



Universiteit
Leiden
The Netherlands

Settling E-Commerce Disputes in the Digital Era: A comparative analysis between China and the European Union

Schrijver, Lineke

Citation

Schrijver, L. (2021). *Settling E-Commerce Disputes in the Digital Era: A comparative analysis between China and the European Union*.

Version: Not Applicable (or Unknown)

License: [License to inclusion and publication of a Bachelor or Master thesis in the Leiden University Student Repository](#)

Downloaded from: <https://hdl.handle.net/1887/3447236>

Note: To cite this publication please use the final published version (if applicable).

Settling E-Commerce Disputes in the Digital Era

A comparative analysis between China and the European Union



Universiteit Leiden

Lineke Schrijver
MA Asian Studies Thesis
Supervisor: Dr. Rogier Creemers
14 December 2021

Number of pages: 52
Word count: 14.609 including footnotes, excluding bibliography

Table of Contents

List of Abbreviations

1. Introduction	1
1.1 Background	1
1.2 Objectives and research questions	4
1.3 Methodology	5
1.4 Structure	7
2. Literature review	8
3. China's E-Commerce Law and Online Dispute Resolution	13
3.1 Background	13
3.2 General and specific principles	14
3.3 The dispute settlement mechanisms	15
3.3.1 Sui generis ODR	16
3.3.2 ADR and ODR: Judicial and extra judicial remedies	18
3.4 Cross-border dispute settlement	22
4. EU E-Commerce legislation and Online Dispute Resolution	25
4.1 Background	25
4.2 The dispute settlement mechanisms and principles	28
4.2.1 Directive 2013/11 on Consumer ADR	28
4.2.2 Regulation 524/2013 on Consumer ODR	30
4.2.3 Critical review and evaluation of the ODR Platform	35
4.3 Cross-border dispute settlement	38
5. Comparative analysis China and the European Union	39
5.1 Similarities	39
5.2 Differences	42
6. Conclusion	45
Bibliography	48

List of abbreviations

ADR	Alternative dispute resolution
B2B	Business to business
B2C	Business to consumer
CIETAC	China International Economic and Trade Arbitration Commission
DS	Dispute settlement
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
E-commerce	Electronic Commerce
EU	European Union
ODR	Online dispute resolution
OECD	Organisation for Economic Co-operation and Development
PRC	People's Republic of China
SWS	Squeaky wheel system
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WG	Working Group

1. Introduction

1.1 Background

Over the past decade, E-commerce has become one of the fast-developing industries in the world. E-commerce is commonly defined as ‘the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing orders’.¹ In more simple terms, E-commerce refers to the sale of goods and services through the Internet. According to the United Nations Conference on Trade and Development (UNCTAD), online retail sales have taken a rapidly increasing part of total retail sales from 2018-2020. In the case of China, the online share of retail sales was 18.4% in 2018; 20.7% in 2019; and 24.9% in 2020.² The COVID-19 pandemic has accelerated the expansion of E-commerce.³ In 2020, 73% of the internet users in the EU shopped online.⁴ As both consumers and business have increased their use of digital technologies, E-commerce can be expected to further grow during the years to come.

While rapid development of E-commerce has expanded business opportunities and made consumers’ lives easier, it has also given rise to legal questions on how to regulate this phenomenon. In today’s world, guaranteeing the sustainable development of E-commerce, while upholding consumer protection, is a critical issue. With the rapid rise of E-commerce, it is not surprising that the number of disputes on E-commerce transactions also increases considerably. E-commerce disputes are associated with low value, high volume, cross-border and between Internet users.⁵ These characteristics do not suit well to the traditional forms of

¹ Organisation for Economic Co-operation and Development (OECD), *OECD Guide to Measuring the Information Society 2011* (2011). For more common definitions of E-commerce, see the OECD iLibrary, available at: <https://www.oecd-ilibrary.org/sites/1885800a-en/index.html?itemId=/content/component/1885800a-en#back-n-ch01-2>.

² UNCTAD, ‘Global e-commerce jumps to \$26.7 trillion, COVID-19 boosts online sales’, 3 May 2021. Available at: <https://unctad.org/news/global-e-commerce-jumps-267-trillion-covid-19-boosts-online-sales>. For more information, see McKinsey & Company, China Consumer Report 2021, ‘Understanding Chinese Consumers: Growth Engine of the World’, November 2020, p. 14.

³ OECD, ‘Policy responses to Coronavirus: E-commerce in the time of COVID-19’, 7 October 2020. Available at: <https://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8/>.

⁴ Eurostat, ‘Ecommerce statistics for individuals’, 2021. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals#General_overview.

⁵ UNCITRAL, Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010), A/CN.9/716, par. 16. Available at: <https://undocs.org/en/A/CN.9/716%20>.

dispute settlement, such as resorting to commercial arbitration or going to court. Both arbitration and litigation are time-consuming, and increasingly expensive. Moreover, courts in many countries are overloaded which render them incapable of handling the fast-growing number of E-commerce disputes, especially those involving small claims.

Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) offer solutions to the problem of access to justice in the digital era, faced by citizens in many countries. ADR is a redress mechanism taking place outside the courtroom, often in the form of negotiation, mediation, or arbitration. ODR refers to ‘a mechanism for resolving disputes through the use of electronic communications and other information and communication technology’.⁶ As E-commerce disputes derive from online E-commerce transactions conducted on the internet, ODR mechanisms create the possibility of settling disputes characterised by low value and high volume in a fast and cheap way by using online technology.

Major economies with enormous E-commerce markets, such as China and the European Union, face similar challenges in E-commerce dispute settlement. In response to practical needs, both jurisdictions have introduced E-commerce laws and regulations, to govern and enhance ADR and ODR mechanisms. The need to regulate the rapidly growing sector of E-commerce has resulted in China’s first Electronic Commerce Law (E-Commerce Law), approved by the Chinese National People’s Congress on 31 August 2018 and which became effective on 1 January 2019. Within the EU, the first legal document for online services in the internal market is the E-commerce Directive issued in 2000. To respond to the fast-changing E-commerce market the EU has constantly enacted new legal instruments. Two of them are of particular importance for E-commerce dispute resolution: the 2013 Directive on Consumer ADR and the 2013 Regulation on Consumer ODR.

Next to mechanisms set up by national governments or institutions, the private sector in both China and the EU have initiated and developed internal complaints systems and other innovative mechanisms to efficiently handle complaints and settle E-commerce disputes. For

⁶ United Nations Commission on International Trade Law, ‘UNCITRAL Technical Notes on Online Dispute Resolution’, April 2017, par. 24. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

instance, the Chinese Black Cat Complaining (黑猫投诉, *hei mao tousu*) is an innovative platform that provides comprehensive services to E-commerce consumers, including ODR. Hence, a host of different routes to seeking redress and consumer protection mechanisms have evolved over the years.

The expansion of cross-border E-commerce has also resulted in a growing number of cross-border disputes. At the international level, the United Nations Commission on International Trade Law (UNCITRAL) which is mandated with progressive harmonisation and unification of international trade law, has established a special working group to study ODR for resolving disputes from growing online cross-border transactions. This has resulted in the Technical Notes on ODR which provide recommendations to states in designing and implementing ODR regimes for cross-border E-commerce disputes.⁷ More than 60 Member States of UNCITRAL, including China and all Member States of the EU, participated in UNCITRAL's drafting work.

This thesis focuses on comparing the E-commerce dispute settlement mechanisms in China and the EU. The Chinese national system and the EU regional system are deemed to have impact beyond their own jurisdiction. Recently, the 'Beijing Effect' has been coined as a new catch-word amongst work from international scholars.⁸ The 'Beijing Effect' refers to how China's approach on data governance has influenced countries which depend on Chinese companies to build digital infrastructures, and consequently emulate the Chinese governance system.⁹ This term is derived from the 'Brussels Effect', which entails that the European Union through its legal institutions and standards-setting is influencing the rest of the world, and hence takes the role of a global regulator in various domains.¹⁰ Due to the limited length of the thesis, it cannot address how China and the EU can influence the drafting of an international legal instrument for the settlement of cross-border E-commerce disputes. Instead, this thesis, through a systematic comparison of the new developments in E-commerce dispute settlement, seeks to contribute to a better understanding on how legal regimes comprising both principles and

⁷ UNCITRAL Technical Notes (n 6).

⁸ See Matthew Steven Erie and Thomas Streinz, 'The Beijing Effect: China's "Digital Silk Road" as Transnational Data Governance', New York University Journal of International Law and Politics (2021) forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3810256.

⁹ Ibid, p. 1.

¹⁰ See Ana Bradford, 'The Brussels Effect', 107 Northwestern University Law Review 1 (2012) and Ana Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

practical means are functioning in China and the EU. The convergencies and divergencies of their respective systems may well provide a foundation for further exploring their role in international regime building.

1.2 Objectives and research questions

The objectives of this thesis are threefold. The first is to provide an updated understanding on how China and the EU have responded to the need of developing innovative E-commerce dispute settlement mechanisms as a result of rapid expansion of E-commerce at national and international level. The efficient and trustful dispute settlement in E-commerce can foster higher public trust in E-commerce, consequently contributing to the further growth of E-commerce that not only benefits consumers and companies involved, but also contributes to both the national and global economy.

Another goal is to demonstrate the possible cooperation between China and the EU in developing an international legal framework for cross-border E-commerce dispute settlement. This goal will be realised through a comparative analysis on the convergence and divergence of the existing ODR systems in China and the EU. This comparative analysis can be helpful in discovering the possibility of convergence of regulatory rules to facilitate cross-border E-commerce between these two important regions with different political systems and legal cultures. Moreover, as international efforts to reach an agreement concerning the principles and ODR proceedings continue to be pursued by UNCITRAL, the new developments in China and the EU can contribute significantly to the further process of international standard-setting. In this context, this thesis can be viewed to provide a basis for future international initiatives by first understanding how the ODR regimes are operating in China and the EU, which are two influential powers in international negotiations.

Lastly, taking into account the relatively new Chinese E-commerce law, and the limited current academic research on comparative studies in ODR mechanisms between China and the EU, this thesis aims to contribute to the wider field of ODR research, and how legal developments and innovative solutions can contribute to the protection of consumers and their access to justice.

The main research question of this thesis is:

In what ways have China and the European Union developed online E-commerce dispute settlement regimes, which can be instrumental in generating potential cooperation in building international ODR standards?

To answer this question, this thesis will address five sub-questions:

- (i) What are the key features of E-commerce dispute settlement mechanisms provided in China's E-commerce Law, and what is the current ODR practice in China?
- (ii) What is China's position on cross-border E-commerce dispute settlement?
- (iii) What are the unique characteristics of E-commerce dispute settlement mechanisms provided in EU law, and how do they operate in the EU market?
- (iv) What is the EU's stance on cross-border E-commerce dispute settlement?
- (v) Where do the two systems converge and diverge?

1.3 Methodology

The methodology of this thesis is a comparative legal and policy analysis to expound the Chinese and European positions concerning alternative and online dispute settlement mechanisms in E-commerce. Modern comparative law can be traced back to French scholars in 1900 with the spirit that 'comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law'.¹¹ While the comparative law was then limited to the few European powers, nowadays it has expanded to cover legal systems of all nations in the world.¹² How to conduct comparative legal research, in other words, the methodology of

¹¹ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Oxford University Press 1998) 3. Available at: <https://www.pierre-legrand.com/zweigert-and-kotz.pdf>.

