



General Assembly

Distr.: General
24 May 2021

Original: English

**United Nations Commission on
International Trade Law**
Fifty-fourth session
Vienna, 29 June–16 July 2021

Revised draft legal taxonomy – new section on online platforms

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I. Introduction

1. Online platforms (also known as “digital platforms” or “electronic platforms”) are increasingly being used for trade. With the help of enhanced data processing and advanced algorithms, online platforms enable the supply of goods and services, connect global supply chain participants, and create online spaces for sharing and collaboration. Employing a range of systems and technologies, while also pursuing a range of business models, online platforms not only create new trading opportunities, but also new ways of trading. The potential of online platforms for trade is particularly acute so for micro, small and medium enterprises (MSMEs).

2. Together with data (see [A/CN.9/1064/Add.2](#)), online platforms are driving the expansion of the digital economy.¹ Electronic commerce (e-commerce) platforms play a significant role in that expansion. According to latest estimates, the value of global business-to-business (B2B) e-commerce was \$21 trillion, representing 83 per cent of all e-commerce.² While that figure covers not only sales through online platforms but also sales via electronic data interchange transactions, other reports suggest that online platforms account for a significant proportion of B2B e-commerce. Yet the value of online platforms to trade is not only measured in terms of the monetary value of the sales that they support; for instance, supply chain platforms represent value in terms of the efficiencies for users.

II. What is an online platform?

3. The Organization for Economic Co-operation and Development (OECD) defines the term “online platform” as “a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet”.³ Using the language of existing UNCITRAL texts on electronic commerce, a working definition of an online platform based on the OECD definition may be formulated in terms of a service that (a) is provided via the Internet or some other communications network by electronic means (i.e. an online service), and (b) facilitates interactions between persons who interact using the service:

(a) A description of online platforms is given in similar terms by UNCTAD in its *Digital Economy Report 2019*⁴ and in a joint publication of the International Telecommunications Union and World Bank on digital regulation;⁵

(b) A similar description has also been developed under the auspices of the Internet Governance Forum, where it has been observed that digital platforms share three main features: (i) they are technically mediated; (ii) they enable interactions between different types of users; and (iii) they allow those types of users to implement specific activities.

4. Using this working definition, services provided by online platforms may be distinguished from other online services, which are commonly referred to as “platforms”, but which do not involve interactions between multiple users of the service. Those other online services may include the direct offer and supply of goods

¹ UNCTAD, *Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries* (Geneva, 2019), p. xv.

² UNCTAD, “UNCTAD Estimates of Global e-Commerce 2018”, UNCTAD Technical Notes on ICT for Development, No. 15 (27 April 2020).

³ OECD, *An Introduction to Online Platforms and Their Role in the Digital Transformation* (Paris, 2019), p. 21.

⁴ UNCTAD, *Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries* (Geneva, 2019), p. xv (referring to “digital platforms” as providing “the mechanisms for bringing together a set of parties to interact online”).

⁵ ITU and World Bank, *Digital Regulation Handbook* (Geneva, 2020), p. 31 (referring to “digital platforms” acting “as a marketplace, bringing together and reducing transaction costs between distinct groups of customers”).

and services online (e.g., via the seller’s website), some cloud computing services (data transactions, which underpin cloud computing services, are addressed in [A/CN.9/1064/Add.2](#)), some digital content services, some online search engines and online content aggregators, and some predictive maintenance systems. Online platforms may also be distinguished from software environments and networked environments, which may also be referred to as “platforms,” but which do not involve the provision of an online service.

5. The working definition covers a wide variety of online platforms in terms of the number of users, and the type and economic value of transactions that they facilitate. Platforms with a particular significance for trade include:

(a) *E-commerce platforms* – online platforms that facilitate transactions involving the supply of goods and services. While commonly associated with “online marketplaces” used for the supply of goods to consumers, which dominate the platform economy in terms of economic value, e-commerce platforms facilitate the supply of a range of goods and services to businesses, including financial services (e.g. crowdfunding and trade finance platforms);

(b) *Dispute resolution platforms* – online platforms that facilitate the resolution of disputes between commercial parties by providing a system for the exchange of electronic records and communications between parties (including remote hearings);

(c) *Supply chain platforms* – online platforms that facilitate interactions between supply chain participants, including in the form of the transfer of dematerialized trade records (e.g. electronic transport records, certificates of origin, and bills of exchange). Legal issues relations to digital assets are addressed in [A/CN.9/1012/Add.3](#). Supply chain platforms also provide a space for users to share (or “pool”) supply chain data. Legal issues related to data aspects of data sharing platforms are addressed in [A/CN.9/1064/Add.2](#).⁶

6. Significantly, the working definition is formulated in technology and system neutral terms, and thus covers platforms employing a range of systems and technologies, including the use of interactive applications (e.g. to support communication between platform users), distributed ledger systems (e.g. to record transaction data), and the deployment of artificial intelligence (AI) and other automated systems (e.g. to optimize the user experience).

