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Internal dispute resolution systems: Do high promises come with higher expectations?

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ABSTRACT

When e-commerce appeared in the 1990s it brought with it disputes related to its operation. E-commerce is risky as the contracting parties do not even know each other, not to mention the fact that disputes have additional legal difficulties concerning jurisdiction and applicable law. However, e-commerce websites have worked out online dispute resolution (ODR) systems in order to maintain the trust of their users, employing an efficient and impartial method if problems arise from deals made on their website. These internal ODR systems are considered successful as they are faster, cheaper and more appropriate than asking for remedy from the courts.

As online marketplaces resolve tens of millions of disputes a year, their influence cannot be avoided. The traditional court system fails to protect consumer rights in high-volume and low-value international transactions in practice. This circumstance raises the question of whether internal dispute resolution systems of private e-commerce sites could develop in such a way that fulfils the minimum procedural fairness requirements for dispute resolution and that is acceptable according to substantial laws. Is justice served in online disputes? Who is responsible for making just decisions, and to what extent can ODR procedures be expected to meet the principles of traditional civil proceedings?

KEYWORDS

ODR, internal dispute resolution, e-commerce, procedural principles, access to justice

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1. THE APPEARANCE OF E-COMMERCE AND ODR – A PRACTICAL SOLUTION

E-commerce started spreading in the 1990s on online marketplaces. These online platforms are software-based facilities offering an online trading venue where providers and users of content, goods and services can meet.[1] Along with the fast-paced, mostly international transactions between strangers involving low value products, conflicts have also emerged. Despite their small scale, these disputes had to be dealt with, otherwise people would have lost trust in the online setting and would not conduct transactions there. The problem was that the traditional, familiar dispute resolution setting did not provide an effective avenue of redress:[2]

- Rights enforcement is first and foremost the task of the public courts.[3] Courts have not been able to deal with these cases due to costly and lengthy procedures and legal difficulties related to jurisdiction and applicable law. 'The value of a right depends heavily on the mode of its enforcement and, in particular, the costs associated with this enforcement.'[4] 'A scheme of rights and obligations – no matter how well designed – is futile unless it achieves compliance, provides redress and sanctions noncompliance.'[5]
  This can be illustrated with the EU's consumer protection policy. Even though the EU has adopted a paternalistic or interventionist approach with the expansion of consumer protection rights, in practice, these rights are only as significant as the consumers' ability to enforce them, which is particularly challenging in the cross-border context.[6] While the first consumer protection policy in 1975 focused on substantive law, issues related to procedural law are still present. The European Small Claims Procedure established in 2007 has yet to achieve its goal for cross-border claims: being too bureaucratic, not user-friendly and uncertain, the EU Small Claims mechanism has not been taken up by users in significant numbers. Despite all efforts influenced by the access-to-justice movement since the 1970s, national court systems are unable to handle small consumer claims, because the procedures are still too expensive, slow or not user-friendly.[7]
- Traditional alternative dispute resolution (ADR), which was aimed at addressing the access to justice problem in the 1970s, also proved to be useless in cross-border, low value-high volume e-commerce disputes as the parties have no mutual interest in resolving their dispute, they usually do not even know each other and long distances between parties make even the alternative dispute resolution unaffordable. 'For small dollar claims, it is even cost prohibitive to seek redress through face-to-face ADR processes such as mediation if one must pay for the mediator's time and bear costs of travel and time off of work.'[8]

[1] Zheng (2019) 237.

[2] Rabinovich-Einy (2021) 127.

[3] Horst and Fries (2013) 7.

[4] Horst and Fries (2013) 4.

[5] Wechsler and Tripković (2016) 1.

[6] Cortés (2017) 2.

[7] Creutzfeldt-Banda (2013) 231.

[8] Schmitz (2018) 2.

Realizing that 'consumers crave fast and easy means of obtaining remedies'[9] and to avoid angry or mistrustful consumers leaving or not using their service, e-commerce sites (eBay first) developed internal dispute resolution systems as part of their customer service. The marketplaces provide a platform where sellers and buyers can contact each other with their issues, facilitate their negotiations and intervene if needed. This was the first form of online dispute resolution (ODR). Since then, many other forms of ODR have emerged, and it is now a heterogenic category. ODR in the wide sense refers to any process of preventing, facilitating and resolving a dispute with the help of information and communications technology.[10] ODR in the narrow sense means the electronic alternative dispute resolution systems that are alternative options to public, state-based court services.[11] An ODR can be private or public; judicial or non-judicial; used by citizens seeking justice, attorneys, courts, or disputed parties; it can have a binding or non-binding effect; and it can focus on, for example, informal legal information, dispute avoidance, dispute containment, dispute resolution, legal research, drafting legal documents, or discovering relevant facts. In this study I will exclusively focus on internal dispute resolution; this is a private, non-judicial ODR provided by e-commerce online marketplaces resolving disputes that arise between buyers and sellers in relation to their transactions.

When ODR was first introduced, it sought to replicate existing alternative dispute resolution processes, while instituting changes where necessary due to the change in the medium involved. Online and asynchronous communication made it possible to overcome physical distances, inconvenient timings and high costs with a lower level of stress than usually attends face-to-face dispute resolution. After a few years, designers of ODR realized the online medium was an opportunity to improve the efficiency of dispute resolution.[12] Over time, the human involvement was mostly replaced by automated tools that allowed eBay to resolve 60 million disputes a year by 2010.

