

**The Challenges of Pseudo-Legal Dispute Resolution in E-commerce:  
Assessing the Implications of the Online Challenge to Traditional Means  
of Dispute Resolution in Commercial Transactions**

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**Abstract**

This review assesses the challenges and implications of the emergence of ‘pseudo-legal’ methods of dispute resolution in the realm of ecommerce, alongside the relative absence of offline, legal means of adjudication in the same area. Firstly, it identifies the key defining characteristics of online transactions – that they are ‘ephemeral’ in nature, have fewer ties to jurisdictional borders, are made at lower cost with greater speed than their offline counterparts. Each of these contributes to the impotence of offline, legal methods of dispute resolution online. The emergence of pseudo-legal online platforms for ad hoc mechanisms for dispute resolution have ensured confidence in ecommerce in their absence.

However the role of profit making actors in rule setting, adjudication and enacting rules in online trade is one that deserves greater scrutiny. The beneficiaries of this have been the largest platforms with recognisable and trusted branding (e.g. eBay, Amazon) creating ‘walled gardens’, which enforce their rules through user exclusion or the threat of exclusion. This fact risks stifling innovative vendors who operate outside of these ‘protected’ spaces.

**1. Introduction**

The embedding of online communications in everyday life has had a transformative effect not just on media, culture and society, but economic behaviour as well. With global ecommerce, loosely defined as the buying and selling of goods and services online, topping 1.2 trillion USD in 2013<sup>1</sup>, it seems particularly timely to consider the impact of this shift on legal dispute resolution in commercial transactions.

To do this, this piece will first outline out why much of the literature has described the Internet as a ‘challenge’ to the legal means of dispute resolution derived from statutory rights,

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<sup>1</sup> eMarketer, *B2C Ecommerce Climbs Worldwide, as Emerging Markets Drive Sales Higher*, (2014), <http://www.emarketer.com/Article/B2C-Ecommerce-Climbs-Worldwide-Emerging-Markets-Drive-Sales-Higher/1010004> (last accessed 29 May 2015).

by assessing the defining characteristics of commercial activity online. First that these transactions are more ‘ephemeral’, second that they are more likely to be transnational and subject to confusion around legal jurisdiction, third that the lower cost of transactions makes expensive legal means of dispute resolution less relevant and fourth that the law might struggle to keep pace with the speed of transactions online.

The piece will then discuss why ecommerce functions so effectively despite the apparent impotence of these offline, legal methods of dispute resolution – critically assessing the policies, platforms and ad hoc mechanisms of dispute resolution that ensure confidence in ecommerce. It then puts forward the argument that while the monetary benefits of online commercial trade have incentivised the creation of such mechanisms, the role of profit making actors in rule setting, adjudication and enacting rules in online trade is one that deserves greater scrutiny.

The beneficiaries of this have been the largest platforms with recognisable and trusted branding (e.g. eBay, Amazon) creating ‘walled gardens’, which enforce their rules through user exclusion or the threat of exclusion. This fact risks stifling innovative vendors who operate outside of these ‘protected’ spaces. If there is one benefit of this though, it is that online adjudication in transactions can resolve disputes at their earliest stages and at lower cost. While statutory legal protections will always underpin their success, if offline legal proceedings are being made increasingly redundant in disputes, there seems to be little evidence this is to the immediate detriment of consumers.

