

Penn State Journal of Law & International Affairs

Volume 4

Issue 1 *Seventeenth Biennial Meeting of the
International Academy of Commercial and Consumer
Law*

December 2015

Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E- Commerce ODR Systems

Louis F. Del Duca
Penn State Dickinson School of Law

Colin Rule

Brian Cressman

ISSN: 2168-7951

Recommended Citation

Louis F. Del Duca, Colin Rule, and Brian Cressman, *Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems*, 4 PENN. ST. J.L. & INT'L AFF. 242 (2015).
Available at: <http://elibrary.law.psu.edu/jlia/vol4/iss1/13>

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State Journal of Law & International Affairs

2015

VOLUME 4 NO. 1

LESSONS AND BEST PRACTICES FOR DESIGNERS OF FAST TRACK, LOW VALUE, HIGH VOLUME GLOBAL E- COMMERCE ODR SYSTEMS*

*Louis F. Del Duca[†], Colin Rule, and Brian Cressman^{**}*

ABSTRACT

The momentum behind development of global online fast track low value high volume dispute resolution (hereafter ODR) continues to accelerate. Consumer and business groups around the world are promoting fair, proportionate, effective, online, fast track redress for low value high volume cross border e-commerce disputes. As a result, there will continue to be increasing demand for a variety of effective ODR systems design and procedural rules. Best practices developed by entities like eBay and lessons learned from the work of UNCITRAL Working Group III can

* The beginning of this article addressing “Low Value Parameters” and “Limiting Types of Claims” was presented as a paper, authored by Louis F. Del Duca, Colin Rule, and Kathryn Rimpfel, entitled *eBay’s De Facto Low Value High Volume Fast Track Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B.Arb. & Mediation 204 (2014) at the 17th Biennial Meeting of the International Academy of Commercial and Consumer Law held 16-19th July 2014 at the Istanbul Bilgi University in Turkey. We expand and update the earlier version with a discussion of eBay’s Automated Trustmark Evaluation/Feedback system and Private Enforcement of Settled Claims and Rulings of Neutrals system.

† Before this article could be published, Professor Del Duca passed away unexpectedly in November, 2015. This publication has been dedicated to his memory by his colleagues and this Journal.

** Louis Del Duca is the Edward N. Polisher Distinguished Faculty Scholar Emeritus at the Penn State Dickinson School of Law. Colin Rule is formerly Director of Online Dispute Resolution for eBay and PayPal and presently CEO of Modria.com. Brian Cressman, The Penn State Dickinson School of Law, J.D. 2015. We wish to express thanks for the research assistance in preparation of this article to Kathryn Rimpfel, The Penn State Dickinson School of Law, J.D. 2014; Lina Ali, Research and Teaching Assistant, University of Basel, Switzerland; Jeremy O’Steen, The Penn State Dickinson School of Law, J.D. 2014; John Pokiniewski, The Penn State Dickinson School of Law, J.D. candidate 2016; Philip Reinhart, The Penn State Dickinson School of Law, J.D. candidate 2016; and Maureen Rostad, The Penn State Dickinson School of Law, J.D. candidate 2017.

be helpful in developing framework models for fast track low value high volume e-commerce ODR systems.

E-commerce ODR systems like eBay's provide a marketplace for e-commerce as well as an electronic system for fast track resolution of disputes which arise on their e-commerce marketplace. **Ordinary** ODR systems do not provide an e-commerce marketplace but only provide for resolution of disputes. Accordingly, best practices developed by eBay's e-commerce ODR system discussed in this article are generally applicable and needed by e-commerce ODR systems, but generally inapplicable and not needed by ordinary ODR systems. This article addresses development by eBay of its highly successful fast track low value high volume e-commerce ODR system by application of the following four best practices:

(i) Low Value Parameters:

Adoption of a generally applicable de facto low value workable monetary "standard" (for example, the Purchase Price "Money Back Guarantee" discussed *infra*) rather than a "numeric" (i.e. \$15,000) monetary description for disputes which are eligible for resolution on the providers' platforms facilitates global development of fast track low value high volume ODR systems. A \$15,000, \$10,000 or \$5,000 monetary ceiling for low value disputes might constitute low value in a developed economy. It will not in an underdeveloped economy. **Hence the need for a low value workable monetary "standard" rather than an unworkable "numeric" monetary description.** As indicated, the eBay Purchase Price "Money Back Guarantee" cap on the amount of a permissible claim provides a workable standard in developed and underdeveloped economies. ***

(ii) Limitation of Types of Claims:

Leaving resolution of disputes involving high value and complicated legal issues to other forums,

*** The eBay system combines general use of a "monetary standard" with a "numeric description" of low value for specific categories of goods. This article also notes the flexibility of eBay's system in responding to market developments by creating actual numeric ceilings for disputes pertaining to equipment and vehicle categories of purchases which also are deemed to be suitable and therefore eligible for resolution on eBay's ODR platform. Adjusting to market developments since the launch of its original dispute resolution system, eBay has added resolution platforms specifically dedicated to categories of purchases, including the (Vehicle Purchase Protection [hereinafter VPP] and Business Equipment Purchases Protection [hereinafter BEPP] programs which require vehicle claims to be more than \$100 and less than \$50,000 and equipment claims to be more than \$1000 and less than \$20,000. Based on the eBay Fast Track Low Value experience, therefore, an ODR Best Practice is to build the basic low value system (i.e., "Money Back Guarantee") as needed, and as market conditions mandate, customize resolution and protection programs specifically designed to address individual categories of disputes. For more on eBay's VPP and BEPP programs, see Purchase Protection Systems For Specific Categories of Goods – Maximum and Minimum Purchase Price Limits on the Amount in Controversy (discussion at Section II.3, *infra*).

General Electric's Oil and Gas Division has experimented with online resolutions for commercial conflicts, as detailed in Vanessa O'Connell, *At GE, Robo-Lawyers*, WALL ST. J.,

eBay's fast track ODR eligibility requirements also limit the complexity and scope of permissible claims (i.e. claims eligible for resolution on its platform) by giving buyers a "Money Back Guarantee," which, as noted *supra*, caps the amount a buyer may claim to recovery of purchase price paid, and also limits the types of claims to "Items not received" or "Items not as described." These limitations on the amount and types of claims permitted facilitate fast track and fair resolution of disputes and enables eBay to handle 60,000,000 e-commerce disputes annually averaging \$70-\$100 in value.

(iii) Buyers' On-Demand Access to Automated Trustmark Evaluation/Feedback Information Needed to Identify Reliable Sellers:

Vital to facilitating e-commerce between buyers and sellers, often in different parts of the world and speaking different languages, is developing trust between buyers and sellers to give them the confidence they need to enter into electronic transactions. eBay's solution to developing this trust between buyers and sellers is the Automated Trustmark Evaluation/Feedback System. This system enables buyers involved in electronically purchasing low value high-volume items to quickly identify on demand a reliable seller without doing extensive research. Buyers seeking to make purchases using the eBay platform are able to assess the reliability of sellers with whom they anticipate doing business based on ratings and feedback derived from performance data supplied electronically by previous buyers after each transaction they completed on the eBay platform.

(iv) Private Enforcement

After discussing (i) Low Value Parameters, (ii) Limitation of Types of Claims, and (iii) Buyers' On Demand Access to Automated Trustmark Evaluation/Feedback Information Needed to Identify Reliable Sellers, we address (iv) Private Enforcement measures available to enforce settled claims and rulings of neutrals to successfully implement fast track low value high volume e-commerce systems.

<http://www.wsj.com/articles/SB10001424052970203633104576620902874155940>
. This program focuses on disputes for less than 50,000 Euros.

TABLE OF CONTENTS

I. ACHIEVING “LOW VALUE” PARAMATERS.....	247
A. eBay’s De Facto “Low Value”	247
II. LIMITING TYPES OF CLAIMS.....	250
A. Buyers’ Claims – “Item Not Received,” “Item Not as Described”	252
B. Sellers’ Claims – “Final Value Fee”.....	254
C. Maximum and Minimum Purchase Price Limits for Certain Categories of Goods	255
III. FACILITATING FAST TRACK RESOLUTION OF DISPUTES – COMBINING USE OF LOW VALUE PARAMETERS & LIMITING TYPES OF CLAIMS.	264
A. Lists of “Item Not Received” and “Item Not as Described” Claims.....	264
1. EBay Explicit Limitation of Types of Claims and List of Specific Claims – Consequential Damages Excluded by “Money Back Guarantee”	264
B. Comparison of Selected eBay Best Practices and the UNCITRAL Draft.....	265
IV. LESSONS AND BEST PRACTICES REGARDING DE FACTO PURCHASE PRICE “MONEY BACK GUARANTEE” LOW VALUE & LIMITATION OF TYPES OF CLAIMS PERMITTED.....	269
V. BUYERS’ ON DEMAND ACCESS TO INFORMATION NEEDED TO IDENTIFY RELIABLE SELLERS.....	271
A. Evaluation of Sellers and Ratings – Building Trust	271
VI. THE EBAY AUTOMATED TRUSTMARK EVALUATION/FEEDBACK SYSTEM.....	272
A. Importance of Making Seller Evaluations and Ratings Available to Foster Trust Between Buyers and Sellers and Facilitate Private Enforcement.....	272
B. “Percentage”, “Score”, and “Comment Feedback”	274
C. “Description”, “Communication”, and “Shipment”, - Detailed Seller Ratings	276
D. Transaction Defect Rate.....	279
VII. AWARDING OF EBAY’S AUTOMATED TRUSTMARKS USING THE EVALUATION/FEEDBACK SYSTEM.....	280
A. PowerSeller Designation - <u>Requirements and Benefits</u>	280

2015	<i>Penn State Journal of Law & International Affairs</i>	4:1
	B. Top-Rated Seller Badge Designation - <u>Requirements and Benefits</u>	282
	C. Comparison of eBay Evaluation System with Other Evaluation Systems.....	285
VIII.	LESSONS & BEST PRACTICES REGARDING EBAY'S AUTOMATED TRUSTMARK SYSTEM & PRIVATE ENFORCEMENT.....	287
	A. eBay's Automated Trustmark System and Private Enforcement of Settled Claims and Rulings of Neutrals Through Voluntary Compliance, Termination of Trustmark Status, Use of Chargebacks, and Access to Escrow Accounts.....	287
	CONCLUSION.....	288

