

Online Dispute Resolution in E-Commerce: Is Consensus in Regulation UNCITRAL's Utopian Idea or a Realistic Ambition?

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Abstract: *The rigorous deliberations of the United Nations Commission on International Trade Law to create a global regulatory framework for Online Dispute Resolution have failed to generate a consensus. This paper analyses whether UNCITRAL's ambition to develop an inclusive ODR regulatory platform has considered the complexities of cutting across cultural boundaries and power (im)balances. The objective here is to challenge UNCITRAL's assumption that technology's a-territorial nature facilitates homogeneity in ODR. To this end, the paper examines the implications of globalisation and the evolution of diverse cultures on ODR and proposes that an alternative approach is needed to combine cosmopolitan and legal pluralism in developing a platform trusted by all disputing parties. The author argues that the focus of contemporary research should extend to consider commonalities across and between national, regional and global levels of governance when regulating for ODR. The paper's findings will inform policy makers and regulators, including UNCITRAL, when considering the role and interaction of various stakeholders when developing an ODR framework. The significance of this article lies in bringing out that the creation of a regulatory ODR framework needs to be more finely nuanced due to its nature as a normative and legal hybrid.*

Keywords: *Online Dispute Resolution, e-commerce, technology, regulation, culture, cosmopolitanism, globalisation, UNCITRAL*

Introduction

In December 2010, Working Group III (Online Dispute Resolution) of the UNCITRAL (United Nations Commission on International Trade Law) commenced discussions on the preparation of legal standards on online dispute resolution (ODR) for cross-border electronic commerce transactions.¹ The deliberations and decisions of

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the Working Group focused on addressing, and responding to, the shared view that there was an absence of an agreed international standard for ODR for high-volume, low-value B2B (Business-to-Business) and B2C (Business-to-Consumer) worldwide e-commerce disputes² that required a rapid, effective and low-cost response.³ The traditional mechanisms for dispute resolution, including the judicial avenue, could not provide an appropriate platform for dealing with cross-border electronic commerce disputes due to the disproportionate relationship of time and cost for their resolution to the value of the dispute.⁴ In that respect, UNCITRAL's overarching aim was to create a global regulatory framework for ODR development that would cut across cultural boundaries and power (im)balances to create an inclusive, equal in access and, hence, mutually trusted dispute resolution platform.

The deliberations and decisions of the Working Group continued until 2016 but did not result in ODR regulations. Instead, they led to the adoption of UNCITRAL's Technical Notes on Online Dispute Resolution (2016), which are descriptive and non-binding.⁵ Although this is an outcome of the fruitless efforts to reach consensus, as acknowledged by the US and the EU,⁶ it is encouraging that a non-democratic,

¹ Online dispute resolution for cross-border electronic commerce transactions, United Nations Commission on International Trade Law, Working Group III (Online Dispute Resolution), Twenty-second Session, Vienna, 13–17 December 2010, A/CN.9/WG.III/WP.105.

² Official Records of the General Assembly, sixty-fifth session, Supplement No.17 (A/65/17), para.257.

³ Online dispute resolution for cross-border electronic commerce transactions, United Nations Commission on International Trade Law, Submission by Colombia and the United States of America, Working Group III (Online Dispute Resolution), Thirty-second Session, Vienna, 30 November–4 December 2015, A/CN.9/WG.III/XXXII/CRP.3, p.3.

⁴ Hornle J., *Cross-border Internet Dispute Resolution*, Cambridge: Cambridge University Press, 2009, p.37. See also United Nations General Assembly, United Nations Commission on International Trade Law, Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13–17 December 2010), Forty-fourth session, Vienna, 27 June–15 July 2011, A/CN.9/716, pp.2–6.

⁵ Available at:

https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf, last accessed on 19 June 2019.

⁶ Benyekhlef K. and Vermeys N., *UNICTRAL Adopts Technical Notes on ODR*, available at: <https://www.slaw.ca/2016/04/18/uncitral-adopts-technical-notes-on-odr>, last accessed on 19 June 2019.

coercive agreement was avoided. Interestingly, however, the lack of consensus as a reason that led to abandoning the negotiations was recognised by two traditionally dominant actors (i.e. the US and the EU), rather than the politically minor actors that ODR is predominantly meant to benefit. On the basis of this outcome, the Technical Notes will provide a springboard for evaluating whether the regulator's aim of creating a platform that would be representative at a universal, state and non-state level is realistic or simplistic.

While the attention of the Working Group on the individuality of jurisdictions and diverse picture of knowledge, experience and stage of development is apparent in the wording of the documents, mention is also made of the vision for a globally- funded ODR system, subject to states' willingness to provide funding.⁷ This duality of approach, therefore, poses the question of whether the ODR systems are to be 'global' and in what sense they will have regard to the individual circumstances, culture, legal culture and legislation of the states involved. There is considerable literature on the cultural aspects of ODR *per se*, which I have considered elsewhere,⁸ and for this reason I have no intention to reproduce existing arguments in the present article. Instead, the following discussion uses the debates and relevant documents and procedures of the UNCITRAL Working Group on ODR to take the enquiry further by analysing content and vision, globalisation versus local diversity, and rhetoric versus reality.⁹ The pivot of this analysis will be to unravel the reasons for the Working Group not reaching consensus in creating ODR regulations despite its manifest vision for inclusion. The inquiry will be framed around three main strands of argument; the urgency for clarity in the use of terms that have an impact on the coherence of regulatory vision; the need for a new systematic enquiry of the connections that exist (or not) at horizontal, vertical and across levels of state and non-state arrangements within the landscape of ODR; and the assertion that the framework that will emanate from this systematic enquiry will redefine the notion of consensus and, ultimately,

⁷ See the Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13–17 December 2010), A/CN.9/716, p.5.

⁸ Sampani C., 'The impact of culture in online dispute resolution for maritime disputes', *Cambrian Law Review*, Vol. 44, March 2015.

⁹ Harding C. and Banach-Gutierrez J.B., 'Analysis and Reflections. The Emergent EU Criminal Policy: Identifying the Species', Dec. 2012, *European Law Review*, Issue 6, 37, pp. 758–9.

legitimacy. The objective of this discussion is, therefore, to challenge UNCITRAL's assumption that the a-territorial nature of technology paves the way for homogeneity in ODR regulations to achieve inclusion and promote equality in access to justice. To meet this objective the paper attempts to 'conceptualise the dynamics of globalisation and culture in e-commerce'¹⁰ and ODR and to give a clearer sense of the direction this can offer to regulators and policy makers. The value added of this analysis is to contribute significant information to the considerations of regulators, policy makers, ODR administrators and parties to ODR proceedings. This is based on the complexities of the role and interaction of the cultures, interests and expectations that the blend of state and non-state actors bring with them to discussions about an ODR regulatory framework.

Against this backdrop, my intention in this paper is not to focus on the nature and contents of the UNCITRAL documents on ODR as such, but rather to advance, in the light of their failure to produce concrete results, the proposition that a novel alternative methodology might prove more effective. To this end, I will, it is true, refer, at an early stage, to the most important aspects of the procedure of deliberations and proposals of Working Group III, as a means to cover the ground. For instance, the Technical Notes provide that they aim to 'foster the development of ODR as a form of dispute resolution'¹¹ and '... to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings' for '**cross-border** transactions' (emphasis added).¹² The UNCITRAL Working Group III that undertook the task to deliberate and decide on the prospect of ODR regulations was composed of all states members of the Commission. The scope of the Technical Notes' provisions for **cross-border** transactions combined with the vision of the UNCITRAL to introduce the intended ODR regulations as the outcome of negotiation and consensus of member states

¹⁰ Cole M. and O'Keefe R.M., 'Conceptualising the Dynamics of Globalisation and Culture in Electronic Commerce', *Journal of Global Information Technology Management*, 2000, 3:1, p.4.

