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Access to justice and multinational corporations: promoting privately driven transnational hybrid adjudication†

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Abstract

This chapter focuses on the delivery of justice to victims of corporate conduct through privately driven transnational hybrid dispute resolution mechanisms. The advent of such mechanisms is now evident through the creation of Meta's Oversight Board ('OSB'). How to incorporate such privately driven justice mechanisms in more conventional forms of legal ordering is an important question constituting the central inquiry of this reflection. Via the example of the OSB, this chapter highlights how some content moderation disputes between Meta, one of the most powerful technology companies today, and its users is being resolved using innovative private adjudicative mechanisms. It is then argued that forums like the OSB should be deferred to. But only if the quality of justice provided is consistent with international standards. Where those standards are met, the broad circulation of decisions made by privately driven adjudicative mechanisms should be promoted. This requires proactive, outcome driven, and coordinated international institutional action.

I. Introduction

Victims of corporate conduct regularly face serious difficulties in accessing justice against multinational corporations (MNCs) due to the lack of available or adequate dispute resolution forums where they can address their claims.[1] International courts where individuals have direct access against MNCs do not yet exist. At the national level, some domestic courts are increasingly willing to take jurisdiction over MNCs even where another jurisdiction may have stronger connections to the dispute at hand.[2] However, this comes at great expense, assuming jurisdictional hurdles can be overcome in the first place.[3] For a range of reasons, national courts on their own do not fill the accountability gap for the victims of MNC conduct. Moreover, international arbitration, which constitutes a well-established, privatized mode of dispute resolution, could also

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1 See generally, Rishi Gulati and Philippa Webb, 'The Legal Accountability of Transnational Institutions: Past, Present and Future' (2023) 34(3) King's Law Journal 411–24.

2 See for example, the decision in *Vedanta Resources* PLC *v Lungowe* [2019] UKSC 20 ('*Vedanta*').

3 *Vedanta*, para 6.

form a potential forum for an aggrieved party.[4] It is trite to say that arbitration is a consent-based process requiring submission to the arbitral tribunal's jurisdiction. Thus, for any arbitral scheme to work, buy-in from MNCs to use arbitration in resolving claims against victims of MNC conduct is needed. In any event, unless procedural rules capable of fully addressing the adverse impact on access to justice of factual inequalities between the disputing parties are adopted, arbitration may not constitute an ideal forum either, at least from the victim's perspective.[5]

Another possibility is to facilitate the delivery of justice through other innovative forms of privately driven dispute resolution mechanisms. This could align with the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) asking MNCs to provide grievance mechanisms to individuals they allegedly harm.[6] The advent of such mechanisms is now evident. This is especially the case in the digital sphere. How to incorporate such privately driven justice mechanisms in more conventional forms of legal ordering is nevertheless an important question, constituting the central inquiry of this article. Via the example of Meta's Oversight Board (OSB), I highlight how many significant content moderation disputes between Meta, one of the most powerful technology companies today, and its users are being resolved using novel and innovative private adjudicative mechanisms.[7] It is then argued that forums like the OSB should be deferred to but only if the quality of justice provided is consistent with international standards. Where these standards are met, the broad circulation of decisions made by privately driven adjudicative mechanisms should be promoted. This requires proactive, outcome driven, and coordinated international institutional action.

II. Meta's OSB: an innovative adjudicative mechanism

Meta, through its social media applications like Facebook and Instagram, exercises extraordinary power over individuals in the digital sphere. It is the most powerful arbiter of online speech,[8] with such power not always being exercised conscientiously. It is hardly surprising that Meta faces immense pressure from users, governments, and civil society to act transparently and with accountability. Responding to such calls, in 2018, it announced plans to create

[4] Indeed, privately driven alternative dispute resolution mechanisms conventionally prominent are arbitration and increasingly, mediation. Accordingly, it is these types of alternative dispute resolution forums that are generally considered by authors in the discussions around transnational access to justice: see for example, Catherine Kessedjian and Humberto Cantú Rivera, Private International Law Aspects of Corporate Social Responsibility (Springer, 2020); Diego P. Fernández Arroyo, 'DENATIONALISING PRIVATE INTERNATIONAL LAW—A LAW WITH MULTIPLE ADJUDICATORS AND ENFORCERS' (2018/19) 20 Yearbook of Private International Law 31–46; and regarding mediation, see the contributions by Judith Knieper and Jonathan Haddad, The history, evolution, and future of the UNCITRAL mediation framework at 216–41 and Nadja Alexander and Clarissa Chern, The Singapore Convention at 242–66, in Rishi Gulati, Thomas John and Ben Köhler (eds), The Elgar Companion to UNCITRAL (Edward Elgar, 2023).

[5] Under the stewardship of Judge Bruno Simma, a group of experts drafted the 2019 Hague Rules on Business and Human Rights Arbitration. It is too early to say whether they will be broadly adopted: see, <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration>, last visited, 22 September 2022; see also, Dalia Polombo, The Hague Rules on Business and Human Rights: reconciling business and human rights with arbitration? In Rishi Gulati et al, The Elgar Companion to UNCITRAL (n 4).

[6] See also the 2030 Agenda for Sustainable Development, which refers to the UNGPs in its para 67; for a study of the role of private international law in achieving the UN Sustainable Development Goals, see, Ralf Michaels, Veronica Ruiz Abou-Nigm and Hans van Loon (eds), The Private Side of Transforming our World: UN Sustainable Development Goals 2030 and the Role of Private International Law (Intersentia, 2021).

[7] The OSB's innovative features are described in Rishi Gulati, 'Meta's Oversight Board and Transnational Hybrid Adjudication: What Consequences for International Law?' (2023) 24(3) German Law Journal 473–93 (the ideas in section 2 of this article are drawn from here); Laurence R. Helfer and Molly K. Land, The Meta Oversight Board's Human Rights Future (2023) 44(6) Cardozo Law Review, <https://cardozolawreview.com/wp-content/uploads/2023/09/2.LAND_.44.6.2.PrintNEW.pdf> (where the authors analyse the OSB as a de facto human rights tribunal); and see also, Anna Sophia Tiedeke and Martin Fertmann, 'A Love Triangle? Mapping Interactions between International Human Rights Institutions, Meta and Its Oversight Board' (2024) European Journal of International Law chad062, <https://doi.org/10.1093/ejil/chad062>.