¹² For instance, see: Olufemi Amao and Chidebe Matthew Nwankwo, 'Exploring African Union Law Through the Lenses of Comparative Law: A Comparative Analysis with European Union Law' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021) and Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia* (Edward Elgar Publishing 2014).

comparative legal research is a question to be first answered. In this regard, six distinctive methods have been identified: the functional, structural, analytical, law-in-context, historical context and the common-core method.¹³ This thesis mainly focuses on the functional approach of comparative study.¹⁴ In the view of Zweigert and Kötz, such approach creates ‘a realistic context within which to compare and contrast the various solutions’ to solve legal problems in different national legal systems.¹⁵ Consequently, ‘functionalism’ can be served through different goals: understanding law, comparison, focusing on similarities, determining the ‘better law’ and unifying law.¹⁶ Van Hoecke observes that functionalism is to discover how various legal issues are dealt with in different societies according to different legal systems. He further explains that even though various legal means are utilised to solve similar or identical problems, the solutions in the end may be alike. Thus, in his view the functional method is to find ‘functional equivalents’ to the solutions.¹⁷

Within the functional method, the focus is on the societal problem and the actual result of the legal approach to that problem. This fits particularly well to the central research question of this thesis. The societal problem is a lack of awareness of the availability of access to dispute settlement in E-commerce transactions and also a lack of trust in its proper operation. The efforts for practical solutions to this problem are identified in two jurisdictions, China and the European Union.

In addition, this thesis goes one step further than the functional method of comparing only two jurisdictions. Although the thesis is limited to a study of China and the EU, in view of the size of the two huge economic markets involved and their extensive external relations, E-commerce dispute settlement mechanisms are not only significant for the two jurisdictions, they also have an international impact as businesses and consumers worldwide are increasingly using Chinese

¹³ Mark van Hoecke, ‘Methodology of Comparative Legal Research’, 12 *Law and Method* (2015) 8.

¹⁴ The functional method of comparative study is a rather complicated theoretical issue on which proponents and opponents are divided. See Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Riemann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008). Due to the limited space in this thesis, no discussion on the controversial aspect of this method is pursued, instead the thesis follows the mainstream approach that the functional method constitutes a paramount component of comparative study.

¹⁵ Zweigert and Kötz (n 11) 45.

¹⁶ Van Hoecke (n 13) 9.

¹⁷ *Ibid*, p. 10.

and European E-commerce platform operators to purchase goods and services. Hence, this thesis argues that the proliferation of E-commerce in China and the EU plays a leading role at the global level, and their success on E-commerce dispute settlement may provide useful experiences for other countries to follow.

Through the study of primary sources, particularly but not limited to the Chinese E-commerce Law of 2019, the EU Directive 2013/11 on Consumer ADR and EU Regulation 524/2013 on Consumer ODR, as well as auxiliary Chinese, EU and UN policy regulations and documents, this thesis intends to identify the similarities and differences between the two jurisdictions under review. Empirical data has mainly been retrieved from evaluation reports and informative websites. In addition, this study has benefited from secondary sources in the form of academic publications, reports by law firms, and guidebooks by other relevant institutions.

1.4 Structure

After this introduction, the thesis proceeds as follows. Chapter two provides a literature review on the evaluation and key controversial issues concerning ADR and ODR in E-commerce. Chapter three examines the dispute settlement system provided in the 2019 Chinese E-commerce Law and highlights some new developments of ODR practice in China. Chapter four discusses the current ODR regime within the EU by focusing on the mechanisms provided in the EU Directive on Consumer ADR and the EU Regulation on Consumer ODR. Chapter five discusses the main similarities and differences between the ODR mechanisms in China and the EU and examines the challenges and opportunities ahead. Finally, chapter six provides a conclusion.

2. Literature review

Parallel to the expansion of E-commerce, there is also a growing number of disputes arising from electronic transactions. From the inception, the E-commerce industry has created its own internal complaint mechanisms. Often cited examples are customer complaint services offered by eBay and PayPal. On the one hand such internal mechanisms are imperative as they offer an efficient and low-cost means of settling small value, large volume disputes, especially resulting from online shopping. On the other hand, internal mechanisms also have their shortcomings. Jie Zheng classifies the internal complaint mechanisms into the ‘automatic execution mechanism’ and the ‘incentive-driven enforcement mechanism’ and holds that both cause concerns on legitimacy and impartiality.¹⁸ To a certain extent, the internal complaint mechanisms serve limited purposes as they reflect a kind of ‘squeaky wheel system’ (SWS) in B2C business. The SWS refers to those who ‘artfully and actively pursue their interests are most likely to get the remedies and other assistance they seek’, while most of the consumers who do not have the knowledge, experience, and resources could not get the same assistance.¹⁹

For the purpose of this thesis, the focus will be mainly on external complaint mechanisms in the form of ADR and ODR. To fill in the gap of internal complaint mechanisms, ADR has initially been used to settle E-commerce disputes. However, traditional ADR is inadequate in addressing the fast-growing number of E-commerce disputes, which can often be described as low value, high volume, cross-border and between Internet users.²⁰ At the same time, the development of technology allows ADR institutions to utilise online services in processing dispute settlement, which has resulted in the emergence of ODR.²¹

¹⁸ Jie Zheng, *Online Resolution of E-commerce Disputes: Perspectives from the European Union, the UK and China* (Springer 2020) 348.

¹⁹ Amy J. Schmitz, ‘Building Trust in Ecommerce Through Online Dispute Resolution’ in John A. Rothschild, *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing 2016) 307.

²⁰ UNCITRAL Report of Working Group III (n 5).

²¹ Yun Zhao, ‘Regulatory Regime for Online Dispute Resolution: Current Forms and Future Development’ in Maria F. Moscati, Michael Palmer and Marian Roberts (eds), *Comparative Dispute Resolution* (Edward Elgar Publishing 2020) 426.

ODR is presented as ‘a realistic and practical solution to the growing needs of the Internet community’.²² To justify the existence of ODR, some scholars emphasise that the core of the system lies in the protection of consumers rights and interests. Pablo Cortes argues that consumer access to justice in case of small claims procedures is insufficient by examining court procedures in selected European countries. Cortes points out that ODR can be deemed as a new option for consumers, considering the challenges concerning funding, awareness, due process and enforcement. Through empirical study of technology-assisted litigation and arbitration in selected European countries, Cortes demonstrates the need for EU guidelines in this area. In his view, ‘a legal framework will boost the legitimacy of ODR by providing appropriate information, awareness and trust ... the development of ODR depends on creating legal standards that will serve as a badge to enforce ODR agreements.’²³

The advantages of ODR have been well elaborated in academic literature. ODR is efficient, convenient, and more transparent than traditional ADR, and offers better traceability.²⁴ Lide expresses that ODR presents more choices for dispute resolution with ‘greater flexibility, more creative solutions and quicker decisions.’²⁵ From a sustainable development perspective, ODR has ‘green benefits by eliminating paper use and the need for office space, and promoting greater energy saving as well as reducing travel and emissions’.²⁶ Yun Zhao also rightly points out that: ‘In today’s global business world, we can easily encounter cultural differences, which may lead to misunderstanding and ultimately to disputes. It is imperative to take into account the socio-cultural dimensions of the traditional dispute resolution process. The online environment helps to create a neutral space for dispute resolution.’²⁷ Cortes and Lodder point out that ‘While it is also obvious that all redress systems have their strengths and weaknesses

²² Lan Q. Hang, ‘Online Dispute Resolution Systems: The Future of Cyberspace Law’, 41(3) Santa Clara Law Review (2001) 866.

²³ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 206.

²⁴ Zhao (n 21) 425.

²⁵ Ibid and E. Caesy Lide, ‘ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation’, 12 Ohio State Journal on Dispute Resolution (1996) 219.

²⁶ Zhao (n 21) 425.

²⁷ Ibid, p. 426.

and no single mechanism is ideal for all types of claims, ODR is clearly suited to resolve consumer disputes, particularly those arising out of E-Commerce'.²⁸

Amy J. Schmitz argues that trust in E-commerce could be built through ODR.²⁹ Recognising the evolving process of ODR at national and international levels, Schmitz argues that apart from the low cost and efficiency, an ideal ODR system should also meet some standards of transparency and fairness which are the foundations of any dispute settlement mechanisms. In this way ODR can 'foster revived corporate responsibility and empower all consumers regardless of their resources, power, or status'.³⁰

Some scholars identify some disadvantages of ODR. Hang draws attention to the lack of confidentiality and security of ODR as there is no guarantee that sensitive materials are protected, the proceedings will not be recorded, and documents will not be disseminated without permission.³¹ Yun Zhao points to the absence of more nuanced communications, body language and face-to-face contact which are essential to build trust and confidence between the disputing parties, and to maintain a good relationship after the resolution of disputes.³² Jie Zheng raises concerns on the procedural fairness in ODR. In Zheng's view: 'The procedural fairness in improving the quality and legitimacy of ODR procedural rules shall be reconciled with procedural efficiency in simplifying the procedure and reducing the processing time of dispute resolution.'³³ Jie Zheng's work also contributes to the debate on enforcement of ODR decisions. Zheng argues that a public enforcement mechanism which requires judicial support, is suitable to disputes of B2B involving large sums of money, but unworkable to most of the E-commerce disputes of B2C involving small claims. Consequently, Zheng strongly recommends enhancing the enforcement mechanism of the ODR outcomes.³⁴

²⁸ Pablo Cortes and Arno R. Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress', 21(1) Maastricht Journal of European and Comparative Law (2014) 37.

²⁹ Schmitz (n 19).

³⁰ Ibid, p. 309.

³¹ Q. Hang (n 22) 859-860.

³² Zhao (n 21) 426.

³³ Zheng (n 18) 347.

³⁴ Ibid, p. 348.

Cross-border E-Commerce dispute resolution

One of the significant features of E-commerce is its cross-border nature. Businesses and consumers do not only use E-commerce within the jurisdiction they permanently reside and live. E-commerce allows businesses and people to sell and purchase goods and services across jurisdictions. How to regulate such cross-border electronic transactions has become a matter of international concern. In 2010, the UNCITRAL Working Group (WG) III was mandated to study ODR for resolving disputes from growing online cross-border transactions. This resulted in the adoption of UNCITRAL's Technical Notes on Online Dispute Resolution (Notes) in 2016.³⁵

The Notes are 'intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communication'.³⁶ The UNCITRAL WG III had an ambitious plan in the beginning, by intending to create four instruments covering: procedural rules that meet the due process requirement; standards for ODR providers; substantive principles for resolving cross-border disputes; and a cross-border enforcement mechanism.³⁷ Constantina Sampani has critically examined the failure of UNCITRAL WG III's attempt to produce a global regulatory framework of ODR relating to cross-border E-commerce.³⁸ In Sampani's view 'the lack of consensus in producing a binding regulatory framework provides a strong indication that although the intent for inclusivity in the heterogeneity of culture, diverse historical experience and stage of development has been articulated in the rhetoric of the Working Group, its acknowledgement has not dissolved the challenges presented by this heterogeneity to generate a uniform style of globalized regulations.'³⁹ However, Sampani argues that 'this heterogeneity is not to be seen as an obstacle that requires removal but rather as an essential source of information for any programme that seeks development and integration.'⁴⁰ Sampani proposes an approach that combines cosmopolitanism and legal pluralism, whilst also taking the position of consumers – 'as a group not defined by belonging

³⁵ UNCITRAL Technical Notes (n 6).

³⁶ Ibid, par. 5.

³⁷ Ibid, par. 21.

³⁸ Constantina Sampani, 'Online Dispute Resolution in E-commerce: Is Consensus in Regulation UNCITRAL's Utopian Idea or a Realistic Ambition?', 30(3) Information & Communications Technology Law (2021).

³⁹ Ibid, p. 252.

⁴⁰ Ibid.

to a nation state but by the commonality of their interests and actions', in developing an international regulatory framework of ODR in E-commerce.⁴¹ It is interesting to note that Jie Zheng also emphasises the impact of legal culture and social values on shaping ADR developments in China and the EU.⁴²

With regard to cross-border E-commerce disputes, Wang examines jurisdiction and choice of law on cross-border electronic B2B and B2C contracts and modernisation and harmonisation of private international law to meet the needs and challenges of the digital age.⁴³ Wang argues that; 'As ODR is not only a new legal concept but also an innovative technology service, amending the traditional arbitration or mediation law itself might not be sufficient to harmonise the conduct of online dispute resolution in the global market. A thorough international ODR legal framework on the technique-related requirements, standards of fair procedure and service liability issues will enhance the legal certainty of the validity and enforcement of ODR agreements An International Model Law or Convention on ODR ... will increase the legal certainty of resolving disputes online, and hence boost the users' confidence in forming cross-border electronic commercial contracts.'⁴⁴

⁴¹ Sampani (n 38) 254.