7. It also covers platforms that offer additional services to users by the platform operator or a third-party affiliate, whether provided on or off the platform:

(a) For *e-commerce platforms*, additional services may include advertising services, ranking and reputation systems, payment services, identity management (IdM) and other trust services, and logistics services. They may also include a system for handling complaints, as well as a system for handling disputes between users (in which case the platform would also be a dispute resolution platform);

(b) For *dispute resolution platforms*, additional services may include the deployment of AI and other automated systems with the aim of expediting the dispute resolution process. These systems may be deployed to generate possible terms of settlement (e.g., by analysing data of past disputes) or to enforce the outcome of the process (e.g. through the deployment of smart contracts). They may also be deployed to inform or determine the outcome of the dispute resolution process itself (e.g. AI decision-making);

(c) For *supply chain and dispute resolution platforms*, additional services may include registry services.

8. The provision of additional services may lead to the platform operators playing a more active and influential role in the interactions between users. In a similar vein,

⁶ The types of platforms are not mutually exclusive; for instance, a supply chain platform may facilitate the provision of trade finance and logistics services.

the working definition also covers online platforms where the platform operator itself uses the platform to interact with users. For instance, the operator of an e-commerce platform may offer goods and services to users in competition with other users.

9. Given the variety of online platforms, some jurisdictions have opted not to enshrine a definition in law when seeking to regulate online platforms.⁷ Several legislative initiatives dealing with e-commerce platforms have attempted to do so. For instance:

(a) An early jurisdiction to legislate a definition was France with the enactment of the Law No. 2015-990 of 6 August 2015. This law inserted article L111-5-1 into the Consumer Code, which imposed certain information requirements on persons operating an “intermediation service” consisting of putting several parties in contact by electronic means with a view to the supply, exchange or sharing of goods and services. Following the enactment of Law No. 2016-1321 of 7 October 2016 (the “Law for a Digital Republic”), the definition is now found in article L111-7(I)(2) of the Consumer Code;

(b) In China, the Electronic Commerce Law (2019) regulates “e-commerce platform operators”, which are defined to mean a person providing the services of “network operational space, transactional matchmaking, and information dissemination for the parties to carry out bilateral or multilateral transactions independently”;

(c) In the European Union, the Platform-to-Business (or P2B) Regulation⁸ regulates “online intermediation services”, which it defines as online services, provided on a contractual basis, which “allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded”;

(d) In India, the *Consumer Protection (E-Commerce) Rules, 2020*, made under the *Consumer Protection Act, 2019*, regulate “e-commerce entities” which own, operate or manage “platforms” for e-commerce. The term “platform” is defined to mean “an online interface in the form of any software including a website or a part thereof and applications including mobile application”. The rules regulate the use of platforms by e-commerce entities not only (i) to “facilitate transactions between buyers and sellers” (referred to as “marketplace e-commerce entities”), but also (ii) to sell goods and services directly to consumers (referred to as “inventory e-commerce entities”);

(e) In Japan, the Act on Improving Transparency and Fairness of Digital Platforms (Act No. 38 of 2020, also known as the “TFDPA”) defines “digital platforms” as online spaces for parties to connect, but adds a requirement that they utilize network effects to expand their users;

(f) In the Russian Federation, amendments to the Law on Consumer Rights Protection by Federal Law No. 250-FZ of 29 July 2018 introduced the concept of an online “aggregator”, which is defined as a computer program, website or web page that allows a consumer: (i) to obtain information about offers of goods and services from suppliers; (ii) to enter contracts with suppliers for the supply of goods and services; and (iii) to make advance payments for the goods or services to the owner of the aggregator.

10. In addition to those legislative efforts, the European Law Institute has developed Model Rules on Online Platforms that aim to “consolidate existing European and national legislation” and to “provide some innovative solutions for issues that could be addressed in forthcoming regulatory initiatives”.⁹

⁷ See, e.g., Australia, *Competition and Consumer Act 2010*, Part IVBA.

⁸ Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation).

⁹ Available at www.europeanlawinstitute.eu/projects-publications/completed-projects-old/online-platforms/.

11. While some of the definitions formulated in those legislative initiatives are broader than the working definition, they all contemplate the use of platforms as an online service that facilitates interactions (in the form of e-commerce transactions) between third parties directly via the platform (even if part of the transaction is carried out off the platform). This understanding may also be applied to other online platforms, such as supply chain platforms and dispute resolution platforms. At the same time, the definition of an online platform ultimately depends on the purpose of the specific legislation.

III. Actors

12. At a basic level, an online platform involves two types of actors:

(a) *Platform operator* – the person who provides the online service constituting the platform, including by deploying the software supporting the online space created by the platform; and

(b) *Platform user* – the person who uses the platform to interact.

13. Platforms establish a “community” of users that interact in a variety of capacities depending on the platform.

(a) For *e-commerce platforms*, the community of users will ordinarily comprise buyers and suppliers of goods or services, who may engage in those activities in the course of business (business users) and for personal, family or household purposes (i.e. as consumers);

(b) For *dispute resolution platforms*, the community of users will ordinarily comprise the parties to the dispute, an arbitrator or mediator, and other persons involved in the dispute resolution process (e.g. expert witnesses). As noted above (para. 5), the platform operator may also play an active role in the dispute resolution process through the deployment of additional AI-enabled services;

(c) For *supply chain platforms*, the community of users will ordinarily comprise participants in the supply chain, including producers, distributors, transporters, and conformity assessment bodies.