[8] Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129(2) Yale Law Journal 2421–99, at 2422.

an independent oversight body to review content decisions.[9] Such a forum is now in place in the form of the OSB.[10] More specifically, as of the date of writing, Facebook and Instagram users can access the OSB's jurisdiction in relation to disputes relating to individual pieces of content removed or allowed to remain on these platforms by Meta.[11] Meta can also self-refer content decisions going beyond individual pieces of content, including on de-platforming a user.[12]

Crucially, the OSB's content moderation decisions are binding on Meta. When the Oversight Board instructs that a given post should be reinstated or removed, Meta has committed to implement the decision, unless doing so could violate national law.[13] So far, implementation of OSB decisions is remarkable, with Meta implementing all of its content moderation decisions.[14] With its institutional structure in place, and plenty of resources to tap into, the OSB may have a real impact on how some transnational disputes are resolved, especially ones pertaining to content moderation. It is thus an important case study. In this section, some of the most innovative aspects of the OSB are observed. I focus on the quality of the OSB's independence, its transnational nature, and the hybrid nature of the law applied. It is concluded that the OSB should be welcomed.

1. The OSB's independence from Meta

For a dispute resolution mechanism to be truly independent, it must enjoy institutional independence, and its judges should enjoy personal independence through provisions on security of tenure. Perhaps one of the most innovative aspects of the OSB relates to how Meta has tried to secure its institutional independence. It goes without saying that had the OSB been placed within Meta's company structure, its independence would have been highly suspect. However, in a novel and creative solution, private law instruments have been adopted to create a separation between Meta and the OSB. By creating and irrevocably granting assets so far amounting to US $280 million to a non-charitable purpose trust under the laws of the state of Delaware or OSB Trust, Meta has ceded a portion of its authority to the OSB to review its content moderation decisions.[15] The purpose of the OSB Trust is set out in clause 2.1 of the agreement creating it, which states:

> The purpose of the Trust … is to facilitate the creation, funding, management, and oversight of a structure that will permit and protect the operation of an Oversight Board (the 'Oversight Board' or 'Board'), the purpose of which is to protect free expression by making principled, independent decisions about important pieces of content and by issuing

[9] Mark Zuckerberg, 'A Blueprint for Content Governance and Enforcement' (*Facebook*, last accessed 5 May 2021) <https://www.facebook.com/notes/751449002072082/?hc_location=ufi> last access 20 August 2021.

[10] See OSB's official page: <https://oversightboard.com/> last access 20 August 2021.

[11] Aggrieved Facebook or Instagram users can appeal to the Oversight Board to either reinstate a piece of content that either platform took down (Article 2.1, Oversight Board Charter ('Charter'), available at <https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf> (last access 20 September 2022)); and Oversight Board Bylaws ('Bylaws'), Article 3, Section 1.1.1, available at <https://www.oversight board.com/sr/governance/bylaws> last access 20 September 2022, and as of 13 April 2021, appeal to remove a piece of content that the platform allowed to remain posted: see <https://www.oversightboard.com/news/267806285017646-the-oversight-board-is-accepting-user-appeals-to-remove-content-from-facebook-and-instagram/> last access 20 August 2021.

[12] Article 2.1, Charter; Article 2, Section 2.1, Bylaws.

[13] Article 4, Charter; Article 2, Sections 1.2.2, 2, 2.2.3 and 2.3.1, Bylaws.

[14] Oversight Board, Annual report (2021), available at <https://www.oversightboard.com/news/322324590080612-oversight-board-publishes-first-annual-report/> last access 20 September 2022.

[15] See clause 2.2, Oversight Board Trust (16 October 2019), available at <https://about.fb.com/wp-content/uploads/2019/12/Trust-Agreement.pdf> last access 20 September 2022; Article 4, Bylaws; Klonick (n 8); for an understanding of this trust arrangement, see, Vincent C. Thomas *et al*, 'Independence With a Purpose: Facebook's Creative Use of Delaware's Purpose Trust Statute to Establish Independent Oversight' *Business Law Today* (17 December 2019) <https://businesslawtoday.org/2019/12/independence-purpose-facebooks-creative-use-delawares-purpose-trust-statute-establish-independent-oversight/>, last access 20 August 2021; also see, <https://www.oversightboard.com/news/1111826643064185-securing-ongoing-funding-for-the-oversight-board>, last accessed 13 September 2022.

> policy advisory opinions on Facebook's content policies. The Board will operate transparently and its reasoning will be explained clearly to the public, while respecting the privacy and confidentiality of the people who use Facebook, Inc.'s services, including Instagram.

Specifically, the OSB consists of three interlocking components: (i) as is now evident, one of these is the OSB Trust, with its trustees responsible for safeguarding the board's independent judgment; (ii) second, the board members or 'judges', who select and decide cases; and (iii) third, the administration, which consists of full-time staff who assist board members with their work.[16] Ultimately, with Meta not involved in day-to-day administration and financial operations, '[a]t least in regard to administrative matters and operation, the Board and Trust largely self-govern'.[17] While the institutional independence of the OSB seems strong on its face, issues with personal independence are evident.

In particular, OSB members are tantamount to contract judges. They are appointed for a three-year term, for a maximum of three terms.[18] Noting that OSB Members seem to receive a six-figure salary for approximately 15 hours of work per week,[19] creating significant financial incentive for renewal, one may question whether such short terms of appointment undermine the OSB's independence, especially as Meta is the respondent in every case before it. However, the ability of users to suggest candidates for membership of the OSB,[20] and the need for diversity and geographical representation going beyond the conventional categories followed in the UN system,[21] are novel features and constitute positive developments. In practice, initial appointments indicate that a highly competent group of individuals has been selected. Providing a representative sample, OSB members include co-chairs who are mandate-holders from human rights bodies, a former judge, and a former prime minister of Denmark.[22] In terms of diversity, the OSB comprises an equal number of men and women. The calibre and quality of judges in any forum is obviously crucial to the delivery of independent justice. It is undeniable that the quality of OSB membership is high as of now.

The independence guarantees present at the OSB are not insignificant. This is especially the case when one also takes into account various aspects relating to 'fairness' that ultimately evidence independent functioning. For example: the complainant makes submissions through the OSB's online platform; submissions may also be made by interested third parties;[23] the OSB is required to issue decisions within a set time; decisions are translated into local languages; and the reasons for decisions are publicly communicated and accessible on the OSB's website. Interestingly, leading law databases have also started to include OSB decisions in their functionality.[24] Overall, it is the OSB's institutional characteristics that are truly novel. As opposed to a treaty-based court set up by states, or a typical arbitral body whose jurisdiction is created and limited by the scope of an arbitration agreement, where the arbitral tribunal ceases to exist after it has discharged its mandate in a particular case, the OSB is a private body enjoying a measure of stability.

16 *Annual Report* (n 14).

17 Klonick (n 8).

18 Article 1.3, Charter.

19 See, Kate Klonick, 'Inside the Making of Facebooks Supreme Court' *The New Yorker* (New York, 12 February 2021) <https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court> last access 20 August 2021; the contracts between the LLC and Oversight Board Members do not appear to have been made public.

20 Article 1, Section 1.2.2, Bylaws: recommendations for candidates can be made by users, Facebook, and members of the Oversight Board.