Internal dispute resolution systems often use automated negotiation processes, as well as online mediation and arbitration, aimed at ending disputes and resolving complaints. Users are provided with sufficient information before engaging in direct negotiation with the other party to the dispute, helping them understand their situation and mapping their options and possible outcomes. User friendliness is further improved as these systems allow consumers and sellers to quickly fill out standard forms and upload related documents to obtain timely resolutions.[13]

ODR, taking advantage of the speed and convenience of the Internet and online case management tools, offers the best (and often the only) option for providing redress to consumers' grievances, strengthening their trust and confidence in a more reliable e-commerce.[14] Assuring their clients that they will not be left alone with a dissatisfying order also provides a valuable market advantage for the e-commerce marketplaces.[15]

[9]Schmitz (2020) 2386.

[10]Susskind (2019) 62.

[11]Orr and Rule (2021) 409.

[12]Rabinovich-Einy (2021) 126.

[13]Schmitz (2020) 2386.

[14]Cortés (2017) 6.

[15]Schmitz (2018) 18.

1.1. The operation of internal dispute resolution systems

Following eBay's example, all big online marketplaces have developed their own internal dispute resolution mechanisms to facilitate transactions and handle disputes arising from transactions concluded on their platforms. These private dispute resolution systems follow a set of their own procedures and transaction rules.[16] They take a staircase approach, beginning with problem diagnosis and working with the complainant, then escalating to direct negotiation assisted by technology, and finally moving to an evaluation phase where the provider decides the case if the transaction partners have not been able to do so.[17]

If the buyer is unsatisfied with a purchase (because the purchased item has not arrived or it is not as described) he or she can file a complaint via the platform online. There are clear pages that are easy to navigate where buyers can see their orders and complaints. The platforms have structured options for parties to select from in describing their problems, (for example, delivery disputes (non-receipt), product quality disputes (not-as-described), and payment disputes), and desired solutions, thereby reducing suspicion and anger and placing parties in a resolution mode.[18]

The platform notifies the seller about the complaint, and the seller is then obliged to answer within a short period of time. The parties are encouraged to resolve their issue on their own through structured negotiation. If the parties fail to reach an agreement or the seller does not respond to the buyer's request, the platform will intervene and act as a third-party neutral or intermediary to handle the dispute, and will ultimately consider the facts and make a determination about the dispute and issue a refund if the complaint is found appropriate.[19] The decision about the refund is automatically enforced by the payment system provider. The software running the platform provides some structure to the communication and to the flow of information between the parties.[20] 'Helping parties frame their communications in such a way that the other side can best hear and understand them is an essential component of moving a dispute toward resolution.'[21] Human facilitators are no longer needed, and are therefore replaced by automated software for tasks such as identifying dispute types; exposing parties' interests; asking questions about positions; reframing demands; suggesting options for solutions; allowing some venting; establishing a time frame; keeping parties informed; disaggregating issues; matching solutions to problems; and drafting agreements.[22] During negotiations parties tend to concentrate on finding a solution for their issue rather than insisting on their contractual rights.[23]

[16]Zheng (2019) 248.

[17]Rule (2008) 10.

[18]Zheng (2019) 250.

[19]See, for example: eBay (link1); Amazon (link2); AliExpress (link3).

[20]Katsh and Rabinovich-Einy (2017) 11.

[21]Rule (2002) 71.

[22]Katsh and Rabinovich-Einy (2017) 34.

[23]Van Loo (2016) 13.

2. EXPECTATIONS OF DISPUTE RESOLUTION SYSTEMS

> 'eBay's sixty million disputes and Alibaba's hundreds of millions of disputes are impressive, but also an indication that government and courts were not viable options. It also illustrates that innovative use of the new technologies can respond effectively to disputes.'[24]

Consumers without the option of using internal dispute resolution systems would let these disputes remain unresolved, causing themselves frustration. Even though states establish several consumer rights in legislation, they are not guaranteed in practice by the states and courts.

There is no doubt over whether or not online dispute resolution is the best option for providing redress on the Internet. However, how to ensure that online dispute resolution services are fair to consumers, or how best to oversee online dispute resolution service providers, is a matter of debate.[25]

'State proceedings are backed with several constitutionally guaranteed procedural rights that do not apply to private forms of dispute resolution.'[26] Where does this leave us? Courts cannot provide solutions for low-value cross-border disputes in practice, but internal dispute resolution systems can. Can we expect any kind of obedience from these private providers in this situation? After all, constitutions do not require them to resolve disputes.

The main goal of any kind of dispute resolution is to achieve justice between the parties. However, the term justice has several layers of meaning not only in legal, but also in moral and political discussions.[27] Without further engaging in this question I will only focus on the distinction between substantive justice (fair outcome) and procedural justice. States and decision makers cannot guarantee that substantive justice will be achieved; they can only guarantee procedural justice by providing a fair process for the parties in dispute. Luckily, it seems people tend to care more about the fairness of the process than about the outcome it delivers.[28] 'A 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.'[29] The primary factors that make people finding informal dispute resolution processes to be fair are: opportunities for participation (voice), the neutrality of the forum, the trustworthiness of the authorities, and the degree to which people are treated with dignity and respect.[30]

It has been observed that business designers aim to create the perception of procedural justice and a neutral decision maker in their dispute resolution processes.[31]

[24] Katsh and Rabinovich-Einy (2017) 15.

[25] Rule (2002) 6.

[26] Janssen and Vennmanns (2021) 71.

[27] See further: Susskind (2019) 71–86.

[28] Bradford and Creutzfeldt (2018) 189.

[29] Tyler (2000) 117.

[30] Tyler (2000) 121.