I. ACHIEVING “LOW VALUE” PARAMETERS

A. eBay’s De Facto “Low Value”

Among privately created online dispute resolution systems, the eBay Resolution Center stands alone. eBay’s process has resolved more disputes over a longer period of time than any other online dispute resolution process in the world. Launched in 1995, eBay was designed to be the largest global online marketplace, evolving from its roots in consumer-to-consumer (C2C) auctions into Business-to-Business and Business-to-Consumer (B2C) verticals. After it acquired PayPal in 2002, eBay set about building a robust, end-to-end Trust and Safety infrastructure. A core tenet of that infrastructure is the Resolution Center, an online redress process provided to every eBay and PayPal user in the world, customized to address most of the dispute volume that arises between buyers and sellers that utilize eBay’s services around the world.¹

eBay is an e-commerce company which has developed a robust online marketplace facilitating low value high volume consumer to consumer, business to consumer, and business to business electronic commerce², and also providing a fast-track low value high volume ODR system for resolving disputes arising from e-commerce transactions on its market place. The low value requirement for disputes eligible for resolution on its platform is needed for ODR systems like eBay which provide an online marketplace coupled with an ODR system for resolution of disputes which arise from e-commerce on its marketplace. The low value requirement generally is not needed for systems that only provide an ODR system for resolving disputes but do not provide an electronic market place, unless the provider is resolving low value high volume disputes arising from transactions conducted outside of its platform.

¹ See ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY 8 (2010).

² See *We are one company*; EBAY INC., http://www.ebayinc.com/who_we_are/one_company (last visited Jan. 14, 2015).

Since its creation in 1995, eBay has expanded internationally at an increasing rate.³ eBay's international growth continues with increased revenues and expansion into new countries abroad.⁴ Currently, eBay has 149 million active buyers worldwide and 700 million total listings.⁵ In 2013, eBay's worldwide revenues were \$8.3 billion and its Gross Merchandise Volume was \$77 billion.⁶

eBay's Resolution Center was created with the aim of addressing the typical disputes arising out of purchases within eBay's marketplaces, which usually average about \$70-\$100 in value.⁷ The eBay platform currently handles over 60 million e-commerce disputes annually through a process that enables parties to resolve their problems amicably through direct communication. The number of disputes being resolved through eBay's online platform is expanding steadily as the transaction volume on the site increases at about 13% per year.⁸

Since the launch of its original dispute resolution system, which focused only on letting buyers report "fraud alerts," eBay has expanded to support dispute resolution in a variety of other problem types, such as "item not received," and "item not as described" disputes (where the buyer is the complainant), or "unpaid item" disputes (where the

³ Trefis Team, *eBay: The Year 2013 in Review*, FORBES (Dec. 26, 2013), <http://www.forbes.com/sites/greatspeculations/2013/12/26/eBay-the-year-2013-in-review/>.

⁴ *Id.*; see *Corporate Fact Sheet: Q4 2010*, EBAY INC., (2010) (on file with author) (eBay.com identifies the following countries and Hong Kong as countries for which it has a website: Argentina, Austria, Australia, Belgium, Brazil, Canada, China, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Korea, Malaysia, Mexico, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Russia, Singapore, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, United Kingdom, and Vietnam).

⁵ *Q2 Fast Facts*, EBAY, INC., <http://www.ebayinc.com/sites/default/files/eBay-q2-fast-facts.pdf> (on file with Journal).

⁶ *Id.*

⁷ See *Corporate Fact Sheet: Q4 2010*, *supra* note 4.

⁸ *Id.*

⁹ In the eBay system, buyers are required to pay for the item before the seller ships it. In cases of direct sales rather than auction sales, sellers are required to be paid prior to the shipment of the item. The seller is therefore unpaid only in the auction sale cases where a buyer who is the successful bidder does not forward the

seller is the complainant).¹⁰ eBay has also added resolution platforms dedicated specifically to several categories of purchases, including the Vehicle Purchase Protection (VPP) and Business Equipment Purchase Protection (BEPP) programs, each with specific minimum and maximum price limitations.¹¹ These developments have enhanced eBay's initial programs focused on low value, high volume, B2C transactions, with more in-depth specialized claims processes relating to higher dollar value purchases.¹²

The eBay ODR system, from the outset, has had a de facto low-value framework because it has been packaged as a kind of money-back guarantee – *recovery is limited to the purchase price for the buyer, and reimbursement for the seller*.¹³ This necessarily excludes an award of consequential damages. Higher dollar value purchases, however, require different kinds of protection and resolution. eBay's specialized procedures for vehicles and equipment disputes, for instance, require equipment claims to involve more than \$1,000 and less than \$20,000, and vehicle claims to be more than \$100 and less than \$50,000.¹⁴ Only disputes involving vehicles or equipment that fall within the minimum and maximum requirements are eligible to be handled by these special ODR processes.

For example, in a traditional sale conducted through eBay's platform for a cell phone, Buyer pays through one of eBay's approved payment methods (such as PayPal), and Seller ships the phone and it

bid amount to the seller. In this situation eBay allows the seller to recover for the "unpaid item" fee (This is a "Final Value Fee," usually 1 to 2% of the purchase price) paid by the seller to eBay for the use of the eBay platform. See discussion *infra* note 24.

¹⁰ *eBay Money Back Guarantee*, EBAY INC., <http://pages.ebay.com/help/policies/money-back-guarantee.html> (last visited Jan. 15, 2015) [hereinafter "eBay Money Back Guarantee Policy"].

¹¹ *eBay Vehicle Purchase Protection*, EBAY INC., <http://pages.motors.ebay.com/buy/purchase-protection/index.html> (last visited Jan. 15, 2015) [hereinafter VPP Policy]; *Business Equipment Purchase Protection*, EBAY INC., <http://pages.ebay.com/help/buy/business-protection.html> (last visited Jan. 15, 2015) [hereinafter BEPP Policy].

¹² See *id.*

¹³ For more information on limitations on the amount recoverable by the seller to the "Final Value Fee," see are discussion *infra* note 24.

¹⁴ See VPP Policy, *supra* note 11; BEPP Policy, *supra* note 11.

arrives in the stated amount of time. However, due to a malfunction stemming from a defect in the cell phone battery, the phone causes a fire in Buyer's home and also results in serious burns to Buyer, his wife, and two children. Though this damage directly results from the deficiency of the item exchanged in the eBay sale, Buyer will have no recourse through the eBay ODR platform for consequential damages. Though Buyer can claim that the phone did not arrive as described – i.e. fully functional - the eBay Money Back Guarantee inherently limits recovery to the price of the item. Thus, although Buyer may seek to recover the consequential damages in a judicial proceeding or other fora, recovery of consequential damages is excluded from the ODR process. eBay has learned from extensive experience that this level of protection is adequate to reassure most eBay buyers that they will be protected.

The eBay system can serve as an example of best practices in limiting the types of claims and amount of recovery to place parameters to create a low-value framework to facilitate fast-track, fair, and low-cost ODR. We include in our discussion *infra* the differences in procedural details of resolving disputes of different types of products covered by the basic, equipment and vehicle protection programs.

II. LIMITING TYPES OF CLAIMS¹⁵

In the basic eBay resolution system, administered in conjunction with PayPal, eBay provides both buyers and sellers a guided process for resolving disputes over purchases made through its site. In the initial step, eBay asks buyers to diagnose the specifics of their complaint, and to suggest a preferred resolution. eBay then encourages the buyers and sellers to negotiate directly through its messaging platform. If the matter cannot be resolved through negotiation, the dispute then can be escalated to the Resolution Services team within Customer Support. Unless a settlement

¹⁵ This section describes the ODR system from the perspective of both the buyer and the seller. This description is based on the information provided for the benefit of customers on the eBay website. See *eBay Money Back Guarantee Policy*, *supra* note 10. This section is citing to that source of authority, unless indicated otherwise.

agreement is reached, Resolution Services will evaluate the buyer's claim and make a ruling about who is right and who is wrong. While this ruling does not have *res judicata* effect,¹⁶ the parties will generally voluntarily satisfy the Resolution Services ruling, and, in the absence of such voluntary compliance, the ruling is enforceable by use of applicable private enforcement procedures including chargeback on credit cards, deprivation of trustmarks, and access to escrow accounts.

The eBay Money Back Guarantee is outlined in a policy found on the eBay website that lists the types of claims that are and are not covered.¹⁷ This policy again confines claims to situations where the item never arrived or the item was not as described in the seller's listing. Then, the policy places certain procedural restrictions on claims, such as: (1) the case must be opened no later than thirty days after the actual or latest estimated delivery date; (2) the purchase must have been made with the "Pay Now" option or an eBay invoice; (3) the buyer must have used one of the five designated payment methods¹⁸; and (4) the item must have been paid for in a single payment. The Money Back Guarantee specifically does not cover certain categories of sales and sales through eBay's affiliate sites, such

¹⁶ As a practical matter, once the eBay neutral decides the dispute, the buyer can proceed to seek private enforcement remedies. Alternatively, either the buyer or the seller can go to court to prove their case or contest the private remedy. However, in most cases it is not economically feasible to seek a judicial remedy. As discussed *supra* in the defective cell phone example, an eBay ruling also has no *res judicata* effect on other claims arising out of a transaction.

¹⁷ See *eBay Money Back Guarantee Policy*, *supra* note 10.

¹⁸ These five payment methods are those available to the buyer through the eBay platform. They include 1) PayPal; 2) ProPay; 3) Skrill; 4) Credit or debit card; and 5) Bill Me Later. PayPal, ProPay and Skrill are digital payment services that allow users to send and receive money without revealing personal financial details. See *About Skrill*, SKRILL, <https://www.skrill.com/en-us/about-us/> (last visited Apr. 29, 2014); *Company History*, PROPAY, <http://www.propay.com/propay-company/company-history/> (last visited Apr. 29, 2014); *About PayPal*, PAYPAL, <https://www.paypal-media.com/about> (last visited Apr. 29, 2014). Bill Me Later, a PayPal subsidiary, is also a digital payment option, however, it is a service that extends the user a line of credit. See *About Bill Me Later*, BILL ME LATER, <https://www.billmelater.com/about/index.xhtml> (last visited, Apr. 29, 2014). PayPal is owned by eBay, and Bill Me Later is a service provided by PayPal. ProPay and Skrill are third party, private online payment services. Credit or debit cards (such as Visa, MasterCard, and American Express) are payment systems administered by banks.

as half.com.¹⁹ In addition, this guarantee prohibits duplication of claims through other dispute resolution methods, such as the PayPal Purchase Protection programs or requesting a chargeback from the payment provider.