21 Article 1, Section 1.4.1 of the Bylaws states that: '[a]t all times the board must include a globally diverse set of members. In particular, this means that board membership should encompass the following regions: United States and Canada; Latin America and the Caribbean; Europe; Sub-Saharan Africa; Middle East and North Africa; Central and South Asia; and Asia Pacific and Oceania.'

22 At date of writing: Catalina Botero-Marino, Michael McConnell and Helle Thorning-Schmidt.

23 *Annual report* (n 14).

24 Westlaw and Lexis/Lexis+includes OSB decisions: annual report, n 14, 55.

2. The transnational aspect of the OSB's work

Further, the OSB's core work is transnational, for it is inherently cross-border in nature. Where the parties to a dispute are located in different States, the subject matter of a dispute cross-cuts State boundaries, or a judgment has transborder implications, a cross-border element will be present.[25] The OSB hears appeals from users located across the globe. The vast majority of the OSB's work is thus likely to be inherently transnational just based on the location of the parties to the dispute. What is more, the OSB is an institution established under US law, but it decides issues arising in numerous jurisdictions. The legal and factual issues the Oversight Board resolves thus transcend one domestic jurisdiction. Finally, the effect of OSB decisions is not limited to any one domestic jurisdiction. If a post is removed or maintained following a decision, then it is visible/not visible on the relevant platforms to any user who is able to access it regardless of where that user is located.

Moreover, the effect of an OSB ruling is not limited to individual users only. Due to the case prioritization practice of the OSB, and given that OSB decisions have precedential value,[26] similar cases will be decided similarly, regardless of where the facts occurred. Indeed, OSB decisions are meant to have a systemic and multi-country effect on Facebook's content moderation decisions.[27] The cross-border implications of OSB decisions can be consequential. As the OSB itself states:

> The volume of cases submitted speaks to the importance of the Board's work to users. In both 2020 and 2021, we intentionally prioritized cases that had a potential to affect lots of users around the world, were critically important to public discourse or raised important questions about Meta's policies. To address issues unique to people in specific countries, we also selected cases from different regions around the world. And we selected several cases that raised major implications for applying international human rights standards to moderating content at global scale. The Board also listened to users by prioritizing cases that focused on issues that were raised repeatedly in their appeals. That means that while we may only select one case that raises a particular issue for review, the Board is able to address common problems shared by a much larger number of people, including those whose cases are not selected. For example, when we saw Meta removing numerous posts referencing Nazi figures even though the content did not support or praise any 'dangerous individuals or organizations', we selected the Nazi quote case to examine a significant issue impacting a large number of users.[28]

The OSB is engaged in dispute resolution that is thus inherently transnational. When we take into account that the regulatory regime that it is required to apply stems from no singular legal order, the conclusion that the OSB's work transcends State boundaries becomes inescapable.

[25] See the discussion in Rishi Gulati, Access to Justice and International Organisations: Coordinating Jurisdiction Between the Institutional and the National Legal Orders (Cup, 2022) 168.

[26] Article 2.2, Charter; see further 4 below.

[27] Article 4 of the Charter provides in part: 'In instances where Facebook identifies that identical content with parallel context—which the board has already decided upon—remains on Facebook, it will take action by analysing whether it is technically and operationally feasible to apply the board's decision to that content as well. When a decision includes policy guidance or a policy advisory opinion, Facebook will take further action by analysing the operational procedures required to implement the guidance, considering it in the formal policy development process of Facebook, and transparently communicating about actions taken as a result'; some commentators have argued that the Oversight Board can be placed within the sphere of global law: Lorenzo Gradoni, 'Chasing Global Legal Particles: Some Guesswork about the Nature of Meta's Oversight Board' (*EJIL: Talk*, 30 December 2021) <https://www.ejiltalk.org/chasing-global-legal-particles-some-guesswork-about-the-nature-of-metas-oversight-board/> (last access 15 June 2022), with the Oversight Board also being compared to a human rights mechanism: Laurence Helfer and Molly K. Land, 'Is the Facebook Oversight Board an International Human Rights Tribunal?' (*Lawfare*, 13 May 2021) <https://www.lawfareblog.com/facebook-oversight-board-international-human-rights-tribunal> last access 15 June 2022.

[28] *Annual report* (n 14).

3. A hybrid regulatory regime applied by the OSB

One of the most controversial aspects relating to the OSB has been its applicable law regime. Before explaining why this controversy exists, it is necessary to set out what this regime provides. According to the OSB's governing documents, the substantive law to be employed by the OSB to resolve cases is 'hybrid' in nature. Article 2.2 of the Oversight Board Charter provides that the substantive standards pursuant to which the OSB adjudicates disputes refer to (i) Facebook's own values and community standards;[29] (ii) the Oversight Board's own pronouncements; and (iii) international human rights law (IHRL). The first two sources belong to the realm of non-State law and form an aspect of what has been referred to as 'platform law'.[30] The third source—namely, IHRL—belongs to public international law.

In practice, the OSB seems to have used IHRL as the core standard on which its decisions turn.[31] Content decisions can engage a range of human rights, including of course the freedom of expression,[32] but also the right to equality and non-discrimination, the right to democratic participation, the right to a fair public hearing, and the right to bodily security.[33] Thus, using IHRL as a central reference point can help ensure consistent and predictable decision-making based on global standards, although, it should be admitted that the boundaries of these standards may be contested. As David Kaye, the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression, explained in 2018:

> Human rights principles … enable companies to create an inclusive environment that accommodates the varied needs and interests of their users while establishing predictable and consistent baseline standards of behaviour. Amidst growing debate about whether companies exercise a combination of intermediary and editorial functions, human rights law expresses a promise to users that they can rely on fundamental norms to protect their expression over and above what national law might curtail. Yet human rights law is not so inflexible or dogmatic that it requires companies to permit expression that would undermine the rights of others or the ability of States to protect legitimate national security or public order interests. Across a range of ills that may have more pronounced impact in digital space than they might offline–such as misogynist or homophobic harassment designed to silence women and sexual minorities, or incitement to violence of all sorts–

[29] See Klonick (n 8) 2422: 'through a system of semipublic rules called "Community Standards," Facebook has created a body of "laws" and a system of governance that dictate what users may say on the platform'.

[30] See UNHRC (38th Session) 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (David Kaye) (6 April 2018) UN. Doc A/HRC/38/35, paras 1 and 24; Molly K. Land, 'The Problem of Platform Law: Pluralistic Legal Ordering on Social Media', in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020), 975–94, section 36.3 where she defines the elements of platform law as consisting of 'four central elements: contract law, substantive law, procedural law, and technical law. Contract law includes the terms of service that govern the relationship between user and company. Substantive law includes both "legislation" (such as community standards or rules) and "common law" (the communications and practices of companies that elaborate and interpret those standards or rules). Technical law includes the design and technical choices that enable, nudge, and constrain the behavior of users on social media platforms'; also see generally, Orly Lobel, 'The Law of the Platform' (2016) 101 Minnesota Law Review 87–166.