⁴² Zheng (n 18) 42.

⁴³ Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge University Press 2010) 188.

⁴⁴ *Ibid*, p. 188.

3. China's E-Commerce Law and Online Dispute Resolution

3.1 Background

The E-commerce Law of the People's Republic of China (电子商务法, *dianzi shangwu fa*) became effective on 1 January 2019.⁴⁵ It is the first comprehensive law in the field of E-commerce in China and one of the first in the world. This is a clear sign of the importance that the Chinese government has given to the rapid development of E-commerce.

The E-commerce law contains seven chapters, with a total of 89 articles, covering the following sections:

- General provisions
- E-commerce Business operators
- Formation and performance of E-commerce contracts
- Settlement of E-commerce disputes
- Promotion of E-commerce
- Legal liabilities
- Supplementary provisions

Obviously, E-commerce dispute resolution constitutes an important part of the E-Commerce Law, which is demonstrated in a full chapter with six articles as well as some relevant articles in other chapters of the E-commerce Law. Three key features can be identified on dispute settlement in the E-Commerce Law. These include: (1) general and specific principles; (2) concrete mechanisms for dispute settlement; and (3) the issue of cross-border disputes. The following sections will provide a brief analysis on these issues.

⁴⁵ The English version of the E-Commerce Law of the People's Republic of China is available at https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf.

3.2 General and specific principles

As a general principle, Article 58 of the E-commerce law provides that the State encourages E-commerce platform operators to set up mechanisms of guaranteeing the quality of commodities and services that are conducive to E-commerce development and the protection of consumer rights and interests. This general principle reflects the objectives of the E-commerce Law as recorded in Article 1, which are safeguarding the legitimate rights and interests of all parties to E-commerce, regulating E-commerce conducts, maintaining market order, and promoting the sustainable and healthy development of E-commerce. Both Article 1 and Article 58 have two implications. One concerns the sound development of E-commerce; the other emphasises the protection of consumer rights. It seems that the E-commerce Law takes the two aspects as an integrated one: a sustainable E-commerce benefits the industry itself and meets the needs of consumers, while consumer protection leads to better trust in E-commerce which provides an enabling environment to boost E-commerce sales.

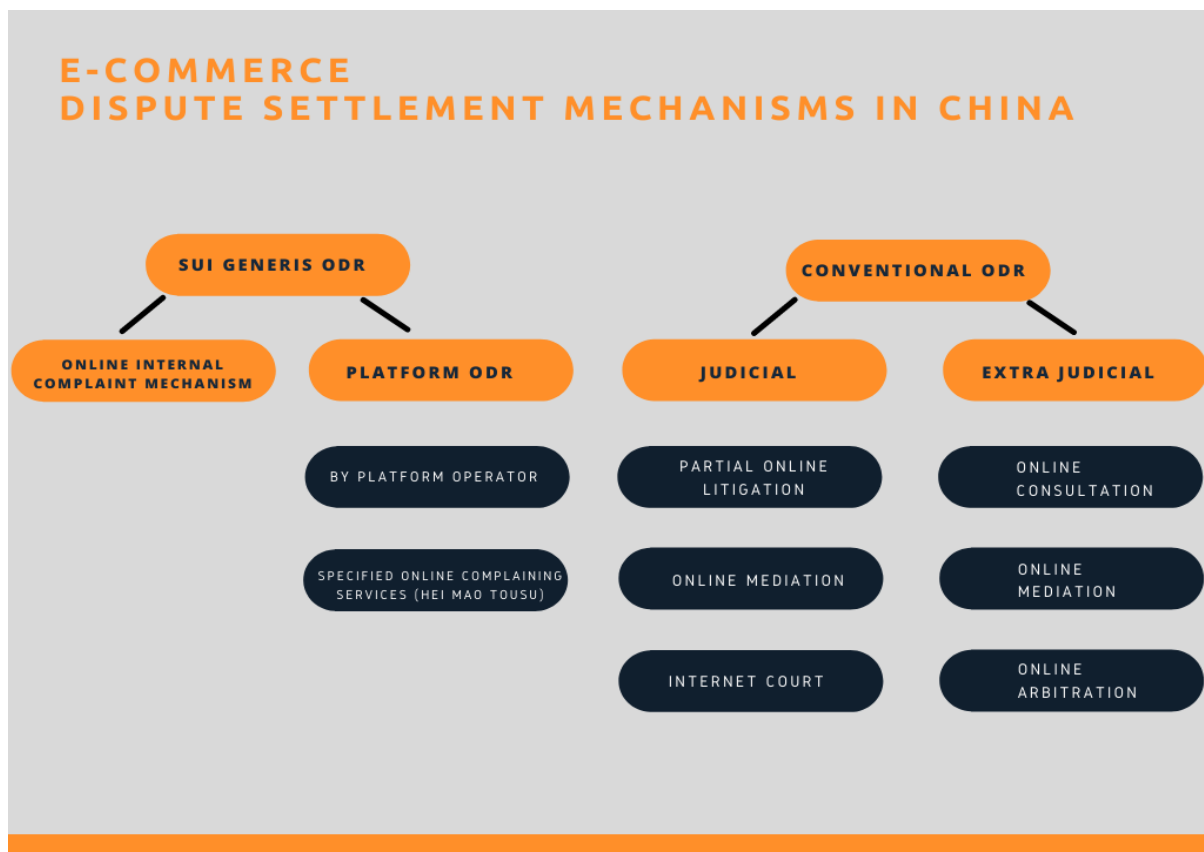
To further enhance the protection of consumer rights, Article 61 provides that the E-commerce platform operators *shall* actively assist the consumer to protect his/her lawful rights and interests, in case a dispute occurs when a consumer purchases commodities or uses services on the E-commerce platform. This specific principle is mandatory for E-commerce platform operators.

In addition, protection of consumer rights is also reflected in other articles of the E-commerce Law, including the consumers' right to know and right to choose, right to receive a refund, right to have their personal information protected, and the right to their health and safety. The E-commerce platform operators are liable for violations of consumers' legitimate rights and interests and should establish and improve credit evaluating systems to enable consumers to assess the goods and services provided by the platform.⁴⁶

⁴⁶ Chinese E-commerce Law, Arts. 17, 21, 32, 33, 37, 38 and 39.

3.3 The dispute settlement mechanisms

The dispute settlement (DS) mechanisms are the core of dispute resolution. The E-Commerce Law provides two set of mechanisms. One is the sui generis ODR which refers to internal complaint mechanisms provided by E-commerce operators and platform ODR provided by E-commerce platform operators.⁴⁷ The other can be understood as external, third-party conventional dispute resolution, including negotiation, mediation, complaining to relevant departments, arbitration, and litigation. In E-commerce practice, these are referred to as conventional ODR. As a whole, China's E-commerce Law provides a variety of options in settling E-commerce disputes.



Source: own design, based on footnote 47.

⁴⁷ Xue Hong, E-commerce Dispute Settlement Innovations and Challenges in China, China Legal Science (2020), section II. Available at: <https://clsjp.chinalaw.org.cn/portal/article/index/id/11226.html>.

3.3.1 Sui generis ODR

Article 59 of the E-commerce Law requires that E-commerce operators *shall* establish convenient and effective mechanisms for complaints and reports, make the mechanisms publicly available, and promptly handle complaints and reports. This is the mandatory online complaining and reporting system imposed on all E-commerce operators. The online complaining mechanism is especially useful to resolve consumer disputes. It has the advantages of being prompt and convenient to settle disputes and prevents escalation of conflicts. This mechanism has also considerably reduced the burden of courts, as otherwise some disputes may be brought to the judiciary. The Chinese scholar Xue Hong points out that E-commerce operators ‘settle the disputes with the complaining consumers amicably so as to avoid deteriorating the disputes and resorting to the courts or other external dispute resolution channels. The online complaining system helps the e-commerce operators improve the customer experience, accept public supervision and upgrade the operational level.’⁴⁸ In practice, most of the cases are settled by this type of complaint mechanism.

Article 63 of the Chinese E-commerce Law provides that E-commerce platform operators *may* establish online dispute settlement mechanisms, formulate, and publish their rules of dispute settlement, with a view to settle disputes fairly and impartially under the principle of voluntariness. This refers to the platform ODR. Unlike the mandatory online complaint and reporting mechanisms, the platform ODR is not mandatory. This reflects the reality that not all companies are capable of creating and managing their own ODR mechanisms. Zheng notes that according to a Chinese survey in 2016, the popular web shop Taobao processed about 3 million cases annually.⁴⁹ This evidently demonstrates the importance of the internal dispute settlement mechanism, though whether it meets the minimum requirements for fair procedure is another question.⁵⁰

One example that can be given is the Alibaba.com Online Transaction Dispute Rules (2018).⁵¹ Article 20 provides: ‘The Buyer and the Seller shall provide evidence for their respective claim

⁴⁸ Hong (n 47).

⁴⁹ Zheng (n 18) 244.

⁵⁰ Ibid.

⁵¹ See Alibaba.com Transaction Dispute Rules, available at: <https://rule.alibaba.com/rule/detail/8882.htm>.

or defense no later than three working days after making application for dispute resolution or receiving the notice of dispute resolution from Alibaba.com, and shall undertake that the evidence provided is authentic, complete, relevant and legitimate. Alibaba.com has the right to obtain evidence on its own or from a third party as it deems necessary, and determine the liability of the parties and the disputes based on the reasonable main standards and international trade practices.’⁵²

As stated earlier, alternative dispute resolution contains mechanisms provided by the private sector too. An interesting development in China is the emergence of third-party consumer complaint platforms that play a kind of supervisory role for E-commerce operators and assist consumers in protecting their rights. One of the well-known established platforms is the Black Cat Complaining (黑猫投诉, *hei mao tousu*) platform by Sina. Black Cat Complaining was established in March 2018 and functions as a website and app for customers to file complaints, while also providing mediation services between customers and businesses. In 2019, Black Cat Complaining received more than 1,000 complaints every day.⁵³ The platform has developed several innovative services to help consumers. For instance, in November 2019, it started the collective complaint functions (聚投诉, *ju tousu*), which works as follows: if several people have a consumer dispute, after one person initiates a complaint, others can quickly participate based on the content filled in by the initiator. This simplifies the complaint process for consumers and provides a channel for so-called ‘mutual assistance’. Moreover, consumers participating in collective complaints can share information, and form a joint force which expand the impact of the complaints. This can result in efficient handling of complaints by companies. In addition, the Black Cat platform also offers a Red and Black List (红黑榜, *hong hei bang*) as an important indicator to measure the customer service quality of companies. At the beginning of each month, it provides a ranking of companies based on calculating companies’ efficiency, transparency, and other factors in managing consumer complaints. The special list can provide a reference point to consumers as well as encourage companies to provide high quality service by exposing irresponsible enterprises. Another innovation is the

⁵² See Alibaba.com Transaction Dispute Rules, available at: <https://rule.alibabacom/rule/detail/8882.htm>.

⁵³ Min Xiong, ‘A Complaint Resolution Platform Rises to Address Dissatisfied Customers on Weibo’, 2019, available at: <https://jingculturecommerce.com/complaint-resolution-weibo/>.

Black Cat Help Group (帮帮团, *bang bang tuan*), a third-party opinion alliance launched by the Black Cat Complaining platform. The members of the Group are invited guests from well-known media, legal professionals, and industry experts. For consumer complaints, they give professional analysis and suggestions to consumers in better protecting their rights. The newest innovation of the Black Cat platform is the online Anchor complaint area (主播投诉专区, *zhu bo tousu zhuanqu*), which started in March 2021 and promotes live stream settlement of E-commerce consumer disputes.⁵⁴ It is reported that till the end of 2020 the number of effective complaints on the Black Cat Complaining platform has exceeded 3.3 million, and by 18 July 2021, was said to have reached 5 million.⁵⁵

It should be noted that these third-party complaint services do not settle disputes with binding results. However, Hong argues that such services ‘inform the businesses of the consumers’ complaints’ and hence, ‘the consumers’ complaints posted online may have the effect of “naming and shaming” and let the pertinent businesses be defamed by the wider community.’⁵⁶

3.3.2 ADR and ODR: Judicial and extra judicial remedies

Article 60 of the E-Commerce Law lists five possible options that any E-commerce dispute may be resolved through: (1) consultation, (2) mediation by consumer organisation, industry association or other legally established mediation organisations, (3) filing complaints to relevant departments, (4) submitting to arbitration and (5) resorting to litigation in courts.

