

# INTERNATIONAL BBB RATINGS A LA EBAY: A PROPOSAL FOR AN IMPROVED ONLINE BETTER BUSINESS BUREAU TO FACILITATE INTERNATIONAL BUSINESS TRANSACTIONS

## INTRODUCTION

*Wanting to make the best of the new world, a Russian family looks abroad to find creative business ideas in the United States, land of milk and honey. They expect transparent business partners composed of sheer integrity—or at least some degree of integrity. Anticipating incredible results, the family pre-pays a \$25,000 consultant fee, product sight unseen.*

*Months later, after leaving countless messages for the American company, the family sends a family member to America to study law. Armed with legal knowledge, the family confronts the American company only to have it produce a canned 4½-minute PowerPoint presentation, a result that falls short of any reasonable expectations.*

*The family counts it as a partial loss, partial lesson learned.<sup>1</sup>*

Business globalization is inhibited by trepidation steeped in a strong history of cultural misunderstandings and a lack of communication.<sup>2</sup> With an internet-based platform<sup>3</sup> to transparently report global business-to-business (“B2B”) dealings, companies could freely invest and transact. The unspoken benefits include an increase in the global economy and standard of living.

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1. This story was told to the author in the spring of 2004 by an LLM student at California Western School of Law who is hopeful one day he will salvage the business relationship.

2. GLOBALIZATION, TECHNOLOGY, AND COMPETITION: THE FUSION OF COMPUTERS AND TELECOMMUNICATIONS IN THE 1990S 3-5 (Stephen P. Bradley et al. eds., 1993). “Globalization is an important emerging business mandate relevant to virtually all businesses. It is an Information Economy, as opposed to an Industrial Economy, business concept.” *Id.*

3. By “platform” the author refers to a website that is not just a page with information and links, but provides various tools and interactive features that can support a variety of functions. This “platform” concept is similar to how the Microsoft Office Suite is a platform for PowerPoint, Word, Access and Excel.

eBay.com has reeducated the world about the strength of human accountability.<sup>4</sup> Accountability simply out-muscles legal action. Without jurisdiction, judge or jury, eBay has brought morals and justice into successful, small, remote transactions between strangers. It has achieved this through its transparent, reputation-based bidding system.<sup>5</sup> Sadly, many business owners are focusing on decreasing profit margins when trying to compete with an operation that sells computers from the back porch of a suburban apartment.<sup>6</sup> In a locked stare at the challenges, many businesses fail to see the advantages available to them in a reputation-based transaction system. Yet, forward-thinkers look to eBay's fame and take careful inventory of their recipe for success—success founded in the self-policing advantages of a reputation-based system.<sup>7</sup>

This comment encourages businesses in B2B environs to pursue a worldwide Better Business Bureau ("BBB") system of reports, with the added twist that reports would not only compile the tragedies of B2B transactions, but also the successes. This BBB system should be styled after eBay's standard, not only introducing sellers and buyers, but also presenting highly desirable transaction feedback, replete with reminder emails and marks for parties who give feedback. Such a system would be possible if this new B2B site was also a meeting place for B2B transactions. The site would have complete historical transactional detail, with rankings sortable by date, amount and vendor. Noting the successes of business-to-consumer (B2C) sites, such as sellers on eBay or other direct sites like [www.bestbuy.com](http://www.bestbuy.com), the B2B site would be comprised of compilations of quantitative

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4. "eBay's mission is to provide a global trading platform where practically anyone can trade practically anything." eBay, Company Overview: Index, at <http://pages.eBay.com/community/abouteBay/overview/index.html> (last visited June 10, 2004).

5. eBay, Company Overview: Trust, Safety, and Privacy, at <http://pages.eBay.com/community/abouteBay/overview/trust.html> (last visited June 10, 2004).

To dispel hesitancy sometimes associated with Internet commerce, eBay invented the industry's first electronic information exchange exclusive to one-to-one trading—the Feedback Forum. Through eBay's innovative Feedback Forum, users can submit comments about their dealings with one another. In addition, we established SafeHarbor™, an in-house customer support team dedicated to providing, to the very best of our ability, a safe trading environment, and protecting the eBay community against fraud.

*Id.*

6. Ian Kaplan, Book Review, at [http://www.bearcave.com/bookrev/increase\\_ret.html](http://www.bearcave.com/bookrev/increase_ret.html) (last modified Oct. 2000) (reviewing W. BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY (2000)).

7. In a reputation-based system users want to do well because a customer's comments about a transaction will be posted for anyone to see. Everyone will see the complete diatribe from all past customers. The seller can do nothing beyond giving a simple explanation for receiving derogatory remarks.

scores and qualitative comments weighted for recency and relevancy to the transaction desired with the stranger company.

This eBay-styled international BBB system would take the threatening stick of adjudication out of the business community's hands and replace it with the much more successful carrot of reputation. Business is faced with immediate repercussions: do a great service and win rave reviews, or perform poorly and suffer a Darwinian demise. A good, collaborative business partner will be highly visible and will quickly reap the rewards of good business dealings.

Part I of this Comment explores the history of business relations, from traditional due diligence measures to more avant-garde online tools for due diligence. These span from BBB's methods of disbursing and indexing companies to hoovers.com and Dun and Bradstreet methods of sizing up a business partner before entering into the contract. Part I also explores eBay's secrets of success, complete with a detailed examination of its feedback and rating systems to find what tools can be gleaned for use in a B2B context.

Part II deals with the Contracts for the International Sale of Goods (CISG)<sup>8</sup> as the United Nation's default adjudicative recourse for international B2B disputes. International B2B e-commerce is acting under economic rather than legal forces. Faced with non-use and common CISG "opt-out" clauses, the United Nations is attempting to make the CISG relevant with future changes.

Part III concludes the current tools for tracking and accessing business credibility are inefficient. Costly due diligence should be replaced or complemented with a reputation-based online transaction reporting system, complete with tools modeled in part by those designed by eBay, Alibaba, Worldbid and the BBB. While the legal system will likely regain relevance in day-to-day B2B e-transactions, right now the relevant precedent is relational, not adjudicative, and markets will act accordingly.

## I. REPUTATION WEIGHT IN B2B TRANSACTIONS

International B2B e-commerce disputes are legitimate fears that businesses openly hope will go away if ignored. In a survey of 100 senior executives of some of the largest companies in the United States, conducted by the American Arbitration Association, two-thirds

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8. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 19 I.L.M. 688-99 (1980) [hereinafter CISG].

of the executives expressed concern about a B2B e-commerce dispute with a major supplier. Sixty-four percent of those respondents, however, said their company does not yet have a plan in place to deal with them.<sup>9</sup> This festering problem is approaching explosion, and the largest companies are watching the timer tick without a plan of action. So what methods of protection are available for more traditional B2B relationships? Many online e-commerce platforms have heard the harbinger of danger and proactively addressed many aspects of e-commerce disputes. Traditionally there are three options, although many companies, sadly enough, stop at the first option.

### *A. Option #1: Restrict B2B Partners to Nationals*

Shuttering international growth is a harbinger of business stagnation and obsolescence. Yet, “[m]any businesses concerned about having to resolve disputes in unfamiliar legal systems have simply chosen not to make their goods available to consumers located outside of their country.”<sup>10</sup> This is the worst option for companies whose competitors are growing globally.<sup>11</sup>

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9. *B2B E-Commerce Posed for Explosion According to American Arbitration Association Study; Survey of Fortune 1000 Uncovers Need for E-Commerce Rules*, BUS. WIRE, May 17, 2001, available at [http://www.findarticles.com/p/articles/mi\\_m0EIN/is\\_2001\\_May\\_17/ai\\_74627151](http://www.findarticles.com/p/articles/mi_m0EIN/is_2001_May_17/ai_74627151).

10. Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1114-15 (2002). See also DAVID BOAZ, LIBERTARIANISM: A PRIMER 82 (1998) (“For an extended society to work, it is essential that people meet the obligations they have assumed and that contracts be enforced. If people are not generally trustworthy, none of us will want to enter into contracts with people we don’t know, and the market economy will not be able to expand and flourish.”).

