaction and the sellers are charged a referral fee.⁷⁵⁵ Alibaba receives a commission of 5% of the subtotal of the order for each transaction carried out, which the supplier has to pay.⁷⁵⁶ HQEW charges the suppliers a service member fee that includes the costs of the escrow as well.

750 'Benefits from Registration', <[http://www.hqew.net/article/showdetails-What-Can-I-Benefit-From-Register\\$3f-Is-It-Free\\$3f_3460.html](http://www.hqew.net/article/showdetails-What-Can-I-Benefit-From-Register$3f-Is-It-Free$3f_3460.html)> Accessed 7 March 2016, It also has a program that charges the buyer 100 dollars per year which could potentially provide neutrality. 'Solutions', <<http://www.hqew.net/solutions/>> Accessed 7 March 2016.

751 'Introduction to the Wholesale', <<http://www.danviews.com/introduction-to-the-wholesale-site-dhgatecom/>> Accessed 7 March 2016.

752 'Premium Buyer Membership', <<http://sourcing.made-in-china.com/tradeservice/assistance/buyer-membership.html>> Accessed 7 March 2016.

753 The gold suppliers have to pay 31100 CNY, which is approximately 4500 USD, can be found at <http://service.made-in-china.com/help/guide/virtualoffice/4419.htm>, while the Buyers pay at most 400 USD a year.

754 'Global Market Group Limited, Global Market Group announces Interim Results for the six months ended 30 June 2015' <[http://investor.globalmarket.com/attachments/GMG_2015_Interim_Results_Final_updated\(20150929\).pdf](http://investor.globalmarket.com/attachments/GMG_2015_Interim_Results_Final_updated(20150929).pdf)> Accessed 7 March 2016

755 'Selling Fees', <[https:// https://services.amazon.com/selling/pricing.htm](https://https://services.amazon.com/selling/pricing.htm) > 'Pay with Amazon Fees' <<https://payments.amazon.com/help/201212280>> Accessed 11 January 2016.

756 'Buyer Frequently Asked Questions' <http://service.alibaba.com/buyer/faq_detail/13842622.htm> Accessed 7 March 2016

It does not state in any policy that commission per transaction will apply.⁷⁵⁷ Similar to Aliababa and Amazon, DHgate receives its revenue by charging commission from each transaction from the sellers. The charges can vary by product category, but generally the sellers pay a commission of 4.5% on sales of \$300 or more and 8% to 12% on sales of under \$300.⁷⁵⁸ MIC does not receive a commission per transaction, but receives a commission from the Free Buyers (20 USD) each time they use the Escrow service. The service is free for paying members, however after use of service twice, the members have to pay a fee.

Toadlane and Retracemobile have a similar transaction fee structure. The both use Armormpayment which receives a commission per transaction, but it does not oblige one side of the market to pay the commission. Depending on the buyers and sellers negotiations, one party pays the commission fee.⁷⁵⁹ This can reduce the probability of having the “repeat player” bias, especially as it refers the parties to another dispute resolution provider (NetNeutrals).

The platforms themselves however receive a commission per transaction. On Retracemobile platform, sellers pay a 4% fee of the transaction value, once the listing sells.⁷⁶⁰ This includes all the sellers’ services, such as concierge listing, active marketing and promotion and price analysis support. The buyer does not pay the intermediary.⁷⁶¹ Toadlane receives a fee from only the sellers when transactions are carried out. It stipulates that “In the meantime, the payment intermediary will initiate the transfer of the Buyer's payment to Seller, less all applicable payment and Toadlane fees.”⁷⁶² GlobalMarket does not receive a commission per transaction.⁷⁶³

757 ‘How much does it cost to use Escrow?’, <<http://www.hqew.net/events/news-article/2888.html>> Accessed 7 March 2016.

758 ‘DhGate Opens Gate’, <<https://www.internetretailer.com/2014/06/24/dhgate-opens-gate-chinas-suppliers>> Accessed 7 March 2016.

759 ‘Fees’, <<http://www.armorpayments.com/fees>> Accessed 7 March 2016.

760 FAQ’, <<https://www.retracemobile.com/faq>> Accessed 7 March 2016.

761 FAQ’, <<https://www.retracemobile.com/faq>> Accessed 7 March 2016.

762 ‘Frequently Asked Questions’ <<https://www.toadlane.com/faq#whytoad>> Accessed 7 March 2016.

763 Terms and Conditions, Clause 5, 5. Transactions between Buyers and Suppliers, “GlobalMarket does not represent the seller nor the buyer in specific transactions and does not charge any commissions from completing any transactions.” ‘Terms and Conditions’ <<http://www.globalmarket.com/terms-of-use.html>> Accessed 1 May 2016.

6.4.4 Independent or Biased Intermediary

The independent intermediaries do not have a line of products or inventory. They are merely a platform for buyers and sellers. The biased intermediaries have a line of products and can be producers themselves. As it was stated in section 5.2.2, biased intermediaries' probability of being neutral during dispute resolution process is less than others. For example, it might be biased when the dispute is over merchandise that the OMI also sells. The neutrality of dispute resolution process might be less hampered if the intermediary refers the parties to a third party. Among the studied OMIs, Amazon is a producer and has a line of products.⁷⁶⁴ HQEW is itself a supplier. It owns the company Kikipcb that provides electric supplies.⁷⁶⁵ Hence HQEW is a biased intermediary with its own line of products. All other studied OMIs including Alibaba, DHgate, Teleroute, RetraceMobile, Toadlane and GlobalMarket and MIC are not biased intermediaries and only provide a platform for suppliers and buyers to transact.

6.4.5 External or Internal Justice System

Referral to external online dispute resolution intermediaries or payment intermediaries that provide dispute resolution can contribute to the neutrality of the OMI especially if the OMI acquires some characteristics that can result in partiality. An internal justice system, however, does not contribute positively to the neutrality of OMI. This section will consider each of the OMIs with regards to internal or external justice system.

Amazon has an internal dispute resolution mechanism. The dispute resolution is either provided by it's A-Z guarantee program or through the payment mechanism (Amazon payment) that resolves the disputes. Amazon payment is also owned by Amazon hence the dispute resolution provided by Amazon is not external dispute resolution.⁷⁶⁶ Alibaba is an enfointermediary that provides the dispute resolution

⁷⁶⁴ In its public annual report, Amazon states that: "We also manufacture and sell electronic devices, including Kindle e-readers, Fire tablets, Fire TVs, and Echo. We strive to offer our customers the lowest prices possible through low everyday product pricing and shipping offers, and to improve our operating efficiencies so that we can continue to lower prices for our customers." Amazon United States Securities and Exchange Commission Form 10-K (2015) D.C. 20549, 3.

⁷⁶⁵ Hqew PCB specializes in Rigid PCB & Flex PCB prototyping, PCB manufacturing, and PCB assembling, and stencil. 'about us', <<http://www.kikipcb.com/about-us.html>>Accessed 7 March 2016.

⁷⁶⁶ Amazon Annual Report, 2015, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-reportsannual>

mechanism itself. It does not refer the parties to a third party. It refers the parties to arbitration if they are dissatisfied with the outcome of Alibaba's dispute resolution.⁷⁶⁷ HQEW, DHgate, MIC, Teleroute, and GlobalMarket also have internal dispute resolution system. RetraceMobile and Toadlane refer the parties to a third party for the provision of dispute resolution.

6.4.6 External Oversight

As it was stated in section 5.2.3, to establish whether the OMIs' dispute resolution is subject to oversight, the thesis will take the following approach: In the case studies if the OMIs dispute resolution process can be considered as arbitration or a regulated dispute resolution system such as mediation, in accordance to the applicable law, then they are subject to the oversight of state law. If no law applies then the dispute resolution mechanism is not subject to oversight. The applicable laws to the studied OMIs were explained in section 4.5. Considering the applicable law each OMIs' dispute resolution based on its jurisdiction and contract will be considered to understand whether its dispute resolution is in the shadow of the law.

According to the applicable law to Amazon, Amazon's dispute resolution process is not arbitration. As explained in Section 4.5, in order for a process to be recognized as arbitration, the important decisive factor is that the dispute resolution be binding i.e. it binds the buyers and sellers to use the dispute resolution process and they should not be able to use litigation until the end of the dispute resolution process. In Amazon,

⁷⁶⁷ TSA, Clause 10.3 "10.3 DISPUTE BETWEEN BUYER AND SELLER. IN CASE A DISPUTE ARISES BETWEEN BUYER AND SELLER FROM OR IN CONNECTION WITH AN ONLINE TRANSACTION, IF THE DISPUTE IS NOT RESOLVED THROUGH AMICABLE NEGOTIATION WITHIN THE PRESCRIBED TIME PERIOD ACCORDING TO THE RELEVANT TRANSACTIONAL TERMS, YOU AGREE TO SUBMIT THE DISPUTE TO ALIBABA.COM FOR DETERMINATION. IF YOU ARE DISSATISFIED WITH ALIBABA.COM'S DETERMINATION, YOU MUST APPLY TO THE HONG KONG ARBITRATION CENTRE ("HKIAC") FOR ARBITRATION AND NOTIFY ALIBABA.COM OF SUCH APPLICATION WITHIN 20 CALENDAR DAYS AFTER ALIBABA.COM'S DETERMINATION. IF EACH OF BUYER AND SELLER IN THE DISPUTE DOES NOT APPLY FOR ARBITRATION WITHIN THE ABOVE 20 CALENDAR DAYS, EACH OF THE BUYER AND THE SELLER SHALL BE DEEMED TO HAVE AGREED THAT ALIBABA.COM'S DETERMINATION SHALL BE FINAL AND BINDING ON YOU. WITH A FINAL DETERMINATION, IN THE CASE THE ONLINE TRANSACTION ADOPTS THE ALIPAY SERVICES, ALIBABA.COM MAY INSTRUCT ALIPAY TO DISPOSE THE FUNDS HELD BY ALIPAY ACCORDING TO SUCH DETERMINATION, AND IN THE CASE THE ONLINE TRANSACTION ADOPTS ALIBABA.COM SUPPLEMENTAL SERVICES, ALIBABA.COM MAY DISPOSE OF THE FUNDS HELD BY ALIBABA.COM ACCORDING TO SUCH DETERMINATION. FURTHER, EACH OF BUYER AND SELLER SHALL BE DEEMED TO HAVE WAIVED ANY CLAIM AGAINST ALIBABA.COM, ALIPAY AND OUR AFFILIATES AND AGENTS." 'Alibaba Transaction Agreement' <http://rule.alibaba.com/rule/detail/2054.htm> Accessed 13 Feb 2016.

dispute resolution process and its outcome are not legally final and binding on the parties and parties can seek recourse from court. Since Amazon dispute resolution process does not constitute arbitration, no laws will apply to the process. The lack of external oversight on Amazon's dispute resolution process will result in lack of incentive for Amazon to remain neutral or to predict measures for achieving neutrality in its process.

To establish if Alibaba.com dispute resolution mechanism is subject to external oversight its dispute resolution design should be considered to establish whether it is arbitration. As it was explained in detail in Section 4.5.1.2, in Alibaba, the law of Hong Kong is the law of the transaction service agreement.⁷⁶⁸ China has entered into special bilateral arbitration arrangements with Hong Kong. According to the arrangement, the Supreme People's Court of Mainland agreed to enforce the arbitral awards made in Hong Kong in accordance to Hong Kong Arbitration Ordinance.⁷⁶⁹ The Arbitration Ordinance in Hong Kong recognizes ad hoc arbitration. However, there are other criteria that a process should meet in order to be recognized as arbitration under the Hong Kong Law, since it is chosen as the governing law and the Hong Kong arbitration ordinance should be referred to in order to find out if it constitutes arbitration. The new ordinance has mainly adopted the UNCITRAL Model Law. The Ordinance and the Model Law do not provide any kind of arbitration definition in order to understand what process constitutes arbitration. Similar to UNCITRAL Model Law, a process to be recognized as arbitration requires an arbitration agreement. The Arbitration Ordinance section 19 (1) defines arbitration agreement as: "(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement."⁷⁷⁰ Accordingly, it can be assumed that if there is no arbitration agreement in accordance to Hong Kong

⁷⁶⁸ Alibaba Transaction Service Agreement, clause 10.1 GOVERNING LAW. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION ("HONG KONG") WITHOUT REGARD TO CONFLICT OF LAW PRINCIPLES. <<https://rule.alibaba.com/rule/detail/2054.htm>> Accessed 19 November 2016.

⁷⁶⁹ Hong Kong Arbitration Ordinance, available at <<http://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf>> Accessed 9 November 2016.

⁷⁷⁰ Hong Kong Arbitration Ordinance (2014), Gazette Number E.R. 2 of 2014 <[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\\$FILE/CAP_609_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf)> Accessed 21 November 2016.

Arbitration Ordinance then the process does not constitute arbitration. If that is the case, then the OMI dispute resolution is not in the shadow of the law and there is no public oversight.

The dispute resolution process that HQEW provides is voluntary and parties do not explicitly agree to arbitration. The terms and conditions of HQEW state that the governing law of the contract is the law of PRC.⁷⁷¹ According to the applicable law (Arbitration Law of People's Republic of China, Article 16) parties should express their intention to use arbitration and should appoint a designated Arbitration Commission. If the process, by the Chinese law, qualifies as arbitration then there is an external oversight. However, the law that applies to arbitration in China, Arbitration Law of the People's Republic of China, sets out prerequisites for the arbitration process to be recognized as arbitration.⁷⁷² HQEW's DSD does not meet the requirement of Article 16. It does not designate an arbitration commission and it is not an arbitration commission itself. Moreover, it does not state a choice of law other than the Chinese law. Hence, it will not qualify as arbitration in China and the oversight does not apply to its process.

DHgate calls its dispute resolution process arbitration. The parties to the disputes also cannot go to court or use any other processes. DHgate explicitly mentions that the process it uses for dispute resolution is arbitration and the award is final and binding.⁷⁷³ If the process, by the Chinese law, qualifies as arbitration then there is an external oversight. Similar to HQEW Chinese law applies to DHgate process and it cannot constitute arbitration.

⁷⁷¹ GOVERNING LAW AND JURISDICTION. This Site (excluding linked sites) is controlled by SHENZHEN HUAQIANG HOLDINGS LIMITED, from its offices within the Shenzhen, PRC. By accessing this Site, you and EN.HQEW.NET agree the laws of the PRC, without regard to the conflicts of laws principles thereof, shall govern all matters relating to your access to, or use of, this Site and any Materials or Services. HQEW Terms and Conditions Available at < <http://www.hqew.net/article/Terms-Conditions.html>>

⁷⁷² See Chinese Arbitration Law, translation in English is available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm.

⁷⁷³ 3.6 In order to help the sellers and the Registered Users solve and settle any transactional disputes effectively and efficiently, DHgate has established the "Handling Procedures for Transactional Dispute". Such procedures can be viewed at: <http://help.dhgate.com/help/buyerhelpen.php?catid=3303>. Here, the sellers and Registered Users shall agree that when the Registered Users file the transactional disputes with DHgate, the sellers and the Registered Users should comply with the "Handling Procedures for Transactional Dispute", and permit DHgate to make a final binding decision regarding the dispute. <http://help.dhgate.com/help/buyer_about_usen.php?catid=g8> Accessed 3 May 2016.

Made-in-China.com states that if the amount of dispute is not more than 6000 USD, the outcome of MIC is final and binding. It also states that if the amount is more than 6000 USD and none of the parties file a dispute at court or arbitration, the award will become final and binding.⁷⁷⁴ In China, as it was indicated in other case studies, OMI's dispute resolution cannot be classified as arbitration, as only arbitration commission entities approved by the government can provide arbitration in China. Hence, there is no external oversight and the process does not constitute arbitration and not subject to oversight.

Toadlane and RetraceMobile use Armorpayment refers disputants to another external dispute resolution provider, NetNeutrals. As NetNeutrals provides arbitration in order to resolve the disputes and it considers it as final and binding, it will fall under the US jurisdiction and is regulated under the law. NetNeutrals process is also subject to the US Federal Arbitration Act. The NetNeutrals agreement states that

“To the maximum extent permitted by law, this agreement is governed by the laws of the State of Wisconsin, USA and you hereby consent to the exclusive jurisdiction and venue of courts in Waukesha, Wisconsin, USA in all disputes arising out of or relating to the use of the NetNeutrals Site.”⁷⁷⁵

Hence, NetNeutrals' process is subject to the Wisconsin State Legislator Statute, chapter 788, which regulates arbitration and has clauses related to the neutrality and other aspects of arbitration⁷⁷⁶

Teleroute The mediation process is regulated under the Belgian Mediation Act 2005. One of the goals of the Mediation Act is to ensure compliance with the procedural principles such as impartiality.⁷⁷⁷ This law was explained in detail in section 4.5.2.1, and as was explained, the Act can be an external oversight for the procedure of mediation at Teleroute.

⁷⁷⁴ Section 10.3, 'Secured Trading Services', <<http://www.made-in-china.com/secured-trading-services.html>> Accessed 7 March 2016.

⁷⁷⁵ 'Terms of Service', <<https://www.NetNeutrals.com/Terms-of-Service.aspx>> Accessed 7 March 2016.

⁷⁷⁶ Wisconsin State Legislator Statute, Chapter 788 <<http://docs.legis.wisconsin.gov/statutes/statutes/788.pdf>> 16 March 2016.

⁷⁷⁷ Piet Taelman and Stefan Voet, 'Mediation in Belgium: A Long and Winding Road' in Carlos Esplugues Mota and Louis Marquis (eds), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, vol 6 (Springer 2015) 92.

GlobalMarket specifically states that it carries out mediation between the parties to resolve the dispute, external oversight only exists if its mediation is subject to the mediation law. Since Hong Kong has jurisdiction over the GlobalMarket agreement, Mediation Law of Hong Kong should be considered.⁷⁷⁸ As it was explained in Section 4.5.2.2, private mediation under the law of Hong Kong is moderately regulated and there are requirements for the mediator and the process such as upholding impartiality during the process.

⁷⁷⁸ GlobalMarket Terms and Conditions, This Agreement shall be governed by the laws of the Hong Kong Special Administrative Region (" Hong Kong ") without regard to its conflict of law provisions. The parties to this Agreement hereby submit to the exclusive jurisdiction of the courts of Hong Kong. <<http://www.globalmarket.com/terms-of-use.html>> Accessed 18 March 2016

6.4.7 The OMI's Neutrality Evaluation

The OMI's Neutrality										
Neutrality	Reasoning for Coding	Amazon	Alibaba	HQEW	Dhgate	Made-in-China	Toadlane	RetraceMobile	Teleroute	GlobalMarket
Biased fee structure	If one side of the market provides fee value of one, if no side or both sides provide fee value of 1.	0	0	0	1	0	1	1	1	0
Transaction fee	Commission received based on each payment that can lead to "repeat player" problem If commissio	0	0	1	0	0	0	0	1	1

	n received, value of 0, if no commission received value of 1.									
External or Internal justice system	Does the OMI refer the parties to an external dispute resolution provider or does it provide the dispute management system itself? If external, value of 1, if internal value of zero.	0	0	0	0	0	1	1	0	0
Which party pays fee for DSD	Does the seller or buyer pay for the DSD or the OMI? If	1	1	1	1	1	0	0	0	0

	OMI, value of 1, if either of the parties to the dispute value of 0.									
Biased or independent intermediary	Is it a public platform that has a line of products or does it not have a line of product. If has a line of product value of 0, if does not value of 1.	0	1	0	1	1	1	1	1	1
External oversight	Do any laws regulate the OMI's dispute resolution mechanism ? Value of 1 for yes and value of zero for no	0	0	0	0	0	1	1	1	1

6.5 Descriptive Analysis of OMIs' Effectiveness

The effectiveness of OMI's dispute resolution mechanism relies on whether it can compel the parties to join the process of disputes resolution and whether it can enforce the award. This section will consider the various OMIs' enforcement mechanisms and their effectiveness. The enforcement mechanisms can be categorized as: Monetary enforcement mechanisms (the escrow mechanism or the payment intermediary) and nonmonetary enforcement mechanisms.

6.5.1 Payment Intermediary

Amazon obliges the parties to use AmazonPayment.⁷⁷⁹ As stated earlier, the ex-ante agreement between the parties to use the payment intermediary can enhance the effectiveness of the dispute resolution mechanism by increasing the probability of the enforcement of the outcome.

⁷⁷⁹

Clause 5. The Transaction Processing Service. By registering for or using the Services, you authorize Amazon Payments, Inc. ("Amazon Payments") to act as your agent for purposes of processing payments, refunds and adjustments for Your Transactions (as defined below), receiving and holding Sales Proceeds (as defined below) on your behalf, remitting Sales Proceeds to your bank account, charging your credit card, and paying Amazon and its affiliates amounts you owe in accordance with this Participation Agreement or other agreements you may have with Amazon or its affiliates (collectively, the "Transaction Processing Service"). "Sales Proceeds" means the gross proceeds from any of Your Transactions, including all shipping and handling, gift wrap and other charges, but excluding any taxes separately stated and charged. "Your Transaction" means any sale of your items through the Site. As used in this Section 5, "we," "us" and "our" mean Amazon Payments. Notwithstanding anything to the contrary in this Participation Agreement, Amazon may in its discretion perform the Transaction Processing Services described in Section 5., <<http://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 21 February 2016

The extent of this effectiveness might be limited due to the short period of time that the money is held by the escrow; however, the probability of the enforcement is high. Moreover, as an ex-ante arrangement, Amazon in its participation agreement obliges the seller to provide refund and accept returns⁷⁸⁰ and obliges the parties to use the payment mechanism. Hence, the probability of enforcement and the magnitude of the punishment are high.⁷⁸¹

Due to ex ante arrangements of payment mechanism, Alibaba is able to enforce its dispute resolution outcome. While the ex ante arrangement exists to use escrow mechanism, only the gold suppliers support such mechanism and other suppliers might not accept Alipay as the payment mechanism.⁷⁸² However, Alibaba has also arranged for holding the money even if it is paid by any other payment methods such as credit cards.⁷⁸³ There are however limitations to the amount of money that Alibaba holds on Alipay. If the dispute is over 50,000\$, Alibaba does not provide secure payment.⁷⁸⁴ If the parties need secure payment service for more than 50,000\$, they need to use Bank Transfer which is similar to that of Alipay service but has no limit.⁷⁸⁵

780 1.1.4 Returns and Refunds. For all of your products that are not fulfilled using the Fulfillment by Amazon service, you will accept and process returns, refunds and adjustments in accordance with this Participation Agreement and the Amazon return policies published on the Site at the time of the applicable order, and we may inform customers that these policies apply to your products. You will determine and calculate the amount of all refunds and adjustments (including any taxes, shipping and handling or other charges) or other amounts to be paid by you to Buyers in connection with Marketplace purchases, using functionality we enable for your account, and will route all such payments through Amazon. We will provide any such payments to the Buyers (which may be in the same payment form originally used to purchase your product), and you will reimburse us for all amounts so paid. We may offset such payments against any amounts to be remitted or paid by Amazon to Seller under this Agreement or seek reimbursement from you via any of the means authorized in this Participation Agreement. For all of your products that are fulfilled using the Fulfillment by Amazon service, the Amazon return policies published on the Site at the time of the applicable order will apply and you will comply with them. You will promptly provide refunds and adjustments that you are obligated to provide under the applicable Amazon return policies and as required by law, and in no case later than thirty (30) days after the obligation arises. 'Return and Refund' <<http://www.amazon.co.uk/gp/help/customer/display.html?nodeId=3216781>> Accessed 11 January 2016.

781 Amazon.com A-to-Z Guarantee, provide a refund to Buyer if Seller cannot promptly deliver the goods, discover erroneous or duplicate transactions, or receive a chargeback from Buyer's credit card issuer for the amount of Buyer's purchase from Seller. We may obtain reimbursement of any amounts owed by Seller to Amazon or us by deducting from future payments owed to Seller, reversing any credits to Seller's Account, charging against gift certificates held in Seller's GC Account (if any) that were purchased with Sales Proceeds, charging Seller's credit card, or seeking such reimbursement from Seller by any other lawful means. You authorize us to use any or all of the foregoing methods to seek reimbursement, including the debiting of your credit card or bank account. Clause J, 'Participation Agreement' <<https://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 11 January 2016.