## **2. Defining Ecommerce and its Challenge to ‘Statutory Rights’**

Over the past two decades the practice of buying and selling online has transformed from utopian fantasy to an often mundane reality. This point is now true not only for the delivery of electronic media, such as software, eBooks or streamed videos, but in retail sales of physical items as well. Amazon.com, founded in 1994 now has a turnover of nearly 75 billion USD, while the promise of lower cost overheads and better targeted product promotion has seen even perishable goods, such as groceries, shift towards online ordering<sup>2</sup>. This obviously has a number of profound implications for commercial ventures and their business models. In journalism for example the print circulation of every major newspaper in

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<sup>2</sup> Sherah Kurnia and Ai-Wen Jenny Chien, *The Acceptance of the Online Grocery Shopping* (paper presented at the 2003 16th Bled eCommerce Conference, Bled, Slovenia), [https://domino.fov.uni-mb.si/proceedings.nsf/0/f862f4273a6fb772c1256ea1002c906e/\\$FILE/17Kurnia.pdf](https://domino.fov.uni-mb.si/proceedings.nsf/0/f862f4273a6fb772c1256ea1002c906e/$FILE/17Kurnia.pdf) (last accessed 29 May 2015).

the UK is in decline year on year<sup>3</sup>, while the UK Government's Portas Review<sup>4</sup> warned of the implications of ecommerce for the 'High Street' and the local communities that surround it.

While Thornburg<sup>5</sup>, Rule<sup>6</sup> and Bakos<sup>7</sup> were among the first to discuss the implications of the Internet for dispute resolution methods, there has been relatively little literature on the subject. As such, this piece will focus on the implications of ecommerce for offline, legal dispute methods, focussing on statutory consumer rights.

The UK Sale of Goods Act (1979) offers a useful working definition here – that if a product sold is not of a “satisfactory quality”, “as described”, “fit for purpose” or does not last “a reasonable length of time” a consumer has the right to a refund for that transaction enshrined in statute law – rules which are underpinned by the coercive power of the state<sup>8</sup>. How far then are these offline, statutory legal protections for consumers relevant online, and if they are not, to what extent should this should be a concern?

Superficially, there is no reason why the Internet should have a transformative impact in this area. Disputes in commercial transactions still exist in online transactions – indeed without the opportunity to see an item being purchased in person this might make disputes and the need for statutory protections greater. First we need to outline why these formal dispute resolution methods which call upon statute law have been challenged, by considering four distinctive features of ecommerce – the ephemeral nature of transactions, the transnational dynamics of transactions, as well as their cost, and speed – identifying the significance of each for the role of the law in regulating commercial transactions online.

### 3. Ecommerce and Ephemeral Transactions

The first challenge to dispute resolution and statutory rights is that commercial transactions online are in theory more 'ephemeral' than those offline. There is less likely to be an ongoing number of transactions between buyer and seller, and as such each party has a reduced interest in arriving at mutual agreement to secure future business, when a transaction does goes array. Calkins, Nikitkov and Richardson<sup>9</sup> outline this as a problem, noting

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<sup>3</sup> THE GUARDIAN, *Audit Bureau of Circulation: National daily newspaper circulation* (2013), <http://www.theguardian.com/media/table/2013/jul/15/abcs-national-newspapers> (last accessed 29 May 2015)

<sup>4</sup> M. Portas, 'The Portas Review: An independent review into the future of our high streets' [2011], Department for Business, Innovation and Skills.

<sup>5</sup> Elizabeth G. Thornburg, *Going private: Technology, due process, and Internet dispute resolution*, 34 U.C. DAVIS L. REV. 151 (Fall 2000)

<sup>6</sup> C. Rule, 'Online dispute resolution for business' [2002] B2B, E-Commerce, Consumer, Employment.

<sup>7</sup> Y. Bakos, *The emerging role of electronic marketplaces on the Internet* 41(8) COMMUNICATIONS OF THE ACM 35-42 (1998).

<sup>8</sup> P.S. ATIYAH, *SALE OF GOODS* (Pearson Education, 2005)

<sup>9</sup> M. Calkins, A. Nikitkov, and V. Richardson, *Mineshafts on Treasure Island: A Relief Map of the eBay Fraud Landscape* PITT. J. TECH. L. & POL'Y, 8, 1 (2008).

especially how eBay, a platform which allows sellers to offer an item as a one-off, superficially at least represents the ideal platform for the sale of fraudulent goods.