¹¹ United Nations General Assembly, United Nations Commission on International Trade Law, Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session (Vienna, 30 November–4 December 2015), A/CN.9/862, p. 5

¹² United Nations General Assembly, United Nations Commission on International Trade Law, Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session (Vienna, 30 November–4 December 2015), A/CN.9/862, p6.

brings the focus of the discussion to an international level. In this respect, ODR regulations were envisaged to be reflective of diverse national legal orders.

Drilling into the rhetoric of the Working Group Reports and the Technical Notes, it is possible to ascertain that they embrace and demonstrate a set of values that they aspire to. These are to ‘...bear in mind the interests of all peoples...’¹³ and to represent ‘significant opportunities for access to dispute resolution ... both in the developed and developing world’¹⁴ and ‘in post-conflict situations’¹⁵ in a culturally inclusive way.¹⁶ In the context of these professed values which were intended to inform ODR regulations, the discussion transcends from the international to cosmopolitan level.

A third point of consideration is that non-state actors (e.g. international non-governmental organisations), amongst others, were invited by the Commission to represent the views (and, consequently, the culture) of their organisations in the deliberations on matters where the organisations concerned had expertise or international experience.¹⁷ These organisations had no participation in the decision making stage but they could influence decisions by facilitating the deliberations at the sessions. The ODR regulations, therefore, were anticipated to be the outcome of the osmosis of views between state and non-state actors. This aspect of the procedure conveys the aim of UNCITRAL to shift the process from being strictly sponsored by the hegemony of the states to a de-territorialised discourse extending to non-state actors and hence leading to ‘a-jurisdictional’ regulations of a ‘global ODR system’.¹⁸

¹³ United Nations Commission on International Trade Law, UNCITRAL Technical Notes on Online Dispute Resolution, New York, 2017, p. vii.

¹⁴ Technical Notes on Online Dispute Resolution UNCITRAL Working Group III, Online Dispute Resolution for cross-border electronic commerce transactions, Thirty-second Session, Vienna, 30 November–4 December 2015, A/CN.9/WG III/XXXII/CRP.3, p. 4.

¹⁵ Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session (New York, 29 February–4 March 2016), A/CN.9/868, p.2.

¹⁶ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13–17 December 2010), A/CN.9/716, p.5.

¹⁷ Annotated Provisional Agenda, Working Group III (Online Dispute Resolution), thirty-third session (New York, 29 February- 4 March 2016), A/CN.9/WG.III/WP.139, p.2.

¹⁸ The term ‘global ODR system’ is used in the Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010), A/CN.9/716, p. 5.

The a-territorial nature of technology gives grounds for regulatory debate that dissolves the borders of national jurisdictions through the emergence of a transborder regulatory scene. This ‘new era’ of regulators’ agenda brings the discussion into a hybrid globalised context.

The regulatory debate and procedure reveal a number of tensions which have been played out in the absence of consensus in regulatory formulation. ‘There is the tension between globalising ‘common interest’ tendencies of uniformity and heterogeneity, and maintaining values of cultural and political diversity and the strength of heterogeneity.’¹⁹ This observation unveils the need for terminological clarification and precision and the construction of a framework through the investigation of new forms of governance with the subsequent aim to achieve consensus and legitimacy. To this effect, the analysis will evolve, as an *a priori* argument, around three main questions: (a) are the terms international, cosmopolitan and global to be used interchangeably in the debates for formulating regulations for ODR or should they be considered as terms which are formally distinct, yet they carry related legal and beyond legal objectives?;²⁰ (b) are these terms to be contemplated with regard to governance and the dynamics they create in the representation of the power balance in ODR regulations that claim to be ‘democratically designed’ and, hence, ‘to function as agents of democratic change in dispute resolution’²¹?; and (c) are these questions to be examined in the light of whether such a regulatory platform could ultimately gain legitimacy and provide effective enforcement and ‘offer a flickering’ yet ‘present hope’ for a truly universal regulatory framework?²²

¹⁹ Harding C. and Banach-Gutierrez J.B., ‘Analysis and Reflections. The Emergent EU Criminal Policy: Identifying the Species’, Dec. 2012, *European Law Review*, Issue 6, 37, pp.760, 761.

²⁰ Harding C. and Banach-Gutierrez J.B., ‘Analysis and Reflections. The Emergent EU Criminal Policy: Identifying the Species’, Dec. 2012, *European Law Review*, Issue 6, 37, p. 759.

²¹ Hand M. and Sandywell B., ‘E-topia as Cosmopolis or Citadel. On the Democratizing and De-democratizing Logics of the Internet, or, Toward a Critique of the New Technological Fetishism’, *Theory, Culture and Society*, 2002, Vol. 19(1-2): 197–225, p. 210.

²² Badger K., ‘Cosmopolitanism and Globalization: A Project of Collectivity’, available at: <https://www.dartmouth.edu/~themalsjournal/pdf/winter14/badger.pdf>, p.11, last accessed on 19 June 2019.

Although these enquiries could be relevant to any area of law, they are distinctly pertinent in the context of technology, which by its nature offers ‘global interconnectedness ... with increasing speed’.²³ The rhetoric and procedures of the ODR Working Group also manifestly aspired to include the views of state and non-state actors and to develop the regulatory means for more democratic, culturally inclusive e-commerce dispute resolution. It is ODR’s principal directions, therefore, that call for an in-depth investigation of its international, cosmopolitan and global aspects relating to the above considerations. The discussion around these questions will inform the deliberations and considerations of whether it is feasible for the prevailing elements of the national legal systems and cultures and the needs of countries in various stages of development and historical experiences, to be reflected in a single, coherent and consistent ODR regulatory framework.

International, Cosmopolitan, Global: Regulatory Convergence or Divergence?

The rhetoric of UNCITRAL reports on ODR has repeatedly expressed the sentiment for drafting rules that ‘respond to the needs of developing countries and those facing post-conflict situations ...’²⁴ or ‘... the ODR must be flexible in order to accommodate the differing circumstances of States, including: differences in culture and level of economic development; and the fact that the meaning of a “low value” transaction might differ from State to State’.²⁵ This is indicative of regulatory ambition but also assumes that global relations and the use of technology in e-commerce and dispute resolution can bisect cultural, economic and political boundaries.²⁶

²³ Schiff Berman P., ‘A World of Legal Conflicts’, in *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders*. Cambridge: Cambridge University Press, 2012, p. 24.

²⁴ Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session (Vienna, 30 November–4 December 2015), A/CN.9/862, p. 2.

²⁵ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13–17 December 2010), A./CN.9/716, p. 5.

²⁶ Cole M. and O’ Keefe R.M., ‘Conceptualising the Dynamics of Globalisation and Culture in Electronic Commerce’, *Journal of Global Information Technology Management*, 2000, 3:1, p. 4.

The attempt to reflect various legal cultures and political interests from countries in different stages of development in one regulatory body is not new.²⁷ What is new is the official acknowledgment of the significance of culture and the aspiration to create a regulatory framework that reflects a ‘global culture’. The technological architecture of networked computing fosters the vision of a global culture to an unprecedented extent,²⁸ whilst it also promotes the influence and role of actors that were not present before. It is, indeed, the technical aspect of global connection that impacts on the socio-cultural and regulatory expectations. Global culture, and the anticipations of it, is contemporary and part of the umbrella concept of culture itself.²⁹ Poster suggests that, frequently, the prevailing figure in the argument about global culture is the ‘cosmopolitan’;³⁰ in other words ‘... a global civil society which extends beyond

²⁷ For instance, an attempt to harmonise the law relating to international sales was made by the International Institute for the Unification of Private Law (UNIDROIT). The two Conventions that were adopted by UNIDROIT (ULIS: Uniform Law on International Sales and ULFIS: Uniform Law on the Formation of International Sales) and ratified by a handful of states – including the United Kingdom – however, were criticised on both political and legal grounds. Their unpopularity paved the way for a return to the drawing board. UNCITRAL (United Nations Commission on International Trade Law) was seen as the most suitable organisation for the drafting of an international convention as its membership consists of developing, developed and socialist countries and, therefore, any political objections would be countered and evened out by the socialist or developing quarters. See Carr I., *International Trade Law*, Routledge-Cavendish, UK-US, 2010, p.57 and Carr I., *International Trade Law*, Chapter 2: The Vienna Convention of the International Sale of Goods 1980, Para 17.2, 2017 [Calibre e-book viewer EPUB], Retrieved from <https://www.bl.uk>.