A. Buyers' Claims – "Item Not Received," "Item Not as Described"

The current Resolution Center web page leads buyers and sellers through the process via a series of questions that: (i) set different claims on different tracks, and (ii) prevent the furtherance of claims that are outside the coverage of eBay's policy. The initial screening still adheres to the two primary bases for buyer claims: that the item did not arrive, or that the item did not match seller's description. The website then presents options for how to proceed, after the claimant has been funneled into a particular category of claims. Throughout the process, there are links to eBay's general policy, which outlines what claims are and are not qualified.

The Money Back Guarantee also limits the applicable disputes through specific exclusions from coverage, as listed in its policy:

- "Buyer's remorse or any reason other than not receiving an item or receiving an item that isn't as described in the listing."
- "Duplicate claims through other resolution methods."
- "Items shipped to another address after original delivery."
- Vehicles (instead, must be pursued through the eBay Vehicle Protection Program)
- Real Estate, Business & Websites for Sale, Classified Ads, services

¹⁹ An eBay subsidiary, half.com, specializes in the sale of books, textbooks, music, movies and games for fixed prices set by sellers, as opposed to eBay's bidding system.

- Some business equipment categories (instead, must be pursued through the eBay Business Equipment Purchase Protection Program)
- “Items purchased on half.com, eBay Wholesale Deals, or eBay Classifieds”²⁰

Buyers have thirty days from the actual or estimated delivery date to make direct contact with the seller through the eBay platform.²¹ If this direct contact does not resolve the problem within three business days of the buyer’s initial communication to the seller, the buyer can choose to escalate the case to eBay.²² If the buyer escalates the case to the Resolution Center, eBay will review the case and contact

²⁰ These parameters for applicable disputes under the basic eBay ODR policy have evolved as eBay gained experience with using the process. Previously, eBay provided more examples to guide the interpretation of “item not delivered” or “item not matching seller’s description in the listing.” In a version of the policy dating back to approximately 2010, the restrictions were phrased in checklist form as follows:

1. The buyer did not receive the items within the estimated delivery date; or
2. The item received was wrong, damaged, or different from the seller’s description. For example:
 - i. Buyer received a completely different item;
 - ii. The condition of the item is not as described;
 - iii. The item is missing parts or components;
 - iv. The item is defective during the first use;
 - v. The item is a different version or edition from the one displayed in the listing;
 - vi. The item was described as authentic but is not;
 - vii. The item is missing major parts or features, and this was not described in the listing;
 - viii. The item was damaged during shipment, or;
 - ix. The buyer received the incorrect amount of items.

This version of the policy was addressed in Louis Del Duca, Colin Rule, & Zbynek Loebel, *Facilitating Expansion of Cross-Border E-Commerce – Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)*, 1 PENN ST. J.L. & INT’L AFFAIRS 59, 65 (2012) (citing *Unpaid Item Policy*, EBAY INC., <http://pages.ebay.com/help/policies/unpaid-item.html> (last visited Mar. 9, 2015)).

²¹ *eBay Money-back Guarantee, How to Help*, EBAY INC., <http://pages.ebay.com/ebay-money-back-guarantee/how-to-help.html> (last visited Mar. 9, 2015).

²² *Id.*

the buyer within 48 hours with a determination of whether the case qualifies for a refund of the full purchase price plus original shipping.²³

B. Sellers' Claims – "Final Value Fee"

Sellers' claims are handled somewhat differently than buyers' claims. Like the buyer resolution process, new disputes are reported through the Resolution Center. However, pre-transaction exposure is significantly smaller for sellers than for buyers. If a buyer has a dispute, they have likely already paid the seller the full purchase price for the item, which averages around \$75 for non-receipt cases and \$100 for not-as-described cases.²⁴ The buyer is concerned that they will not get their purchase price back, so their exposure is significant.

Sellers, on the other hand, are clearly instructed to not ship the item in question before payment is received from the buyer. So if a buyer wins an auction and does not follow through with payment, the seller is only out the "Final Value Fee" paid to eBay as part of the sale (usually less than 1-2% of the purchase price). For sellers, disputes are part of doing business on eBay (Unpaid auction bids are not uncommon), but they are more of a nuisance than a source of major risk exposure.

Once an auction bid is reported as unpaid, Buyer is contacted and given several response options:

- 1) pay for the auction bid
- 2) prove the auction bid is already paid for, or
- 3) request that the transaction be cancelled.

Once the buyer responds, the seller and buyer can communicate to attempt to resolve the issue through mutual agreement. However, if the buyer does not respond, or the seller is not satisfied, the seller has the unilateral right to give the buyer an "Unpaid

²³ *Id.*

²⁴ *See eBay Money Back Guarantee, supra* note 10.

Item Strike.”²⁵ If a buyer receives too many Unpaid Item Strikes in too short a period of time, the buyer’s account on eBay will be suspended.

This process, which handles tens of millions of disputes every year, is entirely automated through technology, with no human involvement. The only human involvement that enters into the Unpaid Item resolution process is when the buyer decides to appeal an Unpaid Item (i.e. auction bid) Strike they have received. If it is the buyer’s first appeal of an Unpaid Item Strike, the appeal is automatically granted (and the vast majority of appeals are first appeals). However, if the appeal is for a second or later strike, an eBay Customer Service Representative will manually review the case to make a determination. In this fashion, an ODR system delivering tens of millions of resolutions per year requires only tens of thousands of human interventions to keep operating in a trusted and effective fashion.

C. Maximum and Minimum Purchase Price Limits for Certain Categories of Goods

As eBay’s Basic Money Back Guarantee program specifically prohibits claims relating to sales of certain categories of products – usually either intangibles or higher-cost items such as vehicles, real estate, and business equipment – this form of online dispute resolution is somewhat incomplete, or at least does not match the breadth of sales transactions taking place on eBay’s platform. In addition to the more

²⁵ eBay provides information through its feedback system to facilitate identification of reliable sellers and buyers and keep market participants honest. eBay assigns parties a “star” based on how many positive reviews they have received. The feedback system, like the dispute resolution system, treats buyers and sellers differently. Buyers can leave positive, neutral or negative ratings, while sellers can only leave short comments and positive ratings. eBay is very clear that feedback extortion and manipulation is not allowed. Sellers can report buyers in violation of the buying practices policy, especially when successful auction bids are not paid by the buyer. This report can result in a “strike” against the buyer. *See* Del Duca, Rule, & Loebel, *supra* note 20, at 64-65 (citing *How do I leave Feedback?*, EBAY INC., <http://pages/ebay.com/help/feedback/questions/leave.html> (last visited Apr. 4, 2012)). eBay’s “Unpaid Item Policy,” detailing Unpaid Item Strikes (sometimes called “unpaid item violations” or “excessive unpaid items”) is detailed at <http://pages.ebay.com/help/policies/unpaid-item.html>. As the policy page states, “eBay may record the unpaid item on the buyer’s account . . . excessive unpaid items on a buyer’s account may result in a range of consequences, including limits on or loss of buying privileges.”

basic ODR system provided as part of the Money Back Guarantee, eBay has developed two category-specific ODR systems to expand dispute resolution options for those using its services. These new systems include the Vehicle Purchase Protection (VPP) and the Business Equipment Purchase Protection (BEPP) programs. The VPP serves as the dispute resolution forum for the sale of vehicles priced at more than \$100 and less than \$50,000, and purchased through certain designated categories within eBay's site. The BEPP applies to sales with a final price of at least \$1,000 but no more than \$20,000, again through certain designated categories (such as Business and Industrial) within eBay's website.

Just as with the traditional eBay Money Back Guarantee, the VPP and BEPP both limit the types of claims that are covered – i.e. the claims that can be pursued through their ODR process. However, due to the higher price of the items involved, eBay's policies defining those claims are much more detailed than the simple choice between an item never being delivered or not being as described in the seller's listing. The following chart details the limitation of claims in both the VPP and BEPP systems:

EBay's Vehicle Purchase Protection (VPP) and Business Equipment Purchase Protection (BEPP) Programs Chart

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
Situations Covered	<ul style="list-style-type: none"> • You pay for a vehicle and never receive it. • You send a refundable deposit for a vehicle and never receive it. • You pay for a vehicle and receive it but suffer losses because: 	<ul style="list-style-type: none"> • Paying for an eligible item and never receiving it. • Sending a deposit for an eligible item and never receiving the item. • Paying for and receiving an eligible item the buyer

²⁶ The information in this column was quoted from the VPP Policy, *supra* note 11.

²⁷ The information in this column was quoted from the BEPP Policy, *supra* note 11.

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
	<ul style="list-style-type: none"> ○ The vehicle was determined by a law enforcement agency to have been stolen at the time of the end of the listing. ○ The vehicle has an undisclosed or unknown lien against its title. ○ The vehicle make, model or year is different than what was described in the seller’s listing at the time you placed your bid or offer. ○ A title is required for the vehicle by your state and the seller’s state but you did not receive a title from the seller and it is not possible to obtain a title from the appropriate DMV. ○ The vehicle has a title with an undisclosed salvage, rebuilt/rebuildable, unrebuildable, reconstructed, scrapped/destroyed, junk, lemon, manufacturer buyback, or water damage brand at the 	<p>can’t legally own because:</p> <ul style="list-style-type: none"> ○ It’s stolen property ○ It’s subject to an undisclosed or unknown lien ● Paying for and receiving an eligible item that’s a different type, make, or model than what was described in the listing, provided the amount of devaluation to the item due to the misrepresentation exceeds \$1,500. ● Paying for and receiving an eligible item with undisclosed damage, provided the cost of necessary repairs exceeds \$1,500 and the item was advertised as being less than 10 years old. The program covers only defects and damages that prevent the equipment from functioning, not defects or damage that are cosmetic or not critical to operate the equipment.