782 'Secure Payment', <<http://activities.alibaba.com/alibaba/secure-payment.php>> Accessed 7 March 2016.

783 'Buyer Frequently Asked Question', <http://service.alibaba.com/buyer/faq_detail/13746603.htm> Accessed 7 March 2016.

784 'Trade Assurance', <http://service.alibaba.com/buyer/faq_detail/13879739.htm> Accessed 7 March 2016.

785 'What Is Secure Payment', <http://service.alibaba.com/buyer/faq_detail/13719055.htm> Accessed 7 March 2016.
<http://service.alibaba.com/buyer/faq_detail/10609426.htm?spm=5386.7691471.1998499217.2.o0JoTU>

The payment intermediary ensures the parties have access to an effective remedy. The enforcement of Alibaba dispute resolution outcome takes place as follows: According to the TSA, upon submission of a dispute to Alibaba.com, Buyer and Suppliers irrevocably agree that , Alibaba issues the award and instruct Alipay to remit the money in accordance to the award.⁷⁸⁶ If the parties are dissatisfied with Alibaba outcome they have to submit their dispute within 20 days to the Hong Kong Arbitration Center. The decisions that are made by the arbitration center are final and binding. Consequently, as the parties have agreed to the terms and conditions (TSA) of Alibaba, they have set aside the right of going to court.

Under the Agreement Clause 10.3 of Alibaba Transaction Services Agreement, if the parties do not seek recourse from the arbitration center within 20 days of the issuance of the outcome of Alibaba Dispute Resolution center, the outcome will become final and binding on the parties. Aliababa does not state whether the outcome becomes final and binding legally or contractually.⁷⁸⁷ However, the referral of the parties to the arbitration center provides a basis for reaching a legally binding award.⁷⁸⁸ HQEW owns an escrow mechanism and it is embedded in the platform and provided by HQEW itself.⁷⁸⁹ HQEW uses the escrow mechanism in order to enforce the monetary outcome of the dispute. In the escrow, money will be deposited for 90 days.⁷⁹⁰ This is not compulsory, the buyer and supplier can use other means of payment but the buyer has the choice to use the escrow mechanism provided by HQEW. The escrow holds the money until the inspection period has passed. This period is based upon the parties'

786 Transaction Service Agreement, Clause 7.1

787 'Alibaba Transaction Services Agreement', <<http://rule.alibaba.com/rule/detail/2054.htm>> 25 March 2016.

788 The payment should take place through AliPay or any other recommended payment service by Alibaba. According to AliPay agreement clause 3.3.(E) and 3.3.(F)

(e) in case that a dispute in relation to Transaction Services has been submitted to Alibaba.com Sites for Alibaba.com's determination and Alibaba.com's determination has become final and binding according to clause 10 of the Alibaba.com Transaction Services Agreement, the funds will be disposed in accordance with Alibaba.com's determination; or

(f) if Alibaba.com or Alipay or our affiliates receives any order, ruling, award or judgment from a competent court, arbitration tribunal or authority which directs us to release the funds, the funds will be disposed in accordance with such order, ruling, award or judgment.

Alipay is not holding any funds on behalf of Buyer, or in any escrow or trust relationship. Seller has requested that the settlement of funds to Seller be delayed as provided in this clause 3.3.<http://rule.alibaba.com/rule/detail/2052.htm>.

789 'about us', <http://www.hqew.net/about_us/about-us.html> Accessed 7 March 2016

790 'Why We Holding Funds Up Front When Using Escrow Service', <<http://www.hqew.net/events/news-article/18248.html>> Accessed 7 March 2016.

agreement.⁷⁹¹ Using the escrow mechanism is not compulsory in normal transactions.⁷⁹² But in delegated purchasing, using Escrow is compulsory.⁷⁹³

DHgate provides an escrow mechanisms. All the transactions that take place on the platform will have taken place through the escrow mechanism. In effect, all the transactions that take place on the platform will have ex-ante agreement for using escrow mechanism of DHgate.

DHgate also requires the buyers to agree to the service agreement. In clause 3.6 of the service agreement, it states that “In order to help the sellers and the registered users solve and settle any transactional disputes effectively and efficiently, DHgate has established the ‘Handling Procedures for Transactional Dispute.’”⁷⁹⁴ Such procedures can be viewed as: the sellers and Registered Users shall agree that when the Registered Users file the transactional disputes with DHgate, the sellers and the Registered Users should comply with the ‘Handling Procedures for Transactional Dispute’, and permit DHgate to make a final binding decision regarding the dispute.”⁷⁹⁵ Therefore, according to the service agreement, the parties have to agree on an escrow mechanism before they carry out their transaction. MIC has a voluntary program for escrow mechanism. It does not oblige the parties to use its escrow services from the beginning, before entry to the website. Only after they have become members, they can apply for the escrow service. This might hamper the effectiveness of the escrow mechanism, as the parties might not agree ex-ante to use escrow and hence, the outcome might not be enforceable without seeking recourse from court. As an ex-ante arrangement, RetraceMobile provides two payment intermediaries for sellers and buyers to choose from. It also speculates in its dispute resolution policy that the payment intermediary will resolve any dispute, through negotiation and arbitration.⁷⁹⁶ Toadlane also refers the parties to an escrow mechanism.⁷⁹⁷ Teleroute does not provide any escrow mechanism. GlobalMarket has an escrow mechanism in place and it enforces the mediation

791 ‘How do Sellers get paid?’, <<http://www.hqew.net/events/news-article/2889.html>> Accessed 7 March 2016.

792 ‘Before Payment’< http://www.hqew.net/article/showdetails-Before-Payment_14760.html> Accessed March 2016.

793 ‘Delegated Purchasing’, <<http://www.hqew.net/delegated-purchasing/index.html>> Accessed 7 March 2016.

794 ‘DHgate Registration Agreement’, < http://help.dhgate.com/help/buyer_about_usen.php?catid=g8 > Accessed 7 March 2016.

795 ‘Terms of Use’, <<http://seller.dhgate.com/news/media/118207.html>> Accessed 7 March 2016.

796 ‘FAQ’, <<https://www.retracemobile.com/faq>> Accessed 7 March 2016.

797 ‘FAQ’, <<https://www.toadlane.com/faq>> Accessed 7 March 2016.

outcomes through the escrow mechanism. However, the mediation outcome is not legally binding and a dispute can be filed in court against the mediation center's decision.⁷⁹⁸

6.5.2 Nonmonetary Sanctions

The effectiveness of nonmonetary sanctions, as explained in section 5.3.3, depends on various factors such as the dominance of the market, the website ranking and the number of users of the platform. Considering this, OMIs' nonmonetary sanctions for compelling the parties to resolve the dispute and comply with the outcome will be considered.

In Amazon, both feedback mechanism and sanction from the platform can be deemed effective, as Amazon is one of the most successful markets globally. The global rank of Amazon website is 6, considering its traffic.⁷⁹⁹ Amazon's net income was 596 million USD in 2015 and the number of registered customers was 304 million.⁸⁰⁰ Alibaba uses various nonmonetary sanctions such as the no complaint status and black list policy. If the supplier is involved in a general dispute and is not cooperating, Alibaba will publish the complaint case record on the defendant's mini-site on Alibaba.com for 90 days.⁸⁰¹ If there is a severe dispute and the supplier is not cooperating and does not enforce the outcome, the supplier will be blacklisted.⁸⁰² The effectiveness of both of these mechanisms will be considered in the following subsections.

In case of Alibaba's nonmonetary sanction, Alibaba has the dominant B2B market in China. In 2014 the number of its members exceeded 279 million.⁸⁰³ According to

798 <http://www.globalmarket.com/gmportal/order/buyerProtection/detail.gm#DoubleCheck>,

799 'Amazon Alexa Rating', <<http://www.alexa.com/siteinfo/amazon.com>> Accessed 11 January 2016.

800 Number of Active Amazon Customer, <<http://www.statista.com/statistics/237810/number-of-active-amazon-customer-accounts-worldwide/>> Accessed 11 January 2016.

801 Another resolution is that Alibaba.com, after considering the evidence, will terminate and blacklist the guilty supplier's account in severe dispute cases, or publish the complaint case record on the defendant's mini-site on Alibaba.com for 90 days in general dispute cases. 'Definition of Dispute and Resolution by Alibaba.com', <<http://rule.alibaba.com/rule/detail/2060.htm>> 3 May 2016.

802 'Definition of Dispute and Resolution by Alibaba.com', <<http://rule.alibaba.com/rule/detail/2060.htm>> 3 May 2016.

803 'Alibaba in Numbers: Statistics and Trade', <<http://www.go-globe.com/blog/alibaba-statistics-trends/>> Accessed 7 March 2016.

Alexa, its website ranking is 60 globally.⁸⁰⁴ Its revenue is more than the revenue of Amazon.com and ebay.com combined.⁸⁰⁵ Due to these reasons it can be argued that Alibaba can be recognized as a dominant intermediary and its reputation mechanism might enhance the effectiveness of enforcement mechanism. HQEW has the biggest network of electric suppliers in Asia and it verifies the suppliers vigorously.⁸⁰⁶ Therefore, the cost of being removed from the intermediary's network might be higher than complying with the outcome; hence, being black listed and using reputation mechanism is more effective than other networks.

DHgate has feedback mechanism as well as removal from the platform as nonmonetary sanctions in case of not abiding by the DHgate outcome or breaching its service agreement.⁸⁰⁷ After Amazon and Alibaba, DHgate website has the highest rank on Alexa (a ranking websites tool that ranks websites based on visits). Hence being a member of DHgate and having access to its platform might be valuable and make the nonmonetary sanctions more effective.

The nonmonetary sanctions of MIC include the feedback mechanism and the black list policy. The nonmonetary sanctions are speculated in Clause 8.4 of Made in China's Terms and Conditions. With ownership of 3.21% of the market share in China and an Alexa ranking of 172,604,⁸⁰⁸ it is one of the most successful online B2B intermediaries that provides dispute resolution. Hence, its feedback mechanism and black list policy might be effective. Toadlane does not have any nonmonetary sanction mechanisms. Teleroute has various nonmonetary sanctions including feedback mechanism and black list policy.⁸⁰⁹ Their effectiveness will be evaluated as positive due to its website ranking of the 639,144⁸¹⁰ as well as its claim that 80% of the dispute resolution outcomes are

804 'Alibaba Traffic Rank', <<http://www.alexa.com/siteinfo/alibaba.com>> Accessed 7 March 2016.

805 Sarwant Singh, B2B eCommerce Market Worth \$6.7 Trillion by 2020: Alibaba & China the Front-Runners, Forbes (2014) <<http://www.forbes.com/sites/sarwantsingh/2014/11/06/b2b-e-commerce-market-worth-6-7-trillion-by-2020/#6d53fddd2e7c>> Accessed 16 April 2016.

806 'Delegated Purchasing', <<http://www.hqew.net/delegated-purchasing/index.html>> Accessed 7 March 2016.

807 'DHgate Terms and Conditions', http://help.dhgate.com/help/buyer_about_user.php?catid=g7 Accessed 7 March 2016

808 'Siteinfo on Madeinchina', <<http://www.alexa.com/siteinfo/madeinchina.com>> Accessed 7 March 2016.

809 'Alexa Site Info', <<http://www.alexa.com/siteinfo/teleroute.com>> Accessed 7 March 2016.

810 'Alexa Site Info', <<http://www.alexa.com/siteinfo/teleroute.com>> Accessed 7 March 2016.

enforced. Moreover, Teleroute is a closed network and is one of the largest B2B freight transport in Europe.⁸¹¹

Retracemobile has a sanctioning mechanism by which it blocks buyers and sellers access to its website if their actions cause financial loss for the other users.⁸¹² Considering the newly established nature of RetraceMobile and its global website ranking,⁸¹³ it seems that the effect of nonmonetary sanction of blocking the user access policy is minimal. GlobalMarket does not consider any nonmonetary sanctions. Although it audits the suppliers, it does not provide any remedy such as negative review or black listing.

6.5.2.1 Feedback Mechanism

For B2C platform, Amazon has a Feedback and Rating mechanism. It is not clear whether this mechanism is used for the business accounts as well, however, as the policies of B2C apply to B2B as well, it can be assumed that Amazon has considered Feedback mechanism for B2B transactions too. The buyers can leave feedback on whether they received a prompt resolution (if a dispute arose).⁸¹⁴

Amazon is a public intermediary and anyone can join the platform by providing minimal information, such as a bank account and a business registration number. Although it has a Seller Credential Program, the certifications are carried out by third parties such as International Standards Organization.⁸¹⁵ It uses reputation as an enforcement mechanism, through user rating. If the scale of effect of feedback mechanism is not large enough, then reputation mechanism cannot work effectively when high values are at stake. The magnitude of the punishment (which is damage to reputation) is not high enough in high value disputes. While this argument can be applied to traditional public intermediaries, it might not be the case for Amazon. Amazon is a dominant online market intermediary both in regards to the ranking of its

811 Piotr Lewandowski, 'Freight Exchange as European Market for Transport' (2014) *Logistyka*.

812 'Terms and Conditions', RetraceMobile <<https://www.retracemobile.com/terms>> Accessed 7 March 2016.

813 Retracemobile global website ranking is 21,631,962, much higher than the threshold of 1,000,000 ranking that this thesis has considered for popular, successful websites. <<http://www.alexa.com/siteinfo/retracemobile.com>>

814 'About Comments, Feedback, & Ratings', <http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-6?ie=UTF8&nodeId=537806&qid=1455405475&sr=1-6> Accessed 14 February 2016.

815 'Seller Credential Program', <<https://www.amazon.com/gp/aw/help/id=201715970>> Accessed 11 January 2016.

website (its global ranking is 6)⁸¹⁶ as well as the market share. Nonmonetary sanctions under such circumstances are more effective. Hence, a positive value will be given to Amazon's Feedback and Review Mechanism.

Alibaba, If a supplier is involved in a dispute and has not been cooperating or complying with the outcome of the dispute resolution center, the record of the complaint appears on its public company profile on Alibaba. The effectiveness of this mechanism is reliant on the (reputational?) cost that the supplier incurs due to such sanction. If the cost is more than the value of the dispute, then such mechanism can be effective to compel the supplier to engage with the dispute resolution process and to comply with the outcome voluntarily.⁸¹⁷

The cost of such public sanction relates to the position of the market intermediary as a dominant market. If the supplier can easily move to another online market intermediary platform, the cost of such sanction is not high enough. Moving easily to another platform depends on the dominant market position of the OMI. If the OMI is dominant enough in the market, it might be more costly for the supplier to move to another platform which is less dominant and does not have a strong network of buyers. Alibaba however as was stated is a dominant market specially in among Chinese Online Market Intermediaries. Therefore a positive value of one will be given to the nonmonetary sanction of No complaint status. HQEW considers feedback mechanism for both buyers and sellers.⁸¹⁸ DHgate has a feedback mechanism in place and a seller rank evaluation, which considers the number of disputes the intermediary has been involved in and the number of positive feedback ratings.⁸¹⁹ At MIC, the feedback mechanism exists as a form of publishing the records of the breach on the website. If a member is in breach of any items of the Agreement or other terms, regulations and policies for the uses of any Service, according to the legally effective judgments or orders of the people's court verify or FOCUS' suspicion at its sole discretion, FOCUS reserves the right to publish the records of such breach on its website and arrange for

816 'Based on Alexa Ranking', < <http://www.alexa.com/siteinfo/amazon.com>> Accessed 15 February 2016.

817 Andrew Minalto, 'Alibaba's Scam Exposed', <<http://andrewminalto.com/alibaba-scam-exposed/>> Accessed 7 March 2016.

818 An example for HQEW feedback system is available at <<http://mingarhk.hqew.net/Evaluate.html>> Accessed 5 March 2016.

819 'Merchants Seals', < <http://www.dhgate.com/promotion/all/DMRS.html>> Accessed 7 March 2016.

other appropriate treatments.⁸²⁰ RetraceMobile, Toadlane and Globalmarket do not have any kind of feedback mechanisms. Teleroute provides Star Index, which works as a feedback mechanism. It also has preferred and non-preferred partners. The more the suppliers are on the preferred list of the buyers, the higher number of reviews they receive.⁸²¹

6.5.2.2 Black List Policy

Blacklist policy is a policy that bans the non-complying party from the platform. In Amazon, if the supplier does not participate in dispute resolution process, under the A-to-Z guarantee program, the lack of participation can affect the Reserve policy (the amount of money that Amazon requires the seller to put in reserve to implement the guarantee program might be affected). Moreover, excessive claims and disputes might lead to warning, suspensions, or account termination.⁸²² Considering the popularity of Amazon as a platform, the cost of sanction from the platform and termination of account might be higher than complying with the award, hence a positive value will be assigned to Amazon's black list policy. In sever cases of breach of contract by the supplier, Alibaba has a black list policy.⁸²³ Similar to non-complaint status, black list policy effectiveness depends on private or public nature of the intermediary and the dominance of the market. Being black listed on a dominant market intermediary can be costly for the supplier. The black list policy is based on penalty points.⁸²⁴ The more penalty points the suppliers receive the more they are prone to be black listed. A positive value of 1 will also be assigned to Black list policy due to the dominance of Alibaba. HQEW has a black list policy which imposes sanctions on the non-complying party. Article 27 of the "Fraud and Dispute" policy predicts that in case of breach of contract or default on behalf of both buyers and sellers, HQEW shall have the right to immediately terminate

820 Clause 8.4, 'Terms and Conditions' <<http://www.made-in-china.com/help/terms/>> Accessed 7 March 2016.

821 'Star Index Program' <http://teleroute.com/en_en/teleroute-freight-exchange/safe-market-place-programme/star-index> Accessed 7 March 2016.

'Debt Mediation', http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

822 'Amazon A-to-z Guarantee Policy for Sellers', < <https://payments.amazon.com/help/201212330>> Accessed 11 January 2016.

823 'Definition of Dispute and Resolution by Alibaba.com', <<http://rule.alibaba.com/rule/detail/2060.htm>> 3 May 2016.

824 'Rules for Enforcement Action against Non-Compliance of Transactions on Alibaba.com' <<http://rule.alibaba.com/rule/detail/3310.htm>> Accessed 7 March 2016.

seller's account and publish the records of such termination on the HQEW website.⁸²⁵ DHgate also has a black list policy in which it assigns points to the sellers based on the number of disputes they receive within 90 days and consider a specific punishment for each state.⁸²⁶ The buyers can also be blacklisted and if blacklisted the buyer will not be permitted to use a credit card to pay for purchase.⁸²⁷ In MIC, black list policy also exists through suspension or sanction from the online platform. According to clause 8.4 "If the Member is in breach of any items of this Agreement or other terms, regulations and policies for the uses of any Service, [...] FOCUS reserves the right to publish the records of such breach on the website, and make other appropriate treatments, including but not limited to termination of Service, prohibition of the use of Made-in-China.com permanently."⁸²⁸ Toadlane and RetraceMobile do not have black list policy. Teleroute has set up an International Security Panel of Judges that get involved with sanctioning those that breach the code of conduct, analyze all claims, incidents and events identified by customers. The primary task of the International Business Security Panel is to manage conflicts between members, linked to breaches of the Terms and Conditions, Code of Conduct or international laws. Anyone found to be in breach or behaving unethically may be sanctioned and be temporarily or permanently excluded from the platform.⁸²⁹ GlobalMarket does not provide termination of membership as a sanction mechanism

825 Article 27 and 28 of Fraud and Dispute Policy. "If the seller or both of the buyer and the seller should be responsible for the default, Hqew.net shall have the right to immediately terminate the seller's account(s) on the Hqew.net Site without refunding the membership subscription fees or other service fees (including the Gold Supplier Account(s) and other Value Added Services Accounts). Hqew.net shall also have the right to publish the record of such termination on the Hqew.net Site and/or other media channels.

If a settlement has been reached between the parties to the dispute, and the buyer retracts the complaint against the seller, Hqew.net shall have the right to exempt the seller from the penalty of terminating the account(s), unless the buyer's retraction of complaint has been found due to on the seller's inducement, threat, or coercion.

Article 28.If the buyer or both of the buyer and the seller should be responsible for any defaults, Hqew.net shall have the right to immediately terminate the buyer's account(s) on the Hqew.net Site without refunding any membership subscription fees or other service fees (including the Gold Supplier Account(s) and other Value Added Services Accounts). Hqew.net shall have the right to publish the records of such termination on the Hqew.net Site and/or other media channels. Where the dispute is that the buyer did not pay the order, if the buyer subsequently fulfilled the payment obligations, then Hqew.net shall have the right to exempt the buyer from the penalty of terminating the account(s).

'Fraud and Dispute Policy', <[http://www.hqew.net/article/showdetails-Fraud-\\$26-Dispute_14762.html](http://www.hqew.net/article/showdetails-Fraud-$26-Dispute_14762.html)> Accessed 7 March 2016.

826 'Policy', <http://seller.dhgate.com/policy/11080301/p75604/t0.html#cms_协议纠纷-list-14> Accessed 7 March 2016.

827 'What is an account'<http://help.dhgate.com/help/buyerhelpen.php?artid=DD74319ECA5A8CEDE04010AC0C645375&catid=3803#help_php-searchmiddel-1> Accessed 7 March 2016.

828 'Terms and Conditions' <<http://www.made-in-china.com/help/terms/>> Accessed 7 March 2016.

829 'Safe Market Place Program', < <http://teleroute.com/en_en/teleroute-freight-exchange/safe-market-place-programme/international-business-security-panel> Accessed 7 March 2016.

The OMIs' Effectiveness										
Effectiveness	Reasoning for Coding	Amazon	Alibaba	HQEW	Dhgate	MIC	Toadlane	RetraceMobile	Telero ute	GlobalMarket
Ex-Ante arrangement for escrow mechanism	Agreed ex-ante by the service agreement	1	1	0	1	0	1	1	0	0
The magnitude of feedback mechanism	If dominant platform value of 1- if not value of zero	1	1	1	1	1	0	0	1	0
The magnitude of black list policy	If dominant platform value of 1- if not value of zero	1	1	1	1	1	0	0	1	0

6.6 OMIs and Efficiency

The efficiency of OMIs' dispute resolution can be measured based on the time and cost of the process. Since most OMIs provide justice systems without any charge, those OMIs, which charge the customers, will be given a value of zero for cost-efficiency. If the average time of the dispute resolution process does not exceed the median of 15 days, which is the median of days that takes for all the B2B intermediaries studied in this thesis, to resolve disputes, then it will be assigned a value of 1 if not, it will be assigned a value of 0.

6.6.1 Cost

Amazon, Alibaba, HQEW, DHgate and GlobalMarket provide the dispute resolution free of charge. RetraceMobile, Toadlane, Teleroute and MIC charge their customers for dispute resolution. RetraceMobile and Toadlane use the same payment intermediary and dispute resolution mechanism, ArmorPayment. ArmorPayment's service is free for the first time users. If it goes to arbitration then the fee is covered by Armorpayment for the first time dispute and for subsequent disputes, a flat fee of 175 USD will be charged.⁸³⁰ The overall cost of mediation includes the cost of proceeding (€10) and the 30 Euros which will be charged, if the case is closed successfully. Hence overall, parties pay 40 Euros.⁸³¹ Made-in-China provides its dispute resolution program as a part of the STS escrow mechanism. The free members have to pay 20 USD for each transaction, in order to be able to use the service. The premium and gold buyers have free access to dispute resolution once and twice a year respectively, which means that they will have to pay for STS service if they file disputes more than twice a year.

830 'Dispute Management' <<http://www.armorpayments.com/escrow/dispute-management-faq>> Accessed 7 March 2016.

831 'Special Terms and Conditions Debt Mediation', (11 October 2013, Wolters Kluwer Transport Services) <http://www.wktransportservices.com/frontend/files/userfiles/files/DEBT_MEDIATION_EN.PDF> Accessed 7 March 2016.