This is problematic, as it deprives the transaction of the leverage that mutual interest from an ongoing relationship between the two parties provides.<sup>10</sup> In theory at least, it should be in the interest of a vendor to satisfy the customer to gain repeat business, through customer loyalty or word of mouth, while for buyers there might be the opportunity to purchase from them again if an item is particularly satisfying. We should note here that many offline relationships between buyer and seller can be described as ephemeral as well. For example a shop on a street with high footfall might rely largely on passing trade, while a consumer might also be visiting a particular venue for a particular item, with no intention of buying again.

While this is true, there are a number of distinguishing features of ecommerce that make this a problem greater. Without physical premises, online sellers might generously be described as footloose, with the potential to disappear with ease at a moment's notice. This does impact on trust, with a 2009 UK Office of Fair Trading Report suggesting that a third of Internet users never shop online, citing "trust" as their main concern – specifically that statutory rights which apply offline might not be enforceable online.<sup>11</sup> If ecommerce is to reach its full potential there needs to be trusted and *known* mechanisms for settlement. Even though these statutory rights apply online there seems to be less confidence in them, given the nature of online transactions.

When consumers shop offline, they can reasonably assume a vendor has an ongoing relationship with legal authorities in the territory in which they operate, and as such that their statutory rights will be enforceable if a transaction is disputed. Indeed one of the key justifications of the coercive power of the state in property rights is that this is a *de facto* means of underwriting all transactions, ensuring confidence so that markets might function effectively.<sup>12</sup> Online statutory law often takes a back seat to the policies and norms of a community in which a transaction is made. For example, a study by Gregg and Scott<sup>13</sup> calculated the fraud rate eBay transactions at a surprisingly low 0.211%, and credited the role of customer feedback mechanisms for creating an *ongoing* relationship with the whole eBay

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<sup>10</sup> O.E. Williamson, *Transaction-cost economics: the governance of contractual relations*, 22(2) JL & ECON. 233 (1979).

<sup>11</sup> Office of Fair Trading, *Findings from consumer surveys on Internet Shopping: A comparison of pre and post study consumer research*, (2009).

<sup>12</sup> D. GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* (Oxford University Press, 2012)

<sup>13</sup> Dawn G. Gregg and Judy E. Scott, *The Role of Reputation Systems in Reducing Online Auction Fraud*, 10(3) INTERNATIONAL JOURNAL OF ELECTRONIC COMMERCE, 95-120 (2006).

community. From this we might argue eBay as an administrator, and the eBay community as a means of reputation assessment, has better secured confidence in transactions than formal, offline, legal recourse to statutory rights.

#### 4. Ecommerce and Territorial Jurisdiction

These points about the ephemeral nature of transactions allude to a strength of offline retail, that the vendor is geographically bounded, with physical premises and fixed overheads, giving potential customers a sense that their operations are well 'rooted' and subject to a specific legal jurisdiction.<sup>14</sup> With online transactions this is less likely to be the case, a point made by Hörnle.<sup>15</sup> Indeed this is one of the appeals of purchasing items online, that – setting aside shipping and packaging costs, with international money transfer consumers have the opportunity to buy goods and services not just from their own country but from others where costs of labour and manufacture might be cheaper. However this benefit comes with a number of risks for consumers buying online, across national borders. While a British citizen purchasing an item from a British vendor would clearly have statutory rights to goods of a "satisfactory quality", across borders this might be less certain.<sup>16</sup> What's more, given the likely cost of pursuing a legal case overseas set against the relatively small size of most transactions, there would seem to be no easy means of legal dispute resolution.

This demonstrates not only the impotency of statutory legal protections, but also the value of ad hoc solutions to solve the confidence gap the absence of the law leaves. For example when trading on a platform like eBay, where user reputation is perceived by the community as necessary to attract buyers,<sup>17</sup> consumers have a form of reputation currency that carries well across national borders, while they are tightly bounded by the terms of conditions of the site they sign up to. The site administrator therefore is a means of international redress, with coercive power derived from its ability to exclude individuals from the benefits of membership of the community. Where the law has failed, multinationals have happily delivered online platforms which fill the void in consumer confidence.