11. “Those who say that humans ‘are made for cooperation, not competition’ fail to recognize that the market *is* cooperation. (Indeed, it is people competing to cooperate better!)” BOAZ, *supra* note 10, at 149. By limiting your marketplace, one limits the pool of available buyers and B2B partners which inherently reduces the possibility of garnering the best price for an item. For example, a used car dealer who only advertises cars to passers by on the street is engaging in an antiquated method of doing business. Today’s used car dealers have a veritable plethora of advertising methods and ways to reach an abounding amount of potential customers, thereby securing the highest possible profit for their company. As Soderquist phrases it, “[n]ot only is selling likely to be easier and quicker in the trading market, but the price also may be better.” LARRY D. SODERQUIST, UNDERSTANDING THE SECURITIES LAW § 2:2.1(c) (4th ed. 2004).

*B. Option #2: Due Diligence: "On the Internet, nobody knows you're a dog"<sup>12</sup>*

People have wanted to know about the quality of their business partners since commerce began.<sup>13</sup> Due diligence requires transparent online access to transaction history. With online video tours of business sites, staff pictures and links to past customers, Alibaba has made progress to compensate for this deficiency.<sup>14</sup> Although video recording of business facilities and present operations seems like a tangible promise, it remains a cousin of reality.<sup>15</sup> Nevertheless, there are several more traditional methods of performing due diligence to one's future business partners that should first be discussed.

*1. Traditional Referrals: Antiquated but Effective*

Relationships facilitate business. For example, various European countries know relationships keep people out of court, so they encourage businesses to follow the proven method of forging business relationships via mandatory memberships in local chambers of commerce.<sup>16</sup> Yet, unless listed online in a user-friendly common area, chamber relationships and reputations are neither transparent nor useful for the world-at-large. Unpublished business reporting perpetuates the "school of hard knocks" for other potential business partners and stunts the growth of the global B2B industry.

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12. Peter Steiner, *THE NEW YORKER*, July 5, 1993, at 61 (displaying a cartoon of two dogs talking to each other while surfing the Internet, with the caption, "[o]n the Internet, nobody knows you're a dog.").

13. "You gather important information when you walk into a huge bank building and look at their marble floors and velvet drapes. You know they're not going anywhere, most likely, and that they have a history of taking care of enough customers to stay in business. If those pieces of information are removed from the transaction process the customer is most likely flying blind . . . ." COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* 93 (2002).

14. For example, when searching through the sellers of "tool cases" inside the "Hardware and Tools" section of *alibaba.com*, there were thirty-seven company listings, yet *none* of these companies had any information in their feedback forum whatsoever. Eighteen of the thirty-seven vendors listed had "Gold Supplier" trustmark status, which can be achieved with merely a \$5000 annual fee and a credit check.

15. Video representations of facilities are never the complete sensory experience that a live site visit will entail. Only a live site visit will ever be deemed a complete reality, and still there will always be skeptics.

16. RULE, *supra*, note 13, at 115.

## 2. *Dun and Bradstreet*

The value of knowing your business partner is timeless.

In 1859 Robert Dun acquired [a mercantile credit] agency and began publishing ratings guides. Establishing his own mercantile credit agency in 1849, his competitor, John Bradstreet, began publishing ratings books in 1857. In 1933 the two agencies were consolidated into Dun and Bradstreet, eventually becoming the owner of Moody's Investors Service . . . in 1962.<sup>17</sup>

These credit ratings play an integral role in the key financial decisions for many related business partners.<sup>18</sup> However, for transactions with these large companies, the true efficacy of a business transaction does not lie in the P&L sheets or how leveraged a company may be. Dun and Bradstreet ratings provide little information about the quality of the companies' B2B transactions. The quality and general feedback on day-to-day business transactions are of paramount importance to the potential B2B transaction.

## 3. *www.Hoovers.com*

Hoovers.com and others have come forward to give company profiles to those willing to pay a fee for a static screen of information.<sup>19</sup> Again, these reports are aimed at providing general company background and often only contain information similar to an annual report.<sup>20</sup> Albeit informative, these reports do not give a direct or accurate portrayal of how a B2B partner should expect to be treated. Unlike option number one with its built-in system of relational history and interdependence for finding quality partners, due diligence through Hoovers.com is only a building block that complements healthy and effective B2B transactions.

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17. Amy K. Rhodes, *The Role of the SEC in the Regulation of the Rating Agencies: Well-Placed Reliance or Free-Market Interference?*, 20 SETON HALL LEGIS. J. 293, 300 (1996) (footnote omitted).

18. No individual would think to place his credit rating for the public to view. However, businesses are different, and these credit reports are valuable tools to assess basic facts about a business partner. Credit reporting agencies and others such as Hoovers.com are not the final analysis of the utility of a future transaction.

19. See *Business Newsletters: Global B2B News*, Volume 1 Issue 6 (Dec. 19, 2001), at <http://www.importexporthelp.com/b2bv1i6.htm>.

20. E-mail from Christine Loerwald, Customer Support Representative, [www.Hoovers.com](http://www.Hoovers.com) (Feb. 25, 2004, 10:14:18 EST) (on file with Cal. Western Int'l L.J.) ("Hoover's supplements its proprietary Database with 12 million Dun & Bradstreet records on small to mid-range US companies, and about 9,000 Mergent records on non-US companies.").

As a whole, the B2B community has grown to the size it is today because of due diligence via Dun & Bradstreet reports, Hoovers.com and referrals. Nonetheless, these methods have one final frontier to conquer, online transaction reporting tools.

### *C. Option #3: Online Transaction Reporting Tools*

To understand online transaction reporting tools, consider how eBay has built its relational-based consumer-to-consumer (C2C) trading platform. Not only does eBay allow one to know how experienced their business partner is, it also gives a detailed look at the “little black book” notes about this party from the party’s prior business partners. “[R]elying only on direct personal experience is both inefficient and perilous: inefficient, because any one individual will be limited in the number of exchange partners she or he has, and perilous, because one will discover untrustworthy partners only through hard experience.”<sup>21</sup> The more informed business actor has several relationships, creating a diversified supply chain, preventing a catastrophe because of reliance on one supplier. This prudent business actor constantly checks into his partners’ dealings with other parties. The actor knows these reports are harbingers of the treatment he will receive.<sup>22</sup> Online, this process is seamless, sortable and summarized at the click of a button.

#### *1. www.eBay.com*

eBay pioneered the theory that reputation brings the value to online sales. eBay began its rating service as an open forum where a person could post a comment about anyone, regardless of whether she

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21. Peter Kollock, *The Production of Trust in Online Markets*, 16 *ADVANCES IN GROUP PROCESSES* 99, 102-03 (1999).

22.

If you’re thinking of doing business with a company or buying a product, you’ll be able to check what others say about it. If you want to buy a refrigerator, you will look for the electric bulletin boards containing formal and informal reviews of refrigerators and their manufacturers and retailers. You’ll get into the habit of checking these bulletin boards before you make any significant purchase. When you have a compliment or complaint about a record club, a doctor, or even a computer chip, it will be easy to find the place on the network where that company or product is discussed and add your opinion. Ultimately, companies that don’t serve their customers well will see their reputations and their sales decline, while those that do a great job will attract sizable followings through this new form of word of “mouth.”

BILL GATES, *THE ROAD AHEAD*, 160 (1995).

was in an active transaction with that party.<sup>23</sup> The open forum process led to abuse of the system where many people were practicing in “shill feedback.”<sup>24</sup> As a result, eBay began to require participants to have an active or past transaction in order to leave feedback.<sup>25</sup> A B2B online platform must have this transaction requirement in order to improve on the learning curve eBay has established.