[31] Van Loo (2016) 4.

Critics of private forms of dispute resolution emphasize that ADR (including ODR) choose to loosen the procedural safeguards of civil justice in order to increase efficiency and flexibility, leading to access to only reduced ('rough') justice.[32]

The purpose of this paper is to examine whether - apart from being the only practical solution – an internal dispute resolution system is capable of fulfilling the principles of civil justice that are applicable to traditional courts.

2.1. Virtual courts versus ODR platforms

As mentioned before, ODR can be defined in the wide sense and in the narrow sense. The difference is that while ODR in the wide sense includes virtual courts, ODR in the narrow sense refers to specialized ADR using electronic means outside of the state-based court system, therefore it is not considered to be a legal procedure.

In a virtual court proceeding, some or all elements of the court proceeding take place online instead of all parties being physically present in a traditional courtroom. There are many forms of virtual courts, therefore it is difficult to characterize them in general terms. While internal dispute resolution focuses exclusively on resolving specialised disputes arising from e-commerce transactions, a virtual court is more general, and its scope varies from jurisdiction to jurisdiction. The resolution process of this tiny proportion of disputes in IDR is very well automated, as there are only a few scenarios in which things can go wrong and correspondingly only a few ways to put them right. IDR proceedings are less formal than virtual court proceedings. In comparison with virtual courts where participation may be obligatory, participation in internal dispute resolution proceedings originates back to the parties accepting the terms and conditions of the e-commerce marketplace. Privacy and security issues can be more severe in a virtual court as more sensitive data is shared in legal proceedings than in IDR proceedings.

Implementing the offline court proceedings to a virtual environment as a whole would not achieve its perceived goals. In order to enhance efficiency and simplify or speed up existing legal proceedings, they need to be rethought. Which elements are must-haves and how could they operate in a virtual environment; which procedures should be kept offline and in person; and most importantly, what is the purpose of digitalization? Existing methods of litigation should be changed in accordance with the new challenges and objectives, and not just purely shaped to the digital environment.

3. THE PRINCIPLES OF CIVIL JUSTICE

As hinted at before, the fairness of the outcome of dispute resolution is closely connected to procedural justice. The minimum requirements of procedural justice and principles of civil justice have been listed in various forms in the legal literature. In this paper I will follow the

[32] Rabinovich-Einy (2021) 128.

grouping of Professor Neil Andrews,[33] who has arranged the fundamental and important principles of civil justice under four headings with the following elements:

I. Access to Justice
   1. Access to Court and to Justice (including, where appropriate, Promoting Settlement and Facilitating Resort to Alternative Forms of Dispute-Resolution, notably Mediation and Arbitration)
   2. Rights of Legal Representation (Right to Choose a Lawyer; Confidential Legal Consultation; Representation in Legal Proceedings)
   3. Protection against Bad or Spurious Claims and Defences.

II. Fairness of the Process
   4. Judicial Independence
   5. Judicial Impartiality
   6. Publicity or Open Justice
   7. Procedural Equality (equal respect for the parties)
   8. Fair Play between the Parties
   9. Judicial Duty to Avoid Surprise: The Principle of Due Notice
   10. Equal Access to Information, including Disclosure of Information between Parties.

III. Speed and Efficiency
   11. Judicial Control of the Civil Process to Ensure Focus and Proportionality (tempered, where appropriate, by Procedural Equity; the process is not to be administered in an oppressive manner)
   12. Avoidance of Undue Delay.

IV. Just Conclusion
   13. Judicial Duty to Give Reasons
   14. Accuracy of Decision-making
   15. Effectiveness (provision of protective relief and enforcement of judgments)
   16. Finality.[34]

In the following, after explaining the meaning and content of each relevant principle I will examine whether and how they are fulfilled or realized in the internal dispute resolution of e-commerce marketplaces.

3.1. Access to justice

Access to justice has traditionally been defined as access to the courts. True access to justice must look beyond the courts as most justiciable issues arising in society never get there.[35]

[33]Professor Neil Andrews is a legal scholar known for his work in civil justice and procedural law and contract law. He was the English representative on the working group for the AMERICAN LAW INSTITUTE/UNIDROIT's 'Transnational Principles of Civil Procedure'. He has acted as expert on aspects of procedure and contract law in transnational disputes centred in New York and Europe. Given his widespread experience of systems of law in all parts of the world, his categorizations can easily resonate with the Hungarian civil procedural law. His grouping provides a comprehensive framework covering all major elements relevant for this article's purpose.

[34]Andrews (2018) 24–25.

[35]Schmitz (2020) 2393.

The principle should refer to formal and economic access as well, meaning there are no technical bars to accessing the court and the parties can afford the costs of litigation.

As turning to courts is not always needed, or is not the appropriate answer to a legal problem, the scope of access to justice is extended to ADR, including internal dispute resolution systems, as well.

'Access to justice can be enhanced by improving processes, thereby giving the participants voice and choice, by enhancing self-determination and empowerment.'[36] E-commerce marketplaces enabling/offering dispute resolution on their sites in itself increases access to justice.

'The Access to Justice movement and the ADR movement have partly overlapping, and to a high degree compatible, goals. The most important overlapping goals are making 'justice' more accessible by offering processes better suited for types of cases or party needs that are currently underserved or unmet, and by including a wider definition of justice than the narrow distributive, strictly legal view taken in traditional legal processes. By extending the range of dispute resolution processes available, society can, at least in theory, increase access to justice.[37]

If the parties are able to bring the dispute to court at any time, the internal complaint mechanism is considered to have complied with the principle of access to justice.[38] The main reason for - or more likely consequence of - providing ODR by e-commerce marketplaces is to enhance access to justice, as the traditional court systems are unable to provide solutions for these kinds of disputes in a procedurally efficient way.