The importance of a consensus-driven approach and inclusiveness of the process and deliberations of the Working Group – as an avenue to ‘... respond to the increasing challenges regarding legitimacy ...’ and enhance access to long-term sustainable growth of developing countries – is also underlined in the UNCITRAL debates on Investor-State Dispute Settlement (and its reform) and Arbitration: all of which attempts resulted successfully in the respective Rules. See, for instance, United Nations Commission on International Trade Law, fifty-first session, New York, 25 June-13 July 2018, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 17 November–1 December 2017) A/CN.9/930/Rev.1, pp. 4, 5; United Nations Commission on International Trade Law, forty-third session, New York, 21 June-9 July 2010, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN.9/712, pp. 6, 7.

²⁸ Poster M., ‘Global Media and Culture’, *Literary History in the Global Age*, 2008, vol. 39, No.3, p. 694.

²⁹ Poster M., ‘Global Media and Culture’, *Literary History in the Global Age*, 2008, vol. 39, No.3, p. 694.

³⁰ Poster M., *Global Media and Culture*, *New Literary History*, 2008, Vol. 39, No.3, pp.686, 694.

the... bordered nation-state ... where human plurality is valued'.³¹ Although hard evidence of such an assertion is, of course, difficult to establish, it seems self-evident that extension beyond the nation state must, to some extent, recognise human plurality.

But let's drill further into the focal elements that compound the concepts of internationalism, cosmopolitanism and globalisation to inform the vision of the policy makers for culturally inclusive, universally accepted, democratic ODR regulations. What triggers this analysis is the proclaimed vision of UNCITRAL's Working Group to harmonise and not to impose or to 'blend things together'. Nonetheless, the question remains; is it sufficient to profess these ideal goals in order to triumph over the challenges of cultural barriers or the present league of powers? By the same token, is the implementation of these ideals possible without the mechanism of the nation-state as a pivot on which to rest and achieve these goals? And if so, is it the legal systems that emerge within jurisdictions that need to be central in regulators' considerations or the well-being of all (humanity) by removing cultural and power barriers that separate people? This analysis aims to transform ideals into reality by considering how thoughts can turn into action.³² It intends to air a reflection on what the regulatory organisations do when they narrate the multicultural and what is the ambition and reality of this narration in contemporary regulations.³³

Conversations across identity boundaries, whether national, cultural or professional, pave the way for an evolving cosmopolitan worldview, where diversity is valued. Despite the multiplicity of approaches, I would suggest, there is a commonality of shared fundamental principles and hopes, or at least, tolerance for the values, ideas and beliefs of others – even if we fail to understand them. Therefore, in the concept of cosmopolitanism there are seeds of equality and an ethical paradigm of universal

³¹ Badger K., 'Cosmopolitanism and Globalization: A Project of Collectivity', available at: <https://www.dartmouth.edu/~themalsjournal/pdf/winter14/badger.pdf>, p. 1, last accessed on 19 June 2019.

³² Recchia S. and Urbinati N. (eds.), *A Cosmopolitanism of Nations. Giuseppe Mazzini's Writings on Democracy, Nation Building, and International Relations*. Princeton and Oxford: Princeton University Press, 2009, pp. 56–8.

³³ Canclini N.G., *Consumers. Globalisation and Multicultural Conflicts*. Translated and with an Introduction by George Yudice. Minneapolis and London: University of Minnesota Press,, 2001, p.77.

distributive justice that contests poverty, conflict, oppression and ideological fundamentalism.³⁴

Moving the analysis forward from cosmopolitan principles to cosmopolitan law, the latter refers to a domain of law different in nature to the law of the states and made between one state and another with the common aim of mutually enhancing geopolitical interests.³⁵ Held, who considers Kant to be the leading interpreter of the idea of cosmopolitan law, claims that Kant construed this idea as the basis upon which the equal moral status of persons in the ‘universal community’³⁶ is manifested.³⁷ For Kant, ‘the peoples of the earth have ... entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*’. The idea of a cosmopolitan right, therefore, is not to be conceived in a utopian or fantastic way; it is a ‘necessary complement to the unwritten code of political and international right’ and a means of its transformation into a public right of humanity.³⁸ In Held’s words, Kant, in this context, shaped the form and scope of cosmopolitan law to the right of oneself to be presented and heard ‘within and across communities’. Held expanded this understanding of cosmopolitan law by positing it as the appropriate mode of embracing the equal moral representation of all human beings and of recognising their entitlement to equal freedom and forms of governance founded on deliberation and consent.³⁹

³⁴ Badger K., ‘Cosmopolitanism and Globalization: A Project of Collectivity’, available at: <https://www.dartmouth.edu/~themalsjournal/pdf/winter14/badger.pdf>, p.1, last accessed on 19 June 2019.

³⁵ Held D., *Cosmopolitanism. Ideals and Realities*. Cambridge and Malden (US): Polity Press, 2010, p. 92.

³⁶ The term ‘universal community’ has been derived from Kant I., *Kant’s Political Writings* (Edition and Introduction by Reiss H.). Cambridge: Cambridge University Press, 1970, p. 107.

³⁷ Held D., *Cosmopolitanism. Ideals and Realities*. Cambridge and Malden (US): Polity Press, 2010, p. 92.

³⁸ Kant I., *Kant’s Political Writings* (Edition and Introduction by Reiss H.). Cambridge: Cambridge University Press, 1970, pp. 107–8.

³⁹ Held D., *Cosmopolitanism. Ideals and Realities*. Cambridge and Malden (US): Polity Press, 2010, p. 92.

An observation of the diverse composition and proposals for inclusion of the Working Group's sessions on ODR⁴⁰ confirms UNCITRAL's apparent intention to produce a 'cosmopolitan' piece of ODR regulation that would adhere to its rhetoric. The same is confirmed by the participation of non-governmental organisations with different orientations. The promotion of the progressive development of international trade law and its codification through international participation is in line with UNCITRAL's organisational culture and mission, since its establishment in 1966.⁴¹

The expressed ideological commitment of the Working Group to collective consciousness in the ODR regulations is met with persistent pervasive scepticism about the promise of globalisation for a freer world. The cosmopolitan ideals appear to be contradicted in recent decades by 'the belligerent reassertion of ethnic nationalism'⁴² and 'the perceived tyranny ...' of the Western world - and especially '... Americanisation, corporatization and homogenization as it extends today across the empire of the world'.⁴³

This distrustful reaction can also be construed as the after effect of bewilderment before a fast emerging process of dissolution between culture and place – due to the increasing traffic between cultures – and the subsequent amalgamation of dis-embedded cultural practices which generates new hybrid cultural forms.⁴⁴ This

⁴⁰ See, for instance, United Nations Commission on International Trade Law, forty-fourth session, Vienna, 27 June–15 July, Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna 13–17 December 2010) A/CN.9/716, 2011, p.5.

⁴¹ The initiative to introduce the unification of international trade law into UNCITRAL came from an Eastern European country (Hungary) and received support from many developing countries. This came as a response to certain organisations (International Rome Institute for the Unification of Private Law and the Hague Conference on Private International Law). Although these organisations had the same aim, in reality their activities were dominated by the controlling influence of the industrialised free-enterprise nations of the Western world, even though they did not form a numerical majority of the membership. See Farnsworth A.E., 'UNCITRAL Why? What? How? When?', *The American Journal of Comparative Law*, Vol. 20, No.2, Spring 1972, pp. 314–5.

⁴² Kurasawa F., 'A Cosmopolitan from Below: Alternative Globalization and the Creation of a Solidarity without Bounds', *European Journal of Sociology* 45.02, (August 2004), pp. 233.