#### *a. Permanent Reputation*

While ratings are permanent and one cannot go back and edit feedback, ratings can be protested.<sup>26</sup> Other exceptions to the amendment of feedback include: listing another party’s personal information, listings posted by transient eBay members, listings including obscenities and listings requiring court-ordered removals for libel or defamation.<sup>27</sup> Similar to how a company’s reputation follows them in their local community, the ideal B2B platform would hold these ratings and information in transparent perpetuity as the relevant community expands globally.<sup>28</sup>

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23. Online eBay ratings are sorted into positive, negative and neutral. There is a summary of the past month, six months and one year with qualitative descriptions of why the party deserved the rating. eBay, Help: Evaluating a Member’s Reputation, at <http://pages.ebay.com/help/feedback/evaluating-feedback.html> (last visited Sept. 8, 2004).

24. Shill feedback is “[u]sing secondary eBay User IDs or other eBay members to artificially raise the level of your own feedback.” eBay, Help: Policies on Feedback at <http://pages.eBay.com/help/feedback/reputation-policies.html> (last visited Sept. 14, 2004). Compare this with the practice of shill bidding which is defined as “the deliberate use of secondary registrations, aliases, family members or associates to artificially drive up the bid price of an item.” eBay, Help: Shill Bidding at <http://pages.ebay.com/help/buy/shillbidding.html> (last visited Sept. 14, 2004).

25. The Memphis Black Business site has partners rate their experience with other businesses. The site had twelve businesses in California and one had user ratings. I tried to leave feedback for a company as a non-registered user and was not allowed until I registered. See Memphis Black Business Rating System, at <http://memphisblackbusiness.com> (last visited Sept. 14, 2004).

26. See generally eBay, Help: Feedback Abuse, Withdrawal and Removal, at <http://pages.eBay.com/help/policies/feedback-removal.html> (last visited November 22, 2004) (discussing the stringent requirements for feedback removal).

27. *Id.* The limits on feedback removal are strenuous: Feedback will be removed if:

- eBay is provided with a valid court order finding that the disputed feedback is slanderous, libelous, defamatory or otherwise illegal.
- The feedback comment contains profane, vulgar, obscene, or racist language or adult material. Inflammatory language, such as “fraud, liar, cheater, scam artist, con man” etc. is strongly discouraged but will not be removed....
- Feedback left by a member who bid on or purchased an item solely to have the opportunity to leave negative feedback for the seller, with no intention of completing the transaction.

*Id.*

28. Admittedly, a company’s reputation is at the mercy of the caliber of its employees, and while company culture is doggedly difficult to transform, key employees can vanish or



### b. Sorting Tools Needed

Even eBay has room for growth. Instead of viewing all information on one page, eBay users must “drill down” through various web pages sorted in several ways (including current bid price and time left in auction). Unfortunately, eBay lacks the ability to sort by seller rating. This seems odd because eBay lists “reviewing the seller’s feedback” as one of the two basic steps between finding the item and bidding on it.<sup>29</sup> Reputations should be transparent and bidding on items should be sortable by characteristics desired by the seller. Even in the advanced search mode this important option is not available.

### c. Reputation Yields Self-Policing

The reputation system is largely self-regulated. Why? Because building up a reputation is money in the bank!<sup>30</sup> The eBay system is founded on the premise that “the desire to build up a good score—and thus be known as a trustworthy trading partner—would be strong enough in each user that they would treat one another fairly.”<sup>31</sup> While this does have the effect of “turning their customers into the equivalent of their police force,”<sup>32</sup> it still is seen as effective for smaller transactions.<sup>33</sup>

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appear overnight. Whether the policy or personnel change is a detriment or a windfall, acknowledgement of the relevance of these personnel changes would be made through the sortability for dates and increasing weights given to more recent transactions.

29. eBay, Help: How do I Buy an Item?, at <http://pages.eBay.com/help/welcome/questions/buy-item.html> (last visited Nov. 29, 2004).

30. See Steven Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1, 1-2. This is both for the consumer and the rating agency, who is “already motivated to provide accurate and efficient ratings because their profitability is directly tied to reputation.” *Id.* at 2. Peter Kollock conducted a similar study of eBay and found that “at least for some high value goods, the seller’s reputation had a positive and statistically significant effect on the price buyers paid for identical goods of equivalent quality.” See Kollock, *supra* note 21, at 15.

31. James M. Snyder, *Online Auction Fraud: Are the Auction Houses Doing All They Should or Could to Stop Online Fraud?* 52 FED. COMM. L.J. 453, 460-61 (2000).

32. Miriam R. Albert, *E-Buyer Beware: Why Online Auction Fraud Should Be Regulated*, 39 AM. BUS. L.J. 575, 624 (2002).

33. “Some members are sometimes apprehensive about leaving negative feedback for fear that recipients would strike back with a negative.” Snyder, *supra* note 31, at 460-61. A method I have seen often used is to wait until there is positive feedback before leaving your feedback about the partner as a way of leveraging positive feedback.

#### d. Reputation is Valuable

Solid reputations take many transactions to build. Although nothing “prevent[s] a dishonest seller (or buyer) from making a new account with eBay under another identity,”<sup>34</sup> with closed-feedback systems, building a reputation from zero loses the selling power benefits of a tenured eBay seller. Not only do these relational transactions lead to less fraud,<sup>35</sup> but those with a vested interest in their rating realize they earn more with a higher eBay rating. In the future, eBay sellers will demand eBay preclude bidders who have lower gross or lower percentage of derogatory ratings.<sup>36</sup>

#### e. Connectivity Increasing

The amount of connectivity by the average consumer in the United States makes the country’s incredible proportion of B2C transactions, an exception to the worldwide norm. The biggest growth involved in B2B transactions is in foreign companies, which comprise the bulk of online transactions. This has led to huge growth in the B2B markets. China experienced a more than 350% growth in three years for online B2B deals and a more than 1300% growth in B2C transactions.<sup>37</sup> While it appears consumer attraction is winning the battle, the gross saturation point of B2B interactions is much higher than B2C markets and has greater potential.<sup>38</sup>

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34. eBay, Feedback Forum, at <http://pages.eBay.com/services/forum/feedback.html> (last visited Nov. 29, 2004).

35. Robert D. Hof, *The People's Company*, BUS. WK., Dec. 3, 2001, available at [http://www.businessweek.com/magazine/content/01\\_49/b3760601.htm](http://www.businessweek.com/magazine/content/01_49/b3760601.htm). eBay participants are more trustworthy than buyers and sellers generally, since they can more readily be ostracized than sellers and buyers whose reputation can less readily be transmitted. Business Week appears to accept that proposition as they report the fraud rate on eBay is one-ninth that of credit cards. *Id.*

36. For example, if one is selling a Cadillac on eBay, one might limit the transaction to serious bidders with an eBay rating of 25+ positive transactions and a 97.5% (39/40) satisfaction rating. However, a high feedback rating does not necessarily mean the user has a stellar reputation. “In most cases, a high feedback rating is a good sign, but you should always check a member’s feedback profile for any negative remarks.” eBay, Feedback FAQs, at [http://pages.eBay.com/help/feedback/feedback\\_faqs.html#checking2](http://pages.eBay.com/help/feedback/feedback_faqs.html#checking2) (last visited Oct. 25, 2004).

37. Kathy Chen, *Alibaba.com Faces Test for Continuing Growth*, ASIAN WALL ST. J., Feb. 17, 2004, <http://www.bdachina.com/content/en/about/pressquotes/P1077088867>.

38. This might not be true if the tide of consumer purchasing turns and online B2C were the norm instead of offline B2C being the reality.

## 2. *www.Worldbid.com*

Other online B2B trading platforms exist, but none of these compare to the B2C success enjoyed by eBay. Two noteworthy platforms are Worldbid.com and Alibaba.com.<sup>39</sup> Worldbid provides a “multi-industry B2B marketplace that connects buyers and sellers worldwide for interactive trade.”<sup>40</sup> The company boasts, “[o]ver 32,000 companies worldwide are registered, and that number is growing by 100 every day. . . . More than 1,000 unique trade leads are posted to the site each day.”<sup>41</sup>

Online B2B trading platforms are a growing and necessary component of international trade success for B2B transactions. The Federal Trade Commission and others have estimated online transactions could reach \$1.5 trillion by the end of 2004.<sup>42</sup> The majority of the transactions in online international commerce are B2B transactions.<sup>43</sup> Being online creates an immediate connectivity that can easily lead to higher transparency. When problems arise, because of the large dollar value of the transactions, B2B disputants can turn to alternative dispute resolution (ADR) in the new format of *online* dispute resolution (ODR).<sup>44</sup> The hope is that with the proper platform

39. Also, [www.stat-usa.gov](http://www.stat-usa.gov) is worth a look for the sheer magnitude of business leads, but in typical governmental fashion, it is the least user-friendly of the three and therefore falls outside of the scope of this comment’s focus on reputational-based platforms. Stat-USA Internet, at <http://www.stat-usa.gov> (last visited Dec. 1, 2004).