[31] See Oversight Board, Case decision 2021-004-FB-UA.

[32] Article 19 of the ICCPR enshrines the right to freedom of expression. Article 19(2) specifically stipulates that the right to freedom of expression applies regardless of frontiers and through any media of one's choice and includes internet-based modes of communication: OHCHR, General Comment No. 34, para 12; also see, UNHRC (32nd Session) 'Resolution on the promotion, protection and enjoyment of human rights on the internet' (27 June 2016) UN. Doc A/HRC/32/L.20 at para 1. Moreover, it has been noted that: 'While freedom of expression is clearly protected by a considerable body of treaty law it can also be regarded as a principle of customary international law': Richard Carver, *Training manual on international and comparative media and freedom of expression law* (MLDI, 2018) 5; and for the international instruments protecting this right, see <https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/international-standards> last access 20 September 2022.

[33] BSR, 2019. Human Rights Review: Facebook Oversight Board, section 3.1.

> human rights law would not deprive companies of tools. To the contrary, it would offer a globally recognized framework for designing those tools and a common vocabulary for explaining their nature, purpose and application to users and States.[34]

While IHRL seems to constitute the core standard against which platform law is assessed, in line with its mandate, it is notable that compliance with Meta's own Community Standards and Values are always first scrutinized by the OSB before it turns to IHRL.[35] Consequently, the applicable regulatory regime for the OSB is truly hybrid. We are perhaps witnessing the initial stages of a convergence of platform law, IHRL, and potentially even national law which can influence the content of platform law.[36] Such a normative churn may lead to a distinct branch of human rights law that could be referred to as digital human rights law.[37]

In sum, as this author has argued elsewhere, the OSB is ultimately engaged in a novel form of 'transnational hybrid adjudication'.[38] Operating virtually, it adjudicates a category of transnational legal disputes applying a hybrid regulatory regime in a binding manner. It has already been pointed out that the institutional structure of the OSB is truly novel when compared to other conventional types of privately driven adjudicative mechanisms, such as international arbitration. Moreover, the OSB is also distinguishable from other types of dispute resolution facilities operating online. Specifically, online dispute resolution (ODR) mechanisms created in the context of resolving low value disputes, such as consumer claims, are inherently of a different character from the types of disputes the OSB resolves, being disputes of a public law nature.[39]

Of course, it remains to be seen whether the OSB will survive in the long run. For now, it is apparent that the OSB is impacting the standards of free speech in the digital sphere, including who determines these standards. It is notable that in its very first year of operation, more than one million users contested Facebook and Instagram's content moderation decisions. The privately driven adjudication, occurring at the OSB, may end up having serious implications in the business and human rights sphere, especially in the technology sector. Dispute resolution mechanisms like the OSB are a practical necessity and should be welcomed.

4. A cautious welcome for privately driven transnational hybrid adjudication

Even though dispute resolution mechanisms set up by MNCs may adopt several positive features, as is the case with the OSB, they can touch on key public concerns. Questions of legitimacy are thus validly raised. Should private entities be allowed to determine fundamental questions of human rights? A pragmatic response must be given. In some spheres where a vast number of transnational claims can arise, privately driven adjudication is a practical necessity. The digital environment can especially be susceptible to this phenomenon. Focusing on the content moderation example, for it is the subject of this article, a very large number of disputes now arise between technology companies and their users every year. Expecting conventional adjudicative mechanisms (international/national courts or

34 Kaye, (n 30) para 43.

35 A perusal of Oversight Board decisions shows that every decision first considers compliance with Meta's community standards, then its values, and finally, IHRL.

36 See Alexandre De Streel *et al*, *Online Platforms' Moderation of Illegal Content Online, Study for the committee on Internal Market and Consumer Protection* (Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020) 65, where it is mentioned that: 'Terms of Service/Terms of Use and Community Standards/Guidelines of the online platforms generally restrict more the freedom of expression than the international fundamental rights standards, in particular because they are based on the lowest common denominator between the different national legislations applicable to content.'

37 Dafna Dror-Shpoliansky and Yuval Shany, 'It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights—A Proposed Typology' (2021) 32(4) European Journal of International Law 1249–82.

38 Rishi Gulati, Meta's Oversight Board (n 7).

39 For a discussion of online dispute resolution generally, see Ronald A. Brand, 'Online Dispute Resolution', in Rishi Gulati et al, The Elgar Companion to UNCITRAL (n 4), 277–95.

mainstream arbitral processes) to consistently resolve countless content moderation disputes is unrealistic for at least three reasons.[40]

First, particularly due to the digitalized context in which content moderation disputes arise, jurisdictional and enforcement issues will naturally tend to present serious hurdles for complainants raising claims against MNCs before national courts.[41] Second, the lack of international agreement on how social media content should be moderated must not be ignored either. One only needs to look at differing regulatory settings prevalent today. For example, in the USA, limitations on free speech are exceptional, and private entities are not bound by the First Amendment (freedom of speech clause) of the US Constitution in any event.[42] On the other hand, in Germany, permissible limitations on free speech are construed more broadly, with German courts open to undermining platform law if it is inconsistent with fundamental rights as understood by domestic courts in that country.[43] When we take into account the broader picture, with China not even allowing US-based major technology companies to operate in its jurisdiction,[44] it seems highly unlikely that States will be able to develop internationally accepted rules on content moderation any time soon. Third, the expense of seeking justice before national courts located in well-established centres of transnational litigation is generally exorbitant. These concerns also arise with implementing mainstream arbitral procedures.

Given the procedural and substantive lacuna, privately driven transnational hybrid adjudication provides the best opportunity to resolve the majority of content moderation disputes in an independent, consistent, and stable manner. Indeed, the European Union's Digital Services Act is worth noting, expressly creating a space for alternative dispute resolution in this sphere.[45] Adjudicative mechanisms such as the OSB can, indeed, have positive impacts on access to justice, institutional design, and consistent decision-making based on international standards. Thus, they should be welcomed. However, the quality of justice delivery must be assured before their outcomes are recognized more broadly.

III. A focus on the quality of justice

For reasons that are now apparent, it is suggested that the decisions of privately driven adjudicative mechanisms should be promoted. But this is only the case if the procedural (including technical) and substantive quality of the justice rendered is of a sufficient standard—in other words, if effective or meaningful access to justice can be ensured.

1. The procedural aspects

Given that the present focus is on the digital sphere, the procedural aspects of justice also include due process issues particularly created by the use of technology in the delivery of justice. On its face, the use of technology is said to promote simplicity, speed, cost

[40] But see role of e-courts by Heidi Tworek *et al*, 'Dispute Resolution and Content Moderation: Fair, Accountable, Independent, Transparent, and Effective' (working paper on the Transatlantic Working group on Content Moderation Online and Freedom of Expression, 14 January 2020*)* 12 ff.