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
	<p>time of the end of the listing. (This protection is not available for vehicles listed in the Dune Buggies, Race Cars or Trailers categories.)</p> <ul style="list-style-type: none"> ○ The vehicle is less than 20 years old and has more than a 5,000 mile odometer discrepancy from the mileage as stated in the seller’s listing. (This protection is only available for vehicles listed in the Cars & Trucks and RVs & Campers categories.) ○ In addition, the VPP also provides protection against certain undisclosed damage for vehicles that are less than 10 years old (10 year threshold is based on model year): The vehicle had undisclosed engine, body, transmission, and/or frame damage at the time of purchase that will cost more than \$1,000 to repair. The cost of 	

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
	<p>repair to any one of those components must exceed \$1,000. For vehicles in the Boats (engine and hull only), Buses, Commercial Trucks, and RVs & Campers categories, the cost of the undisclosed engine, body, transmission, or frame damage must exceed \$1,500. Race Cars are not eligible for this protection. Vehicles that are subject to a recall for this type of damage are not eligible for VPP.</p>	
<p>Situations Not Covered</p>	<p>Vehicle Condition</p> <ul style="list-style-type: none"> • Any damage on vehicles 10 years old or older (10 year threshold is based on model year) • Regular maintenance and fluid levels. • Normal wear and tear, including but not limited to belts, hoses, tires, brakes, bushings, joints, spark plugs and wires, interior features, minor dents, paint chips and scratches. 	<ul style="list-style-type: none"> • Any damage on an item that's more than 10 years old. If the model year is not specified in the eBay listing, then the item isn't eligible for any undisclosed damage. • Regular maintenance • Normal wear and tear, including but not limited to rust, dents, and scratches, or cosmetic damage that doesn't impair the item • Sending a non-refundable

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
	<ul style="list-style-type: none"> • Certain components - Damage to any component other than the engine, transmission, frame or body, including but not limited to the vehicle’s interior, exhaust, air conditioner, electrical, suspension, cooling system, turbo charger, fuel system, differential, clutch/torque converter, and/or pollution control devices. • Damage threshold - Damage to an eligible component that does not exceed \$1,000 (or \$1,500 for boats, buses, commercial trucks, RVs and campers). • Damage after purchase- Damage or loss arising during shipping or otherwise after purchase. • Cosmetic damage, such as paint or external surface rust. • Unverifiable damage. <p>Deposit issues Sending a non-refundable deposit for a vehicle and not receiving the vehicle, or a refund, because you chose to not complete the transaction or pay the remaining balance for any reason.</p>	<p>deposit and not receiving the item or a refund, because the buyer chooses to not complete the transaction or to not pay the remaining balance</p> <ul style="list-style-type: none"> • Any damage or defect that was explained to or noticed by the buyer prior to purchase, or (if the buyer picked up the item from the seller in person) that could have been noticed upon reasonable inspection by the buyer • Items not listed on eBay Business in one of the capital equipment categories • Items purchased for less than \$1,000 • Items damaged or lost in shipping • Inspection costs, warranty fees, and other related expenses • Buyer’s remorse • Any repairs or alterations made to the item after the listing end date, that were not authorized by the third-party provider of the Business Equipment Purchase Protection program

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
	<p>Ancillary losses Punitive claims, lost profits, loss of work, travel expenses, or restocking costs.</p> <p>Title / ownership issues</p> <ul style="list-style-type: none"> • Failure to disclose a title brand if another title brand was disclosed in the listing, or if the title was described in the listing as anything but “clear”. • Failure to receive a certificate of title for a vehicle that was listed with a title brand or with the title being described as anything but “clear”. • Receiving a title that is not signed, is improperly assigned, or receiving a title but not being able to register the vehicle. • Any damage on a vehicle that was listed with a title brand or with the title being described as anything but “clear.” • Losses based on a vehicle classified as “theft recovery” or “previously stolen” but recovered by a law enforcement agency prior to being listed on eBay. <p>Other</p> <ul style="list-style-type: none"> • Differences in sub- 	

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
	<p>model, trim packages, special editions, or options if you have received the year, make, and model described in the listing.</p> <ul style="list-style-type: none"> • Buyer’s remorse. • Any damage or listing discrepancies that were disclosed to you prior to acceptance of the vehicle. • Any damage that could have been discovered upon a reasonable inspection before you paid for and picked up the vehicle in person. • Any damage that does not impact the safety or operability of the vehicle. • Repairs or alterations made by you to the vehicle without the consent of the VPP Administrator. • Inspection costs, warranty fees, taxes paid, or any other fees or expenses that are not expressly covered under these Terms and Conditions. • Transactions occurring directly between the parties (i.e. phone, email, mail, in person, by overnight messenger, etc 	

	Vehicle Purchase Protection ²⁶	Business Equipment Purchase Protection ²⁷
	. . .) and/or on another website rather than through the eBay website.	

This extensive detailed list of types of permissible claims *actually limits* the types of claims that eBay will handle under these two new programs. In addition, for these Vehicle (VPP) and Equipment (BEPP) programs, only claims that are within the specified minimal and maximum permissible amounts are handled by eBay. While both the VPP and BEPP place limits on the permissible amount of a claim (\$50,000 maximum and \$100 minimum for the VPP, and \$20,000 maximum and \$1,000 minimal for the BEPP), the “Money Back Guarantee” further limits the amount of the permissible claim to the amount of the purchase price of the item(s) involved.

For example, a dispute involving a vehicle sold for \$30,000 falls within the \$50,000 maximum/\$100 minimum requirement and, therefore, would be handled by eBay, with application of the “Money Back Guarantee” policy limiting the amount of the claim actually recoverable to the \$30,000 purchase price. A dispute involving a vehicle sold for \$150,000 would not be handled by eBay because the vehicle’s price exceeds the \$50,000 maximum.

In a BEPP case, a dispute involving sale of equipment for \$10,000 would fall within the \$20,000 maximum and \$1,000 minimum requirement and would be handled by eBay. A dispute involving equipment which was sold for \$40,000 would not be handled by eBay because it exceeded the \$20,000 maximum.

The eBay money-back guarantee, i.e. purchase money return guarantee, effectively limits the amount in controversy. The BEPP and VPP programs are in recognition by eBay, as the platform administrator, that the marketing practices within the dollar limits provided for the vehicle and equipment categories can be effectively administered by the eBay ODR low-value high volume system. eBay also concludes that disputed involving purchase prices not within the indicated parameters cannot be effectively and efficiently handled

within the fast-track low-value high volume ODR system. The decision as to the practicability and desirability of creating such special platforms, which can successfully operate within the framework of its low-value high volume ODR system, is a judgment which the platform administrator is best able to make.

III. FACILITATING FAST TRACK RESOLUTION OF DISPUTES –
COMBINING USE OF LOW VALUE PARAMETERS & LIMITING
TYPES OF CLAIMS.

A. Lists of “Item Not Received” and “Item Not as Described”
Claims

1. *EBay Explicit Limitation of Types of Claims and List of Specific Claims – Consequential Damages Excluded by “Money Back Guarantee”* – While eBay’s explicit limitation of types of claims has already been addressed, the “Money Back Guarantee” is discussed further here.²⁸ The “Money Back Guarantee” purchase price limited remedy, with its built-in exclusion of consequential damages, produces a de facto low value framework for all three eBay dispute resolution programs. This approach facilitates fast track, fair, and low-cost online dispute resolution of low value claims across the board for ODR systems generally, including the “negotiation—facilitated negotiation” and the “negotiation—facilitated negotiation—mandatory arbitration” two-track model considered by the UNCITRAL ODR Working Group III.²⁹

EBay’s VPP program achieves the equivalent of this “Money Back Guarantee” by its explicit exclusion of claims relating to

²⁸ See discussion *supra* note 20.

²⁹ At the twenty-sixth session, November 5-9, 2012, Working Group III identified the need for a two-track system to accommodate differences in the substantive law of jurisdictions in which pre-dispute arbitration agreements are valid and binding in business to consumer (B2C) contracts, and the substantive law of jurisdictions in which pre-dispute arbitration agreements in business to consumer (B2C) contracts are invalid and not binding. Under the two-track system, Track I provided an online negotiation stage between the parties, followed by a facilitated negotiation stage in which a neutral is added to the deliberations, and a third arbitration phase if the dispute is not resolved in phase one or two.

“ancillary losses,” such as “punitive claims, lost profits, loss of work, travel expenses, or restocking costs.”³⁰ The equivalent of the “Money Back Guarantee” is achieved in eBay’s BEPP eBay program by explicitly permitting recovery “only up to the devaluation or repair amount of the item or the final purchase price, whichever is lower.”³¹

The “Money Back Guarantee” purchase price limited remedy and its VPP and BEPP equivalents also will self-adjust with the fluctuation in the value of currencies in the marketplace over time, as well as between developed, developing, and underdeveloped economies at any single point in time. EBay sets the coverage thresholds specifically in policies so that all buyers and sellers understand the coverage eligibility guidelines and maximum refunds prior to engaging in any purchase in the first place. There are slight differences in the coverage and eligibility levels by broad geographic region, but the levels change very rarely and are intended to cover 95% of transactions within a given geography and category.

B. Comparison of Selected eBay Best Practices and the UNCITRAL Draft

The UNCITRAL Draft Rules explicitly limited types of permissible claims by providing that:

“These rules shall *only* (emphasis applied) apply to claims:

[“(a) that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the agreement made at the time of the transaction; or

The proposed Track II involved comparable negotiation and facilitated negotiation phases, but did not require arbitration in the event the dispute did not resolve in the negotiation or facilitated negotiation phases. UNCITRAL, Mar. 24-28, 2014, *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules: Note by the Secretariat*, 2 U.N. Doc. A/CN.9/WG.III/WP.127 (Jan. 17, 2014) [hereinafter *Secretariat Note*].

³⁰ VPP Policy, *supra* note 11.

³¹ BEPP Policy, *supra* note 11.