#### 5. Ecommerce and the Costs of Dispute Resolution

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<sup>14</sup> Albert.A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum*, 65(3) YALE LAW JOURNAL 289-314 (1956).

<sup>15</sup> J. HÖRNLE, *CROSS-BORDER INTERNET DISPUTE RESOLUTION* (Cambridge University Press, 2009).

<sup>16</sup> G.P. Calliess, 'Transnational consumer law: co-regulation of B2C-E-Commerce. Responsible Business' in OLAF DILLING, MARTIN HERBERG & GERD WINTER (EDS), *SELF-GOVERNANCE IN TRANSNATIONAL ECONOMIC TRANSACTIONS* 225-258 (Hart 2008).

<sup>17</sup> M.I. Melnik and J. Alm, *Does a seller's ecommerce reputation matter? Evidence from eBay auctions*, 50(3) THE JOURNAL OF INDUSTRIAL ECONOMICS 337-349 (2002).

This links to a third point relating to the costs of transactions, contrasted with the costs of pursuing legal means of redress. One of the strengths of ecommerce is that the cost of buying, and selling goods has been reduced.<sup>18</sup> Sellers no longer necessarily have the overheads of sales premises, or an expensive marketing campaign in print or broadcast media. For buyers they no longer need to leave their abode to buy an item, to travel or spend their time searching for particular items in person, when they have near unlimited choice online, even purchasing small quantities of a product directly from a bulk seller. Curiously this reduced cost of transactions is set alongside an increasing cost of legal activity and legal avenues of redress<sup>19</sup>. Legal price inflation has been substantial over past decades<sup>20</sup>. While in Britain the HM Courts and Tribunals Service offers a ‘small claims’ court service, allowing case to be assessed for as little as 35 GBP if the claim is for less than 300 GBP<sup>21</sup> the costs are still prohibitive for smaller transactions while there is insufficient evidence to show that consumers are aware of this service or their rights more generally.<sup>22</sup>

It is interesting to note how alternative means of dispute resolution have emerged in the absence of statutory rights and resolution methods. Amazon for example has developed policies to minimise the costs of dispute – for example sending another item by default in a dispute over receipt or damage. This is because the cost of sending a second item is generally less than that of formally defending the case to its (expensive) conclusion in a legal setting. Similarly, it is also worth the expense to keep long term customer loyalty, with the pricing in of fraudulent claims a necessary evil. For ‘serial’ returners, Amazon might reserve the right to exclude them from future purchase, as has been the case for Amazon.de sales of eBooks for its Kindle eReaders since 2013<sup>23</sup>. This is a non-legal means of dispute resolution and consumer rights protection but it is, nonetheless, a form of resolution to the satisfaction of

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<sup>18</sup> L. M. Minga, Y. Q. Feng, and Y. J. Li, *Dynamic pricing: ecommerce-oriented price setting algorithm* (Proceedings of the Second International Conference on Machine Learning and Cybernetics, Wan, 2-5 November 2003), <http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=1259606> (last accessed 29 May 2015)

<sup>19</sup> S. Domberger and A. Sherr, *The impact of competition on pricing and quality of legal services* 9(1) INTERNATIONAL REVIEW OF LAW AND ECONOMICS 41-56 (1989).

<sup>20</sup> T.E. Clark, *Disaggregate evidence on the persistence of consumer price inflation* 21(5) JOURNAL OF APPLIED ECONOMETRICS 563-587 (2006).