6.6.2 Duration

Amazon sets out a timeline for resolving disputes. The overall process, under the Buyer Dispute Program, takes a maximum of 45 days or more (which is more than the median of 15 days).⁸³² In Alibaba, when a dispute arises, the buyers and sellers have 30 days to negotiate and resolve the issue amicably; if they do not reach a settlement, then they can notify Alibaba. Alibaba will notify the respondent within two days of receiving the dispute. Both the respondent and claimant have 7 days to file the dispute. Alibaba indicates that it will resolve the dispute and make a decision within a maximum of 45 days.⁸³³ The median of resolution of a dispute among the studied intermediaries is 15 days, 45 days is more than such median therefore a value of 0 will be assigned. The duration of the dispute resolution is not clearly indicated in HQEW. There are no timelines as to when approximately the parties will receive the award. Therefore, a value of 0 will be given to the duration of dispute resolution process. The DHgate Resolution Center will provide a solution to the buyer's case within 10 business days of the date the dispute has been received by DHgate Resolution Center.⁸³⁴ According to the STS terms clause 10.3, the dispute resolution duration should be in accordance with the transactional terms and conditions. These terms and conditions are unknown or can be carried out by the parties. After 20 days of the issuance of the award, MIC will enforce the award if it has not received any notice from either of the parties that they have filed a dispute at an arbitration center or at court. As the overall duration is not clear and it depends on the parties to set a time limit, a negative value will be given to the duration of the dispute resolution process. Toadlane and RetraceMobile dispute resolution duration is 5 days. The overall duration of Teleroute dispute resolution is not

832 'Buyer Dispute Program', <<https://payments.amazon.com/help/201212350>> Accessed 15 February 2016.

833 8.1 Alibaba.com will notify Buyer and Supplier of the dispute within 2 business days from the receipt of notice of the dispute (Buyer and Supplier are however not restricted from contacting Alibaba.com to provide the supporting documents during this notice period).

8.2 Each of Buyer and Supplier must submit the supporting documents to support and/or defend the claim within 7 calendar days of Alibaba.compliance of dispute. If either Buyer or Supplier fails to provide all or part of the supporting documents within the above time period, Alibaba.com may proceed to make its decision based on the available documents.

8.3 Unless there is any special circumstance, Alibaba.com should make its decision within 45 calendar days from its receipt of notice of dispute Alibaba Transaction Services Agreement, <<http://rule.alibaba.com/rule/detail/2058.htm>> Accessed 7 March 2016.

834 'Return and Refund Policy', <http://help.dhgate.com/help/buyerhelpen.php?catid=3302&artid=D364B2DE1CADD9F5E04010AC0C644F06#help_php-indexrelat-1> Accessed 7 March 2016.

indicated in terms and conditions, hence a value of zero will be given to duration, as it creates uncert

about the duration of the proceeding. At GlobalMarket, the whole duration of the negotiation and dispute resolution proceeding is 25 days. The buyer can file the dispute after 3 days, negotiate with the seller for 5 days, then submit it to GMC (the dispute resolution provider), it takes GMC up to 5 days to provide a resolution and the outcome will be enforced within 7 days.⁸³⁵

The OMIs' Efficiency										
Efficiency	Reasoning for Coding	Amazon	Alibaba	HQEW	Dhgate	MIC	Toadlane	RetraceMobile	Teleroute	GlobalMarket
Overall Duration	Less than or equal to 15 days	0	0	0	1	0	1	1	1	0
Overall Costs	If it is free value of 1 if not value of 0	1	1	1	1	0	0	0	0	1

⁸³⁵ 'Buyer Protection', <<http://www.globalmarket.com/gmportal/order/buyerProtection/detail.gm#DoubleCheck>> Accessed 7 March 2016.

6.7 Empirical Results and Discussion

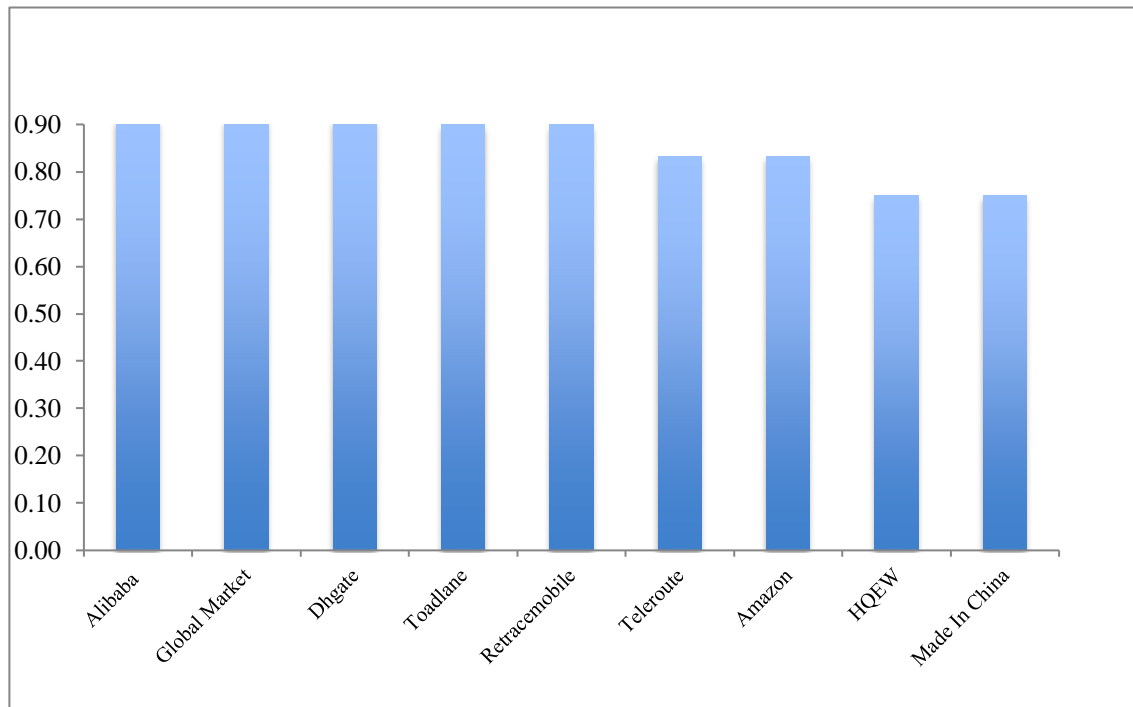
The empirical results in this section will be provided based on the results of all the empirical studies in each case study. The result of the empirical research will be laid out in terms of accessibility, neutrality, efficiency and effectiveness of OMIs dispute resolution and illustrated in charts. Each section discusses the case studies results, and the final Section provides insights into the adherence of OMIs to procedural justice as a whole.

6.7.1 OMIs' Empirical Results and Accessibility

The accessibility of the OMIs' dispute resolution mechanisms is at an acceptable level; this is due to the fact that all of the OMIs accept e-filing, do not need legal representatives, do not need a participation fee, do not require public hearing, accept online evidence and the language of the dispute resolution is the language in which the transaction had been carried out.

Most OMIs provide an accessible dispute resolution based on the information provided in their service agreement. Looking at the most accessible OMIs, it can be realized that two elements have an effect on enhancement of accessibility: 1. The OMIs should not be able to reject the disputes at their own discretion; 2. The OMIs' waiting period for filing disputes should be decreased.

Accessibility of OMIs' Disput Resolution



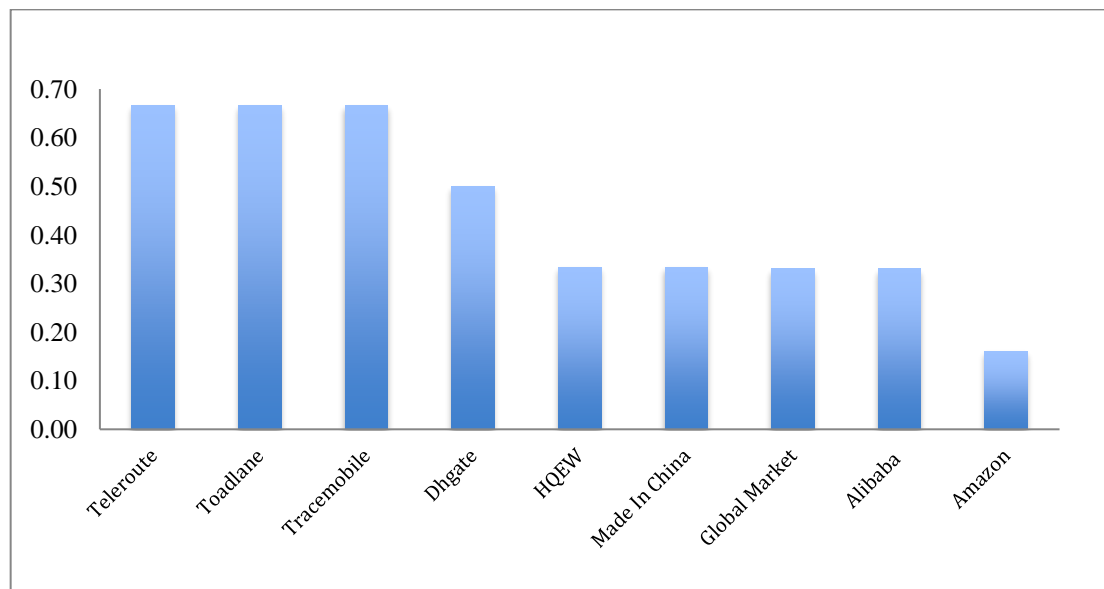
Source: the author

6.7.2 OMIs' Empirical Results and Neutrality

The neutrality of Teleroute, Toadlane and RetraceMobile has scored high among all. They have scored higher than 0.5 with a differential factor of 1.666. Most of other OMIs have scored 0.5 and three have scored under 0.5. The probable lack of neutrality in these B2B intermediaries arises from several factors: They are producers themselves; they have a biased fee structure and receive fee from one side of the market; they receive commission from each transaction, hence those that carry out more transactions are at an advantage and in most of the cases their dispute resolution mechanisms' outcomes cannot be challenged in court, hence there is no oversight of their dispute resolution process. Amazon and HQEW are two of the least neutral dispute resolution providers, due to the fact that they are producers themselves and they do not refer the parties to a third party to remedy the possibility of lack of neutrality; moreover, they receive a commission on each transaction. Teleroute, on the other hand, has received a higher score because it receives a fee from both sides of the market and does not receive a commission based on each transaction.

It can be concluded from the results that intermediaries that refer the disputing parties to an external justice system for resolving disputes can maintain the neutrality of the dispute resolution mechanism better than others, especially those that have a line of products themselves.

Neutrality of OMIs' Dispute Resolution



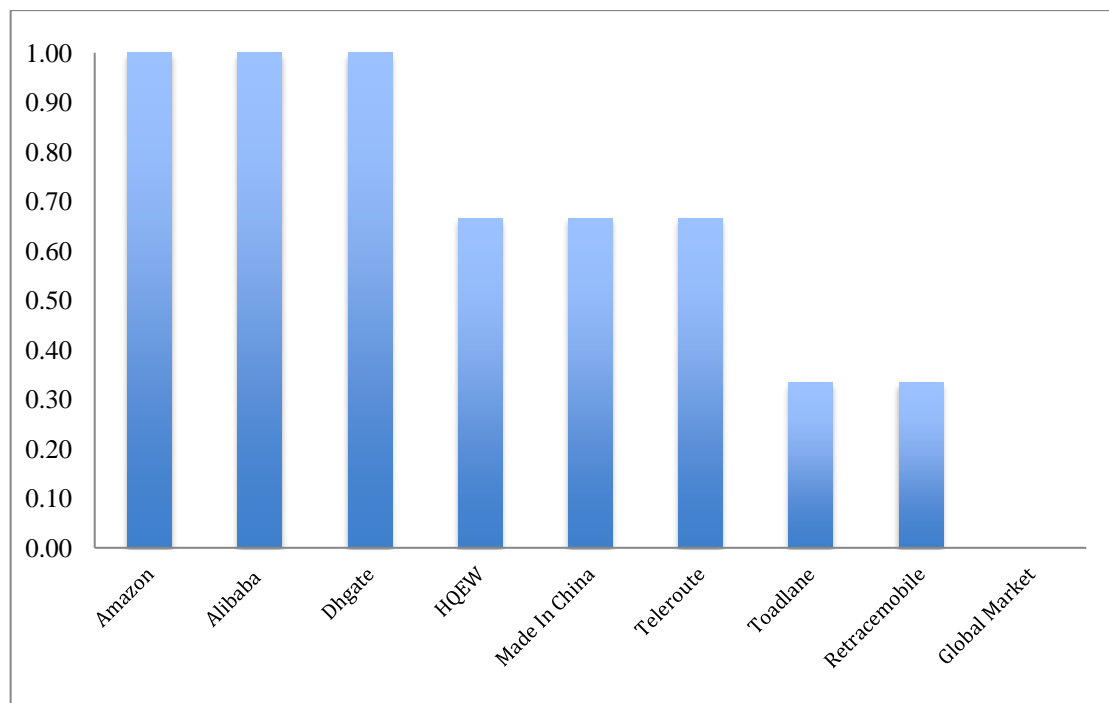
Source: the author

6.7.3 OMIs' Empirical Results and Effectiveness

The effectiveness of OMIs' dispute resolution mechanism rest upon having an ex-ante escrow mechanism agreement and an effective reputation mechanism. As it can be seen from the chart below, Amazon, Alibaba and DHgate provide the most effective dispute resolution mechanisms as they oblige the parties to use their payment services when carrying out transactions and they are dominant in the market, hence the cost of being sanctioned from their platforms or receiving a bad review and being blacklisted might be more effective than other platforms. HQEW, Made in China and Teleroute do not score as high as the abovementioned platforms due to their policy on using a payment service. Teleroute does not provide any payment service, whereas HQEW and Made In China's usage of escrow mechanism is voluntary. Toadlane and RetraceMobile have scored 0.33. Although they have an escrow mechanism in place, they do not have an

effective reputation mechanism, which hampers the effectiveness of their dispute resolution outcome. GlobalMarket’s dispute resolution mechanism’s effectiveness has scored zero due to the fact that although it has a payment intermediary, the parties are not obliged to use it in their transactions. It also does not consider a reputation mechanism for the parties or provide sanctions from the platform in case of breach of contract.

Effectiveness of OMIs Dispute Resolution



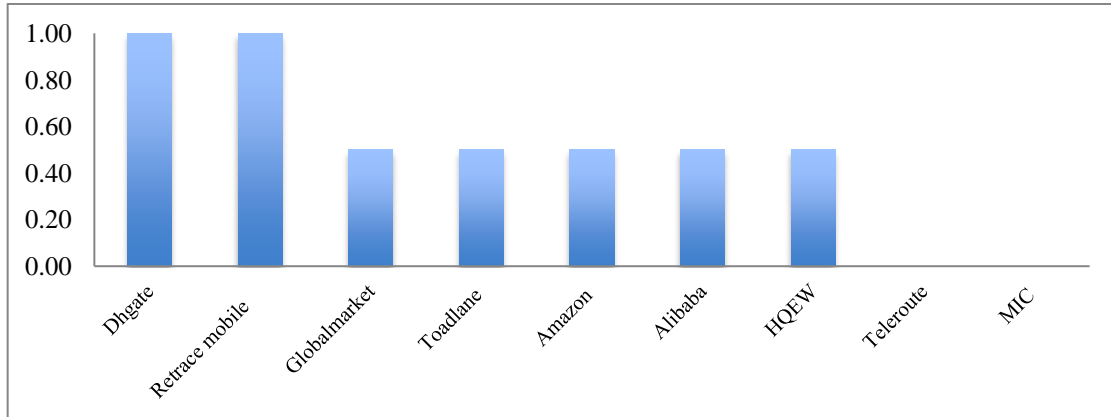
Source: the author

6.7.4 OMIs’ Empirical Results and Efficiency

The efficiency of the OMIs dispute resolution was based on their overall cost and duration. The results yielded that some of the OMIs indicate the overall costs and duration of the dispute resolution process in their policies and in comparison with the duration of other intermediaries’ dispute resolution, they allege that it takes as little as 5 days to issue a dispute resolution outcome and enforce the award. Some (Teleroute and HQEW), however, do not explicitly state any time limit for how long it takes to resolve the dispute. The lack of indication of duration and cost hampers the efficiency of their dispute resolution processes. The other OMIs, while indicating time and cost, score lesser as they (e.g. Toadlane and RetraceMobile) charge the users. Although it is

a minimal charge of 175 USD after the first dispute, they still score lesser than others, as most other intermediaries do not charge their users for resolving disputes.

Efficiency of OMIs' Dispute Resolution

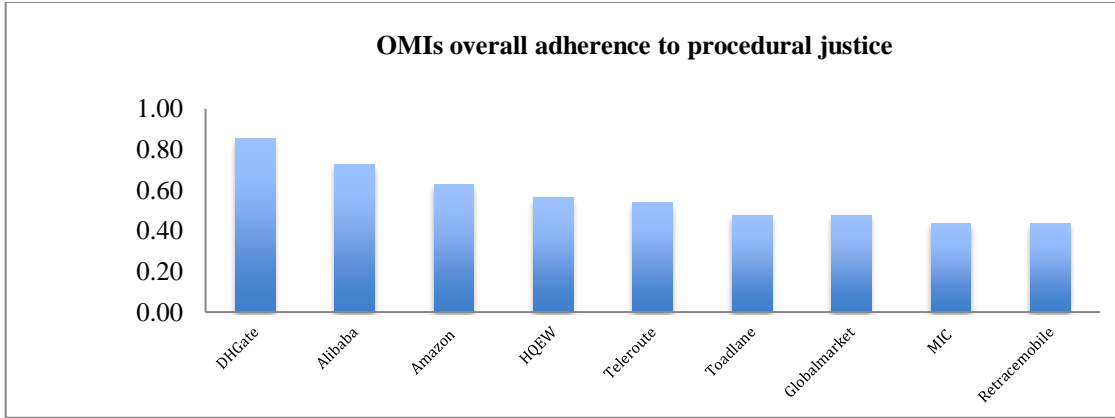


Source: the author

6.7.5 The Overall Adherence of OMIs to Procedural Justice

The overall adherence of OMIs to procedural justice illustrates that the more dominant and well established intermediaries with more members score higher than other intermediaries in the probability of adhering to procedural justice.⁸³⁶ This can be seen from the high scores received by DHgate, Amazon and Alibaba. DHgate, in comparison to Amazon and Alibaba, scores high on effectiveness and efficiency. Amazon falls short in neutrality and Alibaba on accessibility.

⁸³⁶ Some indicators of success of these intermediaries are as follows: Amazon, Alibaba and DHgate have the highest website ranking among the intermediaries. Amazon ranking is 6, Alibaba is 60 and Dhgate is 1260. The website ranking is extracted from www.alexa.com. Amazon and Alibaba are among the biggest OMIs in the world. See 'A Comparative Look At The Valuation Of Amazon, Alibaba and eBay' <<http://www.forbes.com/sites/greatspeculations/2015/10/09/a-comparative-look-at-the-valuation-of-amazon-alibaba-and-ebay/#3cf58d4b747e>> Accessed 16 March 2016.



Source: the author

7 Incentives and Deterrents for OMIs to Adopt Procedural Justice

In her seminal work on understanding institutional diversity, Ostrom asserts that those monitoring a certain interaction face real incentives to apply fair and accepted penalties consistently.⁸³⁷ Drawing on this assertion, there might be certain incentives for OMIs to provide procedural justice and produce fair outcomes. Nevertheless, there might also be deterrents for OMIs to provide a justice system that upholds procedural justice. This chapter intends to find out what incentivizes or deters online market intermediaries in adopting a justice system that provides procedural justice.

To understand such incentives and deterrents, this research considers market, regulation and private contracts. Where appropriate, it applies the theory of transaction costs economics to the OMIs and their dispute resolution mechanisms. In transaction costs economics, Williamson looks at why there are firms and why different activities are combined in one firm. Williamson theorizes that firms choose a certain governance mechanism, either hierarchical or hybrid, based on the attributions of the transaction which affect transaction costs. These attributions are namely asset specificity (whether the value of assets substantially changes in case of breach of contract), the frequency of interactions between the parties and the degree of uncertainty surrounding the transaction.⁸³⁸ Depending on the attributions, the firms choose a governance mechanism that minimizes transaction costs. The transaction costs theory also relies on three assumptions: that firms are risk neutral, that they are rationale actors and that they avoid opportunism.⁸³⁹

The transaction costs economics theory comes to the fore in this research when analyzing whether firms have enough incentives to provide certain governance structures that implement dispute resolution. This research primarily focuses on the governance structure of online market intermediaries; however, some attention will also be paid to the two other players: supplier and buyers and their incentives to use the

837 Ostrom, *Understanding Institutional Diversity* 21.

838 Oliver E. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' (1979) 22 *Journal of Law and Economics* 233.

839 Oliver E Williamson, *The Economic Institutions of Capitalism* (Simon and Schuster 1985).

intermediary. Governance structure, within the context of this research, means whether the intermediaries, firstly, implement a dispute resolution mechanism within the structure of the firm and secondly, which factors can potentially induce them to do so and third which factors can affect their decision to uphold procedural justice. Using transaction costs economics, some of the deterrent factors can also be identified as to why firms choose a dispute resolution mechanism and why they might not uphold procedural justice.

The transaction costs theory is also aligned with the ‘incentive theory’, which asserts that the efficiency of courts is upheld by the incentives of the participants in the dispute resolution process, i.e. the judges, the claimant and defendants and the lawyers. When the participants have the wrong incentives, for example the decision makers do not mind the delay in the process and the defendant’s incentive is in prolonging the process and not enforcing the award. To create the right incentive for the courts that lead to efficiency is to provide time limits and provide losers pay rule, i.e. it changes its governance structure to reduce transaction costs.⁸⁴⁰

In OMIs, the incentives are sometimes different than that of courts. As the design of the OMIs changes the incentives of the participants in dispute resolution to provide a justice system or uphold procedural justice, it is important to consider the design and the incentives that are specific to such intermediaries and their participants in the dispute resolution system. This research looks at the OMI’s incentives through three lenses of the market, regulation and contract.

7.1 OMIs and the Market

OMIs provide contractual certainty for their users by providing services such as dispute resolution. Some market incentives might encourage the OMIs to adhere to procedural justice while resolving disputes between buyers and suppliers. Market factors that incentivize an OMI to implement a dispute resolution mechanism and uphold procedural justice can be divided into: competition, reducing transaction costs, trusts,

⁸⁴⁰ Djankov and others, ‘Courts’.

network externality and remedying power imbalance. Each of these factors will be substantiated below.

7.1.1 Competition

Competition, as Law and Economics scholars proclaim, is a factor that induces various legal systems to evolve and uphold the criteria that their users value.⁸⁴¹ Buscaglia observes that the competition between public and private alternative dispute resolution (ADR) providers acts as a factor for enhancing the efficiency of these processes and induces these providers to incorporate their users' perception of justice.⁸⁴² This also applies to the realm of lawmaking. Competition between different legal systems provides more efficient rules. This phenomenon, which is known as the market for rules, grants an opportunity to users to have access to a larger pool of legal (or non-legal) rules through forum shopping and enlarges the set of rules that could be used in any given transaction.⁸⁴³ Regarding adjudication it's been argued that "increasing competition among courts (between international dispute resolution providers) will continue to constrain international judicial power and enhance their independence more effectively."⁸⁴⁴

In dispute resolution context, the dispute resolution providers that set or adopt the rules for the dispute resolution process are then obliged to follow a set of rules that are often chosen by the parties to the dispute. It is not clear whether competition between the intermediaries will lead them to provide a justice system that upholds procedural justice. The first necessary element for upholding procedural justice is to provide a dispute resolution mechanism. However, contrary to what has been asserted about competition, not many intermediaries adopt a justice system. There is no causation between their successes and whether they adopt a justice system. Colin Rule, in 2002, proclaimed that the failure of B2B online market intermediaries was partially due to

841 Yves Dezalay and Bryant Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29 *Law & Soc'y Rev* 27.

842 Buscaglia, *Law and Economics in Developing Countries* 84.

843 Djankov and others, 'Courts'

844 Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 *Arbitration International* 495, Jacob Katz Cogan, 'Competition and Control in International Adjudication' (2007) 48 *Va J Int'l L* 411, 416.

their lack of access to redress mechanisms.⁸⁴⁵ However, evidence shows that this might not be the case. This was evidenced through studying 118 OMIs. Out of 118 B2B OMIs only 9 provided a dispute resolution mechanism as the chart below illustrates.