Apart from using the traditional formats of mediation, arbitration and litigation, China has developed various forms of ODR in the recent decade, including online consultation, mediation, arbitration, and litigation. In China, ODR can be classified to judicial ODR and extrajudicial ODR. The former refers to judicial mediation and litigation and the latter refers to consultation, mediation and arbitration conducted by specialised institutions.

⁵⁴ This information is obtained from Baidu, when searching for the term *hei mao tou su* (黑猫投诉). Through translation, I have managed to read and understand information on the website. The information is available at: <https://baike.baidu.com/item/%E9%BB%91%E7%8C%AB%E6%8A%95%E8%AF%89/22371679>

⁵⁵ Ibid.

⁵⁶ Hong (n 47) section II.

Mediation

To be brief, mediation by Chinese courts is commonly used before and during the trial process.⁵⁷ Online mediation is widely used by Chinese Internet Courts, with successful outcomes. It is reported that the Beijing Internet Court in its first year of operating handled 29,728 mediation cases, 100% of which were conducted online, with 23,262 cases concluded. Of these, 5,572 were successfully settled, with a reported success rate of 23.9%.⁵⁸

Extrajudicial online mediation can be provided by People's mediation committees, industry associations, lawyers, E-commerce operator platforms and arbitration commissions.⁵⁹ The majority of cases addressed by online mediation include contract disputes, labour disputes, traffic accident disputes, family disputes and consumer disputes with simple facts and clear legal relationships.⁶⁰

Arbitration

Online arbitration is mainly used to settle E-commerce disputes. For instance, the China International Economic and Trade Arbitration Commission (CIETAC), the biggest and oldest arbitration commission in China, issued its Online Arbitration Rules in May 2009.⁶¹ Article 1 of the Rules points out that the primary purpose of the Rules is to settle E-commerce disputes, though parties are free to use them for other disputes as well. CIETAC has its Online Dispute Resolution Centre specialised in solving E-commerce disputes by using online dispute resolution methods.⁶² However, according to Zhao, the use of CIETAC ODR is minimal as a

⁵⁷ See for more on this: Peter C.H. Chan, *Mediation in Contemporary Chinese Civil Justice: A Proceduralist Diachronic Perspective* (Brill Nijhoff 2017).

⁵⁸ Beijing Internet Court, White Paper on trials of Beijing Internet Court, p. 11. Available at: <https://regional.chinadaily.com.cn/pdf/WhitepaperontrialsofBeijingInternetCourt.pdf>

⁵⁹ Jie Zheng, 'The Role of ODR in Resolving Electronic Commerce Disputes in China', 3(1) International Journal on Online Dispute Resolution (2016).

⁶⁰ Ibid, p. 47.

⁶¹ Information on the China International Economic and Trade Arbitration Commission (CIETAC) is available at: <http://www.chinagoabroad.com/en/contributor/china-international-economic-and-trade-arbitration-commission-cietac>.

⁶² The English translation of the Online Arbitration Rules can be found at: https://arbitrationlaw.com/sites/default/files/free_pdfs/CIETAC%20Online%20Arbitration%20Rules.pdf. For a brief summary of these Rules, see Kim M. Rooney, New CIETAC Online Arbitration Rules, at <http://arbitrationblog.kluwerarbitration.com/2009/05/27/new-cietac-online-arbitration-rules/>.

result of consumers' lack of trust, as well as 'the fact that the principle of self-regulation prevails in the Internet industry.'⁶³

Litigation

China's digital litigation has accelerated in recent years. This digital litigation has been classified into two models: phased mode and full-process mode.⁶⁴ The former refers to using electronic technology in case filing, electronic case files and video hearings. The latter means that the whole judicial process, ranging from case filing, case acceptance, pre-trial mediation, submission of evidence, hearing, and making judgment, are all conducted online, or based on parties' request to have part of the process online and the remainder in the traditional way.⁶⁵ While the phased mode is used by many courts – as to the end of December 2018, 2,995 courts offered online litigation service,⁶⁶ the full-process mode refers to the so-called 'Internet Courts', which can be classified as an impressive judicial innovation in recent years. A brief elaboration below shows the key features of such courts.

In June 2017, the first Internet Court was set up in Hangzhou, and in 2018 two Internet Courts were established in Beijing and Guangzhou, respectively. Although the Internet Courts are local courts, they handle cases initiated from all over China. The Beijing Internet Court disclosed that in its first year of operation, 22.3% of claimants came from Beijing and 77.7% from outside of Beijing. Parties came from more than 200 cities in China. Ten cases involved the people from Hong Kong, Macao and Taiwan, and 26 cases involved foreigners.⁶⁷ Foreigner and foreign companies can file lawsuits online too. The Internet Courts in Hangzhou, Beijing

⁶³ Zhao (n 21) 430.

⁶⁴ Meirong Guo, Internet Court's Challenges and Future in China, 40 Computer Law & Security Review (2021) 2.

⁶⁵ Ibid.

⁶⁶ The Supreme People's Court of the People's Republic of China, 'Chinese Courts, Internet Judiciary in Data', available at: http://english.court.gov.cn/2019-12/18/content_37529518.htm. See also 'The SPC Releases the Rules of Online Litigation of People's Court', available at: http://english.court.gov.cn/2021-06/18/content_37545136.htm.

⁶⁷ White Paper on trials of Beijing Internet Court (n 58) 6.

and Guangzhou all have their websites in English, which as well provide an online and mobile litigation platform.⁶⁸

The Internet Courts mainly deal with two types of cases. One is E-commerce disputes concerning online shopping and online services. The other is online intellectual property disputes, such as copyright, trademarks and domain names involving E-commerce directly or indirectly.⁶⁹ In the case of the Beijing Internet Court, in its first-year operation, the Court accepted a total of 34,263 cases and concluded 25,333 cases. Amongst those, 26,607 cases concerned copyright ownership and infringement disputes, accounting for 77.7%; 4,243 cases concerned online shopping contract disputes, accounting for 12.3%; and 2,391 cases concerned online infringement liability disputes, accounting for 7%.⁷⁰

The Internet Courts can be deemed more efficient than normal courts. As plaintiffs do not need to present in court, obviously time is saved. In addition, the Internet Courts provide easier access to justice and have proven to be quite efficient in handling cases. It is reported that in the first two years of operation in the Hangzhou Internet Court, about 20,000 cases were heard and the average time of hearings was around 28 minutes.⁷¹ The Beijing Internet Court reported on its quality and efficiency of trials too. From 9 September 2018 to 31 August 2019: ‘98.3% of the first-instance cases handled by the Beijing Internet Court were concluded with the ruling accepted; 98.0% of the rulings were performed automatically; the first-instance simple procedure was applied in 95.2% of the cases; the court hearing lasted 37 minutes averagely; the handling of each case lasted 40 days averagely.’⁷²

The Mercator Institute for China Studies (MERICS) shows an overall positive assessment of the Internet Courts by providing that: ‘As such, whilst the court does not fundamentally redesign the litigation process, it does provide a vehicle for increased efficiency in an otherwise slow and expensive system. Regardless of demand for more fundamental judicial reform, the

⁶⁸ For more information, see Hangzhou Internet Court; <https://www.netcourt.gov.cn/?lang=En>, Beijing Internet Court; <https://english.bjinternetcourt.gov.cn/index.html>, and Guangzhou Internet Court; <https://ols.gzinternetcourt.gov.cn/?lang=en-US>.

⁶⁹ Hong (n 47) Section I.

⁷⁰ White Paper on trials of Beijing Internet Court (n 58) 6.

⁷¹ MERICS, ‘Size matters: Alibaba shapes China’s first “Court of the Internet”, available at: <https://merics.org/en/analysis/size-matters-alibaba-shapes-chinas-first-court-internet>.

⁷² White Paper on trials of Beijing Internet Court (n 58) 10.

plaintiffs have not lost anything they didn't have before – on the contrary, they have gained a channel for formal dispute resolution that simply didn't exist otherwise, and a comparatively quick and inexpensive one'.⁷³ Recognizing the efficiency of the Internet Courts, some scholars however, have also raised concerns and risks of these courts with respect to their impact on civil jurisdiction; restrictions on the scope of accepted cases; and risks to law from Internet technology.⁷⁴

3.4 Cross-border dispute settlement

While the E-commerce Law applies to all E-commerce activities within the territory of the PRC as clearly provided in Article 2 of the Law, the Law has also taken into account cross-border E-commerce. In Chapter V of the E-commerce Law on state promotion of E-commerce, Articles 71 to 73 deal with state policy on cross-border E-commerce. Article 72 provides that the State import and export administration departments should promote mutual assistance in law enforcement to improve the efficiency of cross-border E-commerce services and supervision. Article 73 indicates that the State promotes the establishment of cross-border E-commerce exchanges and cooperation with different countries and regions, participates in the formulation of international rules on E-commerce, and promotes international mutual recognition of electronic signature and electronic identity. Moreover, Article 73 also indicates that China promotes the establishment of cross-border E-commerce dispute resolution mechanisms with different countries and regions. In recent years, China has promoted cross-border E-commerce in bilateral and regional trade agreements. For example, the China-Mauritius Free Trade Agreement signed in October 2019, provides that the two countries will 'intensify e-commerce cooperation to boost bilateral trade'.⁷⁵ The Regional Comprehensive Economic Partnership (RCEP) in which China has actively involved in its making, also contains a chapter on cross-border E-commerce. While some suspect that the RCEP only encourages the use rather than regulates E-commerce to achieve a balance with social and

⁷³ MERICS (n 71).

⁷⁴ Guo (n 64) 6-9.

⁷⁵ MOFCOM, 'Chief of the WTO Department of MOFCOM introduces the Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Mauritius'. Available at: http://fta.mofcom.gov.cn/enarticle/enrelease/202101/44181_1.html

human rights purposes,⁷⁶ others take it to be a unique opportunity to boost the cross-border E-commerce in the world's biggest free trade zone.⁷⁷

Regarding judicial practice, the Hangzhou Internet Court set up a Cross-border Trade Tribunal to hear cross-border E-commerce cases in July 2020. It is reported that the Court has created the Hangzhou cross-border digital trade judicial platform together with Hangzhou Customs, Hangzhou Taxation Bureau, and other departments. This enables the Court to verify the transaction information provided by the parties by using blockchain technology, which reduces considerably the cost of submitting evidence.⁷⁸ Nevertheless, it is understandable that it is not easy for foreign parties to use the Internet Court in China. As Du and Yu explain: in order to start with the Court, a party's identity needs to be verified. For Chinese parties, verification can be processed via the database of Chinese nationals and enterprises' information. However, there is no such data base for foreign parties which renders identity verification difficult. Moreover, under Chinese law, notarised and authenticated identity documents to Chinese courts are submitted in hard copies by foreign parties. This is not suitable to the online litigation model of Internet courts.⁷⁹

It should be noted that the Supreme People's Court (SPC) in China has initiated a new experiment in promoting online cross-border litigation. On 3 February 2021, the SPC issued Several Provisions on Providing Online case Filing Services for Cross-Border Litigants. The Provisions define cross-border litigants as foreigners, foreign companies and foreign organisations of Hong Kong, Macao and Taiwan, and Chinese citizens living in these three places. These litigants can file online the first instance civil and commercial cases. The SPC created the 'China Mobile Micro Court' (移动微法院, *yidong wei fayuan*) which is a mini-program that can be downloaded via WeChat. If a litigant wants to file a case online by using the China Mobile Micro Court, he or she needs to download and register with WeChat through

⁷⁶ Jane Kelsey, 'Important differences between the final RCEP electronic commerce chapter and the TPPA and lessons for e-commerce in the WTO'. Available at: <https://www.bilaterals.org/?important-differences-between-the>.