⁴³ Poster M., 'Global Media and Culture', *Literary History in the Global Age*, 2008, vol. 39, No.3, p. 2.

⁴⁴ Tomlinson J., *Globalisation and Culture*. Cambridge (UK) and Malden (US): Polity Press, 1999, p. 141.

process is particularly prominent in technology, the presence and use of which is a-territorial and has created its own culture.

Against this backdrop, internationalism and globalisation appear to pull in different directions; internationalism pulling towards the generation of activity driven by the composition of self-organised and defined territory.⁴⁵ Internationalism manifests the idea of composition of traits borne in legal systems of self-governed jurisdictions created within a delimited space, the local and national territory.⁴⁶ Regulations drafted within this context are **cross-border** and directed at the target of being **multicultural**. Globalisation, on the other hand, pulls towards the initiation of new, dense forms of transborder interaction outside the single power of the nation-state, raising the ambition that ‘these can be brought under democratic control and rendered accountable’.⁴⁷ Globalisation, therefore, refers to activities and systems of interaction outside the concept of territory, which create ‘overlapping communities of fate – the interlinking of the fortunes of cities and countries’ outside the single control of the individual or the state.⁴⁸ In this sense, regulations at global level are **transborder** and, as a consequence, national and legal culture dissolves and gives its space to the creation of a hybrid form of culture. The idea that globalised culture is hybrid culture emerges from the intuitive understanding of the notion of deterritorialisation.⁴⁹

Considering the third term: cosmopolitanism elaborates a concern about the prioritisation of the moral equal status of every human being independent of their national, cultural, ethical and other affiliations. Cosmopolitanism does not deny the significance of the historical, sociological and political sources that inform identity, but it asserts that they can obscure what people share.⁵⁰ The question arising here is: if throughout history the key political and legal concepts and mechanisms have evolved

⁴⁵ Held D., *Cosmopolitanism. Ideals and Realities*. Cambridge (UK) and Malden (US): Polity Press, 2010, pp. ix–xii.

⁴⁶ Held D., *ibid*, pp. ix–xii.

⁴⁷ Held D., *ibid*, pp. ix–xii.

⁴⁸ Held D., *ibid*, pp. ix–xii.

⁴⁹ Tomlinson J., *Globalisation and Culture*. Cambridge (UK) and Malden (US): Polity Press, 1999, p. 141.

⁵⁰ Held D., *Cosmopolitanism. Ideals and Realities*. Cambridge (UK) and Malden (US): Polity Press, , 2010, pp. ix–xii.

around the axis of and with reference to particular communities and spaces, how can they be reinvented to embrace a global age?⁵¹

Despite this enquiry, however, such is the unprecedented growth of globalisation that one cannot avoid acknowledging that it has defined a set of processes that re-calibrate the organisation of human activity by stretching the political, economic and social networks of communication and reference across regions and continents. Power is no longer pronounced in particular geographic locations, but rather spreads and diffuses across the world in such a way that an occurrence in one place can have an impact on many others.⁵² The leading polemic about globalisation of culture – and in the context of regulations legal culture – is that the power imbalance imprinted on international texts will be replaced by the prospect of homogenisation, through which hegemonic cultures will prevail against under- represented cultures. A lurking concern is that there will be ‘a world with one culture, one type of political voice, one vision of reality and justice’.⁵³ The aspiration to reflect ‘global culture’ on regulation is further enhanced in the context of ODR by the practice and associated experience of using standard processes, fixed texts, images, sounds – traits inherent in technology – that have become values in and of themselves.⁵⁴

The penetration of globalisation into the considerations of regulators brings about two main strands of argument. One is the growing discontent with homogenised global platforms of regulation, due to a new ideological orientation of anti-globalisation. ‘Westernisation, commoditisation, and the predominance of a neoliberal cosmopolitan ethos’ reflected in the ‘new world order’ is debated in a variety of contexts in the regulatory processes.⁵⁵ It is acknowledged that ‘transnational flows’⁵⁶ or ‘global

⁵¹ Ibid., pp. ix–xii.

⁵² Ibid, pp. ix–xii.

⁵³ Poster M., ‘Global Media and Culture’, *Literary History in the Global Age*, 2008, vol.39, No.3, pp.691–4.

⁵⁴ Poster M., ‘Global Media and Culture’, *Literary History in the Global Age*, 2008, vol.39, No.3, pp.691–4.

⁵⁵ Theodossopoulos D., ‘Introduction: United in Discontent’ in Theodosopoulos D. and Kirtsoglou E. (eds.), *United in Discontent. Local Responses to Cosmopolitanism and Globalization*, New York and Oxford: Berghahn Books, 2010, p. 2.

flows⁵⁷ - terms used by anthropological literature to communicate the complex nuances, local idiosyncrasies and the continuous unfolding of globalisation as an ongoing process — do not move merely ‘from the West to the rest but also between peripheral destinations’. However, transnational flows that lead towards the ‘orientalisation of the West’ are few and far between; an observation that tempts one to conclude that the reason for this is that non-Westerners cannot win the competition against the persuasive power and institutional strengths of Western culture in its many pretexts. This is not the equivalent of stating that globalisation is Westernisation. Globalisation is far more complex than a linear historical change.⁵⁸ It is, indeed, this very essence of globalisation, its semantic vagueness and all-inclusiveness, that encapsulates the dynamic of local complaints that challenge global processes. Globalisation in this context is regarded as responsible for the disaffections of the world order and, therefore, as a category to blame.⁵⁹ These observations bring us closer to the focal point of the increasing complaints of the ‘culturally occupied locales’⁶⁰ about the national and international elites who endorse a neoliberal, cosmopolitan political direction through regulation. Their critical discourse is taking flesh in the words of situated actors who share the awareness of their peripheral position but voice their complaints with confidence and disgruntlement despite the fact that it ‘is mostly unofficial, not very systematic or articulate, but in all cases meaningful within its own cultural specificity’.⁶¹

⁵⁶ Eriksen T.H. (ed.), *Globalisation. Studies in Anthropology*. London and- Sterling, Virginia: Pluto Press, 2003, p.13.

⁵⁷ Appadurai A., *Modernity at Large. Cultural Dimensions of Globalisation*. Minneapolis and London:University of Minnesota Press, 1996, p.29.

⁵⁸ Eriksen T.H. (ed.), *Globalisation. Studies in Anthropology*. London and Sterling, Virginia: Pluto Press, 2003, pp.12–13.

⁵⁹ Theodossopoulos D. and Kirtsoglou E. (eds.), *United in Discontent. Local Responses to Cosmopolitanism and Globalisation*. New York and Oxford: Berghahn Books, 2010, pp.1–2.

⁶⁰ Comaroff J. and Comaroff J.L., ‘Millennial Capitalism: First Thoughts on a Second Coming’ in Comaroff J. and Comaroff J.L. (eds.), *Millennial Capitalism and the Culture of Neoliberalism*. Durham and London: Duke University Press, 2001, p. 14.

⁶¹ Theodossopoulos D. and Kirtsoglou E. (eds.), *United in Discontent. Local Responses to Cosmopolitanism and Globalisation*. New York and Oxford: Berghahn Books, 2010, pp.1–2.

The second strand of argument is that the position of anti-globalisation overlooks that the diversity of cultures persists. ‘Foreign’ cultures are amalgamated with local cultures in inventive hybrids and new local cultures at the global level are infinitely varied as they are not only based on national background.⁶² Bringing this discussion home, the initial core question as to whether the terms international, global and cosmopolitan are to be viewed by ODR regulators as terms that share ‘distinct yet related legal’⁶³ and beyond legal objectives, can be contemplated and evaluated not only in tandem with the rhetoric – as previously analysed – but also with the participants in the ODR deliberations.