Taking AliExpress as an example, it has a separate Transaction Services Agreement for EU consumers[39] to ensure compliance with EU law. Section 9.1 specifically records that although the agreement is subject to Hong Kong laws, it does not deprive European Union consumers of the protection afforded by mandatory provisions in the laws of the country of habitual residence, which means that they may bring a claim regarding their statutory rights in the EU/EEA/UK country in which they live, generally in the courts of the place where they are domiciled.

In conclusion, e-commerce ODR platforms contribute to access to justice by providing an additional opportunity to obtain justice, by clear and transparent rules and by providing less costly and more efficient solutions for conflicts which traditional court systems and ADR systems are unable to deal with or are unsuited to. This solution does not take away the consumers' right to access to the courts if they wish to file a claim.

3.2. Procedural fairness

Fairness is largely a matter of perception.[40] In general, research results show disputants' perceptions of the justice provided by a procedure affect their judgments of the distributive justice provided by the outcome, their compliance with that outcome, and their faith in the legitimacy of the institution that offered the procedure. Parties feel they are treated fairly in the dispute resolution process when they had the opportunity to tell their stories; the decision

[36]Nylund (2014) 327.

[37]Nylund (2014) 342.

[38]Zheng (2019) 251.

[39]Link4.

[40]Welsh (2004) 766.

maker considered their stories; the decision maker treated them in an even-handed and dignified manner; the decision maker was impartial.[41]

The requirement of fairness applies to proceedings in their entirety.[42]

3.2.1. Judicial independence. The term independence in the practice of the European Court of Human Rights (ECHR) refers to independence vis-á-vis the other powers (the executive and the Parliament) and also vis-á-vis the parties.[43]

In order to establish whether a body can be considered independent in the practice of the ECHR, regard must be had, inter alia, to:

- the manner of appointment of its members and
- the duration of their term of office;
- the existence of guarantees against outside pressures; and
- whether the body presents an appearance of independence.[44]

Internal dispute resolution systems are supplied by the e-commerce marketplaces themselves. Human workers in the customer service departments are the employees of the platforms. It is inevitable that the third-party facilitators have an interest in the platform, which will impact on their neutrality. Neutrality and independence will influence the fairness of the final decision. In practice, there are many complaints about the fairness of the customer service of Taobao,[45] the largest Chinese online marketplace. In 2012, it was revealed that some merchants were suspected of conspiring with Taobao employees who took bribes to cheat consumers by removing negative feedback posts and raising their credit ratings.[46]

Taobao introduced a unique public juror system in 2012: reliable users can volunteer to settle minor cases in a panel of 31 adjudicators. The composition of jurors is random, and buyers and sellers can join the jury without a fixed ratio. The crowd-jury adjudication is subject to a final review by the customer service department upon the application of a party.[47] There are some concerns with this system regarding the requirements of impartiality mentioned above. Voluntary jurors may be biased in rendering decisions in favour of consumers and may treat them as weaker parties. There is no guarantee that jurors are familiar with platform transaction rules and they lack professional knowledge of dispute resolution.

However, effective explanations have the potential to advance perceptions of neutrality. E-commerce marketplaces aim to use neutral language when communicating with customers[48] and make general terms and conditions easily understandable, implying the decision they make is not a matter of their personal opinion.

[41]Welsh (2001) 817.

[42]Stran Greek Refineries and Stratis Andreadis v Greece App no 13427/87 (Strasbourg, 9 December 1994) § 49.

[43]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR 2018, 39.

[44]Campbell and Fell v the United Kingdom App no 7819/77; 7878/77 (Strasbourg, 28 June 1984) 78.

[45]Juanjuan (2017) 22–23.

[46]Link5.

[47]Zheng (2019) 253.

[48]Van Loo (2016) 562.

3.2.2. Judicial Impartiality. There is a close inter-relationship between the guarantees of an 'independent' and an 'impartial' tribunal in the practice of the ECHR.[49] Impartiality is determined by the subjective test in which it is examined whether the judge held any personal prejudice or bias in a given case or has a personal interest in the case; and by the objective test, in which it is determined whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.[50] Professional, financial or personal links between a judge and a party to a case, or the party's advocate, may also raise questions of impartiality.[51] Similar to the case of judicial independence, the Court has emphasised that even appearances may be of a certain importance or, in other words, 'justice must not only be done, it must also be seen to be done'. What is at stake is the confidence which the courts in a democratic society must inspire in the public.[52]

One might wonder whether the commercial interests of the marketplaces impair their impartiality in the context of the internal dispute resolution mechanism. E-commerce sites tend to be softer on buyers, putting sellers at a disadvantage. Sellers who do not wish to offer, for example, 30-day return policies appear later in listings in eBay. Satisfied buyers will buy more on the website while sellers are forced to sell there due to the market power of these sites.

Users do not know who intervenes their disputes, so they have no chance of knowing whether they are biased or have a conflict of interest with them. Most platforms act as marketplaces and as retailers at the same time, a fact which already questions their impartiality.[53] Amazon even has an antitrust investigation against it for a similar reason; 'the European Commission takes issue with Amazon systematically relying on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third party sellers.'[54]

Colin Rule, founder of Modria and director of ODR for eBay and PayPal from 2003 to 2011 first argued that eBay was well positioned to play a dispute resolution role, because it was neither the buyer nor the seller in each transaction. As a marketplace administrator with no stake in the outcome of the dispute other than a desire to maintain trust in the marketplace, it could credibly play the role of mediator. He then realized eBay has a very personal relationship with each user and that eBay's business decisions have a great impact on the sellers' volume of the trade; therefore eBay is rarely seen as an impartial figure. [55]

[49]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR, Council of Europe, European Court of Human Rights, 2018, 38.