[41] For a discussion of access to justice challenges in transnational contexts, see especially, Christopher Whytock, 'Transnational Access to Justice' (2020) 38(2) Berkeley Journal of International Law 155–83.

[42] See the decision of the United States Supreme Court in *Manhattan Community Access Corp Et Al v Halleck Et Al* 587 US (2019) 3.

[43] See for example the series of right to be forgotten cases, Case C-136/17 GC and Others EU:C:2019:773; Case C-507/17 Google v CNIL EU:C:2019:772; and Case C-131/12 Google Spain and Google EU:C:2014:317 = GRUR Int 2014, 719. For a decision specifically concerning Facebook, German courts have required Facebook to reinstate content: see, Douglas Busvine, 'Top German court strikes down Facebook rules on hate speech' (*Reuters*, 29 July 2021) <https://www.reuters.com/technology/top-german-court-strikes-down-facebook-rules-hate-speech-2021-07-29/> last access 20 August 2021.

[44] See, <https://www.businessinsider.com/major-us-tech-companies-blocked-from-operating-in-china-2019-5?r=US&IR=T>, last visited 22 September 2022.

[45] See especially Article 21 of REGULATION (EU) 2022/2065 of the European Parliament and of the Council 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

efficiency, flexibility, and enhanced accessibility. Especially in transnational disputes, technology can play an even larger role in streamlining the justice machinery, and, to a large extent, address the tyranny of distance. Virtually all aspects of the justice process can benefit from the adoption of technological means. This includes the service of documents, the taking of evidence, the filing of submissions, the conduct of oral hearings, examination and cross examination of witnesses, assessment of damages, the publication of decisions, cross-border judicial communications, and the provision of sophisticated legal databases that can aid in the assessment of foreign (including non-State) law.

Indeed, in theory, all aspects of dispute resolution may now be undertaken virtually. Put differently, justice can be delivered comprehensively through ODR processes. While ODR can yield obvious benefits, it comes with risks too. Regardless of the entity or person responsible for administering an ODR platform, may they be public or private, it is important to incorporate safeguards to ensure that such platforms are administered independently,[46] the confidentiality of data is maintained, and accessibility is prioritized. The technical aspects of the delivery of justice are thus directly linked to due process concerns too. Some regulatory settings already require the administrators of ODR platforms to comply with strict standards. For example, Article 5(1) of the European Union's ODR Regulation 2013 states:

> The Commission shall develop the ODR platform and be responsible for its operation, including all the translation functions necessary for the purpose of this Regulation, its maintenance, funding and data security. The ODR platform shall be user-friendly. The development, operation and maintenance of the ODR platform shall ensure that the privacy of its users is respected from the design stage ('privacy by design') and that the ODR platform is accessible and usable by all, including vulnerable users ('design for all'), as far as possible.[47]

The quality of ODR platforms could be assured by implementing robust regulatory schemes.[48] Amongst other things, this would assist in realizing basic standards of independent administration, and consistency with user rights. Naturally, there may be overlaps between technical solutions employed to deliver justice in a digital environment with the procedural rights of the parties to a dispute that are applicable regardless of the medium used to dispense justice. At its core, proceedings online should be subject to the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context.[49]

Where the quality of procedural justice is high—that is, it complies with the basic standards of a fair trial (independence, impartiality, and fairness)—it is suggested that conventional/State-based courts be willing to defer regulatory authority to private mechanisms as long as the substantive norms applied to resolve the dispute are not deficient. In practice, this means that if effective justice has been delivered at a private adjudicative mechanism, State-based courts should not exercise jurisdiction that they may otherwise possess. If this approach is adopted, parallel proceedings, potential inconsistent judgments, and inefficiencies in the administration of justice are avoided.

[46] See, UNCITRAL Technical Notes on ODR, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf>, last visited 15 February 2023.

[47] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524> last access 20 September 2022.

[48] In the European Union for example, alternative dispute resolution bodies are assessed by member states and must meet a number of quality requirements to guarantee that they operate in an effective, fair, impartial, independent and transparent way: see especially Articles 6 and 19 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

[49] See, UNCITRAL Technical Notes to ODR (n 46).

On this approach, MNCs are treated similar to public international organizations (IOs), which are required to provide 'reasonable alternative means' of dispute resolution to persons they allegedly harm. Such an obligation is placed on IOs due to their jurisdictional immunities before national courts. This makes conventional courts unavailable to the victims of IO conduct. Accordingly, IO-based adjudicative mechanisms become the 'appropriate' court to resolve claims against them. By the same logic, where conventional courts are unavailable or unable to deliver meaningful justice in a claim against a private actor, recognizing the regulatory authority of a private adjudicative mechanism rendering due process compliant justice is a sensible approach. Indeed, Principle 22 of the UNGPs states that '[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.' The commentary to this principle provides:

> Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation.[50]

Therefore, as long as justice delivery is effective, recognizing the regulatory authority of privately driven dispute resolution mechanisms, of which the OSB is just one example, is clearly not an out of the ordinary suggestion. One must not fail to appreciate that, after all, outcomes of privately held arbitration procedures between private parties have a long history of enjoying broad enforceability around the world as long as basic due process guarantees are ensured.[51]

Equally, where a particular mechanism does not provide fair trial compliant justice, the outcome of such a proceeding could be rejected if a procedural flaw results in a failure of justice. More information is required to fully assess the procedural and technical aspects of the delivery of justice at the OSB,[52] being a type of an ODR mechanism for all steps of the justice process that occur virtually. However, as was pointed out, for the limited number of individuals whose cases get selected for determination, the quality of justice at the OSB from a due process perspective otherwise seems robust.[53] As a broader point, the OSB, similarly structured mechanisms, or mechanisms whose independence from the parties can be effectively secured, could in principle provide for effective means of alternative dispute resolution whose regulatory authority may be broadly recognized. But the analysis cannot end here. Attention must also be focused on issues of substance.

2. The substantive aspect

The most challenging aspect of privately driven transnational hybrid adjudication relates to situations where private actors adjudicate cases that are inherently public in character. The OSB is such a mechanism, for its core work involves applying IHRL to cases before it.

[50] See also Commentary on Principle 28 of the UN Guiding Principles on Business and Human Rights 2011: 'One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.'

[51] Gary B. Born, International Commercial Arbitration (3rd ed) (Kluwer, 2021), section 1.04.

[52] For privacy and data protection at the OSB, see <https://www.oversightboard.com/data-policy/> last access 20 September 2020; also see, Article 2, Section 1.1, Bylaws.

[53] Of course, for the majority of users whose appeals are not selected, the OSB does not provide access to justice.

Whether or not world leaders are allowed to post content, deciding on permissibility of health-related content in the midst of a once-in-a-century pandemic, concerns around privacy of users, and regulating online speech in the context of armed conflicts are just some issues that the OSB has addressed so far. Ultimately, social media platforms are the town squares of today. Some have resisted the advent of the OSB because it is undesirable for a private actor to engage in adjudication that goes at the heart of what may be called the public side of international law.