An attentive look, for instance, at the organisation of the forty-ninth session (2016) of the ODR Working Group, evidences the attendance of representatives of all states’ members of the Commission, observers from the EU and non-member states, and observers from non-governmental organisations of various backgrounds.⁶⁴ The nature of the composition of attendees is yet another acknowledgment that the regulations on ODR were intended to reflect the interests, and be the outcome, of multiple, overlapping normative communities. If dispute resolution is to take the route of private justice by technological means, one cannot ignore that private actors, such as electronic platform providers and ODR administrators inevitably also become stakeholders of the normative process. In these respects, regulators are located within a variety of political sub-divisions, such as nations, cities, corporations and non-governmental organisations that govern many aspects of the existence and use of

⁶² Poster M., *Global Media and Culture*, *Literary History in the Global Age*, 2008, vol.39, No.3, pp.691–4.

⁶³ Harding C. and Banach-Gutierrez J.B., ‘Analysis and Reflections. The Emergent EU Criminal Policy: Identifying the Species’, Dec 2012, *European Law Review*, Issue 6, 37, p.759.

⁶⁴ United Nations Commission on International Trade Law, forty-ninth session, New York, 27 June–15 July 2016, Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session, Vienna, 30 November–4 December 2015, A/CN.9/862, p. 3. The same is also verified, for example, by the composition of the Working Group by representatives of states of the Commission, observers from non-member states and from intergovernmental and non-governmental organisations in the thirty-third session of the Working Group III in the United Nations Commission on International Trade Law, Working Group III (Online Dispute Resolution) New York, 29 February–4 March 2016 A/CN.9/WG.III/WP.139, p.1 and in the United Nations Commission on International Trade Law, forty-eight session, Vienna, 29 June–16 July 2015, Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session (New York, 9–13 February 2015), A/CN.9/833, p.3.

technology in dispute resolution. International law may be the source of additional rights and protections, ranging from standards for trade, technology, e-commerce, consumer product labelling and dispute resolution, but these state normative communities are ‘just the tip of the iceberg’. Non-state communities may also play a significant role in the normative force in a new era where ‘... the intensification of global interconnectedness, in which capital, people, commodities, images, and ideologies move across distance and physical boundaries with increasing speed and frequency’.⁶⁵ Moving from this realisation, we need to ask if- in a world where non-state actors, such as industry standard setting bodies, non-governmental organisations, national groups and other networks exercising ‘normative pull’ towards their interests and cultural affiliations- UNCITRAL, or any other organisation, can build a capacious in-depth understanding of the incredible range of overlapping authorities competing in the creation of regulation for ODR and our daily reality? Finally, this plurality of authority stimulated by migration and global technological communication encourages people to feel ties to, and act on the basis of affiliations with, multiple communities in addition to their territorial ones. This hybrid reality, therefore, causes conflict and confusion and poses the question of whether or not there are fertile grounds for ‘solving’ such conflicts in a constructive, inclusive process.⁶⁶ The discussion in the following section, therefore, seeks to grapple with the complexities of creating regulation in a world where a single act or actor is potentially governed and influenced by multiple legal and/or quasi-legal regimes.⁶⁷

International, Cosmopolitan, Global: Links between Governance, Power and Democracy

Moving the discussion further from the culture of the rules (or culture reflected in the rules) to the culture of policy making, the concept of governance calls for an analysis. Specifically, the literature distinguishes between governance and government in the light not only of the emergence of policy making that encompasses governments but also the increasing involvement of private actors, such as non-governmental agencies,

⁶⁵ Schiff Berman P., ‘A World of Legal Conflicts’, in *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders*. Cambridge: Cambridge University Press, 2012, p.24.

⁶⁶ *Ibid*, pp.3–5, 9.

⁶⁷ *Ibid*, p. 4.

corporations, associations and interest groups, in the provision of services and in social and economic regulation. This new element of governance becomes particularly pertinent when technology is used as a means of dispute resolution where non-state actors provide the technological means and where dispute resolution takes place outside the state context of the court room. Although the origins of the involvement of private actors in national public policy can historically be traced to government reforms, the underlying causes of these reforms emerged from the international environment. The ‘withdrawal’ of the State in industrialised nations from the provision of public services in favour of private or public-private arrangements has been connected to the recession of the 1970s, the pressure for globalisation, and the rise of the European Union as an ‘alternative political authority in Western Europe’.⁶⁸ Similar reforms took place in developing nations as the result of demands by the International Monetary Fund (IMF) and the World Bank in the early 1990s with the aim of improving the management of the public sector in developing countries.⁶⁹

The concept of governance, therefore, has increasingly been utilised to describe policy making at a national, regional and global level that is comparable with the regulatory processes for online dispute resolution. ‘Definitions and uses of the term of *governance*... are as varied as the issues and levels of analysis to which the concept is applied’. The definitions extend from absorbing any form of social coordination to policy making without the presence of an overarching political authority, to discussions about the elimination of the European welfare state, to reforms in the public sector in African countries. A common thread in all these concepts is the changing position of political authority.⁷⁰ This correlates with the a-territorial nature of technology, and even further with the transfer of authority in dispute resolution from state- sponsored institutions (i.e. the courts) to the non-state institution of ODR.

⁶⁸ Rose R., ‘The Nature of the Challenge’, in Rose R. (ed.), *Challenges to Governance: Studies in Overloaded Politics*. Beverly Hills: Sage, 1980, pp. 5–28 and Majone G., ‘From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance’, *Journal of Public Policy* 17, no.2, 1997, 139, 142.

⁶⁹ Hewitt de Alcantara C., ‘Uses and Abuses of the Concept of Governance’, *International Social Science Journal*, 50, No.1, 1998, pp.107–8.

⁷⁰ Krahmman E., ‘National, Regional, and Global Governance: One Phenomenon or Many?’, *Global Governance*, Vol.9, 2003, p.323.

The diversity and flexibility of the concept of governance is in line with the diversity and flexibility of the mechanisms of dispute resolution outside the court room and in symmetry with the inclusive approach of UNCITRAL towards ODR.

The focus of contemporary research is primarily on the differences between modes of national, regional and global governance, rather than the commonalities ascertained by comparisons of governance arrangements across these levels. As such, there is limited systematic investigation as to whether connections can or cannot be made at different levels of government and non-governmental arrangements. The framework that would emerge from such an analysis would inform policy makers in several ways. If governance is to be perceived as a general phenomenon, this framework would be utilised to draw comparisons across levels of analysis. This encourages the enquiry as to what degree the challenges and failures of governance arrangements at the national, regional, and global levels can be compared, and whether the solutions at one level could be adapted by another. The same framework could also be used to compare governance arrangements across levels. This would suggest that a trend from government to governance can be observable in commerce but also in all areas that have traditionally been identified with state monopoly authority, such as dispute resolution.⁷¹

Finally, the proposed framework could allow decisions to be made as to which factors have promoted the rise of governance in the process of policy making for online dispute resolution and how governance and decision-making modes have transferred from one level to another. The construction of such a framework would add merit to the considerations of ODR policy makers, as the emergence and uses of governance across various levels of analysis demonstrates that there are both differences and crucial similarities. Governance, at a universal level, can be defined by the fragmentation of political authority in the following dimensions: ‘geography, function, resources, interests, norms, decision-making, and policy implementation’. The in-depth understanding of the combination of these dimensions helps to

⁷¹ Krahnemann E., ‘Conceptualizing Security Governance’, *Cooperation and Conflict*, 38, No.1 2003.

distinguish the concepts of governance from government ‘as ideal concepts of fragmented and centralised political authority’.⁷²

Transnational trade in a ‘transnational space’⁷³ and its consequent consensual submission to the other party's jurisdiction or the a-territorial approach in dispute resolution has been a familiar experience of the commercial world since the Middle Ages. *Lex mercatoria* was developed as an autonomous, ‘a-national’ set of rules based on commonly trusted mercantile systems of customary law aiming for quick dispute resolution ‘using norms of ‘fairness’ as between the parties’.⁷⁴ These rules and practices served the needs of the merchants as it relaxed individual procedures to empower dispute resolution and ‘cajole’ the parties to ‘get on with their business’;⁷⁵ but they also suited the monarch, as they provided a system that increased both trade and taxes. Commercial stakeholders, therefore, have a firmly established mutual base of trust and confidence in resorting to non-exclusively state- driven mechanisms of dispute resolution. The term governance, however, has been recruited to conceptualise this practice and provide an umbrella term ‘to signify the minimal state, corporate governance, good governance ...’ and, nowadays, extend to ‘... new forms of public management, a socio-cybernetic system and self-organising networks’.⁷⁶ Frequently, governance is a term also used in connection ‘with government, the exercise of authority or the system and management of authority’.⁷⁷ The prevailing element of *Lex Mercatoria* was pragmatism. The concept of governance, however, in modern academic literature aims to address and deal with the nuances and impact of:

⁷² Krahmman E., ‘National, Regional, and Global Governance: One Phenomenon or Many?’, *Global Governance*, No.9,, 2003, p. 323.