⁷⁷ Zhang Dan, 'RCEP's boost to e-commerce', Global Times, available at: <https://www.globaltimes.cn/content/1207145.shtml>.

⁷⁸ Guodong Du and Meng Yu, 'It's Time to Settle Cross-border E-commerce Disputes in China's Internet Courts', China Justice Observer, available at: <https://www.chinajusticeobserver.com/a/its-time-to-settle-cross-border-e-commerce-disputes-in-chinas-internet-courts>.

⁷⁹ Ibid.

mobile phone. At present, the online filing can be processed in three languages: simplified Chinese, traditional Chinese, and English. Identity verification will be done online within 3 working days.⁸⁰ The online case-filing services can be expected to be more efficient than normal case-filing process for foreign litigants, though the scope for foreign litigants is evidently limited currently. Currently, there is no report of the China Mobile Micro Court available yet. As experiments expand and technology avail, the scope of foreign litigants may be enlarged.

⁸⁰ The National Law Review, ‘China Spring Newsletter 2021: Dispute Resolution, E-Commerce and Securities’, 24 August 2021, written by Greenberg Traurig, LLP, available at: <https://www.natlawreview.com/article/china-spring-newsletter-2021-dispute-resolution-e-commerce-and-securities>.

4. EU E-Commerce legislation and Online Dispute Resolution

4.1 Background

Consumer protection is fundamental to the European Union. Article 169 of the Treaty on the Functioning of the European Union (TFEU) sets out that a high level of consumer protection needs to be ensured in the context of the completion of the internal market.⁸¹ In addition, Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.⁸² This demonstrates that consumers are an integral part of the internal market.

Against this background, consumer rights should also be protected when engaging in economic activities in the online sphere. A lack of this could form an obstacle to the well-functioning of the EU internal market. Hence, all barriers preventing consumers from purchasing online, and inherently hindering the well-functioning of the internal market, should be eliminated. One way to boost consumers trust in purchasing online is to establish coordinated regulation regarding handling disputes in E-commerce. As rightly noted by Donnelly and White, ‘redress plays a pivotal role in any consumer-facing marketplace’.⁸³

The availability of reliable and efficient online dispute resolution is also closely related to another fundamental aspect of consumer protection and core principle in the European Union: access to justice. The right to an effective remedy and the right to a fair trial are enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union, respectively.⁸⁴ The setting up of an effective ADR mechanism can be a means to improve general access to justice in everyday life and simultaneously increases both consumers and

⁸¹ Article 169 of the Consolidated Version of the Treaty on the Functioning of the European Union (2008) OJ C115/47.

⁸² Article 38 of Charter of Fundamental Rights of the European Union (2010) OJ C83/02.

⁸³ Mary Donnelly and Fidelma White, ‘A Nudge in the Right Direction? Trader Engagement with Online Dispute Resolution in the European Union’, 5 *Journal of Business Law* (2019) 389.

⁸⁴ The ECHR is a legal instrument enacted by the Council of Europe in 1959 but nowadays also part and parcel of European Union Law and that of its Member States.

traders' confidence in cross-border E-commerce transactions. Therefore, access to simple, efficient, fast, and low-cost dispute settlement is crucial.

In 1998, the European Union enacted a Recommendation for 'decision-making bodies' of ADR and recommended seven principles in conducting out-of-court dispute settlements: independence, transparency, adversarial process, effectiveness, legality, liberty and representation.⁸⁵ However, online application of dispute mechanisms was not yet mentioned.

More than a decade later, the EU announced its flagship initiative 'Digital Agenda for Europe', with a prominent role in improving alternative dispute resolution mechanisms within the Union and innovative ways to address issues related to E-commerce and access to justice online.⁸⁶ The Digital Agenda for Europe states that: 'The Commission will also launch an EU-wide strategy to improve Alternative Dispute Resolution systems and propose an EU-wide online redress tool for eCommerce and improve the access to justice online.'⁸⁷

E-commerce Directive 2000

According to Cortes and Lodder, the year of 2000 can be seen as the beginning of the EU's formal interest in ODR.⁸⁸ As in 2000, the European Union set out its first basic legal framework for the future regulation of E-commerce.⁸⁹ The objective of the E-commerce Directive was to eliminate barriers to cross-border online services in the European internal market and provide businesses and consumers a legal framework on issues relating to E-commerce transactions.

The E-commerce Directive includes four chapters with 24 articles, containing general provisions, principles, implementation, and final provisions. The first chapter sets out the objective of contributing to the proper functioning of the internal market by ensuring the free

⁸⁵ Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 1998, pp. 31–34. For more information see Cortes and Lodder (n 28).

⁸⁶ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A Digital Agenda for Europe' COM(2010)245 final, p. 13. Available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>.

⁸⁷ Ibid, p. 12.

⁸⁸ Cortes and Lodder (n 28) 20.

⁸⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular E-commerce, in the Internal Market (E-commerce Directive).

movement of information society services between Member States. It also provides the scope of the Directive and lists categories to which the Directive does not apply, such as the field of taxation. Furthermore, it provides the definitions of frequently used terms such as ‘information society services’, as well as ‘consumer’ for the purpose of the Directive.

The E-commerce Directive touches on the topic of alternative dispute settlement too. Article 17 of the Directive covers out-of-court dispute settlement, which provides that:

‘Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means’.⁹⁰

In addition, this Article provides that ‘Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned’.⁹¹ Furthermore, ‘Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce’.⁹²

This E-commerce law forms the basis for exploring alternative dispute resolution mechanisms within the European E-commerce context. However, it was more than twelve years later that ADR/ODR in the European Union really took off in a unified process.

⁹⁰ E-Commerce Directive, Art. 17.

⁹¹ Ibid.

⁹² Ibid.

4.2 The dispute settlement mechanisms and principles

After various attempts to encourage Member States to create their own national solid ADR systems, the EU took the next step by initiating ADR/ODR systems legalisation at the European level. This led to the first binding European legislation on Consumer ADR and ODR, in the forms of the Directive 2013/11 on Consumer ADR and Regulation 524/2013 on Consumer ODR.⁹³ More recent legal developments in the field of consumer protection, such as the New Deal for Consumers package of 2019, including the Directive on better enforcement and modernisation of EU consumer protection, refer to dispute resolution in the instruments discussed below.

4.2.1 Directive 2013/11 on Consumer ADR

The objective of the Directive on Consumer ADR is to contribute through the achievement of a high level of consumer protection and, without restricting consumers' access to the courts, to the proper functioning of the internal market.⁹⁴ The Directive sets out the required infrastructure for ADR to ensure that consumers can on a voluntary basis, submit complaints against traders. This should be done before so-called ADR entities, which should promote an independent, impartial, transparent, effective, fast, and fair alternative procedure of dispute resolution.⁹⁵

The Directive applies to both domestic and cross-border disputes concerning obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union who choose an ADR entity to intervene.⁹⁶ Hence, this

⁹³ The EU Mediation Directive 2008/52/EC also plays a role in the European alternative dispute resolution framework. The Mediation Directive aims to facilitate access to alternative dispute resolution, encourage the use of mediation for settling cross-border civil and commercial disputes and seeks to ensure a balanced relationship between mediation and judicial proceedings. Due to the limited space in this thesis, the EU Mediation Directive is not assessed in-depth as the focus is not on resolving E-commerce disputes online. For more information, see: Commission Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

⁹⁴ 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).

⁹⁵ Ibid, Art. 1.

⁹⁶ Ibid, Art. 2

inclusive scope encompasses contractual obligations from sales or services contracts, both online and offline.⁹⁷ Nonetheless, the Directive excludes certain procedures, such as procedures before consumer complaint-handling systems operated by the trader, disputes between traders, direct negotiation between the consumer and the trader, procedures initiated by a trader against a consumer as well as disputes relating to health and higher education services. Thus, the Directive excludes completely internal complaint mechanisms set up by E-commerce companies.

In the Directive the key principles of such ADR entities are identified, as well as the procedural rules before such an ADR entity.

First, an ADR entity is ‘any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure’.⁹⁸ Based on the Directive, the ADR entities have to meet certain criteria:

1. **Expertise, independence and impartiality:** the natural persons in charge of the ADR process should possess the necessary knowledge and skills in handling judicial consumer disputes, not be subject to any instructions from either party or their representative and must be remunerated in a way that is not linked to the outcome of the procedure.⁹⁹
2. **Transparency:** ADR entities should make information regarding withdrawal, the costs, the average length of procedure, the legal effect of the outcome and the enforceability of any decision reached, publicly available on their website. This includes annual activity reports on the functioning of the ADR entities.¹⁰⁰
3. **Effectiveness:** the ADR procedures before ADR entities should be easily accessible online and offline to both parties, without being obliged to retain a lawyer or legal advisor, and free of charge or available at a nominal fee for consumers, within the maximum period of 90 days.¹⁰¹

⁹⁷ Directive on Consumer ADR, preamble 16.

⁹⁸ Ibid, Art. 4(h).

⁹⁹ Ibid, Art. 6.

¹⁰⁰ Ibid, Art. 7.

¹⁰¹ Ibid, Art. 8.

4. **Fairness:** the ADR procedures before ADR entities should give the parties the possibility, within a reasonable period, of expressing their arguments as well as the possibility to withdraw from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure. Member States must ensure that parties are aware of their rights and the consequences of participating in an ADR procedure.¹⁰²
5. **Liberty:** Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised.¹⁰³
6. **Legality:** in a situation where there is no conflict of laws, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the mandatory law where the consumer is habitually resident.¹⁰⁴

4.2.2 Regulation 524/2013 on Consumer ODR

Regulation 524/2013 on Consumer ODR has been issued against the backdrop of a lack of mechanisms which allow consumers and traders to resolve online E-commerce disputes. This comes to the detriment of consumers, creates an uneven playing field for traders, and ultimately slows down the development of online E-commerce in the internal market.¹⁰⁵ The Regulation on Consumer ODR functions complementary to the Directive on Consumer ADR.

Pan-European ODR Platform

Under the Regulation on Consumer ODR, an EU-wide online Platform for disputes that arise from online transactions was set up on 15 February 2016. The special Platform is part of ADR, as it is an alternative and out-of-court legal mechanism. Pablo Cortes describes it as ‘a hub in the EU for all extra-judicial resolution of consumer complaints’.¹⁰⁶ The ODR Platform operates on the internet, which reduces expensive costs, works faster, simple and more efficient, and

¹⁰² Directive on Consumer ADR, Art. 9.

¹⁰³ Ibid, Art. 10.

¹⁰⁴ Ibid, Art. 11.

¹⁰⁵ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), preamble 8.

¹⁰⁶ Pablo Cortes, ‘A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How To Move Forward’, 35 Legal Studies (2015) 126.

where no physical presence is needed. Through this online Platform, consumers can submit their disputes virtually and seek out-of-court resolution of disputes in any EU Member State.

The scope of the Regulation on Consumer ODR applies to ‘the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union’.¹⁰⁷ This means that any sale which is not done through the internet, is excluded from the Regulation. Hence, this Regulation is specifically tailored to cross-border E-commerce transactions within the European Union.

The Regulation sets out that every trader and online marketplace that is established within the Union, and engages in online sales or service contracts, *shall* provide an electronic link to the EU’s ODR website.¹⁰⁸ An easily accessible link to the ODR Platform (ec.europa.eu/consumers/odr) and a clear contact e-mail address to the Platform on the website, is obliged for every E-commerce trader and all marketplaces, whether they intend to use the ODR Platform or not. This obligation of consumer information aims to inform consumers about the existence of the ODR Platform and promotes the opportunity of using the ODR Platform for resolving their disputes as much as possible. In addition, every Member State has to designate an ODR contact point and two ODR advisors to facilitate the process.¹⁰⁹

While writing this thesis, I came across notifications to the European ODR Platform several times. Below are two examples:

¹⁰⁷ Regulation on Consumer ODR, Art. 2.

¹⁰⁸ Ibid, Art. 14.

¹⁰⁹ Ibid, Art. 7.