14. The platform operator will ordinarily be a legal person providing the online service in the course of business. An online platform may also be established or controlled by a public authority. As noted above (para. 8), the platform operator may also use the platform to interact as a platform user.

15. If the online platform offers additional services, the provider of those services – if not the platform operator itself – will be an additional actor. Third party providers of those services are not ordinarily users of the platform. Other actors include third parties with intellectual property in material that is made available on the platform, as well as manufacturers and producers of goods that are sold on the platform. For some online platforms, regulatory authorities may be relevant actors so far as they set rules for the platform and enforce compliance with those rules and other regulatory requirements.

IV. Legal regimes

A. Contract law

16. The various actors in an online platform are connected by a series of contractual relationships. A contract will ordinarily be concluded between the platform operator and each platform user, which incorporates the terms of use for the platform (i.e. the platform rules). The terms of the contract may vary on account of the capacity in which the user interacts through the platform, including any additional services that it uses. One or more contracts may also be concluded between users in the course of

their interaction via the platform. Depending on the platform, those contracts may include contracts for the sale of goods, contracts for the supply of services, or cooperation agreements.

17. It follows that contract law, including general principles such as good faith and fair dealing, as well as the terms of the contract agreed by the parties under the principle of freedom of contract, will be a primary source of the rights and obligations among the various actors involved in an online platform. The application of the principle of good faith to relations between platform operator and user was considered in a case in Japan concerning fraudulent transactions carried out on an online auction platform. In that case, the Nagoya District Court decided that the principle of good faith required that, in discharging its contract with users, the platform operator needed to build a system that was “without defect” for the sake of those users.¹⁰ In coming to that decision, the court considered a variety of factors, including the social circumstances surrounding online auctions at the time when the service was provided, technical standards of the system, the cost of structuring and maintaining the platform, and the effect of introducing the platform and the convenience for users.¹¹

18. A preliminary issue may arise in the form of isolating the contracts involved in the operation of an online platform. An example of that issue is provided by the case of *B2C2 Ltd. v. Quoine Pte. Ltd.* before the courts of Singapore, which involved trading contracts between users of QUOINExchange, a cryptocurrency exchange platform. The user in that case (B2C2) argued that the trading contracts were part of a “spider’s web” of contracts, with the operator (Quoine) as a central counterparty to both sides of the trade. Conversely, the operator argued that the trading contracts were formed directly between users. The Singapore International Commercial Court agreed with the latter argument.¹² In doing so, the court described what has become known as the “triangular” contractual structure of online platforms.

19. Further issues may arise by virtue of the various contracts being concluded online via the platform and therefore (a) by exchange of electronic communications (i.e., communications by means of data messages), (b) between parties at a distance, and (c) depending on the platform, without human intervention. While none of those issues is specific to online platforms, the prevalence of online platforms for electronic contracting in general, and automated contracting in particular, may give the issues special prominence.

(a) With respect to (a), electronic transactions laws have been enacted in most jurisdictions to recognize that a contract may be concluded by exchange of electronic communications, and that a legal requirement for the contract to be in writing may be met by electronic communications. In many of those jurisdictions, such laws are based on the UNCITRAL Model Law on Electronic Commerce (MLEC). A related issue that is not addressed in the MLEC is the extent to which the use of interactive applications (e.g. the click of a button on a website in a “click-wrap” scenario) – or indeed continued use of the platform (e.g. in a “browse-wrap” scenario) – can constitute acceptance by a party of the terms offered by the counterparty. That may in turn depend on the design and operation of the platform. In some jurisdictions, case law confirms the valid conclusion of a contract using those applications. Another related issue is the availability of the terms of the contract;

(b) With respect to (b), the design or operation of the platform may make it difficult for a user to identify the counterparty to a contract concluded via the platform. And once identified, the counterparty may be difficult to locate or it may be located in another jurisdiction. Moreover, the user may require the identity of the

¹⁰ Nagoya District Court, Judgment, 28 March 2008, Case No. 2005 (Wa) 1243, *Hanrei Jiho*, vol. 2029, p. 89.

¹¹ Cited in the interim discussion paper of 12 December 2018 of the study group on improvement of trading environment surrounding digital platforms (English translation available at https://www.meti.go.jp/english/press/2018/pdf/1212_004b.pdf, p.4).

¹² [A/CN.9/1012/Add.1](#), footnote 33, paras. 126, 131. On appeal, the Court of Appeal of Singapore agreed with this analysis: [A/CN.9/1012/Add.1](#), footnote 34, para. 50.

counterparty to be verified (whether to satisfy a legal obligation or otherwise) and the platform operator may provide IdM services to users. A question therefore arises as to whether the use of IdM service will be recognized by applicable law (e.g., to satisfy the legal obligation for identification, or for the application of some other law, such as an obligation of due diligence, for which verification of identity or particular identity attributes may be relevant);

(c) With respect to (c), legislation has been enacted in some jurisdictions to recognize that a contract may be concluded by use of an automated system (or “electronic agent”) without human intervention. A rule to that effect is also contained in article 12 of the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC). (The use of automated systems in contracting is addressed in A/CN.9/1064/Add.1.)