⁷³ Sweet A.S., ‘The New Lex Mercatoria and Transnational Governance’, *Faculty Scholarship Series*, Paper 92, available at: http://digitalcommons.law.yale.edu/fss_papers/92, p.628.

⁷⁴ Ibid. p.630.

⁷⁵ Ibid., p.630.

⁷⁶ Rhodes R.A.W., ‘The New Governance: Governing Without Government’, *Political Studies*, Vol. 44, No.4, 1996, pp.652–3.

⁷⁷ Krahmman E., National, Regional, and Global Governance: One Phenomenon or Many?, *Global Governance*, Vol. 9, 2003, pp. 323–4.

[a]dministrative structures, colonial rule, democratic decision making, international development, multilevel decision making at a regional level, the regulation of markets, the devolution of political authority to the local and regional levels, and the new transnational regimes' on policy making.⁷⁸

In this context, governance encompasses an international and global character but, most importantly, extends to embrace an acknowledgement of the complex power dynamics and multi-centred focus of political authority and participation in a conscious effort not to reinforce powerful actors' interests.

The acknowledgment of the significance of the influence of non-state actors on the international regulatory process has led eminent scholars⁷⁹ and policy makers to construe these processes of governance as inclusive in the process of reaching consensus. Yet, the inclusive character of regulation processes and enforcement mechanisms does not automatically render the whole regulatory system inclusive. Normative systems, including those encapsulated in international regulatory organisations, traditionally rest on some formal concepts, categories and structural dynamics which inherently require distinctions between what falls within their ambit and what does not.⁸⁰ Moulding an inclusive regulatory process through several spaces of interaction (national, international, regional, transnational, global) of state and non-state actors makes sense if these layers of interaction are based on an understanding of

⁷⁸ Ibid.

⁷⁹ See, for instance, the approach of Professor McDougal referring to a decision making process for the creation of rules '... including both a structure of authorised decision-makers and a body of highly flexible inherited prescriptions': '[i]t is a continuous process of interaction in which the decision-makers of individual nation-states unilaterally put forward claims of the most diverse and conflicting character ... and in which other decision-makers, external to the demanding nation-state and including both national and international officials, weigh and appraise these conflicting claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them'. Myres S., McDougal and Associates, *Studies in World Public Order*, New Haven, CT: Yale University Press, 1960, p. 773.

⁸⁰ D'Aspremont J., 'Inclusive law-making and law-enforcement processes for an exclusive international legal system', in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, D'Aspremont J. (ed.), Taylor and Francis Group, 2011, p. 434.

the structure, process⁸¹ and dynamics within which these actors operate rather than their participation *per se*. To this end, the enquiry arises: Can a process which is apparently fluid and inclusive have a structure? Is this structure of decision makers ‘buried’ in the regulatory rhetoric? If so, ‘Where can it be found?’ How can new claimants of the process convince a structure of established powerful decision makers to abandon their vested interests and allow new claims to enter and change the entire process? If these new claims are dependent for authorisation upon established authorised decision-makers⁸² and underlying normative biases, the mere participation of a wide range of actors will not, by itself, create a cosmopolitan space for reaching consensus in regulation.

This perspective of considering governance would signify a new era in the understanding of the actors and processes involved in the distribution of justice and a recast to include cosmopolitan culture in the composition of participants, the contents of negotiations and, ultimately, the regulatory outcome.

The shift of power from the state – top down, and sideways – to supra-state, sub-state, and, above all, non-state actors is the outcome of the change in the structure of organisations; the transformation from hierarchies to networks and from centralised compulsion to voluntary association. The dominant institutions in these networks remain concentrated in North America and Western Europe but their impact is felt across the globe. The engine of this transformation is the evolution of information technology and the immense expansion of communication capacity. The outcome of this evolution is not world government but rather global governance. If government signifies the exercise of power through established institutions, governance signifies relinquishing state sovereignty and problem solving through the cooperation of

⁸¹ Noortmann M., ‘Towards an interdisciplinary approach to non-state participation in the formation of global law and order’, in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, D’Aspremont J. (ed.), Taylor and Francis Group, 2011, p. 77.

⁸² D’Amato A., ‘Non-state actors from the perspective of the policy-oriented school. Power, law, actors and the view from New Haven’, in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, D’Aspremont J. (ed.), Taylor and Francis Group, 2011, p. 71.

stakeholders within a changing and often uncertain framework,⁸³ with the ultimate aim of gaining regulatory legitimacy.

The Matter of Legitimacy

A discussion about culture embedded in regulatory frameworks and policy making is ultimately a discussion about regulation that aims to gain legitimacy. In the case of technology as a means of communication and the Internet, governance structures- informally developed in its early stages- were substantially different from those emerging from public policy decision making. Traditionally, global telecommunication systems were governed through state-centric mechanisms that were used to establish treaty -regulatory frameworks for non-state actors to operate within. Legitimate participation in traditional governance was the strict privilege of states that possessed the authority of the sole decision maker. In the case of online platforms and the Internet, non-state-actor-driven governance frameworks were developed outside these traditional mechanisms. They were developed in the context of a different conception of legitimacy and authority. State and non-state actors were forced to cooperate around the creation of institutions and regulations that could accommodate and reflect a variety of their cultural views on authority, legitimacy and decision-making processes in governance.⁸⁴ Therefore, the participation of state and non-state actors in decision- making and regulatory processes for online platforms is not unprecedented. David Clark, the chief protocol architect in the development of the internet said: ‘We reject kings, presidents, and voting. We believe in rough consensus and running code.’⁸⁵ This quote reflects that the architecture of online platforms was not only designed as computer networks but also as a means by which this network would be run, managed and regulated.^{86, 87} This vision of governance is imbued with a

⁸³ Slaughter A-M., ‘The Real New World Order’, *Foreign Affairs*, Vol.76, No.5, pp. 184–6.

⁸⁴ Epstein D., ‘The making of institutions of information governance: the case of the Internet Governance Forum’, *Journal of Information Technology*, Vol. 28, p. 137.

⁸⁵ Available at: <http://www.ietf.org/tao.html>, last accessed on 19 June 2019.

⁸⁶ Braman S., ‘The Interpenetration of Technical and Legal Decision-Making for the Internet’, *Information, Communication and Society*, Vol.13(3), pp.309–11.

⁸⁷ Braman S., The Framing Years: Policy fundamentals in the Internet design process, 1969-1979, *The Information Society*, Vol.27(5), pp.295–7.

set of powerful beliefs and redefines the notions of legitimacy and authority for policy deliberations.⁸⁸ The question arising from this new reality is whether these changes can sustainably be embraced in one regulatory body that will not regard justice – by means of ODR – as a commodity enabling the coexistence of competing political interests and neoliberal values of the new elites. Instead, it will reflect a cosmopolitan ethos – i.e. the ethos of ‘the right to present oneself and be heard within and across communities’ through an equal status in deliberation and consent⁸⁹ - which will generate legitimacy amongst its stakeholders.

The question of whether an international, cosmopolitan or global regulatory approach in ODR would facilitate its legitimacy and effective enforcement becomes topical as we experience an epoch of worrisome ambiguity arising from the regression between a ‘belligerent reassertion of ethnic nationalism and religious tribalism’ and the ‘unfulfilled promise of a globalizing world order’. This historical experience thrusts us to the new and urgent query: can a regulatory solidarity be fostered unless the bounds are clarified and explicated?