However, it is the international community that has chosen to place MNCs under a duty to provide effective justice to victims of corporate conduct. Principle 11 of the UNGPs states that '[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.' And the commentary to Principle 11 provides:

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.

Where international standards themselves ask businesses to provide grievance mechanisms to individuals whose human rights they adversely impact, it is disingenuous to criticize corporations who then go on to create such mechanisms. Valid criticisms may be made of the way in which an actor may apply IHRL (even if done through the prism of hybrid law) to the resolution of a case, but not the fact that it applies IHRL in the first place. Returning to our example, applying IHRL in content moderation disputes, whether they be determined by a public or private adjudicative mechanism, is desirable because it provides for a consistent standard for decision-makers.

Further, given that human rights cases can produce different outcomes on the same set of facts depending on where a case is brought, some margin of appreciation should be granted to private adjudicative mechanisms like the OSB. Given the global reach of social media platforms, if such a margin of appreciation is not granted, the result would be inconsistencies and chaotic decision-making. It is natural that some commentators will criticize the OSB for its methodology in applying IHRL, and others will agree with it. These disagreements will continue *vis-à-vis* the OSB or any other mechanism created in the future. Overall, the OSB, in particular, seems to be taking an approach to IHRL that is not out of the ordinary.[54] Commenting on its initial jurisprudence, it said:

> In our first 20 decisions, we have raised concerns that some of Meta's content rules are too vague, too broad, or unclear, prompting recommendations to clarify rules or make secretive internal guidance on interpretation of those rules public. The Board has attached particular importance to political content and content that raises awareness of human rights violations, including political satire, as well as artistic expression and discussion of health issues. We also have questioned whether content removal is always a proportionate response to content that may be linked to harm but does not directly cause imminent harm. For example, in two decisions related to COVID-19 (*Claimed COVID cure* and *COVID lockdowns in Brazil*) we asked whether other measures short of removing the posts (such as warning screens, labelling, or downranking content) could mitigate risk while also protecting expression.[55]

[54] For the OSB's approach to IHRL, see the Annual Report (n 14) 55–6.
[55] *Ibid*.

Grounded in IHRL, the OSB's approach so far does not seem to lack logic. If other mechanisms created by businesses in the future take a similar approach, of course tailored to their own contexts, in net terms, a boost to the business and human rights framework will be a likely outcome. Thus, it is suggested that if a procedurally robust privately driven adjudicative mechanism is rendering substantive justice, then the outcome of this process should not be rejected just because of the identity of the decision-maker. The applicability of hybrid law will naturally present unique challenges that all courts, public or private, will need to tackle sooner rather than later. Reasonable minds may also differ on nuances of how the law is interpreted and applied. A disagreement on nuance should not amount to a wholesale rejection of an outcome that is otherwise independently delivered and based on international standards. In the final analysis, the focus must be on implementing tools to coordinate regulatory authority between private and public adjudicative mechanisms with a view to avoid duplication and inefficiencies in the administration of justice. In practical terms, this result can be achieved by enhancing the circulation of decisions rendered by privately driven adjudicative mechanisms as long as the quality of justice rendered is of a sufficient standard.

IV. Promoting the broad circulation of decisions

In this final section, I put forward some thoughts on how to potentially enhance the circulation of decisions made by privately driven transnational adjudicative mechanisms. The discussion is framed broadly, going beyond the context of the OSB as such. Overall, assuming that the quality of justice, both procedurally and substantively, is assured, the objective should be to promote the broad circulation of such decisions transnationally. Where the decisions or judgments of any adjudicative process enjoy broad circulation, the possibility of parallel proceedings, re-litigation of claims, inconsistent judgments, inefficiencies in the administration of justice, and general uncertainty in transnational legal relationships is considerably reduced.

Accordingly, access to justice is enhanced where a decision is recognized across legal orders without having to re-litigate the underlying claim. With the above in mind, three possibilities for transnational enforcement are identified: namely, the arbitration model, the judgments model, and the soft law option implemented through transnational rules of civil procedure. Of course, a mix of these options may be implemented, depending on the context in which disputes arise. Numerous detailed studies exist on the topic of recognition and enforcement generally. It is not the goal to rehash those discussions. The objective is only to point out the most salient aspects.

1. The arbitration model

Undoubtedly, the most successful cross-border enforcement regime in the transnational sphere is provided by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[56] relating to the enforceability of arbitration awards. A crucial reason for the success of international arbitration is the constitutionalization of the recognition and enforcement regime through that treaty. As arbitration is a private form of dispute settlement, interestingly, it is outcomes of private adjudication that enjoy the broadest circulation today. In purely domestic contexts, there is some debate whether a weaker party (such as a consumer or an employee) can be forced into an arbitration, especially when a dispute arises after an agreement to arbitrate has been made. However, in transnational contexts, regardless of the subject matter of a dispute, or the identity of the parties, every type of dispute can be arbitrated, and the so-called

[56] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 ('New York Convention').

'arbitrability' of disputes is less of a barrier to use arbitration as a forum of choice.[57] This includes claims where the dispute touches concerns of a public law character.[58] Arbitrating business and human rights cases is thus a potential option to deliver justice that can result in producing enforceable awards transnationally.

At its crux, if an adjudicative outcome falls within the scope of the New York Convention, it would enjoy maximum cross-border circulation. Any dispute resolution forum would presumably wish for its outcomes to have the greatest possible circulation, and hard legal impact in terms of real-life recognition and enforcement. In theory, using an arbitration model to enhance the transnational recognition and enforcement of adjudicative outcomes would seem ideal. However, as was intimated at the outset, arbitral jurisdiction generally exists where the parties to a dispute enter into an agreement to arbitrate that is considered valid by the enforcing court. If we take the OSB as an example, the number of cases it selects are a fraction of the complaints lodged and no arbitration clause seems to exist between the consumer and the corporate entity.[59] This is unless one characterizes Meta's dispute resolution system leading up to the OSB as a standing offer to arbitrate that is triggered when a user files a complaint that is then selected for adjudication. Ultimately, it is difficult to see how OSB decisions will fit within the framework of the New York Convention without resorting to some legal acrobatics.

Of course, by making certain adjustments to the relationship between business and individual victims, the notion of 'party autonomy' could be used to create jurisdiction for a private adjudicative mechanism whose outcomes could fall within the scope of the New York Convention. After all, the objective of the Hague Rules for Business and Human Rights Arbitration is precisely to create a workable arbitral regime in relation to business and human rights cases. If such a regime can be practically realized, then subject to the operation of the public policy exception to the enforcement of arbitration awards, and assuming due process was provided, privately driven transnational hybrid adjudicative outcomes can be arguably enforced with relative ease.