“(b) that full payment was not received for goods or services provided.]”³²

This language in Article 1(2) incorporated the eBay basic ‘item not received’ and ‘item received but not as described’ types of claims for buyers and a full payment remedy for sellers, and also allows, unlike eBay for recovery for services. While this is not the forum to discuss in detail the similarities and differences between the eBay and UNCITRAL Draft types of claims covered, we note in passing that the UNCITRAL Draft, in addition to permitting claims arising from the sale of goods types of claims permitted by eBay, also permitted claims pertaining to rendition of services.³³ Service related disputes are much more complicated to resolve, because (i) a return of the goods in question is not an option, and (ii) the evaluation of item condition or service quality is often opinion based and difficult to evaluate. The eBay platform does not provide for sale of services, consequently, services are not a type of transaction included in its ODR system.

Unlike the eBay program, which at the outset clearly limits recovery to the Money Back Guarantee for buyers, the UNCITRAL Draft did not clearly set forth this limited remedy.³⁴

³² See *Secretariat Note, supra* note 29, at 7. eBay’s specific “seller unpaid” and “unpaid item fee” remedy is not incorporated into the UNCITRAL draft. See discussion of eBay “unpaid item” *supra* at note 24. The UNCITRAL draft also did not incorporate an auction type of transaction into its program.

³³ *Secretariat Note, supra* note 29, art. 1 ¶ 2.

³⁴ Under the eBay policies, as described above and *infra*, consequential damages are not specifically excluded or included, but are clearly excluded by the limited Money Back Guarantee. Similarly, for example, the Mexican Consumer Protection Code provides: “At their choice, consumers shall be entitled to the substitution of the product or the return of the amount paid against the delivery of the product acquired . . .” *Ley Federal de Protección al Consumidor [LFPC] [Federal Consumer Protection Act]*, *Diario Oficial de la Federación* el 24 de diciembre de 1992 (Mex.), available at http://www.profeco.gob.mx/juridico/pdf/l_lfpc_06062006_ingles.pdf (English translation).

The Mexican platform Concilianet, which is the Mexican agency handling its ODR system also advises the public that no recovery is possible for consequential damages and informs the public of the consumer’s right to recover such damages in court. *What is it?*, CONCIANET,

The detailed list of specific claims of ‘item not received’ or ‘items received but not as described by seller,’ comparable to detailed eBay lists discussed *supra*³⁵ had not been developed and incorporated into the Drafts or elsewhere, perhaps in the document on Substantive Legal Principles³⁶ envisaged by the text of the Preamble.

The Preamble to the Draft Rules reads as follows:

“1. The UNCITRAL online dispute resolution rules (“the Rules”) are intended for use in the context of disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.

“2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix]:

[“(a) Guidelines and minimum requirements for online dispute resolution providers/platforms/administrators;]

[“(b) Guidelines and minimum requirements for neutrals;]

[“(c) Substantive legal principles for resolving disputes;]

[“(d) Cross-border enforcement mechanism;]

[“. . .];”³⁷

http://concilianet.profeco.gob.mx/concilianet/faces/que_es.jsp (last visited Sept. 19, 2011).

³⁵ See eBay lists, *supra* note 20, for vehicles see note 26, *supra* and accompanying text, for equipment see note 27, *supra* and accompanying text.

³⁶ See *Secretariat Note*, *supra* note 29, at 6.

³⁷ *Secretariat Note*, *supra* note 29, at 5-6

These four documents envisaged by the Preamble³⁸ had not been drafted by the Working Group at the time UNCITRAL instructed the Working Group to prepare a non-binding descriptive document on elements of the ODR process on which the Working Group had reached consensus.

Documents one and two were to provide “guidelines and minimum requirements” for (a) dispute resolution *providers*/platforms/administrators³⁹ and (b) neutrals. Documents three and four were to provide (c) substantive legal principles for resolving disputes and (d) cross-border enforcement mechanisms (presumably private and public).⁴⁰ Whether these documents would be merely persuasive in implementing the Draft, or annexed as legally part of the Draft, had also not yet been determined by the Working Group.⁴¹

³⁸ In earlier drafts, the “documents” were referred to as annexes. See UNCITRAL, Mar. 24-8, 2014, *Online Dispute Resolution For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules: Note by the Secretariat*, 2 U.N. Doc. A/CN.9/WG.III/WP.128, (Jan. 22, 2014).

³⁹ At its March 24 – 28, 2014 New York meeting, UNCITRAL ODR Working Group III agreed that the term “ODR provider” and all references thereto would be deleted from its Rules. The following definitions of “ODR Administrator” and “ODR Platform” would replace earlier definitions in the Rules:

“ODR ‘Administrator’ means the entity that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform, and which is specified in the dispute resolution clause.”

“ODR ‘Platform’ means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules.”

The Secretariat’s official report of this meeting is pending at the time this article is printed.

⁴⁰ *Secretariat Note, supra* note 29.

⁴¹ The Secretariat recently indicated that it might be advisable not to annex guidelines to the Rules. The Secretariat had suggested to the working group that it might wish to consider “(i) the purpose of guidelines that address various stakeholders in the online dispute resolution process, and bearing in mind that purpose, (ii) the relationship of the guidelines with the Rules.” He further noted the suggestion in Document A/CN.9/WG.III/WP.114 that guidelines ought to set out best practices for ODR providers and neutrals, while the Rules aim to establish a procedure for online dispute resolution. He also might be advised not to annex

IV. LESSONS AND BEST PRACTICES REGARDING DE FACTO PURCHASE PRICE “MONEY BACK GUARANTEE” LOW VALUE & LIMITATION OF TYPES OF CLAIMS PERMITTED.

The momentum behind global ODR continues to increase. Consumer and business groups around the world are unanimous in promoting fair, proportionate, effective, online, cross-border redress for low value cross-border disputes. As a result, there will continue to be increasing demand for effective ODR systems design and procedural rules.

It is vital for the continued expansion of e-commerce that consumers and small-to-medium size businesses have access to fast and fair resolution processes. Because of this commercial imperative, the private sector is stepping in to provide manifold solutions to this problem. On balance, market-based approaches facilitate the development of optional solutions for the problem of online redress. This was the experience in the eBay marketplace. Market-based approaches require a lot of experimentation and evolution to get right, and eBay was always tweaking and evolving their ODR systems to account for lessons learned. As such, any ODR systems design should not be too prescriptive, because this may hinder the innovation required to effectively solve this problem over the longer term.

eBay has generally managed to limit the complexity and scope of claims through categorization of claims limiting the types of permissible claims and providing a list of specific claims, coupled with its purchase price “Money Back Guarantee.” However, as previously noted, for “vehicle” (VPP) and “equipment” (BEPP) sales, it also imposes the additional condition that the dispute will not be handled by the eBay ODR system if the purchase price of the vehicle is more than \$50,000 or less than \$100, or in the case of equipment if the purchase price is more than \$20,000 or less than \$1000. This maximum and minimum purchase price limitation on “vehicle” and “equipment” cases handled by the eBay system ensures its efficient operation as a low-value dispute resolution process. It allows eBay, in

guideline to the Rules, as the legal nature and addressees of Rules and guidelines differ. See UNCITRAL, May 21-25, 2012, *Proposal on Principles Applicable to Online Dispute Resolution Providers and Neutrals*, ¶ 28 U.N. Doc. A/CN.9/WG.111/WP.127.

responding to market conditions, to design specific resolution processes and rules for special categories of such goods. It also permits eBay to exclude from the special categories the sales of such goods involving a high value purchase price, which it deems inappropriate for resolution in the fast-track low-cost high-volume eBay system.

In both the basic and specialized “Money Back Guarantee” cases, purchase price will adjust as changes in currency values occur from time to time and adjust around the world to differences in the value of currencies in advanced, advancing, and underdeveloped economies at any given time. It also removes a major source of complexity and controversy in the eventual deliberative resolution process, because the law and jurisdiction to which the parties have agreed is specifically addressed and resolved in the governing policy adopted by the parties in their agreement to utilize the procedural rules.

ODR administrators, marketplaces, and payment providers need the flexibility to design, build, and deploy both non-binding and binding ODR systems. eBay learned this lesson through extensive interactions with the global community of millions of sellers and merchants: each seller must have the flexibility to design their own resolution processes and policies, which are backed up by a standardized escalation process. This is the only way to enable ODR designs to adjust to the many different types of potential disputes and resolutions around the world, while also providing final, definitive resolutions in all cases.

The eBay experience makes very clear that ODR systems designs should avoid specific requirements that constrain the flexibility of disputants and administrators to evolve ODR systems that best meet the needs of various dispute types, marketplaces, and consumer communities. Where possible, ODR rules should articulate higher-level process requirements and values (e.g. due process, transparency, impartiality) as opposed to detailed procedural requirements (e.g. three neutrals per case, seven days to respond).

V. BUYERS' ON DEMAND ACCESS TO INFORMATION NEEDED
TO IDENTIFY RELIABLE SELLERS

A. Evaluation of Sellers and Ratings – Building Trust

A buyer conducting a search for a product to purchase on eBay can obtain information about the reliability of a seller from the Best Match search results page. If a seller has achieved a Top Rated Seller Status (discussed *infra*), under the Evaluation System hereafter discussed, this is displayed in its listing on the Best Match search results page. A lesser trustmark, the PowerSeller status (discussed *infra*), is also available on eBay, however it is not visible from the Best Match search results page. In this way the eBay system provides a reward for the most reputable sellers, the Top Rated Sellers.

A buyer who selects Best Match search results for an item is taken to a page listing that. On this page, a seller's information is conspicuously gathered in the upper right hand corner of the listing page for buyers to consult. From here, a buyer can clearly determine whether a Top Rated Seller badge or PowerSeller insignia is displayed. Additionally, eBay provides two feedback performance metrics on the listing page, the seller's Feedback Score (discussed *infra*) and Feedback Percentage (discussed *infra*). From the listing page a buyer can begin to determine the reputation of sellers that do not qualify for Top Rated Seller status.