20. The terms of use incorporated into the contract between the platform operator and the platform user will ordinarily be the primary vehicle by which the governance framework for the platform is established. The platform rules will not only govern the relations between the platform operator and platform user, but also the interactions between the user and other platform users. The governance framework may give rise to additional contract law issues, including (a) the ability for the platform operator to modify the terms of use unilaterally, and (b) the extent to which the platform operator can “enforce” the platform rules by invoking penalty clauses contained in the terms of use against a non-compliant user (e.g. preventing the non-compliant user from accessing the platform, or downgrading or limiting visibility of goods and services offered by the user). While, again, none of those issues is specific to online platforms, the special nature of the terms of use and the position of influence that they afford the platform operator in relation to the user and interaction among users may give the issues special prominence, even for business users:

(a) With respect to (a), applicable domestic law will usually require modifications to be accepted by the counterparty (i.e. the platform user). In the context of online platforms, this requirement may be satisfied by the user clicking a button on a website in a “click-wrap” scenario, or by the user continuing to use the platform after being notified of the modifications.¹³ However, applicable law – including rules on unfair contract terms, the doctrine of unconscionability, and public policy considerations – may limit the types of modifications that can be made and the circumstances in which they may be accepted, particularly if the platform operator offers the online service on the basis of standard, non-negotiable terms of use;

(b) With respect to (b), the same applicable law may also limit the use of penalty clauses. In a case in China, the Shanghai No.1 Intermediate Court decided that, having regard to the interests of consumers and the promotion of e-commerce, it was reasonable for a platform operator to deduct a sum of money from a supplier using the platform to pay compensation to consumers affected by counterfeit goods.¹⁴

21. Similar laws may also constrain the ability of the platform operator to include other provisions in the terms of use, such as choice of court clauses (for a discussion on private international law issues, see para. 35 below).

22. Given the data-intensity of online platforms, which process data collected from or generated by users, including through their interactions through the platform (e.g. transaction data), the terms of use incorporated into the contract will also address the rights and obligations of the parties in that data. The contractual issues relating to those rights and obligations are addressed in [A/CN.9/1064/Add.2](#).

¹³ The issue of unilateral modification was considered in the *Quoine* case. The Court of Appeal of Singapore noted that, under applicable law, the platform user had to have “reasonable means of knowing that there had been a modification to the terms and what that modification was before any such change could have legal effect”: footnote 12, para. 62.

¹⁴ Shanghai No.1 Intermediate Court, *Jingdezhen Jinlin Business and Trade Co., Ltd. v. Shanghai Xuemeng IT Co., Ltd.*, Hu 01 Min Zhong No. 3224, Judgment, 24 April 2020.

B. Tort law

23. Tort law is another source of the rights and obligations among the various actors involved in an online platform. In particular, tort law – understood broadly to encompass extra-contractual obligations however classified under applicable law – will ordinarily serve as a basis for claims against the platform operator arising from the conduct of a platform user on the platform. For instance, a person may bring a claim for the provision of inaccurate, incomplete and misleading information (e.g., information about the platform, the platform operator or the platform rules), for interference with intellectual property (e.g., copyrighted material made available to users on the platform without permission of the copyright owner), for infringement of reputation or privacy (e.g., defamatory material or personal information is made available to users on the platform), or for interference with property (e.g., a digital asset supported by the platform erroneously transferred to a third party). The claim may rely on the principle by which the platform operator may be held liable for the conduct of the platform user (e.g. joint liability or vicarious liability), or on the intervening conduct of the platform operator (e.g. “publication” of defamatory material posted by the user).

24. A platform operator may seek to limit its liability by (a) invoking an indemnity clause in the terms of use against the platform user (such clause forming part of the governance framework for the platform), or (b) relying on “safe harbour” legislation under the applicable law.

(a) With respect to (a), the same law that limits modifications and penalties (discussed in para. 20 above) may also limit the ability of the platform operator to rely on the indemnity clause;

(b) With respect to (b), “safe harbour” legislation has been enacted in many jurisdictions to shield online service providers from liability arising from user-generated content that they host, on the condition that the provider has no knowledge or awareness of the offending content, or acts expeditiously to remove the content. While some legislation applies to content that infringes copyright,¹⁵ other legislation is of more general application.¹⁶ As online service providers, platform operators will generally be covered by “safe harbour” legislation. In the European Union, the “safe harbour” provisions of the Directive on Electronic Commerce expressly exclude any obligation on the service provider to monitor the content that they host.¹⁷ However, case law has emphasized that those provisions only apply if the platform operator acts as a “neutral” intermediary in the sense that “its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”¹⁸

C. Laws specific to the interactions facilitated by online platforms

25. Online platforms facilitate a variety of interactions between users to which specific legal regimes may be applicable. For instance, transactions involving the supply of goods might engage sale of goods law, transactions involving consumers might engage consumer protection law, interactions involving services to handle

¹⁵ China, Regulation on Protection of the Right to Network Dissemination of Information, State Council Order No. 468 of 18 May 2006; United States, *United States Code*, Title 17, sect. 512(c).