THALYS BOOK DEALS & FARES DESTINATIONS INFO & SERVICES MY THALYS WORLD

HELP TICKETS ACCOUNT

! I WANT TO EDIT A TICKET BECAUSE OF A DISTURBED SITUATION

If your exchange or cancellation is made because of a disturbed situation, this needs to be done at the original selling point or, if you bought your ticket on Thalys.com, by phone with our Customer Service Center.

Your original ticket's tariff conditions can be modified in favour of the exceptional conditions, depending on the type of situation.

Careful, you will not be able to enjoy these exceptional conditions if you edit your ticket online and you need to do the exchange or cancellation by phone with our Customer Service Center, (price of a local call), available from Monday to Friday from 7 a.m. to 10 p.m. and on weekends from 9 a.m. to 5 p.m.:

- From France: +33 1 83 75 49 69
- From Belgium: +32 2 808 19 17
- From the Netherlands: +31 800 370 00 00
- From Germany: +49 302 062 67 990

In case you are not satisfied with the answer the Customer Service Center sent you, or if you did not receive an answer within a reasonable delay, you can contact:

- The ombudsman service for rail passengers: Ombudsrail - Koning Albert II-laan 8 bus 5, 1000 Brussel - Tel: 0800.25.095 - Email: complaints@ombudsrail.be - site web: <https://www.ombudsrail.be>
- The Consumer Mediation Service: North Gate II, Koning Albert II-laan 8 Bus 1, 1000 Brussels - Tel: 02 702 52 20 - Email: contact@consumerombudsman.be - website: <https://consumerombudsman.be>
- The SNCF ombudsperson, online via <https://www.sncf.com/en/customer-service/dispute-management/sncf-ombudsperson/request-mediation>, or by sending a letter to the address: SNCF Mobilités Ombudsperson, TSA 37 701, 59 973 Tourcoing Cedex, France.
- The European Commission's ODR (Online Dispute Resolution) platform at: <https://ec.europa.eu/consumers/odr/>

Primera Ik ben op zoek naar... Zakelijk Winkels Inloggen Verlanglijst Winkelmand

Cadeaukaarten Digitale cadeaukaarten Cadeaus met naam & foto Cadeaukaart inwisselen Verkrijgbaar in de winkel Acties

Klachtenprocedure

Wat vervelend dat je een klacht hebt! Om je klacht zo snel mogelijk op te lossen kun je het beste contact opnemen met onze klantenservice. Het is uiteraard ook mogelijk om schriftelijk je klacht in te dienen. Om je verzoek snel en correct af te kunnen handelen willen wij je vragen om hierin de volgende gegevens te vermelden:

- Naam
- Adres
- Woonplaats
- Klantnummer of bestelnummer

Je kunt de klacht onder vermelding van de bovengenoemde gegevens opsturen naar:

Coöperatie Primera b.a.
T.a.v. afdeling klachten
Antwoordnummer 14307
4181ZX Geldermalsen

Dit mag zowel een klacht zijn over onze producten als over onze diensten. Zodra je klacht is ontvangen, sturen wij een ontvangstbevestiging. Binnen 14 dagen ontvang je telefonisch of via de e-mail een inhoudelijke reactie.

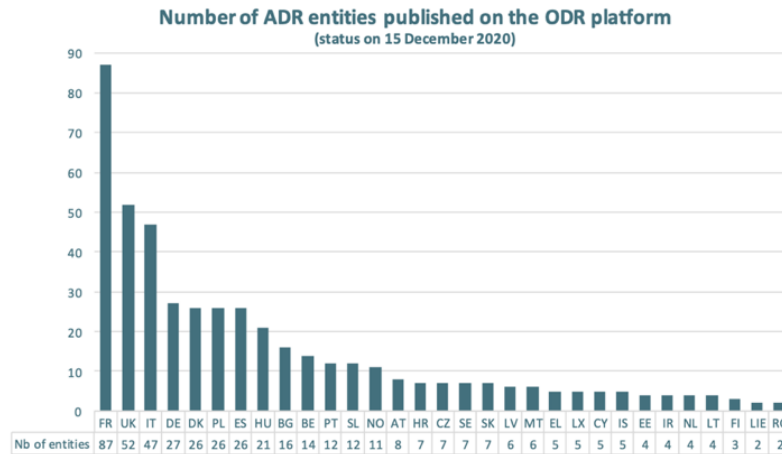
Ben je als consument niet tevreden met de afhandeling van de klacht? Dan kun je jouw klacht voorleggen aan de Geschillencommissie via het Europees ODR Platform (<https://ec.europa.eu/consumers/odr/>). Tevens kun je als consument en als zakelijke klant jouw klacht voorleggen aan Thuiswinkel, voor consumenten via www.sgc.nl en voor zakelijke klanten via www.thuiswinkel.org.

All dispute resolution bodies are listed on the Commission's specific webpage on ODR.¹¹⁰ Currently, there are 468 official ADR bodies active across the European Union, Liechtenstein and Norway.¹¹¹ Taking the Netherlands as an example, there are four authorised alternative dispute resolution bodies in the Netherlands: the Foundation Complaints Committees for Consumer Affairs, Foundation Health Insurance Complaints and Disputes, Netherlands Financial Services Complaints Tribunal and the Rental Disputes Committee.¹¹²

¹¹⁰ Available at: <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>.

¹¹¹ European Commission, Second Report on the functioning of the European Online Dispute Resolution (ODR) Platform, COM(2019) 425 final. Available at: https://ec.europa.eu/info/sites/default/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf.

¹¹² English translation provided. In Dutch: Stichting Geschillencommissies voor Consumentenzaken (SGC), Stichting Klachten en Geschillen Zorgverzekeringen (SKGZ), Stichting Klachteninstituut Financiële



Source: Statistical report on the functioning of the ODR Platform.¹¹³

Functioning of the ODR Platform

The ODR Platform functions as a single point of entry for consumers, through which they are linked to the trader and eventually a chosen ADR entity. The Platform is designed to be user-friendly, including complaint and response forms available in all EU languages, and incorporates clear deadlines to ensure a fast process. However, it should be noted that the actual dispute resolution will be conducted in the language the ADR entity chooses. Cortes and Lodder point out that this could potentially lead to ‘insurmountable challenges when resolving multi-lingual disputes’.¹¹⁴ Loutocky sees this as confusing for the parties, and a serious game changer during the dispute.¹¹⁵ Rühl even calls the language barriers the core problem of cross-border ADR and a ‘missed opportunity to make consumers better off when shopping across borders’.¹¹⁶

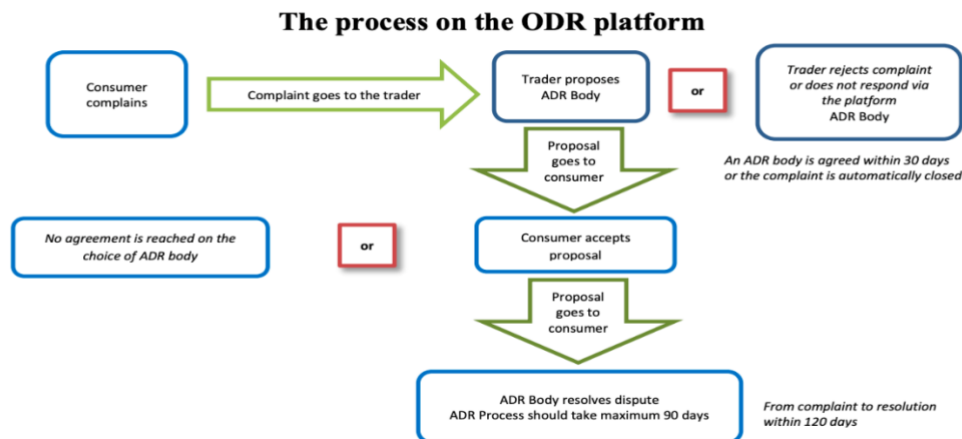
Dienstverklaring (Kifid) en de Huurcommissie. More alternative dispute resolution bodies are available at: <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>.

¹¹³ Functioning of the European ODR Platform, Statistical Report, available at: https://ec.europa.eu/info/sites/default/files/odr_report_2020_clean_final.pdf.

¹¹⁴ Cortes and Lodder (n 28) 35.

¹¹⁵ Pavel Loutocky, ‘Online Dispute Resolution to Resolve Consumer Disputes from the Perspective of European Union Law: Is the Potential of ODR Fully Used?’, 10(1) Masaryk University Journal of Law and Technology (2016) 123.

¹¹⁶ Giesela Rühl, ‘Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: A Critical Evaluation of the European Legislature’s Recent Efforts to Boost Competitiveness and Growth in the Internal Market’, 38 Journal of Consumer Policy (2015) 451.



Source: Commission report on the functioning of the ODR Platform.¹¹⁷

When a consumer submits an electronic complaint form against a trader, the ODR Platform will automatically notify the trader about the consumer's request. After this, there are basically three routes of redress:

1. Bilateral negotiation
2. Refer the dispute to a bilaterally (between consumer and trader) agreed dispute resolution body
3. Traders neglect the complaint or parties fail to agree within 30 days on an ADR entity

The first option is the most used path. Even though the ODR Platform in its current form does not support a mechanism in which consumer and trader can start a negotiation process through the Platform, the first Report on the functioning of the European ODR Platform shows that consumers and traders often choose to resolve their dispute directly with each other, without the interference of a third party.¹¹⁸ This practically means that the consumer and trader initiate their own negotiation process, often outside the Platform. Consumer and trader have a

¹¹⁷ European Commission, Report on the functioning of the European Online Dispute Resolution (ODR) Platform, COM(2017) 744 final.

¹¹⁸ For further elaboration, see Evaluation section 4.2.3. See: Pablo Cortes and Rosa Pérez Martell, 'Second Annual Report on the Functioning of the European Online Dispute Resolution Platform', 25(6) Computer and Telecommunications Law Review (2019).

maximum of 90 days to resolve the dispute and can within this deadline withdraw from their bilateral dialogue at any time and continue with one of the other options.

The second option is to resolve the dispute through a dispute resolution body, the rationale of the ODR Platform. The process entails the following elements. When a trader receives the complaint, it is invited to state within 10 days whether the trader commits to use a specific ADR entity to resolve the dispute with the consumer and if yes, which ADR entity. After this, both parties will have a maximum of 30 days to agree on the ADR body. If the consumer does not reply to the proposition by the trader and no further action is taken, the case is automatically closed. When consumer and trader agree on the dispute resolution body, the chosen authority has 30 days to decide on its jurisdiction concerning the dispute. Once accepted, it will handle the complaint and suggest a settlement within 90 days. The ADR entity cannot require physical presence of the parties, unless both parties so agree. Furthermore, it should be noted that the legally binding status of the solution depends on the authority of the particular dispute resolution body.

When the third, and ultimately less favoured scenario occurs, the consumer complainant is advised to contact the ODR contact point for information on other means of redress within the jurisdiction. The European Commission provides on its website other consumers dispute resolution tools, such as national consumer bodies, European Consumer Centres and the European Small Claims Procedure.¹¹⁹

4.2.3 Critical review and evaluation of the ODR Platform

Some critical observations on the ODR Platform can be made. A weak aspect of the ODR Regulation is that it merely obliges traders to inform consumers about the ODR Platform by creating a link on their websites, and it is subject to the traders to decide whether they participate in the ODR process. It is observed that: ‘There is not a body with enforcement powers that sits behind the Platform and no way for consumers to seek legal redress through

¹¹⁹ More information on the European Small Claims procedure is available at: https://europa.eu/youreurope/business/dealing-with-customers/solving-disputes/european-small-claims-procedure/index_en.htm.

the Platform itself.’¹²⁰ Some call the ODR platform just a ‘referral system’, as the Platform functions as a channel to other dispute resolution bodies which assess the dispute on a substantive level.¹²¹ Donnelly and White even call the term, ‘ODR Platform’, as ‘potentially misleading as the platform does not provide dispute resolution itself but serves only as a bridge between the trader, the consumer and the chosen ADR entity’.¹²²

Furthermore, the differences amongst ODRs at a national level make the fragmentation of the ODR mechanisms unavoidable for EU citizens. It is left to the national laws of Member States to determine whether, and if so, how the parties may enforce an agreement reached out of court. Giesela Rühl rightly emphasises that this may reduce consumer and trader acceptance of such redress mechanisms.¹²³ This could be assessed as a disadvantage of the Platform, and the use of ADR.