Additionally, from the listing page, a buyer can click on the Feedback Score and is hyperlinked to the seller's feedback profile. The seller's feedback profile lists both eBay's feedback performance metrics, including the Feedback Score, feedback percentage, detailed seller ratings, Top Rated Seller status, and also subjective ratings in the form of comments left by former buyers of products offered by the seller. Feedback Comments are listed in reverse chronological order, thus a buyer is prompted to read the most recent Feedback Comments first.

Finally, the seller's feedback profile also lists the number of revised feedbacks the seller has been given. A revised feedback occurs when a buyer first left a negative or neutral feedback and then, after having the issues remedied by the seller, revises the feedback left to

positive. Thus, the buyer can get a feeling for the customer service a seller provides if a buyer is unhappy with a transaction.

After a buyer successfully wins an auction or purchases an item they must pay for the item on eBay.⁴² Payment under the eBay system is usually by credit card. However, payment may also be made through the eBay approved escrow service (www.Escrow.com). Under this procedure, the parties may agree that the buyer place the price in the escrow fund by either wire transfers or through credit card payments (i.e. American Express, MasterCard, Visa, PayPal), United States drawn money orders, United States drawn personal or company checks, or United States drawn cashier's checks. The buyer controls the time of payment from the escrow fund to the seller and will not release the payment from the escrow fund to the seller until he is satisfied that the goods "have been delivered and are as described."⁴³ Thereafter, the item is required to be shipped in accordance with the listing details by the seller. Under a non-escrow transaction, once the item is received, the transaction is complete. After a transaction, a buyer or seller may voluntarily leave feedback; however, a seller may only leave positive feedback for a buyer. A buyer, on the other hand may leave negative, neutral, or positive feedback for a seller. If a buyer hasn't left timely feedback, the seller is permitted to e-mail the buyer a limited number of times to request that the buyer do so.

VI. THE EBAY AUTOMATED TRUSTMARK EVALUATION/FEEDBACK SYSTEM

A. Importance of Making Seller Evaluations and Ratings Available to Foster Trust Between Buyers and Sellers and

⁴² Alibaba has a similar escrow system. For example, Alibaba Secure Payment, a service offered by Alibaba akin to eBay's Paypal, is an escrow service. The steps are as follows: 1) a buyer places an order online; 2) a buyer makes payment to Alibaba Secure Payment; 3) supplier ships the order; 4) buyer receives the order and confirms the order online (matches description, not damaged, etc.); and then 5) Alibaba Secure Payment releases payment to the supplier. *Secure Payment*, ALIBABA.COM, http://activities.alibaba.com/alibaba/secure-payment.php?tracelog=beacon_payment_150114 (last visited Mar. 9, 2015).

⁴³ See *Escrow Services for Vehicle Purchases*, EBAY INC., <http://pages.ebay.com/help/pay/escrow.html> (last visited Mar. 9, 2015).

Facilitate Private Enforcement

The eBay evaluation system is limited to transactions on the eBay site between a buyer and seller. In other words, the eBay evaluation system is tied to the eBay site, and a buyer can only rate a seller, or vice versa, regarding a specific transaction between the two users. Following a transaction on eBay, buyers and sellers can choose to leave feedback about the transaction.⁴⁴ As previously indicated, whereas buyers can leave positive, neutral, or negative feedback, or no feedback at all, sellers can only leave positive feedback or opt to not leave feedback.⁴⁵

By allowing buyers to choose between positive, neutral, or negative evaluation, eBay transforms a qualitative judgment into one of three specified categories. In doing so, eBay can now easily quantify an inherently qualitative judgment: whether a user's experience was good, indifferent, or bad. The effect of quantifying a buyer's experience is to create an objective metric with which a future buyer can evaluate a prospective seller. Thus, evaluations are transformed into numerical data, easily interpreted by a buyer regardless of the language they speak.

eBay additionally provides for a user to leave comments along with an evaluation. By allowing a user to leave a detailed comment, a future buyer has access to a purely qualitative evaluation component regarding a seller's prior transactions. Therefore, the qualitative aspect of a positive, neutral, or negative experience is preserved.

Through a combination of analytical data and express comments provided by former buyers, a current buyer can verify the trustworthiness of a seller that they have never met, and perhaps couldn't communicate with, or have any other way to facilitate the trust a buyer needs to transact with the seller. We next discuss the eBay trustmark system in detail, with an eye to a best practices model in facilitating trust in international commercial transactions.

⁴⁴ *How it works*, EBAY INC., <http://pages.ebay.com/help/feedback/howitworks.html> (last visited Mar. 9, 2015).

⁴⁵ *Id.*

B. “Percentage”, “Score”, and “Comment Feedback”

As indicated *supra*, a seller’s Feedback Rating can be positive, neutral, or negative. A user’s Feedback Percentage is the ratio of positive Feedback Ratings received out of all of the ratings received, in other words the percentage of positive ratings. The higher a user’s feedback percentage, generally speaking, the more trustworthy an eBay member is.⁴⁶ However, it is important to note that a high feedback percentage does not dictate that a user has a significant track record on eBay. For example, User A may have had ten transactions all with positive feedback, therefore resulting in a feedback percentage of 100%. Now consider a second user, User B may have had 1,000 transactions with 980 positive feedbacks given, thereby having a feedback percentage of 98%. As you can see, User A has a higher feedback percentage, but User B is a much more experienced seller. Whereas eBay’s other feedback system components require a number of transactions, the feedback percentage system applies to initial users. The feedback percentage, therefore is an important representation of trustworthiness for a user that has not yet had enough transactions to achieve a Feedback Score warranting a star rating, or other trustmarks, discussed below.

A user’s Feedback Score is measured by subtracting the total number of negative ratings from unique trading partners from the total number of positive ratings from unique trading partners.⁴⁷ For example, if Seller A had ten transactions with ten different buyers that resulted in seven positive and three negative feedbacks being left than Seller A’s Feedback Score would be four (7-3=4). Now consider if Seller A had ten transactions, again with seven positive ratings and three negative, however three of the positive ratings were left by the same buyer. In this case, the duplicative positive ratings left by the

⁴⁶ The feedback system is linked only to transactions where users actually leave feedback. Many completed transactions result in a buyer simply not leaving feedback for a seller. These transactions are not encompassed in the feedback evaluation system.

⁴⁷ *eBay Buying Feedback Quick Guide*, EBAY INC., http://ebay.about.com/od/buyingeffectivel1/a/be_feedquick.htm (last visited Jan. 14, 2015).

buyer would be excluded from Seller A's Feedback Score. Thus, Seller A's Feedback Score would be two (5-3=2).

By limiting the Feedback Score to ratings from unique trading partners the eBay system has a built-in safeguard against disproportionate Feedback Ratings on the basis of repeat buyers,⁴⁸ both positive and negative, skewing a user's score. Besides trustworthiness, a user's Feedback Score measures their experience. The higher a seller's score, the more transactions with unique trading partners that seller has had. A user's Feedback Score is displayed in parenthesis whenever a member ID or member name is displayed in the eBay site. The score is also accompanied by a corresponding star rating, giving a buyer a visual representation matching the score.⁴⁹

⁴⁸ eBay additionally has specific policies against Feedback Extortion, a buyer threatening poor feedback to extort something that wasn't part of the listing or a seller demanding positive feedback from buyers; Feedback Manipulation, exchanging feedback for the purpose of inflating Feedback Scores, gaining eBay privileges, or enhancing reputation, or trying to damage a seller's feedback through a series of repeat purchases; and Feedback in Seller Terms and Conditions, a seller cannot include terms and conditions limiting a buyer's right to leave feedback. *Feedback Policies*, EBAY INC., <http://pages.ebay.com/help/policies/feedback-ov.html#basics> (last visited Jan. 14, 2015).

⁴⁹ Below is an example of a user profile with Feedback Score and star rating, followed by an infographic description of the star ratings.

Here's what the different stars mean:

Yellow Star (★) = 10 to 49 points

Blue Star (★) = 50 to 99 points

Turquoise Star (★) = 100 to 499 points

Purple Star (★) = 500 to 999 points

Red Star (★) = 1,000 to 4,999 points

Green Star (★) = 5,000 to 9,999 points

Yellow Shooting Star (★) = 10,000 to 24,999 points

Turquoise Shooting Star (★) = 25,000 to 49,999 points

Purple Shooting Star (★) = 50,000 to 99,999 points

Red Shooting Star (★) = 100,000 or higher

Buyers are more likely to transact with established sellers. The Feedback Score performance metric provides buyers with a statistic speaking to a seller's track record as a merchant. Since the rating is numerically based, many linguistic issues arising from transacting with buyers and sellers worldwide are avoided.

As part of the eBay feedback system, every Feedback Rating must be accompanied by a user comment.⁵⁰ A comment is required regardless of whether the feedback left is positive, neutral, or negative.⁵¹ A Feedback Comment is the first instance where a buyer can leave a qualitative evaluation of a transaction with a seller. As a result, a Feedback Comment is often where a seller can learn a buyer's dissatisfaction with a transaction. If sellers receive a negative feedback eBay allows the seller an opportunity to remedy the buyer's grievance.⁵² If a seller resolves an issue they can also request a feedback revision from the formerly aggrieved buyer.⁵³

C. "Description", "Communication", and "Shipment", -
Detailed Seller Ratings

eBay allows buyers to rate specific aspects of their transaction experience via a detailed seller rating.⁵⁴ Detailed Seller Ratings are only viewable by buyers for sellers with ten or more detailed seller ratings by buyers within the last year. Buyers rate sellers according to four

eBay Feedback Points, EBAY INC., <http://www.ebay.com/gds/eBay-Feedback-Points-/10000000176715987/g.html> (last visited Mar. 9 2015). It is unclear to me how effective the star rating is as a quick-look reference to a user's Feedback Score. The effectiveness of the star rating is directly tied to a user's understanding of what each star means. Without the above chart, or an understanding thereof, I suspect the star-system is of minimal import in garnering the trust of a user to facilitate a transaction.

⁵⁰ *Feedback*, EBAY INC., <http://pages.ebay.com/services/forum/feedback.html> (last visited Jan. 14, 2015).

⁵¹ *Id.*

⁵² *Revising Feedback*, EBAY.COM, <http://pages.ebay.com/help/feedback/revise-feedback.html> (last visited Jan. 14, 2015).