Another important advantage of arbitration is its flexibility. The parties are free to choose the applicable procedural and substantive law, with specialized procedures implemented to fit particular contexts—that is, sports arbitration.[60] In principle, an arbitration-based framework could address the adverse impact of the inequality of arms on access to justice. But this would require well-crafted procedural rules. Unless such procedural rules can account for the very high expense in arbitrating claims, and implement greater transparency requirements, the viability of international arbitration to resolve business and human rights claims might be limited overall. With several of those procedural issues not fully addressed by existing mechanisms, for the moment, adopting an arbitral framework may not provide all the answers, even if it provides the greatest potential of producing transnationally enforceable outcomes.

To realize international arbitration's full potential in resolving business and human rights cases, concerted action is necessary. As a starting point, UNCITRAL can contribute much to create a workable arbitration framework in business and human rights cases.

[57] Born (n 51), section 6.04.

[58] There exist exceptions in respect of criminal law.

[59] A somewhat complex choice of forum scheme exists. According to Meta's terms and conditions applicable at the date of writing, if one is acting as a consumer, then disputes are decided in the state where the consumer resides. See the following link under 4.4: (Disputes): <https://www.facebook.com/legal/terms/plain_text_terms> last access 21 September 2022; if it is a dispute concerning 'commercial claims', the chosen forum depends on where the business is located. For commercial claims by United States based companies, there is the possibility of arbitration. For commercial claims outside the United States, this does not seem to be the case, with all disputes subject to the exclusive jurisdiction of the United States District Court for the Northern District of California or in a State Court in San Mateo County. The only exception to this is in the case of a commercial claim against Meta Platforms Ireland Limited. In that case, only courts in the Republic of Ireland seem to be competent. See on 'commercial claims' the information under 5. (Disputes): <https://www.facebook.com/legal/commercial_terms> last access 20 September 2022.

[60] Born (n 51), section 1.02.6.

UNCITRAL is the international organization that oversees the New York Convention and aspects of investor–State arbitration (including transparency), has ODR expertise, and recently helped conclude the Singapore Convention on Mediation.[61] Based on its experience, UNCITRAL ought to consider the constructive role it can play in helping develop dispute resolution regimes in the sphere of business and human rights too.

2. The judgments model

Another possibility for ensuring the broad circulation of decisions rendered by private court-like structures is to treat them as co-equal with national court judgments. Admittedly, this is an ambitious suggestion. This would mean that the same rules that apply to the cross-border enforcement of national judgments would apply to judgments by private courts as well.[62] Before homing on the specifics of that possibility, it first bears emphasizing that the cross-border circulation of judgments has not enjoyed the same success as international arbitration awards. However, this might change in the medium to long term.

After almost 50 years of effort, through the Hague Conference on Private International Law (HCCH), a treaty relating to the cross-border recognition and enforcement of foreign civil and commercial judgments was finally negotiated. This convention is commonly known as the 2019 HCCH Judgments Convention[63] (Judgments Convention). It aims to do for national judgments what the New York Convention did for arbitration awards. Whether the Judgments Convention achieves the same success as the New York Convention remains to be seen. Be that as it may, it is beyond contention that there is a need to enhance the circulation of domestic court judgments to bolster access to justice. As the explanatory report to the Judgments Convention states:[64]

> [t]he legal community has long acknowledged the need for a global framework that would allow for the cross-border 'movement' of judgments. The increasing movement of people, information, and assets, together with the growth in cross-border trade, commerce, and investment, has made this need all the more apparent. These developments, amplified by the internet and new technologies, all require the support of an effective and efficient dispute resolution mechanism. In the absence of an effective mechanism for the global circulation of judgments to date, those engaged in cross-border activities have faced significant risks. Successful litigants have been deprived of rights and remedies, often forcing them to relitigate in another State, such as where the judgment debtor resides or has assets, simply in order to obtain relief to which they had already proven entitlement. Not only does this situation give rise to additional costs and delays, but successful litigants are faced with considerable uncertainty regarding the outcome of the new proceedings.
>
> It is in the above context that the Judgments Convention provides a much-needed and long-awaited piece of the 'puzzle' that is cross-border dispute resolution. It establishes a common framework for the global circulation of judgments in civil or commercial matters. In doing so, it offers legal certainty and predictability as to whether, and to what

[61] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, adopted 20 December 2018, entered into force 12 September 2020).

[62] Here, a decision of a private adjudicative mechanism could be treated the same as a judgment of the state under whose law the court has been created.

[63] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (The Hague, 2 July 2019) ('Judgments Convention'); for a discussion, see, Richard Garnett, 'The Judgments Project: fulfilling Assers dream of free-flowing judgments', in Thomas John, Rishi Gulati and Ben Köhler (eds), The Elgar Companion to the Hague Conference on Private International Law (Edward Elgar, 2020), 309–21.

[64] Francisco Garcimartín, Geneviève Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (HCCH Permanent Bureau 2020), available at <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf> last access 21 September 2022.

> extent, a judgment delivered by a court of one Contracting State in a civil or commercial matter will be recognised and/or enforced in another Contracting State. The Convention thus aims to reduce the risks, legal costs, and timeframes ordinarily associated with the recognition and enforcement of judgments abroad. It simultaneously enhances effective access to justice.[65]

Fundamentally, under the Judgments Convention, judgments of the courts of a State party must be recognized in another State party as long as the court rendering the original judgment possessed civil jurisdiction.[66] This is subject to well-accepted exceptions, such as where due process was not provided, a judgment was obtained by fraud, or recognition should be denied for reasons of public policy.[67] Interestingly, the Judgments Convention does not state that the decisions that fall within its scope are limited to those rendered by State-based courts. At first glance, one may thus think that it could incorporate within its scope decisions of privately driven adjudicative mechanisms like the OSB. However, it is useful to have regard for the negotiating history of the convention to gain a deeper perspective. The explanatory report to the Judgments Convention says:

> For a decision on the merits to qualify as a judgment … it must have been given by a 'court'. The Convention does not define 'court'. A definition was proposed at the Second Meeting of the Special Commission in the following terms:
>
> '"court" means: (i) a tribunal belonging to the Judiciary of a Contracting State at any level, and (ii) any other permanent tribunal that, according to the law of a Contracting State, exercises jurisdictional functions on a particular subject matter, according to pre-established procedural rules, being independent and autonomous'.
>
> The proposal was not adopted because it was difficult to articulate a precise definition. In principle, the term 'court' must be interpreted autonomously and refers to authorities or bodies that are part of the judicial branch or system of a State and which exercise judicial functions. It does not include administrative authorities, notaries public or non-State authorities.[68]

Due to the apparent limitations on the identity of the courts whose decisions fall within the recognition and enforcement scheme set out in the Judgments Convention, it is pointless to say much more on this treaty regime given its limited utility to the present debate. The outcomes of privately driven adjudication do not seem to fall within the scope of the Judgments Convention as envisaged by its creators. However, this does not mean that future interpretation of the Convention will remain static. In the end, it is still early days for the Convention regime, and it should be given an opportunity to do its core work. This is to boost the circulation of national court judgments transnationally. Even though the Judgments Convention at this point in time seems a far-fetched mechanism to boost the cross-border circulation of private 'court judgments', it would be advisable for the HCCH to keep abreast of the advent of privately driven transnational hybrid adjudication. If it fails to do so, the HCCH would lose significant opportunities to contribute to an area where it can do much good.