40. Press Release, Worldbid, Worldbid.com Expands Its Global Reach Into Russia (ov. 2000), at [http://www.findarticles.com/p/articles/mi\\_pwwi/is\\_200011/ai\\_mark02018912](http://www.findarticles.com/p/articles/mi_pwwi/is_200011/ai_mark02018912).

41. *Id.*

42. Thomas B. Leary, The Two Faces of Electronic Commerce, n.2, at <http://www.ftc.gov/speeches/leary/leary2facesofelectroniccommerce.htm> (Apr. 28, 2000) (citing Goldman Sachs, B2B: 2B or not 2B, available at <http://www.gs.com/hightech/research/b2b>) (United States business-to-business transactions in 1999 were estimated at \$115 billion and are projected to increase to \$1.5 trillion by 2004). However, “[o]ne estimate of online U.S. retail transactions in 1999 was [only] \$20.2 billion.” *Id.* (citing Forrester, *Online Retail* (Sept. 1999), available at <http://www.forrester.com/ER/Press/Release/0,1769,164,FF.html>). One should not just see awesome numbers, but get a sense for the velocity of the swinging pendulum, as it shifts from retail to B2B transactions, when the sleeping giant of online B2B transactions awakens. Simply dwarfing online retail transactions, and weighing in at 75 times the size of retail transactions, B2B e-commerce is the giant to be reckoned with. I believe the best way to reckon with a giant is not to over-regulate and police by litigious hindsight, but to empower these transactions proactively with as much information as possible. This will allow each entity in a B2B transaction to have full accountability for the care of his business partner, however fleeting, because of the incredible transparency of their actions.

43. *E-Commerce Forum: Announcing OECD Forum 2000 Paris*, Winter 1999, OECD OBSERVER (Jan. 7, 2000), available at [http://www.ciaonet.org/olj/oo/oo\\_dec99t.html](http://www.ciaonet.org/olj/oo/oo_dec99t.html).

44. See RULE, *supra* note 13, at 96. “Ironically, B2C ODR is the focus of much more international attention and effort than B2B ODR, even though B2B ODR has a much more attractive revenue model.” *Id.*

(website), transparency will allow companies to perform due diligence reports on other companies so they can carefully consider the business partner's financial and legal status.<sup>45</sup>

Alibaba has solved one of the main challenges other B2B platforms such as Worldbid are faced with: disclosing what level of agent its users are dealing with.<sup>46</sup> B2B companies are used to going to lunch and sitting across the table from their business partners. Possible ways of determining this could be performing due diligence, which requires time consuming calls to the local embassy, trade references, and verifying involvement in a trade organization, as well as proof of past performance such as sanitized invoices.<sup>47</sup> Barney Lehrer, of the Federation of International Trade Associations, suggests that "[a]t the end of the day, any serious buyer would still have to meet his seller in person if he is really going to have some level of trust."<sup>48</sup> Others report that even with non-disclosure/non-circumvention agreements<sup>49</sup> and seller's standard agreements,<sup>50</sup> businesses run a risk of a deal failing. Worldbid is on the right track, but it fails to distinguish the types of players on its websites.<sup>51</sup> With the advent of a transparent reputation system, matchmakers between two previously unconnected companies are unnecessary. Later discovering a 5-20% fee from a middleman is a quick way to seller's

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45. Kenneth S. Rivlin & Jamaica D. Potts, *Not So Fast: The Sealed Air Asbestos Settlement and Methods of Risk Management in the Acquisition of Companies with Asbestos Liabilities*, 11 N.Y.U. ENVTL. L.J. 626, 653-55 (2003).

46. E-mail from Barney Lehrer, Director of eCommerce, The Federation of International Trade Associations (Dec. 7, 2004, 14:24:59 PST) (on file with Cal. Western Int'l L.J.) [hereinafter Lehrer]. Lehrer stated that the challenge for business people who are looking at partnering with other businesses on websites is, "how do I trust the other guy?" *Id.* This relationship requirement inhibits the players from coming out. Lehrer believes that at least half of the inquiries made at online trading platforms are from middlemen. *Id.* If the matchmakers are out there, the margins must be there for a profitable transaction for the business user. However, something is stopping B2B contact, and the "something" missing is relational trust. The middlemen have entrenched relationships that the almighty dollar will erode bypass and replace in its own good time. B2B platforms are ideal, but not easy to manage.

47. A "sanitized" invoice is one in which the unit price, terms, contact person and other proprietary details are removed before submitted as proof of past business. For a discussion on sanitized invoices and the accompanying problem of counterfeits, see Tal S. Benschar et al., *Proving Willfulness in Trademark Counterfeiting Cases*, 27 COLUM. J.L. & ARTS 121, 122 (2003).

48. Lehrer, *supra*, note 46.

49. Business Newsletters, *supra* note 19. Non-disclosure/non-circumvention agreements would protect a middleman who is matchmaking businesses for a profit up to 20% if they handle the complete financing and shipping.

50. *Id.*

51. Alibaba distinguishes between manufacturers, trading companies, buying offices, agents, wholesalers/distributors and others.

remorse.<sup>52</sup> These “[i]ntermediaries will evolve to add value or perish.”<sup>53</sup>

### 3. *www.Alibaba.com*

A strong player is East China’s *www.Alibaba.com*. Alibaba was founded in 1999 and has three main websites, one of which is a B2B website where businesses worldwide may find suitable business partners based on a reputation system.<sup>54</sup> “Alibaba’s online business-to-business markets have a registered user base of nearly three million, and over 90 percent of China’s small and medium enterprises that use the Internet to trade rely on Alibaba.”<sup>55</sup> While not as detailed or sortable as this author would prefer, its rating systems go beyond trustmarks and into transaction history.

#### *a. Success Secret: “Delayed Financial Gratification”*

Alibaba established a thundering client base before charging for its services. It recognized the importance of managers and directors who retain long-term vision instead of trying to pump profits via inflated stock prices and shortsighted dividends.<sup>56</sup> By maintaining this focus, Alibaba has fully matured after three unprofitable years. Without a constant demand for instant dividends and stock prices, founder and Chief Executive Officer, Jack Ma, has been free to increase Alibaba’s market share and use investors’ extra capital to bring new technologies to the table.<sup>57</sup> Alibaba’s story is akin to the success secrets of eBay whose management and employees were the company’s major shareholders during its founding years.

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52. Business Newsletters, *supra* note 19.

53. BILL GATES, BUSINESS @ THE SPEED OF THOUGHT 67 (1999).

54. Press Release, Alibaba.com, China e-Commerce Leader Alibaba Raises US\$82 Million from First-Tier Investors (Feb. 17, 2004), at [www.alibaba.com/aboutalibaba/press/releases040217.html](http://www.alibaba.com/aboutalibaba/press/releases040217.html).

55. *Id.* “In 2003, Alibaba’s revenues rose 234 percent to a level more than three times the prior year’s. The company also achieved significant profitability last year by generating over US\$12 million in free cash flow.” *Id.*

56. Alibaba’s no-dividend promise echoes eBay’s vow: “eBay has never declared a cash dividend and presently intends to continue this policy.” eBay, Investor Relations, at <http://investor.eBay.com/faq.cfm> (last visited June 10, 2004).

