

UNCITRAL Colloquium on ‘harmonizing law in the age of digital trade and finance – digital assets and platforms’

Digital Platforms and Private Law

Pane 12 – Private law tools to support platform operation: Contract architecture, duties, liability and remedies

Digital Trade Platforms: Is there a need for a harmonised legal text?

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Digital platforms in international trade

- B2B (business to business) platforms.
 - They support trade-related activities along the entire supply chain.
 - The DP refers to these as ‘supply chain platforms’.
 - eg providers of Electronic Transferable Record Management Systems under the MLETR.
 - Common modular architecture of DLT and non-DLT-based platforms
- Focus on contractual aspects and the role of private law in balancing the rights and obligations of platform operators and members/users.
- Despite the economic benefits of digitisation, the uptake of digital trade platforms remains limited.
- General aims: Remove possible obstacles to trade & **enable digitalisation** (ie facilitate the use of digital technologies in trade).

The role of contractual structures

- Gap-filling role (ie fills gaps in the law and provides a foundation for trade transactions between users to occur).
 - eg provide a contractual framework replicating the absence of a suitable legal infrastructure for ETRs across jurisdictions.
- Contract as governance (ie balances the rights and obligations of platform operators and users).
 - access to and use of data;
 - allocation of risks, liabilities and responsibilities;
 - price;
 - limitation of liability;
 - right to amend;
 - right to suspend or terminate.
- Rulebooks are key to determining which stakeholders' interests will be served by digitalisation.

Back to the Question: Where is the problem?

- Contractual structures as a potential barrier to the rollout of platform services and the uptake of digitalisation.
- Key barrier: Relationship-specific investments
- Constrained further by
 - Incomplete contracts (eg re future data usage).
 - Hold-up problems (eg renegotiation once platform achieves network effects).
- Gaps in governance do not facilitate the digital onboarding of smaller actors in the supply chain who remain hesitant to rely on a digital trade platform for transacting.

Tentative proposal and proposed future work

- Is there a need for a harmonised legal text? **Likely, Yes!**
- There is a need for an enabling private law framework that ensures good contractual governance and can protect prospective platform users from opportunistic behaviour.
- Without such protection, prospective users are likely to be cautious of embarking upon digitalisation projects.
- It can also facilitate legal interoperability between the various systems, enabling the T&Cs of different platforms to work seamlessly together.
- *What form would such a harmonised legal text most appropriately take?*
 - *Enabling or regulatory?*
 - *Model law vs model contractual clauses*
 - *Future work can explore the content of this harmonised legal text.*

Thank you for your attention!

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