[50]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR, Council of Europe, European Court of Human Rights, 2018, 41–42.

[51]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR, Council of Europe, European Court of Human Rights, 2018, 45.

[52]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR, Council of Europe, European Court of Human Rights, 2018, 42.

[53]Zheng (2019) 252.

[54]Link6.

[55]Rule (2008) 9.

There is also no information in general about the adjudicators (staff or public jurors) of internal dispute resolution platforms who decide on the cases, so there is no way telling whether there might be personal conflicts of interest.

3.2.3. Publicity or Open Justice. The object of publicity in the law of procedure is the control of justice by the public. Oral procedure is considered to be the means of attaining a better understanding between the judiciary and the public.[56]

In principle, litigants have a right to a public hearing because this protects them against the administration of justice in secret with no public scrutiny. By rendering the administration of justice visible, a public hearing contributes to a fair trial.[57]

Oral proceedings traditionally not only speed up the process but also ensure equality of weapons and give a forum to cross-examination, which allows an excellent method of probing credibility.[58]

There is no oral hearing in internal dispute resolution proceedings. The decision making is based on written documents submitted by the parties, due to time and cost considerations; it is more convenient this way. But is an oral phase even needed in internal dispute resolution? It is a free alternative process to enhance consumer confidence and to facilitate transactions. As all debatable circumstances can be proven electronically (by sharing files or checking the data of the transaction in the system; all transaction marks left on the platform could even be directly taken as evidence[59]), there is really no point in cross-examination and there is nothing to discuss orally. The relative anonymity and comfort of communicating in writing on the platform may ease the pressures of face-to-face communications, especially for consumers who fear stereotypes or biases.[60]

Written communication between the parties comes with the ability to interact asynchronously. It can help parties to 'be at their best' in the debate. Instead of reacting emotionally to a new development or escalating a discussion through a surprise move, parties can consider an issue and communicate in a considered way in the given time frame. They might still react emotionally, but they have the option of stepping back and reflecting before they respond.[61] Internal dispute resolution systems aim to lower the amount of hostility between the parties by reducing the amount of free text complaining and demanding, and instead offering a structured set of exchanges[62] with the help of the built-in communication tools.

The availability of a written submission can only be viewed as a compromise made between efficiency and procedural fairness as long as the parties are able to communicate supporting evidence and present their claims and counter-claims[63] within reasonable limits.

[56]Habscheid (2014) 30.

[57]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR, Council of Europe, European Court of Human Rights, 2018. 63.

[58]Habscheid (2014) 30.

[59]Juanjuan (2017) 22.

[60]Schmitz (2020) 2387.

[61]Rule (2002) 64.

[62]Katsh (2005) 428.

[63]Zheng (2019) 256.

There is no legislative structure, no freedom of information or right-to-know statue, for public access to information about the outcomes of privately-designed dispute resolution systems.[64] Traditionally, one of the main reasons for choosing alternative dispute resolution, especially arbitration, is precisely its private nature.

The need for privacy was not a relevant factor during the development of the operation of internal dispute resolution. The publicity of the disputes is somewhat informally ensured through product ratings and feedback that are visible to anyone browsing the same item or seller.

3.2.4. Procedural equality or equality of arms. This principle requires that a 'fair balance' be maintained between the parties. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* the other party.[65]

The internal dispute resolution systems have proved to be not just more efficient as they are able to handle many more cases, but outcome disparities are also excluded with the use of automated processes guaranteeing equal treatment, unlike traditional dispute resolution systems which are affected by regional and personal differences.[66]

Many have raised the issue of the unjust advantage of repeat players who have a deep familiarity with the system and can use it to create rules that play to their advantage in future cases.[67] Further research is needed to find out whether ODR helps to address repeat player advantages by providing online wizards and self-empowerment portals that help level the playing field, or whether companies retain an advantage in ODR due to better access and ability with respect to technology.[68]

3.2.4.1. Automated systems and algorithms in ODR. The introduction of algorithms in the near future could help level the playing field between sophisticated repeat players and 'one-shotters'. Fixed procedural options incorporated into the software can mitigate repeat players' procedural advantages and algorithmic interventions can reduce human bias; this combination could result in improved legal outcomes and better chances at procedural equality for traditionally disempowered parties.[69]

While the automation of dispute resolution processes through algorithms in online platforms has the potential to streamline operations, increase efficiency and reduce human bias, it also comes with various challenges and concerns that need to be addressed.

Completely automated systems have not achieved the 'human' level of comprehension and cannot understand, let alone take into consideration, the nuances of individual cases. For the

[64] Amsler (2002) 375–378.

[65] Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR, Council of Europe, European Court of Human Rights, 2018, 58.

[66] See Mentovich et al. (2019) 912–18.

[67] Rabinovich-Einy (2021) 179.

[68] Schmitz (2020) 2395.

[69] Rabinovich-Einy (2021) 209.

sake of completeness, it should be mentioned that disputes resolved in e-commerce online platforms have rarely any aspects that would require humans' close attention.