<sup>21</sup> HM Courts and Tribunals Service. *Make a court claim for money, Court fees*, (2014), <https://www.gov.uk/make-court-claim-for-money/court-fees> (last accessed 29 May 2015)

<sup>22</sup> Department for Business, Innovation and Skills. ‘*Consumer rights and issues*’, (2014) <https://www.gov.uk/government/topics/consumer-rights-and-issues> (last accessed 29 May 2015)

<sup>23</sup> Sievers, A-C, *Fear for the return: Amazon blocks customer accounts*, (FRANKFURTER ALLGEMEINE ZEITUNG, 2013), <<http://www.faz.net/aktuell/finanzen/meine-finanzen/geld-ausgeben/nachrichten/amazon-sperrt-kunden-konten-angst-um-die-retoure-12315430.html>> (last accessed 29 May 2015)

consumers. The policies of a platform and its administrators again seem to resemble ad hoc legal structures in online transactions, in their ‘formal’ absence.

## 6. Ecommerce and Transaction Speed

This leads to a final distinguishing feature, that the speed of transactions online is far greater than those offline. To give one example the delivery of digital media and software, especially with the transition to broadband Internet are often delivered instantly. While the delivery of physical goods might take time and be dependent on logistics services available, the actual process of purchase and payment is immediate – for example with Amazon’s patented ‘one-click’ purchasing<sup>24</sup>. To this extent ‘on demand’ has been a defining feature of ecommerce, contrasting starkly with the legal process of settling disputes, for example settling financial losses incurred by a late delivery. Even ‘small claims’ court rulings take 14-28 days to process, while enforcement may take several weeks more. While we have discussed some of the ad hoc means of dealing with disputes, these are economic as opposed to legal ones. Their emergence derives from the fact that they are on balance cheaper, faster and better placed to cross borders than any construction of legal means of dispute resolution<sup>25</sup>. This fact, that the statutory law and consumer protection in the formal sense is a near irrelevance online is a substantive challenge to it.

## 7. The Irrelevance of Statute Law in Ecommerce

From this we could arrive at a conclusion that ecommerce is a mere shadow of its offline counterpart in many important respects, that many of its core strengths also leave consumers and vendors alike with reduced ability to call upon statutory rights and legal redress when disputes arise. Indeed the notion that online transactions are less safe because of this clearly impacts on buyer and seller confidence, something which is no doubt factored into their pricing<sup>26</sup>.

From this we might argue that there needs to be reform to the practice of the law online, to make legal means of dispute resolution more accessible even for the smallest, most expendable transactions. While Amazon and others might have developed effective policy responses, for example sending additional goods, this is clearly not satisfactory as the greatest beneficiaries are those who abuse these policies; the greatest losers are those who have to pay

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<sup>24</sup> K. Mellahi and M. Johnson, *Does it pay to be a first mover in e. commerce? The case of Amazon.com* 38(7) MANAGEMENT DECISION 445-452 (2000)

<sup>25</sup> Thornburg, *supra* note 5.

<sup>26</sup> P. Chawdhry, M. Masera, and M. Wilkens, *Strategies for trust and confidence in B2C e-commerce* 45(1) COMMUNICATIONS & STRATEGIES 81-110 (2002)

a higher price to factor this abuse in. This is clearly not a desirable state of affairs. New statutory rights or at least new means of enforcing existing rights might help protect consumers and vendors from abuse. What's more these methods, of returns policies especially, are not dispute *resolution*— they are instead a means of obscuring disputes when they occur – a policy that focuses not on the specifics of a transaction but the wider risks of a dispute to confidence in their brand. It is then a policy constructed to maximise vendor profit, not to protect consumer interest. This leads to the argument that we should look back to legalistic mechanisms to solve disputes, with a process focussed on the particularities of a case.