¹⁶ See, e.g., Brazil, Law No. 12.965 of 23 April 2014, art. 19; European Union, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce), art. 14; India, *Information Technology Act, 2000*, sect. 79; South Africa, *Electronic Communications and Transactions Act, 2002*, ch. 11.

¹⁷ Directive on Electronic Commerce (footnote 16), art. 15.

¹⁸ Court of Justice of the European Union, *Google France SARL v. Louis Vuitton Malletier SA*, Case No. 236/08, Judgment, 23 March 2010, para. 114. Similar reasoning was applied by the Commercial Court of Appeals of Argentina in *Kosten v. Mercado Libre S.R.L.*, Judgment, 22 March 2018, Case No. 34503/2014.

disputes might engage arbitration or other dispute resolution laws, and transactions involving crowdfunding might engage finance and investment laws.

26. Platforms may employ systems that support the creation and transfer of digital assets. For example, supply chain platforms may be used for the creation and transfer of electronic negotiable instruments such as bills of exchange or promissory notes or electronic negotiable documents such as bills of lading or other documents of title. Legal regimes engaged by dealings with digital assets are addressed in [A/CN.9/1012/Add.3](#).

27. Depending on the platform, it is conceivable that the applicable law will regard the interaction between the platform operator and users as involving a partnership or agency arrangement. A partnership arrangement, which is more likely for a platform establishing an online space for collaboration than an e-commerce platform, would have implications for the rights and obligations between the parties involved. Likewise, an agency arrangement – involving one person (the principal) engaging a second person (the agent) to act on behalf of the principal – would have implications for the rights and obligations between the parties involved.

28. For dispute resolution platforms, a question arises as to whether the applicable law recognizes the use of electronic records (including expressions of consent, submissions, and the outcome of the dispute resolution process) and electronic communications (including remote hearings and communications between the parties), as well as the use of IdM systems to control access to the platform, the use of pseudonyms, or the anonymous use of the platform. A question also arises as to how to translate due process requirements to an online space. In that regard, various initiatives, including by the International Council for Online Dispute Resolution, aim to develop international standards for online dispute resolution.

D. Laws specific to online platforms

29. Several jurisdictions have enacted laws that apply specifically to e-commerce platforms.¹⁹ None of the laws seeks to establish a complete, self-contained regime for e-commerce platforms, although they tend to apply as mandatory law, defining rights and obligations of platform operators and platform users from which the parties cannot contractually deviate (e.g. by way of the platform rules).

(a) *EU* – the P2B Regulation imposes a range of obligations on platform operators in their relations with “business users” which offer goods or services to consumers. In broad terms, those obligations include a requirement:

(i) To ensure that terms of use which are unilaterally determined by the operator comply with certain information requirements relating to (i) the drafting and availability of the terms, (ii) any additional distribution channels and potential affiliate programmes through which the operator might market the goods and services offered by the user, and (iii) the effect of the terms of use on the intellectual property rights of the user;

(ii) To ensure that the terms of use comply with certain content requirements, including (a) the conditions by which the business user may terminate the contract with the platform operator, (b) the grounds for decisions to restrict, suspend or terminate the service provided to the business user, (c) a description of any differentiated treatment which the operator gives in relation to goods or services offered to consumers via the platform, (d) a description of the data provided by users or generated by the platform to which the business user has access; and (e) the main parameters determining “ranking” (i.e. the relative prominence given to goods or services offered via the platform) and a description of any possibility for the business user to pay to influence ranking and the effects of payment on ranking;

¹⁹ See also India, *Consumer Protection (E-Commerce) Rules, 2020*.

(iii) To give the business user prior notice of any proposed modifications to the terms of use;

(iv) To provide the business user with a statement of reasons for any decision concerning restriction, suspension and termination of the service; and

(v) To provide an effective internal complaints handling system for business users which is accessible and free of charge, and handles complaints within a reasonable time frame;

(b) *China* – the Electronic Commerce Law imposes a range of obligations on the platform operator that are not limited to relations with users supplying goods and services via the platform. In broad terms, those obligations include a requirement:

(i) To formulate the terms of use in accordance with principles of fairness, transparency and impartiality and in compliance with certain content requirements, including (i) the rights and obligations for accessing and leaving the platform, (ii) warranties regarding the quality of goods and services offered via the platform, (iii) consumer protection, and (iv) protection of personal data;

(ii) To comply with certain information requirements relating to the terms of use;

(iii) To consult users on proposed modifications to the terms of use, and to publicize the modified terms at least seven days before they take effect;

(iv) To refrain from imposing unreasonable restrictions or conditions on users supplying goods and services with respect to transactions that are carried out via the platform, the price for goods and services supplied, and transactions with other operators, and to refrain from collecting unreasonable fees from those users;

