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eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers

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Ebay’s De Facto Low Value High Volume Resolution Process:
Lessons and Best Practices for ODR Systems Designers

By
Louis F. Del Duca, Colin Rule, and Kathryn Rimpfel*

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I. THE EVOLUTION OF EBAY’S DE FACTO, “LOW VALUE – HIGH VOLUME” FAST TRACK ODR SYSTEM

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 (B2B) 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

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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

The 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.² 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.³ More than \$45 billion in merchandise is sold on eBay each year, and eBay has more than 90 million active buyers and sellers, in 16 languages and 36 countries around the globe as well as Hong Kong.⁴

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"⁵ disputes (where the seller is the complainant).⁶ eBay has also added resolution platforms dedicated specifically to several categories of purchases, including the Vehicle Purchase Protection (hereinafter VPP) and Business Equipment Purchase Protection (hereinafter BEPP) programs, each with specific minimum and maximum price limitations.⁷ These developments have enhanced eBay's initial programs focused on low value, high volume,

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

² See *Corporate Fact Sheet: Q4 2010*, EBAY INC. (2010), http://www.ebayinc.com/content/fact_sheet/ebay_inc___corporate_fact_sheet_q4_2010_ (last visited June 21, 2014).

³ See *id.*

⁴ See *id.* (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, Vietnam); see also *id.* (for statistics on number of sales and users).

⁵ 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 item. The seller is therefore unpaid only in the auction sale cases where a buyer who is the successful bidder does not forward the 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. This is also discussed *infra* at Section II(B).

⁶ *eBay Money Back Guarantee*, EBAY (APRIL 3, 2014), <http://pages.ebay.com/help/policies/money-back-guarantee.html> [hereinafter "eBay Money Back Guarantee Policy"].

⁷ *eBay Vehicle Purchase Protection*, EBAY (April 3, 2014), <http://pages.motors.ebay.com/buy/purchase-protection/index.html> [hereinafter "VPP Policy"]; *eBay Business Equipment Purchase Protection*, EBAY (April 3, 2014) <http://pages.ebay.com/help/buy/business-protection.html> [hereinafter "BEPP Policy"]. Both documents are included in the appendix.

B2C transactions, with more in-depth specialized claims processes relating to higher dollar value purchases.⁸

The eBay ODR system, from the outset, has had a de facto low value framework because it was packaged as a kind of money-back guarantee — *recovery is limited to the purchase price for the buyer, and full reimbursement for the seller*. 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 \$50,000.⁹ Only disputes involving vehicles or equipment which fall within the minimum and maximum requirements are eligible to be handled by these special ODR processes.

For example, take 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 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 the 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 discuss *infra* the differences in procedural details of resolving disputes of different types of products covered by the basic, equipment and vehicle protection programs.

II. BASIC EBAY DISPUTE RESOLUTION SYSTEM¹⁰

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 the buyer to diagnose the

⁸ See VPP Policy, *supra* note 7; BEPP Policy, *supra* note 7.

⁹ See VPP Policy, *supra* note 7; BEPP Policy, *supra* note 7.

¹⁰ 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, on a page previously cited as the “eBay Money Back Guarantee Policy,” *supra* note 6. This section is citing to that source of authority unless indicated otherwise.

specifics of their complaint, and to suggest a preferred resolution. eBay then encourages the buyers and sellers to communicate 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. Once at this stage, the Resolution Services team evaluates the buyer's claims and makes a decision about who is right and who is wrong.

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. 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 being opened no later than 30 days after actual or latest estimated delivery date; (2) the purchase was made with the "Pay Now" option or an eBay invoice; (3) the buyer used one of the five designated payment methods¹¹; and (4) the item was 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 as half.com.¹² 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 through a series of questions that both set different claims on different tracks and 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, 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:

¹¹ 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 (April 29, 2014) <https://www.skrill.com/en-us/about-us/>; "Company History" PROPAY (April 29, 2014) <http://www.propay.com/propay-company/company-history/>; "About PayPal" PAYPAL (April 29, 2014) <https://www.paypal-media.com/about>. 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 (April 29, 2014) <https://www.billmelater.com/about/index.xhtml>. 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.

¹² 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.

- “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
- 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”¹³

Buyers have 30 days from the actual or estimated delivery date to make direct contact with the seller through the eBay platform. If this direct contact does not resolve the problem within three business days of buyer’s initial communication to the seller, the buyer can choose to escalate the case to eBay. If the buyer escalates the case to the Resolution Center, eBay will review the case and contact the buyer within 48 hours with a determination of whether the case qualifies for a refund of the full purchase price plus original shipping.