Nevertheless, it should be considered that in a time where media attention can be fundamental to a web shop’s reputation, the ODR Platform could function as a prevention tool for traders as well. When a consumer submits a complaint, there is a chance for the trader to directly communicate with the consumer on the dispute, before the consumer brings attention to this dissatisfaction online, for instance through social media or third-party rating platforms. This could be an extra incentive for a trader to refer to and make use of the ODR Platform.

Report on the functioning of the European ODR Platform

Article 26 of the Directive on Consumer ADR sets out an obligation for the European Commission to report every four years on the application of the Directive. The European Commission published its first Report on the functioning of the European ODR Platform in December 2017.¹²⁴

¹²⁰ Bird & Bird LLP, ‘EU Online Dispute Resolution: All Bark and No Bite?’, July 2017. Available at: <https://www.twobirds.com/en/news/articles/2017/global/eu-online-dispute-resolution-all-bark-and-no-bite>.

¹²¹ Ibid.

¹²² Donnelly and White (n 83) 450.

¹²³ Rühl (n 116) 450.

¹²⁴ European Commission, Report on the functioning of the European Online Dispute Resolution (ODR) Platform, COM(2017) 744 final.

On 25 September 2019, the Commission published the second Report on the operation of the ODR platform.¹²⁵ The key statistics remained very similar to its former report, reflecting the high number of consumer visits (8.5 million visitors since inception), the many complaints submitted (120.000 consumer-to-business disputes) and indication of successful settlement between consumer and trader (42%). Nonetheless, still 81% of the cases were automatically closed after 30 days without reaching an ADR entity, of which 37% (versus 40% in 2017) mentioned contact with the trader to settle the dispute outside the Platform. Even though traders started this negotiation upon their own initiative, this should be assessed as a win by the ODR platform. Moreover, 13% of complaints (against 9% in 2017) were automatically closed after 30 days due to the lack of cooperation from the trader's side (although in two third of these cases, traders specified to have reached out to the consumer directly). The second functioning report stated that again only 2% of the filed disputes reached an ADR entity of which half (1%) of the cases were actually resolved through an ADR entity. In addition, only 28% of the traders have provided the mandatory link to the ODR platform on their web shop.

Even though 80% of the Platform's visitors indicated that they were satisfied with the Platform's functionality, the Report states two clear shortcomings. First, the requirement that consumer and trader have to agree on a chosen ADR entity before the dispute can be handled, could be seen as an obstruction. The fact that the trader can choose the ADR entity first, may also be cause for concern. Cortes and Martell raise awareness on the possibility of 'forum shopping', meaning that traders choose ADR entities that not only understand their sectors, but are more likely to side with them.¹²⁶ The second concern relates to how the Platform is not adaptive enough to consumer needs due to lack of facilitating the negotiating phase on the Platform itself before the consumer and trader decide to pursue their dispute.

Currently, as the EU ODR Platform remains work in process, one can expect that the mechanism will be improved step by step. The Report concludes that 'about one year after full ADR coverage has been achieved and three-and-a-half years after the launch of the ODR

¹²⁵ European Commission, Second Report on the functioning of the European Online Dispute Resolution (ODR) Platform, COM(2019) 425 final. Available at: https://ec.europa.eu/info/sites/default/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf.

¹²⁶ Cortes and Martell (n 118) 151.

Platform, the ADR/ODR framework is underused and has yet to reach its full potential'.¹²⁷ The main listed challenges remain traders' uptake of the Platform, the awareness of ADR and the reflection of consumers needs in the Platform. The Commission announced an action plan to tackle these issues, including the provision of more targeted information on consumer rights and redress, better referral to the most appropriate redress tools, as well as improved facilitation of direct settlements.¹²⁸

4.3 Cross-border dispute settlement

The above-mentioned legislation and policy papers often refer to 'cross-border' disputes. However, cross-border in this European context means crossing borders within the European Union and not their relationship with third countries outside the Union.

Nonetheless, preamble no. 62 of the E-Commerce Directive notes that 'Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.'¹²⁹ This indicates the willingness of the EU to cooperate further in E-commerce with third countries. However, so far, there is little information on the follow-up of this.

¹²⁷ Second Report on the functioning of the European Online Dispute Resolution Platform (n 125) 17.

¹²⁸ Ibid.

¹²⁹ E-Commerce Directive, preamble 62.

5. Comparative analysis China and the European Union

This chapter reviews key features of the E-commerce dispute settlement regimes in China and the EU. It identifies and examines similarities as well as differences, which could ultimately form the basis for a cooperation between China and the EU in the field of ODR.

5.1 Similarities

Firstly, both China and the EU have taken protection of consumer rights as a basic principle in designing the ADR and ODR of E-commerce disputes. However, it should be noted that the protection of consumer rights has a dominant position in the EU, in the sense that it is the starting point as well as the final purpose of the ODR system. In addition, protection of consumer rights is rooted in the core legal instruments of the EU. In China, consumer protection is part and parcel of the new E-commerce law, but it would be overstated to say that it functions as the main purpose of the legislation.

Secondly, the principle of access to justice is well reflected in the E-commerce dispute resolution systems in both China and the EU. It is rightly stated that access to justice ‘in the digital age has a broader scope that includes not only access to court, access to ADR, but also access to ODR.’¹³⁰ It may be argued that ODR has in general, broadened access to justice by offering easier methods than traditional legal remedies. However, access to justice is not merely ‘access to’ justice; it has implications. Under the EU law, the rights to a fair trial and to an effective remedy are at the core of access to justice. As ODR of E-commerce disputes is relatively new in both China and the EU, the question of whether such ODR can fully meet the quality standard of access to justice remains a question. In addition, E-commerce platforms in both China and the EU have developed their internal complaint mechanisms with certain procedures and outcomes. To what extent private dispute settlement systems meet the standard of access to justice is likely to be investigated on a case-by-case basis.

¹³⁰ Zheng (n 18) 217.

It can be noted that the EU Directive on Consumer ADR only applies to certified ADR institutions. Consequently, internal online dispute resolution mechanisms are completely excluded from the Directive. The E-commerce Law in China obliges E-commerce operators to provide convenient and effective complaint mechanisms to consumers (Article 59), but it does not provide detailed rules for such mechanisms. Thus, the fairness of procedures and the legality of decisions can be challenged.¹³¹ One line of thinking is that: ‘The minimum procedural standards in the internal complaint mechanism should not be to the same degree as in civil procedure rules as the value of disputes is small, the time for dispute settlement is short, and the cost of such dispute resolution is zero for both parties. The question remains as to what extent, the efficiency and flexibility of the internal complaint mechanism are proportionate to meet the minimum procedural fairness requirement?’¹³² By identifying the three main challenges of internal dispute resolution mechanisms, namely, ‘the lack of uniform procedural rules, the conflict between procedural fairness and procedural efficiency, and the tension between flexibility and transparency in ODR’, it is suggested that in order to enhance the ODR mechanism, transparency and fairness standards should be incorporated into the ODR while maintaining its efficiency and low cost.¹³³

Third, both China and the EU have taken a dual approach concerning online resolution of E-commerce disputes. Namely, they promote internal complaint mechanisms, which are also referred to as ‘embedded ODR’¹³⁴ or ‘in-house ODR’¹³⁵, set up by an E-commerce operator, E-commerce platform operator (China) or trader (EU) to handle complaints. In this way, the majority of complaints relating to the sale of goods and services between B2C can be settled by themselves. Empirical studies illustrate that such ODR are mainly used to settle disputes on sales, online loan, domain name, with clear facts and evidence, and with small values.¹³⁶

¹³¹ Zheng (n 18) 244.

¹³² Ibid, p. 245.

¹³³ Ibid, pp. 261-262.

¹³⁴ Ibid, p. 244. The author refers to Jonathan Hill, *Cross-border Consumer Contract* (Oxford University Press 2008).

¹³⁵ Gabriella Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 44.

¹³⁶ Zheng (n 18) 261.

While recognizing the efficiency and convenience of internal complaint mechanisms, the fairness and transparency of the mechanisms have been improved as a result of accumulation of experiences by business, public pressure and government intervention. However, private settlement mechanisms give E-commerce operators more leeway than consumers. Thus, private remedies alone are not sufficient to cope with E-commerce disputes. In China, neutral third-party online service providers, such as Black Cat Complaining, can be very helpful in assisting consumers to identify reliable E-commerce operators, and share information which could result in collective pressure on E-commerce operators and platforms that eventually compel them to readdress disputes.

Meanwhile, both Chinese law and EU regulations provide and promote external mechanisms which typically take the form of online negotiation, mediation, arbitration and even litigation in the case of China. This dual approach can be viewed as a combination of private and public instruments which offer diverse choices for parties involved. Its convenience for users is therefore a unique advantage.

Fourth, regarding ODR for cross-border E-commerce disputes, China and the EU have addressed this issue within their respective jurisdictions. For China, cross-border E-commerce refers to electronic transactions across China and other jurisdictions outside of China. In the landscape of trade and business, Hong Kong, Macao, and Taiwan are positioned as ‘outside of China’. For the EU, cross-border E-commerce covers two layers. One is between Member States. The other involves Member States and third parties (non-EU Member States). Although cross-border E-commerce has been touched upon by a few newly concluded Free Trade Agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Regional Comprehensive Economic Partnership (RCEP), there is no international agreement specifically addressing E-commerce dispute settlement yet. On cross-border ODR, Jie Zheng identified three major barriers: ‘the difficulty in cross-border recognition of E-ADR agreements, the lack of procedural fairness in ODR, and the lack of enforceability mechanism

for ODR outcomes.’¹³⁷ To overcome these barriers, states need to agree on certain principles governing ODR proceedings and mutual recognition and enforcement of ODR decisions.

5.2 Differences

Two main fundamental differences in institutional design between China and the EU concerning online resolution of E-commerce disputes can be observed.

Firstly, since 2017 three Internet Courts have been established in China. The creation and development of such courts is an impressive judicial innovation in China. The high number of cases concluded within an impressively short timeframe prove a high level of efficiency of such courts, which can be deemed conducive to the interests of parties involved. Considering the rapid expansion of E-commerce in China, a unique advantage of the Internet Courts is their open jurisdiction in the sense that litigants can bring claims from any place in China and specially qualified ‘foreign’ regions (Hong Kong, Macao, and Taiwan), which bypass the jurisdiction barrier of location in ordinary courts. The Internet Courts have brought access to justice to a new stage as people do not need to be present in court at all to go through the whole judicial process of filing a case, the hearing, and receiving a judgment.

However, the rationale of setting up Internet Courts can be questioned. It is commonly known that Chinese courts are overburdened with huge numbers of civil and commercial cases. Is it necessary or wise to use the scarce judicial sources to deal with a large number of small E-commerce claims?

One positive argument can be that the decisions given by courts are binding and enforceable, and thus enjoy high authority. This is demonstrated by the low rate of appeal cases in Chinese Internet courts. Moreover, the creation of Internet Courts can also be deemed as a timely response of courts to the new developments of Internet-related business and societal change. On the other hand, one could also argue that the judicial resources could better be reserved for settlement of civil and commercial cases of high value, or perhaps more sophisticated cases. As China has moved forward in developing Internet Courts, the possibility of stopping it is

¹³⁷ Zheng (n 18) 345.

almost impossible. However, the controversies on the Internet Courts in China can be relevant to other countries in weighing whether to create such a specialised Internet Court.

Second, the EU ODR Platform is a distinctive product of the EU. The design of the EU Platform can be considered as a centralised decentralising model. The Platform acts as a bridge to enable consumers access to ADR entities across the Member States of the EU. The certified ODR entities guarantee some level of quality of the services they provide. Moreover, the Platform's 'name and shame' function cannot be under-estimated. If a consumer initiates a claim on the Platform and the trader simply ignores this action, it will at least result in a negative image of the trader. In this way the Platform stimulates the trader to settle disputes either through internal or external dispute resolution. Hence, the Platform is not merely an online referral tool.