(v) To publicize measures taken against users supplying goods and services for breaching any legal or regulatory requirement, such as warnings or the suspension or termination of service;

(vi) To distinguish its own business conducted on the platform;

(vii) To identify goods and services that are ranked against payment;

(viii) To ensure platform security;

(ix) To refrain from aggregate trading practices in the provision of additional services;

(x) To establish a convenient and effective complaints handling system and to handle complaints promptly. In addition, the law permits – but does not require – the platform operator to establish a system for the online settlement of e-commerce disputes between users. It also recognizes that e-commerce disputes may be resolved by negotiation, mediation or arbitration (among other forms of dispute settlement);

The Electronic Commerce Law also provides for the platform operator to be jointly liable with a user if (i) the goods or services supplied by the user fail to comply with safety standards or otherwise violate consumer rights, and (ii) the operator knew or ought to have known of that failure or violation and failed to take necessary action.

(c) *Japan* – the TFDPA, which entered into force on 1 February 2021, imposes several obligations on designated platform operators in their relations with users supplying goods and services via the platform.²⁰ In broad terms, those obligations include a requirement:

(i) To disclose their terms of use;

²⁰ Three online marketplaces and two app stores have been designated under the TFDPA: www.meti.go.jp/english/press/2021/0401_001.html.

(ii) To give prior notice to users of any proposed modifications to the terms of use; and

(iii) To take measures to promote mutual understanding in the business relationship between the platform operator and user in accordance with guidelines issued by the Ministry of Economy, Trade and Industry, which may cover, among other things, (a) systems and procedures to ensure the fair operation of the platform, and (b) systems and procedures to handle user complaints;

(d) *Russian Federation* – the Law on Consumer Rights Protection imposes several obligations on e-commerce platform operators in their relations with consumers using the platform, including a requirement to provide those users with information about its identity and the identity of suppliers using the platform. Moreover, it provides for the platform operator to be liable for loss suffered by a consumer caused by inaccurate or incomplete information provided by the operator (including information about goods and services supplied via the platform). However, it provides that the supplier remains liable for violations of consumer rights.

30. Several jurisdictions have enacted laws that apply specifically to crowdfunding platforms (i.e. platforms that match prospective investors and lenders with persons seeking crowdfunding). For instance:

(a) *EU* – the 2020 Regulation on European Crowdfunding Service Providers²¹ acknowledges that crowdfunding platform operators should act as “neutral intermediaries” between platform users. The regulation imposes a range of obligations on platform operators in their relations with users, including an obligation to act honestly, fairly and professionally in accordance with the best interests of users, an obligation to refrain from participating in crowdfunding, an obligation to carry out due diligence requirements in respect of persons seeking investment, and information disclosure obligations to investors;

(b) *Russian Federation* – Federal Law No. 259-FZ of 2 August 2019 deals with investment platforms that are used to conclude investment agreements between investors and persons raising investments. The law imposes a range of obligations on platform operators in their relations with users, including minimum content requirements for platform rules, an obligation to refrain from various financial activities, an obligation to retain and disclose contract terms, and information disclosure obligations to investors. Moreover, the law provides rules on liability of the platform operators, and rules on the formation of investment agreements between users.

31. While they do differ, the laws pursue a common purpose of addressing the influence of platform operators over the trading activities of platform users, as well as a common objective of rebalancing the relationship through greater transparency and fairness. Overall, they indicate a common view that e-commerce platforms occupy a *sui generis* position in trade that warrants legislative intervention.

32. The laws are primarily focussed on B2C e-commerce platforms, but are not concerned solely with consumer relations. On their terms, the laws in the EU, China and Japan apply to the B2B relationship between the platform operator and businesses that use the platform to sell goods and supply services, and the platforms that they regulate are also used by businesses to buy those goods and services (particularly MSMEs). Moreover, the P2B Regulation in the EU is aimed uniquely at the B2B relationship with business users, even if it recognizes the link between that relationship and consumer welfare. The operation of the various laws tends to support a view that the influence exerted by platform operators over the trading activities of users causes a blurring of the line between B2B relations and B2C relations. Indeed, the principles of transparency and fairness that the various laws pursue are equally relevant to B2B relations.

²¹ Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937.

E. Other laws

33. Even in the absence of specific laws regulating online platforms, the influence that platform operators exert over the interactions between platform users may shape the characterization of its relationship with users and its obligations towards them under existing law, including tort law, consumer protection law, competition law, and employment law:

(a) In the United States, the Court of Appeal of California has found that a major e-commerce platform operator was liable under the doctrine of strict products liability for a defective product supplied by one user (a seller) to another user (a consumer). Having regard to the “structure” of the operator’s relationship with both users, and in particular the warehousing and delivery services that the operator provided to the seller, the court observed that the operator was “a direct link in the chain of distribution, acting as a powerful intermediary between the third-party seller and the consumer”, that it exerted pressure on upstream distributors to enhance safety, and that it had the ability to adjust the cost of liability between itself and its third-party sellers;²²

(b) In a case concerning the competence of EU member States to regulate taxis, the Court of Justice of the European Union took the view in a 2017 decision that the operator of the ride-sharing platform “Uber” was not merely an intermediary but provided a “service in the field of transport”. In coming to that view, the court noted that the operator exercised “decisive influence” over the conditions under which drivers using the platform provided transport services to passenger users, such as determining the maximum fare, receiving the full fare from the passenger before paying part of it to the driver, and exercising a certain control over the quality of the vehicle, the drivers and their conduct.²³

34. Online platforms rely on data that is collected from or generated by users. The processing of data by platform operators engages privacy and data protection laws, as well as other protective laws identified in [A/CN.9/1064/Add.2](#).