B. Sellers’ Claims – “Unpaid Item” Fee

Sellers’ claims are handled somewhat differently than buyers’ claims. Like the buyer resolution process, new disputes are reported through the Resolution Center. But per-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.

¹³ 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 Law*, 1 PENN ST. J. L. & INT’L AFFAIRS 59, 65 (2012).

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: a) pay for the auction bid, b) prove the auction bid is already paid for, or, c) 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 Item Strike.”¹⁴ 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.

¹⁴ 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 13, at 64-65 (citing *how do I leave Feedback?*, EBAY, INC. (June 20, 2011), <http://pages.ebay.com/help/feedback/questions/leave.html> (last visited April 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.”

III. PURCHASE PROTECTION SYSTEMS FOR SPECIFIC TYPES OF GOODS – MAXIMUM AND MINIMUM PURCHASE PRICE LIMITS ON THE AMOUNT IN CONTROVERSY

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 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:

A. eBay’s Vehicle Purchase Protection (VPP) and Business Equipment Purchase Protection (BEPP) Programs

	Vehicle Purchase Protection ¹⁵	Business Equipment Purchase Protection ¹⁶
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"> ○ 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. 	<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 can't legally own because: <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

¹⁵ The information in this column was quoted from the VPP Policy, *supra* note 7.

¹⁶ The information in this column was quoted from the BEPP Policy, *supra* note 7.

	<ul style="list-style-type: none"> ○ 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 time of the end of the listing. (This protection is not available for vehicles listed in the Dune Buggies, Race Cars or Trailers categories.) ○ 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 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 	<p>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.</p> <ul style="list-style-type: none"> ● 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.
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	that are subject to a recall for this type of damage are not eligible for VPP.	
Situations Not Covered	<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. 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>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 	<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 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 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

	<p>the listing as anything but "clear".</p> <ul style="list-style-type: none"> • 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-model, trim packages, special editions, or options if you have received the year, make, and model described in the listing. • 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...) and/or on another website rather than through the eBay website. 	
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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 which 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/\$1,000 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 which was sold for \$150,000 would not be handled by eBay because it 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.

IV. USING LIMITATIONS ON TYPES OF CLAIMS, LISTS OF CLAIMS AND LOW VALUE FRAMEWORKS TO SUPPORT ODR SYSTEMS RESPONSIVE TO PRIVATE AND PUBLIC NEEDS

A. eBay Explicit Limitation of Types of Claims and List of Specific Claims – Consequential Damages Excluded by “Money Back Guarantee”

eBay’s explicit limitation of types of claims has been addressed, *supra*. The “Money Back Guarantee” purchase price limited remedy with its built-in exclusion of consequential damages produces a *de facto* low value framework in all three eBay dispute resolution programs. This approach facilitates fast track, fair, 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 currently being considered by the UNCITRAL ODR Working Group III.¹⁷

¹⁷ 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 (B-to-C) contracts, and the substantive law of jurisdictions in which pre-dispute arbitration agreements in business to consumer (B-to-C) contracts are invalid and not binding.

Under the two-track system, Track I provides 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.

The proposed Track II involves comparable negotiation and facilitated negotiation phases, but does not require arbitration in the event the dispute is not resolved in the negotiation or facilitated negotiation phases. Online Dispute Resolution For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.127 at p. 2 (Jan. 17, 2014).

The equivalent of this “Money Back Guarantee” is achieved in eBay’s VPP program by its explicit exclusion of claims relating to “ancillary losses” such as “punitive claims, lost profits, loss of work, travel expenses, or restocking costs.”¹⁸ 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.”¹⁹

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. UNCITRAL Explicit Limitation of Types of Claims and Pending List of Specific Claims – Consequential Damages Not Explicitly Excluded

The current UNCITRAL draft. Rule explicitly limiting types of permissible claims provides that:

These rules shall *only* 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
- (b) that full payment was not received for goods or services provided.²⁰

This language in Article 1(2) incorporates 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. While this is not the forum to discuss in detail the similarities and differences between the eBay and proposed UNCITRAL types of claims covered, we note in passing that the UNCITRAL system in addition to permitting the sale of goods types of claims permitted by eBay, also would permit claims pertaining to rendition of services.²¹ Service related disputes are much more complicated to resolve, because a) a

¹⁸ VPP Policy, *supra* note 7. See VPP document, in appendix.

¹⁹ BEPP Policy, *supra* note 7. See BEPP document, in appendix.