### 8. Alternative 'Pseudo-Legal' Mechanisms of Consumer Protection

At this point we should consider some of the alternative mechanisms ecommerce has found to secure confidence in trade beyond the threat of community exclusion or policies of default compensation - alternatives which have a more robust, legalistic, procedural system for dealing with complaints. A good example of this discussed in the literature by Abernethy<sup>27</sup> and others since is SquareTrade, an online ecommerce dispute resolution platform which has particular notoriety for its endorsement by eBay. The site describes it as an “unbiased method that can help you resolve disputes that may arise involving eBay transactions”. This offers users a free, web based, structured platform for dialogue between two parties, as well as a professional human mediator at a fixed fee of 15 USD – both of which boast 80% or above satisfaction rates, regardless of the outcome for a particular individual.<sup>28</sup>

It might better be described then as a process of automated *mediation* as opposed to legal arbitration. The curiosity of its success is that such processes from start to finish have no statutory legal basis or underpinning.<sup>29</sup> Participants have no formal obligation to follow a mediator's advice, and SquareTrade has no effective power of coercion over its participants, an important element in giving people mutual confidence in the Rule of Law<sup>30</sup>. If one party believes the other is compelled to adhere to adjudication then they can have confidence the process is worth going through. Yet this process functions because it is in both parties mutual interest in time and cost terms to do so. While the speed, costs and distribution of these new

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<sup>27</sup> S. Abernethy, 'Building large-scale online dispute resolution & trustmark systems' [2003]. UNECE Forum on ODR.

<sup>28</sup> Abernethy, *supra* note 27.

<sup>29</sup> E. Katsh, J. Rifkin, A. Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: in the shadow of eBay law*, 15(3) OHIO ST. J. ON DISP. RESOL. 705 (2000)

<sup>30</sup> HART, H. L. A. THE CONCEPT OF LAW (Oxford University Press, 2012)



ecommerce transactions leads to statutory protections being less relevant – it is interesting how these alternative means of resolution have sprung up in their place. It also leads to another point, that we don't necessarily need formal legal means, backed by statute, to arrive at a resolution method with the benefits of formal legal process. If its participants are equally satisfied, and the process is performed swiftly and at a lower cost, it surely facilitates confidence in trade every bit as well. It begs the question: is the de facto absence of statutory backed rights and legal structures alluded to in the question necessarily a bad thing?

## 9. Differentiating Between 'Pseudo-Legal Mechanisms' and Statutory Ones

On this point we can consider the defining features of the statutory legal process of dispute resolution from SquareTrade and other informal methods. The first point we need to make is that just because a process is cheap, and in an individual transaction mutually beneficial, this does not mean it is proper, appropriate or in collective interest. Superficially the process of online dispute mediation has all the hallmarks of a formal, legal one, and as such it's most desirable characteristics. It is rooted in a dichotomy between claimant and defendant, much like the traditional legal process in which each party has the opportunity to offer a representation of its case and presentation of evidence. They are then providing adjudication and enforcement in disputes but without the high costs of offline legal mechanisms. One issue here though is that mediation and judgement in the legal process needs to be, or at the very least needs to be seen to be, neutral.

In most Western liberal democracies this is done through the use of state paid, neutral, qualified individuals such as judges, or panels of our peers, with each party being represented by a professional, legally trained representative. This is expensive and highly elaborate, but also reassures both parties of a fair process, aiding confidence in legal dispute resolution when statutory rights have been violated. Admittedly legal process is not always fair - there are numerous cases of the law dealing painful injustice, wrongly depriving individuals or their liberty either by accident (misunderstood evidence, wrongful convictions) or by design (judicial corruption)<sup>31</sup> but at least the process for this is 'fair' in its architecture. Each side has its opportunity to present a case, and generally speaking in Western liberal democracies the judiciary is now held in higher public confidence than many other public institutions – politicians especially<sup>32</sup>. Indeed one could make an argument that even while the SquareTrade

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<sup>31</sup> J. T. Noonan Jr, *Judicial Impartiality and the Judiciary Act of 1789*, 14 NOVA L. REV. 14, 123 (1989-1990).