Although sub- and supra-national solidaristic bonds have existed and manifested themselves in various forms, and to different extents, over time, the omnipresent recognition of globalisation provokes the reflection that ‘the sense of togetherness’ has historically not only existed within the framework of nation-states but also in universalist ideologies (political doctrines, religions) and collective identities (gender, ethnic background). Cosmopolitanism, despite its long pedigree, has been resurfaced as an appealing alternative to the dynamics of social solidarity with reference to national frameworks. Whether cosmopolitanism is to be viewed as a universalist moral ideal, whereby all humans understand themselves as citizens of the world who can interact with a multiplicity of ways of life, or as a political project inventing rigorous international regulation and transferring sovereignty ‘upward’ to institutions of global governance, the current concept of cosmopolitanism is promising.

⁸⁸ Epstein D., The making of institutions of information governance: the case of the Internet Governance Forum’, *Journal of Information Technology*, Vol. 28, p.137.

⁸⁹ Held D., *Cosmopolitanism. Ideals and Realities*. Cambridge and Malden (US): Polity Press, 2010, p. 92.

Wherever one lays one's hat is home if one has no particular attachment. Such an approach can breed so-called jet-elitism, 'the class consciousness of frequent travellers' that is complacent with its own deterritorialised sophistication whilst it cringes at the 'provincialism' of anything that reflects a more rooted experience and lifeworlds within which humans usually operate.⁹⁰ Does, therefore, the a-territorial nature of technology suffice to reinforce and crystallise bonds of mutual commitment and transnational reciprocity? Is the rhetoric of the debates that ODR will broaden access to justice through reciprocal discourse⁹¹ a mere expression of desire or is it that the realisation of this rhetoric depends on something more than regulation decreed from above?⁹² Moreover, if power in negotiation is asymmetrical, how can this asymmetry not be reflected in the outcome of the negotiation for regulation? Power can ignore consensus, unless the actors involved in the negotiation process share some more potent consensus. This alternate power base may be found in touching consumers as a self-selecting group, not defined by belonging to a nation state but in the commonality of their interests (as for instance, not to be deceived) and actions.

The diversity of the membership envisaged for ODR users makes generalisations in regulations challenging. Transnational coalitions may end up as patchworks unless legal cosmopolitanism is achieved 'from below' via normatively- and politically-shaped forms of global social action. Learning from earlier political and regulatory

⁹⁰ Calhoun C., 'The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism', in Archibugi D., (ed.), *Debating Cosmopolitics*, London and New York: Verso, 2003, pp. 86, 90.

⁹¹ See, for instance, UNCITRAL Technical Notes on Online Dispute Resolution, United Nations, New York, p.viii, 'Noting with appreciation that all States and interested international organisations were invited to participate in the preparation of the Technical Notes either as members or as observers from the forty-fourth to the forty-ninth session of the Commission, including through circulation of the text of the draft Technical Notes from comment to all States as well as to international organisations invited to attend the meeting of the Commission as observers.' See also UNCITRAL Report of Working Group III (ODR) on the work of its thirty-second session (Vienna, 30 November-4 December 2015), A/CN.9/862, p. 2: 'It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations ...' and in the same '... and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations'.

⁹² Kurasawa F., 'A Cosmopolitanism from Below: Alternative Globalisation and the Creation of a Solidarity without Bounds', *European Journal of Sociology*, Vol. 45, No. 2, 2004, pp. 233-4.

movements,⁹³ bureaucratic authoritarian tendencies (with rigid divisions between leadership and rank-and-file members) led to disunity, conflict and ultimately, lack of legitimacy. Cosmopolitanism ‘from below’ could invent an organisational structure that is decentralised and relatively flexible but this is subject to consistency of expectation and cross-cultural agreement, which is a dimension of the process to be explored with a critical approach. By this I mean that even the ideas of other agents below the state level are not necessarily democratic. ‘Community leaders’, of whatever that ‘community’ is, may still represent, consciously or not, the interests and culture of actors who traditionally have had access to power. Grassroots initiatives with direct citizen and organisation involvement would facilitate effective transnational linkages by representing the, sometimes, disparate causes they represent (anti-poverty, human rights, indigenous rights etc.). Within the context of horizontal organisational mechanisms, affinity group participants and self-governing units can liaise during meetings and fora as to what coalitions they will join during the process of regulatory debate and negotiation. This process of open debate and negotiation, I would suggest, encourages the assembly to reach consensus. These proposed procedures are not flawless and strong debates may remain, but they could aspire to challenge global neoliberalism and promote a coherent set of policy proposals for a different world order.⁹⁴

This alternative design of procedures, institutions and discursive practices are in line with UNCITRAL’s professed aim of broadening access to justice through ODR by responding ‘to the needs of developing countries and those facing post-conflict

⁹³ See the two aforementioned Conventions adopted by UNIDROIT (ULIS: Uniform Law on International Sales and ULFIS: Uniform Law on the Formation of International Sales) in an attempt to harmonise the law on international sales. They were ratified by a handful of states and heavily criticised on both political and legal grounds. The United Nations Commission on International Trade Law (UNCITRAL) was, therefore, considered to be the ideal organisation to undertake the drafting of such an international convention since its membership consisted of developing, developed and socialist countries- the interests of which were anticipated to be more fairly reflected in the provisions of the Convention. Carr I., *International Trade Law*, Routledge-Cavendish, UK-US, 2010, p.57 and Carr I., *International Trade Law*, Chapter 2: The Vienna Convention of the International Sale of Goods 1980, Para 17.2, 2017 [Calibre e-book viewer EPUB], Retrieved from <https://www.bl.uk>.

⁹⁴ Kurasawa F., ‘A Cosmopolitan from Below: Alternative Globalisation and the Creation of a Solidarity without Bounds’, *European Journal of Sociology*. Vol.45, No.2, 2004, pp. 233-4.

situations’,⁹⁵ or by ‘... including differences in culture and level of economic development’⁹⁶ and are fundamentally both cosmopolitan and pluralist. Pluralist institutions and processes may better reflect the complexity of the world, despite their challenges. The added norms, viewpoints, cultural approaches and participants produce better decision making mechanisms and, therefore, better adherence to these decisions by participants and non-participants and ultimately better world outcomes. A focus on this hybridity in the law making mechanism, and in this case the making of ODR regulations, also needs to acknowledge the complexity of deciding how much to defer to one normative/cultural community and how much to impose the norms of one’s own community. A cosmopolitan pluralist approach may not provide an authoritative metric of which set of norms and cultural traits should prevail in this messy hybrid world. Cosmopolitan pluralism aims to provide a ‘jurisgenerative’ model which is moulded by the creative interventions of various communities and normative sources in the ongoing political, rhetorical and legal iterations that are inherent in the nature and philosophy of online platforms for dispute resolution. ‘Law beyond borders’ not only refers to norms across territorial borders but also to legal articulations that function ‘beyond’ the conceptual borders between law and political rhetoric. A cultural analysis of law making, therefore, argues that regulations should both reflect and construct social reality. The ODR debates and making of regulations should not reflect a world of coercive power and abstract notions of legitimacy but rather a world where ‘jurisgenerative’ practices proliferate and opportunities for discourse and creative adaptation are growing. Scholars and policy makers should encourage this multiplicity and engage in conversation so that regulations are not created in ‘a top-down framework that cannot help but distort the astonishing variety on the ground’.⁹⁷ This conversation, however, should occur with due consideration to the problems that arise in who will represent, who will speak on behalf of, these

⁹⁵ Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session (Vienna, 30 November-4 December 2015), A/CN.9/862, p. 2.

⁹⁶ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010), A/CN.9/716, p. 5.

⁹⁷ Berman P.S., *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders*. Cambridge and New York: Cambridge University Press, 2012, p. 22.

communities as aforementioned. Nonetheless, at least this approach holds up the possibility of progress, I suppose, to the existing certainty of failure.