⁵³ *Id.*

⁵⁴ *Detailed Seller Ratings*, EBAY.COM, <http://pages.ebay.com/help/feedback/detailed-seller-ratings.html> (last visited Mar. 9, 2015).

categories⁵⁵ as follows, from a rating of five stars (highest) to one star (lowest):

- Accuracy of item description;
- Satisfaction with communication;
- Expediency of shipping; and
- Reasonableness of shipping and handling charges.

Buyers are requested to evaluate the sellers for the adherence to the four categories through a series of specific tips for rating as indicated in the chart that follows.

What you rate	Tips for rating
How accurate was the item description?	<ul style="list-style-type: none"> • Review the item title, description, and condition to see if they match the item you received.
How satisfied were you with the seller's communication?	<ul style="list-style-type: none"> • Recall whether the seller addressed any questions or concerns that you had, and did so in a professional manner. • Consider only business days when evaluating the timeliness of the seller's communication (sellers might not check email on weekends and holidays). • If the seller meets specific requirements, we give the seller a 5-star communication detailed seller rating automatically, and you won't be able to change the rating.
How quickly did the seller ship the item?	<ul style="list-style-type: none"> • Rate the seller only on the time it took to mail the item, not the time it took you to receive the item.

⁵⁵ *Id.* Certain transactions aren't rated according to all four categories. For example, Motor Vehicle transactions are not rated on shipping time and shipping and handling charges.

	<ul style="list-style-type: none"> • Don't hold sellers responsible for delays in mail services, international custom delays, or for the time it takes for your payment to clear. If you picked up the item locally, you won't be able to provide a rating for this category. • If the seller met specific shipping time requirements, we give the seller a 5-star shipping time detailed seller rating automatically, and you won't be able to change the rating. • If we determine at a later date that the seller met the requirements for an automatic 5-star shipping time rating, we may adjust the rating to 5 stars.
How reasonable were the shipping and handling charges?	<ul style="list-style-type: none"> • Remember that sellers can charge for the cost of the actual packaging materials, along with a reasonable handling fee to cover their time and direct costs associated with shipping. • If the seller provided free shipping, we give the seller a 5-star shipping and handling charges detailed seller rating automatically, and you won't be able to change the rating. • For international transactions, you as a buyer are expected to pay duties, taxes, and customs clearance fees as required by country laws. • If you picked up the item locally, you won't be able to provide a rating for this category.⁵⁶

⁵⁶ *Detailed Seller Ratings*, *supra* note 47.

D. Transaction Defect Rate

Starting with the August 20, 2014 monthly seller evaluation, eBay instituted an additional metric to evaluate seller performance.⁵⁷ The new metric, the transaction defect rate (hereinafter “defect rate”) is measured as a percentage of a seller’s successful transactions that have one of a specified number of defects.⁵⁸ These defects, according to eBay, are the top predictors that a buyer will either leave eBay all together or buy less on the marketplace.⁵⁹ The specified defects are as follows:

- Detailed seller rating of 1, 2, or 3 for item as described;
- Detailed seller rating of 1 for shipping time;
- Negative or neutral feedback;
- Return initiated for a reason that indicates the item was not as described;
- eBay Money Back Guarantee or PayPal Purchase Protection case opened for an item not received or an item not as described; and
- Seller-cancelled transactions.⁶⁰

The new defect rate policy mandated changes in the eBay Seller Ratings system. Following the update, to qualify as a Top Rated Seller a defect rate of up to 2% is tolerated.⁶¹ For purposes of Seller Ratings, however, only transactions with US buyers count towards the defect

⁵⁷ *Seller Standards*, EBAY INC., <http://pages.ebay.com/sellerinformation/news/springupdate2014/sellerstandards.html> (last visited Jan. 14, 2015).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

rate.⁶² Buyers cannot see a seller's defect rate, however a seller with a high defect rate will not show favorably in Best Match search results.⁶³

VII. AWARDING OF EBAY'S AUTOMATED TRUSTMARKS USING
THE EVALUATION/FEEDBACK SYSTEM

As indicated, *supra*, eBay employs a Top Rated Seller automated Trustmark, granted only for highest-level performances, and a PowerSeller Trustmark granted for quality performance but not of the top level. We first discuss the PowerSeller Trustmark and subsequently the Top Rated Seller.

A. PowerSeller Designation - Requirements and Benefits

The PowerSeller designation is handed out on the basis of volume of sales and customer service requirements. As a PowerSeller, the seller must:

- be registered with eBay for at least 90 days and have an account in good standing;⁶⁴
- follow all eBay policies;⁶⁵
- may have no more than three tenths of one percent of transactions result in Money Back Guarantee or PayPal Purchase Protection cases closed without seller resolution;⁶⁶ and
- have a minimum of 100 transactions and \$3,000 in sales with US buyers over the past 12 months.⁶⁷

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Powersellers*, EBAY.COM, <http://pages.ebay.com/help/sell/sell-powersellers.html> (last visited Mar. 9, 2015).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

Further, the PowerSeller System is linked to Detailed Seller Ratings in two ways, as follows:

- the seller must have an average of at least 4.60 from US buyers across all four detailed seller rating categories;⁶⁸ and
- a seller must have no more than 1% of their transactions with low DSRs (1 or 2 ratings) on the category “item as described,” and no more than 2% of transactions with low DSRs in the “communication,” “shipping time,” and “shipping and handling cost” categories.⁶⁹

The above listed requirements qualifies a seller as a “Bronze” level PowerSeller.⁷⁰ Depending on the volume of sales, in either number of items or in dollar amount, a seller may improve their PowerSeller level above Bronze to either Silver, Gold, Platinum or Titanium levels.⁷¹ EBay has a designated insignia for PowerSellers across the various levels. Pictured below, the insignia only changes by reference to the appropriate PowerSeller level.



Notably, a user may advertise their PowerSeller status, however, whether a user is a PowerSeller or not is not apparent from search results, whereas a Top Ratedseller status is visible in a search listing.⁷² If a user looks at a particular seller’s eBay store they can find

⁶⁸ *Id.*; see *Bay Buying Feedback Guide*, *supra* note 47, *eBay Feedback Policies*, *supra* note 48, *eBay Feedback Points*, *supra* note 49, and *eBay Feedback*, *supra* note 50.

⁶⁹ *Powersellers*, *supra* note 64.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² For example, search any major product, such as an iPad, on [eBay.com](http://www.ebay.com). *iPad*, EBAY.COM, http://www.ebay.com/sch/i.html?_from=R40&_trksid=p2050601.m570.11313.TR0.TRC0.H0.Xipad&_nkw=ipad&_sacat=0 (last visited Mar. 9, 2015).

a seller's PowerSeller insignia located there.⁷³ From a practical perspective, the PowerSeller status requires more search time from a buyer and, thus, is less accessible than the Top Rated insignia. For this reason, a PowerSeller insignia is a less efficient trustmark than the Top Rated insignia.

Similar to the Top Rated Seller system, the PowerSeller rating includes discounted shipping, including United States Postal Service Savings Program and United Parcel Service rate discounts.⁷⁴ A PowerSeller also gains access to eBay protection for unpaid items,⁷⁵ receives promotional offers and opportunities to participate in research,⁷⁶ and gains access to resources from eBay that regular members cannot access.⁷⁷ These resources include a separate, more easily accessible customer service team for PowerSellers and access to marketing and sales tools directly from eBay.⁷⁸ Finally, the PowerSeller status is a step toward Top Rated Top Rated Seller status and the benefits discussed *infra* associated with the Top Rated Top Rated Seller status.⁷⁹

B. Top-Rated Seller Badge Designation - Requirements and Benefits

A Top-Rated Seller is a PowerSeller that has maintained high performance and customer service standards.⁸⁰ The PowerSeller designation then is a precursor to a Top-Rated Seller designation. Thus, the Top-Rated Seller badge can be viewed as a more significant trustmark than the PowerSeller status. In order to qualify as a Top-Rated Seller, an eBay user must meet several requirements related to customer service. For example, if a seller offers one-day or same day handling, the seller must upload tracking information in at least 90%

⁷³ For example, see *Titanium Powerseller Status*, EBAY.COM, <http://stores.ebay.com/irecrafts/Titanium-PowerSeller-Status.html> (last visited Mar. 9, 2015).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Powersellers*, *supra* note 64.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Glossary of Terms – Top Rated Seller*, EBAY INC., <http://pages.ebay.com/help/account/glossary.html> (last visited Mar. 9, 2015).

of their transactions in the prescribed time according to the relevant eBay policies.⁸¹ Additionally, a seller must meet the eBay Money Back Guarantee promise and PayPal Purchase Protection requirements.⁸² The case requirements under these programs state that at most three tenths of a percent of cases brought by a buyer may be closed without seller resolution.⁸³ In terms of feedback requirements, to meet Top Rated Seller requirements, a seller can only have a transaction defect rate of 2% at most.⁸⁴

EBay offers a second status of Top Rated Seller seals, the Top Rated Plus Seal.⁸⁵ In order to garner a Top Rated Plus Seal, a Top Rated Seller must offer listings that provide a 14-day or longer money-back return policy and provide same-day or one business day handling time.⁸⁶ Further, listings meeting the Top Rated Plus requirements must include extended holiday returns on listings.⁸⁷

Currently, a user can become a Top Rated Seller in the United States, United Kingdom, and Germany.⁸⁸ The U.S. Top Rated Seller system, discussed *infra*, is based only on sales through eBay.com.⁸⁹ A seller can become a Top Rated Seller in the United Kingdom or Germany through their associated eBay sites, <http://www.ebay.co.uk/> and <http://www.ebay.de/>, respectively.⁹⁰ The Top Rated Seller designation in those countries is based only on transactions with buyers in those countries.⁹¹ A seller need not be from the United States, United Kingdom, or Germany to qualify as a Top Rated Seller in that country. For example, a United States seller may become a Top Rated Seller in the United Kingdom if they meet the requirements of

⁸¹ *Top Rated Seller*, EBAY INC., <http://pages.ebay.com/help/sell/top-rated.html#what> (last visited Mar. 9, 2015).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

the U.K. Top Rated Seller Program.⁹² For associated eBay sites in countries other than the U.K. and Germany, a U.S. seller can become a Top Rated Seller in that country based on the eBay global seller performance standards.⁹³ Unlike the United States, United Kingdom and Germany Top Rated Seller systems, the Top Rated Seller designation in all other countries is based on transactions with buyers in all countries and not just native buyers.⁹⁴

Once a seller qualifies as a Top Rated Seller they receive a 20% discount on final value fees charged by eBay and access to United States Postal Service Commercial Plus Pricing on shipping.⁹⁵ As soon as a seller qualifies, sometimes immediately but at most in a matter of hours,⁹⁶ a seal is displayed on any of the seller's listings which offer same-day or 1-day handling and extended holiday returns identifying them as a Top Rated Seller.⁹⁷ Additionally, a seller receives preferential search results, or in eBay's terms, improved search standing in eBay's Best Match search results.⁹⁸ The Top Rated Seller and Top Rated Plus seal, pictured below, appear both in eBay search results and in an individual item's listing page.⁹⁹

⁹² *Id.*; For the United Kingdom requirements, see *Top Rated Seller*, EBAY.UK <http://pages.ebay.co.uk/help/sell/top-rated.html> (Mar. 9, 2015).