<sup>32</sup> F.T. Morton, *Can Judicial Supremacy Be Stopped?*, POLICY OPTIONS (October 2003), <http://policyoptions.irpp.org/issues/who-decides-the-courts-or-parliament/can-judicial-supremacy-be-stopped/> (last accessed 29 May 2015)

apparently undermines the role of formal legal redress, its success is underpinned by consumers' confidence in a wider legal framework. Whatever the inadequacies of SquareTrade in terms of enforcement and coercion from a complainant perspective, knowing that their statutory rights are still there if the process fails must surely be reassuring.

## 10. The Profit Motive and Adjudication

However this is focussing on the narrow, short term, efficacy of these alternatives in dispute resolution – there are also ethical and other considerations that need to be made here. While it is perfectly possible to argue SquareTrade delivers an effective service for its users, they are also *customers* – and the profit motive is an important and potentially distorting dynamic in this process. The difficulty here is that SquareTrade is a profit making organisation, a private company, and by definition has its interest in resolving a dispute, but only in so far as they make money from that resolution, either paid by results or paid on a number of cases dealt with by commission. This creates a perverse incentive, in which cases might be dealt with in an unsatisfactory but timely manner for example. Admittedly, this is often the case in offline legal dispute resolution as well. Legal professionals are paid by public or private funds on any number of terms and conditions that incentivise certain behaviours (Levinson 1986). Payment by the hour has attracted a great deal of criticism in academic literature on the law and many do perceive a 'two-tiered' justice system, based on the price and cost of one's legal team<sup>33</sup>.

Regardless of the realities of this, this perception is certainly real, and to that extent the criticism made of SquareTrade here can be applied to the wider law as well. Indeed outright corruption in the judiciary can be a highly lucrative act, and is common practice in many parts of the world – an accepted part of the legal process<sup>34</sup>. However at the same time the punishments for this are extremely severe and it is perceived as potentially costly for a judicial actor – we still on balance have confidence in our legal system<sup>35</sup>. The same cannot be said of SquareTrade – without a statutory, formal basis for its authority and the obligations that go with that, its agents are arguably more corruptible. It's its status as a private profit making company that should raise greatest concern. The direction towards privatisation of legal services is already noteworthy<sup>36</sup> – to have this enshrined in the architecture of

<sup>33</sup> L.A. Bebachuk and A. T. Guzman, *How Would You Like to Pay for That -The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53 (1996).

<sup>34</sup> P. Mauro, *Corruption and growth*, 110(3) THE QUARTERLY JOURNAL OF ECONOMICS 681-712 (1995)

<sup>35</sup> Morton, *supra* note 32.

<sup>36</sup> G. P. Calliess, *Reflexive transnational law: The privatisation of civil law and the civilisation of private law* [2002] ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 23, 185-216

ecommerce, as it becomes the norm in our day to day lives, is something not to be taken lightly.

### 11. Consumer Awareness of the Distinction

Yet there is a counter claim to make to this, that from the perspective of individuals this distinction between public and private, for profit and not-for-profit, statutory and informal, is not really meaningful or important in any way. What matters to them is functionality – and while most opinions polls show the public in principle has less confidence in ecommerce than other forms of transaction, in practice, it does function on a day to day basis. While this system would be morally reprehensible in some cases, for example rape, or murder – where most would agree advanced scrutiny and consideration is necessary for the benefit of both accuser and defendant, it is not only appropriate but arguably moral in these less ‘important’ cases to use such mechanisms. Whatever the flaws of the SquareTrade methodology of dispute resolution, its participants still get to have “their day in court”<sup>37</sup> so is it intrinsically improper that this is executed through non-legal means? It is on this point that the question prompting this argument hinges.

### 12. Protection Beyond the ‘Walled Gardens’

Yet there is an important point to note here, that while these services operate without absolute coercion, their power comes from the platforms they are integrated into – for example eBay or Etsy. The power of statutory law offline is backed by the coercive power of the threat of driving one of their liberty, to be expelled from civil society in the most profound and powerful of ways<sup>38</sup>. Online, vendors who violate rules and norms might be expelled from their platform – to have their eBay accounts disabled – which is a significant and coercive cost for a regular user for example one whose living depends upon selling online.