Concluding Remarks

The deliberations of the UNCITRAL Working Group on ODR attempted to animate a project that was envisaged in the frame of inclusion of cultures, stages of development and post-conflict experiences on the common platform of technology. At this stage, the participant states⁹⁸ have not been able to establish a long-lasting form of collaboration and mutual consent for binding ODR regulations. The rhetoric of the documentation of these deliberations demonstrates an evolutionary modernising tendency, but this did not lead to the consensual binding regulatory framework that was the intended outcome of this lengthy process. This was, perhaps, the best outcome that could be achieved at this stage; no outcome is better than a coercively achieved outcome. There was an underlying confidence that the actor of technology would facilitate homogeneity in ODR and establish fluid linkages amongst the participants. This was imprinted in the consensual outcome of the Technical Notes but did not reach the extent of these rules having binding force.

Despite the fact that it is easier nowadays for certain industries to communicate via technological networks rather than through the mail, there is not necessarily a direct link between technological modernisation and the elimination of persistent marked ethnic, regional, national and developmental differences amongst participants. On the contrary, the lack of consensus in producing a binding regulatory framework provides a strong indication that although the intent for inclusivity in the heterogeneity of culture, diverse historical experience and stage of development has been articulated in the rhetoric of the Working Group, its acknowledgment has not dissolved the challenges presented by this heterogeneity to generate a uniform style of globalised regulations. Nonetheless, this heterogeneity is not to be seen as an obstacle that

⁹⁸ Participant countries, amongst others, were: Argentina, Armenia, Austria, Brazil, Bulgaria, Canada, China, Colombia, Czech Republic, Ecuador, El Salvador, Fiji, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Mexico, Namibia, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America, Venezuela (Bolivarian Republic of). See UNCITRAL, Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session (New York, 29 February-4 March 2016), A/CN.9/WG.III/XXXII/CRP.2, p.3.

requires removal but rather as an essential source of information for any programme that seeks development and integration.⁹⁹

Policies and regulations aimed at promoting greater integration through cultural and other inclusion ought to consider that economic globalisation and technological innovation have already begun to reconfigure identities, beliefs and conceptualisations of 'what is one's own and one's connections to others'. In order to understand the challenges of the multicultural development project of the ODR regulations, one could distinguish between two of its main constituents: its multiple ethnicities and the multicultural outcome of a range of modern forms of segmentation and the organisation of culture in industrialised, non-industrialised and post-conflict societies. This complexity is evident in life circumstances along with attempts to formulate regulations. There is no dearth of research on the impact of the representation of multi-ethnic relations in the process of modernisation and integration. Problems arise with attempts at integration and modernisation when it becomes increasingly obvious that metropolitan models of development and integration cannot be applied mechanically. It is not necessarily that the reason for this is that modern technologies are incompatible with non-Western traditions. Cultural diversity can contribute to growth. Technological techniques and traditional consumption cultural norms, and the wealth of the variety of modes in dispute resolution can be the basis of alternative forms of regulatory development.¹⁰⁰

The a-territorial nature of technological means does not suffice to create a common regulatory platform which everyone feels that can refer to and trust. A cultural analysis of deliberations, rules and regulations is argued to be the avenue that contributes to the understanding of how regulations operate as norms that both 'reflect and construct social reality'. For instance, one may think that the single purpose of regulations is to construct simple, easily defined rules that foster efficiency and predictability, irrespective of whether and how they reflect social reality. However, even if there is such an underlying impulse in the rationale of drafting regulations,

⁹⁹ Canclini N.G., *Consumers. Globalisation and Multicultural Conflicts*. Translated and with an Introduction by George Yudice. Minneapolis and London: University of Minnesota Press, 2001, p. 124.

¹⁰⁰ Canclini N.G., *Consumers. Globalisation and Multicultural Conflicts*. Translated and with an Introduction by George Yudice. Minneapolis and London: University of Minnesota Press, 2001, pp. 123–34.

formalist rules that fail to reflect ‘social reality and lived experience’ tend to be short-lived and replaced over time by other such rules that are destined to share the same fate. Purely jurisdictional and international rules could not cope with the fast changing social reality that has been moulded by the headway made in transportation and communication technologies and the resulting shifts made in the way governments, corporations and non-governmental organisations operate and interact and how people live their lives.¹⁰¹

A culturally analytical framework, therefore, in the discussion of drafting regulations serves the purpose of conceptualising law and globalisation. Ultimately, by devoting attention to the normative and legal hybrid which operates, and is created in, various local settings in multiple communities – be they geographical, national, ethnic, cultural or epistemic– policy makers can acquire a more in-depth ‘nuanced understanding of the international and transnational terrain’. This will, expectantly, be a regulatory world ‘in which claims for coercive power, abstract notions of legitimacy, and arguments about legal authority are only part of an ongoing conversation, not the final determining factors’. The proposition is that this alternative jurisprudence will be fundamentally a combination of both cosmopolitanism and legal pluralism. Cosmopolitan as a framework that recognises the membership of multiple communities – local, global, territorial and epistemic – in drafting and governing norms. Legally pluralist in exploring and acknowledging the myriad ways in which overlapping legal systems interact with each other and their multiplicity ‘can ... create openings of contestation, resistance and creative adaptation’.¹⁰²

Future empirical research through interviews, case studies and surveys can test the organisational and professional culture and perceptions of policy makers when they are called to regulate on ODR. Also, the same methodological avenues can be used to offer insights into which aspects of the regulatory process or the proposed outcome policy makers, participating governmental and non-governmental and private actors considered to be not fairly reflecting their perspective or interests. Or, in what way the

¹⁰¹ Berman P.S., *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders* Cambridge: Cambridge University Press, 2012, pp.21–2.

¹⁰² Berman P.S., *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders* Cambridge: Cambridge University Press, 2012, pp.21–2.

intended bridge between policy and end receivers failed to be created and translated into support of wider and fairer access to justice through ODR. Establishing fora where representatives, not only of member states but also non-governmental organisations, private actors and end users will exchange views on the operation of ODR in parallel to the formal procedures will inform policy makers and their reactions. This practice aims to shed light on whether the proposed regulation is reflective of power-balance and inclusive strategies and how, and if not why. This will shift pragmatism in regulation into an ethical paradigm of cosmopolitanism through inclusion and democracy as these are imprinted in the rhetoric of UNCITRAL.

A broader engagement with and reflection on these findings, concepts and diverse legal traditions, will strive to replace conscious or sub-conscious attempts to stifle conflict - either through the imposition of sovereigntist, territory-based privileges or through universalist harmonisation schemes – and will, instead, seek to establish a wide variety of procedural mechanisms, institutions and practices for managing, without eliminating hybridity. In sum, pluralism and cosmopolitanism will not only offer a more comprehensive account of the world we live in and its sustainability when considering the operation of ODR within it, but also ‘a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices’.¹⁰³

The proposed reformulation of the terms of the discussion about ODR regulation aims to address the difficulties encountered in presenting different social phenomena as a result of confusing similar yet distinct terminology. This confusion of terms may be part of the reason that no consensus in binding ODR regulation was reached. The way the international, cosmopolitan and global aims were dealt with in regulatory procedure and debate conceals more than it reveals about the acknowledgment of the various levels of competing interests and values of the involved actors.

By this approach I do not solve, I recognise, the impact of state oppression in debates over regulations, or the culturally determined inequality of access to technology due to age, income or other factors. I, instead, argue that the proposed different orientation

¹⁰³ Berman P.S., ‘Global Legal Pluralism’, *Southern California Law Review*, Vol.80, 2007, pp. 1155–6.

in rule formulation may, in touching consumers - as a group not defined by belonging to a nation state but by the commonality of their interests and actions - and in using the 'bottom-up' strategy as a starting device, actually mean that we reach, not a perfect consensus and an ideal result, but an alternative framing of a problem which, as currently addressed, has manifestly failed everyone.