Most OMIs are Infointermediaries (those that do not provide sanctions mechanism as described in Chapter 2 section 4) that do not provide justice systems for their users. This might be due to the fact that, while the customers are more willing to pay Enfointermediaries (Enforcement Intermediaries that get involved with sanctioning and providing enforcement mechanisms) a higher commission than Infointermediaries, the upfront investment is much higher and competition against newcomers can decrease the Enfointermediary's life expectancy.⁸⁴⁶

To restate an earlier proposition, it is generally believed that competition can lead to evolving law and policies. If this assertion is applied to OMIs, then more uniform policies to the resolution of disputes among B2B OMIs should be observed. However, as it was illustrated in the case studies in Chapter 6, the policies of OMIs are varied and their dispute resolution mechanisms have various designs; hence, evolvement and adoption of one policy have not taken place. Some OMIs do not provide justice systems, some provide only non-binding dispute resolution methods, and some refer the parties to a third party decision maker. While competition among OMIs might not be an incentive for providing dispute resolution and upholding procedural justice, OMIs that already provide dispute resolution systems might have an incentive to uphold procedural justice in order to maintain their customers. According to a study by Rule on the buyers that were involved with disputes on eBay, only those that faced delays in handling the dispute, which affects accessibility, decreased their activities on the platform.⁸⁴⁷ However, this has not resulted in the harmonization of procedures. Unified trends by which the OMIs resolve disputes can only be found in very successful OMIs such as Alibaba and Amazon. However, adoption of a dispute resolution mechanism that follows the most successful OMIs policies has not taken place.

⁸⁴⁵ Rule, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* 124. Colin asserted that: "B2B didn't survive partially due to lack of access to redress mechanisms" .

⁸⁴⁶ Dixit, *Lawlessness and Economics: Alternative Modes of Governance* 110.

⁸⁴⁷ Rule, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* 124.

The competition also did not result in adherences to procedural justice in other areas of online dispute resolution, such as ODR providers for domain name disputes. Internet Corporation for Assigned Names and Numbers (ICANN) developed a set of policies, Uniform Dispute Resolution Policy (UDRP) to resolve the disputes regarding domain names. Various ODR providers were established that adopted UDRP as a harmonized rule and provided dispute resolution for domain names disputes. The general assumption was that the competition between these providers could lead to evolvement and fairer outcome, however several scholars empirically rejected the assumption.⁸⁴⁸ Similar to other ODR cases there is no evidence that competition between the intermediaries works as an incentive to provide procedural justice or a justice system.

7.1.2 Reducing Transaction Costs

Transaction costs economics originates from the theory of transaction costs that was put forward first by Ronald Coase. He asserted that “in order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on which terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed in to make sure that the terms of the contract are being observed and so on.”⁸⁴⁹ Taking up the transaction costs theory, Williamson shaped the theory of Transaction Cost Economics. Transaction Costs Economics emerged in the 1970s as a methodology to analyze how the governance of economic organization affects the economic value and predict why firm carry out certain behavior and adopt certain governance mechanism.⁸⁵⁰

Williamson defines transaction costs as the ex-ante and ex post costs of contracting. Ex-ante transaction costs include the costs of drafting, negotiating and safeguarding an agreement. Ex post transaction costs include the maladaptation, haggling, governance

⁸⁴⁸ Cho, *International Commercial Online Dispute Resolution: Just Procedure through the Internet*, Mueller, ‘Rough Justice: A Statistical Assessment of Icann’s Uniform Dispute Resolution Policy’, Jay P. Kesan, ‘The Market for Private Dispute Resolution Services- an Empirical Re-Assessment of Icann-Udrp Performance’.

⁸⁴⁹ Ronald Coase, ‘The Problem of Social Cost’ in Donald Wittman (ed), *Economic Analysis of the Law: Selected Readings* (John Wiley & Sons 2003) 10.

⁸⁵⁰ Williamson, *Markets and Hierarchies*, and Jay P. Kesan, ‘The Market for Private Dispute Resolution Services- an Empirical Re-Assessment of Icann-Udrp Performance’.

and other costs that arise when contract execution is misaligned as a result of gaps, errors, omissions and unanticipated disturbances.⁸⁵¹

In the commercial context, market intermediaries' primary goal is to provide "economic efficiency" by reducing transaction costs.⁸⁵² Based on Williamson abovementioned definition, transaction costs consist of search costs, information costs, bargaining costs, decision costs, policing costs and enforcement costs. Intermediaries reduce the transaction costs by facilitating coordination, negotiation and provision of information.⁸⁵³ They reduce the transaction costs ex-ante by reducing "the costs of drafting, negotiating, and safeguarding an agreement."⁸⁵⁴ They can also reduce transaction costs by providing ex post remedies, in case the contract fails.

After the transaction takes place, when the contract fails to respond, there are costs associated with the set up and operating costs of structures for dispute resolution and bonding costs of effective and secure commitment. Intermediaries can reduce these costs by laying out the structure of dispute resolution system and put in place effective remedies in case of breach of contracts.

The reduction of transaction costs of contracting, negotiation and dispute resolution is especially important for small and medium sized enterprises. The transaction costs of negotiating individual contracts and transaction agreements are especially high for these enterprises. They do not have the experience of larger corporations and most of the time, this will force them to rely on public courts. In international trade, relying on public courts can be very costly; hence, they are deterred from entering the market unless they find a forum that can provide them with lower transaction costs and provide equal access to a dispute resolution forum. Therefore, market intermediaries have the advantage of attracting SMEs if they provide appropriate dispute resolution mechanism. As Buscaglia states, smaller firms look for fewer delays in the dispute resolution process and a forum that can remedy the power imbalance, make the

851 Oliver E Williamson, *The Mechanisms of Governance* (Oxford University Press 1996) 379.

852 Steven L Schwarcz, 'Private Ordering' (2002) 97 Northwestern University Law Review 31.

853 Williamson, *The Mechanisms of Governance* 379. Cosimano, 'Intermediation'; MBA Hope Koch, 'Business-to-Business Electronic Commerce Marketplaces: the Alliance Process' (2002) 3 Journal of Electronic Commerce Research; Sanjay Gosain and Jonathan W Palmer, 'Exploring Strategic Choices in Marketplace Positioning' (2004) 14 Electronic Markets 308.

854 Williamson, *The Mechanisms of Governance*. 379.

procedure more neutral and level the playing field as to the expertise and negotiating power.⁸⁵⁵

Moreover, implementing a dispute resolution mechanism that upholds procedural justice by the intermediary can enhance contractual certainty. As it was stated before, if procedural justice is maintained during a dispute resolution process, the parties are more likely to abide by the outcome.⁸⁵⁶ Procedural justice increases the chances that the parties voluntarily enforce the outcome and do not take matters to court, which enhances certainty and reduces transaction costs of dispute resolution for the parties. Intermediaries provide a less costly and less time consuming dispute resolution mechanism compared to court, which will also reduce the transaction costs for them.

The use of dispute resolution for reducing transaction costs is mostly seen in payment intermediaries. They sometimes use the dispute resolution mechanism as a strategy to attract customers. For example, SafeFunds, an escrow system mechanism states that its service is more transparent, as it provides information about dispute resolution and how the disputes are resolved.⁸⁵⁷

In conclusion, the better procedural justice is upheld, the more successfully the intermediary can reduce transaction costs of dispute resolution for the parties ex post. Reduction of transaction costs for customers can maximize profit for the intermediary and achieve more economic efficiency. However, there are costs associated with providing a justice system that upholds procedural justice. This will in turn affect the cost of maintaining the intermediary. As a result, not many OMIs provide a justice system for their users and the parties have to come up with their own means of dispute resolution and contractual enforcement.

855 Buscaglia, *Law and Economics in Developing Countries* 85.

856 Tom R Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 *International journal of psychology* 117. Tyler asserts that "review of recent research demonstrates that people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair. Studies of procedural justice judgements further suggest that people evaluate fairness primarily through criteria that can be provided to all the parties to a conflict: whether there are opportunities to participate; whether the authorities are neutral; the degree to which people trust the motives of the authorities; and whether people are treated with dignity and respect during the process."

857 How SAFEFUNDS Works - More Detail < <http://safefunds.com/detail.html>> Accessed 4 March 2016.

7.1.3 Trust

Trust is a means that can reduce transaction costs. Trust between the parties can lead to less costly contract negotiations and low threshold safeguards. Trust in the intermediaries incentivizes the intermediaries to uphold procedural justice, as such trust brings more users to the intermediaries. This section first lays out the economics of trust and how it affects transaction costs in firms in general and in dispute resolution in particular. It will then move on to consider the trust between the parties and in the OMI and consider how its existence or non-existence can play a role in the provisioning of dispute resolution and upholding procedural justice.

7.1.3.1 The Economics of Trust

To understand the economics of trust, the first step is to investigate where trust is located within the governance of a firm. Williamson provides a spectrum of a firm's behavior and how firms change their behavior based on various situations. He provides 4 kinds of governance structures within the contractual schema: at the beginning of the spectrum is the unassisted market which does not predict any safeguards and relies on courts for ensuring commitments. Another governance mechanism is an unrelieved hazard in which the firms do not consider any kind of safeguards. On the third governance structure, the firms consider additional safeguards. In the fourth and final part of the spectrum if the cost of additional safeguards is too high, the firm might decide to take the transaction out of the market and organize it under a hierarchy (unified ownership, vertical integration).⁸⁵⁸ It is important to note that the price under which the suppliers offer their merchandise in hybrid form of governance with safeguards will be less than the price that it offers in unrelieved hazard structure with no safeguards.⁸⁵⁹

However, what Williamson did not consider in the suggested spectrum is the element of trust and how it affects costs. Trust might have a similar effect to other safeguards on reducing transaction costs and might also affect the price of which the supplier offers its merchandise. If trust is an element existing within the spectrum then the governance structure might not predict other safeguards against breach and lack of

⁸⁵⁸ Oliver E. Williamson, 'The Economics of Governance' (2005) 95 *The American Economic Review* 1, 12.

⁸⁵⁹ Williamson, 'The Economics of Governance', 12.

cooperation. In the face of opportunism contracts have to be laden with safeguards that are designed to protect each party from the opportunistic behavior of the other. Such safeguards are costly and include costs associated with negotiation, drafting and monitoring contracts. This also includes negotiations over dispute resolution mechanisms in case of conflicts. Trust, ex-ante to the dispute, decreases negotiating costs by fostering an approach to negotiations in which actors are cooperative and quick to come to a resolution, rather than a technical type approach in which actors are cautious and slow to come to a resolution. Trust decreases drafting costs by allowing contracts to be specified more loosely with the expectation that any ex-ante gaps in the contract will be dealt with ex post in a fair manner. Trust decreases monitoring costs as a result of each party's confidence in the other's performance, even though short-term incentives may favor opportunism. Trust abolishes the need for complex safeguards which increase the transaction costs such as bonding. Moreover, a party's reputation for trustworthiness decreases the costs of finding an exchange partner. Because the costs associated with contractual safeguards and search costs are in fact, transaction costs, trust economizes transaction costs. Trust in transaction costs economics can shift the cost of governance of the firm, this means that in case of the existence of trust, the supplier provides its merchandise at a lower price and the buyer is more likely to enter into the contract. ⁸⁶⁰ As for the Online Market Intermediary, trust can induce more users to use the OMI and carry out transactions on its platform.

The economics of trust illustrates that trust can act as an incentive in two instances for ensuring commitment and cooperation: first trust between the parties and second trust in the market intermediary. The following sections will scrutinize the effect of trust between the B2B parties in market intermediaries and the trust of the suppliers and buyers in the market intermediaries and how existence or lack of trust can play a role in the implementation of a dispute resolution mechanism and upholding procedural justice.

7.1.3.2 Trust Between the Parties

The parties are carrying out transactions on online market intermediaries, especially in public OMIs, in most instances have not dealt with each other before. Hence, trust

⁸⁶⁰ Todd H Chiles and John F McMackin, 'Integrating Variable Risk Preferences, Trust, and Transaction Cost Economics' (1996) 21 *Academy of Management Review* 73, 89.

between the parties is non-existent or minimal. The lack of trust between the parties increases the transaction costs.

By providing several mechanisms for the parties OMIs help reduce the transaction costs incurred due to lack of trust and help the parties to conclude their contracts. In other words, OMIs provide institutional trust for the parties. These mechanisms include: providing contractual certainty by providing effective enforcement mechanisms, providing contractual assistance and providing the terms and conditions of the contract as well as predicting a dispute resolution mechanism that resolves disputes fairly.

This means that OMIs create an institutional trust for the parties by providing a secure environment for transactions and by reducing the transaction costs that are high due to lack of trust, by providing various mechanisms that induce certainty. There are instances when parties participate in B2B e-market transactions and do not have an established relationship, with little or no prior interaction with each other. Because trust may not exist between the parties, the role of the intermediaries is crucial as they normally establish a legal infrastructure by instituting and enforcing fair rules, procedures and outcomes, and if necessary, provide recourse for buyers to deal with a seller's opportunistic behavior. OMIs may refer the parties to a more formal and protective means of redress such as binding arbitration.⁸⁶¹

When there is lack of trust between the parties, the transaction costs are high. By providing dispute resolution mechanisms that uphold procedural justice, OMIs help reduce such transaction costs. This will lead to ensuring that when trust between the parties is weak, they still enter in to contracts with strangers, since the transaction costs are mitigated by the OMIs' dispute resolution system.

7.1.3.3 Trust in the Intermediary

Trust reflects technical competency and fiduciary obligations and it is based on predictability, past behavior, dependability and fairness.⁸⁶² Trust can be generated by various factors and its primary role is to reduce transaction costs. For example,

⁸⁶¹ Paul A Pavlou and David Gefen, 'Building Effective Online Marketplaces with Institution-Based Trust' (2004) 15 *Information Systems Research* 37, 44.

⁸⁶² Frank L Jeffries and Richard Reed, 'Trust and Adaptation in Relational Contracting' (2000) 25 *Academy of Management Review* 873, 875.

customers are hesitant to purchase from online market intermediaries that are unknown and newly established as unfamiliarity increases the perceived level of risk, and makes the OMI less dependable. A study performed in 2002 by the Georgia Institute of Technology showed that all intermediaries, regardless of being online or offline, are not perceived as trustworthy. OMIs that are better known, such as eBay and Amazon are to be more trusted than lesser known OMIs.⁸⁶³

Regulation, which holds a firm accountable for its actions, can enhance the trust in the firm. OMIs' dispute resolution mechanisms most of the time goes unregulated by law; hence, it does not provide much trust in this respect to the customers. Other than regulation, OMIs can enhance trust in their intermediary through upholding procedural justice.

OMIs can directly affect the trust of the parties in B2B e-commerce and their platforms by providing information regarding their dispute resolution mechanisms and upholding procedural justice.⁸⁶⁴ While the intermediary enhances trust between the parties by providing dispute resolution, upholding procedural justice during the process can enhance the trust in the intermediary and therefore, legitimacy for these intermediaries.⁸⁶⁵ eBay has carried out a survey of customers trust in a platform that illustrates that the more effective and fair the intermediary is in resolving disputes between the parties, the more customers are likely to use the platform and become loyal customers. Interestingly, the effect of procedural justice on customers is to the extent that those customers who have been involved in disputes in eBay and have perceived the system as fair and efficient, subsequently carry out more transactions on the platform.⁸⁶⁶ Moreover, trust in the intermediaries can encourage long term contracts between the parties and more members; long term contracts maximize the profit for OMIs.⁸⁶⁷

⁸⁶³ Jacqueline Ghosen Study shows perceived risk of online credit purchases linked to trust, familiarity with intermediaries. University at Buffalo, The State University of New York, <<http://www.buffalo.edu/news/fast-execute.cgi/article-page.html?article=59430009>> Accessed 24 February 2014

⁸⁶⁴ Muneesh Kumar and Mamta Sareen, *Trust and Technology in B2B E-Commerce: Practices and Strategies for Assurance* (IGI Global 2011) 39,45. European Commission, 'Open consultation on "Trust barriers for B2B e-market places' (2002) ICT Industries and Services.

⁸⁶⁵ Kumar and Sareen, *Trust and Technology in B2B E-Commerce: Practices and Strategies for Assurance* 39.

⁸⁶⁶ Colin Rule, CEO at MODRIA (and former ODR Director for eBay and PayPal), Presentation on eBay ODR Experience at the 10th International ODR Forum, Chennai, India, 9 February 2011 Global Redress System for Low-Value Cross-Border Disputes, 422.

⁸⁶⁷ Ali Reza Montazemi, John J Siam and Akbar Esfahanipour, 'Effect of Network Relations on the Adoption of Electronic Trading Systems' (2008) 25 *Journal of Management Information Systems* 233.

B2B OMIs have an incentive to create trust between the parties. Trust reduces the transaction costs of using the intermediary and entering into agreement with another party on the platform, as it reduces the perceived high level of risk and ultimately can result in more transactions. Therefore, OMIs have the incentive to uphold procedural justice in order to maintain trust.

7.1.4 Network Externalities and Procedural Justice

To understand the relationship between network externality and procedural justice, it is first important to understand when and where network externality occurs. Network externality occurs when customers value a good based on the increasing number of other users. For example, the value of owning a phone would increase as additional users join the network. Markets exhibit network externality when the value of the membership of network to a user is positively affected when other users join the network.⁸⁶⁸ Treating OMIs as a network, the value of participating in an OMI will increase when there are more suppliers and buyers using the platform. If one side of the market leaves the platform, for example the buyers leave the platform, then the other side of the market (the suppliers) might leave the platform too, as they have fewer buyers to carry out transactions with and the platform has lost its value.⁸⁶⁹ Conversely, the more agents use the platform, the more it attracts other agents from outside the network to use the platform.⁸⁷⁰

Lack of upholding procedural justice in dispute resolution might lead to network externality which is not economically beneficial for the intermediary. It is quite evident that network externality is a risk for the OMIs. For example Alibaba.com in its annual report stated that overcoming network externality is one of its key to success and network externality can be treated as a risk and in its recommendations to avoid network externality it asserted that it should offer a secure platform that meets customer needs and have secure payment options and escrow mechanism.⁸⁷¹

⁸⁶⁸ Michael L. Katz and Carl Shapiro, 'Network Externalities, Competition, and Compatibility' (1985) *The American Economic Review* 424.

⁸⁶⁹ Michael L. Katz and Carl Shapiro, 'Network Externalities, Competition, and Compatibility' (1985) *The American Economic Review* 424

⁸⁷⁰ Michael L. Katz and Carl Shapiro, 'Systems Competition and Network Effects' (1994) 8 *The Journal of Economic Perspectives* 93, 94.

⁸⁷¹ Alibaba Group Holding Limited Financial Annual Report, 'Form 20-F of United States Securities and Exchange Commission' 8.

In dispute resolution, corporations care about procedural justice as much as individuals do.⁸⁷² If procedural justice criteria do not exist in a certain dispute resolution mechanism, they might forgo contracting and completing a transaction⁸⁷³ or might leave the intermediary. The lack of elements of procedural justice could be treated as increasing the price or the transaction costs for one side of the market. A platform that considers raising its price to one side has to consider the extent to which the other side leaves the market. This is due to the fact that customers join an OMI to have access to certain types of sellers or buyers. If one side of the market leaves the platform due to an inefficient, ineffective or biased dispute resolution mechanism, it will result in the other side of the market leaving the platform. Hence, it decreases the mass participants that the intermediary has accumulated and result in economic loss. Therefore, the market has to meet both sides' needs and demands and cannot treat one side of the market unfairly without facing economic loss.⁸⁷⁴

The network effect can be an incentive for an OMI to uphold procedural justice. As the market intermediary is in need of both sides of the market in order to maximize profit, in the long term, it will be costly for the intermediary not to be neutral during the dispute resolution process, as this might lead to one side of the market to leave the platform. Even if it refers the dispute to a third party platform, if the platform is not neutral, the intermediary will be at a loss. This might also encourage the intermediary to refer the party to its contract to more neutral platforms. The network effect can also affect trust of the customers, which in turn affects the number of users of the platform. Customers are more likely to trust intermediaries that have many suppliers, because this

⁸⁷² Katz and Shapiro, 'Network Externalities, Competition, and Compatibility'.

⁸⁷³ Bernstein argues that in the presence of a private justice system, more transactions will take place as opposed to the presence of only a public legal system they might forgo contracting because of the cost and delay of the court system. Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions', 19.

⁸⁷⁴ Evans and Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* 410. Evans and Schmalensee discuss the competition constrain on the multisided platforms regarding pricing. They state that: "the competitive constraints on raising price to one side, or engaging in any other, strategy, can come directly or indirectly from any and all sides of competing platforms. A platform, that considers raising its price to one side, for example, has to consider the extent to which customers leave that side; how that affects customer losses on other sides; the extent to which other platforms pick up those customers; and how the addition of customers on each side of a competing platform increases the value of that platform to the other sides through positive feedback effects."

implies that the intermediary will be less biased in general and when resolving disputes.

875

Some have argued that network externality might lead to the harmonization of rules.⁸⁷⁶ This means that the provision of dispute resolution and the rules governing the dispute resolution might also be harmonized throughout OMIs. Applying this to OMIs and procedural justice, the participants in a network choose the more procedurally just online market intermediary. If that network does not provide harmonized procedurally just rules, they will leave the network which will endanger the OMI's existence.

The network effect and its consequences for standardization and harmonization of rules are, however, contested.⁸⁷⁷ It is argued that the networks that follow the harmonized rules might be at a disadvantage by those that do not follow the standards. The benefit from standardization might be small and costly and those that follow the standards might incur more costs without benefits.⁸⁷⁸ Additionally, standardization through network externality and private ordering in general is in need of heavy legal intervention that enforces the standards through courts, this might be costly and unfeasible in some circumstances and networks.⁸⁷⁹ As it was also illustrated in this thesis, many OMIs do not consider providing dispute resolution and their approach to providing dispute resolution is not yet harmonized. It is not clear whether procedurally unjust dispute resolution mechanisms will lead to network externality, i.e. the parties leave the online market intermediary because of lack of a procedurally just dispute resolution. Hence network externality might not be a deterrent for OMI to uphold procedural justice.

7.1.5 Remediating Power Imbalance by the Intermediary

While OMIs do not have a specific policy that differentiates between SMEs and big corporations and accommodates the SMEs needs, the dispute resolution mechanisms

875 Mitra Barun Sarkar, Brian Butler and Charles Steinfield, 'Intermediaries and Cybermediaries: A Continuing Role for Mediating Players in the Electronic Marketplace' (1995) 1 *Journal of computer-mediated communication* 1.

876 Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: the Numerus Clausus Principle' (2000) *Yale Law Journal* 1, 50.

877 Merrill and Smith, 'Optimal Standardization in the Law of Property: the Numerus Clausus Principle'.

878 Michael Klausner, 'Corporations, Corporate Law, and Networks of Contracts' (1995) *Virginia Law Review* 757

879 Merrill and Smith, 'Optimal Standardization in the Law of Property: the Numerus Clausus Principle'.

that they use might remedy some of the power imbalance existing between the large corporations and the SMEs. This might result in gathering more SMEs on intermediaries' platform and maximizing profits.