Algorithms are only as good as the data they are trained on. If the data used to develop these systems are biased or incomplete, the algorithm may perpetuate and amplify existing biases. Some authors have even cautioned that algorithms may take into 'consideration' personal data to discriminate among consumers that would not be relevant in legal proceedings. Making a decision based on certain characteristics of the disputing parties rather than the facts of the case would be unacceptable in a court.[70] However, if the users are aware of these circumstances, get proper information about what personal data will be used and still want to use this alternative way to resolve their disputes, the legislator must accept their decision. Unfortunately, algorithms employing artificial intelligence and machine learning are complex and difficult to interpret.

3.2.5. Fair Play between the parties. Being fair in the proceedings is essential in order to achieve a fair decision. In the practice of the ECHR, whether or not proceedings are fair is determined by examining them in their entirety.[71] The Court has also stressed the importance of appearances in the administration of justice; it is important to make sure the fairness of the proceedings is apparent.[72]

3.2.6. The Principle of Due Notice. This principle requires that a person who will be affected by a decision must be given advance notice of the procedure and possible outcomes. Proceedings should not be conducted without both parties enjoying reasonable notice of the case. The parties should be notified of all the factual and legal information that is necessary for them to present or defend for themselves.[73] An adequate notice is sufficient if it provides the person with the opportunity to respond to the claim against him/her.

The principle of due notice is guaranteed in internal dispute resolution systems as there are clear rules and time limits for the parties to submit their claims and relevant evidence. Deadlines are enforced by automated processes which exclude the possibility of human error. The marketplace sends notifications through various means (text messages, emails, phone calls) and reminders to the parties to a dispute.

3.2.7. Equal Access to information. This principle also aims to guarantee the equality of the parties in a dispute, and therefore the fairness of the procedure. Transparency is an important factor: for the dispute resolution to be fair, it is essential to be able to understand the process in which the decisions are made. E-commerce marketplaces give clear rules that are easy to understand as regards their terms and conditions. All the details are available in one place in a structured form, which means the users can be navigated to only those sections of the rules that are relevant for them at that moment. These rules are less complex than litigious proceedings, therefore they are also more easily understandable.

[70] Van Loo (2016) 565–66.

[71] Ankerl v Switzerland App no 17748/91 (Strasbourg, 23 October 1996) § 38.

[72] Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR 2018, 49.

[73] Zheng (2019) 237.

3.3. Speed and Efficiency

Timeliness is a crucial factor in deciding whether the right to a fair trial was violated or not in the practice of the ECHR. In requiring cases to be heard within a 'reasonable time', the 'Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility'.[74]

In general, settlement speed is closely linked to the complexity of the procedure: the simpler the procedure the shorter the time spent in solving the problem.[75] However, traditional forms of dispute resolution fail to act in a timely way in small claims disputes as well. In this respect internal dispute resolution is the best way to resolve low-value cross-border disputes.

The fast resolution of disputes is made possible by setting reasonably short time limits for issuing the complaint, replying to a dispute, making an agreement, making a decision if no agreement is reached, and for returning the faulty item or reimbursing the buyer.

The most obvious way to enhance efficiency is to loosen the strict procedural rules. In fact, some problematic aspects of dispute resolution processes have always been accepted based on the understanding that attempts to increase such processes' fairness are inevitably costly in terms of efficiency. The trade-off between efficiency and fairness is viewed as inherent to dispute resolution.[76]

E-commerce platforms created their own procedural and substantive rules regarding terms and conditions for their ODR procedures. These rules improve efficiency without having to refer to the national laws of each jurisdiction in which the disputed parties are located. They provide clear instructions for staff adjudicators and public jurors (if the process is not yet automated) on how to conduct the dispute resolution. This also means that the decisions of ODR procedures are not required to be the same as those that traditional courts would reach.[77] If the substantive transaction rules are in conflict with national mandatory laws (such as consumer protection law), the mandatory national laws will prevail. However, the parties are unable to apply mandatory national laws to their disputes unless they file a legal action in the court which is a quite costly and time-consuming process.[78]

3.4. Just Conclusion

Article 6 § 1 of the European Convention on Human Rights includes the obligation for courts to give sufficient reasons for their decisions. 'The right to be heard requires more than a mere leave to speak. The court must rather listen and be disposed to take the submissions into account in its decision.'[79] 'A reasoned decision shows the parties that their case has truly been heard.'[80] The right to be heard means parties have the right to present the observations which they regard as relevant to their case. This right can only be seen to be effective if the observations are actually

[74]H. v France App no 10073/82 (Strasbourg, 24 October 1989) § 58.

[75]Juanjuan (2017) 22.

[76]Katsh and Rabinovich-Einy (2017) 50.

[77]Voet et al. (2022) 75.

[78]Zheng (2019) 257.

[79]Habscheid (2014) 27.

[80]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR 2018, 62.

'heard', that is to say duly considered by the trial court. In other words, the 'tribunal' has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.[81]

In comparison with judicial decisions, the internal complaint mechanism does not provide sound legal reasoning for decisions, as the decisions are fact-based and are in accordance with transaction rules.[82] However, experience shows decision makers in internal dispute resolution systems do not delve into details if, for example, the point of argument concerns the meaning of an attribute indicated in the advertisement. The goal is to make an arrangement that is acceptable for everyone rather than determine who was right.

As mentioned before, procedural justice seems to be more important for society than substantive justice, which cannot even be guaranteed by the decision makers as there are limits to discovering the truth. If the complainants feel that they have a voice, are listened to, are treated with respect and dignity, and feel that the person they are dealing with is neutral, then the chances are high that they will accept the outcome, even if this is not in their favour.[83]

One core value of substantive fairness is consistency; similar cases should yield similar results.[84] Decisions of ODR with automated processes excluding the possibility of human errors, are believed to be more consistent than court decisions made by different judges with different backgrounds and preconceptions.