⁹³ *Top Rated Seller*, *supra* note 81; for global seller performance standards, see *Global Seller Performance*, EBAY.COM, <http://pages.ebay.com/help/policies/global-seller-performance.html> (last visited Mar. 9, 2015). Even though a U.S. buyer can become a Top Rated Seller in the United Kingdom and Germany they do not qualify for discounts through those sites. Likewise, only U.S. and Canadian sellers are eligible for the 20% final value fee discount on eBay.com.

⁹⁴ *Top Rated Seller*, *supra* note 81.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Build your Business*, EBAY.COM, <http://pages.ebay.com/sellerinformation/build-your-business-online/status-standards/top-rated-seller.html> (last visited Mar. 9, 2015).

⁹⁸ *Id.*

⁹⁹ For an example of search results, see eBay "iPad" search, *supra* note 72; for an example of a listing page, see: Apple iPad Mini, EBAY http://www.ebay.com/itm/NEW-Apple-iPad-Mini-16GB-Wi-Fi-7-9-Tablet-White-MD531LL-A-or-Gray-MF432LL-A-/181511708378?pt=US_Tablets&var=&hash=item2a42f0deda (last visited Mar. 9, 2015).



C. Comparison of eBay Evaluation System with Other Evaluation Systems

There are two important observations to be made regarding the exclusivity of the eBay system. First, the eBay feedback system is a closed system, that is, the system is tied only to transactions conducted on the eBay website. Second, a trustmark earned through transactions on eBay cannot be used by a merchant outside of the eBay website. Each of these observations has important implications regarding the practical use of such a system universally for international transactions.

Since its inception, eBay has developed and refined its feedback system. Thereby engendering trust in transactions on its platform and facilitating trade. In doing so, eBay has gained a reputation as a safe and secure global marketplace. There are clear incentives for eBay to protect their investment in the feedback system. It comes as no surprise then that eBay's system remains closed. Thus, eBay does not allow their feedback system to be outsourced to transactions occurring off the eBay site. As an added level of protection, ensuring sellers continue using eBay, the trustmarks earned through the eBay feedback system cannot be utilized by a seller on another platform. Thus, an eBay seller may not advertise their reputation on eBay elsewhere.

As an e-commerce site, the eBay feedback system provides evaluations of buyers and sellers for transactions on its platform. Each feedback left is tied to a particular transaction, for a particular item, between a particular buyer and seller. eBay's system then provides objective scores, based on observable and quantifiable elements as provided by the parties to a transaction to evaluate buyers and sellers

in the aggregate of all of their transactions.¹⁰⁰ From a perspective of reliability in collecting data and enforcement of the rules and regulations related to the feedback system, a closed system, that is a system tied to a particular platform, is the only practical option.

Under the open system model, in comparison to the closed system model the seller conducts transactions on more than one platform rather than a single platform. However, the evaluation system and its feedback and ratings are, hosted on a single platform. Another difference is that the open system model has to rely on subjective feedback as opposed to the quantitative feedback of the eBay closed system.

There are relatively few open systems on the market. However earlier research uncovered iKarma, which regrettably is no longer in operation and its website is no longer in existence. However, we can nevertheless use the iKarma system to illustrate the open system model. An iKarma user first created an iKarma account, and then they were awarded an iKarma seal. The user placed this seal on their website, in emails, etc. that linked to their iKarma profile. The user's iKarma profile contained ratings and comments from previous buyers of their goods or services. At its core, the iKarma site was more or less just a place to host reviews. This stands in stark contrast to eBay's platform driven, empirical evaluation and trustmark system. iKarma was essentially a place to evaluate a seller's reputation, the seal acted less as a trustmark than as an access point to see what, if anything, other people had said about a seller. A seller could advertise their iKarma profile and ratings, but again the site acted more as a place to host reviews and less as a trustmark. Because sites like iKarma are not tied to specific platforms or even to specific types of transactions, i.e. a lawyer and a company selling electronics can both have an iKarma type profile, the open system does not lend itself to objective evaluations. Thus, because evaluations are based largely on subjective, qualitative comments, there is not objective data to base metrics off or

¹⁰⁰ eBay's use of numerical rather than verbal ratings reduces misunderstandings and improves communication regarding ratings, particularly in cross-border transactions involving use of different languages by parties to the transaction.

to base an automated trustmark on. The automation and efficiency of the eBay closed system is therefore lost in the iKarma open system.

The SquareTrade seal provides evaluation and feedback of past transactions and also gives guarantees as to performance obligations regarding a current listing. The SquareTrade system also verifies a seller's identity, requires the seller to commit to the SquareTrade dispute resolution process, and generates info pages to provide a buyer with information regarding a seller's past transactions.¹⁰¹ Therefore, the SquareTrade seal provides a retrospective trustmark, similar to the eBay system. SquareTrade centrally monitors a user's compliance with its trustmark and can remove the trustmark from a seller's site or auction listings.¹⁰² The SquareTrade seal is not linked to one site or platform, and seems to be a middle ground from the eBay completely closed system to the open systems such as iKarma.

VIII. LESSONS & BEST PRACTICES REGARDING EBAY'S AUTOMATED TRUSTMARK SYSTEM & PRIVATE ENFORCEMENT

A. eBay's Automated Trustmark System and Private Enforcement of Settled Claims and Rulings of Neutrals Through Voluntary Compliance, Termination of Trustmark Status, Use of Chargebacks, and Access to Escrow Accounts

The eBay "Automated Electronic Trustmark System" enables buyers on demand to obtain evaluations and performance ratings of sellers from whom they anticipate making purchases. These ratings are obtained electronically and cumulatively from the reports supplied by prior buyers after each purchase they made on the eBay platform.¹⁰³

¹⁰¹ SquareTrade Criteria for Trusted Business Seal Membership, SQUARETRADE, https://www.squaretrade.com/htm/pop/popup_busCriteria.html (last visited Mar. 9, 2015).

¹⁰² SquareTrade Standards, SQUARETRADE, https://www.squaretrade.com/htm/pop/popup_ST_standards.html (last visited Mar. 9, 2015).

¹⁰³ eBay's use of numerical rather than verbal ratings reduces misunderstandings and improves communication regarding ratings, particularly in cross-border transactions involving use of different languages by parties to the transaction.

The eBay automated system is efficient and cost-effective and does not depend on cumbersome and costly third-party evaluations to determine who is or is not entitled to trustmark status.

Under the eBay Trustmark Evaluation/Feedback System sellers' desire to obtain favorable performance evaluations in order to establish their reputation and reliability, and increase their sales, motivates them to perform their contract obligations well, facilitate fair resolution of disputes, and voluntarily satisfy the rulings of neutrals following unsuccessful negotiations and facilitated negotiations. In most cases voluntary private satisfaction and enforcement of settled claims and rulings of neutrals will occur. In the absence of such voluntary compliance, use of private enforcement procedures including chargebacks on credit card payment, access to escrow accounts, and termination of trustmark status are available to achieve private enforcement of rulings. As noted the rulings of neutrals do not have res judicata effect but are enforceable by use of applicable private enforcement procedures.¹⁰⁴

CONCLUSION

Development of fast-track low-value high-volume ODR systems which provide a marketplace for e-commerce, as well as an ODR system for fast-track resolution of disputes arising from e-commerce on its electronic marketplace is facilitated by application of the following four best practices used by eBay in creating its highly successful system:

¹⁰⁴ Much discussion has occurred in UNCITRAL Working Group III sessions on the subject of whether the ruling made by the neutral at the end of the facilitated negotiation second stage of the resolution process should be termed a "recommendation," "decision," "ruling" or some other yet to be discovered term. Proponents of the "recommendation" term are concerned that the neutral's ruling does not have res judicata effect and therefore are not comfortable with using the term "decision." Proponents of the term "decision" are concerned that the term "recommendation" could be interpreted to mean that the ruling has no legal effect. These concerns can be addressed by clarifying the definition of whatever term is used in the definition section of the Preliminary Rules by specifying that the "[term] does not have res judicata effect, but is enforceable by use of applicable private enforcement procedures."

- 1) Using a de facto purchase price “Money Back Guarantee” definition of low value to limit the amount of each permitted claim;¹⁰⁵
- 2) Limiting the Types of Permitted Claims to “item not received” and “item not as described”;¹⁰⁶
- 3) Making Available to Buyers’ On-Demand Access to Automated Trustmark Evaluation/Feedback Information Needed to Identify Reliable Sellers;¹⁰⁷ and
- 4) Providing For Private Enforcement of Settled Claims and Rulings of Neutrals through facilitation of voluntary compliance, termination of trustmark status, and using charge backs on credit card payments and access to escrow funds to satisfy claims and rulings of neutrals in the absence of voluntary compliance.¹⁰⁸

¹⁰⁵ See discussion at *supra* note 10.

¹⁰⁶ See discussion at *supra* note 15.

¹⁰⁷ See discussion at *supra* note 43, 41 (read in stated order).

¹⁰⁸ See text at note 103, *supra*.