Spulber argues that intermediaries get involved with the transaction agreements so the parties do not have to bargain over the terms and conditions of the transaction agreements.⁸⁸⁰ As the intermediary must consider the interests of both sides of the market and reduces the transaction costs of contracting for both sides, it might remedy the power imbalance and make the scales more equal. This means that the intermediary has to be neutral to avoid losing customers and it has to provide accessible, neutral and efficient means of dispute resolution for both parties. The parties do not need to bargain over the terms of the agreement, because the intermediary has already drafted it (over dispute resolution). Therefore, the power imbalance in bargaining is of fewer concerns if the third party has the incentive to consider both sides of the transaction when drafting the agreement.

Moreover, the OMIs can reduce the transaction costs in seeking effective justice by providing an effective remedy for the weaker party. An analogy between OMIs and chargeback systems can reveal how they can reduce transaction costs of the effectiveness of the justice system. Credit card chargebacks award the consumer the amount disputed until the merchant provides evidence that the merchandise was shipped or other required evidence. This takes place via the credit card "issuing bank". Cardholders can file a complaint regarding fraudulent transactions as well as other reasons such as non-receipt of the merchandise or if the merchandise is not of their desired quality. If the seller cannot prove that the buyers' allegations are untrue, then the bank takes the entire value of the transaction from the suppliers' account along with an additional fee. The fee depends on the merchant's sponsoring bank. If the claim was found to be untrue, no refund is requested, however, additional processing fees may be charged to the merchant. Merchants' accounts receiving too many chargeback requests can be labeled by credit card companies as fraudulent and this can damage the reputation of the business.⁸⁸¹

880 Spulber, 'Market Microstructure and Intermediation'.

881 Understanding Chargebacks <<https://www.dalpay.com/en/support/chargebacks.html>> 4 March 2016.

The credit card company reduces the transaction costs of going to court for the consumer substantially by inflicting immediate punishment on the merchant and forcing the merchant to participate in the process.⁸⁸² If the same mechanism is employed in B2B transactions when the buyer is an SME and the seller is a large corporation, the effective remedy provided by chargebacks can remedy the power imbalance.⁸⁸³ This can be even facilitated further by the OMIs' involvement ex-ante, when they provide payment intermediaries that function similar to credit card charge backs.

7.1.6 Size of the Firm and Economy of Scale

Small and medium sized online market intermediaries are at a disadvantage to implementing dispute resolution, as providing such mechanisms is costly. Small intermediaries deal with smaller scale of suppliers and buyers, their scope of activities might be limited and they have little knowledge advantages compared to bigger firms.⁸⁸⁴

The economy of scale might be able to shed some lights regarding why OMIs provide dispute resolution when they are more established and have reached dominance in the market. The economy of scale can be defined as the decrease in average cost of production with an increase in production. The economy of scale puts a firm in an advantageous position due to its size, output or scale of operation.⁸⁸⁵ In the OMIs' case, the more the OMIs receive revenue for their services and the larger their network of buyers and suppliers, the more they will be able to decrease their cost of operation. This might allow them to adopt dispute resolution mechanisms.

Transaction costs, in general, are higher for smaller firms.⁸⁸⁶ Among the case studies, Madeinchina, dhgate, hqew and Alibaba adopted dispute resolution within an average length of 9 years. The newer and smaller OMIs, such as RetraceMobile, referred the parties to an external justice system. This might be an indicator that

882 Mann, 'Making Sense of Payments Policy in the Information Age'.

883 Using exactly the same model as consumers dispute resolution, might not encourage big corporations to trade with SMEs.

884 Kurtzberg and Henikoff, 'Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation'.

885 Bart Nooteboom, 'Firm Size Effects on Transaction Costs' (1993) 5 Small business economics.

886 Bart Nooteboom, 'Firm Size Effects on Transaction Costs' (1993) 5 Small business economics 283.

economy of scale has an impact on the decision of OMIs to adopt an internal justice system. The transaction costs of adopting an internal justice system might be too high. The solution to this might be to refer the parties to an external justice provider, as the recently established OMIs do.

7.2 Regulation

The existence or lack of regulations for administering the dispute resolution mechanism of OMIs, either incentivizes the OMIs to adopt a justice system and uphold procedural justice, or deters them from getting involved with resolving disputes at all. Hence, it is important to find out whether there are regulations that apply to the B2B OMI's dispute resolution and how they incentivize or deter OMIs to provide dispute resolution and uphold procedural justice. In order to do so two systems are considered in this section: the effect of liability regimes and the effect of Article 6 of ECHR on upholding procedural justice in OMIs.

The liability regimes that apply to online intermediaries, in general, differ in various jurisdictions. Some jurisdictions provide a safe harbor for these intermediaries, shielding them from liability for the content that is produced by the users on their platform.⁸⁸⁷ Some have a more strict approach and hold intermediaries liable if the information disseminated by the users on the platform breaches any law. Most of the time, this liability regime regulates the content and is not related to the transactions that occur between the parties. In India, under the Information Technology Act (2000),⁸⁸⁸ online market intermediaries are defined as “any person who on behalf of another person receives, stores, or transmits that record or provides any service with respect to that record.”⁸⁸⁹ Under this Act online intermediaries include payment intermediaries and auction websites among others. The approach of the legislator is content oriented. It only regulates the content and does not regulate the parties' transactions with regards

⁸⁸⁷ In the US Article 230(c) of the Communications Decency Act (CDA) provides total immunity in respect of all kinds of liability bar that relating to the server provider, as long as the content is not provided by the service provider but by the user. Digital Millennium Act Title 512, exempts online intermediaries from copyright infringement liabilities under certain circumstances. The Electronic Commerce Directive covers the liability of many online intermediaries and limits the liability of online intermediaries.

⁸⁸⁸ Section (2 w)

⁸⁸⁹ Act 295 (2nd ed. 2011). 64 The Information Technology Act, 2000, § 2, cl. w.

to other aspects such as dispute resolution. Hence, the definition of online market intermediaries in the legislation is limited to content intermediaries.

Evidently, these liability regimes do not regulate the service that OMI's provide to resolve the dispute between B2B parties. In fact, to the author's knowledge, there are no liability regimes in any jurisdiction that have specific laws related to the dispute resolution systems that OMI's provide.

The regulations might not apply to OMI's dispute resolution regarding liability, however, in some instances, the procedure that OMI's use might be regulated under national and international laws. When OMI's refer the parties to an online arbitration institution or when their dispute resolution method can qualify as arbitration or mediation, then the laws that regulate mediation and arbitration will apply, depending on jurisdiction. The applicable law can be the UN Convention on Enforcement of Foreign Arbitral Awards or national arbitration laws or regional laws such as the European Convention On Human Rights (ECHR). These laws apply certain prerequisites which the OMI or online arbitration provider should abide by.

Due to the similarities between OMI's dispute resolution and arbitration, to find out if OMI's are subject to other liability regimes, an analogy can be drawn upon them. Arbitration provides an internationally enforceable award, which resolves commercial disputes confidentially with a neutral forum.⁸⁹⁰ Some OMI's are also dispute resolution providers that provide a third party private decision-maker which can issue an award which is enforceable through private means or can become final and binding if recognized as arbitration. If under the law of a certain country, OMI's internal dispute resolution is considered as arbitration or any other regulated dispute resolution, the OMI should observe the procedural safeguards that are set by law.

7.2.1 Liability of Arbitrators and Arbitral Institutions

Through international laws and national laws, Arbitration is among one of the most highly regulated alternative dispute resolution systems. Laws that administer arbitration

⁸⁹⁰ Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 New York Law School Journal of International and Comparative Law 1, 1.

might apply to some OMIs' dispute resolution; and consequently, affect the incentives of OMIs to, firstly, adopt a justice system and secondly, uphold procedural justice.⁸⁹¹ Liability regimes affect OMIs incentives to adopt an internal justice system and they might not apply when OMIs refer the parties to a third party for dispute resolution. OMIs are more prone to being held liable if they provide the dispute resolution system themselves – which is why many of the OMIs stipulate in their terms and conditions that the parties agree not to hold the OMI liable if any dispute arises between the users.⁸⁹² The issue is, under which circumstances (if any) OMIs might be held liable for the misconduct in dispute resolution mechanism.

To consider the OMIs liability, we should clarify the actors that might be held liable. In arbitration literature the liability of two actors is usually discussed. These actors are: the arbitrator who resolves the dispute, and the sponsoring organization. In OMIs such division can be made if OMIs' dispute resolution constitutes arbitration. In that case, the employee of the OMIs can be recognized as the arbitrator. Hence the same classification of actors and liabilities can be applied to OMIs as well.

To understand whether OMIs are subject to liability regimes, this section first lays out the liability of the arbitrators and arbitral tribunals in some jurisdictions and then discusses the immunity of the arbitrator and arbitral institution.

Liability regime is based on two theories, the tort theory and the contract theory. Under tort theory, the liability of an arbitrator or an arbitration tribunal can raise from their professional obligation to perform competently.⁸⁹³ These are acts that have not

⁸⁹¹ It has been asserted that liability of the arbitrators and the judges can affect the efficiency and fairness of the process. *Bradley v. Fisher*, the US Supreme Court asserted that because of the need for proper and efficient administration of justice judges cannot be subjected to responsibility for a decision. 80 U.S. 335 (1871), Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity', 29.

⁸⁹² Almost all the OMIs that were studied had an indemnity clause in their service agreement with the users. Indiamart terms and conditions read as: In the event of a dispute with any party to a transaction, user(s) agrees to release and indemnify IIL (and our agents, affiliates, directors, officers and employees) from all claims, demands, actions, proceedings, costs, expenses and damages (including without limitation any actual, special, incidental or consequential damages) arising out of or in connection with such transaction. User(s) may use the content/features on web site solely for their personal or internal purposes. 'IndiaMart Terms and Conditions', <<http://www.indiamart.com/terms-of-use.html#xii>> Accessed 20 April 2016; A similar clause also can be found in ECplaza: 6.5: In the event that any User has a dispute with any party to a transaction, such User agrees to release and indemnify EC Plaza (and our agents, affiliates, directors, officers and employees) from all claims, demands, actions, proceedings, costs, expenses and damages (including without limitation any actual, special, incidental or consequential damages) arising out of or in connection with such transaction. 'ECplaza Terms and Conditions', <http://www.ecplaza.net/f.to/help/terms_of_use.html> Accessed 20 April 2016.

⁸⁹³ Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 *New York Law School Journal of International and Comparative Law* 1,10.

been predicted in the contract. Under the contractual liability doctrine, the liability of the arbitrators and arbitral tribunals can also be determined by the general contractual liability principles contained in Civil Codes.⁸⁹⁴ In contractual liability, liability is determined by action or inaction that breaches the contractual obligations of the parties, determined in the arbitration agreement between the parties and the arbitrators or arbitration tribunal.

Mustill and Boyd enumerate duties of the arbitrator as: to take care (carry out their task with skill and care, this might be with regards to both substance of the outcome and carrying out procedural matters), to proceed diligently (arbitrator to fulfill its obligations and act within a reasonable time) and to act impartially (to treat both parties with fairness and due process).⁸⁹⁵ The arbitrators can be liable for two inappropriate behaviors that can affect the procedure of the arbitration as well as the substance of arbitral award: affirmative misconducts and failure to act.⁸⁹⁶ Nevertheless, the liability regime might not apply to the arbitrator or the arbitral institution in jurisdictions that the theory of immunity is in place, and the extent of arbitral immunity can also be an incentive or a deterrent for the OMIs to provide a justice system. The following section considers arbitral liability from two perspectives: arbitrators' liability and institutional liability. It will then discuss arbitral immunity and concludes how liability regimes and immunity doctrines can incentivize and deter OMIs to provide a dispute resolution mechanism and uphold procedural justice.

7.2.1.1 Liability of the Arbitrators

Liability of the arbitrators as Franck points out can stem from actions and inactions of the arbitrators.⁸⁹⁷ Actions include inappropriate withdrawal from the process, corruption, bad faith and acting in bad faith. As it will be substantiated below civil law and common law legal systems treat the liability of arbitrators differently.

In Civil law systems, arbitrators are subject to liability regimes. Such systems have sometimes explicitly mentioned the liability of the arbitrators in their statutes: In

⁸⁹⁴ Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity', 7.

⁸⁹⁵ Mustill and Stewart Boyd law and practice of commercial arbitration in England 224-32(2d ed 1989) cited in Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity', 29.

⁸⁹⁶ Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' 11.

⁸⁹⁷ Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' 11

Austrian Code of Civil Procedure Article 584 section (2) states that: “(2) An arbitrator who does not fulfill in time or at all the obligations assumed by his acceptance of office is liable to the parties for all the loss caused by his wrongful refusal or delay, without prejudice to the parties' rights to claim rescission of the arbitration agreement.” The Romanian Code of Civil Procedure of 2010, limits the liability of arbitrators to a number of reasons and states them in article 565. Under the Swiss law, the arbitrator’s relationship with the parties is governed by a contract which can result in the application of contractual liability rules stipulated in Swiss Code of Obligations, Article 97.⁸⁹⁸

In common law countries however, establishing liability for the decision-maker depends whether the decision-maker is an arbitrator and has a quasi-judicial role. To determine whether the decision-maker has a quasi-judicial function depends on the definition of the arbitrator. To identify whether a designated person for resolving a dispute is an arbitrator and acts in a quasi-judicial capacity, in England it is required that there should be: a formulated dispute between the parties, parties should submit the dispute to the tribunal or the person for a binding decision and the hearing of the evidence should take place, and the decision-maker decision should be fair and unbiased.⁸⁹⁹ Similarly, in Canada in *Sports Maska Inc. v. Zittner*,⁹⁰⁰ the court held that for a decision-maker to be recognized as an arbitrator, there should be a formulated dispute to resolve and the outcome should be definitively determined.

It could be construed from the common law approach that the arbitrators can be held liable only when they do not act in their quasi-judicial function. In common law countries, there are different approaches in expressly stating the liability of the arbitrators. In England for example in Section 29 of the Arbitration Act 1998, it has been expressly stated that the arbitrator can be held liable if acts in bad faith. It reads as: “(1)An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator *unless the act or omission is shown to have been in bad faith.*”⁹⁰¹ In the US, arbitrators are mostly not liable for any of their

898 See generally Nadia Smahi, ‘The Arbitrator’s Liability and Immunity Under Swiss Law – Part I’ (2016) 34 ASA Bulletin 4, 876.

899 See Jason Yat-Sen Li, *Arbitral Immunity: A Profession Comes of Age*, (1998) 64 *Arbitration* 51, 52 and Matthew Rasmussen, ‘Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France’ (2002) *Fordham Int'l LJ* 26 1824.

900 [1988] 1 S.C.R. 615-16 (Can.)

901 Emphasis added by the author.

actions related to the arbitral process. In *Austern v. Chi. Bd. Options Exch., Inc.*, the court stated that:

*“Accordingly, we hold that arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process.”*⁹⁰²

In conclusion, in civil law countries, generally the liability of the arbitrators is expressed in law and their immunity is limited. In common law countries liability of the arbitrators is very much restricted and they might receive absolute or qualified immunity. The implications of such difference in liability regimes for OMIs is that if they are incorporated in civil law countries, their employees who resolve disputes might be held liable for their actions if they are recognized as arbitrators. This raises the costs of providing such services. In common law countries on the other hand, since the immunity of the arbitrators is more likely, it might be less costly for the OMIs to provide dispute resolution.

7.2.1.2 Liability of Arbitration Institutions

Arbitration institutions in general set the rules for arbitration, decide on the institutions' competency to accept or reject a dispute, to appoint arbitrators and replace or recuse them, determine how the process of arbitration is conducted, provide a time frame for arbitration and set the fee (if any) and undertake the issuance of award and communications.⁹⁰³ Most arbitral institutions declare in their terms and conditions that they do not directly get involved with resolving the dispute and the disputes are not resolved under the name of the arbitral institution. In this, they differ with the OMIs' internal justice system since OMIs in their terms and condition state that the dispute between two parties will be resolved by the OMI itself. Although OMIs claim that their dispute resolution center is not an arbitration tribunal and they do not have trained

⁹⁰² *Austern v. Chicago BD. Options Exchange, INC*, 898 F.2d 882, 886 (2d Cir. 1990). Similarly, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity. See *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987); *Ozark Air Lines, Inc. v. National Mediation Board*, 797 F.2d 557, 564 (8th Cir. 1986); *Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 686-91 (5th Cir. 1985); *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1208-11 (6th Cir. 1982); *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977); *Cahn v. International Ladies' Garment Union*, 311 F.2d 113, 114-15 (3d Cir. 1962).

⁹⁰³ Eric Robine, 'The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law' (1989) 5 *Arbitration International* 323, 324.

arbitrators,⁹⁰⁴ their dispute resolution might be recognized as arbitration in some jurisdictions as was explained in Section 4.5. Since they also provide the rules for the arbitration process they might have institutional liability in certain jurisdictions. Hence it is important to look at the institutional liability of OMI through the lens of arbitral institutions liability.

The liability of arbitral institutions has been contested in various jurisdictions which has led to various outcomes. Arbitration institutions are normally shielded from liability in the US. In *Austern* the plaintiff led a lawsuit against the arbitration institution, as they did not receive a notice for hearing and the panel was not composed of arbitrators that were agreed on according to the arbitration institution's rules. The court ruled that the institution does not have civil liability.⁹⁰⁵ In another case, *Ruberstein v. Otterbourg*,⁹⁰⁶ when the arbitration institution was sued because it did not move to disqualify the arbitrator due to inaction, the Civil Court of the City of New York held that arbitral institutions are also immune from civil liability. This, however, does not mean that Arbitral institutions are always shielded from liability in common law countries. In *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.*, the court stated that California common law had recognized a narrow exception to arbitral immunity, which is that the immunity does not apply when the arbitrator breaches the contract by failing to make a decision. By not issuing an award, the arbitrator loses his quasi-judicial role that is the ground for granting immunity. In effect, the arbitrator becomes liable.⁹⁰⁷

The situation might be different in Civil Law countries. In France, the arbitral institutions have a duty to follow the rules applicable to arbitration tribunals.⁹⁰⁸ The French Court has ruled that rules such as Article 6 of European Convention On Human Rights (ECHR) (elaborated in detail in section 7.2.2) which include fundamental

⁹⁰⁴ Alibaba TSA, 2.9 "You also acknowledge that Alibaba.com is not a judicial or arbitration institution and will make the determinations only as an ordinary non-professional person. Further, we do not warrant that the supporting documents that the parties to the Dispute submit will be true, complete or accurate. You agree not to hold Alibaba.com and our affiliates liable for any material which is untrue or misleading. <<https://rule.alibaba.com/rule/detail/2054.htm>> Accessed 24 November 2016.

⁹⁰⁵ 716 F.Supp. 121, 122-23 (S.D.N.Y. 1989)

⁹⁰⁶ 357 N.Y.S.2d 62, 64 (1973)

⁹⁰⁷ 140 Cal. App. 4th 795, 44 Cal. Rptr. 3d 782 (2d Dist. 2006)

⁹⁰⁸ See Ehe Kleiman, 'SNF v. International Chamber of Commerce Case, and the Obligation to Conduct Arbitration Proceeding with Expected Dispatch' in Devin Bray and Heather L. Bray (eds.) '*International Arbitration and Public Policy*' (2014 Juris Publishing.Inc) 81 and Eric Robine , 'The Liability of Arbitrators and Arbitral Institutions in International Arbitrations under French Law'.

fairness principles for trials are applicable to arbitration centers in France. In *République de Guinée v. la Chambre Arbitrale de Paris* the Paris First Instance Court and the Paris Court of Appeal both found that arbitral institutions have a duty to ensure that the parties have had access to a fair trial, preserving their fundamental rights as laid out in ECHR Article 6.⁹⁰⁹

In conclusion, the arbitration institutions in common law countries receive immunity even if they do not apply their own rules while handling the dispute. The arbitrators' immunity is extended to such institutions and they are immunized by the same rationale that their quasi-judicial arbitral functions should be protected. Such institutional immunity can also be applied to OMIs and might encourage OMIs to provide dispute resolution for the suppliers and buyers. In civil law countries, if such immunity is not provided or as is the case of France and Europe, they have to follow the ECHR in their procedures, then the adoption of dispute resolution might be too expensive for the OMIs and they might not be willing to incur such costs.

7.2.1.3 Arbitral Immunity

The theory of arbitral immunity provides that both the arbitrator and arbitral institutions are immune from lawsuits, as was stated in the previous section, because their function is quasi-judicial. This theory is also called the "status" school, grants the arbitrator an element of "status" which justifies their treatment similar to the judges and immunizes them.⁹¹⁰ In other words, the immunity of arbitrators from suit is partly based upon the doctrine of judicial immunity and often depends on whether arbitrators' responsibilities are functionally comparable to those of a judge.⁹¹¹ Park describes such similar functionality comes from: "(i) whether a dispute exists, (ii) Whether there is an ultimate determination of liability, and (iii) whether the decision-maker conducts a hearing and takes evidence from the parties as would a judge."⁹¹² The arbitrators' immunity also extends to arbitration institutions. The theory of immunity applies to the functions of

⁹⁰⁹ Eke Kleiman, 'SNF v. International Chamber of Commerce Case, and the Obligation to Conduct Arbitration Proceeding with Expected Dispatch' 81.

⁹¹⁰ Alan Redfern, Alan and Martin Hunter, *Law And Practice of International Commercial Arbitration* (Sweet and Maxwell 2004) 285.

⁹¹¹ Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' 15.

⁹¹² William W Park, 'Text and Context in International Dispute Resolution' (1997) 15 BU Int'l LJ 191.

arbitration that are intrinsically related to judicial acts regardless of which body or person carries them out.⁹¹³

As it was argued in *Austern*, the arbitral immunity purpose will be defeated if liability is shifted from the arbitrator to the arbitration tribunal. The Court followed a judgment in *Corey v. New York Stock Exchange* in which it was argued that “[e]xtension of arbitral immunity to encompass boards [that] sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illus[ory]. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association.”⁹¹⁴

To provide a rationale for arbitration institutions immunity, US courts argue that such liability can deter institutions from providing such services: “Reducing the CBOE's immunity based on the arbitral deficiencies present here would merely serve to discourage its sponsorship of future arbitrations — a policy that is strongly encouraged by the Federal Arbitration Act. See 9 U.S.C. §§ 2, 3, 4.”⁹¹⁵

In common law countries arbitrators receive an almost absolute immunity for their actions (either actions that result in incorrect outcomes or other conducts), while in civil law countries they might be liable for some misconducts. In the doctrine of arbitral immunity, the arbitrator or the institution providing arbitration is immune from civil liability.⁹¹⁶ The party that has received an adverse arbitration award might want to bring a lawsuit against the arbitrator. The doctrine of arbitral immunity protects the arbitrators from such lawsuits. In the US, the doctrine has been applied more broadly and scholars

⁹¹³ In *Austern*, the court states that absolute immunity is justified by the function it protects. “Absolute immunity” *Austern* at 885. The court argues this quoting other cases. It argues “Absolute immunity, “justified and defined by the functions it protects and serves, not by the person to whom it attaches,” *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555 (1988), CBOE, as the commercial sponsoring organization, is therefore entitled to immunity for all functions that are integrally related to the arbitral process.” For more recent rulings and judgments about the immunity of arbitral institutions refer to: *Gregory Imbruce, Giddings Invs., LLC v. Am. Arbitration Ass'n, Inc.*, (S.D.N.Y. 2016) *Landmark Ventures, Inc. v. Cohen* (S.D.N.Y. 2014), *Kuruwa v. Am. Arbitration Ass'n*, (S.D.N.Y. 2013), *Richardson v. Am. Arbitration Ass'n*, 888 F. Supp. 604, 605 (1995).