F. Private international law

35. To the extent that online platforms involve the provision of online services or the conclusion of contracts online, existing rules of private international law as applied to the online environment will apply to determine the applicable law and the jurisdiction of courts. In the case of contracts in B2B transactions, those rules will ordinarily accept the law and the court chosen by the parties pursuant to the principle of party autonomy, which in turn may be controlled by the terms of use of the platform to establish, as much as possible, a uniform legal environment. Where no choice is made, or where that choice is not accepted, the global reach of online platforms means that the rules of private international law, including rules based on the location of the parties or the location of the impugned conduct, may lead to different laws applying to the use of the same platform. By creating an online space for the parties to interact, online platforms present the possibility of fashioning new rules of private international law that promote greater uniformity, including rules based on the location of the platform or platform operator.

²² *Bolger v. Amazon.com, LLC*, Judgment, 13 August 2020, *California Appellate Reports, Fifth Series*, vol. 53, pp. 431, 438-439.

²³ *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, Judgement, 20 December 2017, Case No. 434/15, para. 39. The court did not need to consider whether the operator was itself the provider of the transport services to passenger users.

V. Preliminary appraisal of relevant UNCITRAL texts

A. Electronic commerce texts

36. In technical terms, online platforms are essentially a system for processing electronic communications among the platform operator and the community of users. As noted above (para. 19), communications may be exchanged to conclude contracts (e.g. a contract for the supply of goods or services, or a dispute settlement agreement), to create and transfer digital assets, and to provide digital services. Accordingly, UNCITRAL texts in the area of electronic commerce give legal recognition to electronic communications and contracts concluded electronically using online platforms. Specifically, article 11 MLEC provides that an offer and acceptance may be expressed by means of electronic communications, and that a contract shall not be denied validity or enforceability on the sole ground that an electronic communication was used for that purpose. Moreover, UNCITRAL texts give legal recognition to contracts concluded using automated systems deployed by online platforms. Specifically, article 12 ECC provides that a contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract. The ECC also contains a provision dealing with a person's intention to be bound when offering goods and services online (art. 11).

37. UNCITRAL texts also give legal recognition to certain types of digital assets that may be created and transferred on an online platform. Specifically, article 7 of the Model Law on Electronic Transferable Records (MLETR) provides that an electronic transferable record complying with the requirements of the MLETR shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

38. Specific laws on online platform that have been enacted in various jurisdictions identify a range of other areas relating to electronic transactions that are not currently addressed in UNCITRAL texts on electronic commerce, including (a) requirements for the formation of electronic contracts, and (b) obligations to retain and disclose the terms of electronic contracts.

B. CISG

39. To the extent that cross-border transactions carried out via online platforms involve the sale of goods, the United Nations Convention on Contracts for the International Sale of Goods (CISG) may play a role with respect to the related contract for sale, even though its drafters would not have had online platforms in mind. As the term "goods" is not defined in the CISG, there has been lively debate as to whether the CISG applies to software or even data, which is addressed in [A/CN.9/1064/Add.2](#).

40. With respect to contract formation, the CISG (arts. 11 and 12) does not subject the contract of sale to any requirement as to form and provides that no written agreement is necessary. The ECC (art. 20(1)) makes it clear that the electronic communications exchanged by parties to contracts falling under the scope of application of the CISG will benefit from the favourable regime provided by the ECC, which assures that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents.

C. Dispute resolution texts

41. The Electronic Commerce Law of China expressly permits platform operators to establish a system for resolving disputes among users through the platform. This recognizes a growing trend among e-commerce platforms to include dispute resolution services as a way to promote user confidence in the platform and therefore

trading activities via the platform. It also parallels the emergence of dedicated dispute resolution platforms.

1. UNCITRAL Technical Notes on Online Dispute Resolution

42. UNCITRAL's earlier work on online dispute resolution (ODR) resulted in the adoption in 2016 of the non-binding Technical Notes on Online Dispute Resolution (Technical Notes).²⁴ The Technical Notes are designed to foster the development of ODR and are intended for use in disputes arising from cross-border low-value e-commerce transactions. The Technical Notes are relevant not only for dedicated dispute resolution platforms, but also dispute resolution systems that are integrated into e-commerce platforms.