57. Chen, *supra* note 37, at A1.

*b. Paramount Importance: Cultural Sensitivity*

Alibaba has addressed cultural differences that are often listed as the top reason for international B2B contract disputes. A “large cultural chasm still loom[s]. Chinese factory owners have become adept at churning out massive quantities of goods at ever-cheaper prices. But when it comes to the basic protocol of international trade, many of them lack the manners, sophistication and experience to interact with customers halfway around the world.”<sup>58</sup> Jack Ma’s Alibaba “charm school” is an attempt to reduce the inevitable confusion stemming from international B2B communication conflicts and culture differences.<sup>59</sup> This recognition of human complications, combined with a training program for users and employees, bodes well for Alibaba’s long-term growth.

*c. Seeking: Attractive, Reliable B2B Partner*

A fledgling B2B provider, [www.ec21.com](http://www.ec21.com), describes its frustration and its need for a trustseal process:

As far as we [are] concerned, this is one of [the] major weakness[es] of our website. According to the survey for the EC21 members carried out in 2003, buyers are in a difficulty finding serious and sincere suppliers. Suppliers also have difficulty in finding buyers since they are treated as some unreliable suppliers.<sup>60</sup>

EC21 soon thereafter began a trustseal process to verify the legitimacy of its members seeking to commence B2B e-commerce.

*d. Are Trustmarks Enough?*

As indicators of general company stability, online trustmarks are worth precious little in a world where company personnel and policies change daily. The Council of Better Business Bureaus (CBBB) and the United States Department of Commerce started efforts in 2003 to establish a Global Trustmark Alliance.<sup>61</sup> Other “internationally

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58. Mei Fong, *Chinese Charm School Helps East Meet West*, WALL ST. J., Jan. 13, 2004, at B1.

59. *See id.*

60. EC21, *New Service, Trade OK Opens on 10<sup>th</sup> of Jan.*, at <http://www.ec21.com/app/servlet/RequestProcessor?event=NoticeView.Click&actionName=view&seqno=FS00012937> (last visited Nov. 29, 2004). With a membership fee of \$360 per year, EC21 will have a tough time competing with Alibaba. *Id.* A search for “tool chest” manufacturers yielded 20 results at [alibaba.com](http://alibaba.com) and 6 at [ec21.com](http://ec21.com). There was no sorting by ratings at EC21 or qualitative comments to be seen.

61. Fred Sandmark, *Global Confidence for E-Commerce Transactions*, IQ MAG.,

recognizable trustmark[s]”<sup>62</sup> are being created because “self-regulation is at the heart of trustmark efforts. ‘Consumers and businesses want some reasonably common standards,’ says Steven Cole, senior vice president and general counsel of the CBBB and BBBOnLine. ‘If we wait for governments to do it, we’re going to need treaties and ten years of negotiation.’”<sup>63</sup> Businesses can, and must, drive the changes that are needed for efficient growth. Alibaba and EC21 have trustmark processes and Worldbid has the coveted tier-level trustmark system.

However, these trustmarks are not the savior of B2B relations. Trustmarks are static and do not reflect the day-to-day transactions as transparently as live feedback from recent users. Trustmarks establish a minimum level of credibility that does not ensure the parties interests will be protected, and often have disclaimers about their standards in fine print.

While trustmarks on a secure, neutral platform such as Alibaba, Worldbid or EC21 are a basic level of assurance, there will be many abuses of these trustmarks on other websites.<sup>64</sup> Additionally, the use of a trustmark does nothing more than show a company has satisfied basic requirements. Nothing more is promised. This trustmark system is not enough for a businessperson whose lifeline depends on the integrity and operations of his business partners.<sup>65</sup> The transparent

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Mar./Apr 2003, available at [http://www.cisco.com/en/US/about/ac123/iqmagazine/archives/mar\\_apr\\_2003/departments/net\\_index/global\\_confidence.html](http://www.cisco.com/en/US/about/ac123/iqmagazine/archives/mar_apr_2003/departments/net_index/global_confidence.html).

62. Better Business Bureau, *BBBOnLine, FEDMA, Eurochambres Move to Create International Trust Initiative for E-Commerce*, at <http://www.bbb.com/alerts/article.asp?ID=167> (Apr. 23, 2001).

63. See Sandsmark, *supra* note 61.

64. Trustmarks should not be trusted outside of a secure and trustmark-sponsored platform. For a fly-by-night company, a trustmark can be easily graphically replicated and abused, funds can be transferred and a ghost town-website will be left behind.

65. Alibaba also suggests the following for safe online trading:

1. Call the telephone and fax numbers provided in the company's Alibaba posting to check that they are genuine.
2. Check with the registrar of business in the country or territory that the other party claims to be from, to insure that the business is legitimate and licensed to operate.
3. Use an external inspection service to insure that the products meet your requirements.
4. Pay for a sample before purchasing in bulk.
5. Do business with Alibaba paid advertisers such as Gold Suppliers and TrustPass members (designated on Alibaba.com by special logos), and featured buyers, who have been individually verified as legitimate businesses by Alibaba.com.
6. Be guided by your instinct. If the seller seems more focused on payment than any other issue, or indicates that cash payment must be made urgently, more caution should be given to the transaction.

Alibaba Help Center: Spam & Fraud, at <http://www.alibaba.com/trade/servlet/page/help/Spam> (last visited Nov. 15, 2004).

qualitative and quantitative scores and comments from previous business dealings are needed. Only that information will provide adequate incentives for business partners to venture out into this brave new world with vigor.

## II. THE ALTERNATIVES: CISG & UCC

While relations and reputation are paramount to B2B e-commerce, the law provides a backbone for building relations and reputations. Regardless of jurisdiction<sup>66</sup> or governing law, parties enter into contracts to assure they will receive either promised performance or a remedy. Parties often specify they agree to submit any dispute to binding arbitration under the International Chamber of Commerce's (ICC) International Court of Arbitration.<sup>67</sup> While many

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66. How does a company check for jurisdiction in e-commerce B2B transactions? Generally, for purposes of jurisdiction, courts will treat online contracts and communication like faxes, phone calls or postal mail. Assuming the defendants availed themselves to the benefits of activity in the jurisdiction, the activity would satisfy the "purposeful availment" requirement of the minimum contacts test. Therefore, the activities of companies proactively interacting with American-based companies will be subject to American jurisdiction.

Physical presence requirements were obviated long ago. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Personal jurisdiction is generally avoided despite the fact that courts have not established a clear line of rules for finding personal jurisdiction in online transaction cases. Even an electronic point-and-click contract sent to the forum state via the Internet is analogous to a paper contract sent to that state. Furthermore, in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, the court stated a passive web site established in a state might fall within another forum state's long-arm statute, as it constitutes the "purposeful availment of doing business [in the other jurisdiction where customers are gleaned via the website]" and the exercise of personal jurisdiction might be reasonable. 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997).

However, *Zippo's* broad jurisdictional holding for websites is weakening, with recent treatises stating: "*GTE* and its slowly burgeoning progeny reflect a retreat toward traditional jurisdictional principles in that they employ standards of 'purposeful direction' and 'intended effects' rather than a standard based on the interactive nature of the Web site [sic] itself." F. LAWRENCE STREET & MARK P. GRANT, *LAW OF THE INTERNET* § 3.01 (2004).

The international nature of the parties in a B2B dispute satisfies the federal court's diversity jurisdiction requirement codified in 28 U.S.C. § 1332(a)(2). The second prong, which requires the amount in controversy to exceed \$75,000, is easily established in most B2B transactions.

67. See FRANK REYNOLDS, *A TO Z OF INTERNATIONAL TRADE* (2002), <http://www.iccbooksusa.com/index.cfm?fid=143>. The ICC is also addressing voluntary rules to enable industry self-governance, called "e-Terms 2004."

Parties who prefer arbitration to litigation are strongly advised to include an arbitration clause in their contract. The clause will specify the institution and rules to which the parties will turn in the event of a dispute. It might also mention the applicable law, the number and choice of arbitrators, as well as the place and language of the arbitration. Prior to or instead of arbitration, parties might prefer an amicable approach and seek to resolve their differences by conciliation, mediation or other consensual methods of settlement.