⁹¹⁴ 691 F.2d 1205, 1211 (6th Cir. 1982)

⁹¹⁵ *Austern V. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886-87 (2d Cir. 1990). see also *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

⁹¹⁶ Cited in Rsmussen, *Austern v. Chi. Bd. Options Exch., Inc.*, 898 F.2d 882, 884 (2d Cir. 1990), at 123-24, “holding that arbitral institutions cannot be held liable for actions regarding arbitration because, as sponsors of arbitrations, they need same immunity as arbitrators.” Franck, ‘The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity’.

have even encouraged the broad interpretation, as they argue that this will maintain arbitrators' neutrality and finality of the arbitral award.⁹¹⁷

In England, section 74 Arbitration Act 1996 grants immunity to arbitral organizations and sponsoring organizations that appoint the arbitrators. It states in section 74(2) that: "An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator." It then adds in section 74(3) that: "The above [immunity] provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself." Hence, it provides immunity for the arbitrator, the arbitral tribunal and the sponsoring organization.

The rationale behind the arbitral immunity can also be extended to OMI's dispute resolution. Arbitral immunity can reduce the costs of dispute resolution as well as bring finality to the process. If OMI's are incorporated in civil law countries, depending on the liability laws, the OMI's might, in fact, be held liable for their dispute resolution process and this can deter them from providing arbitration for the parties. In common law countries, however, arbitrators might be immune from lawsuits and OMI's will be less deterred to provide dispute resolution.

7.2.2 Does Article 6 ECHR Apply to OMI's and is it an Incentive for Upholding Procedural Justice?

Within the Online Dispute Resolution field, scholars have mainly focused on Article 6(1) European Convention on Human Rights (ECHR) and whether the Online Dispute Resolution process and mainly online arbitration are subject to this article.⁹¹⁸ As it has been very much discussed in the field of Online Dispute Resolution,⁹¹⁹ it deserves some analysis as a Convention that can incentivize or deter OMI's to provide dispute

⁹¹⁷ Dennis R Nolan and Roger I Abrams, 'Arbitral Immunity' (1989) *Industrial Relations Law Journal* 228.

⁹¹⁸ Hörnle, *Cross-Border Internet Dispute Resolution* 100. Schiavetta, 'The Relationship between E-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights'

⁹¹⁹ Hörnle, *Cross-Border Internet Dispute Resolution* 100. Schiavetta, 'The Relationship between E-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights'.

resolution mechanisms. ECHR has a limited scope of application. It only applies to the members of Council of Europe which comprises of 47 member states. The 47 member states have entered into a legal undertaking to comply with the Convention and have agreed to the supervision of their compliance by the European Court of Human Rights.⁹²⁰

The related Article to procedural justice and the OMI's dispute resolution is Article 6(1). Article 6(1) ECHR lays out certain criteria for the fairness of tribunals established by law. It states that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”⁹²¹

For Article 6(1) ECHR to apply to OMIs' dispute resolution, as it stipulates, the dispute resolution process should determine “civil rights and obligations” and should also be a “tribunal established by law”. Hence, whether the nature of the B2B OMIs' dispute resolution procedure, which is commercial, can be categorized as a process that decides on civil rights and obligations should be clarified. Additionally, it should be established whether OMIs' dispute resolution process is directly or indirectly established by law.

The first issue can be clarified by looking at European Court of Human Right (ECtHR) interpretation of civil rights and obligations. The Court has in fact held that the rights and obligations of private persons in their relations are in all cases civil rights and obligations.⁹²² This also includes commercial cases, as the Court in *Edificaciones March Gallego S.A. v. Spain*⁹²³ admitted an application lodged by a Public Limited

920 European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms 5 <
http://www.echr.coe.int/Documents/Convention_ENG.pdf> Accessed 15 March 2016.

921 App no 35943/02 (ECtHR, 16 December 2003)

922 Schiavetta, 'The Relationship between E-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights'.

923 App no 28028/95 (ECtHR, 19 February 1998)

Company, which challenged the fairness of the procedure of the Spanish courts under ECHR. The applicant argued that its right to challenge a bill of exchange was hampered by the Spanish Courts. Considering the acceptance of applications of a commercial nature at ECtHR, the disputes resolution process that resolves B2B disputes can also be challenged in accordance to Article 6(1) ECHR.

The second issue is whether OMI's dispute resolution process is directly or indirectly established by law, as under Article 6(1) ECHR, applicants can only challenge a decision that has been made by a tribunal established by law. To explore this issue, it is necessary to find out whether OMI's dispute resolution process is arbitration, or another kind of dispute resolution that results in binding outcomes. In the field of arbitration, Jaksic asserted that arbitration is a quasi-judicial function and parties have the right to challenge the arbitration awards based on applicable human rights norms.⁹²⁴ Schiavetta proclaims that Article 6 ECHR should apply to those Online Dispute Resolution (ODR) providers that bring about binding and final outcomes for the parties, specifically if the state substitutes a public court with a private ADR. She then goes on to say that states have to ensure that ODR procedures fall under their jurisdiction comply with the rights found in Article 6 ECHR.⁹²⁵ Others are of the opinion that arbitration is a voluntary, contractual dispute resolution mechanism and that ECHR may be indirectly applicable, by way of admissible grounds for challenging an award.⁹²⁶

Following Schiavetta's approach, any kind of non-state supported binding dispute resolution should be regulated by the states to ensure adherence to procedural fairness. Accordingly, all OMI's dispute resolution mechanisms with binding outcome regardless of being B2B or B2C and all other standalone ODRs should comply with the set of fairness criteria that are stipulated in Article 6(1) ECHR. This specifically applies if OMI's use arbitration. This argument is based on the theory that when a state decides to delegate the power of adjudication to arbitration, then it is required to ensure that the dispute resolution system meets the requirements of procedural justice, to the same extent that a court is required to uphold such procedural justice. Hence the application

⁹²⁴ Jaksic, *Arbitration and Human Rights*, 203.

⁹²⁵ Schiavetta, 'The Relationship between E-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights'.

⁹²⁶ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution : Challenges for Contemporary Justice* (Kluwer Law Internat. 2004).

of Article 6(1) can be extended to tribunals other than courts. In *Transando-Transportes Flviais Do Sado S.A. v. Portugal*, the court noted that:

*“Article 6 does not preclude the setting up of arbitration tribunals in order to settle certain disputes. Indeed, the word “tribunal” in Article 6 § 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country”*⁹²⁷

The second approach confirms that arbitration is contractual and s did not delegate their power to arbitration, hence, it might not be subject to Article 6. However, states can indirectly, by putting in place national laws that regulate arbitration, adhere to Article 6 ECHR.⁹²⁸

Hörnle proclaims that Article 6(1) ECHR guarantees a minimum of procedural protection either directly or indirectly, but she criticizes the extremely limited role of ECHR on protection of due process, as few cases have been successful as well as its very minimal protection of procedural justice.⁹²⁹

Clearly, Article 6(1) of ECHR applies to arbitration and in case of recognizing the OMIs dispute resolution process as arbitration, Article 6(1) ECHR will apply. However, to what extent it applies to dispute resolution process such as those that OMIs, credit card charge back and others provide is disputed. Some OMIs state that the dispute resolution process they provide is not arbitration. But, if OMIs dispute resolution constitutes elements that are sufficient for a jurisdiction to be recognized as arbitration then the process OMIs used is in fact arbitration. Scholars have presented various definitions for arbitration, the more comprehensive one is presented by Born: “[Arbitration is] a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedure affording the parties an opportunity to be heard.”⁹³⁰ According to this definition, arbitration should include four elements: Mutual consent to submit a dispute to a private dispute resolution, a private dispute resolution provider, participation and a binding

⁹²⁷ *Transando-Transportes Flviais Do Sado S.A. v. Portugal*, App no 35943/02 (ECtHR 16/12/2003)

⁹²⁸ A view taken by C. Jarrosson in ‘L’Arbitrage et la Convention européenne des droits de l’Homme’, 573–607, 588–9; he concedes, that the ECHR may have some indirect influence on arbitrators.” Cited in Hörnle, ‘Cross Border Internet Dispute Resolution’.

⁹²⁹ Hörnle, *Cross-Border Internet Dispute Resolution* 108.

⁹³⁰ Gary Born, *International Commercial Arbitration*, vol 1 (Kluwer Law International The Hague 2009) 217.

decision. OMI's are private dispute resolution mechanisms that allow participation in their dispute resolution and the parties mutually agree by the service agreement for OMI's or another third party to resolve disputes. OMI's decision, however, might not be final and binding at all or might not be final and binding by the applicable law and the court of law does not get involved with its enforcement. In some OMI's that refer the parties to arbitration (such as Alibaba and those OMI's that refer the parties to online arbitration providers), the process is arbitration and parties agree to the use of arbitration in the process. When OMI's do not refer the parties to arbitration, the decision is contractually binding and enforceable by the escrow mechanism and the parties to the dispute can still challenge the outcome at court. This difference might affect the nature of the dispute resolution and it might not be considered as arbitration even if it includes other constitutive elements of arbitration.

In conclusion, if an OMI's dispute resolution process can be recognized as arbitration, it might then be subject to Article 6(1) of ECHR. If the OMI's dispute resolution outcome is nonbinding and the parties can challenge the outcome in court, the process is not subject to Article 6 of ECHR, but it might be regulated by other national laws and regulations. Subjecting OMI's' dispute resolution to Article 6 of ECHR might result in over protection and implementation of processes that do not align with B2B parties' preferences. This can result in dissatisfaction with the process. The next section will discuss whether Article 6 of ECHR can act as a deterrent for the OMI's to provide dispute resolution.

7.2.2.1 Article 6 of ECHR and B2B Preferences

Article 6(1) applies to commercial disputes. It requires the proceeding of the dispute resolution process to be a fair and public hearing to be held within a reasonable time by an independent and impartial tribunal. As for fairness, the process should have characteristics such as the right of access to court, a hearing in the presence of the accused, equality of arms, the right to adversarial proceedings and reasoned judgment.⁹³¹

Article 6(1) ECHR applies only to those dispute resolution mechanisms that provide arbitration or their outcome is binding on the parties and enforceable in a court

⁹³¹ Hörnle, *Cross-Border Internet Dispute Resolution* 108.

of law. Despite this, recently the Council of Europe Parliamentary Assembly called upon the member states to “ensure that existing and future ODR (online dispute resolution) procedures contain safeguards compliant with Articles 6 and 13 of the European Convention on Human Rights, which may include access to legal advice”.⁹³² As ODR also provides non-binding outcomes, it is unclear whether the Assembly also considers non-binding dispute resolution be subjected to Articles 6 and 13 of the ECHR.

Subjecting ODR to the ECHR has to be treated with caution, especially in online B2B disputes. While Article 6(1) are not in stark contrast to the parties’ preferences for procedural justice, many of the safeguards in Article 6(1) and the interpretation of the Court goes against the parties’ preferences. The following subsections will discuss the effect of Article 6(1) on accessibility, neutrality, effectiveness and efficiency.

7.2.2.1.1 Accessibility (Participation)

Participation in a proceeding means that the parties to the proceedings must have a reasonable opportunity of presenting their case to the court under conditions, which do not place them at a substantial disadvantage to their opponents.⁹³³ This also corresponds with the principle of equality of arms. Substantial disadvantage has various meanings. Not being physically present at a proceeding does not put the parties at substantial disadvantage at all times. The waiver of a right is acceptable as long as “supported by minimum procedural guarantees commensurate to the importance of the rights waived”.⁹³⁴ A party may waive the right to be present at an oral hearing, but the minimum safeguards for attendance should be predicted and commensurate to the importance of the right to in-person hearing. Presence at the hearing is not required in civil cases (including commercial cases), such as cases that involve a party’s personal conduct.⁹³⁵ Hence, not holding in-person hearing in OMI’s dispute resolution might not be interpreted as curtailing access to justice and not giving the parties an opportunity to participate under Article 6 of ECHR.

932 Spain Rapporteur: Mr Jordi Xuclà, Alliance of Liberals and Democrats for Europe, *Committee on Legal Affairs and Human Rights, Access to Justice and the Internet: Potential and Challenge* (2016) Para 7.2.

933 Nuala Mole and Catharina Harby, ‘A Guide to the Implementation of Article 6 of the European Convention on Human Rights’ 46.

934 *Uovaniemi and Others v. Finland*, 5; See also *Thompson v. UK* (2005) 40 EHRR 11 (ECtHR), para. 43. Cited in Hörnle, *Cross-Border Internet Dispute Resolution* 107.

935 Nuala Mole and Catharina Harby, ‘A Guide to the Implementation of Article 6 of the European Convention on Human Rights’ (2006) No.3 Council of Europe 44.

In-person hearing can cost money and take more time than participating in a dispute resolution process through electronic filing and online participation. Considering the preferences of commercial parties for dispute resolution (accessibility), the fact that Article 6(1) does not oblige holding in-person hearings for civil and commercial cases goes in line with those preferences. The question is whether the court accepts e-filing and electronic communication as a form of participation. ECHR has not yet received a case on this matter.⁹³⁶ The uncertainty about this can be costly for the OMI and the participants in the process.

For both civil and criminal trials, ECHR considers right to a fair hearing also incorporates the right to adversarial proceedings, which means the opportunity for the parties to a civil trial to have knowledge of and comment on all evidence received.⁹³⁷ As it was discussed in firms' preferences for dispute resolution mechanism (Chapter 3), the parties in commercial disputes favor limited discovery.⁹³⁸ Some of the rights can be waived contractually. However, the transaction costs of predicting all these rights, especially in cross-border transactions where sometimes more than 2 countries are involved, are high. Hence, the right to comment on all the evidence could potentially increase the cost of providing dispute resolution and using the dispute resolution mechanism.

The participation in hearing requires that a fair balance be struck between the parties. Such fair balance might be struck in OMI that facilitate disputes between SMEs and large corporations, as they reduce the cost of participation in the dispute resolution process substantially. Such fair balance might be acceptable in court. However, it is unclear whether online participation can be treated as hearing or be recognized as participation in the process, under Article 6 ECHR. If online hearing is not acceptable as participation in the process, then the court might set aside the dispute resolution outcome. This creates uncertainty as to the effectiveness of the OMI dispute

⁹³⁶ All the cases regarding the disputes related to the Internet filed at ECtHR can be found at Council of Europe Research Division, 'Internet: Case-Law of the European Court of Human Rights' (2015) Council of Europe/European Court of Human Rights.

⁹³⁷ Mole and Harby, 'A Guide to the Implementation of Article 6 of the European Convention on Human Rights', 44.

⁹³⁸ Lipsky and Seeber, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by Us Corporations'.

resolution system. Uncertainty increases transactions costs and can be a deterrent for both OMIs and the parties to use the system.

Article 6 ECHR, under certain circumstances, requires that the parties should be entitled to witness cross-examination.⁹³⁹ As stated in Chapter 4, commercial parties preferred limited discovery and obliging the dispute resolution provider to entitle the parties to cross-examination of witnesses, hampers the values of accessibility, effectiveness and efficiency, as it increases transaction costs. When both parties have waived their right to cross-examination, they should not be entitled to cross-examination of witnesses.

7.2.2.1.2 Neutrality

Neutrality, according to the Court interpretation, can be subjective or objective.⁹⁴⁰ To establish subjective neutrality, the judge's personal conduct should be considered.⁹⁴¹ Subjective bias is very difficult to prove.⁹⁴² Objective bias is established when there are favorable circumstances made for the judge and the judge is unable to provide guarantees sufficient to disprove lack of bias.⁹⁴³

In online B2B dispute resolution, provided by OMIs, neither objective nor subjective neutrality of the individual decision maker can be fully established. In most cases (when parties are not referred to online arbitration providers), the parties to the dispute are referred to an employee of the OMI who has the task of dealing with the dispute. Such an employee is not a professional arbitrator and the cost of verifying the neutrality of the decision maker in this case is high, especially in transnational disputes.

The OMI's neutrality as a dispute resolution provider might be challenged under the ECHR. The disputant should be able to establish that the OMI as an organization has a vested interest in taking side with one of the parties. In this case, those OMIs who are manufacturers themselves and receive large amount of revenue from one side of the market might not be able to prove their lack of bias. This can incentivize such OMIs to refer the parties to an external online dispute resolution provider or maintain their

939 Article 6(3)(D), ECHR.

940 *Piersack v. Belgium* (1982) Series A no 11 para. 30.

941 *Lavents v. Latvia*, 28 November 2002.

942 Mole and Harby, 'A Guide to the Implementation of Article 6 of the European Convention on Human Rights', 33.

943 *Piersack v. Belgium* (1982) Series A no 11 para 30.

neutrality through other means. The OMI's can also put in place a process for the parties to challenge the neutrality of the process. This might enhance the neutrality of biased OMI's and their outcomes.

7.2.2.1.3 Effectiveness

The importance of the effectiveness of the outcome of the tribunal has been asserted both in Article 13 and the Court. Article 13 (ECHR) reads: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The Court considers two factors that can affect the effectiveness of the award: the enforcement of the award and the delay in enforcing the award.⁹⁴⁴ Effectiveness, in terms of enforcement of the award and the delay in enforcement of the award, is in line with the preferences of the B2B parties and they expect an effective justice system to issue the award in a timely manner and enforce it. Hence, this aspect is in line with parties' preferences and it can incentivize the OMI's or online dispute resolution providers to carry out timely enforcement.

7.2.2.1.4 Efficiency

B2B parties prefer an efficient dispute resolution process, i.e. a process that is not costly and time consuming. To discuss whether ECHR aligns with the preferences of B2B parties, this section will consider relevant parts of ECHR regarding cost and duration of the dispute resolution process as well as related Court decisions. Article 6(1) does not explicitly mention the cost of the proceeding and it does not consider it as a factor that might hamper a fair trial. However, ECHR has considered time as a matter of effectiveness and necessary for a fair trial. It states that hearing should be held within a reasonable amount of time. Article 6 (2)(b) states that the accused should be provided with adequate time and facility. This also applies to some civil cases.⁹⁴⁵

⁹⁴⁴ *Burdov v. Russia* App no. 33509/04 (ECtHR 15 January 2009) para. 8.

⁹⁴⁵ Mole and Harby, 'A Guide to the Implementation of Article 6 of the European Convention on Human Rights', 33.

The reasonableness of the duration of the proceeding depends on the circumstances of the case, including the complexity of the case, the conduct of the applicant and of the relevant authorities and what is at stake for the applicant in the dispute.⁹⁴⁶ The complexity of the case relates to the fact and the law, for instance, the number of the parties involved with the case can be a factual matter which lengthens the process. Complexity regarding the law is the legal requirements for some cases that can make the process more complicated, for example if the case is subject to special processes for evidentiary submission.⁹⁴⁷ The conducts of the applicant which can lengthen the dispute resolution process are varied and depends on circumstances for example it could be lack of readiness and willingness to file submissions and evidence⁹⁴⁸ or requests that affect the duration of conduct.⁹⁴⁹ The relevant authorities and in case of arbitration, the sponsoring organizations or the arbitrator can be held responsible for delaying the process.⁹⁵⁰ The nature of the dispute and what is at stake is also important for defining reasonable time. Under certain justified circumstances, it is necessary to expedite the process or not to delay the process. For example, child custody cases should be expedited since the welfare of the child is at stake.⁹⁵¹

Evidently, there is precedential guidance on what reasonable timeliness is and the Court has supported upholding efficiency by having fewer lengthy processes. However, the complexity of the case and other circumstances under which the process is defined as reasonably timely might create ambiguity for OMIs. It might be difficult to establish

⁹⁴⁶ In *Le Compte V. Belgium* App no. 7299/75 (ECtHR 10 February 1983), court considered complexity of the case and agreed that 15 days notice was adequate. It asserted that “41. Under paragraph 3 of Article 6 (art. 6-3), the applicant asserted that he had not been informed in detail of the accusations against him, that he had not had adequate time for the preparation of his defence and that he had not had the benefit of the right to obtain the attendance and examination of witnesses on his behalf. These allegations are unfounded. The letter written to Dr. Albert by the President of the Provincial Council and inviting him to appear before the Bureau of the Council specified the nature and cause of the complaints made against him by the Ordre (see paragraph 9 above). In addition, the applicant had more than fifteen days in which to prepare his defence. A time-limit of this length, which is provided for under section 25 of the Royal Decree of 6 February 1970, appears in itself to be reasonable, especially in view of the lack of complexity of the case”. Also see *Comingersoll S.A. v. Portugal [GC]* App no. 35382/97, § 19, (ECtHR 6/April/2000) and *Rydlander v. France* App no 30979/96 (ECtHR 27 June 2000).

⁹⁴⁷ Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)’ (2013) Council of Europe/European Court of Human Rights 52.

⁹⁴⁸ *Vernillo v. France* App no 11889/85 (ECtHR 20 February 1999) para 34.

⁹⁴⁹ *Case of Acquaviva v. France* App no 19248/91 (ECtHR 21 November 1995).

⁹⁵⁰ The states can be held responsible for delaying the process, such responsibility can be also extended to arbitration tribunals as it was argued previously. For example, the repeated change of the decision-maker which can lead to lengthy process is not justifiable *CASE OF LECHNER AND Hess v. Austria* App No 9316/81 (ECtHR 23 April 1987).

⁹⁵¹ *Hokkanen v. Finland*, App no. 19823/92 (ECtHR 23 september 1994), para 72.

what policy for dispute resolution process for online B2B disputes appropriately has captured a reasonable duration for a dispute resolution process.

The other element of efficiency is cost. Despite the fact that Article 6 of ECHR is silent about the cost of the proceeding and does not mention that cost can be a factor in access to a fair trial, there is precedent by the Court that accepts procedural economy as a principle. Procedural economy can include both time and costs. In *BENet Praha, spol. sr.o. v. the Czech Republic* the Court considered the contravention of the principle of procedural economy, although it did not accept the Government's procedural economy argument, it accepted procedural economy as a principle. The Court argued that:

*“The Court cannot accept the Government's contention that too strict an interpretation of the rule could contravene the principle of procedural economy and that it would place a disproportionate burden on the functioning of the Constitutional Court. In this particular context all that the right to adversarial proceedings requires is for the parties to have the opportunity to have knowledge of and comment on all observations submitted, with a view to influencing the court's decision.”*⁹⁵²

Although this case was about the duration of the proceeding, the Court consideration of procedural economy as a principle and its pragmatic approach to the case can be used in consideration of the cost of proceeding. However, despite the pragmatic approach and consideration of procedural economy, the Court did not rule in favor of efficiency.

In the Case of *Beer v. Austria*, the Court found that in determining the ancillary costs, it was understandable for the State to consider the matters of efficiency and economy. However, it placed the knowledge and the opportunity of expressing disputants views on every document on file above efficiency and economy and argued that efficiency and economy do not justify disregarding fundamental principles of adversarial proceedings which in that case was commenting on every document in the file by the parties.⁹⁵³

In effect with regards to efficiency the Court could rule both ways: it could argue that procedural economy and efficiency are values that should be upheld, but it could

⁹⁵² App no 33571/06 (ECtHR 24 May 2011), para 141.

⁹⁵³ App no 30428/96 (ECtHR 6 February 2001) para 18.

also argue that such values should not be upheld at the cost of undermining the fundamental rights considered in Article 6 ECHR. Hence, depending on the context of the dispute, Court's ruling might change.

7.2.2.2 Conclusion

While not all the requirements of 6(1) ECHR are against the B2B parties' preferences and some are aligned, and the Court is attentive to some principles that B2B parties value such as procedural economy, the extent to which the strict procedural principles should be applied (for example, the standards for fair hearing) brings about uncertainty in the parties and the dispute resolution provider about what constitutes minimum procedural fairness. Complying with these requirements in full, increases transaction costs and might even hamper procedural justice and defeat the purpose of having an online dispute resolution system in place. Applying these principles deters OMIs to adopt a justice system, because of its difficulty and expenses to uphold the criteria set under Article 6 ECHR. Applying all the principles of ECHR strictly to OMIs can affect the values of efficiency and accessibility as well as accuracy, which are paramount for the parties in B2B disputes.⁹⁵⁴ The ECHR can also lead to procedural formalism. Procedural formalism takes place when a dispute resolution process and parties involved with the process have to comply with many requirements such as regimenting procedures, how claims and counter claims are presented, rules on admitting evidence, cross examination, compulsory in person hearing and other matters in order to submit a dispute, process a dispute and enforce an award.⁹⁵⁵ Procedural formalism has long been considered as a factor that might lead to injustice.⁹⁵⁶ As observed by Djankov, procedural formalism can directly affect procedural justice; can lead to lower enforceability of contracts, higher corruption, and lack of consistency and fairness of the system.⁹⁵⁷ Procedural formalism also does not protect the disempowered and those who are not repeat players and legal formalism hampers a fair and just outcome.