The internal dispute resolution processes could work as learning systems; by using the data of users' usage patterns, history, account data and surveys, the performance of the platform can be monitored and improved. The repetitive nature of many of the disputes and the large scale on which they occurred allowed eBay to function more like a system, moving beyond its role in generating solutions for individual disputes, by studying how to improve its resolution avenues – what works and under what conditions, as well as perform 'dispute prevention'.[85] 'By studying the data uncovered in the dispute resolution processes, eBay has managed to identify common sources of problems and to structure information and services on its site so that these problems do not recur.'[86] When many disputes were related to confusing return and exchange policies, eBay changed the listing process to make the collection of return data more structured and transparent. As a result, disputes involving returns dropped dramatically.[87] Other companies have also started to improve their services by collecting and analysing information about disputes arising and then adjusting their behaviour in response.[88] Products and services are increasingly being designed to avoid consumers needing to complain and where possible, to allow consumers to fix problems themselves.[89]

[81]Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb) ECHR 2018, 48.

[82]Zheng (2019) 258.

[83]Hodges et al. (2016) 4.

[84]Rhode (2004) 39.

[85]Rabinovich-Einy (2021) 131.

[86]Rabinovich-Einy and Katsh (2014) 24.

[87]Rule (2008) 11.

[88]Van Loo (2016) 563.

[89]Stone (2011) 120.

4. SPECIFIC PRINCIPLES OF ODR

As ODR is not an alternative but rather the only chance consumers have to access justice, a certain level of quality requirements should ideally be reached.[90]

> 'The very plurality of forms of dispute resolution challenges traditional conceptions of what constitutes justice, or fair procedure, in dispute resolution. Constitutional principles that are applied to the courts may or may not be relevant for other types of dispute resolution.'[91]

In the past few decades, ethical rules and standards have been developed which are specialized to alternative dispute resolution, including mediation and arbitration, because certain quality requirements were missing due to the flexibility and variable nature of ADR.[92] With the increasing role of technology in dispute resolution, new guidelines became necessary as most ADR standards focus on the personal aspects of dispute resolution.[93]

It is important to see that 'there are no "binding" rules to govern the development of ODR applications.'[94] Private ODR is not compulsory to anyone, it operates on the consent of the users even when it is practically the only possible tool for resolving a dispute. Therefore, states and other external entities are not in a position to impose rules on private actors.

Many standards and recommendations have been issued regarding quality ODR since 1999. Almost all of them have focused on business-to-consumer (B2C) e-commerce, mainly because there has been a clear need for redress in B2C e-commerce transactions as the existing legal infrastructure does not adapt well to cover these types of transactions.[95] The International Council for Online Dispute Resolution (ICODR)[96] created a list for ODR more generally. The ICODR standards provide a starting point for developing best practices to ensure fairness, due process, transparency and efficiency.[97] These standards require ODR platforms and processes to be:

- accessible (easy to find; available with minimum costs to everyone)
- accountable (to the institutions, legal frameworks, and communities that they serve)
- competent (to have the relevant expertise)
- confidential (to maintain the confidentiality of party communications)
- equal (to treat all participants with respect and dignity)
- fair and impartial (to treat all parties equitably and with due process, without bias, benefits or conflicts of interest)
- legal (to abide by, uphold, and disclose to the parties relevant laws and regulations under which the process falls)

[90] Voet et al. (2022) 47.

[91] Hodges et al. (2016) 1.

[92] Zheng (2019) 226.

[93] See, for example, 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.

[94] Rainey (2014) 55.

[95] Rule (2002) 269–270.

[96] ICODR was created 2017 as a nonprofit consortium. It promotes worldwide standards for all forms of technology-assisted dispute resolution, including diagnosis, negotiation, mediation, arbitration and courts. See further link7.

[97] Schmitz (2019) 163.

– secure (to ensure that data and communication stored in the platform are not shared with unauthorized parties)
– transparent (about the form and enforceability of the processes and outcomes and the possible risks, benefits and costs).

ICODR does not possess any power over ODR providers (except those who chose to be organizational members), therefore it can only recommend these standards be followed. Internal dispute resolution systems are generally accessible, secure and transparent, and confidentiality is also ensured. However, outsiders cannot be sure about the competence and impartiality of the decision makers, there is no way to make them follow the relevant laws, and fairness is often questioned by the users who feel the platforms are softer on the buyers.

The main reason for e-commerce marketplaces providing dispute resolution as an extended customer service is to increase profits by intervening in a satisfying way for customers and then improving their processes in order to limit conflicts arising from the same cause. To reach this goal they generally aim to:

– have clear procedures;
– provide a speedy response;
– be reliable and consistent;
– have a single point of contact for complainants;
– facilitate access to the complaints process;
– facilitate the use of the process;
– keep the complainant informed;
– educate and empower the staff to deal with complaint processes;
– take complaints seriously;
– check with customers in follow-up procedures after resolution;
– use the data to engineer-out the problems;
– use measures based on cause reduction rather than complaint volume reduction.[98]

Comparing this list with the requirements of ICODR, many similarities can be found which derive from the principles of civil justice.

Therefore, as of today, the procedural rights of the users of online marketplaces depend on the good faith of the service providers. This dependency could call for an EU framework indicating the minimum procedural requirements for internal dispute resolution mechanisms within corporations' complaints handling processes. A well-established framework could ensure consistency, enhance fairness, protect the rights of the consumers and support compliance with existing laws.