*Id.* ICC attendee Jonas Astrup was mentioned in a U.N. press release advocating the idea of industry self-governance. Press Release, United Nations, United Nations Working Group Makes Recommendations on Draft of E-Commerce Convention, at <http://www>.



companies are choosing binding arbitration as the preferred means of resolving the inevitable dispute, some fail to agree to any set of laws and fall under the default contractual terms established by the United Nations CISG.

#### A. *United Nations Default Contract Law: CISG*

Regardless of whether a party chooses arbitration or adjudication, two prominent governing laws used for international transactions with a United States party are the CISG<sup>68</sup> and the Uniform Commercial Code (UCC). Article 1(1)(b) of the CISG specifies the CISG will apply as default contract law even if only one party to the contract is from one of the sixty-two signatory countries to the CISG,<sup>69</sup> with one important exception discussed below.

#### B. *Commonly Used Option to Opt-Out of CISG*

The CISG and the UCC contain performance duties along with damages and specific performance remedies. Under Article 6 of the CISG, parties can elect any regional domestic law to govern their transaction<sup>70</sup> or, if their jurisdiction's law is either deficient or undesirable, the parties might contract for a third jurisdiction's law to govern their transactions.<sup>71</sup>

A large caveat to applying the CISG is countries such as the United States, China, Slovakia, Czech Republic and Singapore have made declarations, allowed under Article 95, that if only one contracting party is a signatory to CISG, it will not default to CISG as outlined in the convention's Article 1(1)(b).<sup>72</sup>

CISG has been adopted by the United States and sixty-two other countries and is a self-executing treaty.<sup>73</sup> Therefore, the CISG

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un.org/News/Press/docs/2004/eco55.doc.htm (Mar. 19, 2004) [hereinafter U.N. Press Release].

68. CISG, *supra* note 8, at 668-99.

69. *Id.* at 672.

70. If the parties simply state the governing law is that of the contracting jurisdiction, there is dispute as to whether the CISG or local law (such as the UCC) would apply.

71. CISG, *supra* note 8, at 673 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

72. For further explanation, see Louis F. Del Duca & Patrick Del Duca, *Selected Topics Under the Convention on International Sale of Goods (CISG)*, 106 DICK. L. REV. 205, 213 (2001).

73. Albert H. Kritzer, *CISG: Table of Contracting States*, Pace Law School, CISG Database, at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited June 10, 2004).

governs all international contracts with companies from one of the sixty-two member nation signatories unless the parties “opt out” of CISG’s laws.

The forum for CISG adjudication may be elected in a forum-selection clause and courts have noted they will not interfere with another CISG signatory court that has initiated proceedings to resolve the dispute.<sup>74</sup> In addition, *Asante Technologies, Inc. v. PMC-Sierra, Inc.*<sup>75</sup> held conflicting choice of law forms are not adequate to show intent to opt out of the CISG.<sup>76</sup> So, in accordance with *Asante*, any disputants wishing to have CISG control their disputes must make a clear choice of law.

In tumultuous global times, an international B2B agent does not want the outcome of its transaction determined by a judge making a first impression interpretation of the CISG. Further, many parties still choose to elect the UCC, which carries the strength of predictability and a strong history of interpretative case law that gives the stability desired by many international contracting parties.

### C. CISG Often Interpreted With UCC Case Law

If no Article 6 opt-out selection is made to remove the contract from CISG’s domain, courts look to CISG case law for statutory interpretation. However, because CISG case law is sparse, CISG Article 7(2) allows courts to “look to its language and ‘to the general principles’ upon which it is based.”<sup>77</sup> While this principle is not universally applicable, when CISG’s provisions are identical to the UCC *and* there is a lack of CISG case law on point, courts may look to UCC case law to interpret CISG statutes.<sup>78</sup> While CISG cases have been quoted as becoming the future “lex mercatoria,”<sup>79</sup> the few CISG

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French Commercial Courts hear disputes between merchants concerning transactions governed by commercial law. Commercial actions in France, such as the one here, ‘must’ be brought before the Commercial Court in the first instance. French Commercial Court proceedings can result in a final, enforceable judgment. . . . It would be unnecessarily duplicative for this court to rule on issues already addressed by the French court.

Supermicro Computer Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147, 1151-52 (N.D. Cal. 2001) (citation omitted).

75. 164 F. Supp. 2d 1142 (N.D. Cal. 2001).

76. *Id.* at 1147 (where each party’s form indicated a choice of law in their home country, the parties did not opt out of the CISG).

77. *Delchi Carrier v. Rotorex*, 71 F.3d 1024, 1028 (2d Cir. 1995).

78. *Id.* at 1028 (warning, however, that UCC case law is not applicable per se (citing *Orbisphere Corp. v. U.S.*, 726 F. Supp. 1344, 1355 n.7 (Ct. Int’l Trade 1989)).

79. Bruno Zeller, *Application of the CISG and Why it Matters to You and Your Clients*,

cases tried in United States courts have yet to be prove their breadth and depth to be considered a reliable source of law.

#### *D. Imminent Changes to CISG to Facilitate e-commerce*

In a March 19, 2004 press release, the United Nations Commission on International Trade Law (UNCITRAL) announced its working group is drafting a convention to facilitate global electronic commerce.<sup>80</sup> The working group chairman, Jeffrey Chan, acknowledged the primary reason for the draft is that, “in international business, different countries have different legal rules for contracts. This creates uncertainty when the same transaction is conducted across international borders.’ Often companies must hire lawyers in different countries to advise them, and this is costly.”<sup>81</sup>

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at <http://www.business.vu.edu.au/cisg/> (last visited Mar. 30, 2004). CISG has found wide acceptance and will increasingly become the accepted “lex mercatoria” *Id.*

80. U.N. Press Release, *supra* note 67.

81. *Id.* (“The convention tries to create a uniform legal regime for such transactions . . . This would generate confidence in e-commerce and reduce costs. E-commerce would be greatly encouraged. With this, there can be an expansion of international trading transactions.”). *Id.* Instead of regulation, promoting a B2B environment with such lucid historical transparency that businesses “compete to cooperate” is far superior to any post-ante lawsuit. See BOAZ, *supra* note 10, at 149. The market forces of organized and much more complete, transparent reputations would fuel a new economy similar to the difference between a market selection in communist Russia and a supermarket in the United States. As David Boaz describes this best, I will draw the analogy afterwards:

When I go to the supermarket, I encounter a veritable cornucopia of food—from milk and bread to Wolfgang Puck’s Spago Pizza and fresh kiwis from New Zealand. The average supermarket today has 30,000 items, double the number just ten years ago. Like most shoppers, I take this abundance for granted. I stand in the middle of this culinary festival and say something like, ‘I can’t believe this crummy store doesn’t have Diet Caffeine-free Cherry Coke in 12-ounce cans!’ But how does this marvelous feat happen? How is it that I, who couldn’t find a farm with a map, can go to a store at any time of day or night and expect to find all the food I want, in convenient packages and ready for purchase, with extra quantities of turkey in November and lemonade in June? Who plans this complex undertaking? The secret is, of course, is precisely that no one plans it . . . The modern supermarket is a commonplace but ultimately astounding example of the infinitely complex spontaneous order known as the free market.

BOAZ, *supra* note 10, at 148. By analogy, this competition to cooperate in B2B settings will also increase because transparent reputations will drive the B2B marketplace based on the transparent needs of people. Similarly, realizing that globalization (NAFTA, CAFTA, EU, etc.) is changing the business of being a government to a much more competitive venture, governments are now realizing their place in the market is not guaranteed, and like B2B members, they too must compete for tax revenue and keep a steady watch on their business-friendly legislation and taxation. New Zealand’s Maurice P. McTigue stated:

What many in the public sector today fail to recognize is that the challenge of competitiveness is worldwide. Capital and labor can move so freely and rapidly from place to place that the only way to stop business from leaving is to make certain that your business climate is better than anybody else’s.