43. The Technical Notes recognize the potential for ODR to offer a simple, fast and efficient process utilizing various forms of dispute resolution (including negotiation, conciliation, mediation, facilitated settlement, arbitration, among others). At the same time, they emphasize that ODR should comply with the same confidentiality and due process standards that apply to offline dispute settlement.

44. The Technical Notes also recognize the need for:

(a) A "technology-based intermediary" – an "ODR platform" – which is defined as a "system for generating, sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security"; and

(b) An "ODR administrator", which may be separate from, or part of, the ODR platform, and therefore act as the platform operator or a third party providing additional services on the platform.

45. The Technical Notes describe desirable practices and procedures for resolving disputes using ODR platforms. One such practice is that all communications in ODR proceedings take place via the ODR platform. The Technical Notes also describe desirable practices of the ODR administrator to promote transparency about the platform, and to promote the independence and expertise of third party "neutrals". The term "neutral" is defined as an "individual" who assists the parties in settling or resolving the dispute. They also describe desirable practices for the appointment of neutrals and the powers with which they are conferred.

2. Other dispute resolution texts

46. Other UNCITRAL dispute resolution texts include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the UNCITRAL Arbitration Rules, the UNCITRAL Model Law on International Commercial Arbitration (MAL), the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention), and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.

47. While those texts were not drafted with dispute resolution platforms in mind, they are generally flexible enough to accommodate mediation and arbitration carried out using electronic communications (including remote hearings). Provisions explicitly recognizing the use of electronic means to satisfy requirement for "writing" and "signature" have found their way into more recent UNCITRAL texts (e.g. arts. 2(2) and 4(2) of the Singapore Convention). When revising the MAL in 2006, two options were provided in article 7 with the first option taking a similar approach (see art. 7(4)) and the second option taking a more flexible approach with no form requirements for arbitration agreements. This also led to the 2006 recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention,²⁵ which cast the form requirements in the Convention for

²⁴ Available at <https://uncitral.un.org/texts/onlinedispute>.

²⁵ Available at https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_awards.

an arbitral agreement against the backdrop of the widening use of electronic commerce, including arbitral agreements in electronic form. In parallel, article 20(1) ECC makes it clear that electronic communications exchanged in connection with the formation of a contract (including a contract containing an arbitration agreement) benefit from the favourable regime provided by the ECC, which assures that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. Conversely, for arbitral awards, article 31 MAL requires the award to be in writing and to be signed by the arbitrator or arbitrators and does not recognize the use of electronic means to satisfy that requirement.

48. More recently, Working Group II, which is preparing draft provisions on expedited arbitration to accompany the UNCITRAL Arbitration Rules, has been considering the inclusion of a general provision on the use of technology in expedited arbitration. Such a provision would give discretion to the tribunal to utilize any technological means as it considers appropriate to communicate with the parties and to hold consultations and hearings remotely after inviting the parties to express their views and taking into account the circumstances of the case.

49. Overall, UNCITRAL dispute resolution texts generally provide the basis for online dispute resolution. However, particular features of dispute resolution platforms may raise issues as to the applicability of those texts.

(a) One issue relates to human involvement in the dispute resolution process in view of the deployment of AI systems on dispute resolution platforms (see para. 7). While there is no explicit requirement for an arbitrator or mediator to be a human, the MAL and arbitration laws in many jurisdictions based on the MAL assume a human arbitrator (see, e.g., arts. 11 and 12 MAL). The Singapore Mediation Convention defines a mediator as a third person or persons assisting the parties to reach an amicable settlement of their dispute (see art. 2(3)). Moreover, the use of an AI system to determine the outcome (e.g., the award) or to assist the parties in reaching an amicable settlement (e.g. by generating possible terms of settlement) without human involvement may affect the characterization of the dispute resolution process as “arbitration” or “mediation”. Questions may also be raised as to how disclosure requirements to ensure impartiality and independence as well as challenge procedures could be implemented when AI systems are involved;

(b) Another issue relates to the translation of due process requirements – such as the requirement to treat the parties with equality and to give each party a full opportunity of presenting their case (art. 18 MAL) – to an online environment. The Model Law on Mediation requires the mediator to seek to maintain fair treatment of the parties, taking into account the circumstances of the cases. Questions may be raised as to how dispute resolution platforms satisfy those requirements. In that regard, initiatives aimed at developing international standards for online dispute resolution may be relevant;

(c) Yet another issue is whether awards and settlement agreement resulting from dispute resolution platforms could fully benefit from the enforcement framework provided for in the New York Convention and the Singapore Mediation Convention. That issue requires a careful analysis of the requirements for seeking enforcement and grounds for refusing enforcement, and whether the use of dispute resolution platforms or the use of AI systems could engage the grounds for refusal. For example, if a court finds that the platform does not allow parties to present their case, or that the involvement of an AI system in the decision-making process would be contrary to the agreement of the parties in the composition of the tribunal, an award rendered by using the platform could be refused enforcement (art. V(1)(b) or (d) of the New York Convention). The use of AI and automation in mediation without informing the parties may also constitute a serious breach by the mediator of standards applicable to the mediator (art. 5(1)(e) of the Singapore Mediation Convention).