⁹⁵⁴ For the parties preferences see Lind and others, 'Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic'.

⁹⁵⁵ Mole and Harby, 'A Guide to the Implementation of Article 6 of the European Convention on Human Rights', 60.

⁹⁵⁶ Roscoe Pound wrote: "For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backward-ness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man." Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1964) 10 *Crime & Delinquency* 355, 365.

⁹⁵⁷ Djankov and others, 'Courts', 457.

Kurtzberg and Henikoff demonstrate that procedural formalism can even work against the poor and disempowered in the context of landlord/tenant disputes. They state that: “the notion of the poor tenant who is protected by a strong advocate who eloquently asserts a multitude of formal legal defenses and counterclaims to eviction on the tenant's behalf, thereby ensuring a fair and just outcome is mocked by the realities of the formal legal system.”⁹⁵⁸

Setting aside the debate over whether OMIs' dispute resolution is arbitration or not and assuming that Article 6 ECHR applies to OMIs dispute resolution regardless of its nature, there are other barriers with regards to its applicability. While legally, the outcome of the process can be challenged in court, in cross-border transactions where different jurisdictions are involved, the outcome might not be challenged in practice under Article 6, due to its high costs and non-applicability of Article 6 to disputes that take place among those countries which are not a member of Council of Europe. The ECHR might not provide an incentive for OMIs to provide a justice system or uphold procedural justice, especially if their country of incorporation is not a member of the Council of Europe and not subject to the Convention. These OMIs are not obliged to follow Article 6(1) ECHR. Article 6(1) ECHR might even act as a deterrent for the OMI to provide a justice system at all; as it will open the way to bring claims against the process they use and incur costs on the OMI.

7.3 Private Contracting

Private contracting and the clauses in the service agreement of OMIs can have deterrent effect for OMIs to uphold procedural justice or might also incentivize the OMIs to uphold procedural justice. This also applies to the users of the OMIs. Certain

⁹⁵⁸ Joel Kurtzberg and Jamie Henikoff, 'Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation' (1997) J Disp Resol 53. They also reveal the empirical research on this. “The notion of the poor tenant who is protected by a strong advocate who eloquently asserts a multitude of formal legal defenses and counterclaims to eviction on the tenant's behalf, thereby ensuring a fair and just outcome is mocked by the realities of the formal legal system. An examination of all of the 1995 summary process cases 3 in four separate Massachusetts district courts (Quincy, Plymouth, Hingham, and Northampton) reveals that adjudication's so-called formal protections for the poor and disempowered rarely amount to considerable protection in practice For example, while 81.8% of landlords in our sample were either represented by counsel or were experienced repeat players, only 8.1% of tenants had attorneys and none were repeat players. Without the benefit of legal counsel, tenants frequently forfeited their formal legal protections by failing to assert them. In 71.7% of the cases examined, tenants waived all of their defenses and counterclaims prior to trial by failing to file an answers. To make matters worse, 38.2% of the few answers that were actually file were “uninformed” in that they raised no real defenses or counterclaims at all.”

contractual clauses that make dispute resolution more effective can also incentivize the participants to participate in the process, which can contribute to the effectiveness of the mechanism.

7.3.1 Contractual Liability

In almost all online market intermediaries, there is a waiver clause stipulating that the parties to the transactions will not hold the OMIs and their employees liable for any dispute that arises from the transactions.⁹⁵⁹ This indemnification clause can also be extended to the role of OMIs in resolving the dispute. In other words, the OMIs cannot be held liable at court if they do not uphold procedural justice.

To find out the incentives of OMIs under this liability waiver clause, it should be determined whether the clause is legally valid and can be referred to, in case it is

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Alibaba.com Transaction Services Agreement, 10.3 DISPUTE BETWEEN BUYER AND SELLER. IN CASE A DISPUTE ARISES BETWEEN BUYER AND SELLER FROM OR IN CONNECTION WITH AN ONLINE TRANSACTION, IF THE DISPUTE IS NOT RESOLVED THROUGH AMICABLE NEGOTIATION WITHIN THE PRESCRIBED TIME PERIOD ACCORDING TO THE RELEVANT TRANSACTIONAL TERMS, YOU AGREE TO SUBMIT THE DISPUTE TO ALIBABA.COM FOR DETERMINATION. IF YOU ARE DISSATISFIED WITH ALIBABA.COM'S DETERMINATION, YOU MUST APPLY TO THE HONG KONG ARBITRATION CENTRE ("HKIAC") FOR ARBITRATION AND NOTIFY ALIBABA.COM OF SUCH APPLICATION WITHIN 20 CALENDAR DAYS AFTER ALIBABA.COM'S DETERMINATION. IF EACH OF BUYER AND SELLER IN THE DISPUTE DOES NOT APPLY FOR ARBITRATION WITHIN THE ABOVE 20 CALENDAR DAYS, EACH OF THE BUYER AND THE SELLER SHALL BE DEEMED TO HAVE AGREED THAT ALIBABA.COM'S DETERMINATION SHALL BE FINAL AND BINDING ON YOU. WITH A FINAL DETERMINATION, IN THE CASE THE ONLINE TRANSACTION ADOPTS THEALIPAY SERVICES, ALIBABA.COM MAY INSTRUCT ALIPAY TO DISPOSE THE FUNDS HELD BY ALIPAY ACCORDING TO SUCH DETERMINATION. FURTHER, EACH OF BUYER AND SELLER SHALL BE DEEMED TO HAVE WAIVED ANY CLAIM AGAINST ALIBABA.COM, ALIPAY AND OUR AFFILIATES AND AGENTS.

< <http://rule.alibaba.com/rule/detail/2054.htm>>

< <https://intl.alipay.com/help/agreements/detail.htm?agreement=AlipayServiceAgreement>>

Alipay Account Service Agreement, 10.6 If you have a dispute with other parties, you release Alipay (and our affiliates and officers, directors, agents, and employees thereof) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, arising out of or in any way connected with such disputes.

Amazon also have a general indemnification clause: 16. General Release. because amazon and amazon payments are not involved in transactions between buyers and sellers or other participant dealings, if a dispute arises between one or more participants, each of you release amazon and amazon payments (and their respective agents and employees) from claims, demands, and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such DISPUTES.< <https://www.amazon.com/gp/help/customer/display.html?nodeId=1161302>> Accessed 9 March 2016

Made-in-China also has a clause which waives its liability as regards to its judgement:" 8.2

You acknowledge and promise that (a) the ability of making a judgment and/or dealing with a complaint, dissension, or dispute is limited, (b) no warrant shall be made that the results would meet your requirements, anticipation, or hope, (c) and in no event shall FOCUS be liable for the judgment or results. It is FOCUS's right to decide whether or not to participate in the handling of the complaint, dissension, or dispute."

Made-in-China STS, <<http://www.made-in-china.com/help/terms/>> Accessed 9 March 2016

challenged at court. This is to find out whether an indemnification clause creates an incentive for the OMI to provide a dispute resolution mechanism for the parties. According to Franck and as it was stated in section 7.2.1, most common law countries consider immunity for the arbitrators.⁹⁶⁰ Such immunity is not generated from the contractual agreement but the function of the arbitrator and arbitral tribunal which is quasi judicial. Hence in common law countries, due to quasi judicial role of the arbitrators and arbitration institutions, they are not liable for their actions or their inactions.⁹⁶¹ The effectiveness of such waiver clauses is limited when the agreement is unconscionable⁹⁶² or the arbitrator acts in bad faith.⁹⁶³ Extending this argument to intermediaries that are located in common law countries jurisdictions, the liability waiver clause in the contract can be effective and it will be enforceable. In common law countries, as parties are limited in holding an OMI liable for its actions during dispute resolution, it does not increase the cost of providing a justice system for the OMI and the cost will not be passed on to the customers.

The situation might be different in civil law countries. The OMIs might be held liable despite the limited or no liability clause, and courts might consider the decision makers liable based on breaching duty of care or terms that are imposed by the operation of law.⁹⁶⁴

Overall, if OMIs do not receive immunity for their dispute resolution in certain jurisdictions, they might not have enough incentives to provide arbitration or binding dispute resolutions that can be recognized in court as arbitration, due to the liability regimes. They might resort to other means of providing dispute resolution for the

960 Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity', 31.

961 See Section 7.2.1

962 US Uniform Commercial Code, § 2-302

963 UK Arbitration Law Act 1996, Section (29) Immunity of arbitrator. (1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his function.

964 In Austria, arbitration is a contract for service, Art. 584(2) of the Austrian Code of Civil Procedure considers liability for arbitrators through a failure to comply with their duties. These can include the duty to conduct the proceedings in the appropriate manner, the duty to render an award and the duty to give leave for enforcement of the award. In Finland, the relationship between the arbitrator and the parties is contractual. The arbitrator has to provide a proficient service and can be held liable if such service is not provided. See Alan Redfern and Martin Hunter, 'Law and Practice Of International Commercial Arbitration' (Sweet and Maxwell, 2004) 240-241.

parties, such as referring them to an external third party or providing nonbinding dispute resolution.

7.3.2 The Arbitration Clause

Some OMIs have an arbitration clause, which stipulates that if any dispute arises between the members of OMI and the OMI regarding its services, it should be resolved through arbitration.⁹⁶⁵ Dispute resolution system that OMIs provide is a service, hence it can be concluded from such clauses that the disputes against OMIs regarding the conduct of the dispute resolution should be referred to arbitration, as well. In such circumstances, the party to the dispute might not be satisfied with dispute resolution process that, for example Amazon.com, has in place. In its transaction agreement, Amazon specifies that in case of any dispute between Amazon and a user, the user should go to arbitration. This might mean that the conflicts regarding Amazon dispute resolution mechanism should also go to arbitration.

The contractual clause that stipulates this condition reads as: “Any dispute or claim relating in any way to your use of *any Amazon Service*, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved *by binding arbitration*, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.”⁹⁶⁶ As stated in this clause, disputants should go to arbitration for a broad range of disputes that can also include disputes that relate to Amazon’s conduct regarding its dispute resolution system and the outcome of the disputes. The OMI, in this scenario, has a one-sided control over the parties’ dispute design. It has already chosen the law that will apply. It also chooses the arbitration institution and will pay the cost of arbitration, if it is less than 10,000 USD.⁹⁶⁷ The fact that Amazon has control

965 Amazon Conditions of Use, <<http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>> Accessed 9 March 2016.

966 ‘Conditions of Use’, <<http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>> Accessed 9 March 2016.

967 The paragraph reads as - “To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to our registered agent Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, WA 98501. The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA’s Supplementary Procedures for Consumer-Related Disputes. The AAA’s rules are available at www.adr.org or by calling 1-800-778-7879. Payment of all filing, administration and arbitrator fees will be governed by the AAA’s rules. We will reimburse those fees for claims totaling less than \$10,000 unless the arbitrator determines the claims are frivolous.” Conditions of Use’, <<http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>> Accessed 9 March 2016.

over the design of dispute resolution that can challenge its own dispute resolution outcome can lead to hampering of the procedural justice of dispute system design.

Referring users to arbitration that is designed by OMIs can shield intermediaries from being held liable at court for the dispute resolution mechanisms they provide and in effect, the dispute resolution design speculates two stages of seeking recourse from private dispute resolution mechanisms, before the disputant can go to court. This exhausts the users' resources and will be too costly. While such processes can be a way to shield the OMIs from liability and hence make it less costly for them to provide dispute resolution for the parties, it does not help to incentivize the intermediaries to uphold procedural justice.

7.4 The Major Challenges Facing ODRs

This section briefly considers the independent ODR providers and why they have been failing to remain in business and provide services to their customers. It uses some of the empirical research results, as well as the incentive structure of OMIs, to understand the ODR design pitfalls. It first starts with laying out the problems that ODRs face and then discusses the design of ODRs and their pitfall.

7.4.1 ODRs' Failures

After some initial success, entrepreneurial ODRs have not been very successful in attracting users.⁹⁶⁸ In 2008, Cortes suggested that the standalone ODRs are failing even when they are publicly funded. For example, Electronic Consumer Dispute Resolution (ECODIR) has not achieved much success, although it is publicly funded and free of charge.⁹⁶⁹ According to a study in 2010, the number of active ODR providers has dropped. Six years later, in 2016, ODR providers have not achieved much success, either. They have been struggling in designing a system that could encourage

⁹⁶⁸ In 2004, there were 115 ODRs resolved around 1 million disputes. Tyler, Mellisa Conley (2004) '115 and counting: the State of ODR 2004' in Melissa conley Tyler, Ethan kitsch and D Choi (eds) Proceedings of the Third annual Forum on Online Dispute Resolution.

⁹⁶⁹ Pablo Cortes, 'Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes' (2008) 17 Information & Communications Technology Law 221.

participants to resolve their disputes using their services on a mass scale. Some ODR providers had to merge with bigger providers and some are no longer active.⁹⁷⁰ The bigger and more well know platforms have had better success but not without failure. In 2000, the American Arbitration Association established an e-commerce group. This e-commerce group built up a platform for online B2B disputes, which specifically addresses supply chains, as well as the intermediaries.⁹⁷¹ The platform was not did not continue its operation. It later on developed some rules for resolving suppliers and buyers' disputes online and provided its service through International Center for Dispute Resolution.⁹⁷²

There are multiple reasons for the failure of ODRs, such as limited scope, the technology employed, the absence of agreements to use the service and insufficient publicity.⁹⁷³ Some legal scholarship bases the failure of ODRs on the lack of governmental regulation.⁹⁷⁴ It has been contended that the failure of ODRs is due to lack of enforceability of their outcomes and scholars suggest regulating ODR providers and bringing about more enforceability of their award in court.⁹⁷⁵ Some attribute the failure of ODR providers to the lack of trust in such platforms. They suggest that to bring about trust, the government should control these platforms and that the governments, in the field of dispute resolution, are the most trusted or legitimate controllers.⁹⁷⁶

970 Modria, an American ODR provider has acquired some European ODR providers such as themediationroom and Juripax.

971 Ken Cimino, 'Site Launched To Settle B2B Disputes Online', (13 July 2001) <<http://www.ecommercetimes.com/story/11971.html>> Accessed 20 April 2016. Although AAA resolves B2B disputes, there is no trace of the launched platform on its website.

972 ICDR Manufacturer/Supplier Online Dispute Resolution Program, available at <https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_015216> Accessed 24 November 2016.

973 Pablo Cortes, 'Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes' (2008) 17 Information & Communications Technology Law 221

974 Mohamed S Abdel Wahab, M Ethan Katsh and Daniel Rainey, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Pub. 2012) 18.

975 Cortes, 'Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes'; American Bar Association [ABA] Survey, *Addressing Disputes in Electronic Commerce: Final Recommendation and Report*, (2002) 58 Business Law 415,420.

976 Thomas Schultz, 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust' (2004) 6 North Carolina Journal of Law & Technology 71, 72. ;Rafal Morek, 'Regulatory Framework for Online Dispute Resolution: A Critical View, The' (2006) 38 U Tol L Rev 163; American Bar Association [ABA] Survey, *Addressing Disputes in Electronic Commerce: Final Recommendation and Report*, (2002) 58 Business Law 415,420 .

As to how the government needs to regulate ODR providers, scholars have focused on the procedural justice aspect of such regulations.⁹⁷⁷ Emphasis on the necessity of having governmental regulation has led to the issuance of directives and laws. In Europe, the European Union voted to support new legislation to govern online disputes that arise from online transactions, known as EU-wide dispute resolution platform (ODR platform). The legislation provides a single online platform that can refer the disputant to an ODR or alternative dispute resolution platforms. A set of common rules governs the functioning of the ODR platform. It will have a set of national advisers providing information to the consumers.⁹⁷⁸ The ODR platform connects ADR initiatives in various countries and requests that the online merchants provide a link to the platform on their website. It has become active in the beginning of 2016.⁹⁷⁹

What scholars have called to pay attention to is not only the procedural rules that govern ODR providers, they have also studied and called for the design of the dispute resolution provider to be investigated.⁹⁸⁰ The design of ODR providers should be also looked at and how the design of their dispute resolution can hamper procedural justice should be analyzed. The following sections will briefly look into the of ODR mechanisms that can hamper procedural justice.

7.4.2 The Design Problem in Online Dispute Resolution

The design of the ODR mechanisms has proved to have serious pitfalls in providing neutrality and effectiveness, in particular. The following subsections will focus on how neutrality and effectiveness are hampered by the design of ODRs. From the theories that have been developed based on this study, the following sub-section discusses some of the design problems of ODR providers.

⁹⁷⁷ Wahab, Katsh and Rainey, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* 18.

⁹⁷⁸ Commission, 'Proposal for a Regulation of The European Parliament and of the Council on online dispute resolution for consumer disputes (regulation on consumer ODR)', COM (2011) 0794 final.

⁹⁷⁹ Commission Memo, 'A Step Forward for EU Consumers: Questions and Answers on Alternative Dispute Resolution and Online Dispute Resolution' MEMO (2013) 193.

⁹⁸⁰ Louise Ellen Teitz, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of on-Line Dispute Resolution' (2001) 70 *Fordham L Rev* 985, 1010. ;Orna Rabinovich-Einy and Ethan Katsh, 'Lessons from Online Dispute Resolution for Dispute Systems Design' in *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012).

7.4.2.1 Neutrality

It is not clear how ODR providers preserve independence and neutrality. This is due to the fact that the design of their systems regarding their fee structure has not been studied or is not clear and the control over the design of the process remains disputed. Financial incentives for remaining neutral are of utmost importance. To this effect, state legal systems consider exigent rules for preventing judges from having economic incentives. As Posner argues, in the judicial system, in order to preserve neutrality of judges, the judges are placed in a vacuum away from economic incentives.⁹⁸¹ Hence if one party to the transaction designs the dispute resolution system by referral to a court, in many instances, the neutrality of court deems to be preserved.

The economic incentives of the ODR providers are not very clear. If one of the parties has control over designing the dispute resolution system, by referring the other party in the agreement to a standalone ODR, the other party might be at a disadvantage. Party referral can lead to ‘repeat player’ effect and hamper the neutrality of ODRs. This is different in organizational ODR, which might overcome the repeat player problem by acting as the third party who controls the design of dispute resolution and has incentives to be neutral in designing the dispute resolution system.

Furthermore, it is unclear how the standalone ODR mechanism’s design maintains neutrality, as opposed to merely claiming neutrality. The economic incentives of the ODR providers have not been analyzed before and not many of ODR providers are transparent about their fee structures.⁹⁸²

7.4.2.2 Effectiveness

The other factor that may hamper the development of ODRs is the effectiveness of such mechanisms. As it was defined in detail in Chapter 3, effectiveness can be defined as a process that can compel the parties in dispute to participate in the process and enforce the award. ODR providers do not provide an escrow mechanism and are not involved ex-ante to the dispute. Ex post, it is extremely important to compel the parties to participate in the process, as there are no incentives for one or both of the parties to participate. Unlike standalone ODRs, in organizational ODR, the parties agree to

⁹⁸¹ Richard A Posner. ‘What do judges and justices maximize? (The same thing everybody else does)’ (1993) Supreme Court Economic Review 1-41.

⁹⁸² Cortes, ‘Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes’.

resolve their dispute through the ODR platform, ex-ante. This facilitates the effectiveness of such systems. In order to be effective, the provider should be able to compel the parties to engage in the dispute resolution process and enforce the award. Since organizational ODRs have the power to enforce the outcome even if the party does not engage with the process, they provide an effective system.

Not participating in the ODR process might not have any reputational costs for sellers and buyers and any monetary punishment is not immediate, if there are no escrow mechanisms in place. The escrow mechanism should be a non-interest based escrow and the ODR provider should not be able to profit from holding the money in anyway. Many studies have considered the enforceability of the ODR awards,⁹⁸³ however, it only remains theoretical as online awards have not been challenged in court and it is not clear if online dispute resolution outcomes have been enforced at court. Hence to provide an effective mechanism and prevent uncertainty surrounding the effectiveness of the outcome, ODR providers should consider ex-ante measures.

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Rafael Morek, 'The Regulatory Framework for Online Dispute Resolution: A Critical View' (2006) U. Tol. L. Rev. 38, 163. Amy Schmitz, 'Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR' Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR (June 16, 2010). Baylor Law Review 62 (2010): 178. Ponte, L. M. (2001). Throwing bad money after bad: Can online dispute resolution (ODR) really deliver the goods for the unhappy Internet shopper. Tul. J. Tech. & Intell. Prop., 3, 55.

8 The Optimal Design of Online Market Intermediaries' Dispute Resolution

To design an optimal justice system for online market intermediaries, specifically B2B OMIs, attention should be paid to the factors that incentivize them to or deter them from providing accessibility, neutrality, efficiency and effectiveness in their justice system. To reach this objective, this chapter considers the empirical insights that were gathered in Chapter 6 as well as other incentives and deterrents that were delineated in Chapter 7 to provide recommendations for the optimal design of justice systems in OMIs. The first section considers the accessibility of OMIs and discusses the optimal design to provide an accessible dispute resolution mechanism for the parties. It considers all the design elements in OMIs that were explored in Chapter 4 and 5. The second section considers the neutrality of OMIs and discusses a neutral design for OMIs. The third section discusses the effectiveness of OMIs and the fourth discusses the efficiency of such systems.

8.1 Optimal Design for Accessibility

Based on the empirical results of accessibility of OMIs, this section will re-iterate the accessibility pitfalls and provide solutions for overcoming the problems and providing a more accessible justice system.

8.1.1 Arbitrary Rejection of Claims

The accessibility of OMIs, as it was evidenced in Chapter 6, can be hampered mainly by arbitrary rejection of claims and longer duration needed for filing a complaint. Arbitrary rejection of claims should not take place in OMIs and if the OMI is allowed to reject a claim, it should have an appeals mechanism. This will ensure that the parties have access to dispute resolution mechanisms. There might be some legal incentives for the OMI not to reject the claim arbitrarily. In various civil and Islamic law

countries,⁹⁸⁴ the arbitrator's withdrawal from the process creates liability for the arbitrator and it can also be expanded to institutions.⁹⁸⁵

8.1.2 Long Duration of Negotiation

Regarding duration, all the OMIs' dispute resolution design considers negotiation before allowing the parties to submit a dispute to the dispute resolution system. While this is an appropriate approach as it might result in the resolution of a dispute without the need to submit the dispute, long negotiation times will hamper the accessibility of OMIs dispute resolution. OMIs need to have a specific and short time period for negotiations and set a time limit and explicitly mention the time limit in their service agreements.

8.1.3 Nonbinding Procedures: The Accessibility and Effectiveness Issue

If the dispute resolution policy allows the parties to seek recourse from court at any stage of the dispute resolution process, this might hamper both access to justice for one party and effectiveness. If one party can lodge a complaint against the other in their home country court, then this also has an impact on the expected value of non-compliance with participating in the process. Since the dispute resolution forum allows a one party design of justice system as well, that party can go to a court that is competent and cheaper and leave the other party without recourse to access to remedy. For example, consider a Chinese supplier and a German buyer enter into a transaction agreement on a platform incorporated in China and it results in dispute. The German buyer lodges a complaint at the OMI's dispute resolution center. The Chinese supplier files a counter claim against the German buyer at the Chinese court. The Chinese supplier is the stronger party in this instance, since the supplier is at an advantageous position with regards to the subcomponents of accessibility, such as language of the proceeding, the ease of access to forum and knowledge about the rules. This can be remedied by having an escrow mechanism in place, as the informal monetary

⁹⁸⁴ Abdul Hamid El-Ahdab and Jalal El-ahdab, *Arbitration with the Arab Countries* (2 edn, Kluwer Law International 1999), 348-49 (Lebanon), 430 (Libya), 457 (Morocco), 520 (Qatar), 755 (Yemen).