Maurice P. McTigue, *Rolling Back Government: Lessons from New Zealand*, 33 IMPRIMIS 1, 4

*E. UCC v. CISG: Noteworthy Differences*

Some noteworthy differences between the CISG and the UCC are the noted absence of a parole evidence rule, a statute of frauds, a perfect tender rule and the protections found in unconscionability and public policy.<sup>82</sup> In 1998, the Eleventh Circuit held in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, SpA* that the UCC's parole evidence rule was inapplicable where the CISG was the contractually agreed-upon body of law.<sup>83</sup> In the same year, the court in *Calzaturificio Claudia v. Olivieri Footwear* ruled the CISG has no provision for the statute of frauds.<sup>84</sup> Under the CISG, the perfect tender rule is not applicable.<sup>85</sup> A buyer can only reject the goods if the defect amounts to a fundamental breach.<sup>86</sup> This is a stark contrast to the flexibility available in UCC § 2-601, which allows for the buyer of goods to reject or accept the whole, activate the perfect tender rule by specifying so in the contract, or accept any conforming partial delivery.<sup>87</sup>

Many ask if the governments will step in and assist with disruptive business interactions. Recently, the American Bar Association announced that it would create a joint Task Force and Advisory Committee to determine appropriate protocols, policies and standards for ODR providers dealing with both B2C and B2B disputes.<sup>88</sup> The focus for the task force is on the reparative efforts after the inevitable conflicts and surprises arise from the current trade practices. However, perhaps rather than reparative efforts, the better, albeit more challenging approach, is prevention of the cumbersome and increasingly international task of online B2B disputes.

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(2004).

82. See *MCC-Marble Ceramic Ctr. v. Ceramica Nuova d'Agostino*, 144 F.3d 1384, (11th Cir. 1998). However, it should be noted that the parties are free to adopt a merger clause, stipulating that oral modifications or rescissions are prohibited. See Allison E. Butler, *The International Contract: Knowing When, Why, and How To "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods*, 76 FLA. BAR J. 24, 26 (2002).

83. *MCC-Marble*, 144 F.3d at 1388-89.

84. No. 96 Civ. 8052, 1998 WL 164824 \*5 (S.D.N.Y. Apr. 7, 1998).

85. See Butler, *supra* note 82, at 28.

86. *Id.*

87. U.C.C. § 2-601 (2003).

88. Press Release, American Bar Association Task Force on E-Commerce and ADR Seeks Public Comment on Online Dispute Resolution (Dec. 26, 2000), at <http://www.abanet.org/media/dec00/publiccomment.html>.

### III. SUGGESTIONS FOR B2B ONLINE E-COMMERCE

The proposals below are applicable to business participants, governmental efforts to increase commerce, and web-based platforms trying to establish a solid program. Acting under the shadow of adjudication, a company with international B2B e-commerce would want to: first, be sure to stipulate what legal safety net applies (CISG, UCC or Arbitration) and second, like a marital pre-nuptial or good life insurance policy, store these adjudicative measures deep in the file marked 'expensive litigation hell' and take active steps to prevent those measures from being pressed into service. The following recommendations are aimed at increasing efficacy of the B2B online e-Commerce process.

#### *A. Knowledge of B2B Partners is Power*

First, tools are needed to enhance the knowledge powerbase of a B2B partner. When working from an online platform, there are many effective ways to increase the knowledge of business partners: third-party verified trustmark tiers, unlimited off and online transaction history,<sup>89</sup> party description/categorization<sup>90</sup> and video site tours.<sup>91</sup>

Trustmark tiers have been tested successfully by Worldbid and are a valuable tool.<sup>92</sup> These often tell whether a company has met certain guidelines for document submittal, confirmed tax reports, and conformity with local laws and registry requirements. While useful, trustmarks should be used only as a springboard to investigate B2B

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89. Like any service viewed as indispensable, you will have to not only make registering information of previous transactions free, but akin to pharmaceutical reps or LexisNexis/Westlaw representatives at law school, an effective platform will have to pay for verifiable transaction history to attract the minimum threshold of history needed to make an online B2B rating relevant. This process will be costly and will require investors with deep pockets and vision.

90. For example, Alibaba categorizes participants in their website menus as: Manufacturer, Trading Co., Buying Office, Agent, Wholesaler/Distributor, Others. See <http://www.alibaba.com> (last visited Nov. 16, 2004).

91. See Peter Grant, *Cable Giants Vie to Improve Online Phoning* WALL ST. J., Jan. 8, 2004, available at <http://online.wsj.com>. Dave Watson, executive vice president of Comcast states "Being able to have a video chat over the TV is not out of the realm of possibility." *Id.* If taxes are ruled out for the FCC on the VOIP (Voice Over Internet Protocol), this would hasten the mainstreaming of videoconferencing.

92. This is not to be confused with the commonplace "trustmark" that has no echelons to differentiate businesses from one another. This tiered trustmark verification would be done by third parties, paid for their services regardless of the investigation outcome via the trustmark fund of the online platform. Pay amounts would be commensurate with the level of investigation done. Highest levels would have complete audited financials available online, similar to 501c3's requirements via IRS's form 990 disclosure requirements.

feedback from historical and active transactions. This direct connection to B2B matchmaking will serve to add a more complete picture of transaction history, as compared to the online complaint history offered by agencies such as the BBB. The BBB is often limited to failed transactions and does not give an accurate industry-wide portrayal of the success scaled percentages that are available. If the platform had a transactional history that was founded in B2B matchmaking instead of something akin to B2B divorce court, a better picture of true transaction history would be available for future B2B partners. In order to jump-start the process, a confidential submission method for the past 1-3 years offline transactions should be permitted with transaction comments from both parties. In addition to the success stories, instead of typical 30-day limitations, searches for company feedback should be opened to include 90 up to 1440 days. This open bank of transaction history will prove to be a powerful comparison tool in the hands of a potential international B2B partner and will keep many out of the courts.

### *B. Develop Tools that Protect*

Second, tools should be introduced and refined to provide greater protections for B2B partners. Tools such as semi-private auctions<sup>93</sup> and escrow deals<sup>94</sup> should be offered at appropriate price points. Akin to graduating from a Class C<sup>95</sup> driver's license to a Class B to drive a bus, semi-private auctions serve to keep the real players in the room for high stakes deals. A successful platform would encourage higher priced semi-private auctions where only those invited or those with a

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93. Sites such as ChannelAdvisor are offering this luxury. This is useful for larger auctions where there are winning "bidders who don't pay for auctions . . . These aren't a problem on a private auction, where bidders come by invitation only." Nick Wingfield, *As eBay Grows, Site Disappoints Some Big Retailers*, WALL ST. J., Feb. 26, 2004, at A1, available at [http://online.wsj.com/article\\_print/0,,SB107774820022339304,00.html](http://online.wsj.com/article_print/0,,SB107774820022339304,00.html).

94. "[I]f Alibaba.com were to play a major role in online transactions, such as [facilitating escrow transactions] 'I'd be more likely to accept [paying for Alibaba.com services].'" Chen, *supra* note 37, at A1. A strong B2B platform must actively accept escrow deals. The company who does not recognize this will miss the opportunity to secure additional confidence for its buyers. If it does not provide the service, price-gouging middlemen will. While Alibaba is understandably reluctant to accept this sort of financial responsibility, for all risks there is a break-even price of profitability. Alibaba would simply need to follow eBay's lead. "There are fraudulent escrow services, so use caution if a seller suggests using a service other than [www.escrow.com](http://www.escrow.com) or an eBay approved international escrow service for international transactions." eBay, Help: Using Escrow, at <http://pages.eBay.com/help/pay/payment.html#escrow> (last visited Nov. 16, 2004).

95. Class C is a common automobile license in state of California. See California Department of Motor Vehicles, at [http://www.dmv.ca.gov/pubs/cdl\\_hm/lic\\_chart.htm](http://www.dmv.ca.gov/pubs/cdl_hm/lic_chart.htm) (last visited Jun. 10, 2004).

strong trustmark and/or rating percentage are deemed worthy to bid. To avoid restricting a growing trader's upward mobility, up-and-coming traders should be allowed to use other established players as cosigners of a newcomer's liquidity and strength. With tools to provide operational boundaries that serve more of an informative purpose than a restrictive one, the system can help the right B2B players to meet and succeed.