²⁰ Online Dispute Resoluition For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.127 (Jan. 17, 2014) (emphasis added). eBay’s specific “seller unpaid” and “unpaid item fee” remedy is not incorporated into the UNCITRAL draft. See discussion of eBay “unpaid item”, *supra* Section II(B). At this stage of development UNCITRAL has not incorporated an auction type of transaction into its program.

²¹ *Id.* at Article 1 indent 2

return of the goods in question is not an option, and b) the evaluation of item condition or service quality is often opinion based and difficult to evaluate.

Unlike the eBay program, which at the outset clearly limits recovery to the Money Back Guarantee for buyers or payment of price for sellers, the UNCITRAL rules do not explicitly set forth this limited remedy. This may lead to downstream confusion and concern about how much liability a buyer or seller is taking on by participating in the UNCITRAL ODR process. UNCITRAL may wish to explicitly incorporate appropriate language into the Rules or elsewhere, perhaps in the “documents” provided for in the Preamble to the Rules, to clearly limit recovery to the Money Back Guarantee full payment.²²

The detailed list of specific claims of ‘item not received’ or ‘items received but not as described by seller’ comparable to the detailed eBay lists discussed *supra* has yet to be developed and incorporated into the Rules or elsewhere, (perhaps in the document on Substantive Legal Principles²³) envisaged by the text of the Preamble.

The Preamble to the Rules currently 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;]

²² 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 the Mexican Consumer Protection Code provides:

Article 92. – 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.

art. 92, available at http://www.profeco.gob.mx/juridico/pdf/1lfpc_06062006_ingles.pdf. (last visited 8 May 2014).

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.

http://concilianet.profeco.gob.mx/concilianet/faces/que_es.jsp (translated using Google Translate on Sept. 19, 2011).

²³ See *infra* Preamble, indent 2(c).

[(d) Cross-border enforcement mechanism;]
[...];²⁴

The UNCITRAL draft is still a work in progress. These four documents envisaged by the Preamble have not yet been drafted by the Working Group.

The Preamble contemplates production of four “documents.”²⁵ Documents one and two would provide “guidelines and minimum requirements” for (a) dispute resolution providers/platforms/administrators²⁶ and (b) neutrals. Documents three and four would provide (c) substantive legal principles for resolving disputes and (d) cross-border enforcement mechanism (presumably private and public).²⁷ Whether these documents would be merely persuasive in implementing the Rules, or annexed as legally part of the Rules, has not yet been determined by the Working Group.²⁸

V. CONCLUSION: LESSONS AND BEST PRACTICES FROM THE EBAY EXPERIENCE FOR ODR SYSTEMS DESIGNERS

The momentum behind global ODR continues to increase. Consumer and business groups around the world are unanimous in promoting fair, proportionate,

²⁴ Online Dispute Resolution For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.127 at pp. 5-6 (Jan. 17, 2014).

²⁵ In earlier drafts, the “documents” were referred to as annexes. Online Dispute Resolution For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.128 at p. 2 (Jan. 22, 2014).

²⁶ 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.

²⁷ Online Dispute Resolution For Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.127 (Jan. 17, 2014).

²⁸ The Secretariat has recently indicated that it may be advisable not to annex guidelines to the Rules. The Secretariat has 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 notes that it may be advisable not to annex guideline to the Rules, as the legal nature and addressees of Rules and guidelines differ. Document A/CN.9/WG.111/WP.127, paragraph 28; Document A/CN.9?WG.111/WP.127/Add.1.

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. At the forefront is UNCITRAL's Working Group III, whose rules (when they are finally issued) will certainly serve as a foundational design document for other ODR systems designers around the world.

The UNCITRAL designers have been hamstrung by a variety of controversies over the past few years. These disagreements have slowed progress in reaching agreement. We believe that the eBay experience and systems design can help to find a path through some of these disagreements.

First, the UNCITRAL Rules can benefit from explicit value floors and ceilings, similar to the eBay design. Leaving the eligibility and payout amounts indeterminate will create downstream complexity and extend the timeframe for developing resolutions processes. Part of every resolutions process will entail negotiating case eligibility and determining the appropriate reimbursement amount, and whether it falls into the procedural maximum and minimum values. By following the eBay example and putting in specific value amounts as guidelines, the UNCITRAL ODR Rules can help to both set buyer and seller expectations and expedite the resolutions process.

Second, 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 they 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 assures its efficient operation as a low-value dispute resolution process. It allows eBay, in responding to market conditions, as it deems necessary, to design specific resolution processes and rules to exclude from the eBay system sales of goods involving a 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 the currency values occur from time to time, and also 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 extended 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).