Taking into consideration the principles of civil justice, the existing recommendations for ODR providers and the specific characteristics of internal dispute resolution processes, I would propose that the following principles be included in such an EU framework.

– ease of access (easy to find, use and understand; available with minimum costs to everyone)
– competence (to have the relevant specialized expertise; if parties cannot negotiate to reach an agreement, the decision of the ODR provider should reflect the relevant laws in addition to its internal terms and conditions)

[98] Stone (2011) 116.

- equality (to treat all participants with respect and dignity)
- speediness and efficiency (avoidance of undue delay, promoting negotiation where it would be appropriate)
- fairness and impartiality (to treat all parties equitably and with due process, without bias, benefits or conflicts of interest)
- promotion of negotiation between parties and opportunities for participation (to be heard)
- legality (to abide by, uphold, and disclose to the parties the relevant laws and regulations under which the process falls)
- due notice and transparency (about its operation and employees involved in the processes, the form and enforceability of the processes and outcomes and the possible risks, benefits and costs; keeping the parties informed throughout the whole process)
- duty to give reasons for the decisions
- compliance monitoring (assessing whether IDR providers adhere to the established requirements)
- cooperation between IDR providers and courts (in cases in which the same dispute is brought to a court as well)
- secure communication on the platform.

If the protection of consumers is left to out-of-court dispute resolution procedures in practice, it should be ensured that consumer rights are applied.[99]

The EU has already established principles for out-of-court dispute resolution proceedings; 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 (Directive on consumer ADR) apply to disputes between consumers and traders concerning contractual obligations stemming from sales or services contracts[100], resolved through the intervention of a certified ADR entity. To be certified, ADR entities must comply with the requirements set by Articles 6–10; expertise, independence and impartiality, transparency, effectiveness, fairness and liberty. As a consequence, ADR entities that do not comply with the definition of the Directive[101] fall outside of the scope of the Directive, and Member States are not obliged to ensure they meet such minimum quality standards, unless they have expanded the scope of the transposed Directive to cover non-certified bodies.[102] As 'the Directive only applies to certified ADR entities, there is the risk that non-certified ADR entities operating in the market may disregard the quality standards as set by the Directive, with negative repercussions on consumer perception of ADR in general'[103].

[99]Voet et al. (2022) 47.

[100]Recital 16 of Directive on consumer ADR.

[101]Par. 1. (h) of Article 4 of Directive on consumer ADR: 'ADR entity' means 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).

[102]Voet et al. (2022) 13.

[103]Voet et al. (2022) 128.

5. CONCLUSIONS

The appeal of ODR for disputes arising out of online transactions is not only evident because the original communication took place online, and evidence and documents are available on the platform, but also due to the lack of viable alternatives.[104] As shown above, internal dispute resolution proceedings offer a solution that works in practice to an issue that traditional dispute resolutions cannot cope with. However, the internal dispute resolution systems of e-commerce marketplaces also face challenges as to the legality of decisions and the fairness of such a procedure.[105] Loosening the procedural safeguards that the courts are expected to operate by could mean that the legality of internal dispute resolution is questioned. Just because the courts are unable to grant access to justice in the annually occurring tens of millions of low value cross-border disputes that are dealt by internal ODR platforms a year, it does not mean that internal dispute resolution proceedings have to be accepted as lawful as they are. Internal dispute resolution 'should be an alternative to court proceedings, not an alternative to justice'.[106]

Similar concerns were raised regarding alternative dispute resolution methods when they started to spread in the 1970s. ADR (including ODR) does not provide all the procedural safeguards of litigation, but in exchange offers basically faster and cheaper, enforceable dispute resolution. This concept has long been accepted by the guiding principle of proportionality. The challenge is to have a process that is effective, but still fair.[107]

Credit should be given to the users of such ODR platforms. Just like e-commerce, dispute resolution processes require the trust of the buyers and sellers. If they did not find the internal dispute resolution proceedings fair, they would stop using the e-commerce marketplaces themselves. The continuing popularity of e-commerce and the number of adjudicated cases in internal dispute resolution proceedings indicate users are satisfied with the justice they are served.

The popularity of the e-commerce internal dispute resolution systems, based on their high utilization, indicates that in online B2C disputes efficiency and economy are more important than fairness, neutrality, professionalism and validity.[108]

One of the greatest strengths of ODR - user-friendliness - is often overlooked, but it can be an explanation of why internal dispute resolution proceedings succeed, particularly over other ADR or court mechanisms.[109] User-friendliness is more and more important as justice increasingly becomes understood as a service.

Internal dispute resolution will never substitute courts entirely because the fairness of the decisions may be doubted as the methods employed to ascertain facts are limited; the third party who helps settle the dispute has interests with both parties. However, in the context that there is still no relevant formal solution for the rapid, high-volume and low-value B2C transactions, the internal dispute resolution model is undoubtedly the most direct and efficient way to resolve

[104]Rabinovich-Einy and Katsh (2014) 23.

[105]Zheng (2019) 248.

[106]Voet et al. (2022) 47.

[107]Lodder and Zeleznikow (2010) 21.

[108]Juanjuan (2017) 26–27.

[109]Hodges et al. (2016) 5.

online disputes.[110] We should move beyond any sense that alternative dispute resolution including ODR 'is an impoverished or "second-best" form of civil justice. Within a mature system of civil justice there is a place for both formal and informal processes'.[111]

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