However, the Platform itself does not handle any cases directly. The operational power is delegated to institutions at the national level. As a single-entry point created at the EU level, ADR entities are competent authorities approved by Member States which meet the minimum quality requirements provided in the ADR Directive.

China may take the EU ODR Platform approach as a reference in further developing its ODR of E-commerce disputes. Currently, the Chinese E-commerce dispute resolution mechanisms are of a quite diverse nature, which is an advantage in itself. At the same time, it makes the system fragmented and the quality of dispute settlement providers is uneven. Consumers may experience difficulties when choosing which body to settle their disputes. If a centralised authority can be established as a platform, to defer cases automatically to internal and external dispute settlement providers which meet certain qualifications required by law, it will improve the current dispute resolution landscape, gain higher public trust, and eventually benefit a sustainable E-commerce development.

Nevertheless, the weaknesses of the European ODR Platform are also obvious. A weak aspect of the ODR Regulation is that it merely obliges traders to inform consumers about the ODR Platform by creating a link in their websites. It is subject to the traders to decide whether they participate in the ODR process. Scholars consider an information obligation as an insufficient

incentive for traders to take part in the ODR process.¹³⁸ In addition, there is a language impediment. While no mandatory action can be taken, the EU and its Member States at least can encourage ODR providers to be flexible in accommodating the choice of consumers as far as the working language is concerned.

Currently, as the EU ODR Platform remains work in process, one can expect that the mechanism will be improved in tandem with the expanding E-commerce in the EU. For instance, more incentives can be integrated to compel traders to engage in the ODR process. Cortes and Lodder suggest that in sectors such as airlines, where traders are most reluctant to participate in the ODR process, more incentives should be provided by ‘connecting the ODR Platform to feedback on review sites, employing a trust mark or online label, and cooperation with search engines so that users can edit their searches in such a way that (reliable) traders committed to ADR will appear first.’¹³⁹ Moreover, they also propose the ODR Platform to publish awards, promote voluntary compliance with the awards, and black-list those who refuse to execute the awards.¹⁴⁰ These suggested measures are similar to how the Chinese platform Black Cat Complaining operates.

Based on the shared principles and pursuing ODR in E-commerce dispute settlement, one may predicate that China and the EU face similar challenges and have the incentive to learn from each other’s best practices to further promote and improve their ODR systems. Moreover, it is desirable if they can cooperate at international level to facilitate the formulation of international standards on ODR.

¹³⁸ Cortes and Lodder (n 28) 29-30.

¹³⁹ Ibid, p. 30.

¹⁴⁰ Ibid.

6. Conclusion

The spectacular rise of E-commerce brings new opportunities as well as challenges. One of such challenges is the rapid growth of the number of E-commerce disputes, which prompted innovative regulations to settle E-commerce disputes in both China and the European Union.

This thesis sets out in what ways China and the EU have each developed online E-commerce dispute settlement regimes. A host of internal and external dispute settlement mechanisms has been developed in parallel with E-commerce regulations at national level and beyond. The establishment of Internet Courts, private settlement mechanisms and neutral third-party online service providers such as Black Cat Complaining in China, and the specialised ADR entities and pan-European ODR Platform within the EU, are critically examined.

By discussing the unique features of each system and the direction they take, the convergences and overlap can be recognised. This thesis identifies a partial convergence, as China (a country) and the EU (an international organisation) each have their own strengths and weaknesses. However, such convergence may provide fertile ground for future cooperation, not only at intergovernmental level in terms of law-making, but also for a parallel track of their respective E-commerce businesses in providing common standard setting, implementation, and good practices in online dispute resolution.

Based on this legal analysis and comparison, this thesis argues that a foundation for future cooperation in the field of E-commerce is recommended, and given the relatively weak international context, even desired. As discussed, in parallel with the proliferation of cross-border E-commerce, the need for international harmonisation of online resolution of E-commerce disputes is rising. With regards to dispute resolution concerning cross-border E-commerce disputes at global level, there is a general recognition of its significance. However, so far there is no international agreement on a regulatory system yet. Although UNCITRAL Working Group III did not achieve its original objective to create universal regulations of ODR for resolving disputes from the growing number of online cross-border transactions, the Technical Notes as produced offer some guidance for states to set up and improve their internal

ODR systems.¹⁴¹ Moreover, in view of the continuing growth of cross-border E-commerce, the need remains for an international legal framework to formulate basic principles and standards of ODR proceedings. Whenever ODR will be discussed at UNCITRAL level, the China-EU cooperation as well as their experiences can provide relevant examples to build upon and perhaps even contribute to international consensus building.

This thesis focusses on a legal analysis of the new developments of E-commerce dispute settlement in China and the EU. Building on the findings of the analysis, it argues that there is a possibility and momentum for the two powers to engage in cooperation in E-commerce ODR. However, by the nature of its approach, the thesis does not analyse external factors which could further stimulate or impede such cooperation. This includes the political relationship and economic parameters which go beyond the scope of this thesis. Further research should be directed on how international cooperation would evolve from these developments. It is a well-known fact that the China-EU relationship is volatile and subject to ups and downs, very much influenced by non-economic factors. Moreover, bilateral cooperation cannot operate in a vacuum. While the EU is an independent economic power, it is interwoven into the Western world in which the United States is still dominant today. This is also reflected in international negotiations such as those in the context of UNCITRAL. In addition, further research on the effectiveness of the implementation of the Chinese and European norms, including a detailed case-by-case empirical study, would substantiate the possibilities of cooperation.

In conclusion, this thesis argues that direct cooperation between China and the European Union in standard setting for ODR can certainly benefit consumers (both individual citizens and businesses) and set a pioneering example for international cooperation in the relatively young field of ODR. It can well be constructive if the EU and China establish a joint taskforce to promote international efforts in rulemaking for cross-border settlement of E-commerce disputes.

Hence, by capitalising the momentum resulting from the rapid growth of E-commerce in COVID-19 times, such cooperation can also have a wider positive impact on the future

¹⁴¹ UNCITRAL Technical Notes (n 6).

development of ODR. In such a way, this rather unique cooperation between China and the EU can pave the way for both friendly relations between the two economies and encourage multilateral approaches in this regard.

Bibliography

Books:

Amao O and C.M. Nwankwo, 'Exploring African Union Law Through the Lenses of Comparative Law: A Comparative Analysis with European Union Law' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021).

Bradford A, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

Chan P.H., *Mediation in Contemporary Chinese Civil Justice: A Proceduralist Diachronic Perspective* (Brill Nijhoff 2017).

Cortes P, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011).

Cortes P, *The Law of Consumer Redress in an Evolving Digital Market* (Cambridge University Press 2017).

Cortes P, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2018).

Dixon R and T Ginsburg, *Comparative Constitutional Law in Asia* (Edward Elgar Publishing 2014).

Gijrath S, S van der Hof, A.R. Lodder and G Zwenne, *Concise European Data Protection, E-Commerce and IT Law* (Wolters Kluwer 2018).

Glenn, H.P., 'Aims of Comparative Law' in Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006).

Nielsen R, S.S. Jacobsen and J Trzaskowski, *EU Electronic Commerce Law* (Djøf Publishing 2004).

Rolland S.E., 'Consumer Protection Issues in Cross-Border Ecommerce' in John A. Rothschild, *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing 2016).

Schmitz A.J., 'Building Trust in Ecommerce Through Online Dispute Resolution' in John A. Rothschild, *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing 2016).

Shao G, *Internet Law in China* (Chandos Publishing 2012).

Spindler G and F Börner, *E-Commerce Law in Europe and the USA* (Springer 2002).

Trimble M, 'Extraterritorial Enforcement of National Laws in Connection with Online Commercial Activity' in John A. Rothschild, *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing 2016).

Wang F, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge University Press 2010).

Zhao Y, 'Regulatory Regime for Online Dispute Resolution: Current Forms and Future Development' in Maria F. Moscati, Michael Palmer and Marian Roberts (eds), *Comparative Dispute Resolution* (Edward Elgar Publishing 2020).

Zheng J, *Online Resolution of E-commerce Disputes: Perspectives from the European Union, the UK and China* (Springer 2020).

Zweigert K and H Kötz, *An Introduction to Comparative Law* (Oxford University Press 1998).

Journal Articles:

Bradford A, 'The Brussels Effect', 107 *Northwestern University Law Review* 1 (2012) 1.

Cortes P and A.R. Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress', 21(1) *Maastricht Journal of European and Comparative Law* (2014) 14.

Cortes P, 'A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How To Move Forward', 35 *Legal Studies* (2015) 114.

Cortes P and R Pérez Martell, 'Second Annual Report on the Functioning of the European Online Dispute Resolution Platform', 25(6) *Computer and Telecommunications Law Review* (2019) 149.

Donnelly M and F White, 'A Nudge in the Right Direction? Trader Engagement with Online Dispute Resolution in the European Union', 5 *Journal of Business Law* (2019) 388.

Erie M.S. and T Streinz, 'The Beijing Effect: China's "Digital Silk Road" as Transnational Data Governance', *New York University Journal of International Law and Politics* (2021) forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3810256.

Frenken P.M.P., 'ODR-procedures bij platformen: laagdrempelig voor consumenten, maar zonder waarborgen voor legaliteit en procedure rechtvaardigheid', 5 Tijdschrift voor Consumentenrecht en handelspraktijken (2019) 210.

Guo M, 'Internet Court's Challenges and Future in China', 40 Computer Law & Security Review (2021) 1.

Hong X, 'E-commerce Dispute Settlement Innovations and Challenges in China', China Legal Science (2020). Available at: <https://clsjp.chinalaw.org.cn/portal/article/index/id/11226.html>.

Jeretina U, 'Consumer Online Dispute Resolution (ODR) – A Mechanism for Innovative E-governance in EU', 16(2) Central European Public Administration Review (2018) 45.

Loutocky P, 'Online Dispute Resolution to Resolve Consumer Disputes from the Perspective of European Union Law: Is the Potential of ODR Fully Used?', 10(1) Masaryk University Journal of Law and Technology (2016) 113.

Q. Hang L, 'Online Dispute Resolution Systems: The Future of Cyberspace Law', 41(3) Santa Clara Law Review (2001) 837.

Rühl G, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: A Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market', 38 Journal of Consumer Policy (2015) 431.

Sampani C, 'Online Dispute Resolution in E-commerce: Is Consensus in Regulation UNCITRAL's Utopian Idea or a Realistic Ambition?', 30(3) Information & Communications Technology Law (2021) 235.

Van Gelder E, 'The EU Approach to Consumer ODR', 6(2) International Journal of Online Dispute Resolution (2019) 219.

Van Hoecke M, 'Methodology of Comparative Legal Research', 12 Law and Method (2015) 1.

Van den Heuvel E, 'Online Dispute Resolution as a Solution to Cross-Border Disputes: An Introduction to ODR', 1997. Available at: <https://www.oecd.org/digital/consumer/1878940.pdf>.

Zheng J, 'The Role of ODR in Resolving Electronic Commerce Disputes in China', 3(1) International Journal on Online Dispute Resolution (2016) 41.

Legal documents

China

E-Commerce Law of the People's Republic of China (Adopted at the Fifth Session of the Standing Committee of the 13th National People's Congress on August 31, 2018). The English version is available at https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf.

Council of Europe

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Available at: https://www.echr.coe.int/documents/convention_eng.pdf.

European Union

Directive 2000/31/EC of the European Parliament and of the Council of 8 June on certain legal aspects of information society services, in particular E-commerce, in the Internal Market. ('Directive on Electronic Commerce'). Available: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>.

European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

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'). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011>.

Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. ('Regulation on Consumer ODR'). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524>.

UNCITRAL

United Nations Commission on International Trade Law, Online dispute resolution for cross-border electronic commerce transactions, Working Group III (Online Dispute Resolution), Twenty-second session, Vienna, 13-17 December 2010. A/CN.9/WG.III/WP.105 Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V10/574/10/PDF/V1057410.pdf?OpenElement>.

United Nations Commission on International Trade Law, UNCITRAL Technical Notes on Online Dispute Resolution, April 2017. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.