⁹⁸⁵ Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 *New York Law School Journal of International and Comparative Law* 1, 1.

enforcement takes place before the party goes to court. But the escrow will have to comply with any judgment from court if the dispute resolution outcome is nonbinding; hence, for having access to effective remedy it is important to require the proceeding and outcome be binding on the parties.

8.2 Optimal Design for Neutrality

Another important characteristic of a marketplace is its bias, based on which a basic distinction is made between neutral or biased marketplaces. Neutral marketplaces ensure that the interest of none of the participants, the buyer side as well as the seller side, predominates, while biased intermediaries act in favor of one of the two parties. In this respect, private and consortia OMIs (as were defined in section 2.4) are generally biased towards their owner(s)⁹⁸⁶ (case studies were not available for these type of OMIs), whereas public OMIs are assumed to treat both sides equally.⁹⁸⁷

In public OMIs, those that have their own line of products might be less neutral if they provide the dispute resolution mechanism themselves. If the design of the OMI also leads to the one side of the party bringing substantially more revenue than other, it will lead to the “repeat player” problem. The solution to this could be a referral to an external dispute resolution provider. However, as it was observed in section 6.10.1, OMIs that refer the parties to an external dispute resolution provider might incur more costs on the parties and it can hamper efficiency.

In order to come up with the optimal design, we need to pay attention to the preferences of the B2B parties. If the B2B parties want to eliminate all the factors that can hamper the neutrality of OMIs and prefer a more neutral dispute resolution provider to a less expensive dispute resolution provider, then it can be safely assumed that OMIs should refer the parties to an external dispute resolution provider (an ODR or a payment intermediary with an ODR mechanism). If the B2B parties are willing to pay a lesser price and use a process that might be less neutral but also less expensive then referral is not needed.

⁹⁸⁶ Steven Kaplan and Mohanbir Sawhney, ‘E-Hubs: the New B2B Marketplaces’ (2000) 78 Harvard Business Review 97.

⁹⁸⁷ Kaplan and Sawhney, ‘E-Hubs: the New B2B Marketplaces’.

8.3 Optimal Design for Effectiveness

The effectiveness of OMIs is directly related to the ex-ante arrangements for payments and providing an escrow mechanism. Ex-ante agreement between the parties to use a certain payment intermediary or escrow mechanism can increase the cost of non-compliance with the outcome and compel the parties to participate in the process and comply with the outcome. Hence, if the process is non-binding and there are no escrow mechanisms or payment intermediary in place, the effectiveness of OMIs dispute resolution outcome is hampered. Moreover, the effect of the reputation mechanism for OMIs that are not well established and not dominant in the market, is lower than the effect of reputation mechanism for the big players. Hence, they need a more effective mechanism other than reputation mechanism.

In the case studies, Teleroute claims that its dispute resolution mechanism is in fact effective and 80 percent of the cases are resolved.⁹⁸⁸ This is an exceptional case, as Teleroute does not provide an escrow mechanism or a payment intermediary. The reasons that would help Teleroute to provide an effective mechanism could be that: Teleroute is not necessarily a public intermediary i.e. not everyone can join by providing limited information. It has a thorough verification and approval process. Being the biggest online market intermediary in transportation in Europe also helps Teleroute to increase the cost of non-compliance with the outcome of the process by the threat of removal from the platform.⁹⁸⁹

Considering Teleroute's success, it might be concluded that the public and private nature of OMIs has an effect on the effectiveness of their dispute resolution processes and outcomes. If they are private intermediaries, binding outcomes and ex-ante preparations might be less needed than if they are public intermediaries. Hence, private intermediaries with a thorough verification process and a dominant role in the market, might not be in need of providing an escrow mechanism to ensure effectiveness. Other intermediaries, however, are in need of an escrow mechanism.

988 Teleroute Safe Market Place Program <http://teleroute.com/en_en/teleroute-freight-exchange/safe-market-place-programme/debt-mediation> 5 March 2016.

989 'Verification' <http://teleroute.com/en_en/teleroute-freight-exchange/safe-market-place-programme/verification> 5 March 2016.

As it was stated in Section 7.1.3, the effectiveness of the process might also be hampered if one of the parties has more power to go to court and leave the process. In this case, parties should not be allowed to leave the process and the outcome should be binding on the parties. To challenge the dispute resolution outcome, the parties should be referred to online arbitration. Online arbitration is more accessible for the party that is not located where the competent court is and a balance of power can be achieved this way.

8.4 Optimal Design for Efficiency

Based on the evaluation of OMIs' dispute resolution, efficiency is better achieved compared to other criteria. However, there are trade offs between efficiency and the criteria of neutrality. On the one hand, the duration of the dispute resolution process is prolonged when OMIs do not refer the dispute to an external dispute resolution provider. On the other hand, the cost of an external dispute resolution provider is more than an internal dispute resolution provider. The optimal design in this case also relates to the preferences of the parties. If B2B parties prefer a cost effective dispute resolution over a short duration of dispute resolution, then it is more aligned with their preferences to refer the parties to an internal justice system. If they prefer otherwise, then an external dispute resolution is appropriate.

8.5 Design Elements and Liability

Liability, through regulation and application of laws, might be one of the deterrents in providing dispute resolution for the parties. While arbitral immunity can help with incentivizing OMIs to provide online arbitration for their users, it does not deter them from breaching procedural justice. Hence, a balance should be struck through a system that does not hold OMIs liable at court for their service related to dispute resolution, but at the same time, generates an oversight for the conduct of the OMIs regarding dispute resolution. This could be achieved through referring parties to arbitration if they would like to challenge OMIs' dispute resolution system, based on procedural issues. This referral to arbitration has its pitfalls, such as making it difficult for the parties to

access to court; however, while OMIs cannot be held liable for their dispute system design, the parties still have a way to challenge the dispute system by arbitration.

The process of referring the parties to arbitration in case they want to challenge an OMI's dispute system design should itself be implemented in a way that does not have an effect on the fairness of arbitration, for example the process should not be unilaterally designed by the OMI and OMI should not have control over the process, for example should not be able to unilaterally decide which tribunal parties can go to, to challenge the OMIs dispute resolution process.

9 Conclusion

This thesis aimed to investigate whether online private justice systems that resolve Business-to-Business disputes uphold procedural justice. It focused on B2B online market intermediaries. B2B online market intermediaries (OMIs) provide a platform for facilitating transactions between suppliers and buyers on the Internet. The question that was addressed was: Do Online Market Intermediaries (OMIs) uphold procedural justice in B2B disputes? The focus on OMIs was due to their potential role in facilitating B2B transactions and resolving disputes. Online B2B disputes were chosen, as there are not many studies about them in the legal field. It is one of the first studies to analyze the service agreements and designs of B2B online market intermediaries' dispute system management. The question is important from two angles; firstly, procedural justice is an important normative concept and it should exist in dispute resolution systems and it is specifically important when the dispute system is not operating in the shadow of law. Secondly, procedural justice has many objectives shared with the rule of law. Rule of law is closely connected to economic growth. If procedural justice factors exist in B2B online private justice systems, more trade might be facilitated and lead to economic growth.

To find out the answer, this thesis studied the theories of procedural justice (the normative criteria i.e. the goals of a justice system) and the positive approach to procedural justice (how to achieve those goals). Theories of procedural justice can be divided into: the accuracy model, the participation model and the balancing approach. The accuracy model deems a procedure as just if the result is accurate. This approach maintains that the process should allow for many measures, such as participation, right to review, full discovery and other matters that may result in an accurate outcome. It does not consider the cost of the proceeding. The participation model establishes that the parties in the dispute should be given the right to participate in the decision making process and should be given an opportunity to present evidence. The participation model does not evaluate the procedural justice of the proceeding based on the accuracy of the outcome, but based on merely the procedure. The balancing approach considers both participation and accuracy, but it should be achieved at the minimum cost.

Applying the balancing approach theory to online B2B disputes, the preferences of the B2B disputants were considered, in order to establish the values of the procedural justice that the dispute resolution process should uphold, to be perceived as fair. Overall, using theories of procedural justice from the normative perspective and how to achieve the procedural principles from the positive perspective, it clarified what B2B parties' preferences are, for achieving procedural justice. It was concluded that four values are highly important for B2B parties: accessibility, neutrality, effectiveness and efficiency.

It then used the theory of institutional design, laid out by Ostrom, to provide a thorough analysis of OMIs' dispute resolution design and how it affects procedural justice criteria. The OMIs' dispute systems' design was analyzed based on Ostrom and Bingham's theory of institutional design and dispute system design and considered matters such as who designs the justice system, the goal of dispute resolution process, the nature of DSD, the type of dispute resolution and the nature of its outcome, the financial structure of the neutrals and the nature of an external oversight.

Based on the abovementioned factors, it analyzed OMIs' dispute system design. For each procedural justice criteria, it drew elements, based on the theory of institutional design and dispute system design, in order to find out how to evaluate the system and determine if OMIs' dispute design adheres to procedural justice. It then carried out the empirical research. The empirical research went as follows: 118 B2B OMIs and their service agreements were studied. Nine OMIs were chosen as they provided an internal or external dispute resolution mechanism. Then, based on the chosen OMIs' service agreements, their types and financial structures, each criterion of procedural justice was evaluated, based on the existence or lack of existence of the subcomponents. Then explanation was provided as to the current state of adherence to procedural justice in OMIs, based on the evaluation model that was provided.

Accessibility of OMIs' dispute resolution was at an acceptable level, due to the fact that all of the OMIs accept e-filing, do not need legal representatives, do not need a participation fee, do not require in-person hearing, accept online evidence and the language of dispute resolution is the language in which the transaction has been carried out.

The adherence of OMIs to procedural justice had serious pitfalls, in terms of neutrality; the reasons were mainly: they are producers themselves, they have a biased fee structure and receive fee from one side of the market, they receive commission from each transaction, hence those that carry out more transactions are at an advantage and in most of the cases their dispute resolution mechanism outcome cannot be challenged in court, hence there is no oversight for their dispute resolution process. Regarding efficiency and effectiveness, ex-ante arrangements for escrow mechanism and payment intermediaries and review and feedback mechanisms were considered. Most of the platforms provided such mechanisms. But when it came to efficiency, some of the OMIs fell short in setting time-limits for enforcement of awards.

The thesis then, using a Law and Economics analysis and transaction costs economics, looked at the incentives and deterrent of OMIs for providing a justice system and upholding procedural justice. This was to provide an optimal design for B2B OMIs' justice systems and draw some conclusions for online dispute resolution providers, as a whole. The research showed that some OMIs with higher revenue and a more dominant position could more effectively provide dispute resolution and have the capacity to adhere to procedural justice; while small sized firms did not adopt dispute resolution or they referred it to the third party. However, the revenue or success (in terms of users) of OMIs was not a decisive factor for adhering to procedural justice or providing dispute resolution. Other OMIs that were not dominant provided more neutral dispute resolution mechanism for their users.

Analyzing the incentives and deterrents of OMIs for adopting and upholding procedural justice, three kinds of incentives were considered: market incentives, regulatory incentives and contractual incentives. The thesis found that transaction costs is a very important factor and affects OMIs' decision to adopt or not to adopt or to refer the parties to an external justice system. It was also concluded that strict regulations can lead to procedural formalism and might not incentivize OMIs to adopt dispute resolution or uphold procedural justice, as it increases the transaction costs of providing such services. Applying network externality to OMIs' dispute resolution design, the research theorized that network externality could affect the neutrality of OMIs in dispute resolution, either positively or negatively. To satisfy both sides of the market to stay on the platform, the OMIs need to preserve their neutrality. However, if the market

is one-sided and the OMI receives most of its revenue from one side, it might not remain neutral.

Finally, the thesis provided some insights regarding the optimal design of OMIs' dispute resolution; based on the findings during the empirical analysis and the incentives and deterrents studies, the thesis suggested that OMIs should not arbitrarily reject disputes, if they are producers, refer the parties to an external justice system to refrain from biased decisions and that they need ex-ante agreements and should use payment intermediaries to provide an effective justice system. They also need to clearly state the time-limits for various stages and ways of enforcement of the award, in order to be able to provide a dispute resolution system that upholds procedural justice. As to the optimal design for liability of OMIs, OMIs should not be liable for their dispute services, but they should have a mechanism in place which can be evoked if the parties believe that the OMIs' dispute resolution did not uphold procedural justice criteria. This can create a private oversight for OMIs' dispute resolution process.

Overall, the research has challenged the view that all the normative criteria of procedural justice should be applicable to all circumstances. It has also argued that in evaluating a certain dispute resolution mechanism the dispute system design of the justice providers should be considered as a whole. Considering only applicable laws as incentives for upholding procedural justice is not going to yield realistically achievable results.

The study faced some limitations in gathering data. The data that were used to understand the preferences of commercial actors for a dispute resolution system have been gathered from other studies. The respondents to the surveys in the studies are not asked to value each criterion of procedural justice or set a price to see how much they are willing to pay for each criterion. If that were the case, then a better understanding of parties' preferences would have been possible.

As to carrying out empirical studies that show the real performance of OMIs, it is not clear how many disputes B2B OMIs resolve and similar to arbitration, the outcomes of their dispute resolution are kept confidential. Many of the intermediaries are private online intermediaries and their revenue is not accessible, hence their dominance in the market could not be exactly measured. The lack of access to such information makes it challenging to objectively verify the theories that were put forward in this thesis.

This research and the theories that have been developed and the method for measuring OMIs' dispute resolution can be used in other studies of online intermediaries in general, commercial and non-commercial. Internet intermediaries' liability, in case of dispute between the parties, is a highly discussed topic and the approach of this thesis regarding the analysis of dispute resolution in OMIs can be used to develop methods to answer questions such as, why Internet intermediaries adopt a justice system and to what extent they uphold procedural justice.

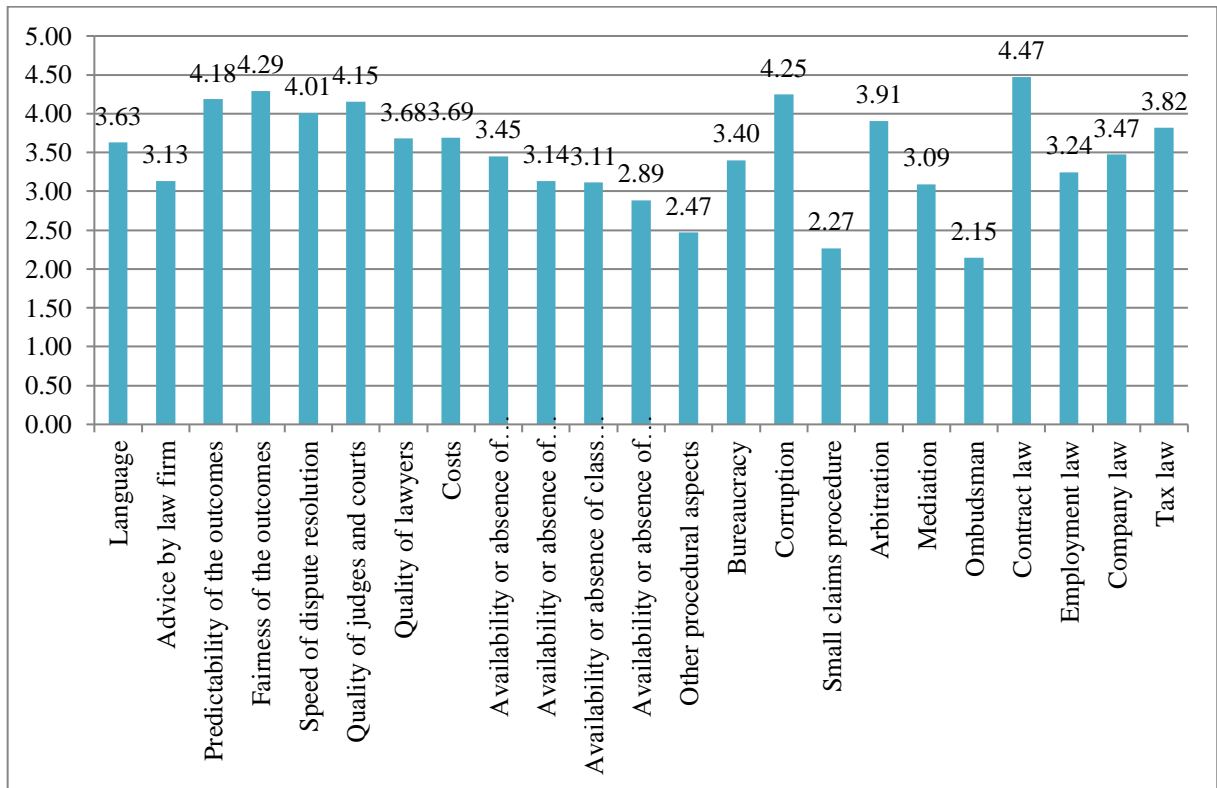
On the theoretical level, future research can be carried out on the preferences of online users and dispute management systems. This can take the research further away from normative values of procedural justice and reach a more positive and thus realistic approach to which dispute system design is based on the preferences of the parties.

On the empirical level, researchers can use the research design of this research in order to evaluate other dispute management systems online. Although the design is primarily focused on online B2B dispute resolution, the same design can be used to measure other general platforms that are not necessarily B2B. The theory of procedural justice and the preferences of the users can be applied to various contexts and the institutional design of commercial and non-commercial online platforms can be analyzed based on the structure that was provided in this thesis.

In conclusion, as the Internet becomes a pervasive tool for commerce and OMIs become prominent in facilitating commerce, the disputes that arise from such transactions should be resolved in accordance to the normative criteria of procedural justice while considering the preferences of the parties. This can grant such dispute management systems legitimacy and optimal design for OMIs' dispute resolution management can bring about certainty in contracting.

Index 1

Why firms avoid a certain judicial forum ?



Source: the Oxford Survey on Civil Justice System

Index 2	
Factors that affect accessibility	ALI/UNIDROIT Measures
Language	- Due notice for the Right to be heard: The language of the court is primarily used, however, the court may allow to hold the proceeding in the language of the habitual residence of the parties, or the language of the principal documents. <i>Ali/UNIDROIT Principles. Article 5.2 and Article 6.</i>
Communication	- Oral and written communication: Court can primarily agree on written submission and electronic means of communication can be used unless the parties ask for an oral hearing. <i>Ali/UNIDROIT Principles. Article 19 Comment P- 19B.</i>
Steps to File a Dispute	- The court should commence the proceeding as early as possible. Consideration should be given to the transnational character of the dispute. It should also determine the steps for filing and resolving the dispute and include dates and deadlines. <i>Ali/UNIDROIT Principles. Articles 14.1, 14.3</i> - Procedural rules should prescribe reasonable schedule and deadlines <i>Ali/UNIDROIT Principles. Article 7.2</i>
Location of Dispute Resolution	- When location of dispute resolution forum creates substantial inconvenience to the party, then that venue should not be considered for resolving the dispute. <i>Ali/UNIDROIT Principles. Article 3.4 and Comment P- 3E</i>
Factors that affect neutrality	ALI/UNIDROIT Measures
A process for monitoring neutrality of the judge	- <i>P-ID</i> A procedure for addressing questions of judicial bias is necessary only in unusual circumstances, but availability of the procedure is a reassurance to litigants, especially nationals of other countries. However, the procedure should not invite abuse through insubstantial claims of bias.
Factors that affect Effectiveness	ALI/UNIDROIT Measures
Not Predicted	- Effectiveness of the justice system and enforcement of award is beyond the scope of Ali/UNIDROIT therefore other sources will be considered for measuring an effective justice system. <i>Ali/UNIDROIT 29 and 29 A.</i>
Factors that affect Efficiency	ALI/UNIDROIT Measures
Time	- Procedural rules and court orders for scheduling and deadlines should be in place. <i>Ali/UNIDROIT 7.2</i> - The court should promptly issue the judgment <i>Ali/UNIDROIT 23.1</i>

Cost (Flexibility)	<ul style="list-style-type: none">- The “structure” of proceeding (applying the procedural rule of law) should be flexible and based on the nature of particular case. <i>Ali/UNIDROIT P-9A</i>- The court should manage the case in consultation with the parties as it will be more efficient. <i>Ali/UNIDROIT 14.2 and 7.2</i>
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Index 3

Intermediary	No Justice System	Online Third Party	Internal
indiamart.com	x		
Ariba.com	x		
tradeindia.com/	x		
globalsources.com	x		
tradekey.com/	x		
ecasb.com/	x		
tradekorea.com/	x		
importers.com	x		
made-in-china.com			x
ec21.com	x		
sugoo.com	x		
dhgate.com			x
thomasnet.com/	x		
mfg.com	x		
en.algomtl.com/	x		
hqew.net			x
globaltradeconnect.com/	x		
getdistributors.com/	x		
ecplaza.net	x		
http://www.b2bbazar.com/	x		
eworldtradefair.com/terms.html	x		
thomasnet.com/terms.html	x		
tradett.com/	x		
trademetro.net	x		
herostart.com	x		
www.com51.com	x		
wdtrade.com	x		
tradeeight.com	x		
trade-world.org	x		
tradeindeed.com	x		
ecvv.com	x		

https://panjiva.com	x		
http://bizbroker24.com/	x		
http://www.tradeboss.com/	x		
diytrade.com/	x		
esources.co.uk/	x		
tr-buy.com/	x		
allproducts.com/	x		
exportindia.com	x		
b2b.tradeholding.com	x		
exportersindia.net	x		
etradeasia.com/terms-of-service.html	x		
21food.com/	x		
wotol.com	x		
Italianmoda.com	x		
barry-wehmiller.com	x		
Fordaq.com	x		
e2open.com/company/terms-of-use	x		
https://jooraccess.com/terms_conditions	x		
Zilzar.com	x		
hubwoo.com/	x		
perfect.com/	x		
rusbiz.com/	x		
tejari.com/	x		
www2.tenderlink.com/	x		
Intermediary	No Justice System	Online Third Party	Internal
ecasb.com/	x		
arabiantravelmarket.com/	x		
b2brazil.com/	x		
mysteel.net	x		
hubwoo.com/	x		
ebay.com	x		
Amazon.com			x

supplyon.com/	X		
truckscout24.com/	X		
worldwide.vortal.biz/	X		
mfg.com/	X		
www2.tenderlink.com/	X		
https://tradeplace.com	X		
teleroute.com/			X
buildingmarkets.org/	X		
agriaffaires.co.uk/	X		
asianproducts.com	X		
b2bchinasources.com/	X		
manufacturers.com.tw/	X		
bizbuysell.com/	X		
buykorea.org/	X		
chinabusinessworld.com/	X		
en.china.cn/	X		
icexindia.com/	X		
acesuppliers.com/	X		
agrotrade.net/	X		
autoindustria.com/	X		
itradein.com/	X		
tradebig.com/	X		
tradedarabia.com/	X		
wotol.com/	X		
http://www.blurgroup.com	X		
https://www.markitx.com	X		
http://www.bizbilla.com/	X		
gtexus.com	X		
covisint.com	X		
http://www.1worldsync.com/	X		
tradeford.com	X		
http://www.offstock.com/	X		
http://www.metrade.net	X		
alibaba.com			X

https://www.tradeloop.com/m12/home/	x		
http://www.tradelead.com/	x		
https://uppler.com/	x		
http://www.toboc.com/	x		
http://www.tradekorea.com/	x		
http://www.fibre2fashion.com/f2firms.htm	x		
http://www.eleb2b.com/	x		
http://www.skyeplus.com/	x		
http://www.acesuppliers.com/	x		
http://www.dramexchange.com/	x		
http://www.hktdc.com/	x		
http://www.tradebanq.com/	x		
https://www.toadlane.com/		x	
http://www.exostar.com/	x		
tradegood.com	x		
http://www.panasiaexchange.net/	x		
Intermediary	No Justice System	Online Third Party	Internal
https://b2bsphere.com	x		
http://www.nuorder.com/	x		
http://www.hktdc.com/	x		
Retracemobile.com		x	
Globalmarket.com			x

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