3. Soft law approaches through the creation of transnational rules of civil procedure

The third and final possibility suggested on promoting the broad recognition and enforcement of 'private court' decisions is through adoption or amendment of soft law instruments

[65] ibid 4.
[66] Articles 5–6, Judgments Convention.
[67] Article 7, Judgments Convention.
[68] Garcimartín et al (n 64) 75.

that provide guidance on the transnational rules of civil procedure. This approach is consistent with developments in both public and private international law, where soft law instruments are increasingly being adopted for a range of reasons. These include the difficulty in reaching international agreement on contentious topics, with transnational judgment enforcement being just one of them. After all, it took half a century to reach consensus on the global rules on recognition and enforcement of foreign civil judgments, noting that international agreement on the rules governing the existence and exercise of civil jurisdiction has still not been reached despite painstaking efforts at the HCCH.

In particular, international organizations having experience in creating principles on the transnational rules of civil procedure could take initiatives to help boost the recognition of 'private court' decisions. This work could focus on procedural aspects of access to justice before tackling issues of substantive law given the controversy regarding the latter. UNIDROIT is the ideal global institution to tackle this project. Relevantly, together with the American Law Institute (ALI), UNIDROIT developed the ALI/ UNIDROIT Principles of Transnational Civil Procedure in 2005 (UNIDROIT Principles).[69] These are procedural principles and rules that a legal system may adopt for adjudication of disputes arising from international commercial transactions.

In fact, the work leading up to the creation of the UNIDROIT Principles found that there exist fundamental similarities among legal systems around the world *vis-à-vis* the rules of civil procedure. These are as follows: standards governing assertion of personal jurisdiction and subject-matter jurisdiction; specifications for a neutral adjudicator; procedure for notice to defendant; rules for formulation of claims; explication of applicable substantive law; establishment of facts through proof; provision for expert testimony; rules for deliberation, decision, and appellate review; and the rules of finality of judgments. Moreover, as the various HCCH conventions show, international agreement on cross-border service of documents, taking of evidence, and more recently, recognition and enforcement, are sufficiently similar from one State to another that they have been susceptible to substantial resolution through international practice and formal conventions. Ultimately, by spelling out the procedural requirements as to independence and impartiality of adjudicators, recognition of judgments, and various other aspects of a fair procedure, the UNIDROIT Principles give content to broadly drafted fair trial rights found in IHRL. As the introduction to the commentaries to the UNIDROIT Principles[70] note:

> The objective of the Principles and Rules is to offer a system of fair procedure for litigants involved in legal disputes arising from transnational commercial transactions. Appreciating that all litigation is unpleasant from the viewpoint of the litigants, the Principles and Rules seek to reduce the uncertainty and anxiety that particularly attend parties obliged to litigate in unfamiliar surroundings. The reduction of difference in legal systems, commonly called 'harmonization' of law, is an aspect of achieving such fairness. However, a system of rules is only one aspect of fair procedure. Much more important, as a practical matter, are the competence, independence, and neutrality of judges and the competence and integrity of legal counsel. Nevertheless, rules of procedure are influential in the conduct of litigation.[71]

[69] For a contemporary perspective, see, Christoph Kern, 'UNIDROIT's work in the area of civil procedure', in Ben Köhler, Rishi Gulati and Thomas John (eds), The Elgar Companion to UNIDROIT (Edward Elgar, 2024), 390–402.

[70] Joint ALI/ UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, *ALI/ UNIDROIT Principles on Transnational Civil Procedure* (Rome January 2005), Study LXXVI—Doc 13, 7, available at <https://www.unidroit.org/english/documents/2005/study76/s-76-13-e.pdf> last access 21 September 2022.

[71] Ibid.

The UNIDROIT Principles are aimed at dispute resolution before national courts. There is no reason why an appropriately modified set of similar principles could not be created to facilitate the administration of justice at private adjudicative mechanisms, including setting the parameters for recognition and enforcement of their decisions. Crucially, any such initiative should provide distinct provisions that also cover the minimum technical requirements for ODR processes. This will ensure that the principles reflect contemporary realities where, more and more, justice is delivered virtually. The advent of privately driven adjudicative mechanisms, of which the OSB is a prime example, requires international action to incorporate such alternative 'court like' bodies into more conventional forms of legal ordering. If UNIDROIT helps set the standard for justice delivery at private adjudicative bodies, the quality of justice delivery at such forums could be assured assuming such standards are adopted. And as has been argued, where 'private courts' render high quality justice, then their outcomes ought to be circulated transnationally with relative ease.

V. Conclusion

The advent of privately driven adjudicative mechanisms such as the OSB should be welcomed as long as justice is delivered consistently with international standards. A key focus of this article has been on the delivery of justice in the online context through a study of the OSB. In the digital sphere, the procedural and substantive quality of justice must be robust. If quality can be assured, then the outcomes of private adjudicative mechanisms should be broadly recognized by conventional courts. In practice, this means that where a private adjudicative mechanism has delivered effective justice, or is capable of doing so, a State-based court may defer regulatory authority to it. This ensures that the administration of justice is streamlined. Such rationalization is especially important in the digital sphere where countless disputes arise, and issues of jurisdiction, enforcement, and lack of global agreement on substantive standards is much too evident. Of course, if a failure of justice is apparent, there is nothing stopping a State-based court from exercising its regulatory authority over a particular dispute.

But how specifically 'private court' decisions may be transnationally circulated is not a straightforward issue. Such decisions may qualify neither as arbitral awards nor as national court judgments. Thus, they may require their own enforcement regime. It is suggested that UNIDROIT is best placed to build on its existing work on transnational civil procedure to initially develop a soft law instrument specifically tailored to the administration of justice at private adjudicative mechanisms. However, this must be done in close coordination with its sister organizations, namely the HCCH and UNCITRAL. This is because these two institutions have significant expertise in developing instruments in related spheres. The HCCH, UNIDROIT, and UNCITRAL are often said to be rivals whose work overlaps and duplicates. If these three sister organizations work cooperatively, coordinate their work, and focus on outcomes, a joint initiative to help streamline the delivery of justice at privately driven adjudicative mechanisms like the OSB could be accomplished. Given the nature of expertise and input required, at the appropriate moment, partnership with technology companies, non-governmental organizations, academics, and other stakeholders is also imperative. In the end, if international organizations and their Member States wish to have a say on how private adjudicative mechanisms like the OSB operate, they must play their part. The alternative is the private sector completely dominating an area of regulation where public scrutiny is critical.