But what of outside vendors and buyers beyond the ‘walled gardens’ as described by Smith<sup>39</sup>. For these, SquareTrade might *not* be a platform they can mutually agree upon using. A fraudulent vendor outside of these platforms is unlikely to leave a mechanism for negative feedback or consumer criticism visible to third parties or potential customers. It is in these cases where we see the need for the statutory protections and the legal means of redress attached to them. It is an alarming trend that a handful of platforms, eBay and Amazon

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<sup>37</sup> R. G. Bone, *Rethinking “the Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U.L. REV. 193 (May 1992)

<sup>38</sup> H. L. A., *THE CONCEPT OF LAW* (Oxford University Press, 2012)

<sup>39</sup> Smith, A. ‘Web 2.0 and Official Statistics: The UK Perspective’ [2009] International Statistical Institute.

especially, have been allowed to be defined by the security they offer, a security which should be afforded to all consumers through the enforcement of their statutory rights. This state of affairs has served to protect their position as market leaders – and arguably stifles innovation in the still developing ecommerce sector.

### 13. The Challenge of Defining ‘Success’ in Dispute Resolution

From this we can conclude that the success of non-legal means of dispute resolution in commercial transactions online demonstrates the inadequacies of our offline legal structure, but not the process, nor its statutory basis, nor the nature of the coercive power that underpins it. Indeed formal statutory rights underpin much of the success of these resolution platforms, providing a notional call of last resort if they fail to resolve a dispute to the satisfaction of both parties. The argument we need to make here then is that the legal process, and a dispute being settled in the courts, should not be seen as a sign of *success*. Indeed it might even be seen as a sign of failure of other means of dispute resolution.

We increasingly live in a litigious culture in Europe and the United States, where the law is the first recourse, not the last<sup>40</sup>. The sole beneficiaries of this are an exclusive legal profession and the powerful political lobby that supports their work<sup>41</sup>. The irrelevance of statute law online is real, and should be a cause for concern – but it is also a sign that we have found other, more effective means of resolving disputes. If these do undercut legal methods in their speed and cost then this might be in the *long term* interest of the law, as pressure from competition brings prices down and makes formal legal redress more readily available. While the undercutting of the legal profession in relation to cost has provided eBay, Amazon and others with the perfect conditions (the perception of insecurity) for them to create ‘walled gardens’ which undermine competition in ecommerce, it may yet reinvigorate competition in the legal profession.

### 14. Conclusion

There are more similarities between the risks of online and offline transactions than many give credit for, both in terms of costs and benefits. That being said there are some distinguishing features between the two – the speed, cost and transnational dynamics of ecommerce online especially. Each of these has challenged the position of costly, slow, and territory based dispute resolution mechanisms which enforce consumer statutory rights, to the

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<sup>40</sup> J. Evetts, *Trust and Professionalism: Challenges and Occupational Changes*, 54(4) CURRENT SOCIOLOGY 515-531 (2006)

<sup>41</sup> D. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (Oxford University Press 2003)

point they are now more or less redundant online. With the attractions of ecommerce for consumers and vendors alike so great, the private sector has found alternatives to make adjudication work, either in compensation policies or through resolution platforms backed by the coercive power of community exclusion. This is problematic, as the position of these private services as de facto law makers and judiciaries not only is a shadow of the impartiality of the legal mechanisms, but also protects the position of a handful of ‘walled gardens’ in the market place – against the interest of consumers.

Legal practice can and should be reinvigorated in order to break this stranglehold and reinforce statutory rights online – in order that consumers might have the confidence to trade not just on recognised platforms but with any website. Importantly, while these alternative means of legal resolution protect walled gardens, they also compete *against* legal mechanisms. We have arrived at a more or less functioning, pseudo-legal system to protect ecommerce online, which may yet compel offline law to reform to be made relevant in the context of ecommerce especially.