### *C. Tools that Contrast & Compare*

Third, technical tools must be provided to allow for quicker partner evaluation. Allowing vendors from various categories to be compared and contrasted by placing them in a shopping basket, where multi-layered and tailored company sorting tools can be used, will streamline the search process for new business partners.

Multi-layered company sorts should be available.<sup>96</sup> Consumers and sellers should be able to sort a list not only by the previous satisfaction ratings, but also by the volume of previous transactions.

In addition, a successful platform would also enable contrasting and comparing via sortable information that could be tailored to screen views saved into a user's profile.<sup>97</sup> This "memory" from past information gathered would reduce the time required to "drill down" to find relevant B2B information. To ensure a company is an appropriate partner, information based on a percentage satisfaction rating could be added to the first screen to prevent having to "drill down" to find it. In addition, the other common business vendors dealing with this company could be displayed. This transparency would reduce the chance of supply chain conflicts among competitors. This would only be possible with an online platform capable of recognizing the user's industry via SIC codes or otherwise. A shopping basket of information in various categories is a powerful way to collect information and partners to auto-construct a

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96. For example, I might want to see how well the company performed on large transactions or, if my product is seasonal, how well it has done on similar transactions during this time of year for order sizes in my echelon. Conversely, a smaller business might ask whether it has a pattern of handling small orders competently or fairly, when it is also dealing with large volume orders.

97. Many websites have cookies that auto-enable these features; for example, [www.half.com](http://www.half.com) "remembers" I am a law student, knows which books I have purchased recently, and, because those books are often sold along with a supplement or treatise, arranges other books on my welcome page in accordance with the needs [half.com](http://www.half.com) perceives I have. See *Half.com by eBay*, at <http://half.ebay.com/index.jsp> (last visited Nov. 16, 2004).

comparative, sortable matrix.<sup>98</sup> This matrix should be sortable not by merely one category, but by multiple categories at a time.<sup>99</sup>

While tools for contrasting, comparing and sorting can be confusing, they should be unlocked for the B2B actor in order to make educated decisions about future international business partners.

D. "If it works, don't fix it," But . . .

Finally, overall suggestions for the platforms include retaining traditional due diligence as a complement to online research, lower transaction fees for active feedback participants, feedback weighted by rating, and double-blind feedback requirements.<sup>100</sup>

Under a lowered transaction fee structure, incentives encourage participants to leave feedback. Active feedback participants would have their fees reduced by twenty percent of their transaction fees, multiplied by the percentage of feedback left on past transactions.<sup>101</sup> In addition, a company with a low percentage of completed surveys may attract disreputable companies hoping to skate away from a mixed-result transaction. In this way, the automatic posting of a dismal percentage of feedback completed would serve as a form of self-governance.

In addition to these completed ratings, positive, negative and neutral feedback should be weighted by the percentage of positive feedback the commentator company has earned.<sup>102</sup> This "taking the

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98. For example, Orbitz.com has a matrix-based system for online ordering services. This rudimentary feature allows a user to expand or contract the number of variables they want to compare. For the sake of user-friendliness, Orbitz.com has kept this feature locked in a simple format that lacks the sophistication needed to hone information about B2B partners. See <http://www.orbitz.com> (last visited Nov. 16, 2004).

99. Microsoft Excel has a similar option in their menu for allowing users to sort by one column and then another once values match in the first column.

100. Double blind means both trading partners leave feedback before being able to view feedback left by the other party.

101. This would be accomplished by a new rate structure where those leaving feedback would have a portion of their fee reduced by the percentage of transactions for which they left feedback. For example, if Billy at XYZ Corp. makes the time to respond to 75% of the transactions he has completed with metal suppliers to his zipper company, he would see a 75% REDUCTION in a \$20 dollar portion of his next \$100 transaction bill ( $100 - (20 * .75) = 100 - 15 = \$85$  bill for XYZ Corp.'s next transactions).

102. This way a generally obtuse person cannot hurt your rating as much as someone who is an angel.

If I find that a prior buyer has made a negative comment about a seller from whom I am contemplating buying, I may want to determine whether the prior buyer likely suffered what I would also consider to be a transactional breakdown or was just a chronic complainer or a spiteful participant . . . . eBay helps to clarify the signal by allowing users to view all comments made by a particular commentator.

Clayton P. Gillette, *Reputation and Intermediaries in Electronic Commerce*, 62 LA. L. REV.



car keys from the drunks” would serve to prevent the malicious mavericks from ruining the reputation of good B2B actors.

Finally, the positive feedback game of chicken played by many eBay players should be ended by requiring comments be mutually blind until both parties have submitted their non-retractable feedback. The feedback and information gathering that has made international business successful should not be abandoned, but rather, the online environment should be used as a supplement until a standard benchmark redefines traditional due diligence into a click of the mouse.

Relational based B2B trading efforts will continue to outpace legal protections such as the CISG and the ICC. Websites such as eBay, Alibaba and BBBonline are the paradigms on the cutting edge of what the B2B frontier could be.<sup>103</sup> Combined with proper contractual legal measures, the compilation of successful tools would enable a less litigious global B2B environment inside a new, international, transparent B2B online e-commerce platform.

*When Li Bo began producing memento buttons in 1998, he reckoned his three-man operation would sell its goods mostly to tourist-site operators and other buyers in his hometown of Shenyang, a city in northeastern China. Then he registered his company with Alibaba.com, a Chinese Internet company that specializes in introducing manufacturers and*

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1165, 1179 (2002). The concern about dealing with new/inexperienced eBay participants is a valid fear. New methods of “drilling down” through feedback comments could be helpful as well. For example, what if derogatory ratings left on a person’s site were valued dependent upon the rating of the individual leaving the feedback? (That is, a person with 100% rating on 10 transactions would have their rating count 10 times more than a person with only 1 positive feedback leaving a derogatory comment on your site.)

eBay currently resolves this problem by letting people “drill” through to see what the person’s rating sheet is like who left a derogatory remark on the person they are thinking of bidding on. (For example, Sue goes to “GETWEBB1” to bid on something and notices that the site has had 90 reviews, 3 of which were negative in the last month. eBay users Tom, Dick and Bob made these 3 derogatory remarks. She clicks on their user names and finds that Tom and Dick have horrible ratings and only have a 60% positive feedback rating. She breathes a sigh of relief and bids at “GETWEBB1” with confidence.

I suggest the proper rating for the hypothetical above, instead of 1 whole point against “GETWEBB1” for each of the 3 derogatory ratings, those three points would be weighted at Tom, Dick and Bob’s respective ratings (.6 + .6 + 1 = 2.2).

103. “Excluding special items, eBay earned \$194.97 million, or 28 cents per share, up from \$118.33 million, or 18 cents per share, in the third quarter of 2003.” Associated Press, *Update 2: eBay's Profit Jumps More Than 76 Percent* (Oct. 20, 2004), available at [http://www.forbes.com/home\\_asia/feeds/ap/2004/10/20/ap1601471.html](http://www.forbes.com/home_asia/feeds/ap/2004/10/20/ap1601471.html). eBay is continually updating many of its policies, as when they changed rating systems from anonymous to transactional-based feedback. eBay’s success is not only reflected in their profits, but also in increased employment demands, eBay “has added about 250 employees in the past 10 weeks [as of early January to mid-March 2004] and estimates it will hire 1,000 more by the end of 2004.” Anne Marie Chaker, *Many Sectors Are Adding Jobs: Where to Find Them*, WALL ST. J., Mar. 18, 2004, at D1.

*buyers across China and around the world. A Chinese trading company more than 2,000 kilometers away saw Mr. Li's listing and ordered 200,000 political-campaign buttons for a buyer in France. Last year, Mr. Li's company generated nearly seven million yuan (\$845,700) in revenue, and ...half of its orders [came] ... through Alibaba.com. "We would never have done so well if it weren't for Alibaba," Mr. Li says.<sup>104</sup>*

*Lenden Webb\*†*

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104. Chen, *supra* note 37, at A1.

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† This Comment is related to the author's additional Comment, Lenden Webb, Comment, *Brainstorming Meets Online Dispute Resolution*, 15 COLUM. AM. REV. INT'L ARB. WINTER 2004.